IN THE SUPREME COURT OF FLORIDA

ELWOOD C. BARCLAY,

Petitioner,

-v- CASE NO. 64,386

LOUIE L. WAINWRIGHT, Secretary, Department of Corrections, State of Florida,

Respondent.

_____/

RESPONSE

Comes now respondent, by and through undersigned counsel, and makes this response pursuant to the order of this court heretofore entered in the captioned proceeding on December 15, 1983, and says:

I.

Preliminary Statement

An examination of the petition reveals that under the first point petitioner asserts that he was denied the effective assistance of appellate counsel in the direct appeal of his conviction and sentence to this court. While admitting, as he must, that multiple representation does not always involve a conflict of interest, it is urged sub judice that there was a conflict because of an alleged "undisclosed romantic interest in petitioner's codefendant's (Dougan) sister."

Secondly, petitioner makes the general assertion that he was entitled to the effective assistance of appellate counsel (which is difficult to argue with) and that a quick look at the brief filed by his counsel shows that he was denied this right (which is quite easy to argue with). Next, present counsel for petitioner sets forth a profusion of alleged errors which he

believes to have merit and which he can't understand how original appellate counsel could have overlooked. For example, please see the list of "should have" dones set forth on p. iii of the petition. Of course, present counsel has the benefit of much judicial refinement that was unavailable to his predecessor but, as noted infra, nearly all of these asserted "meritorious claims" have already been found by this court to be without merit. What petitioner is really seeking is a perpetual review in this court by couching discarded claims under a new umbrella and by inventing illusory arguments that are readily refuted.

Thirdly, petitioner urges that his death sentence should be vacated because when the case was last before this court, rehearing was denied by a 3-3 vote. Barclay v. State, 411 So.2d 1310 (Fla. 1981). This argument is untenable and finds no support in Vasil v. State, 374 So.2d 465 (Fla. 1979). The decision in Vasil is bottomed on the proposition that a sentence of death cannot be lawfully carried out unless at least four members of this court agree that it is warranted. Respondent emphasizes that at least four members of this court have repeatedly held that the death sentence was properly imposed on petitioner. Barclay v. State, 343 So.2d 1266 (Fla. 1977). The United States Supreme Court has agreed with this court that the death sentence was properly imposed on petitioner. Barclay v. Florida, ____U.S.____, 77 L.Ed.2d 1134, 103 S.Ct._____(1983).

Petitioner's fourth claim for relief asserts that his constitutional rights were violated when a psychological screening report prepared by prison officials was allegedly considered by this court during his appeal. This claim has previously been rejected by this court in Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). The en banc Eleventh Circuit agrees. Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983), en banc, cert.denied, 78 L.Ed.2d 176 (1983).

Petitioner's fifth and last complaint accuses this court of an unconstitutional application of the "law of the case" rule allegedly resulting in a violation of petitioner's constitutional rights. Strange, the Supreme Court of the United States found nothing wrong with this court's application of the "law of the case" rule. Please note:

> When that court vacated the death sentence and ordered the trial court to hold a hearing to permit petitioner to rebut undisclosed information in the presentence report, it applied a uniform procedure which expressly limited the scope of the trial court's proceedings and the scope of appellate review to "matters related to compliance with this order." 362 So.2d 657 (Fla. 1978). The court's subsequent opinion accordingly dealt only with the presentence report and treated the previous affirmance of the death sentence as "law of the case" with regard to the aggravating circumstances.

Stevens, J., concurring. Id. 77 L.Ed.2d 1158, 1159.

II.

The Alleged Conflict of Interest

Petitioner was represented at trial by private counsel, Fredrick Buttner. Each of petitioner's codefendants at trial were represented by separate counsel, including Jacob John Dougan, Jr., who was represented by Ernest Jackson. Upon imposition of sentence against petitioner and Dougan, the trial court appointed the public defender to represent them in their appeal to this court (R Vol.II, p. 247)[1]. Both petitioner and Dougan moved the trial court to appoint Ernest Jackson as their appellate counsel, which motions were at first denied but subsequently granted upon the concurrence of the public defender (R Vol.II, pp. 254-268). It is, therefore, important to note that petitioner expressly sought to be represented by Mr. Jackson because of an expressed confidence in him and his familiarity

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[1] References are to the original trial record filed with this court on petitioner's direct appeal.

with the case. Notably absent from the record is any indication that such confidence ever waned. Petitioner's statements to the contrary at this point must necessarily be viewed in light of his interest now being asserted.

