IN THE SUPREME COURT OF FLORIDA

CASE NO. 64,386

ELWOOD C. BARCLAY,

Petitioner,

vs.

LOUIE L. WAINWRIGHT,
SECRETARY, DEPARTMENT OF
CORRECTIONS, STATE OF
FLORIDA,

Respondents.

FILED
SID J. WHITE
JAN 12 1984
CLERK, SUPREME COURT
By Chief Deputy Clerk

PETITIONER'S REPLY TO RESPONSE OF STATE

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INTRODUCTION

This is an original proceeding in which the Petitioner asserts fundamental rights. The case began on October 14, 1983 with the filing of a verified petition and appendix which (1) alleged specific facts supported by affidavits; and (2) placed five distinct legal arguments before the Court.

Three months later, the State has filed its Response which contains no factual response. The State leaps into argument which neither admits nor denies the specific facts but, without affidavits or other proof, merely speculates about the Petitioner's facts.

The Response has an Orwellian cast to it:

-- The fact of attorney Ernest Jackson's marriage to the sister of Barclay's co-defendant Jacob Dougan becomes an incentive to better represent the conflicting interests of Barclay because "the warmth of a new found love would spur Mr. Jackson to an even greater degree of professional excellence;"

-- The detailed facts of Ernest Jackson's ill health, his financial problems, the disarray of his law practice do not, to the State, have any meaning;

-- The fact of Ernest Jackson's primary loyalty to Jacob Dougan -- a fee being paid by Dougan's father for Dougan and not for Barclay -- has no significance to the State which fails to even mention or deal with the doctrine of Wood v. Georgia;

-- The fact that Jackson, a single practitioner most of the time he was handling the Petitioner's appeal, had 2,500 open files, becomes, in the eyes of the State, a testimonial to Jackson's flourishing practice even though the State does not at all dispute the fact that Jackson's law practice was in shambles;

-- The State, without rebuttal of the plain evidence, dismisses the affidavits[1] as inadmissible expert testimony and "one-sided views of lawyers who have not discussed the case with Mr. Jackson" (now deceased).[2]

-- The brief, -- filed in identical form in two courts for three different clients -- is, to the State, a "seventy-page brief containing twenty-seven separate points,"[3] although twenty-one of the twenty-seven points were not argued in the brief.

-- The fact of Jackson's failure to even raise or argue the jury recommendation of life and the many elements which justified different treatment of Dougan and Barclay becomes, to the State, a vindication of Jackson and -- somehow -- evidence that there was no merit to such an argument.[4]

The State's Response is an altogether unsatisfactory document. The State has a duty to step up to the facts of this case and to either admit the facts alleged or to dispute

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[1] Note that the State attempts to lump all the affidavits together. A review of those affidavits will demonstrate that they are on several subjects, Jackson's incompetence and Jackson's conflict. If some affidavits are, to the State, similar it is because all lawyers who have reviewed these facts are outraged by what happened. It is the State's burden to come forward with some evidence to contradict the Petition or, in good faith, to admit the allegations of the Petition.

[2] The State also complains that the lawyers base their affidavits on the affidavit of Elwood Barclay. Of course, they do, in part, for that is the evidence of Jackson's conflict.

[3] Apparently the State is not troubled by page 47 of the Ernest Jackson brief filed for Dougan, Barclay and Crittendon.

[4] Despite the fact that no argument was made by Jackson, two members of a six-person court voted with Barclay. If any advocacy had been made there is the real chance that others may have agreed.

the facts.[5] If the facts are disputed, Petitioner is entitled to discovery, an opportunity to fully develop all facts and an evidentiary hearing.

This need to determine the facts, if they are indeed in dispute, is essential for certain of the Petitioner's points and due process requires that the State let the Court and Petitioner know what facts they intend to contest. For that reason, the Petitioner has filed with this Reply a Motion: Motion to Deem All Petitioner's Allegations Admitted or, in the Alternative, a Motion for a Full and Fair Evidentiary Hearing.

