IN THE SUPREME COURT OF FLORIDA

CASE NO.

ELWOOD C. BARCLAY,

Petitioner,

vs.

LOUIE L. WAINWRIGHT, SECRETARY, DEPARTMENT OF CORRECTIONS, STATE OF FLORIDA,

Respondent.

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# PETITION FOR WRIT OF HABEAS CORPUS

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## EXPLANATION OF REFERENCES

Throughout this Petition, "App. ____" will refer to sections of the Consolidated Appendix, Volumes I and II, being filed with this Petition.

For the convenient reference of the Court, an Appendix of Opinions is being furnished in a separate volume.

References to the original record will be designated "R. _____."

References to the trial transcript will be designated "Tr. _____."

References to the Penalty Trial transcript will be designated "Pen. Tr. _____."

References to the original Brief for Appellant will be designated "Brief."

References to the hearing transcript after the Gardner remand will be designated "R.T. _____."

TABLE OF CITATIONS

STATUTORY AUTHORITIES

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IN THE SUPREME COURT OF FLORIDA

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| ELWOOD C. BARCLAY, | ) |
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## PETITION FOR WRIT OF HABEAS CORPUS

Elwood C. Barclay, now confined at the State Prison in the custody of the Respondent, Louie Wainwright, under a sentence of death imposed by the Circuit Court of Duval County, respectfully petitions this Court for a Writ of Habeas Corpus on the grounds set forth below.

## INTRODUCTION

Elwood Barclay has been sentenced to die. He is before this Court on a habeas corpus petition to correct the injustice occasioned when his appellate lawyer attempted to represent him and a co-defendant (also on death row) in one appeal, filing one brief and offering a single argument. The conflict of interest was extreme because Elwood Barclay's different involvement in the crime resulted in his receiving a recommendation of life imprisonment from the trial jury which had recommended the death penalty for his co-defendant.

Moreover, the appellate process was fatally tainted by the fact that Elwood Barclay's lawyer had a romantic relationship with his co-defendant's sister, a relationship which was not known to Elwood Barclay until after his counsel and his co-defendant's sister were married.

We argue both conflict of interest and ineffective assistance of counsel on appeal. Both arguments relate to the integrity of the adversary system, the duty of the lawyer to

properly represent his client's unique interest and the essential role of this Court in assuring that justice is done and is seen to be done.

Particularly where the system fails in a capital case and that failure is the fault of a lawyer burdened by a severe conflict of interest, this Court, charged by Article V, Section 15, Constitution of Florida, with the duty of regulating the profession, and thereby protecting the public, must take a direct hand in correcting the injustice.

This introduction does not suggest a lack of diligence on the part of this Court. Indeed, this matter has been before this Court on three prior occasions.1/ At one time or another, three members of the present Court (Justices Boyd, Overton and McDonald) have dissented or expressed views which, had they been accepted by a majority of the Court, would have resulted in Elwood Barclay's release from the death penalty. Only one of these three, Justice Boyd, expressed his reason for dissent when, in the original appeal, he stated:

> A careful review of the entire record convinces me the jury was correct in recommending a higher degree of punishment for appellant Dougan than for appellant Barclay. Appellant Dougan was the architect of this atrocity, planned the crime and lead his karate students on the night of the murder, directed the course of the auto trip of the defendants and selected the victim to be killed. Appellant Barclay was a principal and is guilty of murder, but he was a follower who did exactly what he was told to do by appellant Dougan and I feel that he should be granted a life sentence rather than death.
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> 343 So.2d at 1272.
> Emphasis added.

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1/ This Court considered the joint appeal by Dougan and Barclay, splitting 4-2 (three justices and a retired justice voting in the majority), Barclay and Dougan v. State, 343 So.2d 1266 (Fla. 1977), cert. denied, 439 U.S. 892; the Gardner response, Barclay and Dougan v. State, 362 So.2d 657 (Fla. 1978), and the appeal from the post-Gardner sentencing, Barclay v. State, 411 So.2d 1310 (Fla. 1981) (4-2 opinion) rehearing denied, April 14, 1982 (3-3 vote). See also Dougan v. State, 398 So.2d 439 (Fla. 1981). Barclay was also one of the 123 petitioners in Brown v. Wainwright, 392 So.2d 1329 (Fla. 1981).

A fourth member of this Court, Justice Ehrlich, voted to grant rehearing to Elwood Barclay when the matter was last before the Court and the Court split in a 3-3 tie thereby denying rehearing.2/

## BASIS FOR JURISDICTION

Petitioner's Writ of Habeas Corpus is filed pursuant to Article V, Section 3(b)(1), (7) and (9) of the Constitution of the State of Florida and Rule 9.030(a)(3) and 9.100 of the Florida Rules of Appellate Procedure.

The issues raised involve appellate review of Petitioner's case by this Court and do not involve the proceedings in the trial court.3/ Knight v. State, 394 So.2d 997 (Fla. 1981).

## FACTS ON WHICH THE PETITIONER RELIES

Indictment of four defendants. On September 26, 1974 Elwood Barclay and three other defendants were indicted for first degree murder in Jacksonville, Florida.

1. Jacob Dougan was the oldest of the defendants. The state's testimony demonstrated that he was also the leader of the group, which began as a karate group under his direction. He conceived and directed the plan which resulted in the murder of a white man picked up while hitch-hiking. According to the state's testimony, it was Dougan who organized and directed the group, it was Dougan who wrote a note prior to the victim being located, it was Dougan who actually fired the fatal shots and it was Dougan who continued to direct the group in making and mailing tape recordings containing revolutionary rhetoric.

2. Elwood Barclay was an assistant karate instructor,

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2/ A fifth member of the present court, Justice Leander Shaw, has never been presented with the case and a former member of this Court, Justice Joseph W. Hatchett, would have remanded the original case for resentencing.

3/ The records before this Court in Barclay & Dougan v. State, No. 47,260 and the appeal following remand in Barclay v. State, No. 47,260 are hereby incorporated by reference.

working under Jacob Dougan. The state's trial testimony linked him with the victim's stab wounds made with a small knife but there was no testimony to tie these wounds with the death of the victim which was caused solely by pistol shots fired by Dougan into the victim's head.

3. Dwyne Crittendon was a young man who was present but did not directly participate in the injury to the victim.

4. Brad Evans also was part of the group and there was testimony that he injured the victim. Both Evans and Crittendon participated with Dougan, Barclay and several others in the propaganda effort following the slaying.

There was a fifth person involved, William Hearn, who supplied the gun which Dougan used in the murder. Hearn provided the state with its principal testimony linking Barclay, Crittendon and Evans with the crime.4/

Trial. At trial (February 19-March 5, 1975), each defendant was represented by separate counsel. Jacob Dougan's lawyer was a lawyer in private practice named Ernest Jackson who was assisted by his partner Ms. Deitra Micks.5/ Elwood Barclay's trial counsel, Frederic Buttner, sought to sever his case from the others. The court denied this motion. During closing arguments, the lawyers for Barclay, Crittendon and Evans each emphasized the distinct and arguably lesser roles of their clients as shown by the state's evidence. T.1995-2004, 2183-2193 (Barclay); T.2004-2015, 2193-2211 (Crittendon); T.2138-2157 (Evans).

Verdict. (March 4, 1975). The jury returned first degree murder verdicts against Jacob Dougan and Elwood Barclay.

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4/ There was other evidence against Dougan, that the note left on the victim's body was in Dougan's handwriting, according to an FBI witness.

5/ Since Ernest Jackson's role as appellate counsel is the focus of this case, a detailed chronology of Jackson's performance in Elwood Barclay's case is included in the appendix (App. A).

Dwyne Crittendon and Brad Evans were found guilty of second degree murder.

Penalty Trial. (March 5, 1975). Prior to the penalty trial Barclay's trial counsel renewed a motion to sever his trial from Dougan's on the ground that the state planned to recall William Hearn to testify that Dougan, Evans and Crittendon were implicated in another murder case (the murder of Stephen Roberts) which had not yet been brought to trial. Pen.Tr. 19-55. The motion to sever was again denied. Ibid. Hearn testified about the Roberts murder over objection by both Barclay and Dougan. Barclay's trial attorney also unsuccessfully twice objected to questioning of Hearn by Dougan's lawyer, Ernest Jackson, which brought out details of the Roberts murder that the trial judge had not permitted the state to develop on direct examination. Pen.Tr. 98, 104-105.6/

In closing argument on the sentence, Barclay's trial attorney again argued Barclay's lesser role as a "follower" in the Orlando murder, and the disparity in his punishment compared with Crittendon, Evans and Hearn who were charged with the Roberts murder. Pen.Tr. 152-158, 167-168.

Different Jury Recommendations for Dougan and Barclay. (March 5, 1975). The jury determination of penalty demonstrated that there were significant distinctions between Jacob Dougan and Elwood Barclay. The recommendation for Dougan was death; for Barclay, it was life imprisonment.

Sentence. (April 10, 1975). Despite the recommendation as to Barclay, Judge Hudson Olliff entered a sentence of death for both Dougan and Barclay, stating his basis for this decision in one order.7/ The public defender was appointed to represent Barclay, Dougan and Crittendon on appeal.

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6/ Barclay was never charged with the Roberts murder, and was not in Jacksonville at the time of that murder. But on direct examination, Hearn named "Elwood" as one of those present at a meeting on the night of the Roberts murder. Pen.Tr. 90. The state's attorney made no effort to correct the erroneous mention of Elwood Barclay. On cross-examination Hearn stated that Barclay was not present in that occasion. Pen.Tr. 109.

7/ The sentencing order is unusual in many ways. It is internally contradictory, very emotional, and praises the jury while rejecting its recommendation of mercy.

Jackson Seeks Out Barclay. After the April 10th sentencing, Elwood Barclay was in jail and had not seen or heard from any counsel since the sentencing trial. Sometime shortly before April 16th when Elwood Barclay was transported to state prison, Ernest Jackson came to the jail and offered to represent him.

Ernest Jackson said that he would like to represent Elwood Barclay, and told Barclay that Barclay would be better off with a private attorney than with the public defender (App. B).8/ Barclay informed Jackson that he could not afford to pay, and Jackson offered to represent Barclay without fee. Jackson did not disclose to Barclay that Jackson had a fee arrangement with Dougan's father (App. B).

The meeting between Jackson and Barclay lasted about twenty minutes. There was no discussion of conflicts of interest (App. B). Elwood Barclay did not see or talk with Jackson again until after the brief on appeal was filed more than a year later.

Barclay never again talked to Jackson alone. Nor did Barclay receive correspondence or copies of papers from him.

The visit by Jackson was not anticipated by Barclay and, since Jackson is now dead, we cannot explain to the Court why Jackson sought out Elwood Barclay and, without revealing the conflict problem, undertook the simultaneous representation of Barclay, Dougan and Crittendon.9/ When Dietra Micks asked him how he could possibly handle the three appeals alone, Mr. Jackson stated that it would be no more work to handle the three appeals than to do one. (Micks affidavit; App. C)

Jackson Appears for Three Defendants. Ernest Jackson

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8/ Elwood Barclay was never contacted by the Public Defender.

9/ The appendix filed with this brief contains affidavits which demonstrate that Jackson's conflict of interest was not explained to Barclay, and that Barclay never understood that his case would be lumped together with that of Jacob Dougan on appeal (App. B). Elwood Barclay, under sentence to die, did expect that separate attention would be given to his case (App. B). Elwood Barclay did not learn of Jackson's representation of Crittendon until several months later and Jackson never discussed this with Barclay (App. B).

entered his appearance as appellate counsel for three defendants -- his original client Jacob Dougan (jury recommendation of death penalty accepted by the judge), this petitioner, Elwood Barclay (jury recommendation of life imprisonment rejected by the judge) and Dwyne Crittendon (second degree murder conviction).10/

Jackson's Conflict. When Judge Olliff approved this arrangement he did so with a background of trial observation which included the attempts by Barclay's trial counsel to sever the trial both in the guilt and penalty phases, the dramatically different facts relating to the culpability, of Dougan and Barclay respectively, the jury's different recommendations for the two. Neither Judge Olliff nor Ernest Jackson explained the implications of these facts for the decision to have a single attorney on appeal, and Jackson never told Barclay that he planned to file a single brief, make a single argument, and raise no issues that spoke for Barclay alone or differentiated Barclay from Dougan. Since Barclay did not have an opportunity to talk to any lawyer other than Jackson (App. B), he was not aware of what was involved in accepting Jackson as his appellate counsel. Under sentence to die, he took the only offer of help which was made (App. B).

Jackson's Conflict Compounded By Romantic Involvement With Jacob Dougan's Sister. The conflict occasioned by Ernest

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10/ Judge Olliff appointed the Public Defender to represent Dougan, Barclay and Crittendon. This appointment was insensitive to the conflict of interest of the Public Defender's Office which Judge Olliff had previously allowed to withdraw from representing Crittendon because of its prior representation of Edred Black, a state witness. R.102-104, 107-113. The judge's creation of a multiple representation undoubtedly desensitized Barclay to the danger of multiple representation, instead of warning him of its dangers. Then Judge Olliff denied a motion filed by Jackson to have himself appointed as Barclay's appellate counsel, but on a second motion by Jackson "recognized" Jackson's appearance as private counsel. The court did nothing to alert Barclay to the problem of multiple representation.

In 1980 when Judge Olliff's attention was called to Jackson's conflict of interest he stated that he knew that Jackson was related to Dougan by marriage at the time of the appeal and that "I wondered about it myself, but that's another matter for another court." Resentencing Tr. April 18, 1980, p. 119-120. Barclay was never warned of the Judge's doubts about Jackson's role.

Jackson's representation of two death penalty-sentenced appellants with adverse interests 11/ was aggravated by the failure to provide the clients with any disclosure or other basis for informed consent to this arrangement. This conflict was further aggravated by a personal relationship which developed between Ernest Jackson and Thelma Turner, the sister of his original client, Jacob Dougan. The affidavits of Deitra Micks (App. C) and Elwood Barclay (App. B), attached to this petition, demonstrate the following facts:

-- Ernest Jackson met Jacob Dougan's sister in connection with his defense of Jacob Dougan. He became infatuated with her in December 1974.

-- Prior to Ernest Jackson's appearance on behalf of Elwood Barclay, Jackson was romantically involved with Thelma Turner.

-- Ernest Jackson divorced his third wife Lougenia Jackson (who was his secretary during 1974-75) and the divorce became final on December 10, 1975. On February 14, 1976 -- two months prior to filing a joint appellate brief for Jacob Dougan and Elwood Barclay -- he married Jacob Dougan's sister.

-- None of this was disclosed to Elwood Barclay by Ernest Jackson. Barclay learned of the marriage only several weeks after it took place.

Jackson's Fees Paid by Dougan's Father. The fees for Jackson's representation of Dougan were paid by Dougan's father, a fact unknown even to Jackson's then partner, Deitra Micks.

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11/ The appendix to this petition contains affidavits from distinguished Florida lawyers who have given their opinion about the conflict. These include Bennett Brummer (Public Defender, 11th Judicial Circuit), Richard Gerstein (former State Attorney, former Chairman, ABA Section of Criminal Justice), Robert Josefsberg (former federal prosecutor and former member of Florida Bar of Governors), Theodore Klein (former federal prosecutor, former President of the Federal Bar and present member of the Board of Governors), Bruce Rogow (law professor), Richard Snyder (former prosecutor, criminal defense attorney), Barry L. Zisser (former Chief Trial Attorney for the Public Defender's Office, 4th Judicial Circuit and former First Assistant State Attorney for the Fourth Judicial Circuit), Lacy Mahon (former Prosecuting Attorney for Duval County and former Florida legislator) and William H. Maness (former Circuit Judge for the 4th Judicial Circuit and former Florida legislator). (App. E).

(See Affidavits of Jacob John Dougan, Sr. and Deitra Micks, App. D; App. C) Ernest Jackson did not receive any fees for representing Elwood Barclay.

The Failure to Consult. Ernest Jackson's failure to disclose the conflicts and his failure to disclose the specific conflict brought on by his romantic and domestic involvement with a co-defendant's sister was consistent with the pattern of Jackson's representation of Elwood Barclay. After the first 20-minute meeting in county jail before Barclay was taken to state prison, Barclay did not see or hear from his appellate laywer (or any other lawyer) until after the brief was filed. He never again saw Ernest Jackson alone (App. B). Barclay was never sent copies of the papers pertaining to his appeal; he saw Jackson only in the visitor's park on family visiting days; he was never consulted on matters relating to his case (App. B). Barclay received word of his case through occasional contacts with Dougan.

Ernest Jackson's Other Disabilities. Given the conflicts described above, it may be redundant to enumerate the other burdens carried by Ernest Jackson during the time he was responsible for Elwood Barclay's appeal, but those facts are independently significant for habeas corpus based on inadequacy of counsel, and serve to explain further the omissions which are detailed in the argument portion of this petition. These facts relate to Jackson's family, his health, his professional life.

The facts of his infatuation with Jacob Dougan's sister, his divorce and his marriage have already been stated. With that remarriage, on February 14, 1976, Thelma Turner became the fourth Mrs. Ernest Jackson. Mr. Jackson had four children by his second wife and he subsequently adopted three of Thelma Jackson's children by a former marriage (App. C.). As we shall shortly see, his income was less than $2,000 in 1976, and zero in 1977.

Mr. Jackson suffered several significant health problems. On November 3, 1975, he was involved in an automobile accident and was hospitalized until November 21, 1975. (Apps. F, T, C.) According to his treating physician, Ernest Jackson was disabled from November 3, 1975 until January 23, 1976 and after

this three and one-half month period, he was still suffering ill effects from the accident. (App. T.) He suffered a second accident on July 1, 1976 and was in the hospital from July 1 to July 9. (Apps. F, T, C). Jackson's treating physician has given an interview to Petitioner's counsel, in which he stated, consistent with contemporary hospital records, that Ernest Jackson was not able to return to work when he left the hospital and that during the period from July 1 until September 1, Ernest Jackson had, at best, the ability to work only part time. (App. T.) These accidents naturally placed a great deal of stress on Mr. Jackson who also suffered from diabetes and high blood pressure, and was on heavy medication for treatment of both diseases. (App. F,T,C.)

