IN THE SUPREME COURT OF FLORIDA

THOMAS DEWEY POPE, Petitioner, v. LOUIE L. WAINWRIGHT, Secretary, Department of Corrections, State of Florida, Respondent.	)	CASE NO. 67,054

RESPONSE TO PETITION FOR
WRIT OF HABEAS CORPUS

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Respondent, through undersigned counsel, responds to the Petition for Writ of Habeas Corpus filed by Petitioner, Thomas Pope, and states:

I

JURISDICTION

The Petitioner's petition for writ of habeas corpus is based on the claim that he did not receive the effective assistance of appellate counsel in his direct appeal before this Court. The claim is properly presented in this Court, Knight v. State, 394 So.2d 997, 999 (Fla. 1981), but Respondent maintains the Petitioner is not entitled to relief.

II

FACTS

Introduction

The Petitioner has gone to great lengths to assert appellate counsel's omissions but has overlooked what the attorney did in the appeal. Mr. Gelety's initial brief (Respondent's Appendix A) raised three issues, two of which pertained to the guilt phase, and if successful, would have resulted in new trial. The third issue concerned sentencing, which if successful would have entitled Petitioner to resentencing.

In this Court's opinion affirming the convictions, it discussed the first point raised (whether the trial court properly allowed the video-taped deposition of a witness to be introduced at trial), summarily denied the second issue as being without merit (sufficiency of the evidence) and thoroughly discussed the sentencing issue. Pope v. State, 441 So.2d 1073 (Fla. 1983). Mr. Gelety filed a motion for rehearing (Respondent's Appendix B) which was denied (Respondent's Appendix C).

III

NATURE OF RELIEF SOUGHT

Respondent requests that this Court DENY the Petition for Writ of Habeas Corpus, for Petitioner has failed to show he received ineffective assistance of counsel on direct appeal.

IV

BASIS FOR DENIAL OF THE PETITION

A. Standard for Determining Effective Assistance of Counsel on Appeal

This Court, in its recent decision in Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985), applied the standard set by the United States Supreme Court in Strickland v. Washington, ___U.S. ___, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), for gauging the effectiveness of counsel generally, to a claim of ineffective appellate counsel. Accordingly:

> A person convicted of a crime, whose conviction has been affirmed on appeal and who seeks relief from the conviction or sentence on the ground of ineffectiveness of counsel on appeal must show, first, that there were specific errors or omissions of such magnitude that it can be said that they deviated from the norm or fell outside the range of professionally acceptable performance; and second, that the failure or deficiency caused prejudicial impact on the appellant by compromising the appellate process to such a degree as to undermine confidence in the fairness and correctness of the outcome under the governing standards of decision.

Johnson v. Wainwright, 463 So.2d 207, 209 (Fla. 1985).

In considering a claim of ineffectiveness for failure to raise an issue on appeal the court does not reach the merits of the issue, but decides whether counsel's failure to raise it was a serious deviation from professional norms, and, if so, whether the defect undermines confidence in the outcome of the appellate process. Johnson v. Wainwright, supra, at 211. Counsel need not raise every conceivable claim. Ruffin v. Wainwright, 461 So.2d 109, 111 (Fla. 1984); Gillihan v. Rodriguez, 551 F.2d 1182, 1189 (10th Cir. 1977); Harshaw v. United States, 542 F.2d 455, 457 (8th Cir. 1976).

This Court in McCrae v. Wainwright, 439 So.2d 868, 870 (Fla. 1983), held that habeas corpus should not be used as a vehicle for presenting issues which should have been raised at trial and on appeal, thus allegations of ineffective assistance of appellate counsel should not be allowed to serve as a means of circumventing the rule that habeas corpus will not lie to provide a second or substitute appeal. Further where an issue does not rise to the level of fundamental unfairness it is clear that appellate counsel's failure to raise the issue is not a serious and substantial deficiency. Id at 870-871. This is particularly true where, as here, the issues have not been preserved for appellate review; if there was no chance of convincingly arguing fundamental unfairness then appellate counsel's conduct in not raising the issues is not deficient. McRae, supra; Johnson v. Wainwright, supra.

