IN THE SUPREME COURT OF FLORIDA



DAN EDWARD ROUTLY,

Petitioner,

vs. CASE NO. 68,889

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

Respondents.

_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COME NOW respondents, Louie L. Wainwright and Richard L. Dugger, by and through the undersigned counsel, pursuant to Florida Rule of Appellate Procedure 9.100, in response to petitioner's petition for writ of habeas corpus, filed on or about July 28, 1986, and this court's order to show cause, rendered August 4, 1986, and move this honorable court to deny such petition, for the reasons set forth in the instant response.

PRELIMINARY STATEMENT

Petitioner was indicted on one count of first degree murder, in violation of section 782.04 Florida Statutes (1977), in reference to the shooting death of Anthony Bockini (R 1). He was found guilty as charged following a trial by jury in Marion County Circuit Court on July 14 through 18, 1980. In a separate penalty proceeding, the jury returned an advisory sentence of life imprisonment (R 1235). On November 24, 1980, however, Judge Angel sentenced petitioner to death (R 175-177, 180-186).

Petitioner appealed such judgment and sentence to this court on December 19, 1980, and Attorney Raymond L. Goodman, Esquire, was subsequently appointed to represent him. Following briefing and oral argument, this court rendered its decision on September 22, 1983, reported as Routly v. State, 441 So.2d 1257

(Fla. 1983), in which it affirmed conviction and sentence. Petitioner filed a petition for writ of certiorari, seeking review by the United States Supreme Court, which was denied on July 5, 1984. See, Routly v. Florida, __U.S.__, 104 S.Ct. 3591 (1984).

On or about July 25, 1986, petitioner filed the instant petition for writ of habeas corpus in this court, claiming that he received ineffective assistance of counsel on appeal, and that, consequently, this court should vacate his conviction and sentence and remand for a new trial or, in the alternative, grant him a new appeal. In his petition, petitioner not only identifies the alleged acts or omissions of counsel constituting ineffective assistance, but also contends that the manner in which appellate counsel was appointed and the very statute authorizing his appointment and compensation rendered him ineffective.

## MERITS

In an exhaustive, and at times exhausting, petition, petitioner's present counsel has outlined in the greatest possible detail the alleged acts or omissions of petitioner's appellate counsel which, in his view, constitute ineffective assistance. Some forty pages alone are devoted to the manner in which Attorney Goodman could, or should, have conducted oral argument of the instant appeal. Respondents contend that, despite the battery of accusations against former counsel, petitioner has failed to demonstrate, in light of such precedents as Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and Downs v. Wainwright, 476 So.2d 654 (Fla. 1985), that he received less than effective representation from appellate counsel. Given this result as to petitioner's primary argument, respondents suggests that petitioner's two ancillary claims, regarding the circumstances of counsel's appointment and the statute authorizing his compensation, are not deserving of extended response or consideration.

## I. PETITIONER HAS FAILED TO DEMONSTRATE EITHER DEFICIENCIES ON THE PART OF APPELLATE COUNSEL OR RESULTANT PREJUDICE SO AS TO MERIT RELIEF FROM THIS COURT.

Appellate counsel raised five primary arguments on appeal in reference to petitioner's conviction and sentence. The points relating to the conviction included specific attacks upon trial counsel's denial of his motion to suppress his confession, as well as upon such court's denial of his motion for discharge; in a more general point, counsel contended that, due to the cumulative impact of a number of errors, petitioner had been denied a fair trial. In reference to the sentence of death, appellate counsel included a point on appeal addressing the constitutionality of the death penalty statute and, separately, a specific attack upon the propriety of the death sentence in his case. It would seem fair to say that petitioner presently contends that each of these issues was mishandled by appellate counsel. Additionally, to the extent that respondents can determine, petitioner seems to argue at this juncture that appellate counsel was ineffective in omitting some seven arguments now asserted to be meritorious. In analyzing the above claims, respondents take something of a different approach from that utilized by petitioner. Instead of scrutinizing each facet of counsel's performance, i.e. oral argument, rehearing, etc., respondents suggest that the most productive inquiry concerns the"strength", or lack thereof, of the appellate issues, raised and unraised.

### A. APPELLATE COUNSEL EFFECTIVELY PRESENTED THOSE ISSUES RAISED ON APPEAL

Petitioner makes a number of attacks upon the briefs submitted by appellate counsel, one of the least justified of such general attacks involving Attorney Goodman's alleged "plagiarism" of the work-product of trial counsel. Petitioner asserts in the instant petition that appellate counsel failed to adequately research or familiarize himself with the facts of the case and, as evidence to support such allegation, looks to the fact that appellate counsel re-presented a number of arguments made by trial counsel (See petition at 43-53). To

respondents, this "complaint" does not seem a cause for great concern. Given the frequency in capital appeals with which this court has been compelled to comment upon the need for proper preservation, see, e.g., Steinhorst v. State, 412 So.2d 332 (Fla. 1982), it should hardly be a "badge" of ineffectiveness that an appellate attorney actually complies with proper procedure.

