No. _____

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IN THE

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

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Supreme Court, U.S.
FILED
OCT 26 2000
OFFICE OF THE CLERK

IN RE ROBERT SUAREZ - PETITIONER

vs.

MICHAEL W. MOORE, ET AL. - RESPONDENT(S)

ON PETITION FOR WRIT OF HABEAS CORPUS TO

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of habeas corpus without prepayment of costs and to proceed *in forma pauperis*.

[X] Petitioner has previously been granted heave to proceed *in forma pauperis* in the following court(s):

THE UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION, (CASE NO. 88-1441-Civ-T-13A).

[ ] Petitioner has not previously been granted leave to proceed *in forma pauperis* in any other court.
Petitioner's affidavit or declaration in support of this motion is attached hereto.

Robert Suarez
(Signature)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner respectfully prays that a writ of habeas corpus issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States court of appeals appears at Appendix A to the petition and is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is unpublished.

JURISDICTION

The date on which the United States Court of Appeals decided this case was May 18, 1990.

The date on which the highest state court decided this case was November 27, 1985. A copy of that decision appears at Appendix C, and is published at *Suarez v. State*, 478 So.2d 1173 (Fla. 2nd DCA 1985).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1651(a).

Petitioner's having exhausted his remedies in Florida's State

courts, sought 28 U.S.C. § 2254 habeas corpus relief in the United States District Court for the middle District of Florida, and appealed denial of habeas corpus relief to the United States Court of Appeals for the Eleventh Circuit to no avail, he is without any available remedy except by petition for writ of habeas corpus to this Court. This Court has jurisdiction to entertain and grant original habeas corpus petitions. *Felker v. Turpin*, 518 U.S. 651 (1996). Petitioner maintains his innocence and, but for ineffective assistance of appointed counsel in State trial and appellate courts, and ineffective assistance of appointed counsel in the United States District Court on federal habeas corpus review, it would be evident that Petitioner is not guilty of the crime for which he is presently incarcerated. Under the Fourteenth Amendment, Petitioner must be afforded an avenue of redress of his grievances. Petitioning this most Honorable Court is Petitioner's only available remedy.

The exceptional circumstances presented by this case pertain to the course of proceedings previously had in federal court following filing of Mr.Suarez's first § 2254 petition in the district court, including: appointed federal habeas counsel's waiving claims presented therein except for a single claim regarding ineffective assistance of trial counsel; appointed counsel's further waiving a federal evidentiary hearing due to trial counsel's unavailability; the lack of an available remedy by which to challenge habeas counsel's

ineffectiveness for waiving claims contrary to Mr. Suarez's wishes; and the A.E.D.P.A.'s precluding successive presentation, for federal review, of meritorious claims previously asserted by Mr. Suarez yet, without his consent, waived by appointed habeas counsel. In addition, the A.E.D.P.A.'s application in this case, *and to others incarcerated in Florida*, where the Florida Department of Corrections' has never complied with this court's constitutional mandate to affirmatively shoulder the burden of protecting an inmate's rights of access to the courts, See: *Bounds v. Smith, Infra,* coupled with Florida's elimination of habeas relief on claims of unconstitutional detention, See Rule 3.850 (h), Florida Rules of Criminal Procedure, violates the fundamental fairness requirement of the Fourteenth Amendment by making practically impossible a state prisoner's full and fair federal review of claims relating to unconstitutional detention. The need for federal review of unconstitutional detention not otherwise available in the absence of resort to this court directs Mr. Suarez here *as a last resort* to obtain proper and entitled judicial scrutiny on claims of constitutional magnitude that, if not corrected, will perpetuate a manifest injustice.

* * *

Section Five. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

QUESTIONS PRESENTED

I

WHETHER PETITIONER WAS UNCONSTITUTIONALLY DEPRIVED OF A FUNDAMENTALLY FAIR TRIAL AND THE OPPORTUNITY TO PRESENT A COMPLETE DEFENSE BY THE TRIAL JUDGE'S REFUSING TO ALLOW DEFENSE COUNSEL TO REOPEN PETITIONER'S CASE AFTER BOTH SIDES RESTED, BUT BEFORE CLOSING ARGUMENTS, FOR THE PURPOSE OF PRESENTING TESTIMONY OF A WITNESS WHOSE DEPOSITION DEFENSE COUNSEL INADVERTENTLY OVERLOOKED, WHERE SUCH TESTIMONY WOULD HAVE BEEN THAT THE DECEASED WAS ALIVE AFTER THE TIME THE STATE CLAIMS PETITIONER KILLED HIM. U.S. CONST. AMEND. 5, 6, AND 14.