Here Mr. Gelety filed briefs and raised claims of sufficient significance so that the court addressed the issues in its opinion. His tactical decision not to challenge issues which were not preserved for review, while addressing issues which had merit, provided Petitioner with effective assistance of counsel.

V

ARGUMENT

POINT ONE

The remarks of the trial court and the prosecutor, which were not objected to at trial, were not such as to deprive Petitioner of a fair and impartial jury.

Petitioner complains of a variety of comments by the trial court and by the prosecutor were so prejudicial as to deprive him of a fair trial. Respondent asserts that as none of the complained of comments was objected to at trial, they have not been preserved for appellate review. State v. Cumbie, 380 So.2d 1031 (Fla. 1980); Clark v. State, 363 So.2d 331 (Fla. 1978). As no objection was tendered in the trial, and as prosecutorial comment alone does not warrant automatic reversal, i.e., is not fundamental error Mr. Gelety, Petitioner's counsel was not ineffective for failing to raise this issue.

A. Comments of the trial court.

Petitioner complains the trial court engaged in a course of comments which undermined the importance of the instructions as to the law and encouraged the jury to render its verdict on matters outside the record.

Specifically Petitioner complains of the trial court's opening remarks to the venire (R. 14-18); the trial comment regarding the four types of homicide (R. 1053); the trial court's comment regarding the definition of justifiable homicide (R. 1057) and the trial court's comment that no one has "a right to violate the rules we all share" (R. 1075).

Examining these comments individually reveals that absent objection these comments do not constitute fundamental error, thus appellate counsel properly did not argue them and Petitioner is not entitled to relief upon them. Further any improper inference which might have been drawn from them was clearly vitiated by the trial court's subsequent

proper instruction on how the jury was to reach its verdict, read directly from Florida Standard Jury Instructions in Criminal Cases both before the sworn jury heard any evidence (R. 194-198) and before the jury began deliberations (R. 1053-1075).

Before voir dire began the trial court addressed the jury regarding their responsibilities as jurors and our system of government (R. 14-18). Particularly petitioner asserts the court's comments that the jury would be force-fed the law and that once the legal jargon was cut away (R. 16-17), the jury would use its common sense, would be construed by the potential jurors as an invitation to disregard the court's instructions on the law. However, as soon as the jurors were sworn the trial court read Florida Standard Jury Instruction 1.01 which clearly the jury is to base its decision on the evidence presented at trial and the instructions on the law given by the trial court (R. 194-198). Further Standard Instruction 2.04, also given to the jury (R. 1066), specifically instructs the jury to use its common sense. Hence, not only was a portion of the trial court's remarks to the venire a correct statement of the law, whatever misimpression might have been given the jurors was corrected by the trial court's later proper instructions as found in Florida Standard Jury Instructions in Criminal Cases (R. 194-198, 1053-1075).

Petitioner next complains of a question asked a potential juror by the trial court (R. 180), asserting the import of the court's comment was that the court did not think it important whether the juror could render his verdict on the basis of the law and evidence.

Respondent asserts the more likely inference of the question was that the trial court did not want the juror to think that the court was questioning his ability to render a fair and impartial verdict. This same question had been

asked repeatedly throughout voir dire and that the trial court is required to determine whether a juror can render a fair and impartial verdict is a correct statement of the law. Leon v. State, 396 So.2 203 (Fla. 1981).

Petitioner also complains that the trial court's comment that he didn't know why the standard instruction on justifiable use of deadly force required repetition of the language regarding "any attempt to commit murder upon an dwelling house occupied by him" (R. 1057), left the jury with the impression the law's requirements did not make sense. The more likely interpretation of this comment is that the trial court was attempting to inform the jury that it was not repeating itself but instructing the jury as the law required. Clearly the court was not asserting the law did not make sense, the court merely stated it did not understand repetition of that particular phrase.