Added to these extraordinary health problems was the final and fatal disease -- cancer. We know that cancer ended Ernest Jackson's life and we know that, before it had run its course in February 1979, the illness interfered with his representation of his clients.12/ We do not know when this illness began nor when it began to take its toll on Mr. Jackson's energy and intellect.

Although Mr. Jackson is now deceased, we know what he said about this sad medical history. In 1977, Ernest Jackson filed papers before Judge Sam Goodfriend in an attempt to get his alimony to his third wife reduced (App. J). In those papers, Ernest Jackson asserted that he made a "serious mistake" in signing a Stipulated Agreement filed December 18, 1975 at the final hearing in the divorce case. He stated:

> The mistake on the part of the husband was due to a serious head injury and the heavy medications prescribed by Dr. Jacob Green, M.D., Neurologist prior to, during and after the filing and granting of the Dissolution of Marriage.
>
> (App. J.)

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12/ Judge Hudson Olliff detailed some of these problems in his February 1979 report to this Court, a copy of which is in the appendix (App. S).

Jackson's Professional Life. The health problems and the domestic problems of Mr. Jackson are the background for his professional life. That life was, at best, chaotic. Mr. Jackson appears to have been a generous and good man in many respects, but he was not able to control his law practice any more than he could bring order to his domestic life. He attempted to handle literally hundreds and hundreds of cases and he seemed incapable of refusing a client (App. C). When Deitra Micks took over his law practice, she found 2500 open files (App. C).

He was also in trouble with the courts. The appendix documents two 1977 matters -- one year after the appeal in this case -- and these provide useful clues to the problems. On April 25, 1977, Circuit Judge Clark found that Mr. Jackson's representation of a defendant in a criminal trial "was so grossly deficient as to render the proceedings fundamentally unfair." (App. K.) On December 21, 1977, Circuit Judge Southwood held Mr. Jackson in contempt of court for his failure to appear for trial. (App. L.)

These court orders, which reflect so seriously on Ernest Jackson's professional life, are consistent with the observations of lawyers in the community. Those who knew Ernest Jackson well do not condemn him as a human being but also do not hesitate to state that his professional performance did not remotely measure up to the standard which would justify his handling of a capital case appeal during this period of rapid changes in the law. The affidavit of Barry Zisser, a Jacksonville attorney who as an Assistant State Attorney, Assistant Public Defender and private attorney had frequent contact with Ernest Jackson, demonstrates that Jackson was, during his last years, never prepared or interested in the developments of case law (App. E).

Another affidavit, from Jacksonville attorney Lacy Mahon, confirms this observation and, based on Mr. Mahon's personal dealings with Ernest Jackson and representation of

Jackson's ex-wife, Mr. Mahon concludes that Jackson was not able to competently practice law in the years 1975 and 1976. Mr. Mahon attributes this inability to the accidents of November 1975 and July 1976. (App. E.) In Vaught v. State, No. 63,561, now pending in this Court on appeal for denial of post-conviction relief, 25 Jacksonville lawyers signed affidavits testifying about Mr. Jackson's ineffectiveness as a lawyer. We request that the Court take judicial notice of those affidavits which are in the appendix hereto (App. U).

Mr. Jackson's financial problems are aptly described by Judge Goodfriend's Order of April 25, 1978 in the matrimonial case:

> However, this Court finds that the Husband's total net income was $14,577.98 in 1974; $14,708.66 in 1975; $1,928.37 in 1976 and nothing in 1977. (App. I.)

As his income deteriorated Mr. Jackson was sued by numerous creditors, including suits to evict him from his office for nonpayment of rent, suits by court reporters and merchants, and alimony claims by his third wife. (App. V).

Given the plague of accidents, physical disabilities and intense personal problems which Mr. Jackson faced, it is remarkable that he did anything to represent Mr. Barclay. He did, however, file a brief.

The Brief. (April 19, 1976) One brief was filed under one case number for the two defendants facing the death penalty. The brief is in the appendix (App. M). There are important facts about that brief which can be observed:

- It is a joint brief for two defendants and it is the same brief filed (with a different cover page) in the First District Court of Appeal for yet a third defendant.13/

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13/ Only the cover page, the first page, page 47 and the conclusion of this identical brief filed on behalf of Crittendon is included in the Appendix at App. N. These make the point. Copying of the other pages would be a waste of effort. All pages except the cover page are identical.

- Of the six points discussed in the brief, one is a generalized attack on the constitutionality of the death penalty statute, one is a venue point, two relate to discovery, and the other two relate only to the defendant Dougan.
- There is no issue either argued or stated which relates solely to Elwood Barclay.14/
- The brief does not touch any sentencing issue. This is particularly strange because the jury had voted to recommend life imprisonment for Elwood Barclay.
- The brief is never completed. On page 47 (App. M), Ernest Jackson's brief abruptly stops and we find -- in the middle of these papers -- a "Motion for Additional Time to File Supplemental Brief On Additional Points Submitted to This Court for Consideration." Nowhere does it appear that this motion was pursued or that Ernest Jackson ever attempted to file a separate motion or any additional papers, or that he sought to bring to the attention of the Court his unorthodox motion buried in the middle of an incomplete brief.15/
- Of the 46 pages of the brief prior to the "Motion for Additional Time, etc." twelve pages were a listing of the twenty-seven issues on appeal.
- The brief fails to contain any argument or citations of authority with respect to twenty-one points listed as error. See brief, pages 48-70 (App. M).16/

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14/ Jackson filed an Assignment of Error relating to the denial of Barclay's motion for a severance which was applicable only to Barclay. The point was not argued in the brief.

15/ Incredibly, page 47 of the First District Court of Appeal brief, filed on behalf of Dwyne Crittendon, is the identical motion, word for word (App. N).

16/ As the affidavit of the Petitioner demonstrates, he had anticipated argument would be made on several of these points.

- Elwood Barclay's name is never even mentioned in the argument portion of the brief, pages 22-46.[17]
- Elwood Barclay's name is never even mentioned in the three page Statement of Facts in the brief, pages 7-9. The brief contains no analysis -- indeed, no mention -- of the evidence relating to Barclay as distinct from the other defendants.[18]
- The brief contains no citation to any capital case decided by the Florida Supreme Court since the enactment of Florida's current capital punishment law, Section 921.141 Fla. Stat. in 1972.

Reply Brief. After the state filed its brief, there was an opportunity to file a reply brief. No reply brief was filed.

Supplemental Authorities. No notice of supplemental authority was filed.

Oral Argument. (September 15, 1976.) The record reflects that only one thirty-minute argument was made for the two appellants and there is no record of an attempt to expand the time for oral argument. We are advised that there is no tape recording of the argument in existence.

Opinion of this Court. This Court handed down its 4-2 opinion on March 17, 1977 and denied rehearing on April 7, 1977. The divided opinion is significant for its primary concern with an obvious issue, the propriety of the sentencing, which was not even touched in the brief filed by Ernest Jackson.[19]

The per curiam opinion for the majority quotes extensively from the trial court's sentencing order. The portion

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17/ Ernest Jackson's brief does refer to Jacob Dougan, his brother-in-law, in several places in the argument.

18/ The statement of facts does refer to Dougan by name three times. See brief p. 9.

19/ In addition to its discussion of sentencing, the opinion deals with the constitutionality of the statute and with the failure of the state to reveal details of a plea bargain arrangement with a state witness.

of it dealing with sentencing is notable in that it treats the findings of aggravating circumstances in detail with respect to Dougan (343 So.2d at 1270-71), but deals with Barclay mainly by reference back to Dougan's facts, saying "virtually the same considerations apply with respect to the consequences of the criminal episode." (343 So.2d at 1271). There is no real discussion of the facts concerning Barclay's different degree of participation in the offense, except for references to the trial court's opinion and conclusions. The Court accepted the conclusion that "the two co-perpetrators ... participated equally" without examining the facts which led the jury to reach the opposite conclusion on that point. 343 So.2d at 1271.

From our present perspective, this is terribly glib and even outrageously incorrect, but, from the perspective of the Court acting in 1977, the fact that anyone even looked at this point is a tribute to the Court. Barclay's counsel offered no citation to the leading cases nor any discussion of the facts which would have shown, unquestionably, that Elwood Barclay and Jacob Dougan were not "co-perpetrators [who] ... participated equally" in the crime. Ernest Jackson did not do that because, given the facts of his situation, he could not.

Ernest Jackson could not strenuously argue the disparate jury recommendations without placing his original client and brother-in-law, Jacob Dougan, at severe hazard. His failure to put the case in perspective through proper advocacy appears to be especially tragic when this Court's opinion is read closely. Since the Court expressed its real concern with equal treatment, effective advocacy would have convinced the Court that Elwood Barclay's situation was much more like that of Crittendon, Evans and Hearn who did not receive the death penalty. In fact, Barclay -- unlike the co-defendants who received lesser sentences -- was never even charged with a second murder, the Roberts murder.

Even without argument of counsel, Justice Boyd addressed the point and he wrote:

> A careful review of the entire record convinces me the jury was correct in recom-

mending a higher degree of punishment for Appellant Dougan than for Appellant Barclay.

343 So.2d 1272.

The decision not to argue sentencing issues was a mistake for Dougan as well as Barclay, for Justice Hatchett was able to understand, without briefing, that the trial judge considered "factors outside the record" and outside of the statutory factors in sentencing Dougan and Barclay to death. 343 So.2d at 1272.

Rehearing. (March 31, 1977). A single rehearing petition was filed for the two defendants. No separate argument was made for Barclay. Indeed, the petition does not directly deal with any sentencing issue and, instead, focuses again on the venue issue, an issue in which this Court had not shown any interest. The petition cited no Florida capital cases.

Order for Gardner Relief. (September 7, 1978). This Court vacated the sentence and remanded for a hearing and resentencing. Barclay & Dougan v. State, 362 So.2d 657 (Fla. 1978). On remand petitioner was again sentenced to death on April 18, 1980.

Brown v. Wainwright. (1980). Barclay was one of 123 death row inmates who joined in the petition for extraordinary relief in Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), cert. denied, 454 U.S. 1000 (1981). Additional relevant facts about the psychiatric report on Barclay, and the fact that he was given no Fifth and Sixth Amendment warnings and did not waive his rights are set forth in Argument IV, infra, and Barclay's affidavit on the subject which is incorporated herein by reference. App. O.

Affirmance of the 1980 death sentence. (June 4, 1981). This Court applied the law of the case rule, refused to reconsider the merits and affirmed Barclay's second death sentence in an opinion which relies mainly on the Court's second review of the Dougan case. Barclay v. State, 411 So.2d 1310 (Fla. 1981), citing Dougan v. State, 398 So.2d 439 (Fla. 1981). The matter was last before this Court when rehearing was denied by a 3-3 vote on April 14, 1982. Justices Overton, McDonald and Ehrlich voted for rehearing.

On July 6, 1983 the decision was affirmed by the U.S. Supreme Court. Barclay v. Florida, 51 U.S.L.W. 5206 (July 6, 1983); rehearing was denied on October 3, 1983. This petition was filed promptly thereafter.

## NATURE OF RELIEF SOUGHT

The Petitioner seeks by his petition for a writ of habeas corpus an order to reduce his sentence to life imprisonment or to allow an appeal to this Court on all issues in his case. Further, the Petitioner seeks to have an evidentiary hearing by commissioner or otherwise if there is any dispute as to an issue of fact. The Petitioner requests such other, further relief as this Court may find necessary to fully remedy the obvious injustice.

## SUMMARY OF ARGUMENT

### I. Conflict of Interest of Appellate Counsel.

Petitioner's Sixth Amendment right to the assistance of counsel on appeal was violated by his lawyer's conflict of interest. We do not contend that multiple representation always involves a conflict, but that in the circumstances of this case there was an actual conflict. Holloway v. Arkansas, 435 U.S. 475 (1978); Cuyler v. Sullivan, 446 U.S. 335 (1980); Wood v. Georgia, 450 U.S 261 (1981); Glasser v. United States, 315 U.S. 60 (1942); Foster v. State, 387 So.2d 344 (Fla. 1980). The core of the conflict was that a lawyer simultaneously representing petitioner Barclay -- who had a secondary role in the killing, and a jury recommendation of life imprisonment -- and Jacob Dougan -- who had a primary role in the killing, and a jury recommendation of death -- could not effectively advocate arguments vital to the adequate representation of Barclay on appeal without necessarily jaundicing Dougan.

This central conflict was exacerbated by additional circumstances. Jackson had been retained to represent Dougan at trial. He had an undisclosed romantic interest in Dougan's

sister which eventually led to marriage, and he was paid by Dougan's father. After trial, he went to Barclay's jail cell and volunteered to represent Barclay on appeal without charge. He gave Barclay no warning or explanation about a conflict of interest, and assured Barclay that he could get his conviction reversed and do a better job than the public defender who had been appointed to represent Barclay.

A number of substantial arguments available to Barclay on appeal would have disadvantaged Dougan. The arguments required emphasizing factually that Barclay's involvement in the crime was less than that of Dougan, the leader and "triggerman." They required emphasizing legally that the jury's favorable sentencing recommendation for Barclay was rationally grounded in the facts, and entitled to respect because of Dougan's greater culpability.

These arguments were never made. Instead, Jackson filed a joint brief for Barclay and Dougan (and the identical brief in the District Court of Appeal for a third defendant) which advanced no separate arguments for Barclay, took no issue with his sentence (apart from the constitutionality of the statute), and did not document Barclay's lesser culpability or urge that weight be given to his jury recommendation of life imprisonment. Barclay was never consulted about any issues on appeal, never received a letter or professional visit from his lawyer and was never told that his case would not be separately presented on appeal.

## II. Ineffective Assistance of Appellate Counsel.

Barclay's appellate counsel was ineffective when measured by the standards adopted by this Court. Knight v. State, 394 So.2d 997 (Fla. 1981); McKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), cert. denied, 368 U.S. 877 (1961).

In the totality of the circumstances, Mr. Jackson was not "reasonably likely to render" effective assistance to Barclay. In addition to his conflict of interest, Mr. Jackson was undergoing a unique series of experiences and difficulties

which finally culminated in his death. Burdened with an impossibly heavy caseload, Mr. Jackson cumulatively encountered chronic illnesses and heavy medication, an auto accident requiring long hospitalization, a divorce from a third wife and a marriage to a fourth wife (the co-defendant's sister), a total of seven children, a second auto accident and hospitalization, a deteriorating income accompanied by numerous lawsuits from creditors, and finally the discovery of cancer, complete disability and death.

The brief on appeal was seriously deficient. It contained an inadequate statement of facts which did not mention Barclay's name. It contained a legal argument which cited none of the available cases decided under Florida's capital sentencing statute. The failure of the brief to contest the trial court's findings with respect to aggravating and mitigating circumstances was a gross shortcoming. Holmes v. State, 429 So.2d 297 (Fla. 1983). The failure to argue in support of the jury recommendation of life imprisonment for Barclay and to invoke this Court's applicable precedents, most notably Tedder v. State, 322 So.2d 908 (Fla. 1975), gravely prejudiced Barclay. It is evident that the failure to make these arguments was prejudicial because some of the same arguments were later accepted by a member of the 4-2 majority who voted against Barclay, when new counsel made the arguments in a co-defendant's case. Thus there is a likelihood that Barclay would have had at least a 3-3 vote, resulting in a life sentence, if the arguments had been made on his appeal by Mr. Jackson.

The brief was also deficient in failing to make arguments pertaining to (1) the overzealous conduct of the prosecutor at trial, (2) the denial of a severance, and the use of collateral crime evidence against Dougan in such a manner as to prejudice Barclay, (3) erroneous penalty instructions to the jury, (4) a failure to consider non-statutory mitigating factors in sentencing, (5) the prejudicial effect of improper procedures of death-qualifying of the jury, and (6) violations of Witherspoon v. Illinois, 391 U.S. 510 (1968).

## III. This Court's 3-3 vote on rehearing in Barclay's case should have resulted in a life sentence under the doctrine of Vasil v. State, 374 So.2d 465 (Fla. 1979).

The principle of Vasil v. State, 374 So.2d 465 (Fla. 1979), cert. denied, 446 U.S. 967 (1980), requires that a sentence of death be reduced to life imprisonment where there are not four votes in this Court in favor of a death sentence. The Vasil rule is grounded in the Eighth Amendment and due process requirements of meaningful appellate review in capital cases. There is no good reason for not applying the principle on rehearing, since this Court's judgments are not final until rehearing petitions are decided. And, there is an added reason to apply the Vasil rule to Barclay, where four present members of the court have at one time or another voted in a way which would have prevented his execution, and a fifth former member of the court, Justice Hatchett, also voted for Barclay.

## IV. Barclay's federal constitutional rights were violated by this Court's use of a prison psychological screening report during his appeal.

Barclay was given psychological tests and interviews on three occasions at the Florida State Prison. He was never advised of his Fifth and Sixth Amendment rights, and never waived those rights, in connection with the interviews or reports; he never had any idea that the reports might be used by this Court during his appeal. Barclay tenders proof that at least one of the three reports was used by this Court during his appeal: a 1976 letter from the Clerk noting receipt of the report, and the Court's docket sheet indicating that the report was placed in the file on June 8, 1976, and was removed from the file and placed in the Clerk's vault on October 8, 1980.

Although petitioner was a member of the putative class before the Court in Brown v. Wainwright, 392 So.2d 1329 (Fla. 1981), cert. denied, 454 U.S. 1000 (1981), and preserves the claims made then, he now also makes an individual claim that his Fifth and Sixth Amendment rights against self-incrimination and to the assistance of counsel were violated. Barclay rests his new claim on Estelle v. Smith, 451 U.S. 454 (1981), and asserts

that his rights were violated on his appeal just as they would have been violated if the same unwarned and uncounseled psychological examination results had been placed before the jury.

V. Barclay was denied equal protection and due process by the failure of the Court to provide a meaningful appellate review of his 1980 death sentence.

