Prisoner's Name: MACK RUFFIN, JR.
Prisoner's Number: 065797
Prisoner's Confinement: Florida State Prison,
Starke, Florida

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
APR 4 1984
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

MACK RUFFIN, JR.,

Petitioner,

- v -

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Offender Rehabilitation, and RICHARD DUGGER, Superintendent, Florida State Prison at Starke, Florida,

Respondents.

Case No. 65117

PETITION FOR A WRIT OF HABEAS CORPUS

To the Honorable Justices of the Supreme Court of the State of Florida:

1. Petitioner seeks a writ of habeas corpus pursuant to Article V, Sections 3(b)(1), (7) and (9) of the Constitution of the State of Florida and Rule 9.030(a)(3) of the Florida Rules of Appellate Procedure. Petitioner seeks relief in this Court because the issues raised in this petition concern the Court's appellate review of petitioner's case.

2. As described more fully below, petitioner was denied the effective assistance of appellate counsel in proceedings before this Court at the time of his direct appeal. Counsel failed to raise, or to bring to the attention of this Court in any way, issues which, if raised, would have required the reversal of petitioner's conviction and death sentence, and a new trial.

Since the ineffective assistance of counsel allegations stem from acts or omissions before this Court, this Court has jurisdiction. Knight v. State, 394 So. 2d 997, 999 (Fla. 1981).

3. Florida law has consistently recognized that the appropriate remedy where the appellate right is thwarted due to the omissions or ineffectiveness of appointed counsel is a belated appeal. See, e.g., State v. Wooden, 246 So. 2d 755, 756 (Fla. 1971); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); Ross v. State, 287 So. 2d 372, 374-75 (Fla. 2d DCA 1973); Davis v. State, 276 So. 2d 846, 849 (Fla. 2d DCA 1973), affirmed, 290 So. 2d 30 (Fla. 1974). The proper means of securing such a belated appeal is a petition for a writ of habeas corpus, filed in the appellate court empowered to hear the direct appeal. See, e.g., Baggett, supra, 229 So. 2d at 244; cf. Ross, supra, 287 So. 2d at 374-75; Powe v. State, 216 So. 2d 446, 448 (Fla. 1968).

4. Accordingly, the habeas corpus jurisdiction of an appellate court is properly invoked to review "all matters which should have been argued in the direct appeal," Ross v. State, supra, 287 So. 2d at 375-76, where such matters were originally overlooked or otherwise not pursued by appellate counsel. See Ross, supra, at 374; Davis, supra, 276 So. 2d at 849.

5. The name and location of the court which entered the judgment of conviction and sentence, the appeal from which is under attack are:

a. The Circuit Court of the Fifth Judicial Circuit in and for Sumter County, Florida.

b. In Palatka, Putnam County, Florida. (There was a change of venue in the trial, from Sumter to Putnam counties).

6. The date of the judgment of conviction is July 21, 1978.

7. The sentence is that Mack Ruffin, Jr., be put to death. His execution date was stayed by order of the United States District Court, Middle District of Florida on October 1, 1982. The stay has been continued by order of the same court entered March 6, 1984.

8. The nature of the offense involved is that petitioner was charged with first degree murder, in violation of Florida Statutes Annotated § 782.04, and with sexual battery, in violation of Florida Statutes Annotated § 794.011, in that he allegedly raped and murdered Karol Hurst.

9. Petitioner's plea was not guilty.

10. Trial of the issues of guilt or innocence and of sentence was had before a jury.

11. Petitioner did not testify at trial during either the guilt/innocence phase or during the penalty phase.

12. Petitioner appealed his conviction and death sentence.

13. The facts of the petitioner's appeal are as follows:

a. Mack Ruffin, Jr., filed a motion for a new trial immediately after judgments and sentences were

filed on July 21, 1978. That motion was denied on August 3, 1978.

b. Petitioner filed notices of appeal from both convictions on August 29, 1978. The murder conviction notice was filed with the Supreme Court of Florida and the sexual battery conviction notice was filed with the Second District Court of Appeal. The Second District Court of Appeal then transferred the latter appeal to the Supreme Court on May 1, 1979.

c. The judgment and sentences were affirmed by the Supreme Court of Florida on March 26, 1981. 397 So. 2d 277. However, the Chief Justice and Jutices England and McDonald dissented with respect to the sentence of death.

d. A petition for rehearing was denied on May 15, 1981.

e. Petitioner filed a petition for writ of certiorari with the Supreme Court of the United States on July 13, 1981. The Court denied petitioner's petition on October 5, 1981, at 454 U.S. 882. (Justices Brennan and Marshall were of the opinion that certiorari should have been granted.)

14. Other than the appeals described in paragraph 13 above, the only petitions, applications, motions, or proceedings filed or maintained by Mack Ruffin, Jr. with respect to the judgment of July 21, 1978 of the Fifth Judicial Circuit of Florida are those described below in paragraph 15.

15. (a) On June 29, 1982, Mack Ruffin, Jr., pursuant

to Florida Rules of Criminal Procedure, Rule 3.850, filed in the Circuit Court for the Fifth Judicial Circuit a motion to vacate, set aside, or correct the conviction and sentence in this case, and concomitant motions, inter alia, for the admission of counsel pro hac vice, appointment of counsel, a psychiatrist and an investigator, and discovery.

(b) After a clemency hearing held on June 23, 1982, the Governor signed a death warrant on September 9, 1982, setting petitioner's execution for October 6, 1982.

(c) On September 13, 1982, Ruffin moved for a stay of execution of judgment pending a fair hearing on, and resolution of, his Rule 3.850 motion. Both the 3.850 motion and the stay were denied on September 17, 1982. On that day the Court also denied motions for the appointment of a psychiatrist and an investigator, and for discovery. The Court continued until further order Ruffin's motion for the appointment of counsel.

(d) On September 20, 1982, Ruffin filed a Notice of Appeal with the Circuit Court of Appeals for the Fifth Judicial District of Florida; concomitantly, Ruffin filed in the Supreme Court of Florida an appeal of the denial of his Rule 3.850 motion, and his ancillary motions for discovery and the appointment of a psychiatrist and an investigator, and a stay of execution. On that day the Supreme Court of Florida ordered Ruffin's brief on appeal to be filed on September 22, 1982. On September 29, 1982 the Court denied petitioner's appeal, Justice McDonald dissenting. 420 So. 2d

591.[1]

(e) On September 29, 1982, petitioner filed a petition for a writ of habeas corpus pursuant to 28 U.S.C.A. § 2254 in the United States District Court for the Middle District of Florida, Ocala Division. On October 1, 1982, the Court stayed petitioner's execution.

(f) On October 29, 1982, respondents filed a motion to dismiss on the ground that petitioner had not exhausted available state remedies for his claim of ineffective assistance of appellate counsel. Respondents asserted that petitioner could file a habeas corpus petition before this Court to air the unexhausted claim. Petitioner opposed the motion.

(g) Petitioner had not had an opportunity to

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1 Should the Court so order, (Fla. R. App. P. 9.100 (g)), petitioner will file with this Court (1) the record on direct appeal to the Supreme Court of Florida; and (2) the record on appeal from the denial of the 3.850 motion.