Turning to the appeal itself, it should also be clear that appellate counsel was somewhat limited in what he could raise. Petitioner's trial was of short duration and surely was not fraught with constitutional error. At the sentencing proceeding, the jury returned an advisory verdict of life, a situation eliminating a number of potential appellate points. Respondents maintain that Attorney Goodman did the best that he could with what he had and that petitioner, despite the literal avalanche of often contumacious allegations, has failed to demonstrate any basis for relief.

1. THE SUPPRESSION OF CONFESSION ISSUE

In this point, Attorney Goodman argued that the trial court had committed reversible error in denying petitioner's motion to suppress his confession or statement, asserting that such statement had been made involuntarily and following an illegal arrest; in support of his contentions, appellate counsel cited to precedents of the United States Supreme Court and of this court, as well as from a number of Florida District Courts. In its opinion in the appeal, this court found that this issue had not been preserved for review, due to trial counsel's failure to make a contemporaneous specific objection at the time the statement was admitted; alternatively, this court found the argument to be without merit. Routly at 1260-1. Given the fact that appellate counsel cannot be ineffective in failing to argue an issue which has been procedurally barred, see, Ruffin v. Wainwright, 461 So.2d 109 (Fla. 1984), it would seem that Attorney Goodman did more than could reasonably have been expected to him in reference to this point. Further,

petitioner's latter-day contentions notwithstanding, nothing appellate counsel could have argued to this court could have conferred preservation on this point; in the reply brief, Attorney Goodman vehemently sought to rebut the state's allegations of lack of preservation and cited to this court the exact language of the objection interposed at the time of the statement's admission (Reply brief at 3-6). The state suggests that petitioner has failed to demonstrate any deficiency of performance in regard to appellate counsel's handling of this issue on appeal.

2. THE SPEEDY TRIAL ISSUE

In this point, Attorney Goodman argued that the trial court had committed reversible error in denying petitioner's motion for discharge, arguing that it had been error for the trial court to have extended speedy trial due to the unforeseen unavailability of a state witness, then in the final, and apparently painful, term of her pregnancy. In its opinion, this court found, on the merits, that the trial court had not abused its discretion. Routly at 1261. In his petition, most of petitioner's arguments concerning this point relate to appellate counsel's alleged failure to adequately reply to the state's answer brief, and much of the argument presented therein would seem to represent, in the final analysis, simply dissatisfaction with this court's ultimate resolution of this point on appeal. The fact that present counsel would argue this point differently does not mean that petitioner's original appellate counsel did not render effective assistance. See, Steinhorst v. Wainwright, 477 So.2d 537 (Fla. 1985). The fact remains that this court has found that the ruling below, extending speedy trial, was a proper one, given the condition of the witness, and, had Attorney Goodman made the arguments now presented in the instant petition concerning the predictability of her cramps (Petition at 74-9), it can safely be said that the result of the appeal would not have been any different.

3. THE ISSUE REGARDING PETITIONER'S SENTENCE OF DEATH

In this point, Attorney Goodman attacked the propriety of Judge Angel's override of the jury's recommended sentence of death. In the initial brief, counsel specifically attacked the finding of each of the five aggravating circumstances, citing to a number of this court's precedents in support of his contention. Counsel also argued that the judge had erred in not finding several mitigating factors and in overriding the jury's advisory verdict in general. In his reply brief, he sought to distinguish those cases relied upon by the state in support of the sentence. In its opinion, this court wrote at length upon the propriety of the death sentence, affirming the correctness of each of the aggravating circumstances and, throughout, explicitly discussing the cases relied upon by petitioner's counsel. Routly at 1262-6. Although Justice McDonald disagreed as to the finding of that aggravating circumstance relating to commission of the homicide for the purpose of preventing a lawful arrest, he concurred as to the affirmance of the conviction and sentence as a whole.

Although in the instant petition, petitioner's counsel expresses derision for the precedents relied upon by Attorney Goodman in the initial and reply briefs, he fails to identify at this juncture just what cases should have been cited, and it is clear that even with the advantage of hindsight, he has failed to come forward with any "missing" legal authority which would have affected the outcome of the appeal. Compare, Kennedy v. Wainwright, 483 So.2d 424 (Fla. 1986). Similarly, petitioner's dissatisfaction with Attorney Goodman's handling of the portion of the sentencing argument relating to the finding that the homicide had been committed during the course of a burglary is of minimal importance and, in respondents' opinion, is premised upon dubious legal authority. The fact remains that the death sentence in this case was premised upon the finding of five (5) aggravating circumstances; one of these findings, pursuant to section 921.141(5)(d) Florida Statutes (1977), was that the

homicide had been committed while petitioner was engaged in the commission of a kidnapping and while fleeing from a burglary. Thus, the finding of the commission of a burglary represented, at most, one half of one aggravating circumstance, and, should this court have regarded its finding as error, the ultimate sentence of death would have remained undisturbed. As with the preceding issue, petitioner expresses nothing more than dissatisfaction with the result of his appeal, and has failed to demonstrate that Attorney Goodman was less than effective in relation to his handling of this point. See, Steinhorst, supra.