Petitioner was resentenced to death in April 1980 and his case was again reviewed, but this Court applied the "law of the case" rule to limit the scope of the appeal. Petitioner asserts that this was inappropriate and violated his constitutional rights. He notes that the trial court had changed two crucial sentencing findings from the 1975 order and that he was denied a review of the changed findings. Further, the Attorney General of Florida has filed a brief in the U.S. Supreme Court admitting that there was state-law error by the sentencing judge. This Court has never ruled on the case in light of the error now admitted by the State.

Among the other points this Court has not reviewed is the trial court's use of a statutory definition of kidnapping which became law after Barclay's trial and is ex post facto as to him. Barclay has thus gotten the worst of both worlds: unfavorable changes of law were used against him, while the "law of the case" prevented him from receiving the benefit of favorable legal developments. In all, Barclay has been denied the kind of even-handedness in the administration of the death penalty required by the Eighth Amendment and Equal Protection. See Lee v. State, 340 So.2d 474 (Fla. 1976).

## ARGUMENT

### I.

### PETITIONER'S SIXTH AMENDMENT RIGHT TO COUNSEL WAS VIOLATED BECAUSE HIS LAWYER ON APPEAL HAD AN ACTUAL CONFLICT OF INTEREST.

Petitioner does not assert that multiple representation always violates the constitution. Holloway v. Arkansas, 435 U.S. 475, 482 (1978); Cuyler v. Sullivan, 446 U.S. 335, 347

(1980). It is the particular facts of this case which demonstrate an actual conflict of interest.

This case presents the Court with a situation where one lawyer attempted to represent simultaneously two criminal defendants on appeal under circumstances where:

- both defendants were under death sentences;
- the two defendants had different degrees of involvement in the crime, and that difference, which would have supported a forceful argument against the death penalty for one defendant, was commensurately prejudicial to the other;
- the two defendants also had sharply divergent interests in regard to any argument that touched upon the weight which should be given on appeal to the jury's recommendation of sentence, since the same jury had recommended a life sentence for one defendant and death for the other;
- the lawyer's original loyalty was to petitioner's co-defendant, whom the lawyer represented at trial;
- the lawyer was paid by the co-defendant's father and not by petitioner; and,
- prior to filing a joint brief for both defendants on the appeal, the lawyer divorced his wife and married the co-defendant's sister.

These facts have been brought to the attention of experienced criminal lawyers in Florida -- lawyers whose background includes trial and appellate practice in the criminal law field, and whose commitment to the community and the improvement of the legal profession has been demonstrated by participation in a wide variety of bar activities, public service and legal education, such as Presidency of the National District Attorneys Association, Chairmanship of the ABA Section on Criminal Justice, and service on the Florida Bar Board of Governors (including review of bar grievance matters). These attorneys (Bennett Brummer, Richard Gerstein, Robert Josefsberg, Theodore Klein, Bruce Rogow and Richard Snyder) have sworn that

they regard the representation of both Barclay and Dougan on appeal as a clear conflict of interest. For example, Robert Josefsberg states:

> It is my opinion, under the circumstances, that Mr. Jackson clearly had a conflict of interest and should not have represented both Mr. Dougan and Mr. Barclay on appeal. Moreover, it was absolutely improper for Mr. Jackson to represent Mr. Barclay without fully disclosing to Barclay the relationship between Mr. Jackson and a sister of Barclay's co-defendant, Mr. Dougan.
>
> (Paragraph 6, App. E.)

Mr. Josefsberg observes that Mr. Jackson made no individual arguments for Elwood Barclay (paragraph 7f) and that the brief missed other important points. His affidavit includes the following statement:

> ... I conclude that Elwood C. Barclay did not receive effective assistance of counsel on appeal; that counsel did not provide adequate representation during his appeal; and that counsel had a severe conflict of interest due to the facts of the case ... and this severe conflict was further complicated by the fact, unknown to Mr. Barclay, of the lawyer's relationship with a sister of his co-defendant. Jackson's failure to disclose this fact to Barclay is, to your affiant, a strong inference that Jackson was either (a) incompetent or (b) acting for the benefit of Dougan to the detriment of Barclay ...
>
> (Paragraph 8.)

The soundness of these affiants' opinions is demonstrated by a review of the law and the facts.

A. Standards for determination of conflict.

The United States Supreme Court has recognized that "[w]here a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflict of interest." Wood v. Georgia, 450 U.S. 261, 271 (1981) (citations omitted). In the seminal decision of Glasser v. United States, 315 U.S. 60 (1942), the Court held that "the 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such

assistance be untrammeled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests." Id. at 70.

The Court has had occasion in subsequent decisions to refine the standards by which an asserted conflict of interest will be assessed. Once an actual conflict of interest is shown to have existed, there is no requirement that prejudice be shown to have resulted from that conflict. Prejudice is presumed from the very fact of the conflict.20/ Glasser v. United States, 315 U.S. at 75-76. Accord, Holloway v. Arkansas, 435 U.S. 475, 487-91 (1978).

The Eleventh Circuit recently decided Westbrook v. Zant, 704 F.2d 1487 (11th Cir. 1983) (Hatchett, Kravitch and Clark) which dealt with a conflict in a somewhat more remote context than the present case. In Westbrook, the defense lawyer was allegedly also representing the county in defense of a challenge to the composition of the jury lists. The court noted that, if this were true, the lawyer was not free to raise questions of jury composition without breaching his duty in the other case:

> It seems to us that Westbrook's counsel would have been hard pressed to present a jury composition challenge prior to Westbrook's trial because such a challenge would have been directed against another client.
>
> 704 F.2d at 1499.

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20/ The case law requires that the court should investigate an apparent conflict of interest where it "knows or reasonably should know" that a conflict exists. Cuyler v. Sullivan, 446 U.S. at 347; Wood v. Georgia, 450 U.S. at 272 n.18.

Here, the trial judge who approved the joint representation on appeal appears to have been indifferent to the conflict. He did not take any steps to assure that the conflict was disclosed to Barclay. He did show some interest in Jackson's subsequent marriage but, even there, he seemed to feel that the problem was not his to solve. At the 1980 resentencing, Judge Olliff acknowledged that he knew that Ernest Jackson was related to Dougan by marriage and Judge Olliff stated: "I wondered about it myself, but that's another matter for another court." Resentencing Tr. April 18, 1980, p. 119-120, emphasis added.

Since the facts of this case demonstrate an actual conflict, it is not necessary to pursue the failure of the trial judge to investigate the conflict, but the Petitioner does not waive that point.

The remand of the case ordered by Judge Hatchett's opinion was for determination of the simple factual question of whether the defense counsel also represented the county in the jury pool challenge. 704 F.2d at 1499.

The decisions of the Florida courts have been consistent with these federal decisions. In 1980, this Court found a conflict of interest in Foster v. State, 387 So.2d 344 (Fla. 1980), a death-penalty case:

> The state argues that reversal cannot be ordered on the ground since there was no defense objection to representation or motion for separate representation. To deny a motion for separate representation, where a risk of conflicting interests exists, is reversible error. Holloway v. Arkansas, ... Even in the absence of an objection or motion below, however, where actual conflict of interest or prejudice to the appellant is shown, the court's action in making the joint appointment and allowing the joint representation to continue is reversible error. See Belton v. State 217 So.2d 97 (Fla. 1968). As the United States Supreme Court said in Glasser, "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused. ... The trial court should protect the right of an accused to have the assistance of counsel." ...
>
> We hold that the appellant was denied his right to the effective assistance of counsel by the joint representation of the appellant and a state witness by the same court-appointed attorney. The judgment and sentences are vacated and the case is remanded for a new trial.

Of course, not all cases dealing with alleged conflicts have been resolved in favor of the conflict claim. Each case must turn on its particular facts. But the Court here is not presented with a situation in which co-defendants embarked on a strategy of common defense with a single counsel. See United States v. Benavidez, 664 F.2d 1255 (5th Cir. 1982), cert. denied, 457 U.S. 1121 (1982). Nor is it called on to address an abstract claim that appellate counsel would find it difficult to argue questions of harshness of sentence because of co-defendants' differing sentencing orders. See Derringer v. United States, 441 F.2d 1140 (8th Cir. 1971) (per curiam). Instead, it is faced with a most dramatic set of facts establishing a clear conflict in a death case. As the next

sub-point demonstrates, the two clients here could not practically nor ethically be represented by a single attorney. As the distinguished lawyers whose affidavits accompany this petition concluded, there was simply no way for a lawyer to appear effectively for both Barclay and Dougan.

B. An Actual Conflict of Interest Infected Mr. Jackson's Representation of Petitioner in his Direct Appeal.

Crucial arguments on behalf of Barclay were never made by his appellate counsel who also represented Dougan. A mere scanning of several of these arguments demonstrates the impossibility of the situation in which Jackson represented both appellants:

| Arguments for Barclay | Impact on Dougan |
|---|---|
| The jury could have reasonably concluded that Barclay should not be put to death. | Supporting the jury determination for Barclay would emphasize the rationality of the jury's differentiation between Barclay and Dougan. |
| Barclay's role in handling a weapon was, at worse, to inflict superficial wounds with a pocket knife, and this did not contribute to Orlando's death. | Dougan obtained the gun and used it to fire bullets into Orlando's head. Orlando died from these bullet wounds. |
| Barclay and the others who were relatively young were led by Dougan, who exercised a measure of domination over them. | This again acknowledges Dougan's major role. |
| Barclay was not involved in any way with the Roberts murder. | Dougan's role in other criminal activity is thereby emphasized. |
| Barclay was prejudiced by not having separate trials for both guilt and penalty. | The reasons that Barclay was prejudiced all reflect badly on Dougan. |

The conflict of interest is glaring and critical. A conflict of interest is present "whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a codefendant whom counsel is also representing." Foxworth v. Wainwright, 516 F.2d 1072, 1076 (5th Cir. 1975). Additionally, a conflict will be found "when procedures or tactics are pursued that benefit one codefendant while harming another," United States v. Medel, 592 F.2d 1305, 1311 (5th Cir. 1979) (dictum).

On Petitioner's appeal, critical arguments were not made, and could not have been made, without seriously undermining Dougan's position. Chief among these was the argument, supported by substantial evidence, that the jury's recommendation of a life sentence for Barclay was entitled to respect because it recognized that Dougan was the "ringleader" in the homicide, and that Barclay's role was distinctly secondary to Dougan's. See United States v. Alvarez, 580 F.2d 1251, 1257 (5th Cir. 1978) (appellant's counsel "wore two different hats, having as his dual objective the irreconcilable task of at once bolstering and discrediting the testimony of [his other clients]"); Foxworth v. Wainwright, 516 F.2d at 1077 ("the trial court should have foreseen the possibility that one of the boys might be in a position to further his own defense by showing that a codefendant . . . was solely responsible for the crime"). In fact, this Court's opinion on appeal did undertake to compare the relative involvements of Barclay and Dougan in the crime, as pertinent to the justifiability of the jury's differing recommendations for the two men. Its treatment of this vital issue was factually ill-advised, not because of any failing by the Court, but because the lawyer supposedly representing Barclay on the appeal never undertook to analyze the record in detail, to demonstrate concretely the extent of Barclay's lesser culpability. Once again we emphasize that we do not presume to criticize the Court for considering the issue sua sponte, without benefit of factual or legal argument by counsel. Its statutory duty called for that. But Barclay's constitutional right to counsel serving as an advocate on appeal called for something more. Anders v. California, 386 U.S. 738 (1967). Before this Court made its determination that Barclay's degree of involvement in the crime seemed so like Dougan's that the jury's differentiation of the two was rationally unsupportable under Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), Barclay, "through counsel, had a right to be heard in summation of the evidence from the point of view most favorable to him." Herring v. New York, 422 U.S. 853, 864 (1975).

Barclay had no such thing. Mr. Jackson did not -- and could not, without prejudice to Jacob Dougan -- emphasize in his statement of facts and legal arguments significant differences in evidence adduced with respect to the two codefendants be represented. His brief on appeal, which petitioner emphasizes was filed jointly on behalf of Barclay and Dougan, failed to make a single argument which relied on the substantial disparity in culpability of the two. It failed to analyze, or even summarize or cite the pages of the transcript showing, the evidence distinguishing Barclay's role from Dougan's. No mention was made of the fact that Dougan was regarded as the leader in the homicide by Barclay and the other participants. Nor was the Court referred to the trial testimony which establishes that Dougan, and not Barclay, was principally responsible for the fabrication of the tape recordings which, at least in part, formed the basis for Judge Olliff's decision to sentence both Dougan and Barclay to death.

In addition, an argument plainly should have been made on Barclay's behalf that under Tedder v. State, supra, the trial court committed error in rejecting the jury's verdict of a life sentence, and imposing a death sentence. No such argument was made, nor could have it been made without seriously jeopardizing Dougan's posture. This was so not only because an emphasis upon the jury's pivotal role in capital sentencing would have condemned Dougan while sparing Barclay, but also because one of the strongest points to be made in support of the jury's recommendation under Tedder was its discernment in distinguishing Barclay's lesser role from Dougan's greater one. Cf. O'Kelley v. North Carolina, 606 F.2d 56, 59 (4th Cir. 1979) (affirming district court's holding that actual conflict, caused by disparate prior criminal record of codefendants and distinct facts with respect to possession of gun, required new hearing on sentencing, and appointment of separate counsel).

The upshot was that Mr. Jackson's brief failed entirely to question the propriety of Barclay's death sentence, as distinguished from Dougan's. Such a failure would be

astounding, were it not explained by Mr. Jackson's conflicting representation of the two appellants. But Mr. Jackson could not forcefully advance the arguments for Barclay's life -- perhaps could not even appreciate their significance -- because of their adverse effects on Dougan. Inevitably, the issue of a proper sentence for Barclay in this case was one which involved the question of relative degrees of guilt, and of the individual characteristics of Barclay and Dougan which supported the jury's sentencing decision. That no such matters were raised by Mr. Jackson in his brief to this Court was as felicitous for Dougan as it was fatal for Barclay.

The conflict of interest which was inherent in joint representation of petitioner and Dougan by any attorney was exacerbated by Mr. Jackson's unique situation. As revealed by the affidavits of petitioner (App. B) and attorney Deitra Micks (App. C), certain circumstances peculiar to Mr. Jackson subjected him to a conflict of interest over and above that which inhered in the very fact of joint representation in this case.

First of all, Mr. Jackson represented Dougan, but not petitioner, at the trial which resulted in both defendants' convictions. It follows naturally that he was far more fully apprised of the facts with respect to Dougan's defense than of those concerning petitioner's defense. His brief on appeal does not cite the trial transcript or manifest any familiarity with it, an indicator which reinforces the probability that his view of the facts on appeal was derived principally from trial recollection, rather than from study of the record. More important, his primary loyalty must be assumed to have rested with Dougan, his client at the trial level. See e.g., United States ex rel. Taylor v. Rundle, 305 F.Supp. 1036, 1039 (E.D. Pa. 1969) ("It is apparent that the attorney's plan in this case was to place the onus of the offense on the relator, thereby obtaining a lighter sentence for his co-defendant who was his original client").

A second and compelling circumstance which gave rise to a conflict of interest in favor of Dougan and against petitioner

was that during the very period when Mr. Jackson undertook to represent petitioner along with Dougan, he was courting Dougan's sister, Thelma Turner. Indeed, on February 14, 1976, prior to the filing of the appellate briefs, Mr. Jackson married Ms. Turner. It would be unnatural if an attorney laboring under an inherent conflict of interest did not give his primary allegiance to his future, and then present, brother-in-law.

Finally, unbeknownst to petitioner, Mr. Jackson's fees for handling the appeal were paid entirely by Dougan's father. The United States Supreme Court has recognized "the inherent dangers that arise when a criminal defendant is represented by a lawyer hired and paid by a third party." Wood v. Georgia, 450 U.S. at 269. In that case, the legal fees which were held to have possibly engendered a conflict of interest were paid by the defendants' employer. In petitioner's case, those fees were paid by the father of a codefendant whose interests were inherently contrary to those of petitioner.

Accordingly, petitioner submits that an actual conflict of interest was involved in the joint representation of petitioner and Dougan, and that the inherent conflict was exacerbated by Mr. Jackson's personal reasons for favoring Dougan. Having established the existence of that conflict of interest, petitioner is entitled to have this Court vacate its decision upon his initial direct appeal, and allow a new direct appeal with the benefit of representation by counsel not laboring under an impermissible conflict of interest.21/

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21/ An actual conflict of interest, once established, so taints counsel's representation of a particular defendant that no specific prejudice need be demonstrated. In other words, the "harmless error" rule has no application in the context of actual conflicts of interest. Holloway v. Arkansas, 435 U.S. at 487-491; Glasser v. United States, 315 U.S. 75-76; Stephens v. United States, 595 F.2d 1066, 1067 (5th Cir. 1979); Zuck v. Alabama, 588 F.2d 436, 439-40 (5th Cir. 1976); cert. denied, 444 U.S. 833 (1979); Foxworth v. Wainwright, 516 F.2d at 1077 n. 7. Nevertheless, the prejudice sustained by Petitioner as a result of the conflict of interest of Mr. Jackson is amply demonstrated by Argument II, below, where we detail counsel's ineffectiveness and its harmful effects.

## II.

## PETITIONER DID NOT HAVE THE EFFECTIVE ASSISTANCE OF COUNSEL ON APPEAL.

### A. Introduction: The legal standard for ineffective assistance.

It is now settled and familiar law that the Constitution guarantees the fundamental right to counsel in criminal cases, Gideon v. Wainwright, 372 U.S. 335 (1963); Argersinger v. Hamlin, 407 U.S. 25 (1972); Powell v. Alabama, 287 U.S. 45 (1932); Glasser v. United States, 315 U.S. 60 (1942); Holloway v. Arkansas, 435 U.S. 475 (1978); Cuyler v. Sullivan, 446 U.S. 335 (1980), and that the right embraces the effective assistance of counsel on appeal as of right from a criminal conviction, Anders v. California, supra; Douglas v. California, 372 U.S. 353 (1963); Swenson v. Bosler, 386 U.S. 258 (1967); Mylar v. Alabama, 671 F.2d 1299 (11th Cir. 1982); Passmore v. Estelle, 607 F.2d 662 (5th Cir. 1979); Foxworth v. Wainwright, 449 F.2d 319 (5th Cir. 1971). This Court has held that these principles apply to both appointed and retained counsel. Vagner v. Wainwright, 398 So.2d 448, 452 (Fla. 1981); Knight v. State, 394 So.2d 997 (Fla. 1981).