The real basis of the asserted conflict of interest consists of nothing more than a personal attack on Mr. Jackson which cannot be refuted because the man is now deceased. The petition repeatedly refers to "Jackson's conflict" and seeks to support this thesis on the "dramatically different facts" relating to the culpability of petitioner and Dougan. In Barclay v. State, 343 So.2d 1266 (Fla. 1977), this court remarked as follows:

> When there is disagreement between the jury and judge after both have evaluated the same data, we have said that the jury's recommendation should generally prevail. In this case, however, there is present one factor which persuades us that the judge's sentence should be upheld. Two co-perpetrators who participated equally in the crime would have disparate sentences were the jury's recommendations accepted. The variation between defendants being so nominal (a minor age difference but no suggestion of different maturities), the facts here do not warrant the dispensation of unequal justice. See Messer v. State, 330 So.2d 137 (Fla. 1976); Slater v. State, 316 So.2d 539 (Fla. 1975). "Equal Justice Under Law" is carved over the doorway to the United States Supreme Court building in Washington. It would have a hollow ring in the halls of that building if the sentences in these cases were not equalized. This is a case, then, where the jury did not act reasonably in the imposition of sentence, and the trial judge properly rejected one of their recommendations.

Id. at 1271. If there is anything dramatic about the facts surrounding the brutal murder of Stephen Orlando, it is the dramatic similarity of the facts relating to the culpability of petitioner and codefendant Dougan.

Next, it is urged that this illusory conflict is somehow compounded by a romantic involvement between Mr. Jackson and Jacob Dougan's sister. Just how this romance compounds an illusory conflict escapes us. It would seem that the warmth of a

new-found love would spur Mr. Jackson to an even greater degree of professional excellence. Petitioner goes to great lengths in discussing Mr. Jackson's personal life, his marital difficulties, health, and income. This is hardly the stuff with which the claim of conflict of interest can be supported, particularly when there is nothing in the record before this court to indicate any conflict. For example, much is said in the petition about the brief filed by Mr. Jackson in behalf of petitioner and Dougan. There is simply nothing in the brief to indicate any conflict of interest or ineffective assistance of counsel and this position is supported by the fact that this court refused Mr. Jackson's request to file a supplemental brief. The only reasonable conclusion that can be drawn is that this court found the initial brief to be more than adequate to cover the essential points on the appeal.

In examining the allegation of conflict of interest, the court must examine the nature of the allegation because an actual, as distinguished from a hypothetical or speculative, conflict must be demonstrated before it can be said that codefendants represented by the same attorney were deprived of the effective assistance of counsel. United States v. Fox, 613 F.2d 99 (5th Cir. 1980). The petition speculates and hypothesizes that appellate counsel failed to attack the sentences imposed in the manner in which petitioner's current counsel would have done simply because, so petitioner claims, he represented both petitioner and Dougan on appeal. These suppositions should not be rewarded. Petitioner's appellate counsel filed a lengthy brief containing twenty-seven points. Argument was submitted under those points which counsel believed to have the most merit but because of time limitations, argument was not submitted under all points. Included within the brief were several points addressing the sentences imposed and most of

the points were framed to attack the judgment and sentence imposed against both petitioner and codefendant Dougan. It is submitted that based upon existing law, it cannot be maintained, convincingly or otherwise, that the brief filed by Mr. Jackson in this court represented a "substantial and serious deficiency measurably below that of competent counsel." Knight v. State, 394 So.2d 997, 1001 (Fla. 1981). It is submitted that it would have been proper for Mr. Jackson to believe, as respondent herein maintains, that there was no merit to the allegations of error contained in the present petition. Surely the failure to make meritless contentions or arguments does not constitute ineffective assistance of counsel. Neither does it demonstrate any alleged conflict of interest. An example of the spurious contentions made in the petition is found on p. 46 thereof where it is claimed that petitioner's appellate counsel should have contested the finding that the murder was committed during a kidnapping. This issue was raised on petitioner's post-Gardner appeal, Barclay, 411 So.2d 1310, and rejected by this court. See Brief of Appellee, pp. 21, 22. What petitioner really wants this court to do is to predicate a finding of ineffective assistance of appellate counsel for failure to argue the merits of the trial judge's findings of aggravating circumstances, twice approved by this court, Barclay, 343 So.2d 1266 and 411 So.2d 1310, and subsequently approved by the Supreme Court of the United States in Barclay v. Florida, supra. Please note:

> Barclay also argues that the trial judge improperly found the "under sentence of imprisonment" and "previously been convicted of a [violent] felony" aggravating circumstances. The Florida Supreme Court, however, construed the trial judge's opinion as finding that these aggravating circumstances "essentially had no relevance here." 343 So.2d at 1271 (footnote omitted). We see no reason to disturb that conclusion. The trial judge plainly stated that Barclay "was not under sentence of imprisonment." App 120. The trial judge also stated in the same paragraph that Barclay's criminal record "is an aggravating circumstance," App 121, but this is simply a repetition of the error noted above.

