IN THE SUPREME COURT OF FLORIDA

ROBERT LAVON SANDERS,

Petitioner,

v. CASE NO. **SC03-640**

STATE OF FLORIDA,

Respondent.
_____/

ON APPEAL FROM THE CIRCUIT COURT
OF THE **THIRD** JUDICIAL CIRCUIT,
IN AND FOR **COLUMBIA** COUNTY, FLORIDA

MERITS BRIEF OF PETITIONER

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MERITS BRIEF OF PETITIONER

PRELIMINARY STATEMENT

Petitioner was the defendant in the trial court and appellant in the district court. He will be referred to herein as either "defendant," "Petitioner," or by his proper name. References to the record shall be by the volume number in Roman numerals, followed by the appropriate page number, both in parentheses.

STATEMENT OF THE CASE AND FACTS

In May 1998, the Defendant, Robert Sanders was charged in the Circuit Court for Columbia County with one count of aiding and abetting an armed robbery with a firearm and one count of burglary while armed (See page 2 of the progress docket). He was tried and found guilty as charged of those offenses and sentenced to serve 100 months in prison followed by five years probation (R 1). The First District Court of Appeal affirmed without an opinion. Sanders v. State, 773 So. 2d 543 (Fla. 2000).

Within the applicable time, he then filed a Motion for Post-conviction Relief, raising as one of his grounds for relief that trial counsel was ineffective for failing to "object to absence of jury instruction on robbery with a weapon, necessarily [lesser] included offense to the main crime charged in count I." (R 1-11). The trial court denied the motion (R 12). Sanders then appealed that decision to the First DCA, and in an opinion filed on March 31, 2003, the court en banc affirmed the trial court's order denying him relief. In doing so, however, it receded from Hill v. State, 788 So. 2d 315 (Fla. 1st DCA 2001), and certified, as a question of great public importance,

> IN CONDUCTING A PREJUDICE ANALYSIS PURSUANT TO A POST-CONVICTION *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?

The Court also acknowledged that its opinion expressly and directly conflicted with those of the Second, Fourth, and Fifth District Courts of Appeal. Peffley v. State, 766 So. 2d 418 (Fla 4th DCA 2000); Oehling v. State, 659 So. 2d 1226 (Fla. 5th DCA 1995); Newton v. State, 527 So. 2d 876 (Fla. 2nd DCA 1988).

Sanders now asks this honorable Court to accept jurisdiction in his case, delete the last clause of the question, and answer the restyled question in the affirmative.

SUMMARY OF ARGUMENT

The First District Court of Appeal assumed that whenever the jury finds a defendant guilty of a lesser offense they did so because of compassion or compromise. That narrow definition of a jury pardon is at odds with this Court's use of the term. As it has defined that phrase, whenever the jury has carried out their duty to weigh the evidence, resolve conflicts, and use their judgment to return a guilty verdict (if one at all) for a crime less than that charged they have pardoned the defendant. When viewed in that light, if a defense lawyer fails to request an instruction on a mandatory lesser offense to the charged crime, he or she may have provided ineffective assistance of counsel because there may have been a reasonable probability that the jury would have returned a guilty verdict of that lesser offense had they been instructed on that crime.

JURISDICTION OF THIS COURT

As noted in the Statement of the Case and Facts, the jurisdictional basis for this Court to hear this case arises from two sources: the First District's certified question, and its recognition of the express conflict with the decisions of three other District Courts of Appeal. [1]

Except for Judge Ervin's concurring and dissenting opinion, and a brief introduction by a now en banc majority, the opinion in Sanders' case is a quote from a large part of the First District's opinion in Hill v. State, 788 So. 2d 315 (Fla. 1st DCA 2001). In that 2001 case, the court faced the same issue as that presented here and concluded that a defendant could raise a colorable claim of ineffectiveness of his lawyer if he had failed to request a jury instruction for a lesser included offense to the one charged. This Court refused to accept jurisdiction in that case. State v. Hill, 807 So. 2d 655 (Fla. 2002).

