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IN THE SUPREME COURT OF FLORIDA

CASE NO.

LEO ALEXANDER JONES,

Petitioner,

v.

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

Respondent.

/

PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, LEO ALEXANDER JONES, by his undersigned counsel, pursuant to Rules 9.030(a)(3) and 9.100, Florida Rules of Appellate Procedure, petitions this Court to issue its writ of habeas corpus.

Petitioner alleges that he was sentence to death in violation of his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and under the statutory and case law of the State of Florida -- for the reason that Petitioner was accorded ineffective assistance of counsel at the appellate level, on his direct appeal to this Court for his conviction and sentence of death.

In support of such petition, in accordance with Rule 9.100(e), Florida Rules of Appellate Procedure, Petitioner states as follows:

I.
JURISDICTION

This is an original action under Rule 9.100(a), Florida Rules of Appellate Procedure. This Court has original jurisdiction pursuant to Rule 9.030(a)(3) thereof, and Article V, § 3(b)(9) of the Florida Constitution.

As described more fully below, Petitioner was denied the effective assistance of appellate counsel in proceedings before this Court at the time of his direct appeal. Counsel failed to raise or adequately address issues which, if raised

and properly argued, would have required (1) the reversal of Petitioner's conviction and death sentence, and (2) a new trial and sentencing hearing.

Since the ineffective assistance of counsel allegations stem from acts or omissions before this Court, this Court has jurisdiction to hear Petitioner's habeas corpus petition. Arango v. State, 437 So.2d 1099 (Fla. 1983); Buford v. Wainwright, 428 So.2d 1389 (Fla. 1983), cert. denied, 104 S. Ct. 372 (1983); Knight v. State, 394 So.2d 997, 999 (Fla. 1981).

If the Court finds that Petitioner's appellate counsel was ineffective, it can and should thereafter consider, on the merits, the appellate issues which should have been raised earlier. Florida law has consistently recognized that the appropriate remedy, where the appellate right has been thwarted due to the omissions or ineffectiveness of appellate counsel, is a new review of the issues raised by the Petitioner. State v. Wooden, 246 So.2d 755, 756 (Fla. 1971); Baggett v. Wainwright, 229 So.2d 239, 243 (Fla. 1969); Futch v. State, 420 So.2d 905 (Fla. 3d DCA 1982); Davis v. State, 276 So.2d 846, 849 (Fla. 2d DCA 1973), Aff'd, 290 So.2d 30 (Fla. 1974).

The proper means of securing such a belated appeal is a petition for a writ of habeas corpus, filed in the appellate court empowered to hear the direct appeal. See Baggett, supra, 229 So.2d at 244; cf. Ross, supra, 287 So.2d at 374-75; Powe v. State, 216 So.2d 446, 448 (Fla. 1968).

Accordingly, the habeas corpus jurisdiction of this Court is properly invoked to review "all matters which should have been argued in the direct appeal," Ross v. State, supra, 287 So.2d at 374-75, where such matters were originally overlooked or otherwise not adequately and effectively pursued by appellate counsel. See id. at 374; Kennedy v. State, 338 So.2d 261, 262 (Fla. 4th DCA 1976); Davis, supra, 276 So.2d at 849.

References to the record on appeal shall be designated "R". References to the transcribed proceedings shall be by designation "TR".

II.
FACTS UPON WHICH PETITIONER RELIES

A. Procedural History

Petitioner, LEO ALEXANDER JONES, was found guilty after trial by jury of First Degree Murder, before the Honorable A. C. Soud, Circuit Judge of the Fourth Judicial Circuit, in and for Duval County, Florida, on October 2, 1981. (R.140). By a vote of nine to three, the jury recommended the death penalty on October 6, 1981. (TR. 1582-1585). The trial court sentenced the Petitioner to death on November 6, 1981. (R. 182-224).

A direct appeal was taken to this Court, which affirmed the judgment and the sentence. Jones v. State, 440 So.2d 570 (Fla. 1983). A motion for rehearing was denied. Id. No further appeals were taken.

B. Facts as set forth by this Court

At trial, the prosecution produced evidence that on May 23, 1981, shortly after 1:00 a.m., a patrolman for the Jacksonville Sheriff's Office was shot by a sniper while driving his patrol car. The Petitioner lived upstairs and across the street from where the shooting occurred. Police arrested the Petitioner in his apartment, where they found two high-powered rifles that could have fired the fatal bullet. At the police headquarters, the Petitioner signed a written confession. See Jones, supra, at 572.

