IN THE SUPREME COURT OF FLORIDA

LEO ALEXANDER JONES,

Petitioner,

vs.

CASE NO.: 66,505

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

Respondent.

_____/

REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

The Attorney General's Response to the Petition for Writ of Habeas Corpus in this cause attempts to use petulant rhetoric to conceal an indefensible premise: where a defendant in a criminal case is represented by the same lawyer at trial and on appeal, the failure of the lawyer to recognize important legal issues will forever preclude those issues from being litigated, or resolved, even where prejudice to the defendant is significant.

The Respondent cites Mr. Fallin's 47 page brief as evidence that he properly raised the "significant" issues in the case. Respondent neglects to mention that it was not until after oral argument, after being ordered by this Court, that Mr. Fallin even discussed the sentence in any brief. Furthermore, a review of the "Appellant's Supplemental Brief" in this cause shows that the only issue raised was that the trial court judge improperly considered non-statutory aggravating factors in support of the death sentence. This contention was expressly refuted by the trial judge in his sentencing order, in which three statutory aggravating circumstances were found. (R.216).

Petitioner's appellate counsel was specifically directed by this Court to "file a brief directed to the penalty phase of the trial only," yet the only issue raised concerned the sentencing order of the trial judge. In his supplemental brief, Petitioner's appellate counsel did not even mention what evidence was presented in the penalty phase trial, what arguments were made, or how the jury was instructed. Petitioner's appellate counsel never did file a brief directed to the penalty phase of the trial, as this Court directed; the brief was limited solely the propriety of findings by the trial court judge. This Court has, therefore, never been asked to review the penalty phase trial that occurred in this case, prior to this Petition.

It is true that Petitioner's counsel failed to object during the penalty phase trial to the testimony of Sheriff Carson, the arguments by the prosecutor, and the limitation of possible mitigating circumstances by both the trial judge and the prosecutor. It is apparent that Petitioner's counsel did not recognize these improprieties. It is equally apparent that these improprieties are. . ."sufficient to undermine confidence in the outcome. . ." of the penalty phase trial. See Strickland v. Washington __U.S.__, 104 S. Ct. 2052, 2068 (1984).

That the Petitioner's chance for a jury life recommendation was severely prejudiced by these improprieties can hardly be disputed. The jury was permitted to hear the Sheriff of Jacksonville himself ask for a death sentence for Petitioner, because of the impact Officer Szanfranski's death had on morale and work performance in the Jacksonville Sheriff's Office. (TR. 1497-1505). The obvious inference was that the police would be less enthusiastic about protecting

the community if the jury recommended life. The State Attorney of Jacksonville himself argued for the death of the Petitioner, appealed to sympathy for the victim, and told the jury that the safety of the community required the death penalty for Petitioner. (TR. 1542-4). The State Attorney also repeatedly told the jury that all of Petitioner's evidence relating to good character, personal history, family, and police harassment could only be considered as one mitigating circumstance. (TR. 1546-7; 1552; 1553). The trial judge's instruction seemed to support his conclusion. (TR. 1513).

The United States Supreme Court discussed the rule of law that should require a new penalty phase trial in this cause in Eddings v. Oklahoma, 455 U.S. 104, 110 (1982):

> In Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), Chief Justice BURGER, writing for the plurality, stated the rule that we apply today:
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> "(W)e conclude that the Eighth and Fourteenth Amendments require that the sentencer. . .not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Id, at 604, 98 S.Ct. at 2964 (emphasis in original).
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> Recognizing "that the imposition of death by public authority is. . .profoundly different from all other penalties," the plurality held that the sentencer must be free to give "independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation. . ." Id., at 605, 98 S.Ct., at 2965.

The jury here was effectively told that they could not give independent weight to each non-statutory mitigating circumstance. Instead, they were, in essence, told that all non-statutory mitigating circumstances had to be lumped together and considered as only one mitigating circumstance. This violates the rule of Lockett and Eddings and undermines

confidence in the outcome of the penalty phase trial, especially where combined with the emotional appeals to sympathy and prejudice presented by the Sheriff and the State Attorney.

CONCLUSION

This is hardly a "typical case" of "trying the case and then trying the lawyer". (p.6, Response by Respondent.) This Court noticed the deficiencies in Petitioner's counsel's brief and ordered a supplemental brief to be filed directed to the penalty phase. Instead, counsel sent this Court a brief discussing the trial judge's sentencing order. The Petitioner has never been accorded full appellate review of the penalty phase trial, and the issues therein, because this Court has never been asked to review it. Petitioner prays for this Honorable Court to give him this opportunity.

Respectfully submitted,

GOODSTEIN & LINK

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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 Mark C. Menser, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32301, this 27 day of March, 1985.

Robert J. Link
Attorney