The standard for judging counsel's adequacy which has been adopted by this Court is the one long used by the U.S. Court of Appeals for the Fifth Circuit. The test is "whether counsel was reasonably likely to render and did render reasonably effective counsel based on the totality of the circumstances." Meeks v. State, 382 So.2d 673 (Fla. 1980); Vagner v. Wainwright, supra at 452; McKenna v. Ellis, 280 F.2d 592, 599 (5th Cir. 1960), cert. denied, 368 U.S. 877 (1961); Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974).

In Knight v. State, 394 So.2d 997 (Fla. 1981), the Court adopted four ancillary principles from United States v. DeCoster, 624 F.2d 196 (D.C. Cir. 1979) (en banc). Knight, supra, requires that for petitioner to prevail, he must (1) detail the specific acts or omissions complained of; (2) demonstrate that the acts or omissions constitute a "substantial and serious deficiency measurably below that of competent counsel"; (3) show that the deficiency was substantial enough to

prejudice him "to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings"; and (4) defeat any effort by the state to rebut the showing of prejudice.22/

B. Ernest Jackson was not "reasonably likely to render" effective assistance of counsel.

The inquiry as to whether counsel was "reasonably likely" to render effective assistance requires a consideration of the totality of circumstances involved in the representation. In McKenna v. Ellis, 280 F.2d 592, 603-604 (5th Cir. 1960), a combination of circumstances was found to have unfairly prevented the accused from defending his case. The court considered such circumstances as the appointment, just prior to

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22/ More recently, the "outcome-determinative" test for prejudice in DeCoster and Knight, supra, has been rejected by the U.S. Court of Appeals for the Eleventh Circuit in Washington v. Strickland, 693 F.2d 1243 (11th Cir. 1982), cert. granted, 51 U.S.L.W. 3871 (June 6, 1983). The Eleventh Circuit's prejudice test is that the petitioner must show that counsel's ineffectiveness caused "actual and substantial disadvantage" to the conduct of his defense. 693 F.2d at 1250.

Subsequent to Washington v. Strickland, this Court has acknowledged the divergence of Washington and Knight, but adhered to the standard of prejudice announced in Knight. See Armstrong v. State, 429 So.2d 287, 290 (Fla. 1983). The choice between the standards makes no difference in the present case because several of Mr. Jackson's errors here were so obviously substantial and prejudicial that they satisfy any of the previously mentioned tests for prejudice. Indeed, because of the unique circumstances of the Barclay case it is possible for us to demonstrate the likelihood that one of the major deficiencies of appellate counsel actually changed the outcome of his appeal. See Part II.C.3(a) and (b) infra. However, because the prejudice resulting from some of the many errors by Barclay's appellate counsel may be less clear than others, because Washington v. Strickland will soon be decided by the United States Supreme Court, and because the extreme penalty requires caution of counsel and the court, we wish to preserve the contention that the outcome-determinative test of Knight violates the Sixth and Fourteenth Amendments. Our contention is that the Knight-DeCoster rule unfairly places the burden of proof on defendants to prove what might have happened if they had been competently represented. The unfair allocation of the burden of proving such a fact violates petitioner's rights for the reasons given by the Eleventh Circuit in Washington v. Strickland, supra; see Mullaney v. Wilbur, 421 U.S. 684 (1975); In Re Winship, 397 U.S. 358 (1970); and Sandstrom v. Montana, 442 U.S. 510 (1979). We believe a fairer and more appropriate test for evaluating prejudice where issues have not been argued on appeal is that stated by the Fifth Circuit in Thor v. United States, 574 F.2d 215 (5th Cir. 1978), e.g., whether petitioner had "an arguable chance of success with respect to (his) contentions" citing Hooks v. Roberts, 480 F.2d 1196 (5th Cir. 1973), cert. denied, 414 U.S. 1163 (1974).

trial, of two young and inexperienced lawyers, who were seeking employment with the district attorney, and who made obvious errors.

The totality of circumstances in petitioner's case includes the facts which we have asserted in Argument I, supra, constitute a conflict of interest. But in addition, we have in the Statement of Facts detailed the overwhelming personal circumstances that made it reasonably "unlikely" rather than "likely" that Ernest Jackson could render effective assistance of counsel for Elwood Barclay. In the midst of handling Barclay's appeal, Jackson was beset with an extraordinary set of personal and professional difficulties which eventually culminated in his complete disability and death.

We again capitulate the facts briefly:

Mr. Jackson began the representation of Elwood Barclay in most inauspicious circumstances. He had an impossibly heavy caseload. His one law partner was about to leave his firm because of her pregnancy. He undertook his task upon the entirely unreasonable premise that it would require no more work to handle appeals for three convicted murderers than to appeal the case of his one original client Jacob Dougan. (App. C)

The series of personal pressures relating to his family, health, professional life and finances which subsequently beset him during the appeal were overwhelming. Indeed, the chaotic sequence of events would doubtless have rendered ineffective a lawyer with far greater resources and a more realistic judgment about the appropriate work to be done on the appeal of a capital case. During the second half of 1975, Ernest Jackson practiced law alone. He divorced his third wife, who was also his law secretary, and courted Thelma Turner who was to become the fourth Mrs. Jackson. Already suffering from diabetes and high blood pressure, he had a serious automobile accident resulting in injuries that required hospitalization and heavy medication for an extended period. In early 1976 he married Ms. Turner and assumed responsibility for the care of her three children in addition to his own four children. He did

so in the face of financial difficulties reflected by the deterioration of his income from $14,708.66 in 1975 to $1,928.37 in 1976, to zero in 1977.

In April 1976 he filed the joint brief for Barclay and Dougan, and the identical brief in another court for Crittendon. In July 1976 he had a second disabling automobile accident and hospitalization. He failed to file any reply brief or supplemental authority, although the case remained under advisement until March 17, 1977, and there were a number of important decisions in the interim. In September 1976 he argued the appeal for Dougan and Barclay in this Court, and the appeal for Crittendon in the First District Court of Appeal.

In 1977 this Court decided the Barclay and Dougan appeal, and Mr. Jackson filed a rehearing petition. During 1977 Mr. Jackson was besieged by creditors, was in difficulty with the courts, and was found to have rendered ineffective assistance in another case. During the same period he was defense counsel in the capital trial of Charles Vaught, wherein 25 Jacksonville attorneys subsequently signed affidavits testifying to Mr. Jackson's ineffectiveness. See Vaught v. State, No. 63,561, now pending in this Court.

In 1978, Mr. Jackson learned that he had an advanced and terminal case of cancer. Later, after this Court entered an order remanding the Barclay-Dougan case for resentencing, Barclay & Dougan v. State, 362 So.2d 657 (Fla. 1978), the trial judge was advised that Ernest Jackson was ill. Following several attempts to schedule hearings which were cancelled due to Mr. Jackson's illness, the trial judge granted Jackson's motion to withdraw. Ernest Jackson died in February 1979.

C. The brief filed on appeal was seriously deficient and incompetent.

1. The Statement of Facts was inadequate.

The brief contains a three page statement of facts to summarize the evidence in a 2,300 page trial transcript. Brief, pp.7-9. The fact statement nowhere mentions Elwood Barclay's name. It makes no mention of the evidence about Barclay's role

in the crime. The fact statement does not contain a single page citation to the trial transcript. It contains not a single quotation from the testimony. It contains no adequate summary of the testimony of the state's key witness, William Hearn. We suggest that a fact statement written without any reference to the trial transcript is measurably below the standard of advocacy required on a capital appeal.

The statement is woefully incompetent in failing to make any effort to develop the facts of record which support available arguments that Barclay's life should be spared. Jackson should have made a full presentation of the facts in an effort to support the reasonableness of the jury's advisory verdict that Barclay be given life imprisonment, not the death penalty. This key issue, which Jackson failed to brief, required reference to the transcript. We discuss the manner in which this failure prejudiced petitioner hereafter, in connection with specific arguments which would have had a high likelihood of prevailing on appeal. See, infra, Argument II-C-3 et. seq.

2. Barclay's appellate counsel failed to do any relevant legal research or cite any cases decided under Florida's capital sentencing statute.

The complete failure of counsel to cite or argue from any decision of the Florida Supreme Court interpreting the applicable capital sentencing statute was a gross deficiency. Although this Court was conscientiously deciding relevant cases during this period,23/ the brief cited no Florida capital case decided after the enactment of Section 921.141, Fla. Stat. (1972).

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23/ The Florida Supreme Court decided 40 capital cases under the statute before the Barclay-Dougan decision of March 17, 1977. Twenty-five cases were decided before the filing of the joint brief for Barclay and Dougan on April 19, 1976. Five more cases were decided prior to oral argument on September 15, 1976, during the time when a reply brief and supplemental authority might have been filed. Ten more cases were decided between the argument and decision. Again, no notices of supplemental authority were filed. None of these forty capital decisions were cited to the Court in the brief or in the rehearing petition.

This Court's decision in Tedder v. State, 322 So.2d 908 (Fla. 1975), is the most obvious and important omission. Halliwell v. State, 323 So.2d 557 (Fla. 1975), was also omitted.24/ The Tedder case should have been at the heart of a competent advocate's strategy to save Barclay's life by urging the reasonableness of the jury recommendation of life imprisonment. It is obvious from the brief that Ernest Jackson did not do the legal research necessary to find the Tedder precedent.25/

The failure of counsel to do appropriate legal research on appeal is analogous to the failure of a trial attorney to do an appropriate investigation. It is incompetent for a trial attorney to do no pretrial investigation. Washington v. Strickland, 693 F.2d 1243, 1251-1258 (11th Cir. 1982), cert. granted, 51 U.S.L.W. 3871 (June 6, 1983); Washington v. Watkins, 655 F.2d 1346, 1355, n. 14 (5th Cir. 1981), cert. denied, 456 U.S. 949, 102 S.Ct. 2021, 72 L.Ed. 2d 474 (1982); Gaines v. Hopper, 575 F.2d 1147, 1149-50 (5th Cir. 1978). On appeal, as well as at trial, a defendant is entitled to representation by an advocate whose arguments and decisions "reflect 'informed, professional deliberation' rather than inexcusable ignorance or senseless disregard of their clients' rights." United States v. Bosch, 584 F.2d 1113, 1122 (1st Cir. 1978) as quoted in Washington v. Strickland, supra, at 1243.

It must be said in defense of Ernest Jackson that he was then struggling under extraordinary burdens. But that does

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24/ A number of other cases which should have been argued in support of Barclay's position, either in a brief or on rehearing were Swan v. State, 322 So.2d 485 (Fla. 1975); Thompson v. State, 328 So.2d 1 (Fla. 1976); Chambers v. State, 339 So.2d 204 (Fla. 1976); Burch v. State, 343 So.2d 831 (Fla. 1977); Cooper v. State, 336 So.2d 1133 (Fla. 1976); Purdy v. State, 343 So.2d 4 (Fla. 1977), cert. denied, 434 U.S. 847 (1977); Meeks v. State, 339 So.2d 186, 192 (Fla. 1976); Messer v. State, 330 So.2d 137 (Fla. 1976); Miller v. State, 332 So.2d 65 (Fla. 1976). The relevance of the cases is explained below in connection with the various substantive arguments which should have been made on appeal.

25/ Tedder was decided November 19, 1975, while Ernest Jackson was still hospitalized from his November 2, 1975 automobile accident. Halliwell was decided December 3, 1975. Another case that would have supported Barclay's position, Provence v. State, 337 So.2d 783 (Fla. 1976), cert. denied, 431 U.S. 969 (1977), was decided July 21, 1976, shortly after Jackson's second automobile accident.

not improve the quality of his defense of Elwood Barclay. For whatever reasons, Barclay plainly did not have an advocate on appeal who had studied the applicable law, or who made use of that law in arguing his case. A discussion of the specific plausible and arguable points which Mr. Jackson failed to argue, and of the prejudicial effect of this failure, appears in the sections which follow.

3. The failure of appellate counsel to contest the aggravating circumstances found by the trial judge was a substantial and serious deficiency which prejudiced petitioner.

This Court held in Holmes v. State, 429 So.2d 297, 300-301 (Fla. 1983), that the failure of counsel to make plausible arguments contesting the existence of statutory aggravating circumstances constituted ineffective assistance at trial. The point is equally applicable on appeal, particularly in the light of Tedder v. State, 322 So.2d 908 (Fla. 1975), holding that a jury recommendation of life imprisonment must be given "great weight" and followed unless "virtually no reasonable person could differ" with a judge's decision to impose a death sentence in the teeth of such a recommendation.26/

Barclay's appellate counsel should have argued that none of the statutory aggravating circumstances were applicable. He should also have argued that Tedder v. State, supra, required that the death sentence be set aside because a jury might reasonably have found facts on this record which made the statutory aggravating circumstances inapplicable. Counsel should have pointed out the inconsistency between the trial judge's approach and that mandated by Tedder. Judge Olliff utterly failed to demonstrate in his sentencing order that the record facts were such that the jury was not reasonable in

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26/ Other contemporary decisions applying Tedder, or otherwise reducing death sentences to life imprisonment which Ernest Jackson did not cite were: Swan v. State, 322 So.2d 485 (Fla. 1975); Thompson v. State, 328 So.2d 1 (Fla. 1976); Chambers v. State, 339 So.2d 204 (Fla. 1976); and Burch v. State, 343 So.2d 831 (Fla. 1977).

making its written finding that "sufficient aggravating circumstances do not exist to justify a sentence of death: ...(and that) sufficient mitigating circumstances do exist which outweigh any aggravating circumstances". (R. 186).

With respect to each of the 7 aggravating circumstances which we discuss below, Barclay's lawyer should have argued (1) that the jury finding was reasonably supported by the record, and (2) that there was insufficient evidence to support Judge Olliff's finding. Under Tedder, the jury's factfinding should prevail. Counsel was peculiarly deficient in not attacking any of the seven aggravating-circumstances findings where the State's Attorney at trial had only contended that one of them was applicable, e.g. "especially heinous, atrocious or cruel". Pen.Tr. 121.

(a) Counsel should have contested the finding that the murder created a great risk of death to many persons.

Counsel should have argued that the risk of death created must involve "many" people, not just one or two, and that there must be something in the homicidal act itself (as in arson or the use of explosives), or in the defendant's conduct immediately surrounding the homicide, which created a "great" risk to many people. These arguments were plainly suggested by the state's testimony that it was Dougan's plan for the defendants to set out to kill one person; that they searched until they found one person alone; and that they took him to a still lonelier spot, where he was the only person present except the confederates at the time of the killing. Tr. 1363-1370. There was no evidence to sustain a finding that the homicide created a great risk of death to "many" persons. Surely it could not be said that a jury which found this factor inapplicable, by believing the state's eyewitness, was so totally wrong that no reasonable person could differ.

If Mr. Jackson had made this simple argument, supported by the language of the statute and the state's own version of

the facts, Barclay's death sentence likely would have been set aside. We can know this because Barclay lost his appeal in 1977 by a vote of 4-2. When the argument that the "great risk" factor was not proved was made to the Court on the same record by different counsel in Dougan v. State, 398 So.2d 439, 441 (Fla. 1981), Justice Overton, a member of the original 4-2 majority in the 1977 decision, agreed with Justice McDonald's dissenting opinion. The dissent stated:

> The judge also improperly found that in committing the murder the defendant knowingly created a great risk of death to many persons. There was evidence that the defendant may have sought other victims when he perpetrated this murder, but the murder endangered no one but the victim. The test set out in Kampff v. State, 371 So.2d 1007 (Fla. 1979) is not met.

Thus, it is likely that, if the argument had been made on the original appeal, Barclay would have obtained at least a 3-3 vote, and his sentence could not have been affirmed because there were not 4 votes for the death sentence. Vasil v. State, 374 So.2d 465, 471 (Fla. 1979), cert. denied, 446 U.S. 967 (1980). (See Point III, infra.) Our view that the argument would have succeeded if it had been made by Barclay's counsel is also supported by the fact that this Court has vacated Judge Olliff's findings of the same "great risk" factor in other cases when he used similar reasoning. See Lewis (Robert) v. State, 398 So.2d 432, 438 (Fla. 1981); Dobbert v. State, 375 So.2d 1069, 1070 (Fla. 1979).

The failure of Barclay's counsel to argue from the record and the plain language of the statute, and to cite the Tedder case, was a gross and substantial error measurably below the level required of competent counsel. While an attorney will not be deemed incompetent for not anticipating a change of law, competent counsel must argue simple contentions of statutory construction based on plain language. Our position that the argument would likely have succeeded is also supported by the many subsequent decisions which have made it clear that Section 921.141 (5)(c) does indeed require "many" people and not just

one or two people;27/ and that the risk must be created by the homicide or conduct immediately surrounding it.28/

Judge Olliff's finding was based on the fact that the defendants passed over several other persons before Orlando was selected as the victim, and on the alleged danger created by a note left on the body and the tapes mailed to the media which the court held to have endangered the white people of Jacksonville "roughly seventy percent of more than half a million people". Barclay's counsel should have argued that the decision to pick one victim and pass over others who, were not harmed or attacked, did not make the circumstance applicable. Such a construction of the law would make it applicable to every murderer who by his decision to seek a lone victim passes over

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27/ See Kampff v. State, 371 So.2d 1007, 1009 (Fla. 1979)(5 shots fired in bakery with two others present; held not "many" persons); Odom v. State, 403 So.2d 936, 942 (Fla. 1981); (two women present when shotguns fired at victim; held not "many" persons; Lewis (Robert) v. State, 398 So.2d 432, 438 (Fla. 1981) (same; Odom's accomplice; Judge Olliff reversed); Blair v. State, 406 So.2d 1103, 1107-1108 (Fla. 1981) (victim alone with defendant in House; child outside; held "one or two" is not "many" persons); Jacobs v. State, 396 So.2d 713, 718 (Fla. 1981)(Shooting close to major highway, but with pistols at close range; few not "many" suffered risk of injury); Johnson v. State, 393 So.2d 1069, 1073 (Fla. 1981), (gun battle in pharmacy, 3 present held not "many"); Williams v. State, 386 So.2d 538, 541-542 (Fla. 1980)(two people held not "many"); Brown v. State, 381 So.2d 690, 696 (Fla. 1980) (robbery of shop, no indication of numbers, held not "many" persons endangered); Lewis (Enoch) v. State, 377 So.2d 640, 646 (Fla. 1979)(victim's son and daughter in yard when shots fired; held not "many" persons); Dobbert v. State, 375 So.2d 1069 (Fla. 1979) (Defendant killed one child, abused 3 others; held not "many" persons; Judge Olliff's finding vacated).

