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.

_____/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

The Respondent answers the Petition for Writ of Habeas Corpus as follows:

JURISDICTION

This is a petition for habeas corpus relief alleging ineffective assistance of appellate counsel. This Court has jurisdiction. Arango v. State, 437 So.2d 1099 (Fla. 1983); Buford v. Wainwright, 428 So.2d 1389 (Fla. 1983), cert. den., 104 S.Ct. 372 (1983); Knight v. State, 394 So.2d 997 (Fla. 1981).

FACTS

The Petitioner was convicted of the sniper-killing of Officer Szafranski of the Jacksonville Police Department. The facts of the case are adequately set forth in this Honorable Court's opinion in Jones v. State, 440 So.2d 570 (Fla. 1983) and shall not be repeated here.

The Petitioner alleges certain other facts which he submits entitle him to habeas corpus relief. The major complaint is that the original appellate attorney, Mr. H. R. Fallin, Esq., filed appellate briefs which failed to, in Mr. Jones' words, "present all issues of arguable merit to the appellate court." (Petition, p. 14). Mr. Jones alleges, in fact, that it is the duty of appellate counsel to argue every issue of arguable merit.

The attorney in question, Mr. Fallin, served as both trial and appellate counsel. Mr. Fallin, as this Court will recall, filed a 47 page brief outlining six alleged errors, to wit:

(1) Denial of motion to suppress physical evidence.

(2) Denial of a motion to suppress a statement.

(3) "Erroneous" admission of "unqualified" opinion testimony.

(4) "Erroneous" admission of testimony regarding an unrelated sniper incident.

(5) Improper limitation of cross examination.

(6) Denial of a defense motion for mistrial after an "improper" opening argument.

Mr. Fallin then filed a supplemental brief relating to sentencing issues.

The Petitioner quotes extensively from the State's closing arguments, alleging that these arguments should have been addressed. The Petitioner fails to note, however:

(1) Both counsel for the State and the defense reminded the jury that their arguments were not evidence. (T 1349, 1393).

(2) Nothwithstanding any discussion regarding the "heinous" aggravating factor, defense counsel <u>also</u> referred to this murder as <u>heinous</u>. (T 1393).

(3) Defense counsel, just like the State, expressed improper personal beliefs regarding the facts and the truthfulness of witnesses, and also used the term "liar." (T 1399, 1411, 1423, 1428, 1429, 1431, 1439). Including an assertion that witness Hammond "wouldn't know the truth if it hit him." (T 1429). Defense

Counsel also argued in an ad hominem manner about the state attorney. (T 1392).

(4) The trial judge held the State's arguments to be fair comment on the evidence which, while "borderline" were not prejudicial. (T 1462,64).

Of more importance are the arguments themselves. Reviewed seriatim we find:

(1) No defense objection appears of record at page (T 1350, 1360, 1380, 1385-86, 1456, 1464, 1502, 1504, 1542, 1546-47 and 1552).

(2) The defense objection at (T 1389) caused the court to caution the prosecutor but no prejudice was found. (T 1389). In addition, the court noted that defense counsel waited "four minutes" before objecting (allowing the arguments to be made - apparently). (T 1390).

(3) The defense objection at (T 1862) to the prosecutor going outside the evidence was overruled as a fair comment on the evidence (T 1464) and not "outside" the evidence. Counsel also objected to the State's perceived "emotional appeal" but, again, no prejudice or error was noted by the court.

The court's instruction on mitigating circumstances did not preclude consideration of any aspect of Jones' character and, more importantly, was not objected to by defense counsel. (T 1577).

ARGUMENT

The Petitioner, operating under the theory that:

> "It is the responsibility of effective appellate counsel to present all issues of arguable merit to the Appellate Court" (p. 14)

contends that appellate counsel was ineffective under the standards announced in Knight v. State, 394 So.2d 997 (Fla. 1981) for failing to raise certain issues on appeal, to wit:

(1) Improper closing argument by the prosecutor.

(2) Improper penalty phase argument by the prosecutor.

(3) Use of "inadmissible evidence" during the penalty phase.

(4) Improper "limitations" on consideration of what Jones calls mitigating evidence.

While the Petitioner apparently read Knight, it is obvious that his petition attacking the competence of appellate counsel is itself poorly researched and an unworthy document for questioning the abilities of counsel.

