IN THE SUPREME COURT OF FLORIDA

JOHN O'CALLAGHAN, Petitioner, v. LOUIE L. WAINWRIGHT, Secretary, Department of Corrections, State of Florida, Respondent.	)	CASE NO:

RESPONSE TO ANTICIPATED PETITION FOR WRIT OF HABEAS CORPUS.

COMES NOW, Respondent, LOUIE L. WAINWRIGHT, by and through undersigned counsel, and files this his Response to the anticipated Petition for Writ of Habeas Corpus. Due to the shortness of time occasioned by Petitioner's scheduled execution date on May 31, 1984, and the scheduled oral argument on May 29, 1984, Petitioner and Respondent have been directed to file simultaneous pleadings. Thus, this pleading is of an anticipatory nature, and Respondent would like to reserve the right to respond to any allegations he did not address in this pleading, at oral argument. Respondent further anticipates that the nature of Petitioner's habeas corpus action will be to seek a belated appeal, or other similar relief, based on the ground that his attorney, on direct appeal, afforded him ineffective assistance of counsel.

In this Response, "R" will refer to the Record-on-Appeal at trial, and "T" will denote the Transcript of the post-conviction hearing on May 24, 1984.

JURISDICTION

Respondent anticipates that Petitioner will seek to invoke this Court's jurisdiction under Article V, Section 3(b)(9) of the Florida Constitution (1980), and/or under Rule 9.030(a)(3) of the Florida Rules of Appellate Procedure (1977), and that this Court's jurisdiction would be properly invoked on either basis.

PROCEDURAL HISTORY

Appellant was indicted on November 6, 1980, and charged with having committed the first-degree murder of Gerald Leon Vick, on August 20, 1980, in a premeditated manner, by shooting Vick with a handgun (R. 1201). After jury trial on this charge, Appellant was found guilty of first-degree murder, and adjudicated guilty by the trial court (R. 1920-91). Pursuant to Florida law, the jury was reconvened for the sentencing phase and rendered an advisory sentence, by majority, that the death penalty be imposed upon Appellant (R. 1298). On May 12, 1981, the trial court made specific findings of fact, at a sentencing hearing, and imposed the death penalty upon Appellant, citing the existence of evidence to support a finding of four (4) ag-

gravating circumstances, and no mitigating circumstances, under Section 921.141 of the Florida Statutes (R. 1306-1309).

At the conclusion of sentencing, Appellant specifically requested that William Seidel, one of his two trial attorneys, be appointed as his appellate attorney (R. 1191).

On direct appeal, Mr. Seidel raised four issues: (a) the denial of his request for severance of his trial, from that of Tucker; (b) the alleged failure of the indictment to charge Appellant with felony murder; (c) allegedly improper and prejudicial remarks by the prosecutor; and (d), improper imposition of the aggravating circumstances found by the trial court. This court rejected all four arguments, and further found there was "overwhelming evidence" of Appellant's guilt, and that such evidence required affirmance on all points, on their face, and on the basis of the "harmless error doctrine." O'Callaghan v. State, 429 So.2d 691 (Fla. 1983), at 696. This Court also concluded that under its proportionality review, the jury "could reasonably determine" Tucker guilty of second-degree murder, and Petitioner herein guilty of first-degree murder which warranted application of the death penalty. O'Callaghan, at 696.

Justice McDonald wrote a dissenting opinion. O'Callaghan, 429 So.2d, at 696. Other than a slight modification of the dissenting opinion, the Supreme Court denied Appellant's Motion for Rehearing on April 27, 1983.

Appellant was subsequently denied executive clemency by the Governor of the State of Florida, in 1983.

On April 30, 1984, the Governor of Florida issued a death warrant, authorizing the Superintendent of the Florida State Prison to carry out the execution of Appellant between noon on May 25, 1984, and noon on June 1, 1984. The Superintendent has scheduled said execution for May 31, 1984, at 7 a.m.