28/ Bolender v. State, 422 So.2d 833, 838 (Fla. 1982) (others present but defendant never directed actions or weapons to endanger them); Ferguson v. State, 417 So.2d 631, 643, 645 (Fla. 1982)(eight people in house shot, six killed, by defendant or accomplice while bound; each homicide without risk to others; aggravating circumstance held inapplicable); Tafero v. State, 403 So.2d 355, 362 (Fla. 1981)(attempt to run roadblock, stopped by police gunfire; held inapplicable); Mines v. State, 390 So.2d 332, 337 (Fla. 1980), cert. denied, 451 U.S. 916 (1981) (defendant killed woman, took hostage; fled in car at high speed; finding of "great risk" vacated because only conduct surrounding homicide, not after-occurring acts, may provide basis for "great risk"); Dobbert v. State, supra, 375 So.2d at 1070 (strangulation murder did not create great risk, despite abuse of other children; Judge Olliff finding vacated); Elledge v. State, 346 So.2d 998, 1004 (Fla. 1977) (Defendant committed another homicide in another city after victim killed; "only conduct surrounding the capital felony for which the defendant is being sentenced may be considered").

crowds of people. There would be "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Godfrey v. Georgia, 446 U.S. 420, 433 (1980)(plurality opinion).

Reliance on the call for revolution in the notes and the tapes was equally vulnerable to attack, for it violates both the principle that behavior subsequent to the homicide cannot be considered as establishing great risk, and the principle "that a person may not be condemned for what might have occurred. The attempt to predict future conduct cannot be used as a basis to sustain an aggravating circumstance." White v. State, 403 So.2d 331, 337 (Fla. 1981) (emphasis in original). It should have been argued from the trial record that there was no evidence, and not even an attempt by the state to prove, that the tapes or note in fact endangered anyone. The state never for a moment sought to prove or argued that the tapes endangered the population of Jacksonville, as Judge Olliff held.29/ Barclay's counsel should have contested the finding that the tapes created a danger as sheer speculation about what might have happened, contrary to what did actually occur.30/

(b) Counsel should have contested the finding that the murder was committed to disrupt a governmental function.

Judge Olliff found that the note written by Dougan and left on the body, and the tape recordings sent to the media several days after the murder, made applicable the statutory aggravating circumstance that the murder was "committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws." Section 921.141

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29/ The state's witness, Mr. Martin, a newscaster, said he only broadcast "a section of the tape that I would feel would be non-inflammatory" on the news. Tr. 660.

30/ Our point in citing the Court's later decisions is not to fault Barclay's counsel for not predicting the specific holding of these cases. We fault him for failing to make the argument which should have been obvious from the statute, the record and the Tedder precedent -- all of which were available when this case was briefed.

(5)(g) Florida Statutes. This finding rests on Judge Olliff's interpretation that the messages were a call to revolution and to destroy the government. However, although the language threatens "white people," none of the actual language from the tapes or note quoted in the opinion contains any direct reference to local, state or federal government, or calls upon anyone to attack the government.

In his dissent in Dougan v. State, supra, 398 So.2d at 441, Justice McDonald, joined by Justice Overton, found that the record did not support this finding:

> I also disagree with the apparent prior conclusion of this Court that anything supports the trial judge's finding that the murder was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the law because I don't believe the legislature intended for that aggravating factor to apply to the circumstances of this case. (Footnote omitted).

Here again, Barclay's appellate counsel should have argued the simple contention that the facts in the record did not support a finding of interference with a governmental function or hindrance of law enforcement. It was evident that the murder was not an attack on a government official and was not committed to avoid prosecution, or to avoid arrest. The state had not argued for the existence of this aggravating circumstance at trial. Pen.Tr. 121. Appellate counsel should have also argued that under Tedder v. State, supra, the jury finding that the aggravating circumstance does not exist is entitled to great weight, and there is nothing in the evidence of this case which makes such a jury finding clearly unreasonable.

Justice Overton's vote in Dougan, supra, demonstrates that, if Barclay's attorney had made this argument, it is likely that he would have obtained the votes of at least 3 of the 6 members of the court, and his death sentence would not have been affirmed. The failure of Barclay's appellate counsel to contest the applicability of the "disrupt or hinder" aggravating circumstance constitutes ineffective representation. Holmes v. State, supra.

(c) Counsel should have contested the finding that Barclay's "prior criminal activity" constituted an aggravating circumstance.

Judge Olliff converted the absence of the mitigating circumstance of Fla.Stat. Section 921.141 (6)(a) -- that the defendant "has no significant history of prior criminal activity" -- into an aggravating circumstance. He did so by relying on mere arrests which did not result in convictions, and on convictions for non-violent crimes, none of which were proved by competent evidence at trial. Barclay's counsel should have challenged these errors. If he had, the state might have admitted that they violated Florida law, as it later did belatedly when Judge Olliff's findings were contested by subsequent counsel for Barclay. In the United States Supreme Court, the Attorney General of Florida filed a brief acknowledging that this part of the sentencing order was erroneous under state law, citing Mikenas v. State, 367 So.2d 606, 610 (Fla. 1978). See Barclay v. State, 51 U.S.L.W. 5206, 5208 (July 6, 1983).

Such an argument on Barclay's original appeal would not have required prognostication by Ernest Jackson. For Provence v. State, 337 So.2d 783, 786 (Fla. 1976), cert. denied, 431 U.S. 969 (1977), decided prior to Barclay's oral argument but never called to the attention of the Court, held explicitly that a charge which has not resulted in a conviction at the time of the capital trial must be considered as an improper aggravating factor. See also Purdy v. State, 343 So.2d 4 (Fla. 1977), cert. denied, 434 U.S. 847 (1977), which could have been cited by Mr. Jackson on rehearing.

Mr. Jackson should also have objected that the finding of a criminal record was not based on evidence proved at the trial, but rather was based on a pre-sentence investigation report never made available to counsel. Even if counsel had known of the contents of the presentence investigation report, the notorious unreliability and inaccuracy of arrest records and rap sheets was ample ground for Mr. Jackson to have argued that a criminal record, if relevant, must be proved by competent

evidence at trial. See Williams v. State, 386 So.2d 538, 542, 543 (Fla. 1980), holding that even prior violent felony convictions may not be considered based solely on information contained in a presentence investigation report. Yet Mr. Jackson made no effort to challenge factual findings about Barclay's record which were entirely unsupported by evidence.

Mr. Jackson never even interviewed Barclay to determine the nature of his prior encounters with the law. Mr. Jackson did not do the minimal work necessary to know that Judge Olliff's finding of prior arrests and convictions ought to be challenged on any of the several grounds we have mentioned.

(d) Counsel should have contested the finding that Barclay was "under sentence of imprisonment" at the time of the capital felony.

Since Mr. Jackson never interviewed Barclay about his record, Mr. Jackson never troubled to learn that there was not the slightest factual substance to Judge Olliff's finding under Section 921.141 (5)(a) that the capital felony was committed "by a person under sentence of imprisonment". Anyone who spoke with Barclay or examined his record could have quickly ascertained that at the time of the Orlando murder, Barclay was not imprisoned, an escapee, on parole, on probation, or in any other possible sense under "sentence of imprisonment". Here again, Mr. Jackson had only to argue that subsection 5(a) means exactly what it says; the plain language of the statute makes it inapplicable to Barclay's case. There seems little doubt that such an argument would have been successful for Barclay, just as it was successful for others who challenged similarly incorrect applications of subsection 5(a). See Dobbert v. State, 375 So.2d, 1069, 1071 (Fla. 1979)(vacating finding by Judge Olliff using similar cy pres reasoning to expand the statute beyond actual imprisonment); Ford v. State, 374 So.2d 496, 501 n.1, 502 (Fla. 1979); Ferguson v. State, 417 So.2d 631, 636 (Fla. 1982); Peek v. State, 395 So.2d 492, 499 (Fla. 1981); but cf. Dougan v. State, 398 So.2d 439, 441 (Fla. 1981) (McDonald, J. and Overton, J., dissenting) (Judge Olliff found Dougan was not under

sentence of imprisonment, but had once been convicted of criminal contempt, and the aggravating circumstance therefore applied).31/

(e) Counsel should have contested the finding of previous conviction of a violent felony.

Although the prosecution had told the trial court and jury that Barclay and Dougan "didn't have any criminal history" (Pen. Tr. 114),32/ Judge Olliff found the aggravating circumstance of Section 921.141 (5)(b): that the defendant "was previously convicted of . . . a felony involving the use or threat of violence to the person." Judge Olliff reasoned that Barclay had been convicted of breaking and entering with intent to commit grand larceny, that "it is not known if such prior felony involved the use or threat of violence"; but that "such crime can and often does involve violence or threat of violence - if there is a person in the building broken into", and that "there are more aggravating than mitigating circumstances."

Mr. Jackson should have contested the finding, arguing that there was plainly no evidence that Barclay had ever been convicted of any violent felony; and that a statutory aggravating circumstance should not rest on the sheer speculation indulged by Judge Olliff's opinion. Again, if Mr. Jackson had talked with Barclay he would have known that there was no basis in fact for Judge Olliff's speculation, just as there was no basis for it in the record.

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31/ The objection mentioned in part c, supra. -- that Judge Olliff could not in any event have properly found an aggravating circumstance based upon the presentence investigation report without any competent evidence of a judgment of conviction -- also applies to this "imprisonment" finding. See Williams v. State, supra.

32/ State's attorney Austin tried to turn the lack of criminal records into an aggravating factor, arguing: "If a minister steps out and kills somebody that's worse than somebody that never had anything in life killing somebody, because of criminal responsibility. And these two men didn't have any criminal history. They had a chance in life. They had a better chance in life than most black boys have, black men have and a lot of white, and maybe many whites or most." Pen.Tr. 114. He later said: "Prior criminal record. You go ahead. The Judge is going to give it, tell it to you, but tell me if it has anything to do with this case." Pen. Tr. 115.

A similar finding by Judge Olliff was reversed in Lewis v. State, 398 So.2d 432, 438 (Fla. 1981), holding that breaking and entering convictions did not fall within the meaning of violent felonies. The argument which succeeded for Lewis would surely have succeeded for Barclay if Jackson had made it. See also Mann v. State, 420 So.2d 578, 580 (Fla. 1982); Spaziano v. State, 393 So.2d 1119, 1122, 1123 (Fla. 1981); Ford v. State, 374 So.2d 496, 501, n.1 502. Additionally, as noted in part c, supra, even Barclay's breaking and entering record was not proved by evidence at trial, conformably with Williams v. State, supra. In Barclay's case, the procedural protections vouchsafed by Williams would have been far from superfluous because the PSI report contains two different versions of Barclay's record which are contradictory and produce only confusion as to the true facts about Barclay's prior encounters with the law.

(f) Counsel should have contested the finding that the murder was committed during a kidnapping.

Judge Olliff's finding of an aggravating circumstance under section 921.141(5)(d) -- that the murder was committed while the defendant was engaged in a kidnapping -- may seem at first blush to be plausible on the facts which Judge Olliff recites. However, Barclay's appellate counsel should have challenged it because the facts related in Judge Olliff's opinion are nowhere to be found in the record. Indeed, Judge Olliff himself had previously ruled that there was insufficient evidence of a kidnapping in this case. Moreover, the State's Attorney never claimed at the trial that there was proof of a kidnapping. Pen.Tr. 121. For all of these reasons, the jury could plausibly find this aggravating circumstance inapplicable. Tedder v. State, supra.

Judge Olliff's opinion recites that the defendants "by force and/or threats kept [Orlando] . . . in their car until they found an appropriate place for the murder." But the only eyewitness, William Hearn, said that Orlando got in the car voluntarily, joked and exchanged pleasantries, and rode with the defendants without any threat or force being used. Tr.

1369-72. There is no evidence that he protested in the slightest when Dougan ordered Hearn to drive past the street which Orlando had designated as the one where they could buy marijuana. It was only at the site of the homicide, when Dougan told Orlando to get out of the car, that Orlando exhibited any unwillingness to accompany the occupants of the car in which he had hitched a ride. Ibid.

Significantly, Judge Olliff himself deemed the evidence insufficient to establish a kidnapping. During the charge conference at the end of the trial, all counsel and the court agreed that the felony-murder provisions of the first and second degree murder statutes would not be read to the jury because they were inapplicable to the facts proved at the trial. Tr. 1912-13, 1918-19.33/ The prosecutor never argued a kidnapping theory to the jury or the court. Barclay's appellate counsel, Ernest Jackson, knew that the record contained no evidence of kidnapping, but inexplicably he failed to make any argument attacking the finding. When Mr. Jackson filed a rehearing petition, he did finally quote at length from Hearn's testimony to show that Orlando had not been taken in the car by force or threats. But Jackson used this testimony only to support his failed venue argument, and still made no effort to attack the erroneous finding of kidnapping as an aggravating circumstance.

Jackson should also have argued that the evidence failed to prove the elements of kidnapping under the applicable Florida statutes, sections 805.02 (kidnap for ransom) and 805.01 (false imprisonment or kidnap), Fla. Stat. (1974), because there was no evidence of intent to collect a ransom or to forcibly or secretly confine or imprison the victim. When re-sentencing Barclay in 1980, Judge Olliff implicitly acknowledged the force of this argument by amending his sentencing order to rely on a

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33/ A felony-murder instruction was finally given only because counsel refused to waive the third degree murder instruction (murder during the course of a non-enumerated felony), and that instruction was thought to require a listing of the felonies enumerated in the first and second degree murder statute. Tr. 1925, 1975. See part 7(e) of this petition, infra.

Florida kidnapping law which became effective after Barclay's trial. See Argument V, infra. His original finding of an aggravating circumstance which the prosecution had never urged, which Barclay had therefore never had a chance or motive to contest at trial, and which was entirely lacking in evidentiary support for any of its elements, clearly violated the Eighth and Fourteenth Amendment requirements of reliability in capital sentencing announced in Woodson v. North Carolina, 428 U.S. 280, 305 (1976), and Gardner v. Florida, 430 U.S. 349, 357-359 (1977); id. at 363-364 (White, J., concurring), but Mr. Jackson never cited Woodson (decided prior to the oral argument of Barclay's appeal) or Gardner (decided prior to the petition for rehearing) as a basis for challenging the unfounded "kidnapping" finding.

Finally, Mr. Jackson was remiss in failing to invoke Tedder v. State, supra, in support of an argument that the jury could not be deemed unreasonable for failing to find the aggravating circumstance of kidnapping. Even if we assume arguendo that there was evidence which permitted Judge Olliff's inference of facts constituting a kidnapping, the jury's contrary inference was equally permissible on this record. Under Tedder, the jury decision should prevail unless it was clearly unreasonable. The jury obviously could not be faulted as unreasonable for accepting the state's eyewitness and the theory of the crime put forward by the State's Attorney, i.e. that there was no kidnapping.

(g) Counsel should have contested the finding that the murder was "especially heinous, atrocious or cruel."

The prosecutor relied in his argument at trial on the aggravating circumstance of Section 921.141(5)(h). Judge Olliff overruled the jury's advisory verdict and found this factor applicable relying on the fact that the murder was premeditated, that it was motivated by a desire for revolution, and that the victim was "repeatedly stabbed" as he "writhed in pain begging for mercy" before he was shot twice in the head. Barclay's appellate counsel should have argued that the evidence did not

support some of these findings, and that in any event the findings did not establish the applicability of subsection 5(h) as construed in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943 (1974), where the Court said the issue was whether "the actual commission of the capital felony was . . . [a] conscienceless or pitiless crime which is unnecessarily torturous to the victim."

The state's eyewitness Hearn denied that the statement in the tapes depicting Orlando as begging for mercy was an accurate description of what had happened, and said that Orlando never had begged for mercy but that that had been put in the tapes to make them seem more "aggressive." Tr. 1399, 1403. The jury cannot be faulted as unreasonable under the Tedder v. State, supra, doctrine for rendering a verdict based on the state's only eyewitness version of the facts. There was no evidence to contradict Hearn's testimony that the murder was not "torturous," except the tapes which Hearn explained were incorrect in this regard. Counsel should have argued that Judge Olliff's other grounds for finding this factor, e.g., premeditation and the call for revolution, did not serve to make the murder "unnecessarily torturous to the victim" as required by State v. Dixon, supra. If premeditation alone were sufficient, then virtually every first degree murder would be especially heinous, atrocious or cruel. See, for example, Kampff v. State, 371 So.2d 1007, 1008, 1010 (Fla. 1979); Menendez v. State, 368 So.2d 1278, 1282 (Fla. 1979); McCray v. State, 416 So.2d 804, 805, 807 (Fla. 1982), holding the "heinous, atrocious or cruel" section inapplicable.

The jury decision recommending that Barclay's life be spared should have carried even greater force with respect to the heinous, atrocious or cruel factor because the jury, reflecting the community conscience, rejected the prosecutor's argument on this factor. The jury heard the same evidence that Judge Olliff did--the tapes and Hearn and all the rest--and decided that the fact of premeditation, the revolutionary motivation, and the taped claim that the victim had begged for mercy did not justify the death penalty for Elwood Barclay.

