IN THE SUPREME COURT OF FLORIDA

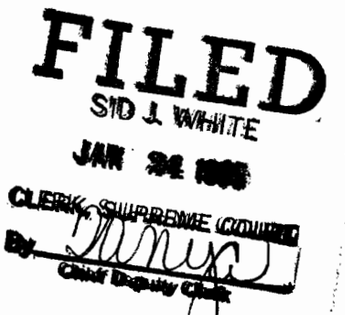
LARRY JOE JOHNSON,

Petitioner,

vs. CASE NO. 66445

STATE OF FLORIDA,

Respondent.
_____/



RESPONSE TO PETITION
FOR WRIT OF HABEAS CORPUS

COMES NOW the Respondent by and through its undersigned attorneys and files this its response to the petition filed herein and says as follows:

I

The respondent holds petitioner pursuant to the judgment and sentence imposed against petitioner by the Circuit Court in and for Madison County, Florida on January 9, 1980. Attached hereto and made a part hereof as Respondent's Exhibit A is a true and correct copy of said judgment and sentence. (R 1125-1126).

Said judgment and sentence was appealed to this Court and on November 17, 1983, this Court entered its opinion affirming the judgment and sentence. Johnson v. State, 442 So.2d 185 (Fla. 1983) cert. denied ____ U.S. ____, 80 L.Ed.2d 563 (1983).

II

The Respondent denies the allegations contained in the petition for writ of habeas corpus filed herein, alleging he was denied effective assistance of counsel on his direct appeal in this Court which lead to the affirmance of his death sentence.

The Respondent affirmatively alleges that the petitioner was not involuntarily removed from the legal proceedings and the

record of the trial proceeding refutes said allegation. The Respondent affirmatively alleges that trial counsel requested that petitioner be allowed to leave the courtroom while one of his witnesses testified on his behalf; that said request was made in the presence of the defendant without objection and that he is estopped from claiming the State of Florida violated any of his rights guaranteed by the Constitution of the United States.

The Respondent affirmatively alleges that the record refutes the allegation that trial counsel properly objected to the exclusion of prospective jurors Stephenson and Bellamy; that appellate counsel was unable to and properly did not raise the alleged Witherspoon violation; and that even if he had the claim would have been rejected.

The Respondent, of course, denies the allegations that constitute legal conclusions of counsel for petitioner.

III

The petition alleges in ground one that he was "removed" from the courtroom while Dr. McMahon testified at her request . . . and with his counsel's consent . . ." (Pet., p. 3). It is also alleged that he was "involuntarily removed" (Pet., p.6). It is further alleged that appellate counsel was ineffective for not raising this impropriety on direct appeal because if he had the sentence would have been vacated under Francis v. State, 413 So.2d 1175 (Fla. 1982); Hall v. Wainwright, 733 Fed.2d 766 (11th Cir. 1984) and Proffit v. Wainwright, 685 Fed.2d 1227 (11th Cir. 1982).

Aside from the fact that none of said decisions were decided when petitioner's brief was filed and an attorney is not ineffective for failing to anticipate judicial decisions, Muhammad v. State, 426 So.2d 533 (Fla. 1982), appellate counsel could not raise as error the petitioner's absence from the courtroom.

The record quite clearly demonstrates that petitioner was

allowed to absent himself from the courtroom while his witness was testifying on his behalf, at the request of his trial attorney (R-901), the request being made in petitioner's presence in open court. Attached hereto and made a part hereof as Respondent's Exhibit C is a true and correct copy of the portion of the record which establishes this fact. As can plainly be seen from the testimony of Dr. McMahon, she explained to the jury that petitioner left the room by a prior arrangement because it was not to his advantage to hear anyone sit and discuss his psychological functions and it would prejudice future evaluations she might be called on to make. (Exhibit C, p. 2). As the face of the petition shows, Judge Lawrence in ruling on the request to absent himself from the proceedings said, "At the request of the defendant and his counsel, it will be permitted". (Exhibit C, p. 1). The record before this Court refutes the allegation that he was "involuntarily removed" from the courtroom and demonstrates he was free to return as soon as Mr. Hunt informed the Court.

It should be clearly understood that Mr. Hunt has not been alleged to have rendered ineffective assistance of counsel and it must be assumed that this was a matter of trial strategy on his part. It should also be noted that petitioner was present when counsel made the request and did not object to the request.