C. Facts Relevant to this Petition

1. During the guilt phase summation, the state had the first and last closing arguments. During the state's first argument, the prosecuting attorney made the following comments:

a.) "Now the picture is now complete, and Leo Jones, Leo Alexander Jones, sits there before you stripped of that presumption of innocence that we talked about at voir dire of this case, stripped of that presumption, and guilty of murder in the First Degree of Tom Szafranski, a police officer who worked for you and he worked for me." (TR. 1350).

b.) "You know, if there's one -- if there's the biggest lie I've heard from the defendant's case during the course of this trial, it's that man asking you to believe that he didn't know that these rifles were under his bed. Phenomenal. You know, you just go -- I can't believe it. And it isn't worth believing." (Tr. 1360).

c.) "I tell you, I don't know, you can -- you know, I feel confident he had that pistol bullet in his hand when Officer Mundy whirled around in his bedroom. . ." (TR. 1365).

d.) "And if you recall -- I tell you why they're unbelievably loud, because they came from right downstairs underneath him. . . .Waking up, said the shot was awful loud, and I'm sure it was because it came from right down below him." (TR. 1380).

e.) "I do know that he went down there and he shot officer Szafranski, and I submit to you you know that, too." (TR. 1385-6).

f.) We've proved that that man is a murderer, and I submit even worse than that, really, that's possible because he struck a blow at you and me, directly. He murdered one of our agents, one of those people that protects us. When that bullet fragment shattered into the head of Officer Tom Szafranski, he was striking at us." (TR. 1388-9).

The Petitioner's motion for mistrial based on these remarks was denied. (TR. 1389-90).

During the state's second argument, the prosecutor made the following remarks:

> g.) "That man (the Petitioner) is an unmitigated liar and a murderer." (TR . 1456).
>
> h.)"Tom Szafranski. This is an important case, all cases are important, criminal cases are important. Man's life is in jeopardy, a man is dead. Tom Szafranski is dead. There is a void, a void with his friend, a void with his family. You're not to take this sympathy into consideration and we're asking you not to, but that fact is there. We are in the trial of a premeditated, mean, vicious killing of a police officer. We live in a society where we have a very very small element, a group of people called the police who in a mass of -- in Duval County, six hundred thousand, a mass of society, is the symbol of order, is the symbol of our rights to live in our homes and feel secure, of our rights to work in our places of business and then go to and about and to and from without fear. That is the function of the police power of the police presence in a community, and it is very very small. It is the symbol of society's determination to live free from fear, to live orderly, to have property and to own it and to be safe. That policeman is society's symbol, pitifully few numbers, but he's the symbol of everything we stand for, for the advances we make, and he is the representative of society out there on that street. And when a human being lays in wait and with premeditation assassinates, kills and murders a policeman, he reaches down and he tears at the heart of society itself. He tears at the heart of what we are as a people when he kills our symbol of order and of security and of safety." (TR. 1461-62).

The Petitioner's objection to these remarks was overruled. (TR. 1462).

i.) "It's more than a murder case. It's the assassination of society's symbol of safety and security. That's what it is." (TR. 1462).

The Petitioner's motion for mistrial based on these remarks also denied. (TR. 1463-4).

2. During the penalty phase trial, the state presented the testimony of Jacksonville Sheriff Dale Carson. (TR. 1497-1505). The Sheriff was permitted to talk to the jury in conclusory terms about how the killing of a police officer affects the ability of the police department to carry out its duties. The police force was described as a "Family". (TR. 1502). The Sheriff testified that violence against police officers is on the increase, to the extent that policemen are targets for those dissatisfied with government. (TR. 1504). He stated that killing a police officer does disrupt the lawful exercise of the duties of the Sheriff's Office and the enforcement of laws. (TR. 1504-5). The Sheriff further testified about "the last police officer we had killed before this," "that his killer was still on death row, and nothing has happened". (TR. 1505). This was a reference to James David Raulerson, who was recently executed for the incident reviewed by this Court in Raulerson v. State, 358 So.2d 826 (Fla. 1978).

3. During his penalty phase summation, the prosecutor made the following remarks:

a.) "He's been convicted of the most despicable crime and the most heinous crime that exists in our dictionary of all the crimes, the premeditated murder of a fellow human being." (TR. 1542).