The record on direct appeal to the Supreme Court of Florida consists of eleven volumes. Volumes I through III are primarily pleadings from the Circuit Court's file. The page numbers are 1 through 471 and will be designated by "R" in this brief. Volumes IV through XI are the transcripts of the trial and pre-trial hearings. Page numbering recommences with volume IV, running 1 through 1537. These will be designated "TR" in this petition. The Circuit Court of Florida took judicial notice of the trial record during the September 15, 1982 Rule 3.850 hearing.

A supplemental record was sent to the Supreme Court of Florida on July 26, 1979. It consists of one volume with pages running 1 through 47. Reference to this record will be designated "SR".

In May 1979, the Second District Court of Appeal transferred an appeal from the sexual battery judgment and sentence in this case to the Supreme Court of Florida. A duplicate eleven volume record on appeal accompanied the transfer. Portions of that record are not contained in the original record filed with the Supreme Court of Florida. Those portions will be referred to by "DCR".

consolidate an original habeas corpus petition challenging the effectiveness of his appellate counsel on direct appeal with his appeal from the denial of his Rule 3.850 motion in the few days allotted for briefing between September 20, 1982 and September 22, 1982. At that time, petitioner's counsel focused on preparing the appeal from the denial of the Rule 3.850 motion, and in obtaining a stay of execution. Subsequently, petitioner's counsel opposed the remand to this Court from the Federal District Court for purposes of exhaustion, as he sought expeditious resolution of the issues, and attempted to avoid further delay.

(h) On March 6, 1984, however, the Honorable John H. Moore denied respondents' motion to dismiss but required that petitioner amend the federal petition to eliminate reference to the ineffective assistance of appellate counsel point and commence a habeas corpus proceeding before this Court raising the issue. The Court further abated the federal proceedings pending resolution of the State petition for habeas corpus brought before this Court and provided for continuation of the stay of execution. The leave to amend, abatement of proceedings, and continuation of the stay was conditioned on petitioner's filing the instant petition within 30 days. Petitioner's current counsel has at all times moved promptly and sought to avoid unnecessary delay.

16. Petitioner Mack Ruffin's conviction and sentence were obtained and imposed in violation of his rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, for numerous reasons including the reasons set forth more fully below. These errors were compounded on appeal, when appellate counsel omitted to bring them to this Court's attention for review.

The evidence at trial was as follows:

17. Desland Culpepper, a neighbor, saw Karol Hurst in a Pantry Pride store at about 3:00 p.m. on February 21, 1978. (TR 487) She talked to Karol in the store and stood behind her at the check-out counter. (TR 487-490) At trial, Culpepper described several grocery items Karol bought, and noted that the cashier had made an error in Karol's charges. (TR 488-490) Karol's husband Benjamin Hurst testified that he had left his 1975 Plymouth Fury automobile with his wife on that day. (TR 508)

18. At about 7:00 P.M., two black males driving a light colored Plymouth were observed at a Stop and Go store in Hernando County. (TR 543) Charlotte Best, the store manager, became suspicious of the two men and asked two of her regular customers to notify the police. (TR 546) A substation for the Hernando County Sheriff's Department was located just across the street. (TR 545, 551)

19. The two men remained in the store approximately 20 to 25 minutes (TR 548, 602), purchased a teddy bear and some socks (TR 548, 558, 607) and left at the same time as two of the regular customers, Jerry Brannen and her daughter, Regina. (TR 547, 608, 620, 629) The Brannens saw the men approach a deputy who was standing by a patrol car holding his shotgun. (TR 621, 622, 630-631) Jerry Brannen also saw the light colored car parked in a vacant lot adjacent to the building. (TR 620)

20. Nancy Boone, a dispatcher at the Sheriff's Department substation, had received a call from Deputy Lonnie Coburn requesting a check on an auto license number. She ran

the number through the computer and related to Coburn that the car was a 1975 Plymouth registered to Benjamin Hurst. (TR 623-628)

21. As soon as the two men left the store, Charlotte Best telephoned the Sheriff's Department substation across the street. (TR 551) After the conversation, she heard what she thought was a gunshot. She went outside to the side of the store and saw Coburn, who had been shot, lying on the ground by his patrol car with Deputy Leonard Mills assisting him. (TR 554-556, 634-635) The beige colored car parked by the trash bin was no longer there. (TR 546, 552-553)

22. Deputy Tom Nolin arrived a few minutes later. (TR 667-671). He and Mills discovered a .38 caliber pistol that did not belong to Coburn beside his body. (TR 634-635, 670). They also noticed a teddy bear and 2 bundles of socks close to Coburn. (TR 559) And, just after his arrival, Mills saw a light colored car speeding south on U.S. 301. (TR 661)

23. Pursuant to a dispatch, a Pasco County deputy, Michael Janes, began following the 1975 Plymouth. (TR 671-673) He followed the car at 55 m.p.h. for over a mile, when a high speed chase began. (TR 673-674) The deputy identified the occupants of the car only as two black persons (TR 674), and the one on the passenger's side fired three shots at the deputy with a chrome plated handgun. (TR 675) The chase lasted only four or five minutes before the car was abandoned in an orange grove. (TR 674-676) Deputy Janes stayed with the car while the two black persons fled. (TR 677-678)

24. Several items were recovered from the automobile.

One was a chromed, .357 magnum pistol which was proven to belong to Deputy Coburn. (TR 686-689, 890-894) Another was a maroon lady's handbag identified as the one that Karol Hurst carried on that day. (TR 484, 895) State officers later found in the car some groceries shown to be consistent with those purchased by Hurst, a receipt for the groceries, a blue wool hat and a woman's stocking. (TR 897-899) (Employees of the Stop and Go had testified that one of the black males in the store wore a wool cap, the other a stocking on his head. (TR 543, 600)) A latent fingerprint, which matched petitioner's[2] left thumb, was lifted from the inside of the passenger window. (TR 907-909, 959-960)

25. Boyd Caudell, a Pasco County deputy, apprehended petitioner in the above-noted orange grove during the night of February 21, 1978. (TR 690-695)

26. Caudell recovered, upon searching petitioner, a cigarette lighter with the name "Ben Hurst" engraved on it. (TR 693-694)

27. Upon information obtained from petitioner and other sources (TR 856-862), several law enforcement personnel proceeded to a location in Sumter County near Webster. (TR 757-759, 819-827)

28. In a wooded area, they discovered the body of Karol Hurst lying face down with a bullet hole in the back of her head. (TR 759-760, 771-772, 819) The bullet had been fired from the .38 caliber pistol found beside Lonnie Coburn in Hernando County. (TR 633-634, 1065-1073) A torn check drawn

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2 Petitioner is sometimes hereinafter referred to as "Ruffin" or "defendant."

on the Hursts' bank account, found about nine feet from the body, had been made out to "John Doe" in the amount of $20,000, and was dated February 21, 1978 and signed by Karol Hurst. (TR 513-514, 832, 1098-1099)