We are told by present counsel that Michael J. Minerva was ineffective in his representation of petitioner on appeal because he did not argue the grant of petitioner's request was error. Mr. Minerva in his affidavit states the failure to raise this was not a strategic decision. (Aff'd in Support of Pet). That is irrelevant for there are other reasons why it was not raised which Mr. Minerva does not mention in his ex parte affidavit.

The law established by this Court is that appellate counsel is bound by the acts of trial counsel and he can not take inconsistent legal positions from that presented below, Castor v. State, 365 So.2d 701 (Fla. 1978). See also: McPhee v. State,

254 So.2d 406 (Fla. 1st DCA 1971) and Ray v. State, 403 So.2d 956 (Fla. 1981) holding a defendant is estopped from challenging judicial acts which he requested be taken. Mr. Minerva is well aware of Castor and its progeny for he was counsel of record in said case. Since an appellant may not take advantage of an error which he invited and an appellate attorney is bound by the acts of trial counsel and may not take an inconsistent position with regard thereto, petitioner's appellate attorneys could not raise this issue on the direct appeal, and if they had, it would not have been viable.

This case involves more than a procedural default under Wainwright v. Sykes, 433 U.S. 72 (1972): it involves an estoppel based upon the affirmative actions of counsel which were for strategic reasons. To allow a criminal defendant to take a course of action at trial and after it proved unsuccessful to seek a reversal based upon those very actions would constitute a "perversion of justice". Curry v. Wilson, 405 Fed.2d 110 (9th Cir. 1968).

In Curry, the defense attorney did not move to suppress a confession during the trial for strategic reasons, to wit: the testimony surrounding the taking of the statement would affirmatively assist in the defense raised. After Curry was convicted he attempted to secure a writ of habeas corpus by claiming his constitutional rights were violated by the introduction of the statement. Curry, like petitioner, contended trial counsel could not waive his constitutional claim. The court, in rejecting the claim said:

> ". . . It would be a perversion of the judicial process to now give Curry the best of two worlds upon the basis of such an alleged statement by his counsel. [that the time to raise the confession claim was on appeal] . . . A contrary result would enable counsel for a defendant to try one strategy by deliberately using, for his client's benefit, evidence that could be claimed to be constitutionally tainted and then, if not satisfied with the result, to get a second trial by claiming that the constitutional taint requires a reversal in spite of his tactical decision. We

> do not think the California courts favor such a result; we do not think that this Court should favor it either . . ."

405 Fed.2d at 113.

That is exactly what we have in the instant case and the Respondent is confident that this Court will not permit a defendant to pervert justice by taking advantage of the unsuccessful strategic decisions made during trial of his attorney.

Wainwright v. Sykes, supra, makes it abundantly clear that decisions concerning the conduct of the trial belong to counsel and that the defendant in the absence of an objection is precluded from later raising alleged errors even of constitutional magnitude. The Court so held to prevent sandbagging by defendants in the hopes of insuring a reversal in the event of a conviction. The Court recognized that without such a rule the just administration of the law would be frustrated. This Court recognized this fact prior to Sykes in State v. Jones, 204 So.2d 515 (Fla. 1967) and adopted Sykes shortly after it was decided. Clark v. State, 380 So.2d 1031 (Fla. 1980).

The petitioner alleges there was no record of a waiver by the petitioner himself and therefore he is entitled to relief. This ignores that in matters of trial strategy, the defendant is bound by the acts of competent counsel, Estelle v. Williams, 425 U.S. 501 (1976) and Wainwright v. Sykes, supra, and that dictum Fay v. Noia, 372 U.S. 391 (1963) and Johnson v. Zerbst, 304 U.S. 458 (1938) were significantly constricted by Sykes. See: 433 U.S. at 87-90; 425 U.S. at 508, n. 3. Mr. Justice Brennan, the author of Fay v. Noia dissented in Sykes on the basis of Fay.

In Williams, supra, the defendant was tried in prison garb, without objection by counsel, in violation of his right to a fair trial. The trial judge did not inquire of counsel or the defendant whether this was a deliberate choice. In reversing the grant of a writ of habeas corpus the Supreme Court said:

> "Nothing in this record, therefore, warrants a conclusion that respondent was compelled to stand trial in jail garb or that there was sufficient reason to excuse the failure to raise the issue before trial. Nor can the trial judge be faulted for not asking the respondent or his counsel whether he was deliberately going to trial in jail clothes. To impose this requirement suggests that the trial judge operates under the same burden here as he would in the situation in Johnson v. Zerbst, 304 U.S. 458, 82 L.Ed. 1461, 58 S.Ct. 1019, 146 ALR 357 (1938), where the issue concerned whether the accused willingly stood trial without the benefit of counsel. Under our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney. Any other approach would rewrite the duties of trial judges and counsel in our legal system.
>
> Accordingly, although the State cannot, consistent by with the Fourteenth Amendment, compel an accused to stand trial before a jury while dressed in identifiable prison clothes, the failure to make an objection to the court as to being tried in such clothes, for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation."

