IN THE SUPREME COURT OF FLORIDA

ROBERT LAVON SANDERS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. SC03-640

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent or the State. Petitioner, ROBERT LAVON SANDERS, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner.

The record on appeal consists of one volume, which will be referenced as "R." "IB" will designate Petitioner's Initial Brief. Each symbol will be followed by the appropriate page number in parentheses.

All emphasis through bold lettering is supplied unless the contrary is indicated.

STATEMENT OF THE CASE AND FACTS

The State agrees with Petitioner's statement of the case and facts, with one exception noted below. For clarity to the reader, Respondent adds the following:

Petitioner filed a motion for postconviction relief, alleging ineffective assistance of trial counsel (R 1-11). Petitioner alleged that one of the charges against him was aiding and abetting robbery while armed with a firearm (R 8). Petitioner was found by a jury guilty of this crime as charged (R 1). Petitioner alleged that the Court gave the following lesser-included offense instructions to the jury under this charge: attempt, robbery, aggravated assault with a deadly

weapon, assault, and theft. Id. Petitioner alleged that the court did not instruct the jury on robbery with a weapon as a lesser-included offense, and that his trial counsel was ineffective for failing to object to this omitted instruction (R 8-9). Petitioner alleged that this failure prejudiced him because it deprived the jury of its ability to exercise its "pardon power" by convicting him of this lesser-included offense rather than the charged offense (R 9-10). The trial court denied this ground for relief, finding that Petitioner had failed to meet the standards for ineffective assistance of counsel set forth in Strickland v. Washington, 466 U.S. 668 (1984) (R 12).

Petitioner appealed the denial to the First District Court of Appeal (DCA). The DCA affirmed in an *en banc* decision, receding from several cases from that district. Sanders v. State, 847 So.2d 504 (Fla. 1st DCA 2003). The DCA certified that its decision conflicted with decisions such as Peffley v. State, 766 So.2d 418 (Fla. 4th DCA 2000), Oehling v. State, 659 So.2d 1226 (Fla. 5th DCA 1995), and Newton v. State, 527 So.2d 876 (Fla. 2d DCA 1988).

In his brief, Petitioner stated that the DCA certified a question of great public importance to this Court (IB 2-3). This statement is inaccurate. The DCA noted that it had certified a question of great public importance to this Court in Hill v. State, 788 So.2d 315 (Fla. 1st DCA 2001), and that this Court had denied review in Hill. Sanders at 508. The DCA did

not re-certify the same question. Rather, it determined that "a proper application of Strickland mandates a negative answer to the question [that had been certified in Hill]." Id. Consequently, the DCA receded from Hill and other First DCA cases, and certified conflict with Peffley v. State, 766 So.2d 418 (Fla. 4th DCA 2000), Oehling v. State, 659 So.2d 1226 (Fla. 5th DCA 1995), and Newton v. State, 527 So.2d 876 (Fla. 2d DCA 1988). Id. Again, the DCA did not certify a question of great public importance to this Court, and Petitioner's statement to the contrary is inaccurate.

SUMMARY OF ARGUMENT

The issue in this case is not the propriety of a jury exercising its inherent "pardon power" by finding a defendant guilty of a lesser offense, even though the evidence supported a guilty verdict of the charged offense. Petitioner's disagreements with the DCA's conception of jury pardons miss the point of this matter. The issue is whether a court could find a "reasonable probability" that, had the jury been given the opportunity to return a verdict of guilty of only a lesser-included offense, the jury would have done so, even though its own findings of fact and the trial court's instructions on the law would require a guilty verdict of the charged crime.

A valid claim of ineffective assistance of counsel includes a "reasonable probability" that, but for counsel's errors, the result of the proceeding would have been different. The United States Supreme Court ruled that an assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. Such "nullification" includes the claim of Petitioner here, which suggests that the jury may have ignored its legal instruction to return a verdict of guilty for the highest offense which has been proven beyond a reasonable doubt, had it been given the opportunity. Such a possibility is simply too speculative to constitute a reasonable probability of a different outcome.

Moreover, Petitioner alleged nothing that would have suggested that the jury would have actually chosen to convict him of the crime of robbery with a weapon had it been given the opportunity. Petitioner does not contend that there was any evidence that the instrument he used was anything other than a firearm. Rather, his claim is based upon mere speculation and the hope that the jury would have declined to follow the law.