The balance of this Reply will deal with several essential points of law. Given the deadline for this Reply, only the first three points of Petitioner's original argument are addressed.

ARGUMENT

I.

BARCLAY'S APPELLATE COUNSEL
HAD A CONFLICT OF INTEREST.

A curious organization of the State's Response serves to lump together the law on two separate points -- conflict of interest and ineffective assistance of counsel.

These concepts have both developed to protect the Defendant's Sixth Amendment right to counsel but each concept is governed by legal principles. The Respondent's tactical decision to mix the two points by addressing them in one helter-skelter

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[5] The State, through the State Attorney in Jacksonville, and the Attorney General's office in Tallahassee, had extensive experience with Ernest Jackson over the years. They have access to evidence of Jackson's competence but not a single person has come forward for the State to rebut in any way what the affidavits of ____ lawyers have put before this Court.

point[6] is obviously intended to draw attention away from the merits of each point.

The leading cases on conflict argued by the Petitioner, Wood v. Georgia, 450 U.S. 261, 271 (1981); Westbrook v. Zant, 704 F.2d 1487 (11th Cir. 1983) (Hatchett, Kravitch and Clark), and Foster v. State, 387 So.2d 344 (Fla. 1980) are never cited, much less discussed, by the State. Instead, the State cites a series of cases which are quite off point factually from this case.

The State apparently finds some comfort in United States v. Garcia, 517 F.2d 272 (5th Cir. 1975), cited several times. There, the federal appellate court held that conflict of interest,[7] where disclosed to the client and discussed in open court, should not bar representation by the attorney if the informed client gives consent. Here, the undisputed facts show that there was no discussion with the client, no court inquiry by the judge, and no basis for informed consent.

Similarily misleading is Respondent's citation at P. 7 to Bonds v. Wainwright, 564 F.2d 1125, 1131 (5th Cir. 1977), vacated on other grounds, 579 F.2d 317 (5th Cir. 1978) (en banc). That case did not involve any issue of conflict of interest, or any situation of a lawyer's representing co-defendants. A dictum at P. 1131 does state generally that the right to effective assistance of counsel can be waived, but the court goes on to hold that any such "waiver must be an intelligent, understanding and voluntary decision. A

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[6] The State's Response has a Section II (Pages 3 through 16) entitled "Conflict of Interest which addresses both conflict and ineffectiveness of counsel. For instance, the Respondent asserts, Page 15 of Response, that "Petitioner translates Mr. Jackson's personal problems into a conflict of interest resulting in ineffective assistance of counsel." That is not correct and Jackson's "personal problems" were not argued in the Petitioner's conflict point. The romantic interest and, later, marital relationship with the co-defendant's sister is mentioned in the conflict argument and the Response never gives the Court the State's answer to this fact.

[7] The State refers to the Garcia conflict as an "actual conflict of interest" (Response, P. 7) without distinguishing the facts from this case.

valid waiver of the right to effective assistance of counsel therefore would have to be proceeded by an explanation to the client of what he was waiving. This explanation should make clear to the client the significance of what he is waiving and the risks he runs." Id. at 1132. Mr. Jackson neither discussed to Elwood Barclay the facts underlining his conflict of interest nor discussed with Elwood Barclay the significance of those facts, the conflict, or of a decision to waive the conflict. Elwood Barclay neither made such a decision nor was advised that there was any such decision to make. His representation of Elwood Barclay violated the Constitution and cannot conceivably be argued to have been "waived" (Response, P. 7), since a lawyer having a conflict of interest may represent multiple clients only "if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each client." American Bar Association, Code of Professional Responsibility, DR 5-105(C) (Emphasis added).

The dispute between the Petitioner and the State turns on the facts of this case and the State simply fails to deal forthrightly with the facts. We respectfully submit that the following facts relating to the conflict of interest point are not in dispute:

-- Ernest Jackson first represented Jacob Dougan on appeal.

-- The only fee paid for the Dougan-Barclay representation was paid for Dougan's representation.