29. Dr. William Shutze, a pathologist, performed the autopsy on Karol Hurst. (TR 765-777, 868-879) He found an abrasion below the right side of the chin, a contusion on the right nipple, an abrasion and a large bruise on the shoulder, and four abrasions and two contusions on the back of the neck and upper shoulder. (TR 768-770) The injuries to the neck and upper shoulder were the result of at least four blows to that area. (TR 769) Additionally, a bullet wound traversed the left half of the brain and the bullet lodged in the left front sinus. (TR 771) This wound would have produced immediate unconsciousness without pain (TR 771-772), and would have caused death from immediately on impact to within thirty minutes. (TR 772) Shutze also discovered well preserved sperm inside the vagina which indicated sexual intercourse from a few minutes to six hours before death. (TR 877) There were no bruises, lacerations or tears to the outer portion of the genital area or to the vagina. (TR 876)

30. Detective Thomas Mylander of the Hernando County Sheriff's Department obtained a tape recorded statement from petitioner.[3] (TR 1170-1252) After being redacted pursuant to defense objection, the tape was played for the jury. (TR 1170-1248) Petitioner said the following:

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3 Petitioner's statement should not have been admitted into evidence because it was involuntary. (This contention is raised in petitioner's amended federal habeas petition and should have been raised on direct appeal, see infra).

31. Around 9:00 a.m. on February 21, 1978, Freddie Lee Hall approached petitioner about obtaining a car to "do a job." (TR 1229) Petitioner refused to use his car, but the two men drove petitioner's car to Leesburg to the parking lot of the Pantry Pride store. (TR 1229) A lady came out of the store and got into her car. (TR 1229) Hall approached her with a gun, had her slide over in the seat, and drove away with her in her car. (TR 1229) Petitioner followed in his car at first, but later parked it and joined Hall and the woman in her car. (TR 1229) They drove to a secluded spot. (TR 1229)

32. The woman offered to get $20,000 from her brother-in-law if the men would not kill her. (TR 1237) Petitioner told Hall to try to get the money. (TR 1237) Hall told the woman he would let her go if she had sexual intercourse with him. He threatened to kill her if she refused. Both Hall and petitioner had sex with the woman. (TR 1237-1238)

33. Petitioner wanted to let the woman go, but Hall began waving his gun and hollering that, "he done been up one time, . . . he wasn't going back, for nobody." (TR 1239) Petitioner felt powerless to stop Hall, who alone then had a gun. (TR 1239) The two men walked the woman back into a wooded area. Hall told her to write out a check to "John Doe", which she did. (TR 1239-1240) Hall also took a dollar from the woman's purse. (TR 1240) Petitioner said he would not try to cash the check, so Hall tore it up. (TR 1240) Petitioner tried to convince Hall just to tie the woman up and leave. (TR 1240) He also refused Hall's request to strike her. (TR 1240) The woman pleaded for her life while the men were talking. (TR 1241) Finally, Hall struck the woman in

the back of the neck several times with the .38 pistol. (TR 1241-1242) She fell to the ground on her face and Hall shot her once through the back of her head. (TR 1241)

34. Petitioner knew Hall was going to kill the woman when he struck her, but petitioner felt there was nothing he could do to stop the killing. (TR 1242) Indeed Hall, who had again expressed fear of returning to prison, told him if he tried to leave the scene that he would also be killed. (TR 1242) Petitioner believed that if he had "tried to do anything about it, Hall probably would have killed [him] out there." (TR 1242)

35. The two men drove the woman's car to a convenience store in Ridge Manor in Hernando County. (TR 1229-1230) They intended to rob the store but left because there were too many people inside. (TR 1230) A deputy sheriff confronted them upon their leaving the store. (TR 1230) He began searching Hall who knocked the deputy down and began fighting with him. (TR 1230) Hall managed to grab the deputy's gun and shot him twice. (TR 1230-1232) Petitioner and Hall fled in the woman's car. (TR 1233)

36. Hall lost his gun in the struggle with the deputy, and the gun he carried away was the deputy's pistol. (TR 1233) Petitioner admitted using this gun to shoot at the deputy who chased them into the orange grove. (TR 1234-1235) When they abandoned the car in the grove, the two men discarded their guns and fled on foot. (TR 1236-1237)

37. Thus, the State's witnesses could not establish that Ruffin committed the crimes of premeditated first degree murder and sexual battery for which he was tried. Most of

their testimony related to collateral and irrelevant issues.

38. Ruffin did not testify. The State relied, however, on his confession, which should not have been admitted into evidence.

39. The Florida Supreme Court divided 4-3 in affirming petitioner's conviction and sentence. The Chief Justice and two other Justices filed a written opinion, dissenting from the imposition of the death penalty.

40. In the appeal, petitioner's appellate counsel, William C. McLain, omitted to raise a number of substantial issues (¶¶ 42-89). The failure to raise them was, in each case, a specific omission falling measurably below the standard of competent counsel.[4] A fortiori, these omissions,

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4 Petitioner has applied this Court's four-part test articulated in Knight v. State, 394 So. 2d 997 (Fla. 1981) to the within claims (see infra, ¶¶ 90-94). Petitioner respectfully submits that he has satisfied this standard. A fortiori the requirements of Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982)(en banc), cert. granted, __ U.S. __, 103 S.Ct. 2451 (1983) are fulfilled. However, the question of the proper standard to be applied in ineffective assistance of counsel cases is currently before the Supreme Court of the United States. Strickland v. Washington, No. 82-1554, cert. granted, __ U.S. __, 103 S.Ct. 2451 (1983) (oral argument January 10, 1984, 52 U.S.L.W. 3581). It is anticipated that the decision in Strickland v. Washington will resolve the general confusion as to the appropriate standard to be applied in ineffective assistance of counsel cases. Indeed, it may establish a standard different from both the Knight and Washington standards. See Brief Amici Curiae of the states of Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming, In Support of Petition for Writ of Certiorari, in Strickland v. Washington, 82-1554, supra, (filed April, 1983). See generally Annot., Modern Status of Rules and Standards in State Courts as to Adequacy of Defense Counsel's

(footnote continued)

taken as a whole, were seriously defective performance. Such deficiency rendered the legal assistance petitioner received ineffective and it deprived him of a full and meaningful review of his conviction and sentence.

41. Given the one vote margin of this Court's affirmation of petitioner's sentence, the omission of each one of the issues enumerated below creates a "likelihood", Knight v. State, supra, 394 So. 2d at 1001, that such oversight affected the outcome of petitioner's appeal. Certainly, the failure to raise all of these claims establishes such a "likelihood". As a result, petitioner's rights under the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and under Article I, Sections 2, 9, 16, 17 and 21 of the Florida Constitution[5] were violated, in further exacerbation of the constitutional violations which counsel failed to bring to this court's attention.

Representation of Criminal Client, 2 A.L.R. 4th 27 (1980); Annot., Modern Status of Rule as to Test in Federal Court of Effective Representation by Counsel, 26 A.L.R. Fed 218 (1976). In view of the imminence of the decision of the United States Supreme Court, and its controlling importance to this case, petitioner earnestly requests that this Court stay proceedings on this petition until the decision in Strickland v. Washington is announced.