It is noteworthy that the state had previously stipulated that the aggravating circumstances of "heinous, atrocious, or cruel" did not apply and should not be given. (TR. 1525-6).

b.)"Tom Szafranski was a human being and he was senselessly murdered, cowardly act, murdered by an assassin laying in wait. Tom Szafranski was twenty-eight years old. Tom Szafranski had every right of every other human being to live a full life, to raise a family, to be productive, to have friends, to have loved ones, to grow old, to have children. He had every right to do those things, and he's dead. I told you that this was more than the killing of a policeman. But were it not -- and to use Mr. Fallin's words -- had he been a deliveryman, still, the value that our society places on the life of an innocent person going about their business is such that we must come to the courtroom and we must bring it to you as representives of our society to seek a proper punishment for that crime. Now, were Tom Szafranski not a policeman, the appropriate sentence in this case would be death under the facts and circumstances. But he is a policeman, he was a policeman, and that gives us an added dimension to this case. He's dead. Tom Szafranski is dead because he was a policeman. That's why he's dead. He elected to be a servant, he elected to be a -- participant in the protection of society, and he is dead for that reason, because he elected to wear a uniform and to be a policeman. Tom Szafranski was not hurting a soul on May the 23rd. Tom Szafranski was on a mission of mercy, helping a child in that murderer's own neighborhood and performing his duty when he was just -- just insane -- inhumanely gunned down.

Now, that night, May the 23rd -- you've heard the Sheriff testify, and I touched upon it in the closing argument the other day, but when you think about a police force, as I said before,

the symbol of society's determination to be safe, to be secure in their homes, to be secure in their property, that we had less than a hundred policemen representing society that night in Jacksonville, Florida. Eight hundred forty square miles. Almost six hundred thousand people, and less than a hundred uniformed people out there to protect and maintain the security of the people of this community. You bet you pose a threat to pulling those people out, and it's -- it's sad to say about our society, but if you pull those hundred people out we would have chaos, we would have anarchy. The symbol of orderly society, every free society, is a well-disciplined, well-trained police department that maintains people's safety so they can be safe from other people and their persons against attack, from being murdered and from being attacked, and secure their property. And you'r talking about less than a hundred people, one per approximately six thousand citizens out there that night. The representatives of society, the front line, the thin line of society. Tom Szafranski, policeman, shot and killed because he was a policeman, a member -- a representative of our society doing a job and, as I said before, on an mission of mercy that night." (TR.1542-4).

c.) "The Judge will tell you that there are <u>two</u> possible mitigating factors that you can consider, . . ." (TR. 1546-7).

d.) "Now, we have -- we've talked about the <u>two</u> mitigating factors that we mentioned again; I hope, briefly." (TR. 1552).

e.) ""Any other aspect of the Defendant's character or record and any other circumstance of the offense. Now, this is one mitigating circumstance." (TR. 1553).

The jury was instructed as follows, regarding possible mitigating circumstances:

"Among the mitigating circumstances that you may consider if established by the evidence are: One. That Leo Alexander Jones has no significant history of prior criminal activity. It has come before you that the defendant has been convicted of a felony on two occasions. One is battery on a law enforcement officer which involves the use or threat of violence to some person. The second is one not involving the use or threat of violence to some person. Conviction of a crime not involving the use or threat of violence to some person is not an aggravating circumstance to be considered in determining the penalty to be imposed on the defendant. But a conviction of that crime may be considered by the jury in determining whether the defendant has a significant history of prior criminal activity.
Number two. You may consider any other aspect of the defendant's character or record and any other circumstance of the offense." (TR.1573).

III.
NATURE OF RELIEF SOUGHT

Petitioner seeks an order of this Court vacating the judgment and remanding this case for a new trial. Alternatively, Petitioner seeks an order vacating the sentence and remanding this case for a new sentencing hearing before a new jury. Alternatively, Petitioner seeks an order granting belated appellate review of the judgment and sentence imposed by the trial court, and permitting Petitioner full briefing of the issues presented herein.

IV.