4. THE "FAIR TRIAL" ISSUE

In this point on appeal, Attorney Goodman collected eleven alleged trial errors and presented them in tandem, asserting that their cumulative result had been the denial of a fair trail; as evidenced by the contents of the state's answer brief, this was a reasonable action of appellate counsel, in that a number of the points were not preserved for review and lacked compelling prejudicial impact when considered in isolation. In its opinion, this court did not expressly discuss any of the alleged errors, simply noting,

> we have considered other purported procedural errors asserted by the defendant and find them to be without merit. We have also reviewed the evidence pursuant to Florida Rule of Appellate Procedure 9.140(f) and we conclude that no new trial is required. Routly at 1262.

In the instant petition, petitioner reserves most of his ire for Attorney Goodman's handling of two specific issues, relating to, respectively, the alleged illegality of petitioner's arrest and an alleged comment upon his right not to testify, made by the prosecutor during voir dire. Respondents suggest that the issues, which were raised, were, given their merits, afforded sufficient attention by appellate counsel and that ineffectiveness of such counsel has not been demonstrated.

As petitioner notes in the petition, it is still his position that he was arrested illegally. What petitioner fails to realize is that, even considering there were merit to his

position, which there is not, such conclusion would have no bearing on his present incarceration. As the United States Supreme Court observed in United States v. Crews, 445 U.S. 463, 475, 100 S.Ct. 1244, 63 L.Ed.2d 537 (1980), a defendant is not a suppressible "fruit", and an illegal arrest, without more, has never been viewed as a bar to subsequent prosecution, nor as a defense to a valid conviction. Such holding, of course, is derived from a number of earlier precedents, such as Frisbie v. Collins, 342 U.S. 519, 72 S.Ct. 509, 96 L.Ed.2d 541 (1952) and Ker v. Illinois, 119 U.S. 436, 7 S.Ct. 225, 30 L.Ed. 421 (1886), and is consistent with the position taken by Florida courts in comparable situations. Compare, Akins v. Hamlin, 327 So.2d 59 (Fla. 1st DCA 1976); Jones v. State, 386 So.2d 804 (Fla. 1st DCA 1980); State v. Ballone, 422 So.2d 900 (Fla. 2d DCA 1982). Respondents suggest that Attorney Goodman adequately served his client in identifying this issue on appeal and presenting it to this court and that, in light of the above rule of law, more could not reasonably have been expected. Additionally, to the extent that this issue related to the suppression point, this court, as noted in the discussion of such point, found the issue not to have been preserved. See, Routly at 1260. It should also be noted that, petitioner's statement having been given prior to his arrest by Investigator Jerald (R 210), no evidence, "seized" as a result of the arrest, was used against him. This point is without merit.

Petitioner's second argument, relating to the alleged comment issue, is similarly an example of present counsel seeking re-argument of an issue presented in the original appeal. Compare, Harris v. Wainwright, 473 So.2d 1246 (Fla. 1985). In the initial brief, Attorney Goodman contended that the prosecutor's statements during voir dire constituted an improper comment upon petitioner's right not to testify and that, pursuant to this court's decision of David v. State, 369 So.2d 943 (Fla. 1979), reversal was required without consideration of the harmless error doctrine (Initial brief at 36). In his petition, petitioner contends that Attorney Goodman was ineffective for

failing to expressly quote the remark at issue in his brief, and in failing to argue that there existed repeated instances of alleged prosecutorial misconduct (Petition at 30-43). Although by petitioner's present count, there are approximately four objectionable comments (R 408, 470, 485, 534), there was only one objection and motion for mistrial below, made after the second such remark, and the subject of the instant point on appeal. Given the lack of objection to the other remarks, objection and mistrial required for preservation of error under this court's decision of Clark v. State, 363 So.2d 331 (Fla. 1978), appellate counsel could do no more than raise the single preserved claim of error. Ruffin v. Wainwright, supra.

Further, it is clear that, again, Attorney Goodman did the best with what he had in reference to this claim, inasmuch as the statement was not an improper comment, but rather, as the state argued in its answer brief, a response to certain statements by defense counsel. During voir dire, petitioner's trial counsel, Attorney Fox, asked the jurors the following questions,

> ...If you sat through a trial where somebody was charged with a crime and that person didn't get up on the witness stand and deny it, would you presume he must have done it?
>
> ...If the judge were to tell you at the end of the case that Mr. Routly specifically in this case, and all defendants in all cases, have the absolute right to remain silent and from [sic] the exercise of that right is not to be considered by you in arriving at your verdict in any manner whatsoever, could you all follow that instruction?
>
> ...Could you still presume somebody to be innocent who didn't get up there and explain it away? (R 407-8).
>
> And if the judge tells you, Mr. Giegerich, that the defendant has the right to remain silent and if he chooses to exercise that right you can't use that in arriving at your verdict, would you follow that instruction? (R 476-7)

Defense counsel also specifically questioned the jurors as to whether or not they would automatically believe a witness testifying under oath and whether any interest that a witness might have in the outcome of the case, such as a grant of immunity, would be something which they would wish to know about (R 470-1).