> Barclay also challenges the findings on several other aggravating circumstances. He claims that the trial court improperly found that he caused a great risk of death to many people, that the murder was committed during a kidnapping, that the murder was committed to disrupt the lawful exercise of a governmental function or the enforcement of the laws, and that the murder was expecially heinous, atrocious or cruel. All of these findings were made by the trial court and approved by the Florida Supreme Court under Florida law. Our review of these findings is limited to the question whether they are so unprincipled or arbitrary as to somehow violate the United States Constitution. We think they were not. It was not irrational or arbitrary to apply these aggravating circumstances to the facts of this case.

77 L.Ed.2d, at 1142. It is difficult to imagine this court putting the stamp of ineffectiveness on a lawyer for failure to argue issues that have been found to be meritless by all reviewing courts.

Respondent denies the existence of any conflict. However, at this late date, any rights stemming from any such alleged conflict have been waived. Petitioner requested the appointment of Mr. Jackson as his attorney with the knowledge that he would serve as appellate counsel for his friend Dougan as well. Bonds v. Wainwright, 564 F.2d 1125, 1131 (5th Cir. 1977), vacated on other grounds, 579 F.2d 317 (5th Cir. 1978). This is especially true of appellate counsel because as the court pointed out "[w]hile we might hesitate to give effect to a waiver that purported to permit counsel to fail to prepare a defense, a waiver of effective assistance on appeal is far less drastic." Id. at 1131. Respondent suggests, even affirmatively alleges, that the nature of this court's extraordinary review of capital sentencing makes this distinction even greater. Indeed, in United States v. Garcia, 517 F.2d 272 (5th Cir. 1975), where there was an actual conflict of interest, the court said that the right to waive counsel altogether allows codefendants to "waive the right to have their retained counsel free from conflicts of interest." Id. at 277.

III.

Respondent has no quarrel with petitioner's claim that an appellant who is deprived of effective assistance of appellate counsel is entitled to some measure of relief. However, respondent vehemently disputes the merit of the assertion that petitioner was denied such assistance.

The effectiveness of such representation must be judged in light of the principles adopted by this court in Knight v. State, 394 So.2d 997 (Fla. 1981). First, the specific omission or overt act upon which the claim of ineffective assistance of counsel is based must be detailed in the appropriate pleading. Second, the defendant must show that the specific omission or overt act was a substantial and serious deficiency measurably below that of competent counsel. Third, the defendant must show that such serious deficiency, when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings. Fourth, if a prima facie showing of prejudice is made, the state may rebut by showing beyond a reasonable doubt that there was no prejudice in fact, even if a constitutional violation has been established.

Measured against these principles, respondent submits that the only specific omission alleged in the petition is the alleged lack of attention given to the sentencing proceedings in the brief filed on direct appeal. In an effort to show that the second requirement set forth in Knight has been met, petitioner cites Passmore v. Estelle, 607 F.2d 662 (5th Cir. 1979). But in Passmore, the court was understandably appalled at the fact that the entire brief filed on behalf of the appellant comprised only one sentence. This is comparable to what happened in High v.

Rhay, 519 F.2d 109 (9th Cir. 1975), where the appellant's brief consisted of a one sentence "argument" which merely invited the appellate court to read the transcript in order to determine whether appellant's guilt had been proven beyond a reasonable doubt. See also Wright v. State, 269 So.2d 17 (Fla. 2d DCA 1972), in which the public defender was held ineffective for assuming the role of a judge by filing a one sentence statement that the appeal had no merit, citing Anders v. California, 386 U.S. 738 (1967). The same thing occurred in Ross v. State, 287 So.2d 372 (Fla. 2d DCA 1973). Now, please compare the seventy-page brief containing twenty-seven separate points on appeal that was filed on petitioner's behalf by the counsel whom he now charges with rendering ineffective assistance. It simply defies reason to say that any case cited by petitioner supports his contention that the extensive brief filed by his appellate counsel constituted a substantial and serious deficiency measurably below that of competent counsel.

In an attack on Mr. Jackson's professional life, the petition on p. 11 thereof brings to light an interesting fact. It is alleged that 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) This is indeed interesting because under the mandate of Rule 9.140(f), Florida Rules of Appellate Procedure, this court is required to review all rulings and orders appearing in the record necessary to pass upon the grounds of an appeal. Indeed, the rule states that "[i]n the interest of justice, the court may grant any relief to which any party is entitled." Respondent assumes that this court's judicial discernment as to the competency of counsel is just as sharp as that of Judge Clark. And it can be safely assumed that had this court found that Mr. Jackson's appellate representation

of petitioner was a "substantial and serious deficiency measurably below that of competent counsel," it would have said so. Knight, 394 So.2d, at 1001. The fact that this court has never intimated in any opinion that Mr. Jackson's representation of petitioner was anything other than effective assistance of counsel is convincing evidence that petitioner's appellate representation met the Knight standard.