5 The Florida Constitution establishes an absolute right to direct appeal from a conviction. Marshall v. State, 344 So. 2d 646 (Fla. 2d DCA) cert. denied, 353 So. 2d 679 (Fla. 1977).

A. APPELLATE COUNSEL FAILED TO ARGUE THAT THE PROSECUTOR, IN HIS CLOSING ARGUMENT, MISSTATED THE LAW AS TO AIDING AND ABETTING, COMMENTED UPON PETITIONER'S APPEARANCE AND LIFE-STYLE, VOUCHED FOR HIS CASE, AND GAVE UNSWORN ERRONEOUS TESTIMONY, PRECLUDING A FAIR DETERMINATION OF PETITIONER'S GUILT AND SENTENCE IN VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS

42. Appellate counsel failed to raise the most critical instances of prosecutorial misconduct. This error is particularly egregious in that appellate counsel did argue certain other substantial errors.[6]

43. Among the issues that were not raised are the following: In his closing argument, the prosecutor (i) referred to procedural protections afforded Ruffin, (ii) referred to "the way the defendant looked" on the night of the homicide, and to his failure to work and his card playing on that day, and (iii) most critically, extensively misstated the applicable law and facts regarding Ruffin's aiding and abetting Hall, a critical issue in the case.

44. The prosecutor first told the jury:

> I know, ladies and gentlemen, you have been working a week, in and out of the courtroom, somewhat the same as we have, ladies and gentlemen. You know, our system of law is really not the best system of law, but it's the system of law that seems the most effective and just that man has been able to ascertain or produce, and it does have many safeguards for the defendant, the parties involved, and that is one of the reasons . . . .

(TR 1292) (Emphasis added.)

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6 Appellate counsel argued that the prosecutor had improperly (i) introduced evidence of the death of Deputy Coburn, and (ii) asked the jury to convict defendant to serve as an example to others who might commit crime. These were serious issues, which when added to those that appellate counsel failed to raise would have presented a compelling case for reversal. By themselves, however, they were not as strong.

The prosecutor, by saying this, clearly implied that the jury was inconvenienced and the trial delayed because of the petitioner's insistence on "safeguards". Moreover, it emphasized that the prosecutor was hamstrung and hinted that probative evidence may have been kept from the jury. This perception was reinforced by the prosecutor's statement, in contravention of a specific court ruling, that Hernando County Deputy Lonnie Coburn had been killed. (TR 1305-06) In any event, references to the procedural protections afforded the defendant have no place in a prosecutor's summation. Houston v. Estelle, 569 F.2d 372, 383 (5th Cir. 1978).

45. The prosecutor further stated, referring to a photograph of petitioner on the day of the crime, "[t]he way the defendant looked that night is part of the puzzle," (TR 1297) and he noted that Hall and Ruffin "played some cards that morning [of the homicide], didn't work or anything but played cards." (TR 1302)

46. It does not appear that the prosecutor meant anything other than that the petitioner looked and acted like someone who would commit a crime. It is plain that the photograph displayed no identifying characteristic and, in any event, identification was not an issue in the case; whether or not petitioner was among the 50% of young blacks who are currently unemployed was certainly irrelevant. Such ad hominem attacks are highly improper and quite prejudicial. Houston v. Estelle, supra. (Indeed, Ruffin had an excellent employment history, see ¶ 61, infra.)

47. By far the most egregious of all the prosecutor's intrusions upon petitioner's right to a fair trial was his

elaborate and prolonged misstatement of the law concerning accomplice liability, a critical element in the case.

48. The prosecutor presented the jury with examples of his understanding of accomplice liability:

> Let me give you an example. Suppose three of us go in a room, go in the door, take one other person, there's one gun, we go in there, there's a shot, two of us come out, one is dead in the middle of the room, the gun doesn't have any fingerprints on it, and I said, "No, you can't get me, he did it." And he says, "No, you can't get me, Oldham did it." That's what we're calling aiding and abetting. You go hold a bank up, one guy goes in, one guy kills the teller; he's just as guilty, he's aiding and abetting, he's going there with a gun, he's going there with the purpose to rob.
>
> So I think what we're talking about here, I don't think there's any question of premeditation, and I don't think that there's any question of aiding and abetting . . . .

(TR 1300) (Emphasis added.)

49. The examples grossly misstate the law. In neither of the above examples would aiding and abetting properly be found on the facts set forth, without more. Moreover, they are highly prejudicial -- the examples are this case as the prosecutor wants the jury to see it -- two guys enter a bank to rob it, one kills a teller, the other "is just as guilty, he's aiding and abetting, he's going there with a gun, he's going there with the purpose to rob." The prosecutor thus effectively told the jury that if petitioner had only an intent to rob anyone, and Hall killed independent of the robbery and over defendant's protestations, petitioner is guilty of first degree murder, i.e., aiding and abetting Hall in committing murder.

50. The prosecutor continued:

> Now let's take the defendant Ruffin's statement, and from his statement alone, believing it completely, he is guilty of murder in the first degree. If he aided, abetted, counselled, hired, or otherwise procured some

offense to be committed.

> Now, in his statement, first, I've listened to his statement, I've had it typed and I've read it, . . .

(TR 1301-1302)

51. The prosecutor should never give his opinion on the merits, and he should never put his own credibility at issue. It is well-known, and quite proper, that jurors trust officers of the State. These basic rules were not unknown to the prosecutor. The prosecutor's personal opinion as to whether petitioner's statement establishes his guilt is not relevant, and is overwhelmingly prejudicial. His error is magnified because his opinion was wrong. United States v. Garza, 608 F.2d 659 (5th Cir. 1979); United States v. Herberman, 583 F.2d 222 (5th Cir. 1978); United States v. Corona, 551 F.2d 1386 (5th Cir. 1977).

52. By the end of the part of the summation quoted immediately above, the prosecutor had established himself as an expert on petitioner's statement. Yet, he made a terribly prejudicial misstatement of fact to the jury. Although petitioner stated that he did not have a gun at the time Hurst was killed, (TR 1239) the prosecutor who "listened to, . . . typed . . . and read" the statement, told the jury that petitioner "said that Hall and he both had guns" (TR 1302; see TR 1303).

53. This leads to the culminating melange of misstatement and prosecutorial testimony.

> So taking it as it is, if he says, "Let's tie her up," and Hall says no, but she gives them a check, twenty thousand dollars she's going to give them to let her go, I would too, and Hall says, "Will you go cash it?" and he says "No". So when he won't go cash it, that's when he says Hall beats the woman and then shoots her.

> Now didn't he aid and abet in that killing? He's there with a gun.
>
> * * *
>
> Now, if he didn't aid, abet, procure, help Hall, even if you believe every word of his statement, ladies and gentlemen, there is no question about that. And he's telling you that himself. How much more can you aid and abet someone in committing a crime? I don't know.

(TR 1304, 1306)

54. The prosecutor took the critical issue from the jury by telling them, incorrectly, what the law was, what the facts were, and what judgment was required. Each step is unlawful. Miller v. Pate, 386 U.S. 1 (1967); United States v. Herberman, 583 F.2d 222, 229-231 (5th Cir. 1978); United States v. Williams, 523 F.2d 1203 (5th Cir. 1975); see also, Clark v. Louisiana State Penitentiary, 694 F.2d 75, reh'g denied, 697 F.2d 699 (5th Cir. 1983); United States v. Artus, 591 F.2d 526 (9th Cir. 1979).