When the court began its instructions on the four types of homicide the court noted that the jury might think some of the instruction did not apply (R. 1053); however the court further noted that it was required to so instruct the jury and in light of the other instructions given the jury, they were well aware they were bound to consider the instruction. (R. 1070).

Finally Petitioner complains that the trial court's comment that "[n]o one of us has a right to violate the rules we all share[.]" (R. 1075) implied Petitioner violated the rules. Florida Standard Jury Instruction (in Criminal Cases) 2.09, read by the trial court to the jury contains the exact words about which he now complains. As these instructions were approved for use by this Court, In the Matter of the Use by the Trial Courts of the Standard Jury Instructions in Criminal Cases, 431 So.2d 594, modified 431 So.2d 599 (Fla. 1981), Petitioner's argument as to this "comment" is wholly without merit.

This Court in Gibbs v. State, 193 So.2 460, 463 (Fla. 1967) held that comments of a trial judge which lessened the importance of the instructions of the court in jury deliberations were not fundamental error and absent objection not reversable. Below, no objection was made to any of the aforementioned comments; as they are not fundamental error, and as any prejudicial inference was clearly vitiated by the court's formal instructions (R. 194-198, 1053-1075), Petitioner's counsel's failure to argue these comments was not a serious and substantial deficiency. McCrae, supra; Johnson, supra.

Petitioner also complains of a series of comments by the trial court which he asserts indicated the trial court's view as to his guilt or otherwise insinuated against the petitioner and/or his counsel.

Petitioner initially asserts the trial court told the prospective jurors that it is easy for us professionals to make decisions in this kind of case (R. 16), implied that this was an easy case to decide and that the Petitioner sought to avoid that "easy professional" decision by demanding a jury trial.

The trial court's opening remarks to the prospective jurors, placed in context are as follows:

> At any rate, we ask you to come and serve as jurors. We impress you into service, sometimes against your will and we ask you to do and perform and take on some awesome responsibilities. In this country, we let the people come up pursuant to our Constitution the -- I mean, all of us, we let each other make the final important decision on how this Country is governed, on what the rules are that we govern ourselves by, by electing people to the legislature and by having you people have the last say in our judicial system. It is easy for us as professionals to make decisions in this kind of case, as it is easy for you to make a decision in your line of work, but the Constitution says that if a person wants a jury of his peers, he has that right by the Constitution and accordingly, you are that jury of his peers.

[Emphasis added] (R. 16). Clearly the trial court's comment

was not that the decision in this case was easy, but that the decision making process is easier in the field in which one is trained than in a field where one is not trained; the comment in no way implies the Petitioner was guilty or was seeking to avoid a "professional" decision by demanding jury trial.

Further, the jury was instructed after they were sworn, that they were not to form an opinion prior to hearing all the evidence, argument and instructions (R. 194-198).

Petitioner also argues that the trial court erroneously informed the prospective jurors that they were the conscience of the community and knew right from wrong (R. 15, 17), impressing the jury that something was wrong in this case. Clearly the courts indication to the jury that they were the conscience of the community in no way reflected on the merits of the Petitioner's case, but on the juror's role as voters in the community and country in our system of self-government. (R. 15). That the court told the jury they knew right from wrong is not any more interpretable as something was wrong in this case as it was that something was right. Particularly where the jury who was sworn was told not to form a decision until all the evidence was adduced (R. 194-198) any misimpression was clearly corrected by the trial court's instructions.

Again, Petitioner's complaint regarding the statement "No one of us has a right to violate the rules we all share" is without merit as that is the precise language of charge 2.09 Florida Standard Jury Instructions in Criminal Cases.

This is not an instance like Seward v. State, 59 So.2d 529 (Fla. 1952), cited by Petitioner, where the trial court commented on the facts of the case. Here the trial court in a preliminary introduction to the prospective jurors, spoke only in general terms and did not express his opinion about the facts of the case in any way.