Petitioner also ignores the fact that had the jury wished to exercise its pardon power by finding guilt only for a lesser offense, even though the State had proved the charged offense, it had five lesser offenses from which to choose. Instead, the jury found him guilty as charged. Any argument that the jury may have chosen to exercise a pardon if it had been given just one more lesser crime to choose, constitutes the type of speculation that cannot support an ineffective assistance claim.

Finally, Petitioner cannot ignore his obligation to satisfy the prejudice prong of Strickland by noting that a court's denial of such an instruction would have been reversible error on appeal. The United States Supreme Court has made it clear that discrete attorney errors must be analyzed under Strickland, which requires a showing of prejudice for relief. As Petitioner has utterly failed to meet the specific requirements for prejudice, he is not entitled to relief.

ARGUMENT

IN CONDUCTING A PREJUDICE ANALYSIS PURSUANT TO A POSTCONVICTION STRICKLAND V. WASHINGTON INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM, MAY A COURT FIND A "REASONABLE PROBABILITY" THAT, HAD THE JURY BEEN GIVEN THE OPPORTUNITY TO RETURN A VERDICT OF GUILTY OF ONLY A LESSER INCLUDED OFFENSE, THE JURY WOULD HAVE DONE SO, THUS IGNORING ITS OWN FINDINGS OF FACT AND THE TRIAL COURT'S INSTRUCTIONS ON THE LAW? (Restated)

Introduction

Petitioner filed a motion for postconviction relief, alleging ineffective assistance of trial counsel (R 1-11). Petitioner alleged that one of the charges against him was aiding and abetting robbery while armed with a firearm (R 8). Petitioner was found by a jury guilty of this crime as charged (R 1). Petitioner alleged that the Court gave the following lesser-included offense instructions to the jury under this charge: attempt, robbery, aggravated assault with a deadly weapon, assault, and theft. Id. Petitioner alleged that the court did not instruct the jury on robbery with a weapon as a lesser-included offense, and that his trial counsel was ineffective for failing to object to this omitted instruction (R 8-9). Petitioner alleged that this failure prejudiced him because it deprived the jury of its ability to exercise its "pardon power" by convicting him of this lesser-included offense rather than the charged offense (R 9-10). The trial court denied this ground for relief, finding that Petitioner had failed to meet the standards for ineffective assistance of

counsel set forth in Strickland v. Washington, 466 U.S. 668 (1984) (R 12).

Petitioner appealed the denial to the First District Court of Appeal (DCA). The DCA affirmed in an *en banc* decision, receding from several cases from that district. Sanders v. State, 847 So.2d 504 (Fla. 1st DCA 2003). The DCA certified that its decision conflicted with decisions such as Peffley v. State, 766 So.2d 418 (Fla. 4th DCA 2000), Oehling v. State, 659 So.2d 1226 (Fla. 5th DCA 1995), and Newton v. State, 527 So.2d 876 (Fla. 2d DCA 1988).

Shortly after the original opinion was entered below,[1] the Fourth DCA, in Willis v. State, 840 So.2d 1135 (Fla. 4th DCA 2003), certified conflict with the instant case. The State invoked the discretionary jurisdiction of this Court. State v. Willis, Case No. SC03-642. As in the instant case, this Court postponed its decision on jurisdiction and ordered briefs on the merits.

Petitioner in this case filed his brief on the merits, and this answer brief follows.

The issue raised in this proceeding is whether a claim that a jury might have used its "pardon power," had it been given the opportunity by an instruction on a particular lesser-included offense, sets forth a sufficient claim that satisfies the

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[1]The DCA had withdrawn its original opinion that had been entered in November 2002. Sanders v. State, 27 Fla. L. Weekly D2489 (Fla. 1st DCA, Nov 15, 2002).

prejudice prong of Strickland v. Washington, 466 U.S. 668 (1984). The State asserts Petitioner's claim is at odds with well-settled rules laid down in Strickland, and cannot support an ineffective assistance of counsel claim.

A valid claim of ineffective assistance of counsel is presented when a defendant shows that (1) counsel's representation fell below an objective standard of reasonableness" based on "prevailing professional norms" (the deficient-performance prong) and (2) there is a "reasonable probability" that, but for counsel's ineffectiveness, the result of the proceeding would have been different (the prejudice prong). Strickland at 688-689. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id. at 694.

Deficient performance

As stated, the issue in this case strictly involves the prejudice prong. Regarding the deficient-performance prong, Petitioner erroneously argues that the DCA "recognized that counsel's failing fell below the standard of competent counsel" (IB 7). The DCA in fact made no such finding here.