Petitioner further sought post-conviction relief, by resorting to Motions under Rule 3.850, Florida Rules of Criminal Procedure, filed in and for the Circuit Court of Broward County, Florida, on May 24, 1984, and denied on the same date. Petitioner is appealing such denial, in a separate pleading before this Court.

PETITIONER'S LEGAL CLAIMS

In seeking a writ of habeas corpus to relieve him of the judgment and sentence of death, Petitioner argues that he was not afforded his constitutional right to a meaningful appeal in that his appellate councel failed to render reasonably effective assistance of counsel. The failings which Petitioner set out can be classified as relating either to matters arising out of the trial or out of the sentencing phase.

As to the guilt phase, Petitioner asserts that his counsel was ineffective by reason of failure to raise on ap-

peal the issues of (1) the alleged Brady violation regarding whether the State should have been foreclosed from relying on testimony derived from destroyed evidence (the tee shirt); (2) denial of jury request for testimony; (3) insufficiency of the evidence to establish guilt beyond a reasonable doubt; (4) denial of motion for individual, sequestered voir dire.

With regard to the sentencing phase, Petitioner asserts that his appellate counsel was ineffective by reason of his failure to raise on appeal the question of the Court's allegedly improper instruction to the jury on the jury's role and responsibility which allegedly depreciated or diminished the potential role of the jury as "advisory" regarding its recommendation as to punishment.

Therefore, Petitioner's assertions must be examined in light of the Supreme Court's announced standards in Strickland v. Washington, ___U.S.___, (Case No. 82-1554), 35 Cr.L.Rptr 3066 (opinion rendered May 14, 1984). As stated therein, Petitioner is required to show "deficient performance by counsel," which "prejudiced the defense." Strickland, slip opinion, at 17. In reviewing the performance of trial counsel, a reviewing court will examine the totality of circumstances available to counsel at the time, and attach a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, slip opinion, at 19. The court

must then determine and conclude whether, based upon these considerations, a defendant has shown that "counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, at 16.

Independent of this requirement, it is incumbent upon a defendant to demonstrate that "...there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, at 24. An insufficient showing of such prejudice by a defendant, under this standard, will defeat a defendant's claim, regardless of any determination of the sufficiency of counsel's performance. Strickland, at 27.

As to alleged errors in having failed to raise the judge's instructions to the jury, as to their role in the capital sentencing process, the Court in Strickland mandated that a criminal defendant must demonstrate that:

> ... there is a reasonable probability that, absent the errors, the sentencer - including an appellate court, to the extent it independently reweighs the evidence - would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

Strickland, at 25. There is no language in the Strickland opinion that limits or restricts the application of the

standards formulated therein, solely to trial counsel.[1] Therefore, in applying Strickland, Petitioner cannot establish ineffective assistance of appellate counsel under such standards. All of Petitioner's anticipated issues, as aforementioned, will be addressed sequentially.

Petitioner initially maintains that the inadvertent destruction of the T-shirt found on the victim's remains constituted a violation of Brady v. Maryland, 373 U.S. 83 (1963). The essence of this claim, as stated at trial, was that all testimony derived from the T-shirt, for which the T-shirt would be "useful in direct or impeachment testimony," should be suppressed, since the State allegedly caused its destruction (R. 81-82). The United States Supreme Court specifically rejected this argument made by defense counsel at the post-conviction hearing, and at trial:

> The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' [necessary under Brady].

United States v. Agurs, 427 U.S. 97, 109-110, 96 S.Ct 2392, 49 L.Ed.2d 342, 353 (1976). Appellant's argument in his motion for post-conviction relief merely spoke to the possible results of examination of the T-shirt. This consti-

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[1] In fact, Florida courts have analyzed claims of ineffective assistance of appellate counsel, in state habeas petitions, based on the standard in Knight v. State, 394 So.2d 997 (Fla. 1981), even though the Knight case did not specifically address the issue of ineffective appellate counsel.

tutes the classic deficiency argument addressed om Agurs, supra.