Petitioner's assertions that the trial court's comments to defense counsel gave the jury the impression defense counsel was bad are equally without merit.

During voir dire defense counsel was questioning several jurors who were not clearly responding to his questions. The trial court in an effort to assist defense counsel elicit answers which were responsive to his questions, the court offered to explain or rephrase the question (R. 133, 135, 137, 164). None of the trial court's offers of assistance can fairly be described as disparaging or implying improper or inept questions were being asked. Indeed the trial court was attempting and was successful in producing the answers which defense counsel sought (R. 133-135, 137, 164-165).

That the trial court asked a question directly the prospective jurors, (R. 149), cannot be considered disparaging when viewed in context. The question was the first asked of the particular jurors who had just been called up for individual voir dire (R. 145-149). The trial court had previously made the same preliminary inquiry of other prospective jurors before they were questioned individually (R. 29-30).

Petitioner further complains of a remark by the court, "Counsel it is best to proceed forward in these kind of situations. So why don't you?", (R. 379-380), also reflected poorly on defense counsel. A review of the record reveals the comment came between the end of direct questioning of a witness by the prosecutor and the beginning of cross-examination by defense counsel. It is apparent the trial court was attempting to say something other than "You may proceed," and the comment was in no way disparaging to defense counsel.

Finally Petitioner suggests that the court's comment that defense counsel did not wish to begin cross-examination of a witness (when he could not complete his cross prior to noon recess) reflected a grudging acquiescence to Petitioner's

counsel's requests and reflected detrimentally upon him. (R. 642). Respondent cannot conceive of how the trial court's statement that it wished to extend every possible courtesy to defense counsel (R. 642), can be interpreted as reflecting detrimentally upon Petitioner's counsel; rather it appears deferential.

Clearly this is not a case where the trial court reprimanded defense counsel in front of the jury, Jones v. State, 385 So.2d 132 (Fla. 4th DCA 1980), nor a case where the trial court made numerous gratuitous comments and interjections during the course of trial, Keane v. State, 357 So.2d 457 (Fla. 4th DCA 1978). Here the trial court's comments were minimal and neutral.

Further, none of the "comments" were objected to below, nor did they constitute fundamental error, Gibbs, supra, hence Petitioner's appellate counsel's failure to assign them as error and argue them was not a serious and substantial deficiency. McCrae, supra; Johnson, supra.

B. Comments by the prosecutor.

Petitioner argues that numerous comments made by the prosecutor in closing argument and in argument in the sentencing phase were improper. However, none of these comments was objected to at trial, hence they were not preserved for appellate review. Cumbie, supra; Clark, supra. Further, this Court in Murray v. State, 443 So.2d 955, 956 (Fla. 1984), reiterated that prosecutorial error alone (where properly preserved) does not warrant automatic reversal; the correct standard of review is whether the error was so prejudicial as to vitiate the entire trial. This Court further held: "Reversal of the conviction is a separate matter; it is the duty of appellate courts to ignore harmless error, including most constitutional violations." Id at 956. Where as here the evidence against an appellant is overwhelming, see: Pope v. State, 441 So.2d 1073 (Fla. 1983), the remedy for prosecutorial misconduct is not reversal but bar disciplinary action.

Petitioner asserts the trial court's failure to provide him with a copy of the PSI prior to the day of sentencing is violative of due process and requires reversal for new sentencing.