Even a modicum of research, for example, would have revealed to Jones that his basic theory is incorrect. The fact is that counsel is not required, on appeal, to present every conceivable issue lest he fall below professional standards of competence. Ruffin v. Wainwright, ___ So.2d ___ (Fla. 1985), 10 F.L.W. 20; Francois v. Wainwright, 423 So.2d 357 (Fla. 1982); Knight v. State, 394 So.2d 997 (Fla. 1981); Johnson v. State, ___ So.2d ___ (Fla. 1985), 10 F.L.W. 85 (Fla. 1985).

Had Jones done reasonably competent research into the issue of appellate counsel's incompetence, he would also have discovered that Mr. Fallin was procedurally barred from raising, on appeal, any "error" at trial not accompanied by a specific and contemporaneous objection. Johnson v. State, ___ So.2d ___ (Fla. 1985), 10 F.L.W. 85 (Fla. 1985); Wainwright v. Sykes, 433 U.S. 72 (1977); Engle v. Isaac, 456 U.S. 107 (1982); Castor v. State, 365 So.2d 701 (Fla. 1978).

Indeed, Jones' "second guessing" of his appellate lawyer fails to account for the rather seminal case of Jones v. Barnes, 103 S.Ct. 3308, 3313-14 (1983) which held:

> "There can hardly be any question about the importance of having the appellate advocate examine the record with a view to selecting the most promising issues for review. This has assumed a greater importance in an era when oral argument is strictly limited in most courts - often to as little as 15 minutes - and when page limits on briefs are widely imposed."

and

> "A brief that raises every colorable issue runs the risk of burying good arguments - those that, in the words of the great advocate John W. Davis - 'go for the jugular,' Davis, The Argument of an Appeal, 26 A.G.A.J. 895, 897 (1940) - in a verbal mound made up of weak and strong emotions."

Mr. Fallin faced both page limitations and time limitations in perfecting this appeal. Fallin's brief used 47 of the allotted 50 pages, and raised issues much more significant than the ones in this petition. Jones cannot, in good faith, represent to this court that the Fourth and Fifth Amendment issues appealed in this cause should have been deleted in favor of the claims presented here.

First, Fallin could not appeal at all the unobjected-to jury instruction relating to consideration of mitigating circumstances. Castor, supra.

Second, Fallin could not appeal the impropriety of arguments he did not object to at trial. State v. Jones, 204 So.2d 515 (Fla. 1967), Engle v. Isaac, supra.

Third, even if Fallin could attack the arguments, on the basis of the untimely objection below, to some of those comments, the record shows:

(1) The court found the objections "four minutes" late.

(2) The court specifically found no prejudice flowing from the arguments. This discretionary ruling is not subject to reweighing and is not a strong ground for appeal, even if arguable. Riley v. State, 413 So.2d 1173 (Fla. 1982); Straight v. Wainwright, 422 So.2d 827 (Fla. 1982).

Fourth, defense counsel put on all desired "non-statutory" mitigating evidence. [The evidence could be considered relevant to the issue of Jones' character, and thus be "statutory" evidence too]. The trial judge's unobjected-to instruction was that the statutory factors were "among" those the advisory jury could consider. The instruction (and prosecutorial arguments) are analogous to those in Middleton v. Wainwright, ___ So.2d ___ (Fla. 1985), 10 F.L.W. 149, which, also, were not contested on appeal. The Middleton decision, nonetheless, found the claims

insufficient to warrant habeas corpus relief.

Finally, the trial tactics of counsel have not been questioned and, indeed, no claim of ineffectiveness has been raised. Trial counsel is presumptively competent, and his courtroom decisions bound "appellate counsel" and thus limited review. Johnson v. State, supra. Inconsistent positions could not be assumed on appeal.

The petition at bar is a typical example of the condemned practice of "trying the case and then trying the lawyer." Strickland v. Washington, ___ U.S. ___, 80 L.Ed.2d 674 (1984). In an era when it is becoming increasingly difficult to locate counsel for indigents facing capital punishment, these chronic, baseless attacks on counsel should not be tolerated. Strickland, id.

CONCLUSION

Appellate counsel has not been shown to have been ineffective for his "failure" to raise issues which were either unavailable on appeal or unsupported due to the record.

Respectfully submitted,

JIM SMITH
ATTORNEY GENERAL

MARK C. MENSER
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32301
(904) 488-0600

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response to Petition for Writ of Habeas Corpus has been forwarded by U.S. Mail to Robert J. Link, Esq., 515 North Newnan Street, Jacksonville, Florida 32202, this 15th day of March, 1985.

MARK C. MENSER
ASSISTANT ATTORNEY GENERAL