Under Tedder v. State, supra, the jury finding was entitled to great weight, and there was nothing in the record which made the jury determination so wrong that no reasonable person could differ with the court's death verdict. On the contrary, the jury verdict was based on an entirely logical application of the statute as interpreted by this Court to the facts presented at trial.

(h) Counsel should have argued that Provence v. State, 337 So.2d 783 (Fla. 1976), forbade the use of the same two sets of facts to support six aggravating circumstances.

Mr. Jackson was derelict in not relying on Provence v. State, supra, in support of an argument that Judge Olliff erred by finding three separate aggravating circumstances based on Barclay's criminal record. See arguments 3(c), (d), and (e), supra. He should have also argued that it was error to use the same facts, i.e. the taped messages and the note left on the body, to support three other aggravating circumstances: "great risk", "disrupt . . . a governmental function", "especially heinous, atrocious or cruel". See arguments 3(a), (b) and (g), supra. This Court made it clear in Provence that it was error to double up aggravating circumstances based on the same facts. A fortiori it was error for Judge Olliff to twice "triple" the findings. But counsel failed to do the research necessary to call the Provence precedent to the attention of the court by filing a Notice of Supplemental Authority.

(i) Counsel should have urged federal due process arguments in support of the claims set forth in parts (a)-(g), above.

Mr. Jackson should have argued that there was no evidence to support any of the findings of aggravating circumstances and that findings supported by no evidence violate the due process clause of the Fourteenth Amendment. Thompson v. Louisville, 362 U.S. 199 (1960). Alternatively, counsel should have argued that, if the statutory aggravating circumstances were expansively interpreted to fit the evidence in this record, the statute would be rendered unconstitutionally vague and overbroad in violation of the due process clause of the

Fourteenth Amendment. Gregg v. Georgia, 428 U.S. 153, 195 n.46 (1976); Godfrey v. Georgia, 446 U.S. 420 (1980).

4. The failure of appellate counsel to contest the trial judge's overruling of the jury's findings of mitigating circumstances was a substantial and serious deficiency which prejudiced Barclay.

Mr. Jackson's failure to argue that the jury's finding of mitigating circumstances was supported by the record was a serious deficiency which amounted to ineffective assistance. Holmes v. State, 429 So.2d 297, 300-301 (Fla. 1983). Barclay's appellate counsel should have argued that the jury was rational in finding statutory mitigating circumstances and that it was error under Tedder v. State, supra, to overrule such a jury finding.

(a) Counsel should have supported the jury's advisory verdict on the ground that it was rational for the jury to find that Barclay was an accomplice and his participation was relatively minor.

It was entirely rational for the jury to distinguish between Barclay's and Dougan's participation in the crime by recommending different penalties based on their different actions. The state's medical evidence was that the knife wounds on Orlando were all superficial and not serious, and that the cause of death was two gunshot wounds inflicted by Dougan. Indeed, there was state testimony by the medical examiner that the knife wounds were inflicted after the victim was dead or in deep shock. Tr. 1341-43. The jury could have rationally concluded that there was a difference in culpability between the person who pulled the trigger and an accomplice who inflicted superficial and possibly post-mortem wounds, and that this difference justified a lesser penalty for Barclay. Cf. Meeks v. State, 339 So.2d 186, 192 (Fla. 1976). Counsel should have used the Tedder and Meeks precedents to support the jury's finding of sufficient mitigating circumstances. But Mr. Jackson, laboring under the conflict of interest we have described above, made no such distinction between Barclay and Dougan.

(b) Counsel should have supported the jury's advisory verdict on the ground that Barclay was under the substantial domination of Dougan.

The state's evidence was that Dougan was the leader of the group of young men, that he was their karate teacher, and that on the night of the murder he directed the entire proceedings. He told the others where to meet, what to wear, what to bring, and he instructed Hearn to bring the gun and car. Dougan directed the route to be traveled, selected the spot for the murder, and fired the fatal shots. The state's evidence was that Barclay and the other karate students obeyed Dougan's orders without question or hesitation.

The discipline of the karate class was carried forth in military-style obedience to each of Dougan's orders. The jury might rationally have concluded that this constituted substantial domination of Barclay by Dougan within the meaning of the statute. Cf. Meeks v. State, supra where a young accomplice was given a life sentence. Such a finding could not be said to be so unreasonable as to justify a disregard of the jury verdict.

Of course, as we have seen in our conflict-of-interest point above, Ernest Jackson did not make such arguments for Barclay. He could not have done so without working to the disadvantage of his other client, Dougan. This constitutes both a serious conflict and ineffective assistance to Barclay.

(c) Counsel should have supported the jury's advisory verdict by arguing the record facts about Barclay's life and character.

State's attorney Austin told the jury that "these two men [Barclay and Dougan] didn't have any criminal history." Pen. Tr. 114. Since the state made no effort to prove Barclay's prior arrests, probations and convictions at trial, the jury was entirely justified in believing that the statutory factor of no significant history of prior criminal activity was present. Judge Olliff purported to make factual findings of a criminal record, but as we show elsewhere (supra, page 44), those

findings were improper because no appropriate proof of such a record was before the court.

Even if the Presentence Investigation Report had been in the record and Jackson had known what Barclay's real record was -- neither of which were the case -- the jury verdict could have been supported by argument that Barclay's prior record was not "significant," in that it was not proper to consider mere arrests, that the felony cases only involved property crimes and no crimes of violence, that judgments of conviction had been withheld and probation imposed, that Barclay had successfully completed a probation, and that substantial time without any offenses had elapsed after Barclay's brushes with the law.

The jury verdict could also have been supported by Barclay's comparatively youthful age of 23, and by his record of employment and family life with a wife and five children. All of these factors were ingredients which made the jury verdict of life imprisonment reasonable. It was plainly ineffective for Barclay's appellate counsel to have made no effort to marshal arguments in support of the jury's written finding of "sufficient mitigating circumstances" to outweigh any aggravating circumstances in the record. Holmes v. State, supra.

5. The failure of appellate counsel to contest the overzealous conduct of the prosecutors at trial was a substantial and serious deficiency.

Mr. Jackson failed to argue a number of substantial issues relating to the conduct of the prosecutors during the trial. Some of these issues were listed in the brief but not supported by argument or authorities. See brief pp. 48, 55, 62, 65. They were among the issues that were the subject of Mr. Jackson's unorthodox and irregular motion for leave to file a further brief, which was placed in the middle of his brief and was, of course, never brought to the attention of this Court or followed up.

A number of these issues relate to the penalty trial. However, the fact that a 7-5 majority of the jury recommended

life imprisonment for Barclay does not make penalty-trial errors harmless, since Judge Olliff cited the closeness of the vote as a reason he felt free to disregard the advisory sentence. R.225.34/ The penalty-trial errors were reasonably likely to have influenced the five jurors who did not support a life sentence.

The substantial arguments which appellate counsel should have made are as follows:

(a) Barclay was denied a fair penalty trial when the prosecutors presented testimony which they knew was mistaken, linking Barclay to another murder; failed to correct the error; then belittled defense efforts to correct it.

Assistant state's attorney Bowden presented testimony, which he knew to be incorrect, by William Hearn stating that "Elwood" was present at a meeting where the other defendants planned another murder -- the murder of Stephen Roberts -- on June 21, 1974. Pen.Tr.90. On cross-examination, Hearn admitted that Barclay was not present. Pen.Tr. 109-110. But the prosecutor made no effort to correct Hearn's testimony on direct, although he surely knew that it was false.35/ The prosecutor knew (but defense counsel did not know) that Hearn had given a sworn pretrial statement denying that Barclay was present.36/

This eliciting of false testimony violated Barclay's rights to a fair trial and due process of law. Alcorta v. Texas, 355 U.S. 28 (1957); Napue v. Illinois, 360 U.S. 264 (1959); Giglio v. United States, 405 U.S. 150, 155 (1972). The Chief prosecutor, Mr. Austin, wilfully exploited his assistant's impropriety in failing to correct the witness' mistake. Instead

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34/ "The Court does not feel bound by the advisory sentence as to defendant Barclay because of the closeness of the vote and because of his major participation in the murder."

35/ The investigator in charge of the case, Sgt. Reeves, knew that Barclay was not in Jacksonville on the day of the Roberts murder. See Resentencing Tr. June 23, 1979, pp. 7, 24, 27, 31-32.

36/ See Hearn's statement of January 27, 1975, p. 48 to 49. The cited part of Hearn's statement, which is not a part of the record in this case because it was not provided to Barclay's trial counsel, is described more fully in note 38, below.

of simply telling the jury that Hearn had made an error, Mr. Austin seized upon the error as the predicate for launching an improper argument belittling and criticizing the defense effort to correct Hearn's mistaken testimony. Mr. Austin sarcastically branded the defense effort to correct Hearn's error as "heart-rendering," and combined his own half-hearted acknowledgment of the error with a denunciation of the defendants as liars and of Barclay's efforts to separate himself from Dougan. (Pen.Tr. 113, 119). His argument plainly implied that Barclay was in fact involved in the Roberts murder, although some particular "circumstance . . . kept Barclay from being there" on the occasion when the murder was being discussed. (Pen. Tr. 119.)37/

Some jurors may have been misled into believing that Barclay was involved in the Roberts murder by the combination of Hearn's mistake and Mr. Austin's argument. Barclay's trial counsel objected to this argument as improper and sought a

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37/ In arguing to the jury, Mr. Austin twice belittled the claim that Barclay wasn't present:

> Now, of course, you're going to get the heart-rendering statement that Barclay -- murderer Barclay wasn't there on that one. But he convinced you with that tape and with the stabbling [sic] of Orlando that he was guilty of that murder, and you just heard his voice again filled with hatred, and because he wasn't there at the second one doesn't excuse him for the first one. And if that's his defense, ladies and gentlemen, I submit to you that it will be woefully weak when he gets up here. (Pen. Tr. 113.)

He further argued:

> Jacob John Dougan, Jr. and Elwood Barclay have been telling the same lie since the day this thing started. They have concocked [sic] the same defense and they've trod the primrose path together, but now they wanted to be separated. I wasn't there. Mr. Buttner -- my client wasn't there, was he. Of course he wasn't. He wants to be separated from Jacob John Dougan, Jr., but they weren't separated during this trial. They got up there and told the same lie, except for Jim Mattison, and from whatever circumstance that kept Barclay from being there, it doesn't excuse him from this murder that you are considering, the one that you are sworn to do your best in. (Pen. Tr. 119.)

mistrial to no avail. Pen.Tr. 130-131. The Judge did nothing to correct the damage done to Barclay.38/

(b) Prosecutor Austin called the victim's step-father, Mr. Vincent T. Mallory, as a witness solely to identify the body when non-family identification witnesses were available.

Mr. Mallory was called to testify (Tr. 154-159) despite the fact that a number of other available witnesses knew the victim, and several of them were known to have seen him the night of his death.39/ When he went to identify the body, Mr.

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38/ The prejudice resulting from the mistaken testimony followed by an inflammatory argument was made even worse by the prosecutor's deliberate concealment and withholding from the defense of a substantial and material portion of a sworn pretrial statement by the witness Hearn which had been requested by Barclay during discovery. The facts with respect to this matter are not yet a part of the record in this case, and since they relate to the trial court proceedings they must be presented by Barclay in a Rule 3.850 motion in the Circuit Court. However, we bring the nature of this violation of Brady v. Maryland, 373 U.S. 83 (1963), to the Court's attention in a preliminary fashion now so that the Court will be aware of the relationshp between the several claims of misconduct and their full dimension. Briefly summarized, the facts which we will contend violated Brady are as follows:

The prosecution furnished Hearn's statement of January 27, 1975 to Barclay's trial counsel during January, 1975. The document included pages 1 to 44, line 19. However the complete statement given by Hearn to the prosecutors on January 27 and transcribed by a court reporter consisted of pages 1 to 71. Before giving the statement to Barclay's attorney, the prosecutor deleted lines 20 to 25 of page 44 (thus making it look as if line 19 ended the statement), and all of pages 45 to 71. The deleted portion was never furnished to Barclay's trial counsel, Frederic Buttner. It was belatedly furnished to counsel representing Evans, Crittendon and Dougan sometime in March 1975 after the guilt and penalty trials in the Orlando case had ended and the jury verdicts had been rendered.

The deleted portion of Hearn's statement dealt primarily with the Roberts murder but also contained statements by Hearn that would have been materially helpful to Barclay on the charge of murdering Stephen Orlando. The existence of a Hearn statement on the Roberts murder was further concealed from defense counsel because, when defense counsel attempted to depose Hearn about the Roberts murder, Hearn's attorney interposed self-incrimination objections and directed Hearn not to answer. Hearn deposition of Jan. 31, 1975, pp. 77-78, 177, 201. The prosecutor still did not reveal to the defense that Hearn had already given the state's attorney a full statement on the Roberts murder.

39/ See testimony of Dennis Peters, Tr. 1644-45; Thomas Beaver, Tr. 1692; William Clark, Tr. 1716, James Michael Ryan, Tr. 1739. The man who found the body also knew Orlando as a former schoolmate. Bobby Langston. Tr. 225.

Mallory was accompanied by a next door neighbor, William Colley, Tr. 161.

The state's use of this witness prejudiced Barclay by eliciting sympathy for the victim's family. The prejudice inherent in the situation was realized when Mr. Mallory, in an emotional moment, asked the judge in the presence of the jury to order Mr. Jackson to stop referring to the victim as "Orlando" and to please call him "Stephen". Tr. 162-163. The judge asked Mr. Jackson to comply with the request. Id. This paternal plea concerning his dead son created such an emotional impact in the courtroom and on the jury that another defense attorney felt impelled to join in Mr. Mallory's objection to Jackson's referring to the victim as "Orlando". Tr. 249.

The prosecutor's unnecessary use of a family witness was calculated to invoke the jury's natural sympathies and did so in violation of settled rules of Florida law designed to avoid such prejudice. Melbourne v. State, 51 Fla. 69, 40 So.189 (1906); Rowe v. State, 120 Fla. 649, 163 So. 22 (1935); Ashmore v. State, 214 So.2d 67 (Fla. 1st DCA 1968); Hathaway v. State, 100 So.2d 662 (Fla. 3d DCA 1958); Barnes v. State, 348 So.2d 599 (Fla. 4th DCA 1977); Scott v. State, 256 So.2d 19 (Fla. 4th DCA 1971). Barclay's appellate counsel rendered ineffective assistance by failing to invoke this well settled body of law on appeal.

(c) In his opening statement to the jury, prosecutor Bowden began to read an extraneous indictment naming Barclay's codefendants Dougan, Evans and Crittendon, and the witness Hearn.

One of the defense counsel objected before the prosecutor read the date and victim's name in this Roberts murder indictment, Tr. 45. The objection was sustained, but requests for a mistrial were denied. Tr. 46-67.40/ The reading of part

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40/ A motion for a new trial on this ground was also denied. R. 190; 191.

of an indictment naming the witness Hearn, who was not indicted in the case before the jury, inescapably told the jury that there was more than one indictment against some of the defendants. Because of the way the reading was interrupted, the jury did not know whether Barclay was named in the other indictment. The reading of the extraneous indictment violated Barclay's right to a fair trial as protected by the Due Process Clauses of the state and federal constitutions.

The prejudice was similar to that found in Jones v. State, 194 So.2d 24 (Fla. 3d DCA 1967), where a prosecutor mentioned the defendant's "mug shots" in such a way as to indicate other crimes. Jurors are not stupid. The prosecutor's error plainly revealed the existence of a separate indictment, and the trial court took no action to undo the damage.

The fact of the indictment of Barclay's codefendants in another murder was irrelevant to his guilt and should not have been brought to the attention of the jury. Williams v. State, 110 So.2d 654 (Fla. 1959), cert. denied, 361 U.S. 847 (1959); Williams v. State, 117 So.2d 473 (Fla. 1960); Weiss v. State, 124 So.2d 528 (Fla. 1950); State v. Norris, 168 So.2d 541 (Fla. 1964); Hirsch v. State, 279 So.2d 866 (Fla. 1973); Whitted v. State, 362 So.2d 668 (Fla. 1978); Drake v. State, 400 So.2d 1217 (Fla. 1981). The jury's perception of Barclay may "have been colored by the knowledge of a friend's involvement in a collateral matter. The danger of guilt by association is a real one, which ought to be minimized wherever possible." Fulton v. State, 335 So.2d 280, 285 (Fla. 1976). Counsel was ineffective in failing to argue this point on appeal.

6. The failure of appellate counsel to contest the denial of a severance of Barclay's trial from that of the other defendants and the presentation of collateral-crime evidence involving the other defendants was a serious and substantial deficiency.

Prior to the guilt trial, and again prior to the penalty trial, Barclay moved for a severance from the other

defendants. R.89; Pen.Tr. 20-55. Both motions were denied, although Florida law would have permitted the penalty trial to be held before a different jury.41/ This denial violated Barclay's right to a fair trial under the Due Process clauses of the Florida and United States Constitutions.

The trial court's refusal to grant a severance made the penalty trial demonstrably unfair to Barclay. The error introduced unreliability into the penalty decision in a fashion which conflicts with the Eighth Amendment as made applicable to the states by the Fourteenth Amendment to the United States Constitution.

At the penalty trial of Barclay and Dougan, the prosecutor read to the jury a pending indictment charging Dougan, Evans, Crittendon and Hearn with the murder of Stephen Roberts. Pen.Tr. 87-89. Then the prosecutor called William Hearn, who testified to the general facts of the Roberts murder, which he stated was committed by Crittendon and Evans, whom he accompanied, and that they all were following Dougan's orders. On direct examination, Hearn mistakenly stated that "Elwood" was present during the planning of the Roberts murder. (Pen.Tr.90). He stated on cross-examination that Barclay was out of town on that date. Pen.Tr. 109-110; see point 5(a) supra.