Below, it is clear defense counsel did not receive a copy of the PSI prior to the day of sentencing (R. 1132-1133). The trial court upon being informed of this fact recessed for three hours so that Petitioner and his counsel could read the PSI (R. 1133). After recess Petitioner's counsel stated he was unhappy with the PSI, not in the conclusions it came to but because the author of the PSI went beyond the state's recommendations as to the death penalty and that the PSI did not contain material in mitigation regarding Petitioner suffering from post-traumatic stress syndrome (R. 1135-1138). However, the trial court did allow Petitioner's counsel to present the matters in mitigation that had been omitted from the PSI (R. 1138-1141). Further, while Petitioner was not completely satisfied with the PSI he did not request that sentencing be deferred; as Petitioner indicated his willingness to proceed (R. 1138), no error occurred. Guzlielmo v. State, 318 So.2d 526 (Fla. 1st DCA 1975); Campbell v. State, 342 So.2d 1010 (Fla. 4th DCA 1977).

Contrary to Petitioner's assertion, Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), is not applicable to this case. There the PSI contained a confidential portion which was not disclosed to the defendant, and the Court found the defendant was denied due process when the death sentence was imposed, at least in part, on information the defendant had no opportunity to deny or explain. 51 L.Ed.2d 404.

Here however, Petitioner makes no such claim, the entire PSI was disclosed, further the trial court freely allowed defense counsel to argue matters not contained in the PSI (R. 1136-1141).

Hence, where Petitioner makes no claim that information which the trial court considered in sentencing was withheld from him, where he did not request a deferral of sentencing so as to address matters raised in the PSI, no violation of due process has occurred.

While Petitioner has not addressed how appellate counsel was ineffective in failing to raise this claim, it is clear that not only was this issue not preserved, appellate counsel clearly could not have convincingly argued this issue, hence his failure to do so is not a substantial deficiency. Johnson, supra; Ruffin, supra.

POINT THREE

The sentencing process did not encourage the jury to compare and weigh the circumstances surrounding the deaths of the three victims.

Petitioner asserts, without citation to authority, that the jury could not help but compare the circumstances surrounding the death of Christine Walters with those surrounding the deaths of Mr. DeRuso and Mr. Doranz, thus increasing the likelihood that he would receive a recommendation of death as to the victim whose death weighed heaviest on the scale.

Petitioner recognizes that the greatest number of aggravating factors applied to the murder of Ms. Walters and that the evidence which supported those factors was quite strong; Petitioner further recognizes that the jury's verdict is merely advisory and the ultimate decision rests with the trial court after weighing the aggravating and mitigating circumstances. Florida Statutes 921.141(3).

Petitioner fails to recognize that the imposition of the death penalty for the murder of Ms. Walters was an issue thoroughly litigated in this Court on direct appeal. This Court affirmed that death sentence discussing each aggravating and mitigating circumstance finding there was no merit to appellate counsel's arguments that the aggravating factors were not supported by the evidence to be without merit. Pope, supra.

Hence, regardless of whether the jury may have been led to compare Ms. Walters murder with those of Mr. DeRuso and Mr. Doranz, the imposition of the death penalty for the murder of Ms. Walters has been reviewed and sustained, once by the trial court and once by this Court. Clearly rereview of this issue is wholly unwarranted.

POINT FOUR

Neither the trial court nor the prosecutor misstated the jury's role in sentencing.

Petitioner asserts the decision of Caldwell v. Mississippi, 472 U.S. ___, 105 S.Ct.___, 86 L.Ed.2d 231 (1985), applies to the instant case and warrants reversal. Respondent asserts Petitioner has again failed to assert this claim in terms of ineffective assistance of counsel and the reason is that the issue, the defendant's right to an individualized sentencing determination based upon the particulars of the offense and the offender, were clearly recognized as early as 1976, Woodson v. North Carolina, 428 U.S. 280 (1976) and reiterated in 1978, Lockett v. Ohio, 438 U.S. 586 (1978). Thus, because there was a reasonable legal basis for asserting such a claim in Petitioner's 1982 trial, it should have been asserted, if at all on direct appeal.

However, the failure to object to or challenge the jury instructions regarding the role of the jury in capital sentencing, renders the issue non-reviewable. Kelly v. State, 389 So.2d 701 (Fla. 1978); Spurlock v. State, 420 So.2d 875 (Fla. 1982). Hence appellate counsel's failure to raise this issue was not a substantial deficiency. Johnson, supra.