425 U.S. at 512.

In note 9 the Court further stated:

> "It is not necessary, if indeed it were possible, for us to decide whether this was a defense tactic or simply indifference. In either case, respondent's silence precludes any suggestion of compulsion."

In the instant case, the petitioner's silence to his counsel's statement and his leaving the courtroom, precludes any suggestion that he was involuntarily removed!

In Sykes, this Court dealt with an alleged violation of defendant's Fifth Amendment right by the introduction of a statement without objection by counsel. In reversing the grant of a writ of habeas corpus, the Court rejected the claim that the trial judge, on his own motion had to determine the voluntariness of the confession in the absence of an objection, 433 U.S. at 86; repudiated the dicta in Fay, 433 U.S. at 87-88; and gave effect to the contemporaneous objection rule to prevent "sandbagging" by attorneys, 433 U.S. at 89. Of course, it also prevents defendant's from repudiating the acts of their attorneys

in subsequent proceedings, exemplified by Curry v. Wilson.

Mr. Justice Burger in his concurring opinion in Sykes, recognized that the assertion of constitutional rights is entrusted to the defendant's attorney and said:

> ". . . Once counsel is appointed, the day-to-day conduct of the defense rests with the attorney. He, not the client, has the immediate -- and ultimate -- responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop. Not only do these decisions rest with the attorney, but such decisions must, as a practical matter, be made without consulting the client. The trial process simply does not permit the type of frequent and protracted interruptions which would be necessary if it were required that clients give knowing and intelligent approval to each of the myriad tactical decisions as a trial proceeds.
>
> Since trial decisions are of necessity entrusted to the accused's attorney, the Fay-Zerbst standard of 'knowing and intelligent waiver' is simply inapplicable. . ."

433 at 93.

Justice Stephens in his concurring opinion in Sykes stated:

> ". . . If counsel is to have the responsibility for conducting a contested trial, quite obviously he must have the authority to make important tactical decisions promptly as a trial progresses. The very reasons why counsel's participation is of such critical importance in assuring a fair trial for the defendant . . . make it inappropriate to require that his tactical decisions always be personally approved, or even thoroughly understood, by his client. Unquestionably, assuming the lawyer's competence, the client must accept the consequences of his trial strategy. . ."

433 U.S. at 95.

It is noted that petitioner has not challenged the competency of his trial attorney in the representation of him at his trial.

The Respondent submits that petitioner's appellate counsel would have been estopped or barred from raising the alleged constitutional infirmity on direct appeal by virtue of his trial attorney's affirmative act of requesting that petitioner be allowed to leave the courtroom for obvious strategic reasons and

his failure to raise the constitutional claim in those proceedings. Consequently, appellate counsel was not ineffective for not attempting to repudiate trial counsel's actions by raising the inconsistent claim.

Francis v. State, 413 So.2d 1175 (Fla. 1982) is not controlling here because in said case this Court concluded that the defendant did not voluntarily absent himself. 413 So2d at 1178. In this case, the petitioner did voluntarily absent himself at his lawyer's behest and he should not be able to take advantage of his own acts. His voluntary absence distinguishes this case from Francis. See: Herzog v. State, 439 So.2d 1372 (Fla. 1983).

Hall v. Wainwright, 733 Fed.2d 766 (11th Cir. 1984) and Proffitt v. Wainwright, 685 Fed.2d 1227 (11th Cir. 1982) are clearly inapplicable. The petitioner's claim that the Eleventh Circuit held in those cases that presence is non-waivable is erroneous. First, Proffitt was modified on rehearing, Proffitt v. Wainwright, 706 Fed.2d 311 (1983), which eliminated that portion of the opinion relied on by the petitioner and in Hall the Court remanded for a hearing to determine if the petitioner waived his presence. Obviously, if waiver is impossible, there would be no need for a hearing. Secondly, Hall v. Wainwright, supra, is not final and review of that Eleventh Circuit Court decision is being sought by Louie L. Wainwright. Moreover, Hall v. Wainwright, supra, collides with this Court's decision in Hall v. State, 420 So.2d 872 (Fla. 1982).