The federal standard for the determination of an effectiveness of counsel issue is well known. The Sixth Amendment right to counsel entitled an accused in a criminal proceeding to representation by an attorney reasonably likely to render and rendering reasonably effective assistance. Washington v. Estelle, 648 F.2d 276 (5th Cir. 1981); Goodwin v. Balkcom, 684 F.2d 794, 804 (11th Cir. 1982). However, this Sixth Amendment right does not include a guarantee of a "meaningful attorney client relationship." Morris v. Slappy, ____U.S.____, 77 L.Ed.2d 987 (1983). It is submitted that the adequacy of representation which petitioner recieved can only be decided on an evaluation of services rendered in his behalf. Indeed, a retrospective examination of a lawyer's representation for the purpose of determining whether same was free from error would surely exact a higher measure of competency than the prevailing standard. McMann v. Richardson, 397 U.S. 759 (1970). As the court said in United States v. White, 524 F.2d 1249 (5th Cir. 1975), "the best lawyers have to take the facts as they are and can only do their best to present those facts in any available favorable light." Id. at 1253. And it should be kept in mind that the law does not require that a defendant receive a perfect trial, but only a fair one. It is submitted that this principle articulated in Michigan v. Tucker, 417 U.S. 433 (1974), is equally applicable to appeals. The perspective from which a claim of ineffective assistance is to be evaluated is whether counsel's assistance

falls below the constitutionally minimum level. This ultimate question is not whether the representation was zealous or might have been better. Pollinzi v. Estelle, 628 F.2d 417 (5th Cir. 1980); United States v. Garcia, 625 F.2d 162 (7th Cir. 1980); Dyer v. Crisp, 613 F.2d 275 (10th Cir. 1980), en banc; Herring v. Estelle, 491 F.2d 125 (5th Cir. 1974). It is simply not enough to find that counsel's actions did not satisfy abstract norms or satisfy a checklist of general standards which are suggested as "should normally be dones." "Below the minimum level" must mean just that. It does not mean below the average. For, to be below average would mean that counsel, by definition, would not satisfy the constitutional standard half of the time. United States v. Decoster, 624 F.2d 196 (D.C. Cir. 1979), en banc, cert.denied, 100 S.Ct. 302 (1979); Cooper v. Fitzharris, 586 F.2d 1325 (9th Cir. 1978), en banc.

The burden of proof to establish ineffectiveness and resultant prejudice is on the petitioner. Adams v. Wainwright, 709 F.2d 1443 (11th Cir. 1983); Washington v. Strickland, 693 F.2d 1243, 1258, 1262 (5th Cir. Unit B 1982)(en banc), cert. granted, ____U.S.____, 103 S.Ct. 2451 (1983); Adams v. Balkcom, 688 F.2d 734, 738 (11th Cir. 1982). In sum, petitioner has failed to show that his appellate counsel was ineffective for any reason. He has failed to show, not as a matter of speculation but as a demonstrated reality, that he was prejudiced in any way by his counsel's conduct. Webster v. Estelle, 505 F.2d 926 (5th Cir. 1975); Davis v. State of Alabama, 596 F.2d 1214 (5th Cir. 1979); Winfrey v. Maggio, 664 F.2d 550 (5th Cir. 1981). It is true that some of the things that Mr. Jackson did in the handling of petitioner's appeal might not have been done by his present counsel and, indeed, petitioner's present counsel may have done some things that Mr. Jackson would not have done. But as the Fifth Circuit pointed out in Williams v. Beto, 354 F.2d 698 (5th

Cir. 1965), it is basically unreasonable to judge an attorney by what another would have been, or says he would have done, with the excellence of 20/20 hindsight. For example, petitioner alleges that Mr. Jackson should have conferred with him more extensively about the legal issues to be presented on appeal. However, there is no constitutional requirement that appellate counsel so do. Hooks v. Roberts, 480 F.2d 1196 (5th Cir. 1973). As previously noted herein, petitioner complains that appellate counsel did not challenge many alleged sentencing errors. However, the omission of alleged points of error that are deemed meritless by appellate counsel does not of itself constitute ineffective assistance. Mendiola v. Estelle, 635 F.2d 487 (5th Cir. 1981). And to reiterate, those alleged sentencing errors were demonstrated to be without merit. Barclay v. Florida, supra. And as to the existence of any conflict of interest that would have stamped Mr. Jackson's appellate representation of petitioner as ineffective, let it be known that petitioner has wholly failed to show that his appellate counsel actively represented conflicting interests. In the case of United States v. Panasuk, 693 F.2d 1078 (11th Cir. 1982), the court had occasion to address the issue of conflict of interest at the trial level and it is submitted that the standard is equally applicable to appellate representation. Note the following:

> The Supreme Court addressed this issue in Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980). In that opinion the Court discussed with approval its earlier ruling in Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), quoting: "[u]ntil a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." 446 U.S. at 349-50, 100 S.Ct. at 1718-19. The Court held: "[i]n order to demonstrate a violation of his Sixth Amendment rights, a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." id., 446 U.S. at 350, 100 S.Ct. at 1719. While there has been some argument concerning the exact meaning of "adversely

> affected" as used by the Court, see, e.g., Baty v. Balkcom, 661 F.2d 391 (5th Cir. 1981); id. at 398, (Fay, J., concurring specially), there is no question that active representation of conflicting interests is required to establish a violation of Sixth Amendment rights. The mere suggestion (denied by Mr. Varon and unsupported by the evidence) by the appellant that Mr. Varon was actually hired by and loyal only to Mr. Pollack who was not even indicted cannot amount to "actively representing conflicting interests." Further, there is no showing that even an active and conscious representation of Mr. Pollack by Mr. Varon would conflict with representation of the appellant.
>
> We need not reach the question how much harm a defendant must show when there is an actual conflict of interest to prove that his Sixth Amendment rights have been violated, because we decide that there has been no active representation of conflicting interests by Mr. Varon. "The possibility of conflict is insufficient to impugn a criminal conviction." Sullivan, supra, 446 U.S. at 350, 100 S.Ct. at 1719.

Id. at 1080, 1081. Finally, please see Jones v. Barnes, ____U.S.____, 77 L.Ed.2d 287 (1983), for the proposition that a defense attorney assigned to prosecute an appeal from a criminal conviction does not have a constitutional duty to raise every non-frivolous issue requested by the defendant.

The "Affidavits"

It is the position of respondent that there is no need for expert testimony in affidavit form or otherwise in this case. True, if scientific, technical, or other specialized knowledge would be helpful to this court in determining the issues raised in this proceeding, then the affidavits submitted by petitioner would be appropriate. Section 90.702, F.S. (1981). It is submitted, however, that the one-sided views of lawyers who have not discussed this case with Mr. Jackson and whose opinions as to the existence of conflict rest in large part on the affidavit of pertitioner cannot suffice to supply what is conspiculously absent from the appellate record in Barclay, 343 So.2d 1266, i.e., an actual conflict of interest [that] adversely affected"

Mr. Jackson's appellate performance. United States v. Panasuk, supra, at 1080.

The affidavits are remarkably similar and are found in the appendix submitted by petitioner, Vol.I, section E, pp. 1-26. In none of the affidavits is there to be found any allegation that the affiant personally talked with Mr. Jackson concerning the issues raised on appeal. Consequently, none of the affiants even purport to know or understand the tactics of Mr. Jackson in raising the issues set forth in his appellate brief. As to the facts of the attorney-client relationship between Mr. Jackson and petitioner, all of the affidavits except those of Lacy Mahon, Jr., and William H. Manness, are based on the self-serving allegations found in petitioner's affidavit. Interestingly, the one person who would have been aware of any conflict of interest is Deitra Micks. Ms. Micks served as co-counsel with Mr. Jackson representing Jacob Dougan during his trial for the murder of Stephen Orlando. But an examination of her affidavit (App.Vol.I., sec.C, pp. 1-6) reveals nothing about any alleged conflict of interest. This is interesting because Ms. Micks is the only living person that was in a position to know of the existence of any conflict of interest and her affidavit is completely silent on the issue. In fact, the affidavit expresses no opinion as to the competency of Mr. Jackson's appellate representation of petitioner and, if anything, is favorable to him.

The affidavit of petitioner (App.Vol.I, sec.B, pp. 1-5) is an interesting document, not only because of the self-serving allegations found therein, but also for its attempt to negate the obvious effect of petitioner's sworn motion to appoint counsel in the person of Ernest D. Jackson, Sr. (R 258-260). The court's attention is directed to the footnote on p. 2 of the affidavit which, in effect, says that petitioner did not sign and swear to

the motion for appointment of counsel on April 15, 1975. Respondent says that this is nothing more than a convenient lapse of memory for the purpose above stated.

One final comment as to the affidavits submitted by the nine lawyers: none of the opinions expressed in the affidavits are based on a reading of the trial transcript in an effort to learn the basis for the points raised by Mr. Jackson on petitioner's appeal. The affidavits do not say that the points raised were frivolous or not well taken. In sum, the affidavits do not challenge the efficacy of what Mr. Jackson did do, but only point out what he supposedly "should have done" or what they, the affiants, would have done.