55. As stated in United States v. Corona, 551 F.2d 1386, 1390-91 (5th Cir. 1977), a passage fully applicable to this case:

> The American Bar Association standards governing jury argument are as follows:
>
> > (a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.
> >
> > (b) It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.
> >
> > (c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.
> >
> > (d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader that the guilt or innocence of the

> accused under the controlling law, or by making predictions of the consequences of the jury's verdict. ABA Standards, The Prosecution Function, § 5.8.

The prosecutor in this case singlehandedly violated each of these commands.[7] Untold damage was done to the defendant. As a result, the conviction cannot stand.

56. The prosecutor's summation, when considered in its entirety, clearly deprived petitioner of his Fifth, Sixth, Eighth and Fourteenth Amendment rights. Cf. Donnelly v. DeChristoforo, 416 U.S. 637 (1974); Houston v. Estelle, 569 F.2d 372 (5th Cir. 1978). Appellate counsel inexcusably erred in failing adequately to raise these issues before the Florida Supreme Court.

57. The prosecutor's misconduct in this and other respects was plain error. It fatally infected the proceedings. Appellate counsel committed substantial error in failing to raise the issue.

B. APPELLATE COUNSEL FAILED TO DEVELOP THE SERIOUS PROBLEMS IN REGARD TO THE AGGRAVATING AND MITIGATING CIRCUMSTANCES

58. Appellate cousel also did not adequately apprise this Court of the substantial deficiencies in the presentation to the jury of the aggravating and mitigating circumstances.

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7 Footnote 4 from United States v. Corona, supra, at 1391, states:

> See also ABA Canons of Professional Ethics No. 22: "It is not candid or fair for the lawyer knowingly to misquote . . . the testimony of a witness . . . or in argument to assert as a fact that which has not been proved."

59. In its charge during the sentencing phase, the Court told the jury that if it found sufficient aggravating circumstances to exist, "it [would] then be [its] duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist." (TR 1409) The charge thus placed the burden on petitioner to show that the mitigating circumstances outweigh the aggravating circumstances. This is error, since the State must prove that aggravating circumstances outweigh mitigating circumstances. Arango v. State, 411 So. 2d 172 (Fla.), cert. denied, 457 U.S. 1140 (1982). The remainder of the charge did not remedy the defect, and petitioner's sentence was thus determined in violation of the Eighth and Fourteenth Amendments of the United States Constitution.

60. Besides the mitigating circumstances relevant to petitioner's age, found applicable at trial, and the absence of a significant history of prior criminal activity by petitioner (found applicable by the Chief Justice and Justices England and McDonald, in their dissent when the case was on direct appeal), at least two other statutory mitigating circumstances should have been found applicable to petitioner. These, as appellate counsel argued an appeal, are that petitioner acted under the substantial domination of Hall and that petitioner's participation in the crime was relatively minor. Moreover, petitioner's dull normal intelligence, family background, and current lifestyle may have provided other non-statutory mitigating circumstances.

61. Unfortunately, however, there was little evidence presented on these points. Petitioner's trial counsel merely had the clerk read into the record, in a monotone (TR 1375-

1377), a psychiatric report prepared by the State to test petitioner's competency. In so limiting the evidence in mitigation, defense counsel appears to have omitted a wealth of relevant information. The psychiatric report read into the record reveals that petitioner's mother died when he was two, and that his father, who was an alcoholic, died when he was fourteen. It further noted that petitioner was intellectually dull and that he was a slow learner who had to attend special reading classes. The one independent psychiatric report on Ruffin, prepared prior to his clemency hearing, indicates other factors such as his close relationship with his adopted mother, and provides critical information on his relationship with and dependency upon his co-defendant, Freddie Lee Hall. Finally, conversations with Mr. Ruffin and his sister have revealed that Ruffin has worked steadily, that he attended church regularly and that there are people who will testify to petitioner's character and reputation in the community as non-violent.

62. In view of this Court's independent obligation to review the appropriateness of every death sentence, appellate counsel should have brought all of the non-statutory mitigating circumstances to the attention of this Court on appeal, where they could have been reviewed despite trial counsel's failures.

63. Instead, appellate counsel only argued that the trial court had erred in not finding that petitioner's dull normal intelligence was a non-statutory mitigating circumstance. In conjunction with his failure to point out the erroneous charge on the aggravating and mitigating circumstances, this failure deprived petitioner of his Sixth,

Eighth and Fourteenth Amendment rights to a fair sentencing procedure. Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982) cert. denied, ___ U.S. ___, 103 S.Ct. 1798 (1983); Herring v. Estelle, 491 F.2d 125, 127 (5th Cir. 1974).

64. Appellate counsel also failed to bring to this Court's attention the fact that the trial court, in support of the heinous, atrocious, and cruel aggravating circumstance, had saddled petitioner with responsibility for Hall's actions. The trial court said (R 346, ¶ 7):

> The Defendant Ruffin's confession given to Detective Mylander and Detective Fitzgerald on the morning of the 22nd of February, 1978 and admitted into evidence in which the Defendant Ruffin stated that the victim, Karol Lea Hurst, was beaten and shot to death by his co-defendant Hall. He also admitted that he and his co-defendant had sexual relations by gunpoint with the victim and that she was too afraid to resist. The Defendant Ruffin further stated he stood and watched while his co-defendant Hall "chopped" Karol Lea Hurst behind the neck in an effort to break it and Defendant Ruffin witnessed his co-defendant Hall pistol whip and shoot the victim Karol Lea Hurst in the back of the head with a .38 caliber revolver while she begged for her life and the life of her unborn child. In a futile attempt to save her life and that of her unborn child, she offered the sum of $20,000.00 in the form of a check which was admitted into evidence. The said .38 caliber revolver was later found under the Deputy Lonnie C. Coburn, shot to death in Hernando County, Florida.

65. Thus, the trial court found Hall's actions to have been heinous, atrocious and cruel, and he attributed that aggravating circumstance to petitioner. Moreover, the trial court did not charge the jury that, in order to find that aggravating circumstance, it had to find that petitioner acted or intended the actions that are heinous, atrocious and cruel. Since the court held petitioner responsible for Hall's action, the jury may well have done likewise. Of course, Enmund v. Florida, 458 U.S. 782 (1982) stands for the proposition that death sentencing must be based on individ-

ual, not vicarious, responsibility.

66. As is obvious from the trial court's published finding, it did not find and could not have found that petitioner's crime was heinous, atrocious and cruel. But appellate counsel never raised the issue before this Court.

67. In addition, the definitions of various aggravating and mitigating circumstances set forth in the death penalty statute (Fla. Stat. § 921.141) and charged to the jury in petitioner's case (e.g., "no significant history of prior criminal activity," and "heinous, atrocious or cruel") are vague and indefinite. As a result, the Florida death penalty process is arbitrary and in violation of the Eighth and Fourteenth Amendments to the United States Constitution. Cf. Godfrey v. Georgia, 446 U.S. 420 (1980). Here again, appellate counsel failed to present the issue to this Court.

