IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-2538

RICHARD HENYARD,
Petitioner,

v.

JAMES V. CROSBY, JR.,
Secretary, Florida Department of Corrections,
Respondent.

REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

The Petitioner will rely upon the arguments and authorities contained in the Petition for Writ of Habeas Corpus in support of Arguments I and II.

ARGUMENT III

APPELLATE COUNSEL FOR MR. HENYARD WAS INEFFECTIVE FOR FAILING TO RAISE ON DIRECT APPEAL THE IMPROPER RULING ON TRIAL COUNSEL'S MOTION TO WITHDRAW.

Section 27.53(3), Florida Statutes (1993) provides:

> If at any time during the representation of two or more indigents the public defender shall determine that the interests of those accused are so adverse or hostile that they cannot all be counseled by the public defender or his staff without conflict of interest, or that none can be counseled by the public defender or his staff because of conflict of interest, it shall be his duty to move the court to appoint other counsel. The court may appoint one or more members of The Florida Bar, who are in no way affiliated with the public defender, in his capacity as such, or in his private practice, to represent those accused. However, the trial court shall appoint such other counsel upon its own motion when the facts developed upon the face of the record and files in the cause disclose such conflict. The court shall advise the appropriate public defender and clerk of court, in writing, when making such appointment and state the conflict prompting the appointment. The appointed attorney shall be compensated as provided in s. 925.036.

This was, of course, the law as it existed when the Petitioner was tried back in May of 1994; and was the law when his direct appeal was pending before this court. In Guzman v. State, 644 So.2d 996 (Fla. 1994) this court construed section 27.53(3) as establishing an absolute requirement that when the public defender filed a motion to withdraw alleging conflict the trial court had **no discretion** in the matter; and was required as a matter of Florida statutory law to grant the public defender's motion.

The court reasoned in Guzman as follows:

> The law is well established that a public defender should be permitted to withdraw where the public defender certifies to the trial court that the interests of one client are so adverse or hostile to those of another client that the public defender cannot represent the two clients without a conflict of interest. Babb v. Edwards, 412 So.2d 859 (Fla.1982). Moreover, once a public defender moves to withdraw from the representation of a client based upon a conflict due to adverse or hostile interests between the two clients, under section 27.53(3), Florida Statutes (1991), a trial court ***must*** grant separate representations. Nixon v. Siegel, 626 So.2d 1024 (Fla. 3d DCA 1993). As the district court stated in Nixon, a trial court is not permitted to reweigh the facts considered by the public defender in determining that a conflict exists. **This is true even if the representation of one of the adverse clients has been concluded.** Id. At 1025. (Emphasis added)

In the case sub judice, the public defender twice moved the court to withdraw from representing the Petitioner (R-560; 609) certifying to the court that the office of the public defender had represented ten of the witnesses who were listed on the State's witness list. "The signature of an attorney shall constitute a certificate by the attorney that the attorney has read the pleading or other paper; that to the best of the attorney's knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay." Rule 2.060, Florida Rules of Judicial Administration.

According to Florida law as it existed at the time, the trial court should have automatically granted the Petitioner's motion to withdraw and should have appointed

private counsel to represent him. But it didn't. In direct contravention of the then existing Florida law, the court made inquiry into the facts considered by the public defender in determining that a conflict existed. This action would have constituted prejudicial and reversible error had the issue been raised on direct appeal. But Petitioner's appellate counsel failed to raise this fundamental claim and hence deprived the Petitioner of his right to a meaningful and effective appellate review of the judgment and sentence of death.

As noted above, this court cited with approval the reasoning in the Third DCA's opinion of Nixon v. Siegel, 626 So.2d 1024 (Fla. 3d DCA 1993). In that case, id. at 1205, the Third District reasoned as follows:

> In response to a certified question, the supreme court held in Babb v. Edwards, 412 So.2d 859, 862 (Fla. 1982), that once the public defender has determined conflict and has moved the court to appoint other counsel 'section 27.53(3) clearly and unambiguously requires the trial court to appoint other counsel not affiliated with the public defender's office.' The trial court is not permitted to reweigh those factors considered by the public defender in determining that there is a conflict in representing two adverse defendants. Further, it cannot be said as a matter of law that the conflict vanishes when the case of one of the adverse defendants is concluded. *See* Lightbourne v. Dugger, 829 F.2d 1012, 1023 (11th Cir. 1987) ("An attorney who cross-examines a former client inherently encounters divided loyalties.")