The petitioner seeks to portray Mr. Jackson as a man of ill health, harassed by creditors, and beset by domestic troubles. Then by some feat of mental gymnastics, petitioner translates Mr. Jackson's personal problems into a conflict of interest resulting in ineffective assistance of appellate counsel. This falls far short of directing this court's attention to any active conflict of interest appearing in the record and simply ignores Mr. Jackson's appellate strategy of trying to stay away from the heinous aspects of the crime by raising evidentiary, discovery, and venue issues as a basis for reversal. It would have been pointless for Mr. Jackson to have attacked the validity of the aggravating factors found by the trial judge. It would have been pointless to argue that the facts of the case did not justify the trial judge in overriding the jury advisory and imposing the death penalty. Subsequent appellate review by this court and the United States Supreme Court prove the soundness of his judgment. True, Mr. Jackson did not prevail in his effort to win a new trial for petitioner and codefendant Dougan. But then neither hindsight nor success is the measure for determining adequacy of legal representation. United States ex rel. Reis v.

Wainwright, 525 F.2d 1269 (5th Cir. 1976); Ellis v. State of Oklahoma, 430 F.2d 1352 (10th Cir. 1970), cert.denied, 401 U.S. 1010 (1971). At best, petitioner's assertions show only a conjectural possibility of ineffective assistance. This does not meet the burden of proof of showing ineffectiveness of counsel by a preponderance of the evidence. Marino v. United States, 600 F.2d 462, 464 (5th Cir. 1979). Much less has petitioner directed this court's attention to ineffective assistance as a "demonstrated reality." Webster v. Estelle, supra, at 928. In summary, it is respectfully submitted that this court should view Mr. Jackson's appellate strategy "from the perspective of counsel, taking into account all of the circumstances of the case, but only as those circumstances were known to him at the time in question." Washington v. Watkins, 655 F.2d 1346, 1356 (5th Cir. 1981).

Since petitioner has sought to cover his appellate counsel with mud, it is fitting that respondent remind this court that Mr. Jackson was admitted to practice in this state on August 10, 1953, and on the date of his death, February 3, 1979, he was a member of the Florida Bar and in good standing. Mr. Jackson practiced law in this state for approximately twenty-six (26) years and during that time he had only one complaint filed against him in 1971. No action was taken on this complaint by the Florida Bar. And as far as his financial straits because of a dwindling law practice, petitioner admits that at the time of his death there were 2,500 open files in his office. Petition, p. 11. This doesn't sound like an attorney who is on the brink of bankruptcy because of lack of business.

III.

Petitioner urges this court to conclude that under the rule announced in Vasil v. State, 374 So.2d 465 (Fla. 1979), his death

penalty must be struck down since this court voted 3-3 on his motion for rehearing filed in Barclay, 411 So.2d 1310. This court in Vasil, rather than stating a new procedure for review of capital cases, merely restated the obvious, i.e., that to legally affirm the imposition of the death penalty on appeal, four members of this court must agree. Petitioner has fastened upon that language and has attempted to employ it to persuade this court that a 3-3 vote on a motion for rehearing violates this "rule". The allegation is made that at one time or another, four of the current members of this court have voted "to reject his death sentence." (Petition, p. 72) This is simply not the case. Only one current member of this court, Justice Boyd, has spoken out against the imposition of the death sentence in the instant case. Voting on a motion for rehearing is vastly different from voting on the propriety of a death sentence, and it is that obvious distinction which causes petitioner's claim to fail.

Reading Vasil, it at once becomes apparent that this court was faced with a situation in which it was impossible to affirm the death sentence and also follow the mandate of Proffitt v. Florida, 428 U.S. 242 (1976). Two justices voted to reverse the conviction; two members who would affirm the conviction could not vote to affirm the death sentence; and the remaining two participating members would affirm both judgment and sentence. Under Proffitt, as petitioner has pointed out, the Florida Supreme Court is charged with the duty of reviewing the propriety of the imposition of the death penalty. Faced with such diverse opinions of the justices, along with the fact that only two of the participating six justices would uphold the sentence, the court in Vasil was left with no alternative but to remand with directions to impose a life sentence.

While this court has repeatedly stated its duty to ensure that the death penalty is not imposed in an arbitrary and capricious manner, there is no support for petitioner's theory that after this court has affirmed the conviction and sentence, it must again decide the same issues in a motion for rehearing.

IV.

Petitioner's argument under this point is no longer, if it ever was, a viable one. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), cert.denied, 70 L.Ed.2d 407 (1981); Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983), cert.denied, 78 L.Ed.2d 176 (1983).

In his argument under this point, petitioner urges that in his post-Gardner, 430 U.S. 349 (1977), appeal, he was not afforded a full review. This is incorrect. On June 22, 1979, October 23, 1979, and April 18, 1980, plenary hearings were held in the trial court in response to this court's order in Barclay v. State, 362 So.2d 657 (Fla. 1978). The court's order expressly limited the scope and purpose of the hearing as follows:

> To assure that the sentencing procedure in this case satisfies the constitutional command of the Due Process Clause, the death sentences are vacated and the cause is remanded to the trial court. The court is directed to provide a hearing at which the defense has the opportunity to rebut any of the information contained in the presentence investigation reports, whether in the confidential portion of the report or any other part. This direction, of course, requires that the defense have access to the reports-in-full with sufficient time before the hearing to prepare rebuttal. Following the hearing the court is to impose sentences. If death is imposed as to either appellant there will be available in this Court review, limited to matters related to compliance with this order.