68. The vague and indefinite character of the "no significant history of prior criminal activity" circumstance deprived petitioner of notice that a conviction in a contemporaneous crime would negate a mitigating circumstance in capital sentencing. Similarly, he had no notice that the aggravating circumstance "previously convicted of another capital offense" would be used in such situation. These ambiguities deprived him and trial counsel in both the Coburn and Hurst cases of the opportunity to prepare a procedural strategy which might have resulted in scheduling the Hurst trial first. Petitioner should not have been convicted of first-degree murder in the Coburn case. See Hall v. Florida, 403 So. 2d 1319 (Fla. 1981). At most the facts in that case supported second-degree murder. Any prior conviction in the

Hurst case thus could not have meant the difference between life and death at the Coburn trial.

69. Petitioner was also without notice that a finding of "heinous, atrocious or cruel" acts would be made against a defendant such as he who had not been shown to have killed, attempted to kill, or intended to kill (see ¶¶ 64-66, supra). He was thus hampered in effective preparation of the sentencing phase of his trial.

70. These repeated failures of appellate counsel to point out substantial and plain errors regarding the review and determination of the aggravating and mitigating circumstance severely prejudiced petitioner. In that appeal, three out of seven justices of this Court dissented from the affirmance of petitioner's sentence. There is thus substantial probability that had the additional meritorious claims set forth above been raised, yet another justice would have been moved to reverse petitioner's sentence. Chief Justice Sundberg's dissent powerfully argued against the majority's interpretation of "prior" in the mitigating circumstance of "no significant prior criminal activity". He concluded that it was unjust to consider petitioner's conviction in the subsequent Coburn slaying as nullifying that mitigating circumstance. Had appellate counsel forcefully argued the numerous issues going to the weighing of the aggravating and mitigating circumstances, one other justice might well have concurred in the Chief Justice's opinion. As the State of Florida has argued before the Supreme Court of the United States, to fulfill the prejudice prong of the Knight test

> a defendant need only show a likelihood, not that the claim did affect the outcome of the case.

Reply Brief of Petitioners, Strickland v. Washington, supra, at 15. It is plain that this standard is met here.

C. APPELLATE COUNSEL FAILED TO ARGUE THAT THE JURIES THAT INDICTED AND CONVICTED PETITIONER WERE NOT SELECTED FROM A FAIR CROSS-SECTION OF THE POPULATION

71. Appellate counsel never advised this Court of the unlawful manner in which petitioner's grand and petit juries were formed.

72. Petitioner's grand and petit juries were convened in Sumter and Putnam Counties, respectively. The system used by these counties to derive their jury selection lists was prima facie unconstitutional.

73. Both Sumter and Putnam Counties used voter registration lists as the sole source for their jury selection pool. This is improper, even if the jury selection list is just a random selection from the voter registration list, where, for instance, those

> charged with jury selection knew or had the means of knowing that the voter registration lists failed to be representative of adult black males.

Ford v. Hollowell, 385 F. Supp. 1392, 1400 (N.D. Miss. 1974) (holding use of voter registration lists unconstitutional). Cf. Bryant v. Wainwright, 686 F.2d 1373, 1378 n.4 (11th Cir. 1982), cert. denied, __ U.S. __, 103 S.Ct. 2096 (1983) (the court in Bryant did not address the ready availability of fairer ways of compiling jury selection lists). Other, and fairer means for compiling jury selection lists are well known, and readily available. E.g., Kairys, Kadane and Lehoczky, Jury Representativeness: A Mandate for Multiple

Source Lists, 65 Cal. L. Rev. 776 (1977); Logan and Cole, Reducing Bias in a Jury Source List by Combining Voters and Drivers, 67 Judicature 87 (1983).

74. In Sumter County in 1980 approximately 67.2% of the white population age 18 and over was registered to vote, but only approximately 55.3% of the black population.[8]

75. In Putnam County, according to the 1980 Census and the 1980 Voter Registration records, approximately 63.5% and 62.2% of white males and females, respectively, 18 years of age or over, were registered to vote. The comparable figures for black males and females were 43.1% and 46.3%.[9]

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8 In 1980, Sumter County collected data on registration by race for each of the two major political parties, and classified all other voters, regardless of race, as "other". In 1984, the County showed that of 271 "other", 264 were white, and 7 were black. This ratio was applied to the undifferentiated 1980 "other" category.

1980 Census -- age 18 and over
white 14,615
black 3,025

Voter Registration by Party and Race
white (dem. and rep.) 9,531
black (dem. and rep.) 1,666
other 302

9 According to the Supervisor of Electors, hispanics born abroad who so request are classified together with blacks as "others". It is here assumed that no such persons existed. According to the 1980 Census, persons of Spanish origin constituted only 1.1% of the population.

The raw data are as follows:

1980 Census -- age 18 and over
white male* 14,251
white female* 15,563
black male 2,775
black female 3,455

*Spanish origin is not considered a separate race, but is included as white, and also reported separately. Spanish origin male - 209; Spanish origin female - 190.

(footnote continued)

76. These disparities are clearly excessive. They, prima facie, invalidate reliance on voter registration lists. The 1970 Census and Voter Registration data reveal similar disparities, evidencing that they are of longstanding nature.[10] Despite the availability of these statistics from the County Supervisor of Elections and the Bureau of Census, appellate counsel failed to pursue these arguments.

77. Appellate counsel also failed to challenge the prosecutor's use of peremptory challenges. Four of the five petit jurors peremptorily challenged by the prosecutor were black. This systematic and deliberate use of the peremptory challenge to exclude a discrete and insular minority, especially when a member of that minority group is being tried, was a plain violation of petitioner's right to due process of law and trial by a jury of his peers. Swain v. Alabama, 380 U.S. 202 (1965); see also McCray v. Abrams, 576 F. Supp. 1244 (E.D.N.Y. 1983); People v. Wheeler, 22 Cal. 3d 258, 583 P.2d 748 (1978) (disallowing prosecutorial use of the peremptory challenge to dismiss prospective jurors "merely because they are members of an identifiable group distinguished on racial, religious, ethnic, or similar grounds"); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 881 (1979), all of which disallow the systematic exclusion of black jurors by the State's use of peremptory challenges.

Voter Registration Data	
white male	9,045
white female	9,685
"other" male	1,195
"other" female	1,598

10 Thus for Putnum, the Census (age 21 and over) shows that 77.3% of the population was white, and 22.7% black; but blacks constituted only 15.6% of the Voter Registration list. Only 39.5% of blacks were registered to vote, as compared with 62.9% of whites (age 21 and over).

78. Finally on this point, appellate counsel failed to argue that both the grand jury and the petit jury were selected in a manner that under-represented women.

79. Petitioner was convicted by a petit jury of seven men and five women. We have no data as to the sexual makeup of the grand jury. According to the 1980 Census, the populations of both Sumter County (where the grand jury was convened) and Putnam County (where the trial was held) were approximately 50 percent female. It is clear that the petit jury did statistically under-represent women and it is likely that the grand jury was subject to the same infirmity.