The DCA's opinion cited heavily from Hill v. State, 788 So.2d 315 (Fla. 1st DCA 2001), where the court had reversed a denial of postconviction relief on similar grounds based on existing precedent, but had also expressed disagreement with this existing precedent. In Hill, the DCA recognized that the

choice not to request an instruction on a lesser-included offense does not necessarily constitute deficient performance:

> A competent defense attorney will sometimes decline to request an instruction on a lesser included offense as a matter of reasonable trial tactics. When this occurs, a subsequent finding of deficient performance under the first *Strickland* prong (the performance prong) will be foreclosed.

Hill at 317.

The DCA did not address the deficient-performance prong of the Strickland test in the case at bar, basing its entire ruling on Petitioner's inability to demonstrate the Strickland prejudice prong. As the DCA ruled in Hill that the choice not to request an instruction on a lesser-included offense does not necessarily constitute deficient performance, Petitioner is incorrect in asserting that the DCA even impliedly found that he had established constitutionally deficient performance by counsel.

Prejudice

Petitioner claimed that he was prejudiced by counsel's decision not to request a lesser-included offense instruction on robbery with a weapon, because the jury might have chosen to exercise its "pardon power" to convict him of this lesser offense, in spite of the fact that the jury found that the State had proved beyond a reasonable doubt that he had aided and abetted a robbery while armed with a *firearm*.

A postconviction claimant alleging ineffective assistance of counsel must show that there is a reasonable probability

that, but for counsel's ineffectiveness, the result of the proceeding would have been different. The Strickland Court expanded upon this standard as follows:

> It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, ... and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Strickland at 693. The Court continued:

> In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law. **An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like.** A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency. Although these factors may actually have entered into counsel's selection of strategies and, to that limited extent, may thus affect the performance inquiry, they are irrelevant to the prejudice inquiry. Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination

Id. at 694-695.

Thus, the Strickland court specifically held that the possibility that the jury could "nullify" a properly proved crime has no place in the prejudice inquiry for an ineffective assistance claim. Such an allegation is so speculative that a claimant can never show that it constitutes a "reasonable probability" that, but for the omitted instruction, the result of the proceeding would have been different. A court cannot grant collateral relief on "mere speculation that the defendant was prejudiced by trial error; the court must find that the defendant was actually prejudiced by the error." Calderon v. Coleman, 525 U.S. 141, 146 (1998). A claimant cannot demonstrate that the choice not to instruct on a particular lesser-included offense "actually had an adverse effect on the defense," Strickland at 693, when the only basis for prejudice is that the jury may possibly have chosen to ignore the law and its findings and convict only of that particular lesser offense. The State agrees with the majority opinion below on this matter:

> [A]lthough it is "conceivable" that a jury in a given case might decline to follow the law and grant a jury pardon, this does not seem to us a reasonable probability. We recognize that a finding of reasonable probability under *Strickland* does not require a finding that it is more likely than not that the deficient performance of counsel affected the outcome of the proceeding. It requires only a finding that the deficient performance put the whole case in such a different light as to undermine the court's confidence in the outcome of the proceeding. *See, e.g., Robinson v. State*, 770 So.2d 1167, 1171-73 (Fla. 2000)(Anstead, J., specially concurring). **But we have difficulty accepting the proposition that there is even a substantial possibility that**

> **a jury which has found every element of an offense proved beyond a reasonable doubt, would have, given the opportunity, ignored its own findings of fact and the trial court's instructions on the law and found a defendant guilty of only a lesser included offense.** In fact, we confess some discomfort with the proposition that members of the judiciary should even engage in such speculation.

Sanders at 507.

A finding of prejudice based on the possibility of a "jury pardon" is not only too speculative to form a valid claim, but also fails to recognize that a jury pardon is contrary to the evidence and the law. A jury that finds that the state has proven each element of the charged crime beyond a reasonable doubt, but chooses not to find the defendant guilty of that charge, has violated its oath as jurors. A "jury pardon" is "a not guilty verdict rendered contrary to the law and evidence." State v. Wimberly, 498 So.2d 929, 932 (Fla. 1986)(Shaw, J., dissenting). It is also contrary to Standard Jury Instruction 2.8 (Crim.), which instructs the jury that if it "return[s] a verdict of guilty, it should be for the highest offense which has been proven beyond a reasonable doubt."