The standard jury instructions given by the trial court, at sentencing (R. 1120-1126), see Penalty Proceedings--Capital Cases, Florida Standard Jury Instructions in Criminal Cases (2nd Ed. 1975), at 75-81, reflected the actual statutory roles, assigned to the judge and jury, by statute. Section 921.141(2)(b), Fla. Stat. (1972). This statutory scheme,

which directs that the jury recommend an advisory sentence, and that the judge has the ultimate decision in imposing sentence, has been consistently upheld and approved against constitutional challenges. Proffitt v. Wainwright, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); Thompson v. State, 456 So.2d 444 (Fla. 1984); Booker v. State, 397 So.2d 910 (Fla. 1981); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979); State v. Dixon, 283 So.2d 1 (Fla. 1973); Dobbert v. Strickland, 532 F.Supp. 545 (M.D. Fla. 1982), affirmed, 718 F.2d 1518 (11th Cir. 1983).

Pursuant to this valid scheme, the instructions given to the jury accurately portrayed the jurors' role in sentencing as advisory, and in no way inferred that said role was meaningless or superfluous, as Petitioner contends. Said instructions informed the jury of their duty, to advise the court as to the nature of the appropriate punishment (R. 1120); stated that the majority finding requirement should not be an invitation to "act hastily or without due regard to the gravity of these proceedings" (R. 1125), and further impressed upon the jury the relevance and significance of their deliberations and decisions, in accordance with standard jury instructions, by advising that "Before you ballot, you should carefully weigh, sift and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment" upon the issue of whether to recommend death or life imprisonment (R. 1125) (emphasis added).

Such instructions cannot be compared or equated, in any way, with the prosecutor's argument and comments, that was held to amount to "state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court." Caldwell, at 240. In said decision, the United States Supreme Court's primary concern and basis for

overturning the defendant's conviction was that by virtue of statements by the prosecutor that the jury's decision was "automatically reviewable" by the state supreme court, the defendant was deprived of a determination as to the appropriateness of his death sentence, except on appeal for the first time. Id. The court found that such a process would effectively prevent consideration of the individual offender and offense characteristic, by "sentencers who were present to hear the evidence and arguments and see the witnesses," and would thus render the sentencing process unconstitutionally unreliable and biased, in violation of the Eighth Amendment rights discussed in Woodson and Lockett, supra. Id.

Petitioner has attempted to equate express pronouncements by a State prosecutor (agreed to by the judge as correct, see Caldwell, at 246), to a jury that it should not regard itself as bearing responsibility for capital sentencing, with the giving of standard jury instructions which accurately define the respective statutory responsibilities of judge and jury. Informing a jury that their sentence is advisory in nature is not tantamount to urging upon the jury an ultimate lack of responsibility in capital sentencing. Since the Florida statutory scheme, which was accordingly followed herein, has been held to appropriately direct the "sentencers" (judge's) discretion, allow for consideration of individualized considerations, and afford the trial court the ultimate sentencing decision by carefully weighing aggravating and mitigating circumstances, after hearing and viewing the evidence, Herring v. State, 446 So.2d 1049, 1056 (Fla. 1984); Proffitt, supra; Dobbert, supra, the underlying facts and premises of Caldwell have no application herein. Since the Caldwell decision offers no support for Petitioner's claim, Petitioner has again failed to show how his appellate counsel was ineffective.

CONCLUSION

Wherefore based on the foregoing argument and authorities cited therein Respondent respectfully requests this Court deny the instant Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Petition for Writ of Habeas Corpus has been furnished by United States Mail to: DEBORAH H. ROSS, ESQUIRE, Carlton Fields Ward et al., One Harbour Place, Post Office Box 3239, Tampa, Florida 33601 this 29th day of August, 1985.

Lee Rosenthal

Of Counsel