80. Moreover, at the time of petitioner's trial, Fla. Stat. § 40.013(4) provided that "expectant mothers and mothers with children under 15 years of age, upon their request, shall be exempted from grand jury and petit jury duty." This statute shows that the jury was selected in a manner not adequate to ensure a fair cross-section of the population. As a result, the petit jury at petitioner's trial and the grand jury that indicted him were selected in violation of petitioner's Sixth and Fourteenth Amendment rights under the Supreme Court's decisions in Duren v. Missouri, 439 U.S. 357 (1979) and Taylor v. Louisiana, 419 U.S. 522 (1975). The Florida statute cited above is likewise invalid under the Sixth and Fourteenth Amendments.

81. Appellate counsel was ineffective in failing to raise any of these substantial issues.

82. It is clear that failure to challenge the composition of the grand and petit juries that indicted and convicted the defendant can constitute ineffective assistance of

counsel. Birt v. Montgomery, 709 F.2d 690, 701-02 (11th Cir. 1983); Dixon v. Hopper, 407 F. Supp. 58, 68 (M.D. Ga. 1976) (finding ineffectiveness).

D. APPELLATE COUNSEL FAILED TO ARGUE THAT DEFECTS IN FLORIDA'S DEATH PENALTY PROCESS GENERALLY, AND SPECIFICALLY AS APPLIED TO PETITIONER, PRECLUDED ITS IMPOSITION HERE

83. Appellate counsel also failed to raise the following defects in the Florida death penalty process.

84. The Florida death penalty process violates the Eighth and Fourteenth Amendments because:

> (i) it is racially motivated and has a disproportionately adverse impact on black offenders,
>
> (ii) it is racially motivated and has a disproportionately adverse impact on black offenders who killed white victims, evincing a belief on the part of participants in the sentencing process that white life is more valuable than black, and
>
> (iii) it does not afford black persons the same legal protection against homicide that it affords white persons, as is evidenced by the disproportionate impact of the death penalty on persons who kill white victims.[11]

See Smith v. Balkcom, 660 F.2d 573, 584-85 (5th Cir. 1981), modified, 671 F.2d 858 (1982). See also Zeisel, Race Bias in the Administration of the Death Penalty: The Florida Experience, 95 Harv. L. Rev. 456 (1981). Indeed, the imposition of the death penalty is particularly problematic where, as here, a black man has simultaneously been convicted of raping a white woman -- a crime that has traditionally induced an

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11 This material is not quoted from any authority. It is set off and single spaced for emphasis.

emotional response far beyond that of other rapes, and for which the jury would be inclined to sentence a defendant to death. Of course, petitioner objected to the consolidation of the murder and sexual battery indictments (TR 452-457); separate trials may have allowed the trial to proceed without this traditional source of racial animus. But the trial court erroneously allowed consolidation (TR 452-457), and the concomitant prejudice. Appellate counsel failed to challenge either the consolidation of the trials, or the racial disparities in the death penalty's application. Here again, his performance fell substantially below that of effective appellate advocacy.

E. APPELLATE COUNSEL ERRED IN FAILING TO CHALLENGE THE INTRODUCTION INTO EVIDENCE OF PETITIONER'S "CONFESSION", WHICH DEPRIVED HIM OF HIS PRIVILEGE AGAINST SELF-INCRIMINATION

85. Finally, appellate counsel failed to raise a substantial issue regarding the admission into evidence of petitioner's alleged confession to the crime of rape.

86. Since none of the witnesses for the State gave direct testimony as to petitioner's guilt and since petitioner did not testify, he was convicted on the basis of a statement extracted from him in violation of the Fifth and Fourteenth Amendments. As the confession was obtained from petitioner while in custody during interrogation, the State has a heavy burden, that it has not met, of proving that petitioner understood his right to remain silent and to have an attorney present during interrogation and that petitioner fully and intelligently waived those rights. E.g., Culombe v. Connecticut, 367 U.S. 568, 602 (1961); Stein v. New York, 346 U.S. 156, 185 (1953); Jurek v. Estelle, 623 F.2d 929, 937 (5th Cir. 1980), cert. denied, 450 U.S. 1001 (1981).

87. Petitioner's confession was made on the night of his arrest when he was cold, barefoot, and scantily clad. Officer Johnson, who knew Ruffin, questioned him privately. The sole purpose of Johnson's talking to Ruffin was to encourage the trust and confidence of Ruffin, thus exerting undue influence and control over him. An unusually large number of police officers from three counties participated in the questioning of Ruffin. Ruffin, according to the psychiatrists who examined him, was unduly susceptible to such outside influence. Finally, Ruffin was of borderline

intellect and unable to understand fully and intelligently the questions asked of him or to knowingly waive his rights.

88. In determining whether or not a confession is admissible, this State has long followed the rule set forth in Bram v. United States, 168 U.S. 532, 543 (1897):

> A confession can never be received in evidence where the prisoner had been influenced by any threat or promise; for the law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore excludes the declaration if any degree of influence has been exerted.

See also, Culombe v. Connecticut, supra; Stein v. New York, supra; Jurek v. Estelle, supra.

89. In view of the totality of the circumstances, the confession was not voluntary and should not have been admitted. Appellate counsel was remiss in failing to raise the issue.

F. WHEN CONSIDERED AS A WHOLE, APPELLATE COUNSEL'S PERFORMANCE WAS MEASURABLY BELOW THE STANDARD EXPECTED OF COMPETENT COUNSEL

90. Appellate counsel's failure to raise substantial issues involving plain error for this Court's review was performance measurably below that expected of competent counsel in such cases. Cf. Mylar v. State of Alabama, 671 F.2d 1299 (11th Cir. 1982), cert. denied, ___ US. ___, 103 S.Ct. 3570 (1983); High v. Rhay, 519 F.2d 109 (9th Cir. 1975); People v. Jarrett, 86 A.D.2d 677 (N.Y. 2d Dep't 1982). A similarly situated advocate representing a defendant under sentence of death would not, if acting competently, have committed such substantial oversights. The law in death penalty cases was in 1978, and is now, finely tuned and rapidly

changing. This court has instructed that,

> death penalty cases are different, and consequently the performance of counsel must be judged in light of these circumstances.

Knight v. State, supra, 384 So. 2d at 1001.

91. To be effective, counsel must be "an active advocate," and must "support his client's appeal to the best of his ability." Anders v. California, 386 U.S. 738, 744 (1967). "The advocate's duty [on appeal] is to argue any point which may reasonably be argued . . . ." Wright v. State, 269 So. 2d 17, 18 (Fla. 2d DCA 1972). Thus, if appellate counsel fails to raise issues on direct appeal, the appellant is entitled to renewed appellate review if there existed "an arguable chance of success with respect to these contentions." Thor v. United States, 574 F.2d 215, 221 (5th Cir. 1978); accord, High v. Rhay, supra; Hooks v. Roberts, 480 F.2d 1196, 1197 (5th Cir. 1973), cert. denied, 414 U.S. 1163 (1974); see also Mylar v. State of Alabama, supra.

