IN THE SUPREME COURT OF FLORIDA

Case No. 03-642
Lower Case No. 4D02-3566

STATE OF FLORIDA,

Petitioner,

-vs-

SOLOMON WILLIS,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL OF
FLORIDA, FOURTH DISTRICT

PETITIONER'S REPLY BRIEF ON THE MERITS

CHARLES J. CRIST, JR.,
Attorney General
Tallahassee, Florida

JAMES J. CARNEY
Assistant Attorney General
Florida Bar Number 475246

CLAUDINE M. LaFRANCE
Assistant Attorney General
Florida Bar Number 0094757
Office of the Attorney General

Department of Legal Affairs
1515 Flagler Avenue, Suite 900
West Palm Beach, Florida 33401

(561) 837-5000

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

RULES

STATEMENT OF THE CASE AND FACTS

Petitioner accepts the Respondent's Statement of Facts set forth in his Answer Brief and further relies on the Statement of Facts contained in Petitioner's initial brief on the merits.

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. 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.

ARGUMENT

WHETHER A TRIAL COURT MAY SUMMARILY DENY A POST CONVICTION MOTION AS FACIALLY INSUFFICIENT WHERE THE DEFENDANT ASSERTS BY A GENERAL CONCLUSORY CLAIM THAT HE WAS PREJUDICED BY THE OMISSION OF A NECESSARILY INCLUDED OFFENSE BECAUSE HE SPECULATES THAT HAD THE JURY BEEN GIVEN THE OPPORTUNITY TO EXERCISE ITS PARDON POWER IT WOULD HAVE DONE SO.

Appellant cites numerous cases in his answer brief for the proposition that counsel's failure to object or request a necessarily included offense constitutes deficient performance. However, the issue at bar is not whether counsel's performance was deficient under the first prong of the Strickland analysis. The issue is whether a mere claim that if the jury had been given the opportunity to exercise its pardon power it would have done so satisfies the prejudice prong. See e.g, Firsher v. State, 834 So. 2d 921 (Fla. 3rd DCA 2003)(Defendant was not prejudiced by defense counsel's failure to request instruction on the necessarily lesser included offense of attempted manslaughter, in trial which resulted in defendant's conviction for attempted second degree murder with firearm;) Jones v. State, 484 So. 2d 577 (Fla. 1986)(Petitioner was charged with aggravated battery and was therefore entitled to have the jury instructed on the necessarily lesser included offense of battery; however, counsel did not commit "fundamental error" by

requesting that it not be given as this strategy accorded with petitioner's "all or nothing" defense at trial.)[1]

The majority in Sanders v. State, 847 So. 2d 504, 506-507 (Fla. 1st DCA 2003), 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. 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

---

[1] Where a jury is properly instructed a court will not presume that the jury disregarded the law where the evidence is sufficient to support the verdict. See, Griffin v. United States, 502 U.S. 46, 59-60, 116 L. Ed. 2d 371, 112 S. Ct. 466. (1991); Sochor v. Florida, 504 U.S. 527, 119 L. Ed. 2d 326, 112 S. Ct. 2114, 1992 (1992); San Martin v. State, 717 So. 2d 462, 470 (Fla. 1998)

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 appellant's counsel may have erred in choosing not to object to the omission of the instruction, or that appellant'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.

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 v. Washington, 466 U.S. 688, 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. 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).

As explained in Bufford v. State, 473 So. 2d 795 (Fla. 5th DCA 1985), review denied, 482 So. 2d 347 (Fla. 1986):

> While the jury's "pardon power" is inherent in our system of criminal justice, the exercise of that power has not been encouraged by the courts because it conflicts with the duty of the jury to bring in a verdict in accordance with the law.

Bufford, 473 So. 2d at 796 (emphasis added). Justice Sawaya, eloquently in a specially concurring opinion opined:

As I will explain, when a jury renders a jury pardon in Florida, it violates its oath and the instructions by the trial court that the verdict must be based on the law and the evidence. Moreover, the Court in Strickland made it clear that speculation or the idiosyncracies of the jury for leniency are not relevant factors to be considered in determining whether the prejudice prong has been met. In my view, a finding of prejudice based on the jury pardon is nothing more than speculation of what the jury might have done had a lesser included charge been given to them, and it is certainly based on the idiosyncracy of the jury for leniency. Moreover, when the jury returns a verdict of guilty to the crime charged in the information, such a finding overlooks the presumption that the jury impartially applied the standards that it was given to decide the case.

In Florida, all jurors must take an oath to "well and truly try the issues between the State of Florida and the defendant and render a true verdict according to the law and the evidence." Fla. R. Crim. P. 3.360. n2 When it is selected, the jury is given a preliminary instruction that provides:

> It is your solemn responsibility to determine if the State has proved its accusation beyond a reasonable doubt against (defendant). Your verdict must be based solely on the evidence, or lack of evidence, and the law.

Fla. Std. Jury Instr. (Crim.) 2.1. The instruction given to the jury just before it retires to deliberate provides:

> 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 lived by the constitution and the law. No juror has the right to violate rules we all share.