The question by the prosecutor at issue reads as follows:

> Now, the Defendant has a right to take the witness stand if he wants to but he hasn't got to, but it he takes that witness stand and testifies under oath you have a right to believe or disbelieve his testimony, the same as you would any other witness, and you should consider if he testifies the interest that he has in the outcome of this case. Do you understand that? (R 479).

This statement was plainly invited by that of defense counsel, in that it was petitioner's counsel who interjected the issue of a defendant's testifying or not testifying, as well as that of witness "interest", into the proceeding. Under such precedents of this court as State v. Matera, 278 So.2d 280 (Fla. 1973), the above statement or question was neither erroneous nor reversible. It would further seem to bear great similarity to that before the court in Simpson v. State, 352 So.2d 125 (Fla. 1st DCA 1977), wherein the prosecutor's closing argument had included the following:

> He [defense counsel] told you that the defendant is never required to take the witness stand and that any comment I or the court might make about that is absolutely wrong for us to do that, and he's right in his stating the law to you in that way.

The First District concluded that such remark had no "sinister influence". See also Houston v. State, 432 So.2d 56 (Fla. 1st DCA 1983).

Thus, again, respondents would contend that Attorney Goodman adequately served his client in raising the statement at issue as a potential issue and in arguing, to the extent that he could, pursuant to David v. State, that it constituted an improper comment upon the defendant's right not to testify. The fact that petitioner apparently chose to regard the prosecutor's remarks as somehow provocative and to announce his intention to testify, a decision, in all likelihood, already made, does not have the effect of imposing any "sinister influence" upon the prosecutor's prior remarks. Petitioner has failed to convincingly demonstrate that had Attorney Goodman argued this point any differently, any different result would have occurred, compare, Steinhorst v. Wainwright, and, again, his primary dis-

satisfaction would seem to be the fact that this issue has proven unsuccessful. Ineffective assistance of counsel has not been demonstrated in regard to counsel's handling of this point.

5. THE DEATH PENALTY STATUTE ISSUE

In this point on appeal, Attorney Goodman raised a number of constitutional challenges to Florida's death penalty statute, both upon its face, and as applied in this case, which he was ethically constrained to recognize had previously been rejected. In the instant petition, petitioner's present counsel suggests that appellate counsel should have argued to this court more recent, but largely unnamed, precedent as to the invalidity of Florida's capital sentencing structure. Inasmuch as section 921.141 has withstood over a decade of litigation, respondents suggest that it should not be unduly surprising that Attorney Goodman did not convince this court that the statute should be stricken. Certainly, the argument now presented by petitioner's counsel would have had no such effect.

Petitioner contends in his petition that Attorney Goodman was ineffective for failing to make an argument, based on Presnell v. Georgia, 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207 (1979); petitioner argues that Presnell dictates that no aggravating circumstance, relating to a murderer's commission of a felony during the homicide, can be found unless the defendant has formally been charged and convicted of such felony. This contention is utterly without merit. This court held in Knight v. State, 338 So.2d 201 (Fla. 1976) that the state may prosecute first degree murder under a felony murder theory, even when the indictment has only charged premeditated murder. Similarly, this court in Ruffin v. State, 397 So.2d 277 (Fla. 1981) specifically rejected the notion that a capital defendant must formally be charged and tried for any felony forming the basis for an aggravating circumstance. Thus, omission of this argument does not constitute ineffective assistance of counsel.

In conclusion, petitioner has failed to demonstrate ineffective assistance of counsel in regard to Attorney Goodman's handling of the issues on appeal which he chose to raise. For the most part, the instant petition represents nothing more than continued dissatisfaction with this court's resolution of the appeal, and no amount of "gloss" which petitioner may now seek to put upon the previously rejected issues can be said to raise any doubt as to the reliability of this court's affirmance of petitioner's conviction and sentence. Petitioner has failed to demonstrate either deficiency of performance or resultant prejudice, under Strickland v. Washington, in regard to the issues raised by Attorney Goodman.

### B. APPELLATE COUNSEL'S OMISSION OF THE SEVEN ISSUES IDENTIFIED IN THE INSTANT PETITION DOES NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL

In the instant petition, petitioner identifies seven (7) issues which he claims Attorney Goodman should have raised: (1) the trial court's alleged improper reliance upon a presumption in favor of the death penalty; (2) the trial court's alleged improper reliance upon the victim's "virtues" in overriding the advisory jury sentence; (3) the trial court's alleged improper allowance of unsupervised entry by non-juror into the jury room; (4) the trial court's alleged error in failing to consider all material evidence prior to ruling on the admissibility of petitioner's statement; (5) the trial court's alleged error in shifting the burden of proof to petitioner in regard to the voluntariness of his statement; (6) the alleged error in the jury's conviction of petitioner without hearing material evidence and (7) the alleged error in the delay between conviction and sentence. As this court observed in Steinhorst v. Wainwright,

> When counsel makes a choice not to argue an issue due to his unfavorable evaluation of his chance for success comparing his set of facts with the principles of prevailing law, and his evaluation is reasonably accurate, reflecting reasonable competence, the omission cannot be characterized as ineffectiveness of counsel. Id. at 540.