92. In Knight v. State, supra, 394 So. 2d 997 (Fla. 1981), this Court set forth a four-part test with respect to a claim of ineffective assistance of appellate counsel. First, a petitioner must specify the "omission or overt act upon which the claim of ineffective assistance of counsel is based." Second, he must show that "this specific omission or overt act was a substantial and serious deficiency measurably below that of competent counsel," although this Court recognized that "in applying this standard, death penalty cases are different, and consequently the performance of counsel must be judged in light of these circumstances." Third, Knight provides that the petitioner must demonstrate that "this specific, 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." Id. at 1001.[12]

93. The fourth part of the Knight test, which places a burden of rebuttal on the State, need not be addressed at this time.

94. Petitioner herein has satisfied the three parts of the Knight test imposed upon him, and accordingly has succeeded in establishing prima facie that he was denied the effective assistance of appellate counsel as guaranteed by the United States Constitution and the Constitution and laws of the State of Florida.[13]

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12 On oral argument before the Supreme Court of the United States, the State advocated a standard requiring a showing of "some likelihood of prejuduce or less than a likelihood that the outcome would be affected." Argument of Carolyn M. Snurkowski, Assistant Attorney General of Florida before the Supreme Court of the United States in Strickland v. Washington, supra (January 10, 1984), summarized in 52 U.S.L.W. 3581 (unofficial report).

13 The deficiencies of appellate counsel in this case were so substantial that the likelihood that they affected the outcome of petitioner's appeal before this Court cannot be doubted. As this Court knows, in Washington v. Strickland, 693 F.2d 1243 (5th Cir. 1982) (Unit B) (en banc), cert. granted, 103 S.Ct. 2451 (1983), the en banc United States Court of Appeals for the portion of the old Fifth Circuit now making up the Eleventh Circuit rejected the "outcome determinative" test of "prejudice" and held instead that a petitioner alleging ineffective assistance of counsel must only "show that ineffectiveness of counsel resulted in actual and substantial disadvantage to the course of his defense." Id. at 1262. He "need not show that this 'disadvantage determined the outcome of the entire case'". King v. Strickland, 714 F.2d 1481, 1488 (11th Cir. 1983). While this Court declined to adopt the Washington standard of prejudice in Armstrong v. State, 429 So. 2d 287, 290 (Fla.), cert. denied, ___ U.S. ___, 104 S.Ct. 203 (1983), it is respectfully suggested that, at least where a man's life is at stake, Washington's prejudice standard is more appropriate.

In any event, as the Supreme Court of the United States
(footnote continued)

Further Necessary Information

95. An amended petition for a writ of habeas corpus has been filed with the United States District Court, Middle District of Florida, Ocala Division. That proceeding is being held in abatement, pending the outcome of the within proceeding.

96. Mack Ruffin, Jr., was represented by the following attorneys:

(a) at trial, by William H. Stone, Bushnell, Florida, and by Michael T. Kovach, Inverness, Florida.
(b) on direct appeal to the Supreme Court of Florida, by William C. McLain, Bartow, Florida.
(c) on petition for certiorari, by McLain.
(d) before the governor's clemency board, by Phillip Padavano, Tallahassee, Florida.
(e) in his motion to vacate (Rule 3.850) proceeding in the Circuit Court of the Fifth Judicial Circuit in and for Sumter County, by David Rubman, Bartow, Florida, and Asa D. Sokolow, New York, New York.
(f) in his appeal from the Circuit Court's denial of his 3.850 motion, before the Supreme Court of Florida, by Sokolow and by three attorneys associated with Sokolow; Renee J. Roberts, Edward S. Kornreich, and Elizabeth Shollenberger, all of New York, New York.
(g) in his petition and amended petition for writ of habeas corpus with the United States District Court,

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is about to decide the Washington v. Strickland case, which will obviously control the proceedings herein and which may establish a standard distinct from both Knight and Washington, it is advisable that this Court wait for the Supreme Court's decision before deciding this motion.

Middle District of Florida, by Sokolow, Roberts, Kornreich, Shollenberger, Richard L. Claman, and Susan Arinaga, all of New York, New York.

Stone and Kovach were appointed by the court to represent petitioner at trial, on the basis of a finding that petitioner was indigent and unable to retain private counsel. McLain was appointed by the court to represent petitioner on direct appeal to the Supreme Court of Florida and on the petition for certiorari to the U.S. Supreme Court, on the basis of similar findings of indigency. Padavano was appointed by the court to handle petitioner's clemency petition, on the basis of petitioner's indigency. The other attorneys named above have represented petitioner without compensation. (Sokolow has moved for court appointment in the Circuit Court of Florida but his motion has not yet been determined.)

97. Throughout the period from his arrest until the present, petitioner has been indigent.

98. Petitioner was indicted for first degree murder, and in a separate indictment for sexual battery, kidnapping, grand larceny and robbery. Only the first-degree murder and the sexual battery charges proceeded to trial. The State moved to consolidate the two indictments, and, over defense objections, the motion was granted. Petitioner was sentenced to death for the conviction of first-degree murder and to thirty years imprisonment for the sexual battery conviction.

99. Petitioner is also serving a life sentence imposed upon him for the murder of Hernando County Deputy Lonnie Coburn.

PRAYER FOR RELIEF

WHEREFORE, petitioner Ruffin prays:

1. That the Court issue an order directing respondents to show cause, within the time set by the Court, why petitioner should not be granted a new appeal as of right, including oral argument on all points deemed appropriate, or alternatively, that petitioner be discharged from his unconstitutional confinement and restraint and/or relieved from his unconstitutional sentence of death;

2. That the State of Florida be required to appear and answer the allegations of this motion;

3. That the petitioner be accorded a hearing on the allegations of this motion;

4. That, after full hearing, petitioner be granted a new appeal as of right, including oral argument on all points deemed appropriate, or alternatively be discharged from his unconstitutional confinement and restraint and/or relieved of his unconstitutional sentence of death;

5. That the Court stay further proceedings and its decision on this petition until an opinion by the Supreme Court of the United States is rendered in Strickland v. Washington;

6. That petitioner be allowed such other, further and

alternative relief as may seem just, equitable, and proper under the circumstances.

April 5, 1984

Respectfully submitted,

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ATTORNEYS FOR PETITIONER

By: _____
ASA D. SOKOLOW

By: _____
JOYCE DAVIS

VERIFICATION

STATE OF FLORIDA:
: ss.:
COUNTY OF :

Before me, the undersigned authority, personally appeared Mack C. Ruffin, Jr. who, being first duly sworn, says that he has personal knowledge of the allegations in the foregoing Petition for a Writ of Habeas Corpus and that the allegations and statements contained therein are true and correct to the best of his knowledge.

Mack Ruffin
MACK C. RUFFIN, Jr.

Subscribed and sworn to before me this 3 day of April, 1984.

J W Warren
NOTARY PUBLIC

My Commission expires:

NOTARY PUBLIC, STATE OF FLORIDA
My Commission Expires Oct. 4, 1986

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand/mail to JIM SMITH, Attorney General, State of Florida, Elliot Building, 401 South Monroe Street, Tallahassee, Florida 32301, this 4th day of April, 1984.