BASES FOR THE WRIT

A. Test to be Applied

In Knight v. State, 394 So.2d 997 (Fla. 1981), this Court set forth a four-part test with respect to a claim of ineffective assistance of appellate counsel. First, a Petitioner must specify the "omission or overt act upon which the claim of ineffective assistance of counsel is based". Second, he must show that "this specific omission or overt act was a substantial and serious deficiency measurably below that of competent counsel." This Court recognized, however, that "in applying this standard, death penalty cases are different, and consequently the performance of counsel must be judged in light of these circumstances." Third, Knight provides that the Petitioner must demonstrate that "this specific, serious deficiency, when considered under the circumstances of the individual case, was substantial enough to demonstrate a prejudice to the defendant to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings." Id. at 1001.

The fourth part of the Knight test which places a burden of rebuttal on the State need not be addressed at this time.

As will be demonstrated below, Petitioner herein has satisfied the three parts of the Knight test imposed upon him, and accordingly has succeeded in establishing prima facie that he was denied the effective assistance of appellate counsel as guaranteed by the United States Constitution and the Constitution and laws of the State of Florida.

B. Specific Errors and Omissions

1. Petitioner's appellate counsel failed to bring to this Court's attention the prejudicial, inflammatory, and improper arguments presented by the prosecutors in the guilt phase summation. It is well-settled that a prosecutor may not argue his personal belief in the guilt of the Defendant

or in the veracity of a witness. Grant v. State, 171 So.2d 361 (Fla. 1965); Thompson v. State, 318 So.2d 549 (Fla. 4th. DCA 1975); Buckham v. State, 356 So.2d 1327 (Fla 4th DCA 1978); Dukes v. State, 356 So.2d 873 (Fla. 4th DCA 1978); Richmond v. State, 387 So.2d 493 (Fla. 5th DCA 1980); Harris v. State, 414 So.2d 557 (Fla. 3rd. DCA 1982); DR 7-106, Canon 7, Code of Professional Responsibility. The prosecutor was in clear violation of this long-standing rule of law when he uttered comments (1b) through (1e), above. It is likewise improper to engage in name-calling of the Defendant, as the prosecutor did in comment (1g), above. See Meade v. State, 431 So.2d 1031 (Fla. 4th. DCA 1983); Johnson v. State, 88 Fla. 461, 102 So. 549 (1924).

Probably the most egregious remarks of all occurred in comments (1a), (1f), (1h) and (1i) above. These arguments were blatant appeals to sympathy for the victim of the crime, and his friends and family; remarks that were designed to play on the emotions of the jury; and "golden rule" arguments that presented the shooting of a police officer as a crime against the jurors themselves. Cases prohibiting such tactics are legion: See Lucas v. State, 335 So.2d 566 (Fla. 1st. DCA 1976); Reed v. State, 333 So.2d 524 (Fla. 1st. DCA 1976); Harper v. State, 411 So.2d 235 (Fla. 3rd. DCA 1982). The arguments were objected to and motions for mistrial were made and denied. Even though the trial court recognized the impropriety of some of the remarks, no curative instruction was given. (TR. 1389-90).

2. Petitioner's appellate counsel initially failed to bring any issues relating to the penalty phase and sentence to this Court's attention. However, after oral argument, this Court ordered the submission of supplemental briefs directed to the penalty phase of the trial only. Petitioner's appellate counsel addressed the propriety of the aggravating circumstances found by the trial judge, but still failed to address the propriety of the testimony of Sheriff Carson, the argument of the prosecutor, and the limitation of possible mitigating circumstances by the trial court and by the prosecutor.

The testimony of Sheriff Carson was apparently submitted under the guise of proof of the Aggravating Circumstance described in Section 921.141 (5)(g), Fla. Stat., that the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws. However, this aggravating circumstance relates to the intent of the perpetrator, and the motivation for the shooting, not the end result. Even assuming that Sheriff Carson was qualified to give an opinion as to whether the murder of a police officer disrupts or hinders the exercise of his duties, whether it did or not is not the issue. The issue is whether the perpetrator intended to disrupt or hinder law enforcement by committing the crime.

The testimony of Sheriff Carson was irrelevant, but it did allow him to personally request the death of the Defendant, to evoke sympathy for the department as a "family", and to mention that the last person to kill a police officer in Jacksonville had not been executed and that morale was low because of it. This evidence had no place before the jury and undoubtedly had a substantial impact in convincing nine of the jurors to recommend death.

The prejudicial effect of the testimony of Sheriff Carson was enhanced by the rhetoric of the prosecutor in his appeal to sympathy for the deceased police officer, and his argument that the safety of the community required the death penalty in this case. (TR. 1542-1544). This Court has held such comments to be improper. Johnson v. State, 442 So.2d 185 (Fla. 1983). The comments herein are far more egregious than those complained of in Johnson, supra.