Appellant's speaking suppression motion suggested that there was "reason to believe" that the T-shirt was material to the existence and number of gunshot wounds (R. 81-82). However, the identity of the victim was ascertained through other means, by Louis Huey, and by Vick's family (R. 499-500, 692-693). As the prosecution argued, there were available photographs of the T-shirt, with full front and back views displayed (R. 83-84). Thus, on the Record, Appellant was not prejudiced by the nonavailability of the actual shirt itself.

Clearly, no Brady violation occurred at trial. Therefore, the omission to question the finding on appeal was not a deficiency. Furthermore, even if there was a deficiency in failing to raise the issue, Petitioner has not shown a likelihood that the outcome of the appeal would have been different, had the issue been argued. [2]

Petitioner would likely urge that his appellate counsel should have appealed the denial by the trial court of the jury's request for rereading of the medical testimony, objected to by counsel at trial. (R. 1130-1132).

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[2] It should further be noted that Petitioner's basis for arguing suppression of evidence, on a Brady violation basis, was basically limited to the issue of identity of the victim, and to the existence and number of gunshot wounds. (R. 81-82). If any other basis for failure to appeal this issue has been raised by Petitioner, it would be barred from consideration, since not argued at trial. Sapp v. State, 411 So.2d 363 (Fla. 4th DCA 1982).

However, it is clear that this argument would have lacked substantive merit, if raised on appeal. Florida courts have recognized a trial court's extremely broad discretion, in considering requests by a jury, for the rereading of trial testimony. Green v. State, 414 So.2d 1171 (Fla. 5th DCA 1982); De Castro v. State, 360 So.2d 474 (Fla. 3rd DCA 1978); see also, United States v. Luesada-Rosadal, 685 F.2d 1281. In De Castro, supra, the trial court rejected a request for rereading of testimony, for the reason that "it was not practical" to do so, and that if any rereading was in order, it would have to consist of the entire trial testimony. De Castro, supra, at 475. In view of the trial court's similar reaction to such a request herein, (R. 1130-1131), it cannot be said that such a decision was anything but an appropriate exercise of discretion, and cannot be interpreted as insidious or arbitrary. De Castro, supra; Matire v. State, 232 So.2d 209 (Fla. 4th DCA 1970). Therefore, Petitioner cannot maintain that, the failure to raise this issue was deficient performance, or that, but for such failure to argue this point, it is reasonably possible that the verdict at trial would have been different. Strickland, at 16, 17, 24. Therefore, Petitioner's allegation of ineffective appellate assistance, as to this issue, has no merit.

Petitioner also asserts that ineffective assistance of counsel was demonstrated by counsel's failure to raise on

appeal the question of sufficiency of the evidence to establish guilt beyond a reasonable doubt. While this issue was not specifically raised, in capital cases this Court always examines the sufficiency of the evidence. Rule 9.140(f) Florida Rules of Appellate Procedure; Tibbs v. State, 397 So.2d 1120 (Fla. 1981). Consequently, it is clear that the omission of the sufficiency issue on direct appeal certainly does not constitute a substantial deficiency, measurably below the standard of performance expected of competent counsel, nor can any prejudice be shown. Strickland v. Washington, supra. The rights of the accused to reasonably competent assistance of legal counsel does not entitle him to have every conceivable constitutional challenge pressed upon the court. Engle v. Isaac, 456 U.S. 107, 71 L.Ed.2d 783 (1982).

Petitioner would also assert that failure to raise the denial of the motion for individual sequestered voir dire constitutes ineffective assistance of counsel. This claim is specious in view of Rule 3.300(b) Florida Rules of Criminal Procedure which allows that the Court may examine the jurors individually or collectively. [1]

Moreover, just as it does not constitute ineffective assistance of counsel to request individual examination of prospective witnesses, Thomas v. State, 421 So.2d 160

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[1] To the extent that Petitioner supports this claim with reference to the case of Grigsby v. Mabry, 569 F.Supp. 1273, (E.D. Arkansas 1983), it is clear that the Gribsby issue was never raised in the trial court.

(Fla. 1982), nor is it a substantial deficiency for appellate counsel to omit the issue from direct appeal.