Although the power of "jury pardon" is inherent in the constitutional right of trial by jury, a jury exercising this power is precisely the type of "lawless decisionmaker" whose lawless decisions cannot furnish a basis for a finding of prejudice under Strickland.[2]

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[2]Judge Ervin, in dissent below, objected to the majority's "assumption ... that a jury's decision to pardon is one made

In addition to the clear rule against using the possibility of jury pardons as a basis for prejudice under Strickland, Petitioner has not alleged anything that would otherwise suggest that the jury might have exercised a jury pardon here. Petitioner has not alleged any specific facts nor does point to any evidence that would support his claim that had the instruction on robbery with a weapon been given the jury would have exercised its pardon power. Petitioner points to nothing in the record nor does he provide supporting facts. He does not contend that there was any evidence that the instrument he used was anything other than a firearm. Rather, his claim is based upon mere speculation and the hope that the jury would have declined to follow the law. Such a claim cannot satisfy nor support a colorable claim of ineffective assistance because the prejudice prong has not been properly pled.

Petitioner devotes the majority of his brief quibbling with the DCA's conception of the meaning and effect of a "jury pardon." Petitioner barely addresses the central premise of the

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irrationally, aberrantly, or in an unlawful manner." Sanders at 511 (Ervin, J., dissenting). The State recognizes the inherent power of juries to dispense mercy and the instances cited by Judge Ervin where Florida law has accepted the notion of jury pardons. Nonetheless, it cannot be ignored that such pardons directly disregard the jury's legal obligation to convict of the highest offense which has been proven beyond a reasonable doubt. More importantly, regardless of the propriety of such jury pardons, the State submits that the possibility of one simply cannot constitute a reasonable probability of a different outcome sufficient to meet the Strickland standard for prejudice.

DCA's conclusion: that a postconviction claimant cannot establish that there is a reasonable probability that, but for counsel's decision not to request an instruction on a lesser-included offense, the jury would have exercised its "pardon power" to convict the claimant of that lesser offense, even when it had found that the state had proved the greater offense beyond a reasonable doubt.

Petitioner seems to believe that a "jury pardon" occurs any time a jury determines that the evidence does not support a verdict of guilty to the charged crime, and chooses instead to convict a defendant of any lesser offense than the charged offense.[3] This argument fails to recognize the conception of "jury pardon" as used by the court below. The jury in Petitioner's trial found that the evidence was sufficient for it to find that the State had proven every element of the charged offense beyond a reasonable doubt. In these circumstances, a conviction of any lesser offense would constitute a "jury pardon." Such a "pardon" violates the jury's duty to return a verdict of guilty for the highest offense which has been proven

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[3]Petitioner accuses the DCA of basing its opinion on the "narrow and unjustified premise that whenever a jury finds a defendant guilty of a lesser included offense, even though the State had presented sufficient evidence to justify denying a motion for judgment of acquittal, they do so only as a "jury pardon" (IB 14). The State fails to recognize the relevance of a denial of a motion for judgment of acquittal to this analysis. A jury "pardons" a defendant when it acquits on the charged offense even though the evidence convinced it beyond a reasonable doubt of the defendant's guilt. The legal sufficiency of the evidence is irrelevant to this inquiry.

beyond a reasonable doubt. Moreover, as stated, the possibility of such an act does not constitute a "reasonable probability" of a different outcome demonstrating prejudice under Strickland.

Petitioner cites Beck v. Alabama, 447 U.S. 625 (1980) for the

proposition that failure to give a jury a "third option" of convicting on a lesser-included offense is improper because it "would seem inevitably to enhance the risk of unwarranted conviction." Id. at 637. This reliance on Beck ignores more recent United Supreme Court cases that distinguished Beck, such as Schad v. Arizona, 501 U.S. 624 (1991).