Respondents suggest that Attorney Goodman's failure to raise the

above issues was a decision made after due consideration, and, no doubt, recognition of their lack of merit, and that, consequently, such action was well within the range of professionally competent assistance. Additionally, due to the issues' lack of merit, no prejudice has been demonstrated.

1. THE ISSUE CONCERNING THE TRIAL COURT'S ALLEGED PRESUMPTION IN FAVOR OF THE DEATH PENALTY

In the instant petition, petitioner argues that Attorney Goodman was ineffective in failing to argue to this court that Judge Angel committed error in "presuming" that death was the appropriate sentence; evidence of this "presumption" was allegedly found in language of the sentencing order, wherein the judge, at one point, noted that death was presumed to be the appropriate penalty, unless the aggravating circumstances were outweighed by the mitigating (R 176). Petitioner argues that the above language contravenes this court's decision in Tedder v. State, 322 So.2d 908 (Fla. 1975). Respondents suggest that while this argument was not specifically presented on appeal, the propriety of the instant death sentence, an override by Judge Angel, was obviously before this court. In affirming the sentence, this court specifically observed,

> The lower court properly found the existence of five aggravating factors and no mitigating factors. Even though a jury recommendation is to be accorded great weight by the sentencing judge, death is the appropriate penalty in this situation and the judge was proper in overriding the jury in this case. Routly at 1266.

Thus, even though the existence of any "presumption" was not specifically argued to this court, this court did not affirm the instant sentence of death until it was convinced that clear and convincing reasons existed for rejection of the jury's advisory verdict. The isolated language in the sentencing order, which, in any event, would seem to have been drawn from State v. Dixon, 283 So.2d 1 (Fla. 1973), and which petitioner has failed to demonstrate is reversibly erroneous, could not have properly served as a basis for an independent allegation of error. Ineffective assistance of counsel has not been demonstrated.

2. THE ISSUE CONCERNING THE TRIAL COURT'S ALLEGED OVERRELIANCE UPON THE VICTIM'S VIRTUE AS A BASIS FOR SENTENCING

In this rather unorthodox argument, petitioner contends that Attorney Goodman was ineffective in failing to raise on appeal an argument to the effect that Judge Angel, in imposing death, impermissibly relied upon the victim's "virtuosity" as a basis for aggravation. As in the preceding argument, this assertion would seem largely the result of selective reading of the sentence order. In such order, Judge Angel noted, during the findings of fact in support of the aggravating circumstances relating to the homicide's heinous, atrocious and cruel character and its commission during a kidnapping or burglary, that the victim had been an elderly widower and community volunteer. Petitioner has cited no specific precedent for the proposition that the very existence of these types of observations in a capital sentencing order render such order null and void, and it should be clear that findings of fact in capital cases need not be antiseptically pristine, as long as the factual basis for the findings is clear. Given the fact that these comments, even if objectionable, were made only in reference to two of the five aggravating circumstances and, inasmuch as no factors were found in mitigation, it is clear that their presence could not, and cannot, serve as a basis for vacation of the instant sentence. See, Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983). It is fair to say that should this issue have been included on appeal, the result of the proceeding would not have been any different. Petitioner has failed to demonstrate ineffective assistance of counsel.

3. THE ISSUE CONCERNING THE TRIAL COURT'S ALLEGED IMPROPER ALLOWANCE OF ENTRY OF A NON-JUROR INTO THE JURY ROOM

Petitioner asserts in the instant petition that Attorney Goodman was ineffective in failing to argue on appeal that reversible error occurred in reference to the fact that a court clerk had entered the jury room during deliberation and operated a tape recorder. A careful reading of the record indicates why

such "point" was not raised. As indicated by the transcript, several minutes into deliberation, the jury returned to the courtroom requesting that they be given the transcript of the testimony of two witnesses and a tape recorder with which to play petitioner's tape recorded statement, which had been admitted into evidence (R 1187). Judge Angel and both counsel then discussed how best to accomodate the jury's request and, at one point, defense counsel made the following suggestion:

> BY MR. FOX (Defense Counsel): In the alternative, I suggest when they want to hear it they might want to have the court reporter go back with them and play it on his machine.
>
> BY MR. FITOS (Prosecutor): That would be acceptable.
>
> BY MR. FOX: Have Charles actually back into the jury room and play it for them. (emphasis supplied)(R 1188).

Inasmuch as defense counsel suggested the arrangement now attacked in the instant petition and inasmuch as a defendant cannot take advantage on appeal of a situation which he himself has created at trial, see, McCrae v. State, 395 So.2d 1145 (Fla. 1980), Attorney Goodman cannot be said to have been ineffective in omitting this point on appeal. Ineffective assistance of counsel has not been demonstrated.