Barclay's trial counsel objected to Hearn's testimony, (Pen.Tr.20-55), and repeated his objections during Ernest Jackson's cross-examination of Hearn on behalf of Dougan. Pen.Tr. 98, 105. The trial judge had ruled that the state could not bring out the "gory details" of the Roberts murder. Pen.Tr. 50, 104. Ernest Jackson nevertheless brought out the full details of the Roberts murder by his cross examination in front of the jury. (Pen. Tr. 92-109). Jackson did so ignoring the Judge's cautions and the objection of Barclay's attorney. Even

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41/ Section 921.141(1), Florida Statutes (1975). See also Messer v. State, 330 So.2d 137 (Fla. 1976); Miller v. State, 332 So.2d 65 (Fla. 1976). A motion for new trial on this ground was also denied. R. 190-191.

the prosecutor objected that Jackson was using the penalty trial to do his discovery for the Roberts murder case. Pen.Tr. 105.42/

The unfairness of the introduction of this collateral-crime evidence to Barclay is manifest. The testimony was admitted by the court on the theory that it was proper to prove the "propensity" of Dougan to commit crimes. Pen.Tr. 48-50. It was clear error, even as to Dougan, to put on proof of an indictment which had not led to a conviction. This was an improper aggravating circumstance. See Elledge v. State, 346 So.2d 998, 1002 (Fla. 1977); Provence v. State, 337 So.2d 783, 786 (Fla. 1976), cert. denied, 431 U.S. 969 (1977); Perry v. State, 395 So.2d 170, 174-175 (Fla. 1981).

Admission of the Roberts murder testimony was doubly erroneous and prejudicial with respect to Barclay because it was in no way probative or relevant to a proper individualized consideration of his sentence. Williams v. State, 110 So.2d 654 (Fla. 1959); Hirsch v. State, 279 So.2d 866 (Fla. 1973); Whitted v. State, 362 So.2d 668 (Fla. 1978). Hearn's testimony about the Roberts murder was impermissibly made the "feature" evidence at the penalty trial; the prosecutor called no other witnesses. Williams v. State, 117 So.2d 473 (Fla. 1960). The minority members of the jury who voted for a death sentence for Barclay were improperly misled into thinking that Barclay's close association with Dougan, Evans and Crittendon -- who had committed another murder -- was properly relevant to Barclay's sentence. The state's attorney encouraged this view by his argument attempting to minimize the significance of Barclay's absence from Jacksonville at the time of the Roberts murder. Pen. Tr. 113, 119; see point 5a supra.

Barclay's rights under the Eighth Amendment to the Constitution of the United States were violated by the receipt

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42/ Mr. Jackson had no prior knowledge of what Hearn would testify about the Roberts murder before this cross-examination because Hearn had invoked the privilege against self-incrimination with regard to the Roberts murder at his pre-trial deposition of January 31, 1975, and the Robert's murder portion of his detailed sworn statement of January 27, 1975 had not been provided to defense counsel. See note 38, supra.

of the collateral-crime evidence which permitted jurors to recommend death based on "guilt by association" (cf. Fulton v. State, 335 So.2d 280, 285 (Fla. 1976)), rather than the circumstances of Barclay's own life and crime. Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Enmund v. Florida, 458 U.S. 782, 73 L.Ed. 2d 1140, 102 S. Ct. 3368 (1982).

In failing to make arguments challenging these manifest trial errors, Barclay's appellate counsel rendered ineffective assistance measurably below the level of competent counsel. Mr. Jackson assigned the denial of a severance as an error (R. 298), but then made no argument on the issue.

7. The failure of appellate counsel to contest the court's instructions to the jury was a serious and substantial deficiency.

Barclay's appellate counsel was recusant in failing to make any argument contesting the trial court's instructions to the jury. The jury instructions were erroneous and violated Barclay's rights under the Eighth and Fourteenth Amendments to the Constitution of the United States as well as his rights under Florida law. The instructions at the penalty phase consisted simply of the court reading the statutory aggravating and mitigating circumstances to the jury, providing them with a verdict form, and telling them that their verdict was advisory and need not be unanimous. Pen.Tr. 169-176.

(a) The penalty instructions failed to give the jury any explanation or definition of the statutory aggravating or mitigating circumstances.

Appellate counsel should have argued that the jury instructions were insufficient based on this Court's decision in Cooper v. State, 336 So.2d 1133, 1140 (Fla. 1976), where it was held:

> Of course, a proper instruction defining the terms 'especially heinous, atrocious or cruel' or any other listed circumstance, must be given. Here the trial judge read the jury the interpretation of that term which we gave in Dixon.

Cooper was decided on July 8, 1976 -- yet another relevant opinion which was rendered while Ernest Jackson was hospitalized. He never cited it to this Court.

There was fundamental error in failing to explain to the jury the elements of the aggravating and mitigating circumstances. R. 182-183. Cooper v. State, supra; Gregg v. Georgia, 428 U.S. 153, 193 (1976); Robles v. State, 188 So.2d 789 (Fla. 1966); State v. Jones, 377 So.2d 1163 (Fla. 1979). This failure was particularly significant and crucial with respect to the vague aggravating circumstance "especially heinous, atrocious and cruel." Without the narrowing interpretation of the law provided by State v. Dixon, supra, this vague and overbroad provision left the jury entirely unguided in violation of Barclay's rights under the Eighth and Fourteenth Amendments to the Constitution of the United States. Furman v. Georgia, 408 U.S. 238 (1972); Proffitt v. Florida, 428 U.S. 242 (1976); Godfrey v. Georgia, 446 U.S. 420 (1980).43/

(b) The jury instructions failed to advise the jury that the State had the burden of proving the aggravating circumstances beyond a reasonable doubt. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973); Phippen v. State, 389 So.2d 991, 994 (Fla. 1980); Williams v. State, 386 So.2d 538, 542 (Fla. 1980).

The form of the instruction was sufficiently confusing that it may have led the jury to believe that the defendant had the burden of showing that mitigating circumstances outweighed aggravating circumstances. The instruction that the jury must decide "whether there are sufficient mitigating circumstances existing which outweigh the aggravating circumstances" (Pen.Tr. 170) improperly shifts the burden of proof to the defendant.

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43/ Barclay preserved constitutional objections to the vagueness of the statutory aggravating circumstances. R. 53-56 (motion to dismiss indictment).

There was no corrective instruction in this case explaining the proper allocation of the burden of proof. This violated Mullaney v. Wilbur, 421 U.S. 684 (1975); cf. Arango v. State, 411 So.2d 172, 174 (Fla. 1982) (standard instruction explains burden of proof). This was fundamental error which violated Barclay's Eighth and Fourteenth Amendments rights and should have been argued on appeal.

(c) The jury instructions failed to advise the jury of the significance of its advisory role.

The jury was told that it need not be unanimous and that the judge need not follow the jury decision. The real importance of the jury's role was practically concealed from the jury, with the result that the jury deliberated but 19 minutes over the lives of two men. Pen.Tr. 176-177. This violated Barclay's federal due process rights in several respects.

First, the failure of the instruction to explain the significance of the jury's role under the Florida capital sentencing law diffused the jurors' sentencing responsibility. This was exacerbated by the fact that the trial court never told the jurors it would consider the size of the jury's vote and the lack of unanimity in determining the sentence to be imposed. The jurors were thus left to believe that it did not matter whether their vote was unanimous. The jury obviously made no effort to seek unanimity in a 19-minute period, which allowed time to ballot on each defendant but no time for meaningful discussion or debate on the issue of life or death. Moreover, the jury was not told that it had the inherent power to recommend life imprisonment acting as the conscience of the community despite the aggravating and mitigating circumstances. The jury's weighing role was never explained.

(d) The court erred in failing to advise the jurors that they could consider mitigating circumstances other than those in the statute.

The instructions misled the jury into believing that the only mitigating circumstances that could be considered were those listed in the Florida statutes. R. 183-184. This violated Barclay's Eighth Amendment right to have any relevant

facts about his individual circumstances considered and weighed by the advisory jury. Washington v. Watkins, 655 F.2d 1346, 1376 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); Chenault v. Stynchcombe, 581 F.2d 444, 448 (5th Cir. 1978); Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981), cert. denied, 73 L.Ed.2d 1374, 102 S.Ct. 3495 (1982).

(e) The court erred in giving the jury a felony murder instruction after finding -- correctly -- that there was no evidence of the existence of any of the statutorily enumerated felonies.

The trial court first determined, and the prosecutors agreed, that a felony murder instruction should not be given because there was insufficient evidence to support it. (Tr. 1912-1920.) But when defense counsel requested a third-degree murder instruction, the court decided to charge on first-degree and second-degree felony murder as well, solely for the ostensible purpose of making the third-degree instruction comprehensible. (Tr. 1918-1928, 1975-1980.) Thus, the jury was eventually charged that it could convict the defendants of first-degree murder on a theory of either premeditation or felony murder (R. 171-172), despite the complete lack of evidence for the latter theory. This procedure was as impermissible and prejudicial as it was unnecessary. Obviously, the jury could have been informed of the relevant list of enumerated felonies, so as to make the third-degree murder charge understandable, without allowing the jury to consider and deliberate on a first-degree felony murder charge which had no evidentiary basis. The jury should simply have been instructed that it could not convict of first-degree felony murder.44/

The submission of an unwarranted ground for convicting petitioner of an offense punishable by death deprived him of the measure of reliability which the Eighth Amendment demands in

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44/ Moreover, if a first-degree felony murder instruction was to be given to the jury, the trial court was then required to define for the jurors the elements of the underlying felonies on which a felony murder verdict might be based. That was not done here, and the failure to do so was fundamental error. Robles v. State, 188 So.2d 789 (Fla. 1966); State v. Jones, 377 So.2d 1163 (Fla. 1979); Sanford v. Rubin, 237 So.2d 134, 137 (Fla. 1970).

capital cases. Beck v. Alabama, 447 U.S. 625 (1980). Neither the Eighth Amendment nor Due Process can countenance a procedure which permits the death penalty to rest on a jury verdict of felony murder where there is no basis in the evidence for such a verdict.

8. Appellate counsel should have contested the trial court's failure to consider non-statutory mitigating factors.

The trial judge made no finding with respect to non-statutory mitigating factors, and his opinion indicates that he gave no consideration to any aspects of the defendant's life other than the statutory factors in deciding sentence. R. 226-234. The trial judge operated under the mistaken impression that his consideration was limited to the statutory list of factors in mitigation. This violated Barclay's Eighth Amendment rights. Lockett v. Ohio, supra; Eddings v. Oklahoma, 455 U.S. 104 (1982); Enmund v. Florida, 458 U.S. 782, 73 L.Ed.2d 1140, 102 S.Ct. 3368 (1982).

9. Appellate counsel was deficient in failing to argue that the death-qualification of the jury and the exclusion of all jurors with scruples against the death penalty, by challenges for cause and peremptory challenges, violated Barclay's rights under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

At the beginning of the jury selection process counsel for all of the defendants joined in an objection to the death-qualification of the jury and to the court's general instruction to the jury on the qualifications to serve in a capital case. VT. 3-10 (voir dire tr.) Counsel also repeatedly objected to the questioning of jurors on their death penalty views throughout the voir dire.

(a) Petitioner's rights under Witherspoon v. Illinois, 391 U.S. 510 (1968), were violated by the improper disqualification of several scrupled jurors for cause.

During the voir dire, seven prospective jurors and one prospective alternate were struck for cause based on questioning

about their death penalty attitudes.45/ In each instance, defense counsel objected, preserving the objection to the entire death-qualification process which had been made at the outset of the voir dire. VT. 3-10.

Each of the excluded jurors gave an answer indicating an inability to render an impartial decision on the issue of the defendants' guilt, and thus might at first blush seem to have been properly excluded. Witherspoon v. Illinois, 391 U.S 510, 522 n.21 (1968). However, the members of the venire gave their disqualifying answers without having had a proper explanation of the law governing their role as capital jurors. They were not told that it was their duty to serve as jurors, to follow the judge's instructions, and to obey the law as explained by the judge; thus, they were never asked whether they could subordinate their personal views about the death penalty to their duty to follow the judge's instructions. Rather, the jurors were asked the questions in a manner which suggested that they were merely being asked for their personal preferences.

In Witherspoon, supra, and subsequent cases the United States Supreme Court has indicated that jurors may not be excluded if they are able to subordinate their personal views so as to follow the trial court's instructions and do their duty under the law. Mr. Justice Stewart wrote in Witherspoon:

> "It is entirely possible, of course, that even a juror who believes that capital punishment should never be inflicted and who is irrevocably committed to its abolition could nevertheless subordinate his personal views to what he perceives to be his duty to abide by his oath as a juror and to obey the laws of the state." 398 U.S. at 514, note 7.

The Court followed the same principle and included similar language in its opinions in Boulden v. Holman, 394 U.S. 478, 483 (1969), and Maxwell v. Bishop, 398 U.S. 262, 265 (1970).

The jurors who were excluded in this case did not make it unequivocally clear that they could not subordinate their

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45/ The scrupled jurors struck for cause were Leslie, VT.487-489; Tompkins, VT. 525-33; Norman, VT. 534-38; Barnes, VT. 542-46; Wilder, VT. 577-79; Martin, VT. 585-87; Robinson, VT. 591-94; and alternate Smith, VT. 659-60.

personal opinions and follow the instructions of the court to render a fair verdict on the guilt issue. They were never asked the questions necessary to determine whether they would be willing to follow the law and vote impartially on the question of guilt if told that it was their duty as citizens to do so.

There is a separate and additional way in which the exclusion of these jurors was improper. The jurors gave their disqualifying answers under the influence of a patently incorrect explanation of their role under Florida's capital sentencing law. The judge's initial explanation of the Florida law to the jury (VT. 3-10) was wrong in that it conveyed to the jury the idea that they would have no important role in the penalty decision. They were told that they would be asked for a recommendation, but that the judge was free to ignore their recommendation entirely. They were not told that their recommendation carried great weight and that the judge was bound to follow it unless it was unreasonable.

This failure to properly explain the jury's influence over the final sentence led to the exclusion of those jurors who might vote to convict if they could also vote effectively for a life sentence, but who might refuse to vote to convict if the sentence was entirely out of their hands. They jury venire in this case was incorrectly led to believe that the latter situation was the case. The Supreme Court of the United States has recognized that even a sworn juror facing the option of convicting or acquiting where the death penalty is apparently mandatory may acquit for the impermissible reason "that whatever his crime, the defendant does not deserve death." Beck v. Alabama, 447 U.S. 625, 638-643 (1980); Woodson v. North Carolina, 428 U.S. 280, 293 (1976) (opinion of Stewart, Powell, and Stevens JJ.). Obviously such misinformation would tend to lead the jury venire into similar error.

(b) The jury selection process was systematically unfair and violated petitioner's Sixth Amendment rights because the death-qualification process itself prejudiced the jury.

A major thrust of defense counsels' argument at trial was that the very process of death-qualifying the jury during

voir dire made the trial unfair to the defendants. Judge Eisele in the Eastern District of Arkansas accepted this argument in Grigsby v. Mabry, ___ F.Supp. ___, (E.D. Ark. No. PB-C-78-32, Aug. 5, 1983):

> As pointed out the Haney study provides strong empirical support for what trial lawyers and judges already know, and that is, that regardless of the preconceptions which a juror might have before entering the courtroom, the questions and the answers and the dialogue pursued in the death qualification process have a clear tendency to suggest that the defendant is guilty. Death qualification, then, is comparable to saturating the jury pool with prejudicial pretrial publicity, which, as we know, is unconstitutional. See Rideau v. Louisiana, 373 U.S. 723 (1963); Irvin v. Dowd, 366 U.S. 717 (1961); and Marshall v. United States, 360 U.S. 310 (1959). But the death qualification process is worse because the biasing information is transmitted to the prospective jurors inside the courtroom and is imparted, albeit unconsciously, not only by the attorneys but also by the judge. The reading of the voir dire transcripts in these cases makes this abundantly clear -- so clear that the Court suggests that even without the strong empirical support of the Haney study, the Court could conclude on its own that a reasonable limitations of such voir dire procedures would be appropriate. Judges of our trial and appellate courts are qualified and able to assess the prejudicial effect of a questioning process employed during voir dire. They should, by training and experience, be considered to possess some expertise on the effects of courtroom procedures, such as voir dire, which they observe almost daily either directly or through review of transcripts from state and federal courts. Of course, it is reassuring to have the support of empirical data from qualified social scientists. But the determination of just what is fair procedure, constitutionally falls within the ken of the judiciary. (Memorandum Opinion p.55).

In addition to the prejudicial effect of the death-qualification process, the prosecutor's use of peremptory challenges systematically to remove every mildly scrupled juror from service produced a jury unfairly predisposed to convict the defendants.46/ The use of peremptory challenges by the

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46/ The state's attorney used peremptory challenges to strike seven jurors who expressed scruples against the death penalty but could not be challenged for cause, e.g., jurors Johnson, VT.215; Thomas, VT.236; Calhoun, VT.204; Jones, VT.43; Williams, VT.503; Richardson, VT.503; and Smith, VT.566. Several of these jurors were plainly removed because of their scruples; they were not examined about any other subject.

prosecutor to eliminate all jurors with non-disqualifying scruples against the death penalty achieved indirectly what Witherspoon forbids the prosecution to achieve directly, and hence denied Barclay a jury drawn from a fair, representative cross-section of the community. This violated his rights under the Sixth Amendment to the Constitution of the United States.

The exclusion produced a jury which was "organized to convict." See Winick, Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis, 81 Mich.L.Rev. 1 (1982). As Judge Eisele states in Grigsby, supra:

> "The evidence shows that death penalty attitudes are highly correlated with other criminal justice attitudes. Generally, those who favor the death penalty are more likely to trust prosecutors, distrust defense counsel, to believe the state's witnesses, and to disapprove of certain of the accepted rights of defendants in criminal cases. A jury so selected will not, therefore, be composed of a cross-section of the community. Rather, it will be composed of a group of persons who are uncommonly predisposed to favor the prosecution, a jury 'organized to convict.'"

Petitioner is aware that this Court rejected somewhat kindred arguments on the peremptory challenge issue in Dobbert v. Florida, 409 So.2d 1053 (Fla. 1982) (same issue now pending in the 11th Circuit in Dobbert v. Strickland, No. 82-5121). In Barclay's case, apparently unlike Dobbert, there were contemporaneous objections to the death-qualification of the jury. Furthermore, in this case the use of peremptory challenges is but one facet of the claim of unfairness in the death-qualification process.