Petitioner can be expected to assert that appellate counsel was ineffective, in not raising on appeal that the trial court, in informing the jury that its sentence decision was advisory, depreciated the gravity of the jury's decision making process and therefore rendered their recommendation of the death penalty unreliable. This point also has no merit.

The language of the relevant statutes clearly indicates that appellate counsel was not deficient, and in fact did not raise because the claim had no merit on appeal. Section 921.141(2), and (3), expressly convey that the jury's sentence <u>is</u> advisory. Said statutory provisions read in relevant parts:

> (2) ADVISORY SENTENCE BY THE JURY. - After hearing all the evidence, the jury shall deliberate and render an <u>advisory sentence</u> to the court,...
>
> (3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH. - <u>Notwithstanding the recommendation of a majority of the jury, the court</u>, after weighing the aggravating and mitigating circumstances, <u>shall enter a sentence</u> of life imprisonment or death,... (e.a.)

The language of F.S. 921.141 is clear and unambiguous and the trial court's instructions were no more than a reiteration of statutory language; thus, there was no error in giving them.

Petitioner has previously cited Tedder v. State, 322 So.2d 908 (Fla. 1975) and Richardson v. State, 437 So. 2d 1091 (Fla. 1983), in support of his contention that a jury's recommendation is more than advisory and entitled to great weight by the trial court, yet he has sought, and is expected to pursue his attempt to avoid the jury's recommendation sub judice.

It is further evident that the trial court not only instructed the jury regarding the advisory nature of their opinion, it also instructed them as to the seriousness of their deliberations. Just prior to excusing the jury for deliberation, the trial court instructed the jury as follows:

> The fact that the determination of whether or not a majority of you recommend the sentence of death or sentence of life imprisonment in this case can be reached by a single ballot, should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and to bring to bear your best judgment upon the sole issue which is submitted to you at this time: whether a majority of your number recommend that the Defendant be sentenced to death or to life imprisonment. (R. 1167). (e.a.)

Thus, the jury was not only instructed in accordance with §921.141 Fla.Stats., but were additionally reminded

that their decision would affect a human life. Therefore, Petitioner's argument that the jury may have been otherwise influenced is without merit. It is therefore additionally clear that, besides failing to constitute ineffective appellate counsel, there was no prejudice to Petitioner's direct appellate prospects by the decision not to raise this issue as grounds with which to challenge the sentence imposed. Strickland, supra.[3]

With respect to all of the aforementioned issues, it has been consistently held that appellate counsel cannot, and is not required to raise every conceivable challenge to the trial judgment and sentence, so as to avoid risk of being held accountable as ineffective, at a subsequent point in time. Scott v. Wainwright, 433 So.2d 974 (Fla. 1983). Furthermore, Petitioner was not Constitutionally entitled to such perfect, errorless assistance of counsel. Meeks v. State, 382 So.2d 673 (Fla. 1980); see also, United States v. Fassell, 531 F.2d 1275 (5th Cir. 1976).

Petitioner's counsel did not fail to raise any issue, which if raised, would have been reversible error as to the verdict or sentence. Scott, supra. Therefore, Peti-

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[3] Respondent further points out that there was no contemporaneous objection to the trial court's instructions and statements as to the jury's role in capital sentencing; thus, appellate counsel was not deficient in failing to raise an issue which was not preserved for direct appellate review, at trial. De Castro v. State, 365 So.2d 701 (Fla. 1979).

tioner's appellate counsel, rendered reasonably effective legal assistance, in his direct appeal.

CONCLUSION

WHEREFORE, Respondent respectfully requests that the anticipated Petition for Habeas Corpus be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Anticipated Petition for Writ of Habeas Corpus has been furnished by hand delivery this 28th day of May, 1984 to DAVID LIPMAN, ESQUIRE, Lipman & Weisberg, P.A., 5901 S.W. 74th Street, Suite 304, Miami, Florida 33143 and STEVEN L. WINTER, ESQUIRE, 99 Hudson Street, 16th Floor, New York, New York 10013.

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