II

WHETHER PETITIONER WAS DEPRIVED OF A FUNDAMENTALLY FAIR TRIAL BEFORE A PROPERLY INSTRUCTED, IMPARTIAL JURY BY THE TRIAL JUDGE'S READING, OVER DEFENSE COUNSEL'S OBJECTION, ONLY THE SHORT VERSION OF THE EXCUSABLE HOMICIDE INSTRUCTION, WHICH HAS BEEN HELD TO BE SUBJECT TO BEING MISCONSTRUED AS NOT PROVIDING A DEFENSE IN CASES WHERE A FIREARM HAS BEEN USED. U.S. CONST. AMEND. 5, 6, AND 14.

III

WHETHER DEFENSE COUNSEL'S PERFORMANCE WAS CONSTITUTIONALLY DEFICIENT WHERE HE FAILED TO CALL AS A WITNESS LILLIAN DEBRA LUCAS, WHO WAS DEPOSED BY THE PUBLIC DEFENDER'S OFFICE, AND WHO WOULD HAVE TESTIFIED THAT SHE SPOKE TO THE DECEASED HOURS AFTER, ACCORDING TO THE STATE'S THEORY, THE TIME OF THE VICTIM'S DEATH, DEPRIVING PETITIONER OF THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED BY U.S. CONST. AMEND. 6 AND 14.

IV

WHETHER PETITIONER WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL BY VIRTUE OF COURT APPOINTED APPELLATE COUNSEL'S FAILURE TO ASSERT AS REVERSIBLE ERROR THE FOLLOWING CLAIMS:

A) THAT THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY DENYING DEFENSE COUNSEL'S MOTION TO SUPPRESS THE PETITIONER'S COERCED CONFESSION.

B) THAT THE STATE FAILED TO PROVE PETITIONER'S SANITY DURING THE COMMISSION OF THE OFFENSE IN QUESTION -- WHERE THE EVIDENCE AT TRIAL SUPPORTS A THEORY OF INSANITY.

C) THAT THE EVIDENCE ADDUCED AT TRIAL WAS LEGALLY INSUFFICIENT AS A MATTER OF LAW TO SUSTAIN A CONVICTION FOR FIRST DEGREE MURDER.

D) THAT THE TRIAL COURT COMMITTED FUNDAMENTAL ERROR BY REFUSING TO SUPPRESS PETITIONER'S INVOLUNTARY CONFESSION TAKEN WHILE HE WAS UNDER THE INFLUENCE OF DRUGS.

V

WHETHER PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL AND ADEQUATE APPELLATE REVIEW WHERE APPELLATE COUNSEL NEITHER UTILIZED NOR PROVIDED THE APPELLATE COURT WITH A COMPLETE RECORD OF PROCEEDINGS BEFORE THE TRIAL COURT. U.S. CONST. AMEND. 6 AND 14.

VI

THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996'S ENACTMENT AND ENFORCEMENT VIOLATES THE SUSPENSION CLAUSE OF ARTICLE 1, SECTION 9, CLAUSE 2, OF THE UNITED STATES CONSTITUTION.

VII

CONGRESS'S ENACTMENT OF THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 VIOLATED THE SEPARATION OF POWERS DOCTRINE INHERENT IN ARTICLES ONE THROUGH THREE OF THE UNITED STATES CONSTITUTION BY INFRINGING ON THE JUDICIARY'S EXERCISE OF JURISDICTION, ESPECIALLY IN RELATION TO HABEAS CORPUS PETITIONERS WHO CHALLENGE STATE COURT CRIMINAL JUDGMENTS AND SENTENCES ENTERED PRIOR TO THE ENACTMENT OF THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT.