-- Ernest Jackson became romantically involved with Jacob Dougan's sister and eventually married her.

-- Jacob Dougan received a jury recommendation of death and Elwood Barclay received a recommendation of life imprisonment.

-- Numerous factors justified the distinction seen by the jury:

  -- Dougan was older;

  -- Dougan led the group;

  -- The victim was killed by a bullet wound and only Dougan held the pistol;

  -- Dougan, but not Barclay, was implicated in a second murder.

-- Any argument which made the points above would necessarily emphasize Dougan's involvement and buttress the jury determination in favor of Barclay and against Dougan.

The factor of meaningful appellate review is a significant factor in the Florida death penalty law and a significant feature of this law is the principle known to this Court as the Tedder principle.[8] This important principle, which limits judicial override of jury recommendations, has been developed by this Court to eliminate judicial arbitrariness and to guard against the judge who so passionately favors the death penalty that he will impose it whenever possible. (The questions of jury override are now before the United States Supreme Court in a Florida death case accepted only this week, Spaziano v. Florida, Case No. ___________, cert. granted on January 9, 1984.)

In Barclay's interests, Tedder was quite obviously one of the most important principles to put before the Florida Supreme Court. Tedder is not mentioned in the brief filed by Ernest Jackson and, despite the fact that the Petitioner referred to Tedder on 16 different pages of his Petition, the State doesn't even cite to it.

The most incredible argument of the Response is the State's handling of the Tedder issue. Apparently the State justifies

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[8] Tedder v. State, 322 So.2d 908 (Fla. 1975).

the advocacy of Ernest Jackson by demonstrating that there were not "dramatically different facts" for the Petitioner and Dougan. The trump card played by the State to demonstrate this proposition is a quotation from the 1977 decision (4-2) in Barclay and Dougan v. State, 343 So.2d 1266 (Fla. 1977) -- the very case which was infected by the failure of advocacy. With this type of circular reasoning, it is fair to say that there can never be a case for ineffective assistance of counsel since the bad result flowing from the inadequate lawyer performance will be used to demonstrate that there was no merit to the claim which might have been raised.

Happily, the State's rule has not been adopted and there is no "Catch 22" barrier to ineffective assistance of counsel claims in Florida.

Ernest Jackson had an actual conflict of interest.

II.

BARCLAY DID NOT HAVE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

The Petitioner accepts, arguendo, the principles of Knight v. State, 394 So.2d 997 (Fla. 1981) noting only that the case of Washington v. Strickland[9] in which the Eleventh Circuit adopted a more lenient standard was argued before the United States Supreme Court this very week, January 10, 1984.

The reason the Petitioner does not shy from the Knight v. State standard is the strength of Petitioner's factual case but, again, the State attempts to gloss over these facts.

For purposes of this cause, the following facts, relating to the relevant question of whether Jackson was "reasonably likely to render" effective assistance of counsel, McKenna v. Ellis, 280 F.2d 592, 603-604 (5th Cir. 1960) can be summarized as follows:

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[9] Washington v. Strickland, 693 F.2d 1243 (11th Cir.1982) cert. granted 51 U.S.L.W. 3871 (June 6, 1983).

-- Ernest Jackson carried an extraordinary case load;

-- At the time Jackson took on Barclay's appeal his partner, then pregnant, was shortly to leave;

-- Jackson took the appeals on the assumption that the three cases -- Dougan (first degree), Barclay (first degree), and Crittenden (second degree) -- would be as easy to handle as one appeal;

-- Jackson experienced severe disruptions in his personal life during the time of the appeal including a divorce and remarriage;

-- Jackson began experiencing serious financial problems;

-- Jackson was faced with health problems requiring hospitalization and, according to this own statement, his judgment was impaired "due to a serious head injury and the heavy medications prescribed by Dr. Jacob Green." (App. J).