In Schad, a murder defendant argued that under Beck, he was entitled to a jury instruction on robbery as a lesser-included offense, contending that the due process principles underlying Beck require that the jury in a capital case be instructed on every lesser included noncapital offense supported by the evidence. Schad at 645-646. The Supreme Court rejected this claim:

> Petitioner misapprehends the conceptual underpinnings of *Beck*. Our fundamental concern in *Beck* was that a jury convinced that the defendant had committed some violent crime but not convinced that he was guilty of a capital crime might nonetheless vote for a capital conviction if the only alternative was to set the defendant free with no punishment at all.
>
> ***
>
> We repeatedly stressed the all-or-nothing nature of the decision with which the jury was presented. As we later explained in Spaziano v. Florida, 468 U.S. 447, 455, 104 S.Ct. 3154, 3159, 82 L.Ed.2d 340 (1984), "[t]he absence of a lesser included offense

> instruction increases the risk that the jury will convict ... simply to avoid setting the defendant free.... The goal of the *Beck* rule, in other words, is to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence." *See also Hopper v. Evans,* 456 U.S. 605, 609, 102 S.Ct. 2049, 2051-2052, 72 L.Ed.2d 367 (1982). **This central concern of Beck simply is not implicated in the present case, for petitioner's jury was not faced with an all-or-nothing choice between the offense of conviction (capital murder) and innocence.**

Id. at 646-647.

Even if Beck applied to non-capital prosecutions, Schad demonstrates that it would not apply here. The concern with Beck was strictly the "all-or-nothing" nature of the Alabama capital murder instructions. When other lesser-included offenses are available to the jury, the Beck concerns are absent. Such is the case here. Petitioner postulates that a jury may have convicted him of the charged offense not because it believed that the State had proved the charged offense beyond a reasonable doubt, but because it believed that the defendant "did something wrong" (IB 12-13). If in fact the jury had chosen to ignore its oath in this manner, it had, according to Petitioner's allegations in his motion, six lesser crimes of which it could have found Petitioner guilty: attempt, robbery, aggravated assault with a deadly weapon, assault, and theft (R 1). Petitioner's jury, faced with the possibility of convicting Petitioner of any of these lesser crimes, chose instead to

convict him of the charged offense. Nothing in Beck suggests impropriety here.

Finally, the State will address one of the arguments made by Judge Ervin in the dissent below. The DCA had ruled that the failure to request an instruction on a lesser-included offense in this instance does not constitute ineffective assistance of counsel even though a trial court's denial of such an instruction would be reversible on a direct appeal. Sanders at 506-507. The court reasoned that the different standards and burden of proof for trial error on direct appeal and ineffective assistance of counsel mandated this result. Judge Ervin disagreed, on the ground that the harmless-error test does not apply to a court's denial of a necessarily lesser-included offense instruction. Id. at 510-511 (Ervin, dissenting). As the failure to instruct the jury on a necessarily lesser-included offense constitutes reversible error regardless of harmlessness, Judge Ervin suggests that the failure to request such an instruction may in itself constitute ineffective assistance of counsel.

The State suggests that Judge Ervin's analysis, taken to its logical conclusion, would obliterate Strickland v. Washington and require every ineffective assistance claim to be evaluated under the standards of United States v. Cronic, 466 U.S. 648 (1984). Under Cronic, when counsel's incompetence is so serious that it rises to the level of a constructive denial of counsel, it can constitute constitutional error without any showing of

prejudice. Cronic at 659-660. Judge Ervin's dissent suggests that prejudice should not be a factor in an ineffective assistance claim such as this one where it would have been reversible on appeal without any harmless-error analysis.

The Supreme Court has made it clear that specific instances of "attorney errors" do not implicate Cronic. Bell v. Cone, 535 U.S. 685, 697-698 (2002). Such claims must be evaluated under the Strickland standards, and prejudice must be demonstrated. The fact that Petitioner's counsel may have erred in choosing not to object to the omission of the instruction, or that Petitioner's conviction may have been overturned if the court had refused such an instruction, cannot substitute for the specific requirements of prejudice in a Strickland ineffective assistance claim. Such prejudice cannot be shown by speculating that a jury may have chosen to convict of the lesser crime even though the evidence supported a conviction of the charged crime. Regardless of the relative merits of the "jury pardon," such a claim is simply too speculative for a court to conclude that there was a "reasonable probability" that the outcome would have been different had the omitted instruction been given.

The DCA correctly ruled that a court cannot find a reasonable probability that a jury would have found a defendant guilty only of a particular lesser offense had it been given to do so, in a circumstance where it found that the State had proved the charged offense beyond a reasonable doubt. This

Court should approve the decision below, and disapprove the decisions inconsistent with the decision below.

CONCLUSION

Based on the foregoing, the State respectfully submits the decision of the District Court of Appeal reported at 847 So.2d 504 should be approved, and the order entered in the trial court should be affirmed.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to David A. Davis, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, by MAIL on January 21, 2004.

Respectfully submitted and served,

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[AGO# L03-1-12343]

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

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