In Reardon v. State, 715 So.2d 348 (Fla. 4th DCA 1998), a case where the public defender's office represented a witness for just two minutes, the Fourth DCA

analyzed a Florida defendant's right to be represented by an attorney free from any conflicts of interest under section 27.53(3), Florida Statutes (1991) (which formed the *ratio decedendi* of Guzman), and compared this statutory right to the less expansive right to counsel predicated upon an analysis based purely upon federal constitutional law under the Sixth Amendment. The court opined that:

> While [Holloway v. Arkansas, 435 U.S. 475 (1978)] did not as a matter of federal constitutional law preclude a trial court from 'exploring' the adequacy of the basis of the conflict, Guzman clearly did so as a mater of Florida statutory law. We are bound to follow Guzman, which was based on the Florida Supreme Court's authoritative construction of a state statute affording greater protection than the Sixth Amendment right to counsel. *See* Sapp v. State, 690 So.2d 581, 586 (Fla.), *cert. denied*, 522 U.S. 840, 118 S.Ct. 116, 139 L.Ed.2d 69 (1997)(states may afford greater protection to an individual than federal constitution does); Briggs v. Salcines, 392 So.2d 263, 266 n.2 (Fla. 2nd DCA 1980), *cert. denied*, 454 U.S. 815, 102 S.Ct. 92, 70 L.Ed. 84 (1981)(because extent of attorney-client privilege is matter of state law, state court is not bound to follow United States Supreme Court's holding in the regard).

It is interesting to note parenthetically at this point that in 1999, in response to Reardon, the Florida Legislature amended section 27.53(3) to permit the trial courts to make inquiry as to the basis of the conflict of interest asserted by public defenders in a motion to withdraw. Valle v. State, 763 So.2d 1175 (Fla. 4th DCA 2000). But again, this amendment to the statute did not go into effect until years after the Petitioner's direct appeal was concluded. Until that time, Guzman, supra., "left the trial courts with no discretion when a public defender filed a motion to withdraw

alleging conflict." Id. at 1177.

The Respondent has cited this court's decision in Bouie v. State, 559 So.2d 1113 (Fla. 1990) as authority for the correctness of the procedure followed by the trial court in response to the public defender's motion to withdraw. Quite the opposite is the case. The Bouie decision was predicated exclusively upon a Sixth Amendment analysis of a defendant's right to be represented by a lawyer free of conflicting interests. A defendant's greater rights under section 27.53(3), Florida Statutes was not addressed in the decision.

This court, in effect, overruled Bouie ***sub silencio*** in Gutzman v. State by reminding members of the Bar that clients represented by the public defender's office had greater protections afforded to them by virtue of a state statute. It was presumed by operation of law under that statute that an actual conflict of interest existed simply by virtue of the fact that the defendant's public defender filed a motion to withdraw which asserted such a conflict. "Reading Guzman strictly, the trial court is not permitted to question the verity or motive of the public defender even if reason and common sense dictates otherwise. . . . It is the harsh and arbitrary rule in Guzman which takes all exercise of discretion from the trial judge in these instances." Crowe v. State, 701 So.2d 431, 432 (Fla. 5th DCA 1997)(Dauksch, J. concurring specially).

The Petitioner was twice prejudiced by his attorneys' ineffectivenesses

regarding this critical issue of law. The first time was before the trial court when his public defender failed to argue the applicable law controlling public defenders' motions to withdraw; and the second time was when his appellate attorney failed to even raise this all important issue with the appellate court.[1] Not to place too fine a point on the matter, but it is hardly beyond the pale of reason to expect a public defender to know the law as it applies to public defenders. Conflict of interest issues arise all the time in public defenders' offices throughout the state. As a consequence of these failures the Petitioner was compelled to go to trial represented by an attorney whom the law presumed to be compromised. Compounding the error, the Petitioner was prejudiced a second time by an appellate attorney who failed to recognize the law applicable to his case so that he could raise the issue on direct appeal. These omissions are two paradigm cases of ineffective assistance of counsel.

In order to establish a claim of ineffective assistance of appellate counsel a petitioner must show "1) specific errors or omissions which show that appellate counsel's performance deviated from the norm or fell outside the range of professionally acceptable performance and 2) the deficiency of that performance

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[1]The Respondent is absolutely correct in footnote 2 of its Response to Petition for Habeas Corpus when it observed incredulously that "surprisingly, defense counsel did not immediately argue the motion to withdraw, but presented over twenty-six other defense motions for the court to rule on prior to arguing the motion to withdraw." It is even more surprising that this issue was not recognized by the Petitioner's appellate counsel.

compromised the appellate process to such a degree as to undermine confidence in the fairness and correctness of the appellate result." Downs v. Moore, 801 So.2d 906, 909-910 (Fla. 2001). Both of those two criterion were met in this case.

CONCLUSION

Based upon the above and foregoing argument and authorities, as well as those contained in the Petitioner's Petition for Writ of Habeas Corpus, the Petitioner, Richard Henyard, respectfully asks this Honorable Court to grant habeas relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply to State's Response to Petition for Writ of Habeas Corpus of the Petitioner has been furnished by U.S. Mail, first class postage prepaid, to Stephen D. Ake, Assistant Attorney General, Office of the Attorney General, Concourse Central 4, 3507 E. Frontage Road, Suite 200, Tampa, Florida 33607-7013; and Richard Henyard, DOC #225727, P1220S, Union Correctional Institution, 7819 NW 228th Street, Raiford, Florida 32026, on this ____ day of May, 2003.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

WE HEREBY CERTIFY that the foregoing Reply Brief of Appellant was generated in Times New Roman 14-point font pursuant to Fla.R.App.P. 9.210.

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