4. THE ISSUE CONCERNING THE TRIAL COURT'S ALLEGED ERROR IN FAILING TO CONSIDER ALL MATERIAL EVIDENCE PRIOR TO RULING ON THE ADMISSIBILITY OF PETITIONER'S STATEMENT

Petitioner contends in the instant petition that Attorney Goodman was ineffective in failing to specifically contend on appeal that error had been committed in Judge Angel's alleged failure to consider all evidence prior to ruling on the admissibility of petitioner's statement. In support of this argument, and that following, petitioner cites to the following statement by Judge Angel,

> BY THE COURT: Taking into consideration and taking judicial notice of all prior proceedings before Judge Swigert, in which -- after a thorough hearing and evidentiary hearing and law presented to Judge Swigert he ruled that the confession or statement would be admissible, that being the law in the case, at this point and now having heard additional evidence that was not presented to

> Judge Swigert, I find that the additional evidence that has been presented here does not establish that the statements were not freely and voluntarily given and do not establish any ground which would exclude these statements or admissions by the defendant. Therefore, I find, again, that any statements by the defendant were freely and voluntarily made after a knowing and intelligent waiver of his constitutional rights and, further, that they were not made or induced by any threats or promises. (R 1041).

Respondents would maintain, again, that in asserting this claim as error, petitioner is again misconstruing the record. Judge Angel was entirely justified in noting that petitioner's prior motion to suppress had been denied and, it must be noted that nothing indicates that the judge did not fully consider all of the evidence presented to him immediately prior to this ruling. The judge simply observed that nothing which he had heard would justify a granting of the motion to suppress. There was nothing further for Attorney Goodman to raise in reference to this ruling.

One must also note that Attorney Goodman did raise the denial of the motion to suppress the statement as an issue on appeal and that, significantly, this court found such issue not to have been preserved, due to lack of objection at the time the statement was introduced. Routly at 1260-1. Given the fact that the "ultimate" issue regarding the statement's admissibility was found by this court to be procedurally barred, respondents respectfully suggest that counsel's failure to raise this specific argument pales into insignificance. Ruffin v. Wainwright, supra. If an issue is not preserved, it should hardly matter whether or not counsel raises one or ten subissues in relation to it. Neither deficiency of performance nor resultant prejudice has been demonstrated.

5. THE ISSUE CONCERNING THE TRIAL COURT'S ALLEGED ERROR IN SHIFTING THE BURDEN OF PROOF TO PETITIONER REGARDING THE VOLUNTARINESS OF THE STATEMENT.

This point merits disposition similar to that above. Petitioner's contention that Judge Angel shifted the burden to him to prove voluntariness is based on a selective reading of the judge's remarks, such remarks simply indicating that the

evidence presented supported a finding of voluntariness. Similarly, given the lack of preservation of the ultimate suppression issue, counsel's omission of this specific subpoint represents neither deficiency of performance nor sufficient prejudice. Ruffin v. Wainwright, supra.

6. THE ISSUE CONCERNING THE JURY'S ALLEGED FAILURE TO CONSIDER EVIDENCE

In his petition, petitioner argues that Attorney Goodman should have argued on appeal that Judge Angel erred in failing to declare a sua sponte mistrial when the jury advised that they had not heard the testimony of Colleen O'Brien. The record reflects that the jury did indeed return to the courtroom, after deliberation had begun, and that at such time, the foreman stated that they "weren't able to hear the testimony of Miss O'Brien", requesting that a transcript of such testimony, as well as that of another witness, be provided (R 1187). The following exchange then took place,

> BY MR. FITOS (Prosecutor): I don't think they can have the transcript as requested.
>
> BY MR. FOX (Defense Counsel): I don't think they can, either.
>
> BY MR. FITOS: I think they have to recall the testimony as best they can recall it.
>
> BY MR. FOX: Yes. I mean, if they do that, I would request a transcript of the whole trial -- if you're going to do that.
>
> BY THE COURT: How about this instruction: The evidence has been completed. You must base your verdict upon that evidence and rely upon your recollection of the testimony.
>
> BY MR. FITOS: No objection.
>
> BY MR. FOX: I have no objection, and then as far as the tape recorder telling them you will get them one. (R 1187-8)(emphasis supplied).

Judge Angel then advised the jury that they would have to rely upon their own recollection (R 1188-9).

Petitioner, unsurprisingly, has cited no caselaw in support of his contention that a sua sponte mistrial was required below; presumably, Attorney Goodman would have labored under

the same handicap. It should be clear that although the jury foreman did indeed state that the jury did not hear Miss O'Brien's testimony, such statement should not, as petitioner does, be taken beyond its logical extreme. Inasmuch as Miss O'Brien's testimony comprises close to one hundred (100) pages of transcript, it stretches credulity to believe that the jury failed to hear a single word of it (R 882-972). Further, the more "reasonable" point on appeal would have dealt with the judge's handling of the jury's request for a transcript of such testimony. The above cited dialogue indicates that defense counsel positively stated his lack of objection to the court's denial of the request for a transcript of the testimony and its intention to simply instruct the jury to rely upon their own recollection. Given the unorthodox and unprecedented nature of this potential point on appeal, and the fact that defense counsel below not only failed to object, but acquiesced in the trial court's resolution of the matter, compare, Sullivan v. State, 363 So.2d 632 (Fla. 1974), Attorney Goodman's omission of this issue was clearly reasonable. See also, Steinhorst v. Wainwright, supra. Petitioner has failed to demonstrate either deficiency of performance or resultant prejudice in regard to counsel's failure to raise this issue.