Id. at 658.

Temporary jurisdiction was thus relinquished for the sole purpose of affording petitioner an opportunity to respond to the presentence investigation report that had been used at his

initial sentencing. This was done. Petitioner was given the opportunity of calling any number of witnesses for the purpose of rebutting anything in the P.S.I. that he deemed harmful or incorrect. He called one witness, Deputy Reeves, whose testimony rebutted nothing in the P.S.I. At the conclusion of the hearings, the trial court, having heard nothing to merit relief under the rationale of Gardner, or in mitigation of sentence, reimposed the death sentence. On the post-Gardner appeal, this court limited its review to a determination of whether petitioner had presented any evidence at the hearings which would warrant a finding that the earlier determination of the court in Barclay, 343 So.2d 1266 (Fla. 1977), or that of the trial judge in reimposing the death sentence was erroneous. In refusing to abrogate the law of the case, the court spoke as follows:

> Barclay now challenges the reimposition of a death sentence, primarily by argument against the findings previously reviewed here and affirmed. We cannot accept counsel's suggestion that we abrogate the "law of the case." See Dougan v. State, 398 So.2d 439 (Fla. 1981). The dictates of Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), have been met, and no defect in the original sentencing order has been identified as stemming from improper material in the P.S.I. There being no reason to reconsider the matters previously analyzed, we again affirm the trial judge's sentence of death.

Barclay, 411 So.2d 1310, 1311. The Supreme Court of the United States in Barclay v. Florida, supra, noted that this court in petitioner's post-Gardner appeal refused to abrogate the law of the case and tacitly approved the action of this court in so doing. Barclay v. Florida, 77 L.Ed.2d, at 1141, 1142.

The opinion in Barclay, 411 So.2d 1310, cites Dougan v. State, 398 So.2d 439 (Fla. 1981). This simply means that the court in petitioner's post-Gardner appeal followed the same procedure as it did in Dougan v. State, supra. This procedure is fully explained in footnote 2 of the Dougan opinion which reads as follows:

> Our disposition of this proceeding in accordance with the limitations imposed at the time we remanded this proceeding to the trial judge makes unnecessary any consideration of multiple challenges which Dougan raises to the proceeding below, to the impostion of the death penalty, to the motion denials by the trial judge, and to the absence of a resentencing jury. That the disposition of these matters is unnecessary to this proceeding does not mean that we have not reviewed or considered the arguments presented by Dougan's counsel in this appeal. We have, and the fact is that each argument presented by Dougan's counsel is fully, adequately and accurately refuted or rebutted by the contrary contentions made in appellee's brief.

Dougan, 398 So.2d, at 441.

Petitioner's claim that this court failed to follow the dictates of Proffitt on his post-Gardner appeal is groundless. This court did not say that the sentence was not reexamined, nor did it say that the new sentencing order was not considered; it simply said that the argument against findings previously reviewed and affirmed is governed by the law of the case.

In Dobbert v. State, 375 So.2d 1069 (Fla. 1979), this court explicitly mentioned each of the issues raised by appellant on direct appeal simply because the trial court on remand under Gardner, vacated the entire sentence and afforded defense counsel a new sentencing proceeding on all issues. In the instant case, the trial court specifically directed counsel that the evidentiary matters were to be restricted to a rebuttal of the P.S.I. not previously furnished to counsel. Consequently, the new sentencing proceeding in Dobbert resulted from the order of the trial judge, not this court.

Finally, petitioner claims that the state's concession that one of the aggravating circumstances found by the trial court was erroneous makes it imperative that this court review the sentence anew. While this contention seems unrelated to the allegation that this court improperly imposed "the law of the case,"

respondent notes that under Elledge v. State, 346 So.2d 998 (Fla. 1977), a resentencing hearing is necessary only where a mitigating circumstance has been found. Sub judice, the trial judge expressly held that no mitigating circumstances were found. Therefore, petitioner's claim that he is now entitled to a review before this court is patently without merit.

V.

Each and every of the allegations set forth in the petition challenging the legality of petitioner's custody not heretofore specifically answered and/or denied are hereby severally denied and the contrary allegation lodged.

Respondent holds petitioner in lawful custody pursuant to commitments issued by the Circuit Court, in and for Duval County, Florida, dated April 10, 1975, and April 18, 1980, and are attached hereto as Exhibits 1 and 2 respectively.