Fla. Std. Jury Instr. (Crim.) 2.08. The standard jury instruction concerning lesser included offenses instructs the jury that they are to consider lesser included offenses only if the evidence does not establish the original charge. This standard jury instruction provides in pertinent part:

> In considering the evidence, you should consider the possibility that although the evidence may not convince you that the defendant committed the main crimes of which [he] [she] is accused, there may be evidence that [he] [she] committed other acts that would constitute a lesser included crime [or crimes]. Therefore, if you decide that the main accusation has not been proved beyond a reasonable doubt, you will next need to decide if the defendant is guilty of any lesser included crime.

Fla. Std. Jury Instr. (Crim.) 3.4. The Court in United States v. Powell, 469 U.S. 57, 83 L. Ed. 2d 461, 105 S. Ct. 471 (1984), summarized the general principles contained in these jury instructions as follows:

> Jurors, of course, take an oath to follow the law as charged, and they are expected to follow it. See Adams v. Texas, 448 U.S. 38, 100 S. Ct. 2521, 65 L. Ed. 2d 581 (1980). To this end trials generally begin with voir dire, by

> judge or counsel, seeking to identify those jurors who for whatever reason may be unwilling or unable to follow the law and render an impartial verdict on the facts and the evidence. But with few exceptions, see McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 556, 104 S. Ct. 845, 850, 78 L. Ed. 2d 663 (1984); Smith v. Phillips, 455 U.S. 209, 217, 102 S. Ct. 940, 946, 71 L. Ed. 2d 78 (1982), once the jury has heard the evidence and the case has been submitted, the litigants must accept the jury's collective judgment. Courts have always resisted inquiring into a jury's thought processes, see McDonald v. Pless, 238 U.S. 264, 35 S. Ct. 783, 59 L. Ed. 1300 (1915); Fed. Rule Evid. 606(b)(stating that jurors are generally incompetent to testify concerning jury deliberations); through this deference the jury brings to the criminal process, in addition to the collective judgment of the community, an element of needed finality.

Powell, 469 U.S. at 66-67. Hence, it is clear that the jury must base its verdict on the law and the evidence; not on sympathy or leniency. In order to prevent a verdict from being based on jury sympathy and in order to curb the exercise of the jury pardon, the trial courts are not allowed to instruct the jury on the sentence a defendant may receive if convicted. See Fla. R. Crim. P. 3.390(a); Legette v. State, 718 So. 2d 878 (Fla. 4th DCA 1998). The instructions that the jury is given are clearly not compatible with a concomitant power to pardon and if a jury possesses this as a right, the question arises why the jury is not instructed that

> it has it. The question also arises how the courts of this state can premise a finding of prejudice, under Strickland, on the supposed exercise by a jury of a right that it does not even know it has, especially in light of jury instructions that clearly indicate that such a right does not even exist.
>
> It is clear to me that when a jury grants a pardon to a defendant by finding him or her guilty of a lesser included offense when the state has proven guilt beyond a reasonable doubt regarding the offense charged in the information, the jury violates the oath it took and the instructions given it by the trial court. I also believe that when the jury has convicted the defendant as charged, the presumption that it followed the law should be indulged, i.e., that the charge was proven beyond a reasonable doubt. See Strickland. It is, therefore, clear that a jury pardon is indeed the decision of a lawless decision maker that is based on the idiosyncracies of the jury for leniency. This is just the sort of verdict that the Court in Strickland said must not form the basis for a finding of prejudice under the second prong of the Strickland standard. Speculation on what a lawless jury might do if given the opportunity to violate its oath and the law certainly does not establish "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

Vickery v. State, 2004 WL 534624 (Fla. 5th DCA Mar 19, 2004); 2004 Fla. App. LEXIS 3509 (Fla. 5th DCA 2004).

As such, the State respectfully asks this Court reverse the Fourth District's opinion finding that a mere claim that if the

jury had been given the opportunity to exercise its pardon power it would have done so satisfies the prejudice prong of the Strickland analysis.

CONCLUSION

Based upon the arguments and authorities cited herein, the petitioner respectfully requests this Court reverse the Fourth District's opinion.

Respectfully Submitted,

CHARLES J. CRIST JR.,
Attorney General

_____

JAMES J. CARNEY
Assistant Attorney General
Florida Bar Number 475246

CLAUDINE M. LaFRANCE
Assistant Attorney General
Florida Bar Number 0094757
Office of the Attorney General
Department of Legal Affairs
1515 Flagler Avenue, Suite 900
West Palm Beach, Florida 33401
(561) 837-5000

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Petitioner was mailed this ___ day of March 2004, to BIANCA LISTON, Esq, Attorney for Respondent, Clark, Robb, Mason, Coulombe & Buschman, 19 West Flagler Street, Miami, FL 33130.

CLAUDINE M. LaFRANCE
Assistant Attorney General

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief is typed in 12 point Courier New Font.

CLAUDINE LaFRANCE

Assistant Attorney General