7. THE ISSUE CONCERNING THE DELAY BETWEEN CONVICTION AND SENTENCE

In his penultimate assault upon appellate counsel, petitioner argues that Attorney Goodman should have argued to this court that the sentence of death had to be vacated, due to the fact that 129 days elapsed between the jury's rendition of the advisory sentence of life and Judge Angel's formal imposition of the death sentence. Petitioner argues that he was prejudiced by the delay, in that it "unnecessarily placed him in the position of languishing in a jail cell for 129 days agonized by the trial judge's prolonged procrastination, knowing the possibility of a death sentence was ever-present and wondering what the judge had decided to do with his fate." (Petition at 69). Petitioner's sole legal authority for his position

is a decision of the United States Court of Appeals for the Fifth Circuit, Juarez-Casares v. United States, 496 F.2d 190 (5th Cir. 1974).

Respondents suggest that Attorney Goodman cannot be faulted for omitting the above argument from petitioner's appeal, which, at minimum, must be regarded as bordering on the "novel". But compare, Harvard v. State, 414 So.2d 1032 (Fla. 1982). Although petitioner may have been somewhat discomforted by his uncertain status pending final imposition of sentence, the state respectfully suggests that most convicted persons, facing the possibility of a sentence of death, would prefer that the sentencer not make a snap judgment. Judge Angel, quite literally, had a life or death decision of his own to make, and, no doubt, was aware that any override of the jury's advisory sentence would require detailed and convincing findings of fact. The lone precedent cited by petitioner is simply inapposite to Florida's capital sentencing structure, and it cannot be doubted that, even had this point been presented on appeal, the result of such appeal would not have been different. Petitioner has failed to demonstrate ineffective assistance of counsel in regard to this point.

## II. PETITIONER HAS FAILED TO DEMONSTRATE ANY BASIS FOR RELIEF IN REGARD TO THE MANNER IN WHICH APPELLATE COUNSEL WAS APPOINTED

Aside from the actual performance of Attorney Goodman, petitioner argues that the manner in which he was appointed virtually rendered him ineffective, and that both the trial court and this court were somehow derelict in their respective duties (Petition at 134); petitioner does, however, preserve his arguments relating to Attorney Goodman, maintaining that another badge of his ineffectiveness was his failure to recognize his own incompetence and, thus, to decline the instant appointment (Petition at 137, 143). Given petitioner's failure to demonstrate that Attorney Goodman rendered ineffective assistance, this latter, and rather circular, argument must fail. Further, given the lack of ineffective assistance of counsel

in this case, it would seem that the appointment process sub judice cannot have sufficiently prejudiced petitioner, under Strickland, so as to serve as a basis for relief at this juncture.

Respondents would, however, briefly address a number of allegations contained in the instant petition. While it is uncontravertible that Attorney Goodman was not the first attorney appointed to represent petitioner on appeal and that, at least at some point, there existed difficulty in finding counsel for the appeal, given the withdraw of the public defender, such "facts" do not, in and of themselves, indicate a deficiency in the appointment system. Similarly, while Attorney Goodman now avers in his affidavit that the trial court did not ask him about his past experience during the time of his appointment to the case (Appendix to petition at E, 2), such fact does not mean that that court, prior to appointment, had not, through its own means, assessed counsel's suitability. Petitioner has failed to particularize just what it was about Attorney Goodman that, at the time of appointment, would have alerted the court to his alleged lack of competence; this is not an instance in which an appellant has been represented by an individual never admitted to the bar or, if admitted, disbarred, disciplined or disgraced through drug or drink. Attorney Goodman was not a novice, unfamiliar with criminal law, and the briefs which he filed on petitioner's behalf demonstrate fully his capacity and competence in this matter. The manner of appointment sub judice affords petitioner no basis for relief.

## III. PETITIONER HAS FAILED TO DEMONSTRATE ANY BASIS FOR RELIEF IN REGARD TO THE APPLICATION OF SECTION 925.036 FLORIDA STATUTES (1985) TO HIS CASE

As an independent basis for relief, petitioner contends that section 925.036 Florida Statutes (1985), that statute setting forth the amount of compensation for appointed counsel, operated so as to render Attorney Goodman ineffective in this case (Petition at 154); this assertion would seem rather surprising

in that, one reading the preceding 144 pages of the petition, would have concluded that no amount of money could have "redeemed" Attorney Goodman. In a supplementary section, petitioner acknowledges that this court has recently found the statute constitutional in Makemson v. Martin County, 491 So.2d 1109 (Fla. 1986), but contends that his constitutional arguments, based on equal protection and due process, remain viable. Petitioner also argues that his case falls within the "exception" carved out in Makemson, as to when compensation above the statutory amount would be authorized.