The undisputed facts which demonstrate the "specific acts or omissions" and the likelihood that the death penalty would have been set aside, are equally without dispute and are as follows:[10]

-- The one brief filed by Jackson for Barclay did not discuss any issues relating solely to Barclay.

-- The principle of Tedder v. State was never raised -- no separate issues were raised for Barclay.

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[10] The Petitioner has been charged with throwing mud. This is unfair. One of the reasons to state these facts about Ernest Jackson's circumstances was to explain some of the reasons for the ineffective performance of Ernest Jackson. Petitioner has not sought to condemn Jackson and, indeed, repeats here what was said in the original papers: Jackson seems to have been a generous, cordial and very decent man. During this period, however, he was under great pressures, incapable of performing and, in the final analysis, he did not perform his advocatee's role for Barclay.

- There was no citation to the transcript;
- The brief was technically deficient, there was no citation to modern Florida capital crime case law;
- There was no reply brief;
- There was no supplemental authority filed;[11]
- There was no separate brief or oral argument for Barclay;
- There was no argument before the Court on the "great risk" aggravating factor of the sentence;
- There was no argument to demonstrate that Barclay did not interfere with a governmental function.
- The Court ruled 4-2 against Barclay.
- With the changed vote, the result, a 3-3 tie, would require that a life sentence be imposed under the principle of Vasil v. State.
- When the arguments on "great risk" and "interference with governmental function" were raised on the same record but a separate case, one judge who sat with the six-person court on Barclay's case changed his vote, Dougan v. State, 398 So.2d 439, 441 (Fla. 1981).

Before bowing to the pressures of time and leaving this point, the Petitioner must comment on the startling failure of the State to mention, even in passing, this Court's December 8, 1983 decision in Vaught v. State. That case, mentioned in the original Petition (filed before Vaught was decided) and the Emergency Application for Stay (filed after decision in Vaught), was a case which turned on Ernest Jackson's

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[11] The chronology which appears in Appendix A of the original Petition parallels the developing case law with the facts of this case.

effectiveness as a trial counsel. This Court granted a stay of a death warrant and remanded the case for an evidentiary hearing on ineffectiveness of counsel. The State ignores Vaught and the fact that all of the Vaught affidavits are submitted in Barclay's appendix and suggests no reason why the Court should do less in this case.

Indeed, because of the facts in this case, the Court should do more. On the principles governing conflict of interest and ineffectiveness of counsel, the Court can now rule to provide the Petitioner with an opportunity for a new appeal or, alternatively, to recognize the merits of this case and order a life sentence.

III.

PRINCIPLES OF VASIL v. STATE REQUIRE THAT THE SENTENCE BE REDUCED TO LIFE.

This point need not be labored. Vasil v. State, 374 So.2d 465, 471 (Fla. 1979) holds that, where a majority of the Supreme Court is not able to reach agreement on the death penalty, the Court would not allow the death penalty to be imposed. The Court acknowledged the importance of "meaningful appellate review" of each death sentence, Profitt v. Florida, 428 U.S. 242, 253 (1976).

Since the principle here is appellate court concurrence with the result often "meaningful appellate review" and since that affirmative support for the death sentence was not present when this case was last before this Court, the Petitioner sees no reason why Vasil should not apply and the State suggests none.

Here, as in Vasil, the only proper sentence which can be entered is for life imprisonment.

CONCLUSION

The result reached by the jury -- life imprisonment -- should be reached by this Court, applying the principles of Vasil v. State, or, alternatively, through review of the record and application of the principles of Tedder v. State.

At a minimum, Barclay who was without an independent and effective advocate, is entitled to pursue his right of appeal to this Court with competent counsel.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the Honorable Jim Smith, Attorney General of the State of Florida, The Capitol, Tallahassee, Florida 32301; Wallace Albritton, (By hand) Assistant Attorney General of the State of Florida, The Capitol, Tallahassee, Florida 32301; and to T. Edward Austin, State Attorney, 600 Duval County Courthouse, Jacksonville, Florida 32202 on this 12th day of January, 1984.

Talbot D'Alemberte
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