VIII

WHETHER ENFORCEMENT OF THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT IN STATES, SUCH AS FLORIDA, WHERE THE FLORIDA DEPARTMENT OF CORRECTIONS HAS NEVER COMPLIED WITH THIS COURT'S MANDATE IN *BOUNDS V. SMITH*, 430 U.S. 817 (1976) TO AFFIRMATIVELY SHOULDER THE BURDEN OF PROTECTING THEIR INMATES' RIGHTS TO ACCESS TO THE COURTS, VIOLATES A STATE PRISONER'S RIGHT TO DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

STATEMENT OF THE CASE AND FACTS

The State Attorney for the Sixth Judicial Circuit, in and for Pinellas County, Florida (case number 83-6200 CFANO-B), filed an indictment charging the Petitioner, Robert P. Suarez, with first degree murder allegedly occurring between July 15th and July 22nd of 1983 (R1,2). The following evidence was developed at trial.

David Wasicek testified that he was working for a pest control company and spraying the apartments at 715 E. Lime Street (R182, 183). When he opened the door of apt. 810 on July 22nd, 1983, cold air rushed out and he smelled a very bad odor (R183). Upon entry he noted the thermostat was set at 58 or 60 degrees (R183, 184). He found a body faced downward on the bedroom floor (R183, 184), about ten-thirty or eleven o'clock in the morning (R186), and he called the police (R196,197).

Officer Paul Mayer responded, finding a dead man lying in a pool of blood (R217). It was cold in the apartment, no weapon was seen around the body, and a cartridge from a gun shell was lying on the kitchen floor. (R218-19).

Detective Danny Fivecoat arrived at the apartment a few minutes before noon. The only clothing on the body was a pair of blue pajamas (R261). A newspaper in the apartment was dated July 17 (R262). In the hallway were two pillows, one of which was saturated with blood and crumpled up (R262, 263). A projectile was found stuck into the matted end of the pillow (R263), and a spent cartridge was found on the carpet in the dining room (R263). The telephone cord was partially cut and yanked apart. (R264,265). Detectives Fivecoat and Woods obtained an arrest warrant and

immediately without packing and to go to her mother's home (R783).

On cross examination Mr. Suarez admitted that in April of 1983 he entered a hospital for amnesia (R795). Mr. Suarez had been on cocaine for three days; he could not remember what happened (R795,796). He checked into the hospital for observation for amnesia, and later admitted faking the episode (R795,796). Mr. Suarez was in need of cocaine and told the doctors he had amnesia in order to play the game (R796).

On rebuttal, both Detectives Fivecoat and Woods denied that Mr. Suarez repeatedly asked to call his wife. The only request by Mr. Suarez was prior to Mr. Suarez's transport to the County Jail. Mr. Suarez was allowed to make a phone call shortly after his request was made (R840-847).

Mr. Suarez, on surrebuttal, affirmed making many requests to phone his wife before being allowed to do so (R852-854). Mr. Suarez stated Mr. Brewer kept tapes in the bowling ball box and placed it inside the larger box in the bedroom (R856).

After the defense and the State rested, but before closing arguments, defense counsel asked to re-open the Petitioner's case in order to present testimony of Ms. Lillian Lucas (R876-878). Ms. Lucas testified in a proffer that she had known Mr. Brewer for four years prior to his death and had spoken to him on the telephone about three or four p.m. on Sunday, July 17, 1983. Although Ms. Lucas was hazy as to the exact time, she noted that the phone call was late in the afternoon and could not have occurred as early as 1:30 p.m. (R880-882). Although Mr. Bergman stated Ms. Lucas' deposition was taken prior to trial, and that he had a copy of that deposition, he overlooked this deposition. Mr.

Bergman asked that his client not be punished due to an inadvertent error committed by defense counsel (R876-878, 1059). The request to re-open the trial was denied (R878, 884).

The jury returned a verdict finding Mr. Suarez guilty as charged (R872, 1005-1007). Upon the jury's recommendation of life, the trial court sentenced Mr. Suarez to life imprisonment with twenty-five years minimum mandatory, with credit for time served (R1050-1053, 1055-1057, 8-12).

On direct appeal to the Second District Court of Appeal of Florida (case number 84-1433), Mr. Suarez's appointed appellate counsel asserted the following grounds for relief:

ISSUE I.
DID THE TRIAL COURT ERR IN REFUSING TO ALLOW APPELLANT TO RE-OPEN HIS CASE?

