IN THE SUPREME COURT OF FLORIDA

MACK RUFFIN, JR.,

Petitioner,

v. CASE NO.: 65,117

LOUIE L. WAINWRIGHT, etc., et al.,

Respondents.

RESPONSE

NOW COMES the Respondents, by and through the undersigned Assistant Attorney General, who in Response to the Petition for Habeas Corpus relief filed before this court would show:

I

Petitioner has prosecuted a direct appeal from his convictions for first degree murder and sexual battery and sentence of death. This court affirmed. Ruffin v. State, 397 So.2d 277 (Fla. 1981). The United States Supreme Court denied certiorari. Ruffin v. Florida, 454 U.S. 882, 102 S.Ct. 368, 70 L.Ed.2d 194 (1981). The Governor signed a death warrant and Petitioner was given a hearing on his Fla. R. Crim. P. 3.850 post-conviction claims. The trial court denied relief. This court affirmed the trial court's order denying Petitioner's motion to vacate, to appoint investigator and psychiatrist, and for stay of execution. Ruffin v. State, 420 So.2d 595 (Fla. 1982). Petitioner then raised identical claims in the United States District Court, Middle District of Florida, Ocala Division on a 28 USC §2254 attack. Immediately, an Order staying execution was rendered. Ruffin v. Wainwright, Case No. 82-192-Civ-Oc. There Petitioner additionally raised the claim of ineffective assistance of appellate counsel:

G. PETITIONER'S CONVICTION FOR FIRST DEGREE MURDER, HAVING RESULTED FROM THE INEFFECTIVE ASSISTANCE OF TRIAL AND APPELLATE COUNSEL, MUST BE REVERSED AND THE DEATH PENALTY MAY NOT BE IMPOSED

176. We have previously shown that trial counsel failed to introduce any evidence in mitigation at sentencing. Counsel also failed to object to a slew of prosecutorial errors, not the least of which was the prosecutor's misstatement of law and facts and misapplication of law to facts (see supra, ¶¶ 133-145). Many other highly prejudicial errors noted herein were also not the subject of defense objection.

177. In addition, appellate counsel failed to raise on direct appeal many highly meritorious issues set forth herein.

178. These deficiencies in counsel's performance deprived def endant of a fair trial, and the right to an appeal. Herring v. Estelle, 491 F.2d 125, 127 (5th Cir. 1974); MacKenna v. Ellis, 280 F.2d 592, (5th Cir. 1960).

Respondent moved to dismiss the Petition as the ineffective assistance of appellate counsel claim was not exhausted in this Court; and, as a consequence, the Petition was mixed.[1/] See, Rose v. Lundy, 455 U.S. 509, 71 L.Ed.2d 379, 382, 102 S.Ct. 1198 (1982) where Justice O'Connor in writing for the majority held "that a district court must dismiss such 'mixed petitions,' leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court."

Thereafter, on March 6, 1984, the Honorable John H. Moore, II entered an Order Denying Motion to Dismiss; Granting Application to Leave to Amend and for an Abatement of Proceedings and Continuing Stay of Execution. Attached hereto as Respondent's Exhibit I is a copy of that Order. The United States Supreme Court has granted certiorari in Kavanaugh v. Lucey, Case No. 83-1378 addressing: Does the

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[1/] Respondent filed his motion to dismiss on October 29, 1982. On September 8, 1983, Respondent filed a Motion to Dissolve Stay of Execution as Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983)(en banc) mooted the federal stay order.

Constitution create right to effective assistance of appellate counsel? 35 CrL 4021.

II

Petitioner recognizes the standard for review for these claims is set forth in Knight v. State, 394 So.2d 997 (Fla. 1981). This issue is pending before the United States Supreme Court in Strickland v. Washington, No. 82-1554, cert. granted, __U.S.__, 103 S.Ct. 2451 (1983)(oral argument January 10, 1984, 52 USLW 3581). Petitioner now raises the following claims:

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.

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

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.

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.

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.

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

III

In Dougan v. Wainwright, 9 FLW 125, __So.2d__ (FSC Case No. 61,789, Opinion filed April 5, 1984) this Court found merit to the claim that Dougan's counsel failed to provide effective assistance due both to a conflict of interest and to the failure to raise meritorious legal claims. Persuasive in this Court's opinion was Barclay v. State, 444 So.2d 956 (Fla. 1984). Appellate counsel had represented both Dougan

and Barclay. This Court found conflict of interest in appellate counsel's representation. Additionally, this Court found appellate counsel's representation so deficient as to constitute no representation at all. Such is not the case here.

In Jacobs v. Wainwright, 9 FLW 66, __So.2d__ (FSC Case No. 62,595, Opinion filed February 23, 1984), this Court assessed petitioner's claims according to the principle of Knight v. State, 394 So.2d 997 (Fla. 1981) which adopted the 4-step process encompassed in United States v. DeCoster (DeCoster III), 624 F.2d 196 (D.C. Cir. 1979)(en banc).