## III.

THIS COURT SHOULD NOT APPROVE THE DEATH PENALTY FOR PETITIONER WHERE THE LAST COURT ACTION WAS TAKEN BY A 3-3 VOTE AND WHERE FOUR MEMBERS OF THE PRESENT COURT HAVE VOTED AT ONE TIME OR ANOTHER AGAINST UPHOLDING THE SENTENCE OF DEATH.

Florida has more inmates on death row than any other state, requiring this Court to face more of the demanding work

of appellate review of death cases than any other court in the country. A review of this Court's decision reveals that the Court has evolved a number of important principles to govern its task.47/ This point deals with one of those principles -- the principle that the death penalty cannot be imposed unless it is approved by a majority of this Court.

The principle was stated in Vasil v. State, 374 So.2d 465, 471 (Fla. 1979), where the Court, unable to assemble a majority in support of affirming a sentence of death, vacated the death sentence and ordered "a sentence of life imprisonment, without eligibility for parole for twenty-five years." The reasoning which supported that result was stated as follows:

> In upholding the constitutionality of our death penalty statutes, both the United States Supreme Court and this Court have emphasized that "meaningful appellate review" of each death sentence by this Court is an element essential to the validity of the process.
>
> > [T]o the extent that any risk [of the death penalty being improperly imposed] exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida "to determine independently whether the imposition of the ultimate penalty is warranted."
>
> Proffitt v. Florida, 428 U.S. 242, 253, 96 S.Ct. 2960, 2967, 49 L.Ed.2d 913 (1976). See also State v. Dixon, 283 So.2d 1, 8 (Fla. 1973). It is self-evident that a sentence of death cannot lawfully be carried out unless at least four members of this Court agree that it is warranted, notwithstanding that the sentencing jury advised and the trial judge imposed that sentence.
>
> In a situation such as exists here, it appears to us that the only proper sentence which can be entered is the alternate one authorized for this capital felony by section 775.082(1), Florida Statutes (1977)-that is, life imprisonment without eligibility for parole for twenty-five years.
>
> (Emphasis added.)

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47/ One notable feature of this Court's procedure in handling death cases is the fact that this Court appears to take the entire burden on its own members and the absence of associate justices in death penalty decisions is striking.

This well-grounded principle, established and accepted for purposes of review of death cases, should be applied by the Court here where, when the case was last before the Court, the Court split 3-3 on rehearing. Barclay v. State, 411 So.2d 1310 (Fla. 1981) (Justices Ehrlich, McDonald and Overton voting for rehearing). Even if there were some logical reason to deny application of the Vasil principle to rehearing petitions -- and counsel cannot conceive of any rational basis for such a distinction -- the idea behind the Vasil case should be accepted in this case where a fourth member of the Court -- Justice Boyd -- had previously reviewed the entire record and concluded that the jury was correct in recommending life imprisonment for Barclay.48/

A review of the appellate history in this case will aid analysis of the issue now presented:

When the case first came to this Court, the Court split 4-2, with Justice Boyd stating his opinion in favor of a life sentence for Elwood Barclay, and Justice Hatchett favoring new sentencing for both Barclay and Dougan. Justice Boyd's explanation, 343 So.2d at 1272, made after "a careful review of the entire record" is a powerful and unequivocal statement of agreement with the jury verdict.

When Petitioner's case was back before this Court after the post-Gardner sentencing, the Court again divided 4-2. This time, Justices Overton and McDonald dissented without opinions.49/

Petition for rehearing was filed and, prior to decision on it, Justice England -- who had voted with the majority -- left the Court.

Justice Raymond Ehrlich then joined the Court and, when the Barclay rehearing petition was considered, joined with Justices McDonald and Overton in voting to grant rehearing.

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48/ Justice Boyd reached this conclusion without the benefit of any advocacy by Barclay's then counsel and from an independent review of the record which is nowhere even suggested in the papers filed on behalf of Barclay.

49/ There is some indication to suggest the basis of their dissent, however, for Justice McDonald, joined by Justice Overton, also dissented in the post-Gardner appeal taken by Dougan, and the same point relating to the sentencing judge's use of aggravating circumstances applies to Barclay's sentence. Dougan v. State, 398 So.2d 439, 441 (Fla. 1981).

Elwood Barclay thus remains consigned to death even though it appears that a majority of the members of the present court have, at one time or another, voted to reject his death sentence.50/

Under the principles of Vasil, it is respectfully submitted that the Court should vacate the death sentence against Barclay and order a mandatory twenty-five year life sentence. Alternatively, the Court should at least allow full argument before a full panel of this Court.

Petitioner's argument is predicated on the essential role that this Court plays in reweighing a death sentence "'to determine independently whether the imposition of the ultimate penalty is warranted.'" Profitt v. Florida, 428 U.S. 242, 253 (1976). Inasmuch as the Court has consistently described Florida's death-sentencing procedure as "trifurcated," e.g., Tedder v. State, 322 So.2d 908, 910 (Fla. 1975); Dobbert v. State, 375 So.2d 1069, 1071 (Fla. 1979), it is useful to think of the process as a three-legged stool. To hold weight and stand upright, the stool must be supported by all three legs: the death sentence must be approved by the jury, the trial judge and the Florida Supreme Court. Of course, the analogy is technically imprecise, since it is possible for a trial judge to impose a death sentence contrary to a jury recommendation. But, as a practical matter, since this Court's decision in Tedder v. State, 322 So.2d 908 (Fla. 1975), the jury recommendation of death is an essential aspect of the process: only where extraordinary circumstances are shown -- where no reasonable person could agree with the jury recommendation -- will this Court approve a override of the jury's recommendation of life.51/

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50/ A fifth vote, former Justice Hatchett, also favored Barclay's position on the original appeal.

51/ A jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

Tedder v. State, 322 So.2d at 910.

In Elwood Barclay's case the death penalty is not supported by the jury verdict, nor does it have the affirmative support of a demonstrated majority of this Court. To the contrary, the jury which heard the same evidence heard by Judge Olliff concluded that Elwood Barclay should receive a life sentence, and, through the accidents of timing, review by this Court has demonstrated that even though there have been two affirmances, there is not a clear majority of the present Court which supports a death sentence for Barclay.

The sole support for the death penalty rests on Judge Hudson Olliff.52/

This Court should vacate the death sentence. Vasil v. State, 374 So.2d 465, 471 (Fla. 1979).

IV.

PETITIONER'S FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION AND SIXTH AMENDMENT RIGHT TO THE ASSISTANCE OF COUNSEL WERE VIOLATED WHEN A PSYCHOLOGICAL SCREENING REPORT PREPARED BY PRISON OFFICIALS WAS CONSIDERED EX PARTE BY THIS COURT DURING HIS APPEAL.

In May 1975, shortly after petitioner was imprisoned in the Florida State Prison, he was required by the prison officials to submit to a battery of psychological tests and to interviews by psychologists and psychiatrists.53/

At no time in connection with the administration of these tests and interview was petitioner advised by anyone that he had a right to remain silent and refuse the examinations, or that the results of the tests and interviews could and would be

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52/ Judge Olliff has sentenced 7 defendants to death, overriding a jury recommendation of life in 5 of the 7 cases. The defendants with life recommendations were Walter Carnes, Robert Lewis, Ernest Dobbert, Robert Parker, and Elwood Barclay. The other two were Tommy Groover and Jacob Dougan. The Groover and Parker cases are still pending on appeal; Carnes committed suicide before his appeal was heard; the other cases are reported opinions by this Court.

53/ Barclay was again given a full battery of psychological tests and interviews in December 1976, and was given a third psychological screening in April 1980 when he was returned to the Florida State Prison after resentencing. Petitioner does not yet know whether the 1976 and/or 1980 reports were or were not sent to the Florida Supreme Court.

used in his case on appeal in the Florida Supreme Court. At no time was petitioner advised that he had a right to consult with counsel before submitting to the tests and interviews, or was he given an opportunity to confer with his attorney, or to seek legal advice about submitting to the tests and interviews.

On June 8, 1976, during the pendency of Petitioner's appeal, the Clerk of the Florida Supreme Court wrote a letter acknowledging receipt of a copy of petitioner's Psychological Screening Report from the Florida Department of Offender Rehabilitation. (The same letter acknowledged receipt of reports concerning the codefendant Dougan, and another death row inmate, Monroe Holmes.) See App. P. A copy of the Psychological Screening Report dated May 28, 1975 is included in the appendix hereto. App. P. During the pendency of the appeal, neither Petitioner nor his attorney were ever given a copy of the psychological screening report. Neither were they given any notice that the report had been received by the Court.

During the time when Barclay's case was pending on appeal, this Court had a regular practice of requesting such extra-record psychological materials from state agencies concerning death-sentenced appellants. The practice was conducted in secret, without notice to appellants or their lawyers. The docket maintained by the Clerk of the Court reflects the receipt of the psychological report and the fact that it was placed in the file in this case. The report remained a part of the file in the case and was considered by the Court during Petitioner's appeal. The docket reflects that the psychological screening report was removed from the court file in Petitioner's case and placed in a vault maintained by the Clerk on October 8, 1980.

The Court's receipt and consideration of the psychological screening report, which was obtained without appropriate Fifth and Sixth Amendment warnings to petitioner, and without petitioner's waiver of his constitutional rights, violated those rights, just as they would have been violated if

the same material had been presented in evidence before a sentencing jury. Estelle v. Smith, 451 U.S. 454 (1981).54/

V.

PETITIONER WAS DENIED A MEANINGFUL APPELLATE REVIEW OF HIS 1980 DEATH SENTENCE BY AN INAPPROPRIATE AND UNCONSTITUTIONAL APPLICATION OF THE "LAW OF THE CASE" RULE WHICH VIOLATED THE DUE PROCESS AND EQUAL PROTECTION CLAUSES AS WELL AS THE EIGHTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

After Petitioner's case was remanded by this Court to the trial court under Gardner, Petitioner was resentenced to death in April 1980. The new sentencing order was different from the 1975 sentencing order in at least two significant respects. First, the finding that the murder was committed in the course of a kidnapping was changed, in that Judge Olliff's 1980 order quotes and relies upon a statutory definition of kidnapping contained in section 787.01, Fla. Stat.55/ That statute took effect on October 1, 1975, and was thus not in effect either at the time of the crime or of petitioner's trial. Second, Judge Olliff amended the findings with respect to "great risk of danger to many persons" to delete the reference to a note found on the victim's body.56/ Thus, the only findings concerning this factor which remained as to Barclay were those about stalking other potential victims prior to the murder, and about the making and distribution of tapes after the murder; no finding on this factor with respect to Barclay now relates to events immediately surrounding the

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54/ The receipt of the extra-record psychological report during petitioner's appeal also violated Petitioner's rights to due process of law, Gardner v. Florida, 430 U.S. 349 (1977); to the effective assistance of counsel, Gardner, supra: to confrontation, Pointer v. Texas, 380 U.S. 400 (1965); to reliability in capital sentencing, Woodson v. North Carolina, 428 U.S 280 (1976); and to proportionality in capital sentencing, Woodson, supra.

55/ See 1980 record at R. 78. This part of the order differs also from the 1979 order resentencing Dougan to death. 1980 R. 25-26.

56/ Compare 1975 order at R. 237-238 with 1980 order at R. 77-78. This also differs from the 1979 Dougan resentencing order. R. 40-41.

murder. The 1980 order in Barclay's case is different from the 1979 order in Dougan's case in these two regards.

Barclay has never had appellate review by this Court of Judge Olliff's sentencing order as thus amended. Nor has he had review of the original 1975 sentencing findings in the light of this Court's decisions since that time. When this Court reviewed the case after the resentencing, it declined to consider arguments relating to the findings of aggravating circumstances, ruling that "the law of the case" governed. Barclay v. Florida, 411 So.2d 1310 (Fla. 1981).

This ruling deprived Barclay of the kind of evenhandedness in the administration of the death penalty which is required by both the Eighth Amendment and the Equal Protection Clause. See Lee v. State, 340 So.2d 474 (Fla. 1976). In Lee, supra, this Court decided that it would not permit life and death decisions under the Florida statute to turn on insignificant differences in the timing of legal proceedings. The Court in Lee accepted its overriding responsibility to "ensure that similar results are reached in similar cases." Id. at 475 quoting Proffitt v. Florida, 428 U.S. 242, 258 (1976), citing State v. Dixon, 283 So.2d 1 (Fla. 1973).

Yet Barclay was denied the same kind of full consideration of his challenges to the aggravating-circumstances findings which the Court granted in similar circumstances to Dobbert on the appeal following his Gardner remand. Dobbert v. State, 375 So.2d 1969 (Fla. 1979). Arguably, even Barclay's co-defendant Dougan, got more consideration of the merits of his resentencing order than was afforded to Barclay. See Dougan v. State, 398 So.2d 439, 441, note 2 (holding that each of the arguments was adequately rebutted by the state's brief).

We submit that Equal Protection requires a more considered analysis of Barclay's contentions against his death

sentence than this Court has accorded him thus far. In this connection, it is also highly relevant that the Attorney General of Florida has now acknowledged in the United States Supreme Court that Judge Olliff's sentencing order violated the rule of Mikenas v. State, 367 So.2d 606 (Fla. 1978), by basing Barclay's death sentence on an improper non-statutory aggravating circumstance. See argument II-C-3(e), supra. This concession would itself justify this Court's reconsideration of the case, since the Court has never passed on the propriety of Barclay's sentence on the premise that significant portions of Judge Olliff's order were -- as the Attorney General now admits they were -- fundamentally in error. Furthermore, this Court has never considered Barclay's contention that the 1980 kidnapping finding violated the Ex Post Facto clauses of the Florida and Federal Constitutions. Barclay has been denied a consideration of this important constitutional claim. The result of the law of the case ruling, combined with Judge Olliff's use of the new kidnapping statute is that Barclay was not given the benefit of favorable changes of law, while unfavorable changes of law were used against him. Barclay got the worst of both worlds under this procedure, which turns the normal rules of law topsy-turvy. For it is plainly settled that, at least so long as a case is pending on direct appeal, favorable changes of law or statute are applied to the benefit of a criminal defendant. See Hamm v. Rock Hill, 379 U.S. 306 (1964), United States v. Schooner Peggy, 1 Cranch 103, 2 L.Ed. 49, 51 (1801); Florida East Coast Ry. Co. v. Rouse, 194 So.2d 260 (Fla. 1967); R. & R. Lounge, Inc. v. Wynne, 286 So.2d 13, 15-16 (Fla. 1st DCA 1973); Lee v. State, supra. Conversely, the ex post facto clause prohibits punishment to be based on unfavorable changes of law. Lindsey v. Washington, 301 U.S. 397 (1937); Weaver v. Graham, 450 U.S. 24 (1981).

Finally, the errors made in Judge Olliff's sentencing order have never been evaluated by this Court under a harmless error analysis. Both the plurality and concurring opinions in Barclay v. Florida, 51 U.S.L.W. 5206 (July 6, 1983) make it

clear that Florida's Elledge rule (Elledge v. State, 346 So.2d 998 (Fla. 1977)), permitting the affirmance of death sentences notwithstanding some sentencing errors, can only be sustained on the theory that it is a harmless error principle. This Court has never done a harmless error analysis in this case, as it did in, e.g., Lewis v. State, 398 So.2d 432 (Fla. 1981), or Brown v. State, 381 So.2d 690 (Fla. 1980). We submit that the trial court's sentencing errors here cannot be assumed to have been harmless in light of the fact that Barclay had a jury recommendation of life imprisonment. At the least, Barclay is entitled to have his case evaluated by this Court anew under the Tedder doctrine, in light of the errors in aggravating circumstances which are now recognized.

We believe that such a reexamination should lead this Court to the conclusion that Tedder requires the reduction of the sentence to life imprisonment. Alternatively, if the Court were to hold that one or more of the findings of aggravating circumstances was valid, petitioner would nevertheless be entitled to the kind of remand that was granted in Lewis v. State, supra, where the court struck down some of Judge Olliff's findings and remanded "for reconsideration of sentence by the trial judge so that the single established aggravating circumstance can be weighed against the recommendation of the jury." Once it is recognized that the trial court has made errors in the aggravating circumstances -- and the state has conceded at least one -- then there is no principled way to distinguish Barclay's case from Lewis', and Barclay is at a minimum entitled to resentencing without consideration of non-statutory or otherwise improper aggravating circumstances. Lewis v. State, supra; cf. Lee v. State, supra.

## CONCLUSION

It is respectfully submitted that the petition for habeas corpus should be granted, and the Petitioner should be granted the relief requested herein.

Respectfully submitted,

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IN THE SUPREME COURT OF FLORIDA

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|---|---|---|
| ELWOOD C. BARCLAY,<br><br>Petitioner,<br><br>vs.<br><br>LOUIS L. WAINWRIGHT, SECRETARY, DEPARTMENT OF CORRECTIONS, STATE OF FLORIDA,<br><br>Respondent. | ) | CASE NO.: |

VERIFICATION

Before me the undersigned authority personally appeared Elwood C. Barclay, who after being duly sworn, deposes and says: That he is the Petitioner in the above styled case; that the facts contained in the foregoing Petition of Habeas Corpus in this case are true and correct to the best of his knowledge and belief.

Elwood C. Barclay
Elwood C. Barclay

Sworn to and sbuscribed before me this 6th day of October, 1983.

S. P. Rucker
Notary Public, State of Florida at Large

My Commission Expires: NOTARY PUBLIC, STATE OF FLORIDA My Commission Expires Aug. 11, 1987

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing Petition, Volumes I and II of the Appendix, and Appendix of Opinions were furnished by mail this _____ day of October, 1983 to The Honorable Jim Smith, Attorney General, State of Florida, The Capitol, Tallahassee, Florida 32301; Wallace Albritton, Esquire, Assistant Attorney General, State of Florida, The Capitol, Tallahassee, Florida 32301 and T. Edward Austin, Esquire, State Attorney, 600 Duval County Courthouse, Jacksonville, Florida 32202.

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