Now, two years later, the First DCA has reversed course and declared that Hill and several other of that court's cases raising this issue were wrongly decided. This new position, coupled with the certified question, sufficiently invokes jurisdiction of this Court. Nevertheless, it should also review this case because the lower appellate court cites and relies on this Court's decision in Gragg v. State,

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[1] The Third DCA has not ruled on this issue.

429 So. 2d 1204 (Fla. 1983), but its use of that opinion conflicts with the holding of that case. It cited that collateral estoppel case for the proposition that "[C]ourts should not speculate on whether the jury has reached its verdict through compassion or compromise." In short, reviewing courts are to presume juries acted rationally. Yet, immediately after saying that it limited Gragg's reasoning. "Gragg does not, however, address whether courts should, in other contexts, engage in speculation that a jury might act in a manner that is not rational." Sanders, at 508. Ignoring what this Court said, the First District phrased its certified question assuming that every jury that acquits a defendant of the charged offense would do so for purely irrational reasons. That is, they "ignor[e] its own findings of facts and the trial court's instructions on the law" when they return a verdict for a lesser included offense when given the opportunity to do so. Id.

Sanders, therefore, presents a strong case that this Court should accept jurisdiction of his case to answer the certified question, and to resolve the disagreement the First District has with other District Courts and this Court.

ARGUMENT

ISSUE

THE FIRST DISTRICT COURT OF APPEAL ERRED IN CONCLUDING THAT A DEFENDANT CAN NEVER MAKE A COLORABLE CLAIM THAT HIS ATTORNEY WAS INEFFECTIVE FOR NOT REQUESTING A JURY INSTRUCTION FOR A NECESSARILY LESSER INCLUDED OFFENSE TO THAT CHARGED.

This case involves the problem of judicial speculation that occasionally arises from a jury's verdict and the idea of a "jury pardon." To resolve it, we must understand the posture of the issue as the First District Court of Appeal has presented it. The State charged Robert Sanders with robbery with a firearm. His trial counsel never requested the court give the required instruction on the mandatory lesser included offense of robbery with a weapon. Had he requested it, and the trial court refused to give that guidance, he would have been entitled to a new trial without any consideration of the harm its refusal may have had on the jury's verdict. State v. Wimberly, 498 So. 929, 932 (Fla. 1986); Bethea v. State, 767 So. 2d 630, 631 (Fla. 5th DCA 2000).

In its opinion in this case, the First District recognized that counsel's failing fell below the standard of competent counsel, as articulated in the two part test of

Strickland v. Washington, 466 U.S. 668 (1984).[2] The only question was the harm that deficiency created, or, in terms of Strickland, whether there was a "reasonable probability" that, but for counsel's ineffectiveness in failing to request the instruction on the necessarily lesser included offense, the jury in Sanders would have returned a lesser verdict.

The First District, answering its certified question in the negative, concluded that a defendant could never present a colorable claim that his ineffective lawyer's failure to request a necessarily lesser included offence could have had any impact on the jury's verdict. That holding, simply, is wrong, and this Court should review the certified question and the conflict among the districts de novo.

The court reached its result by taking an unjustified and extraordinarily narrow view of "jury pardons." It assumed that any jury that returned a guilty verdict for some offense less than that charged did so "thus ignoring its own findings of fact and the trial court's instructions on the law," "and granted [the defendant] a jury pardon." Id. at 506. In doing so, it reached two other, unsupported and unsupportable conclusions:

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[2] (1) The acts or omissions of counsel fell below the standard of reasonably effective assistance, and (2) that there is a "reasonable probability" that, but for counsel's ineffectiveness, the result of the proceeding would have been different. Hill v. State, 788 So. 2d 315, 317 (Fla. 1st DCA 2001)(quoted in Sanders, at p. 506)

> Because we know that jury pardons are occasionally awarded by aberrant juries, it would be difficult for an appellate court to conclude beyond a reasonable doubt that a jury in a particular case, given the opportunity, would not disobey the law and grant a pardon.

Id. at 507.[3]

> 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.