ISSUE II
DID THE TRIAL COURT ERR IN ITS INSTRUCTION ON EXCUSABLE HOMICIDE?

The appellate court affirmed by opinion filed November 27, 1985. *Suarez v. State*, 478 So.2d 1173 (Fla. 2nd DCA 1985) (App. "C"). Mr. Suarez then sought postconviction relief in the trial court on December 29, 1985, pursuant to Florida Rule of Criminal Procedure 3.850, claiming his trial counsel was ineffective for failing to properly investigate and present the testimony of Lillian Lucas at trial. Relief was denied on May 27, 1986 without an evidentiary hearing, and the appellate court (case number 86-1653) per curiam affirmed without opinion by decision filed August 1, 1986. *Suarez v. State*, 492 So.2d 373 (Fla. 2nd DCA 1986) (table).

After exhaustion of these State remedies, Mr. Suarez sought

Federal habeas corpus review by filing his 28 U.S.C. 2254 petition in the United States District Court for the Middle District of Florida, Tampa Division (case number 88-1441-CIV-T-13A) on September 26, 1988. The sole issue raised was substantively identical to the issue asserted in Mr. Suarez's rule 3.850 motion for postconviction relief in the State trial court. Following the Respondent's answer, the court issued orders on November 4, 1988 appointing a federal public defender to represent Mr. Suarez and scheduling a pre-evidentiary hearing conference for December 14, 1988. Mr. Suarez's appointed counsel sought a continuance and ultimately filed with the court a pre-evidentiary hearing stipulation that no evidentiary hearing was necessary, due mostly to the fact that Mr. Suarez's trial counsel was unavailable and could not be located. Without holding an evidentiary hearing, the district court denied relief by order dated October 10, 1989, and Mr. Suarez appealed. The Eleventh Circuit Court of Appeals (case number 89-3882) affirmed on May 18, 1990.

Following unsuccessful pursuit of federal habeas relief, Mr. Suarez returned to the State courts on a petition for a writ of habeas corpus in the Second District Court of Appeals of Florida (case number 92-02341) challenging ineffective assistance of appellate counsel for failing to raise issues which entitled Mr. Suarez to relief, namely the trial court's denial of Mr. Suarez's motion to suppress involuntary confession; whether the State proved Mr. Suarez's sanity during commission of the offense, where evidence adduced at trial supported a theory of insanity; the legal insufficiency of the evidence to support conviction for first degree murder; and the trial court's denial of his motion to

suppress a confession extracted while Mr. Suarez was under the influence of narcotics. Relief was denied and Mr. Suarez again sought federal habeas corpus to no avail.[1]

This petition follows:

REASONS FOR GRANTING THE WRIT

I.

Any "provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the states by the Fourteenth Amendment. *Gideon v. Wainwright*, 372 U.S. 335, 342, (1963) (quoting *Betts v. Brady*, 316 U.S. 455 (1942)). This Court has looked to the guarantees of the Sixth Amendment to determine whether a state criminal trial was conducted with due process of law. *Washington v. Texas*, 388 U.S. 14, 18, (1967). The Court has, for example, held that due process requires the accused have the assistance of counsel for his defense, *Gideon v. Wainwright*, *supra*, be confronted with the witnesses against him, *Pointer v. Texas*, 380 U.S. 400 (1965), have the right to a speedy and public trial, *Klopfer v. North Carolina*, 386 U.S. 213, (1967) and *In re Oliver*, 333 U.S. 257 (1948), respectively, and have compulsory process for obtaining witnesses in his favor. *Washington v. Texas*, *supra*.

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[1] During the course of transferring to various institutions within the Florida Department of Corrections, records from the latter proceedings relating to the ineffectiveness of appellate counsel have been misplaced. Mr. Suarez's diligent efforts to procure copies of these records from the federal district and appellate courts have been unsuccessful.

Robert Suarez, a Florida inmate, filed this 28 U.S.C. § 2254 petition attacking his conviction for murder in Pinellas County, Florida. He argues on this appeal that the district court erred in denying him relief on his claim that he did not receive the effective assistance of counsel mandated by the Constitution.

We conclude, based upon a review of the record, that no error has been demonstrated. Accordingly, the judgment of the district court denying relief is

AFFIRMED.