To respondents, this argument, to the effect that the operation of a statute rendered counsel ineffective, bears some similarity to that rejected by this court in Hitchcock v. State, 432 So.2d 42 (Fla. 1983); although ineffective assistance of counsel is properly raised by means of petitions for writ of habeas corpus, respondents also question the propriety of the instant constitutional argument never presented below. Cf., Trushin v. State, 425 So.2d 1126 (Fla. 1982). In any event, respondents maintain that petitioner's due process and equal protection arguments have already been rejected by this court, see, MacKenzie v. Hillsborough County, 288 So.2d 200 (Fla. 1973), Metropolitan Dade County v. Bridges, 402 So.2d 411 (Fla. 1981), and that Makemson represents no retreat from these holdings.

In Makemson, this court, while again upholding the constitutionality of section 925.036, found that it could be applied unconstitutionally when the statutory maximum fees were inflexibly imposed in cases "involving unusual or extraordinary circumstances." This holding has no application sub judice. There has never been any showing that Attorney Goodman was dissatisfied with his compensation in this case or that a higher amount would have effected his performance, such performance, in any event, not deficient. At most, in his affidavit, Attorney Goodman stated that the trial court declined to authorize funds for expert witnesses to determine petitioner's competence (Appendix to petition at E, 2). This result is hardly surprising, in that it is not the function of appellate counsel

to create or seek out new evidence, but rather to raise and argue claims of error supported by the existing record. Further, respondents respectfully suggest that the instant case, while a capital appeal, was not one involving unusual or extraordinary circumstances. The trial and sentencing proceedings were neither long nor fraught with potential error, and the record on appeal, when compared to other capital cases, surely cannot be considered overly long or complex. Similarly, the number of issues which could and should have been raised was limited, and such issues represent matters neither complex nor complicated. Despite the best efforts of petitioner's present counsel, this case simply does not represent an instance in which the statutory maximum should have been exceeded, and respondents suggest that the application of section 925.036 presents no independent basis for relief sub judice. The instant petition for writ of habeas corpus should be denied.

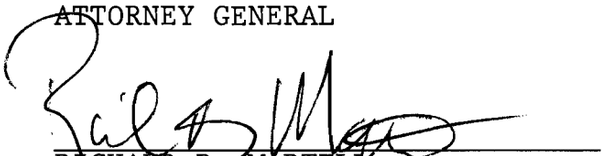
## CONCLUSION

In Downs v. State, 453 So.2d 1102 (Fla. 1984), this court made two significant pronouncements in regard to ineffective assistance of counsel. This court held that the Florida standard on such issue was compatible with that recently announced by the United States Supreme Court in Strickland v. Washington, and then went on to note that claims of ineffective assistance of counsel were extraordinary and "should be made only when the facts warrant it." Id. at 1107. Whereas this court's discussion of the standards of ineffectiveness has been universally followed, the observation regarding the infrequency with which the claim should be made has been honored more in the breech than in the observance. To respondents' knowledge, this court, despite a staggering number of opportunities, has found ineffective assistance of appellate counsel to have existed in only two capital appeals, Wilson v. Wainwright, 474 So.2d 1162 (Fla. 1985) and Fitzpatrick v. Wainwright, 490 So.2d 938 (Fla. 19860; in both instances, this court concluded that appellate counsel had failed to raise an issue critical to the resolution of the appeal.

This case has nothing in common with Wilson or Fitzpatrick. Attorney Goodman raised and competently presented the issues bearing the greatest chance of success. It is well recognized that defense counsel does not have a constitutional duty to raise every non-frivolous issue requested by a defendant. See, Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). To describe some of the issues which petitioner now claims should have been raised as "non-frivolous" is to bestow upon them a great compliment. The instant petition represents nothing more than petitioner's continued dissatisfaction with this court's affirmance of his conviction and sentence, and nothing alleged therein should undermine in the slightest this court's confidence that it correctly resolved the appeal. Ineffective assistance of counsel has not been demonstrated in regard to either the performance of Attorney Goodman, or any prejudice resulting therefrom, or as a result of petitioner's various "systemic" attacks upon the appointment and compensation structures for appointed counsel in capital cases. The instant petition should be denied.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL



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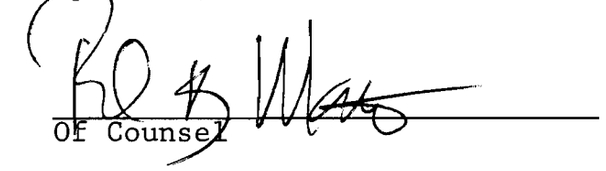
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by mail to Frank Valdes, Esquire, 1500 Edward Ball Building, 100 Chopin Plaza, Miami, Florida 33131, this 17 day of September, 1986.



Of Counsel