Id. (Emphasis in opinion)

The First District, thus, views the "jury pardon" as nothing more than a verdict of some lesser charge or an acquittal only because the jury flouted the law

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[3] This amazing statement has no support in the law or evidence. That is, the court engaged in sheer speculation when it says "we know jury pardons are occasionally awarded by aberrant juries." It cites no evidence to support that statement. Moreover, the conclusion -- that juries will find defendants guilty of lesser included offenses only because they want to "pardon" the defendant -- ignores the oath the jurors have taken to follow the law, the presumption that they will do so, Sutton v. State, 718 So. 2d 215 (Fla. 1st DCA 1998); Collier v. State, 259 So. 2d 765, 766 (Fla. 1st DCA 1972), and the concluding instruction to them:

> In closing, let me remind you that it is important that you follow the law spelled out in these instructions in deciding your verdict. There are no other laws that apply to this case. Even if you do not like the laws that must be applied, you must use them. For two centuries, we have agreed to a constitution and to live by the law. No one of us has the right to violate the rules we all share.

Fla. Std Jury Inst. (Crim.) 2.09.

and facts. That conclusion ignores experience and the law. The law assumes that jurors take their oath to follow the law seriously. Part of that law requires them to presume the defendant innocent of the charged offense, a presumption the State can remove only if it proves beyond a reasonable doubt he or she has committed it. Often the prosecution carries that burden, but without any question juries also regularly return verdicts it has not, and they find defendants either not guilty or guilty of some lesser crime than that charged. Carter v. Brown & Williamson Tobacco Corp. 778 So. 2d 932 (Fla. 2000)("Absent a finding to the contrary, juries are presumed to follow the instructions given them."); Sutton v. State, 718 So. 2d 215, 216 (Fla. 1st DCA 1998). Granting this type of "jury pardon" does not make them some sort rogue jury more readily found in a John Grisham novel than in the courts of Florida.

Instead, a jury pardon includes verdicts where the jury did nothing more than what we expect them to routinely do: weigh the evidence, resolve its conflicts, and use its good judgment to find the defendant guilty of some crime (or none at all) other than the one the State had accused the defendant of committing.

> The necessity for giving instructions on category one through three offenses is obvious. These categories of lesser included offenses implement "the nonconstitutional right of ... giving the jury an opportunity to find the accused guilty of an offense lesser in severity of punishment than that with which he was charged." *Baker [v State],*

> 425 So. 2d [36], 53 [(Fla. 5th DCA 1983)](Cowart, J., dissenting). Jury pardons are the province of the jury, and a trial court is not permitted to invade that province

Baker v. State, 456 So. 2d 419, 420-21 (Fla. 1984). When a jury returns a verdict that the defendant has committed some crime (or none at all) less than that charged, and thus "pardoned" him or her, it does not follow that they did so only by "ignoring its own findings of fact and the trial court's instructions on the law." Instead, it is the product of the law's presumption of the defendant's innocence and the jury holding the State to its constitutional burden of proof beyond a reasonable doubt and finding that it in part or in whole failed to carry it.

Agreeing with this broader view of the jury pardon, Judge Ervin, in his dissenting and concurring opinion in this case, "strongly questioned the assumption made in Hill, and adopted by the majority, that a jury's decision to pardon is one made irrationally, aberrantly, or in an unlawful manner." Sanders, at p. 511 (Ervin, dissenting in part). He, like this Court, would give the jury more credit for doing what it had been charged with doing than the majority of the First District.

The fallacy of the court's narrow definition of "jury pardon" becomes quickly apparent if we consider cases where the defendant has been charged with a capital felony. In that instance, failing or refusing to instruct the jury on necessarily

lesser included offenses would amount to "constitutional error." Beck v. Alabama, 447 U.S. 625 (1980).[4] "Failure to give the jury the 'third option' of convicting on a lesser-included offense inevitably enhances the risk of an unwarranted conviction. Such a risk cannot be tolerated in a case in which the defendant's life is at stake." Id. at 637, 100 S. Ct. at 2389. If that omission raises such serious fundamental, constitutional concerns, counsel's deficiency in not requesting an instruction on lesser included offenses or at least to voice an objection to the trial court's refusal to read them, would raise at least a colorable claim of his or her ineffectiveness. That is all a defendant needs to survive the summary dismissal the First District's ruling in this case would require.