CONCLUSION

In an effort to sustain the requisite burden of proof with a necessary showing of resultant prejudice, petitioner has put on public display Mr. Jackson's private life, his health problems, marital problems, and resultant financial difficulties. Mr. Jackson is now dead and cannot defend himself.

Petitioner's allegations to the contrary notwithstanding, he did receive effective assistance of counsel on his direct appeal and received a meaningful review by this court. The Supreme Court of the United States agreed that petitioner's death sentence was imposed in harmony with federal constitutional requirements and the following language quoted from the concurring opinion of Mr. Justice Stevens forms an appropriate note upon which to conclude this response.

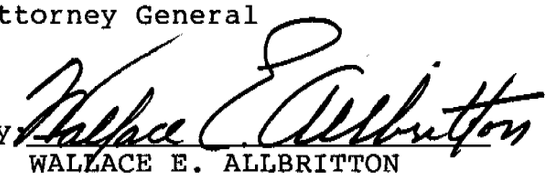
> After giving careful consideration to this case and others decided by the Supreme Court of Florida, I am convinced that Florida has retained the procedural safeguards that supported our decision to uphold the scheme in Proffitt v. Florida, supra, and that the death sentence imposed upon Elwood Barclay is consistent with federal constitutional requirements.

Barclay v. Florida, 77 L.Ed.2d, at 1150.

The petition for writ of habeas corpus should be denied.

Respectfully submitted:

JIM SMITH
Attorney General

By: 
WALLACE E. ALLBRITTON
Assistant Attorney General

AND

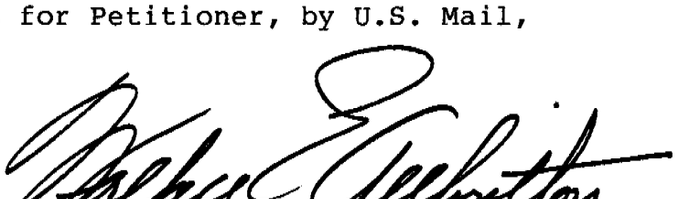

GREGORY C. SMITH
Assistant Attorney General

COUNSEL FOR RESPONDENT

The Capitol
Tallahassee, FL 32301-8048
(904) 488-0290

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have furnished a copy of the foregoing Response to Mr. Talbot D'Alemberte, STEEL HECTOR & DAVIS, 1400 Southeast Bank Building, Miami, Florida 33131, and to Mr. James M. Nabrit, III, 10 Columbus Circle, Suite 2030, New York, New York 10019, Attorneys for Petitioner, by U.S. Mail, this 10th day of January, 1984.


WALLACE E. ALLBRITTON
Assistant Attorney General

of Counsel

FORM DC-9 STATE OF FLORIDA REVISED 1-68

UNIFORM COMMITMENT TO CUSTODY OF DIVISION OF CORRECTIONS

DIV. S

CIRCUIT

(Court)

DUVAL County. FALL Term, 19 74

Conviction for MURDER IN THE FIRST DEGREE
(Offense)

Date of conviction MARCH 4TH, A. D., 1975

Date of sentence imposed APRIL 10TH, A. D., 1975

Term of sentence DEATH BY ELECTROCUTION AT FLORIDA STATE PRISON

O 46621

STATE OF FLORIDA,

Plaintiff,

APR 16 1975

vs.

ELWOOD CLARK BARCLAY

Defendant.

"Case No. 74-4139 CF "

BLACK MALE

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA, TO THE SHERIFF OF SAID COUNTY AND THE DIVISION OF CORRECTIONS OF SAID STATE, GREETING:

The above named defendant having been duly charged with the above named offense in the above styled Court, and he having been duly convicted and adjudged guilty of and sentenced for said offense by said Court, as appears from the attached certified copies of

INDICTMENT

(Indictment) (Information)

judgment and sentence, which are hereby made parts hereof;

Now, therefore, this is to command you, the said Sheriff, to take and keep and, within a reasonable time after receiving this commitment, safely deliver the said defendant into the custody of the Division of Corrections of the State of Florida; and this is to command you, the said Division of Corrections, by and through your director, superintendents, wardens, and other officials, to keep and safely imprison the said defendant for the term of said sentence in the institution in the state correctional system to which you, the said Division of Corrections, may cause the said defendant to be conveyed or thereafter transferred. And these presents shall be your authority for the same. Herein fail not.

WITNESS the Honorable R. HUDSON OLLIFF

Judge of said Court, as also S. MORGAN SLAUGHTER

Clerk, and the Seal thereof, this the day of APR 10 1975, 19

S. MORGAN SLAUGHTER

Clerk of said Court

BY: P. J. Nash DEPUTY CLERK

(To be used in committing defendants under indeterminate sentences as well as under sentences of imprisonment for definite periods.)

Ex. 1

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