As to Claim A, Petitioner urges appellate ineffectiveness as appellate counsel did not argue alleged improprieties in the prosecutor's closing argument. On this score, trial counsel moved for a mistrial on (1) a purported prosecutorial comment on the death of the deputy and (2) a purported prosecutorial comment on making Ruffin an example to the community. (TR 1309) No where did trial counsel object or move for mistrial to the arguments now asserted. (TR 1292-1309) This Court is not called upon to examine the performance of Ruffin's trial counsel. This Court held in Jacobs that appellate counsel cannot be considered incompetent for failing to raise an issue which he was procedurally precluded from raising. So it follows for Ruffin's appellate counsel.

As to Claim B, petitioner urges appellate counsel did not adequately apprise this Court of purported deficiencies in the presentation to the jury of aggravating and mitigating circumstances. No objection was given by defense counsel to the instruction. (TR 1413) As such, appellate counsel is procedurally barred from raising the issue. Florida law requires the sentencer to find at least one valid statutory aggravating circumstance before the death penalty may even be considered, and permits the trial court to admit any evidence

that may be relevant to the proper sentence. Barclay v. Florida, __U.S.__, 77 L.Ed.2d 1134, 103 S.Ct.__(1983). Subsequently, the United States Supreme Court has held Florida death sentencing to be constitutionally imposed even if the trial court relied on a nonstatutory aggravating circumstance. Wainwright v. Goode, __U.S.__, 78 L.Ed.2d 187, 104 S.Ct.__ (1983). Here, appellate counsel argued the record at hand. What habeas counsel argues is at best apperceptive projection; and, reversible error cannot be predicated on conjecture. See, Sullivan v. State, 303 So.2d 632 (Fla. 1974). Habeas counsel concedes trial counsel presented scant evidence on these points. (See, Paragraph 61). Neither appellate counsel nor this Court can review on direct appeal that which is not part of the record proper. This Court's examination of trial counsel's performance was conducted in Ruffin v. State, 420 So.2d 595 (Fla. 1982).

Habeas counsel overlooks that this Court is most sensitive to proportionality review of each death sentence before it. The Supreme Court has recently held that the Constitution does not require proportionality review of capital sentencing so long as the state's procedures are not "so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review..." Pulley v. Harris, __U.S.__, 104 S.Ct. 871, 873, 79 L.Ed.2d 29 (1984). In light of Pulley, Florida is not required to conduct proportionality review, Alvord v. Wainwright, 725 F.2d 1282, 1301 (11th Cir. 1984) reh en banc den. April 25, 1984, though this state has chosen to do so. See, Messer v. State, 439 So.2d 875 (Fla. 1983); Brown v. State, 392 So.2d 1237 (Fla. 1981). This court in each and every death sentence determines whether there was sufficient evidence to support the trial court's findings; that the weighing process was properly carried out; and, that the death penalty was

appropriate under the principles of proportionality. As stated by Justice Boyd in Messer v. State, supra at 879: "Habeas corpus is not a vehicle for obtaining a second determination of matters previously decided on appeal." Specifically, as to charges assailed in paragraph 59, there was no objection. (TR 1413) The charge comports with the standard when Ruffin was tried as once aggravating factors are found to exist then a view is cast toward the mitigating ones.

As to paragraph 64, Petitioner overlooks that this Court exercises in all capital cases an independent responsibility to review heinous, atrocious, and cruel aggravating circumstances. Additionally, habeas counsel overlooks that appellate counsel did argue Ruffin's purported minimum participation. See, Mr. McClain's brief on direct appeal (Issue 4-D). The claim is not couched as habeas counsel would like it; however, the issue was brought to this Court's attention. The trial court did instruct on mitigating factors. (TR 1409) The suggestion in paragraph 67 that the definitional guides of aggravating and mitigating circumstances as set out in Section 921.141, Florida Statutes is meritless as case law insulates against an attack on vague and indefinite grounds. Focusing on paragraph 68, Mr. McClain argued the use of robbery and kidnapping in Issue 4-A. Petitioner, at best, does not like how Mr. McClain framed his issue. Ruffin's conviction was a prior one which was intact at time of trial. This Court addressed and decided this claim in Elledge v. State, 346 So.2d 998 (Fla. 1977) which was the law at the time of Ruffin's appeal.

As to Claim C, the trial court sua sponte filed judicial notice as to how jurors were selected in his Circuit. (R 271-273) There was neither a proffer nor evidence submitted that the Grand Jury which indicted petitioner and the Petit Jury which convicted petitioner were not selected from

a fair cross-section of the population. This claim was not assigned as error. (R 468-471) There existed a procedural bar to raising this claim. See, Engle v. Issac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982) and Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Consequently, appellate counsel cannot argue a claim (1) founded on non-record support/conjecture and (2) from which he was procedurally precluded from raising. There is nothing in this record to suggest there had been improper selection of a jury. This point was not contested below. There is a judicial notice of compliance with United States District Court Judge Scott's order. (R 271-273) As to peremptory challenges, the claim now presented was never developed nor raised in the trial court. The burden is on an accused to demonstrate improper use of peremptory challenges. The record below lends no support to an appellate advocate. There is no record support to argue the sexual make-up in paragraph 79; and, no support for the Section 40.013(4), Florida Statutes attack was laid in the record. See, Alachua County Court Executives v. Anthony, 418 So.2d 264 (Fla. 1982) as extreme hardship under Section 40.013(6), Florida Statutes still serves as excuse from jury service.