Beck's rationale obviously reaches noncapital crimes as well. The First District overlooked the possibility that the jury may very well not have found the defendant guilty of every element of the offense, but nevertheless have convicted him of the charged offense because they believed he had done something wrong.

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[4] In the context of capital sentencing, the United Supreme Court acknowledged that states, beginning in the 19th century, gave juries discretion or a "pardoning power" to find defendants who had killed guilty of some degree of homicide less than first degree, premeditated, murder. Rather than forcing them to decide between the unpalatable choice of guilty of murder and sentenced to death or not guilty and walking free, many states recognized a "third option," They could find the defendant guilty of some lesser, non death worthy crime. Woodson v. North Carolina, 428 U.S. 280, 290-92 (1976).

Beck, cited above. They may have done so because, without any lesser included offenses, they were faced with only the choices of either exonerating him or her with a not guilty verdict or finding them guilty. Beck v. Alabama, 447 U.S. 625 (1980). Because the jury had been told that the appropriate sentence was the court's duty, Fla. Std Jury Inst. (Crim) 2.05(5), it could have reasoned that the trial judge would also recognize the weakness in the State's case and give a more lenient sentence because of the deficiency.

> When the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense – but leaves some doubt with respect to an element that would justify conviction of a capital offense – the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.

Id. at 637.

The First District's opinion also clearly reveals that the court believes that evidence sufficient to support a conviction for the charged offense nevertheless can never have so little weight to justify the jury finding the defendant guilty of a necessarily lesser included offense. That is patently false. Juries regularly convict defendants of some lesser crime than the one the prosecutor claimed he had committed. Whether it is a "third option" or a "jury pardon" the law allows juries to find that the defendant did something wrong, just not the more serious crime the

State believed he or she had committed. Deciding a defendant committed a lesser included offense is a jury pardon in the sense that it is a conclusion that the weight of the evidence (rather than its sufficiency) fails to tip the scales of justice in favor of finding the defendant guilty as charged. There is nothing irrational in the jury doing this. They simply did what the law expects them to do, weigh the evidence, resolve its conflicts, and reach a decision of guilt or innocence, or a third option of guilt of a lesser offense based on the facts as they found them and according to the law given to them. That weighing and resolving of the evidence have nothing to do with "compassion or compromise." Slip opinion at p. 3. Quoting from Gragg v. State, 429 So. 2d 1204, 1207 (Fla. 1983). It is simply the jury exercising the discretion the law gives to them.

In short, the First District based its opinion on the very 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 a judgment of acquittal, they do so only as a "jury pardon." That is, they reached their decision to convict for some crime less than what the State Attorney alleged through some irrational process of "compassion or compromise." No law or reason supports that conclusion. The jury's "pardoning power" as this Court meant is the discretion or right the jury has to weigh evidence, that clearly

may have been sufficient to allow the State to survive a motion for a judgment of acquittal, and find it justified convicting the defendant, if at all, of some lesser offense.

This Court, therefore, should reject the First District's unjustifiably narrow definition of a jury pardon, and rephrase the question it certified without the presumption the jury has ignored its findings of facts and the trial court's instructions on the law. As shortened, this Court should answer it in the affirmative.

CONCLUSION

The Petitioner, Robert Sanders, respectfully asks this honorable Court to accept jurisdiction in this case, rephrase the certified question without the final clause, and answer it in the affirmative.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to **ROBERT R. WHEELER**, Assistant Attorney General, The Capital, Tallahassee, FL 32399-1050; and to Petitioner, **ROBERT LAVON SANDERS**, #I02767, Holmes Correctional Institution, 3142 Thomas Drive, Bonifay, FL 32425, on this date, December 3, 2003
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CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that pursuant to Rule 9.201(a)(2), Fla. R. App. P., this brief was typed in Times New Roman 14 point.

Respectfully submitted,

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