Judge Hill's concurring opinion in Hall, 733 Fed.2d at 780-785, demonstrates with clarity the erroneous argument of petitioner regarding Diaz v. United States, 223 U.S. 442 (1915) and Hopt v. Utah, 110 U.S. 574 (1884). In fact, Judge Hill would have applied Wainwright v. Sykes, supra, 733 Fed.2d at 780, but it was unclear whether this Court reached the merits thereby waiving the State's procedural default defense.

The petitioner has alleged no actual prejudice resulted by his voluntary absence induced by his trial attorney, who is presumed competent since he has not been alleged to have been otherwise, for strategic reasons. It can be presumed that petitioner was consulted in the matter for Mr. Hunt used the words "we" and thus intelligently and knowingly acted as he did.

This belies any serious claim that a "fundamental error" argument could have been advanced by appellate counsel since no prejudice could be shown. This is particularly true in light of the fact that (1) the witness was a defense witness who was testifying in his favor and not an adverse witness, (2) by leaving the courtroom he added significance to her testimony by his dramatic withdrawal therefrom and, (3) gained more candid testimony from his defense witness without fear of an adverse reaction by the petitioner based upon the testimony, such as an outburst or other negative demonstration, which in Dr. McMahon's words would not be "to his advantage". (R-902).

IV

The petition alleges that appellate counsel was ineffective in representing the petitioner on his direct appeal because he did not raise as a ground for reversal of the sentence of death the propriety of the excusal for cause of prospective jurors Stephenson and Bellamy under the rule announced in Witherspoon v. Illinois, 391 U.S. 510 (1968) and its progeny, even though trial counsel objected to said excusal.

The Respondent respectfully submits this claim is totally devoid of any legal merit and that counsel has not accurately reflected what occurred at the trial court level. Assistant public defender, Jimmy Hunt, whose competency has not been questioned by petitioner, did not object to the excusal for cause on the grounds the veniremen were able to consider death as a possible penalty and the record demonstrates this fact. (R-136, 137; 198; Respondent's Ex. B). Indeed, Mr. Hunt candidly stated that he ". . . did not wish to voir dire [Bellamy] because this juror seems to be firm. . ." (R-198) but objected on the ground ". . . that excluding this juror from the jury because of her beliefs as to the death penalty would deny the defendant his right to a jury that represents a fair cross-section of the community . . ." (R-198). That was also the basis of the objection as to venireman Stephenson. In short, Mr. Hunt did not object on the grounds that Witherspoon was violated but that the excusal would deprive the defendant of a jury composed of a cross-section of the community.

That being the case, appellate counsel could not have properly argued the alleged Witherspoon violation on direct appeal because it was not raised and decided in the trial court. North v. State, 65 So.2d 77 (Fla. 1953); Steinhorst v. State, 412 So. 2d 332 (Fla. 1982) [appellant is confined to the specific grounds raised in the trial court and other grounds will not be considered for the first time on direct appeal]. Since appellate counsel could not properly raise the argument that his present attorneys insist he should have, he can not, as a matter

of law, be found ineffective for failing to raise the issue in the appellate proceeding. Francois v. State, 423 So.2d 357 (Fla. 1982); Jackson v. Wainwright, 452 So.2d 533 (Fla. 1984); McRae v. State, 439 So.2d 868 (Fla. 1983); Jacobs v. Wainwright, 450 So.2d 200 (Fla. 1984) and Ruffin v. Wainwright, 10 FLW 20 (January 4, 1985). It should be observed that the petition does allege appellate counsel was ineffective for not raising the claim that trial counsel did raise and preserve, to wit: the deprivation of a jury representing a cross-section of the community. This is understandable because that claim had been rejected by every court of competent jurisdiction, including this court. Lockett v. Ohio, 438 U.S. 586 (1978); Spinkellink v. Wainwright, 578 Fed.2d 582 (5th Cir. 1978); and Downs v. State, 386 So.2d 788 (Fla. 1980). See also: Riley v. State, 366 So.2d 19 (Fla. 1978); Jackson v. State, 366 So.2d 752 (Fla. 1978); Steinhorst v. State, supra; and Maggard v. State, 399 So. 2d 873 (Fla. 1981). Counsel, of course, is not ineffective for failing to raise unmeritorious issues. Indeed, contrary to the argument contained in the petition (Pet. at p. 4,5), an appellate attorney is not ineffective for failing to raise every conceivable claim -- even colorable claims -- and the United States Supreme Court has so held, Jones v. Barnes, ___ U.S. ___, 77 L.Ed.2d 987 (1983), as has this Court. Ruffin v. Wainwright, supra, and the cases cited therein, 10 FLW at 21. The Fifth Circuit Court of Appeals decisions cited in the petition were decided prior to Jones and must therefore be regarded as improper statements of the law.