As to Claim D, Petitioner in short asserts that he would not have received the death penalty but for the purported arbitrary and discriminating application of the death penalty in Florida. There is no record development to raise this issue. This claim focuses on the jury's deliberation. It is incumbent for Petitioner to show jury composition so infected the entire sentencing process that the sentence violates due process. See, Sullivan v. Wainwright, 695 F.2d 1306, 1311 (11th Cir. 1983). It must be noted that constitutional guarantees to a fair trial and competent counsel do not insure that trial attorney will raise every conceivable con-

stitutional claims. Engle v. Issac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). Francois v. State, 423 So.2d 357 (1982). Here the record shows the basis of the trial court's judicial notice (R 257-270) which prophylactically immunized the claim so that this aspect is errorless. Petitioner cannot argue review of a record that operates in his favor. As such appellate counsel is not incompetent for failing to argue assets rather than liabilities. See generally, Tilghman v. State, 64 So.2d 555 (Fla. 1953) cert. denied 346 U.S. 837 where this court declined to consider appellant's contention that his sentence had been improperly reduced.

Respondent would pause to point out no Motion for Severance was filed; or, even if one were filed, there is no basis to sever an underlying felony from a murder prosecution. Additionally, the only method of selecting a jury in Florida is from the voter registration list. Florida has not been mandated to adopt any other method of jury selection.

As to Claim E. the point was assigned as error for appellate review. (R 468) What petitioner's counsel now overlooks is that such reviews bottom-out on asking an appellate court to re-weigh factual determinations. Such is not the function of appellate courts. Credibility determinations are made by the finder of fact. See, Shuler v. State, 132 So.2d 7 (Fla. 1961); Cripe v. Atlantic First National Bank, 422 So.2d 820 (Fla. 1982). Competent and effective appellate practitioners, such as William C. McClain, Assistant Public Defender, do not indulge in meaningless ventures. Appellate counsel, for strategy reasons, is well-advised to choose his claims carefully rather than to take a "shot-gun" approach to appellate advocacy. As voluntariness issues focus on credibility determinations, appellate counsel is not ineffective for choosing not to argue this claim on appeal. Furthermore, there was no testimony from Ruffin at the hearing. (TR 1424) No record support is found to argue the claim.

As to Claim F, Respondent denies that when considered as a whole, William C. McClain's performance was measurably below the standard expected of competent appellate counsel. Respondent relies on this Court's rationale in Jacobs v. Wainwright, 9 FLW 66, __So.2d__ (FSC Case No. 62,595, Opinion filed February 23, 1984) throughout this Return in Respondent's defense of Mr. McClain's appellate expertise, competency, and reputation. The United States Supreme Court has addressed this blanket claim in Jones v. Barnes, __U.S.__, 77 L.Ed.2d 987, 103 S.Ct__(1983). Chief Justice Burger points out:

> [6a, 7a] There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review. This has assumed a greater importance in an era when oral argument is strictly limited in most courts—often to as little as 15 minutes—and when page limits on briefs are widely imposed. See, e.g., Fed Rules App Proc 28(g); McKinney's 1982 New York Rules of Court §§670.17(g)(2), 670.22. Even in a court that imposes no time or page limits, however, the new per se rule laid down by the Court of Appeals is contrary to all experience and logic. A brief that raises every colorable issue runs the risk of burying good arguments—those that, in the words of the great advocate John W. Davis, "go for the jugular," Davis, The Argument of an Appeal, 26 ABAJ 895, 897 (1940)—in a verbal mound made up of strong and weak contentions. See generally, e.g., Godbold, Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal, 30 Sw LJ 801 (1976).[6]
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> (text of 77 L.Ed.2d at 994)

On this collateral review, this Court must not second-guess the reasonable and professional judgments made by Mr. McClain in his representation of Petitioner on direct appeal. In this case, appellate representation was competent, vigorous, and effective. Further if counsel for Petitioner is seeking compensation (See paragraph 96), Respondent's view is that representation is pro bono comporting with the letter of the New York City Bar Association as Petitoner's counsel is a member of a participating law firm: Rosenman Colin Freund Lewis & Cohen. See, "Big Law Firms in New York Stepping Up Volunteer Work," 02 May 1984, New York Times, sec 1, p. 1 attached as Exhibit II.

CONCLUSION

WHEREFORE, having responded to the petition, Respondent denies each and every allegation indicating or suggesting in any manner whatsoever that Petitioner had ineffective assistance of appellate counsel and Respondent prays that this Court holds that Petitioner is not entitled to Habeas Corpus relief and further deny the petition forthwith.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Asa D. Sokolow, Edward S. Kornreich, Richard L. Claman, Regina Harrison, and Susan L. Arinaga of Rosenman Colin Freund Lewis & Cohen, 575 Madison Avenue, New York, New York 10022 on this 3rd day of May, 1984.

OF COUNSEL FOR RESPONDENT