Petitioner's appellate counsel also failed to raise the fact that the trial judge and prosecutor limited the jury's consideration of mitigating factors by instruction and argument, in violation of the holdings of the United States Supreme Court in Lockett v. Ohio, 438 U.S. 586 (1978), and of this Court in Songer v. State, 365 So.2d 696 (Fla. 1978).

The prosecutor in summation repeatedly told the jury that there were three aggravating circumstances and only two possible mitigating circumstances: (1) No significant history of prior criminal activity, and (2) Any other aspect of the Defendant's character or record and any other circumstance of the offense. See comments c, d, and e, above. Such an argument is totally inconsistent with the law, because mitigating circumstances may not be so limited. Songer, supra, and Lockett, supra.

The purpose of the instruction that the jury may consider any other aspect of the Defendant's character or record, and any other circumstance of the offense, as a mitigating circumstance, is to inform the jury that even though aggravating circumstances are limited by statute, mitigating circumstances are not so limited. The Petitioner's trial counsel argued as mitigating factors the fact that Petitioner had grown up in a high crime, ghetto neighborhood; the fact that he was the father of four children from whom he cared; the fact that he supported his children even though he was not married to their mother; the fact that he was well-liked and well respected in his ghetto community; the fact that he did not have a reputation as a dangerous or violent personality; the fact that this incident was totally out of character for the Petitioner; and the fact that the reason for the shooting was harassment the Petitioner had suffered at the hands of the police. (TR. 1559-71). All of these factors were entitled to consideration as independent mitigating circumstances. Lockett, supra; Songer, supra. The jury was told, however, that these facts could only be considered as one mitigating circumstance. (TR. 1553, 1573).

It is important to note that the jury was not instructed that . . ."the procedure to be followed by the jury is not a mere counting process of the number of aggravating circumstances and the number of mitigating circumstances. . ." State v. Dixon, 283 So.2d1, 10 (Fla 1973). The prosecutor was able to successfully argue that there were three aggravating

circumstances to be weighed against only two possible mitigating circumstances, and the judge's instruction seemed to support the state's position. The jurors may very well have based their verdict on the "mere counting process" condemned by this Court in Dixon, supra. The procedure followed in this case did not permit the type of individualized consideration of mitigating factors required by the Eighth and Fourteenth Amendments. Lockett, supra.

CONCLUSION

It is the responsibility of effective appellate counsel to present all issues of arguable merit to the Appellate Court. Counsel in this case failed in that responsibility, despite this Court's written order requiring supplemental briefs about the penalty phase proceedings.

The arguments of the prosecution in the guilt phase of the trial were so egregious that neither objection nor retraction could have destroyed their sinister influence. These comments served to deny the Petitioner a fair trial.

The Petitioner's penalty phase trial was fraught with prejudicial and inflammatory evidence and comments to the extent that the reliability of the entire sentencing proceeding is doubtful, at best. Not only was inadmissible evidence presented and argued, but relevant mitigating evidence did not recieve individualized consideration.

The failure of appellate counsel to properly identify and argue these errors in Petitioner's direct appeal deprived him of meaningful appellate review, in violation of the Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution.

WHEREFORE, Petitioner prays this Honorable Court to grant his Petition and order a new trial in this cause; or, in the alternative, to order a new sentencing proceeding before a new jury; or, alternatively, that this Court allow

full briefing of the issues presented herein, and grant Petitioner belated appellate review from his conviction and sentence.

Respectfully submitted,

GOODSTEIN & LINK

BY: Robert J. Link

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Attorney for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the Assistant Attorney General, Barbara Butler, Duval County Courthouse, Jacksonville, Florida, 32202 this 1st day of February, 1985.

Robert J. Link
Attorney

VERIFICATION

ROBERT J. LINK, being duly sworn, deposes and says that the facts in the foregoing Petition for a Writ of Habeas Corpus are true and correct to the best of his knowledge and belief.

Robert J. Link
ROBERT J. LINK, ESQUIRE

Sworn and subscribed to before me this 1st day of February, 1985.

Mary Sue Allen
Notary Public

My Commission Expires:

NOTARY PUBLIC STATE OF FLORIDA
MY COMMISSION EXP OCT 4, 1987
BONDED THRU GENERAL INS. UND.