The attorneys for petitioner are attempting to use the petition for writ of habeas corpus to raise issues that could have been raised at trial and, if preserved, on appeal, by casting the claim as ineffective assistance of appellate counsel. This Court, in McCrae v. Wainwright, supra, properly held the rule against using the writ as a substitute for direct review cannot be circumvented in such a manner. This is obviously done in the hopes that this Court will decide the merits of his

belated Witherspoon claim so that petitioner can have it considered by a federal court in a habeas corpus proceeding even though there was a procedural default under Newsome v. Henderson, 425 U.S. 967 (1976) and Darden v. Wainwright, 699 Fed.2d 1031 (11th Cir. 1983), cert. pending.

The Supreme Court has conferred upon the several states the right to insist that issues be presented in an orderly and timely fashion by prohibiting federal review by a habeas corpus court if the legal issue was not raised in accordance with state procedural requirements, Wainwright v. Sykes, 433 U.S. 72 (1977) and Engle v. Isaac, 456 U.S. 107 (1982). The Respondent requests this Court to not jeopardize the states legal defense in subsequent proceedings by addressing the alleged Witherspoon issue on its merits.

Should this Court insist on reaching the Witherspoon question to decide the competency of counsel claim the petitioner still fails.

Both Miss Stephenson (R 135-136) and Mrs. Bellamy (R-198) made it abundantly clear that they could never vote to impose the death penalty under any given set of circumstances. The petition relies upon Granviel v. Estelle, 655 Fed.2d 673 (5th Cir. 1981); Burns v. Estelle, 626 Fed.2d 398 (5th Cir. 1980); Darden v. Wainwright, 725 Fed.2d 1526 (11th Cir. 1984); and Witt v. Wainwright, 714 Fed.2d 1069 (11th Cir. 1983) cert. granted ___ U.S. ___, 80 L.Ed.2d 551 (1983) to support his contention that the perspective jurors were improperly excused because they used the words, "I think". Petitioner's attorneys have neglected to inform this Court that the use of such words does not mean the trial judge could not conclude the venireman's views were such that excusal was proper under Witherspoon and that the Eleventh Circuit Court of Appeals so held in the case of McCorquodale v. Balkcom, 721 Fed.2d 1493 (11th Cir. 1983)

(en banc). The reversal of Witt v. Wainwright, supra, by the by The United States Supreme Court on January 21, 1985, Wainwright v. Witt, ___ U.S. ___ (1985), Case No. 83-1427, which counsel for petitioner prematurely relied upon, conclusively establishes that even if trial counsel properly asserted the claim, appellate counsel would not have been ineffective for failing to pursue it. This Court's decision in Witt demonstrates petitioner would not have been successful had the claim been raised on appeal -- assuming this Court reached the merits in the face of the procedural default by trial counsel -- an attorney whose competency has never been challenged, yet! Apparently he, as well as appellate counsel, reasonably concluded a Witherspoon objection was not legally justified. It is strange indeed that appellate counsel's competency has been challenged but trial counsel's has not. Has trial counsel's competency not been raised to prevent him from testifying as to conversations with petitioner regarding his voluntarily leaving the trial proceeding which would demonstrate he knowingly and intelligently waived his right to be present while Dr. McMahon's testified on the advise of counsel for strategic or other justifiable reasons?

CONCLUSION

Appellate counsel was not ineffective for failing to raise issues which he could not have raised because he was estopped from taking a position inconsistent with the acts of trial counsel and trial counsel did not preserve the other issue by interposing a specific objection. The petitioner is certainly not entitled to a new trial. Petitioner isn't even entitled to a belated appeal. Indeed, a belated appeal would merely produce an affirmance because this Court would be precluded from reaching the merits of the claims. The petitioner is entitled to no relief whatsoever, and therefore, the petition for writ of habeas corpus should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response has been forwarded by hand delivery to Counsel for Petitioner, Baya Harrison, The Murphy House, 317 East Park Avenue, Tallahassee, Florida 32301, this 24th day of January, 1985 and by U.S. Mail to Steve Seliger, Post Office Box 324, Quincy, Florida 32351, this 24th day of January, 1985.

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