IN THE SUPREME COURT OF FLORIDA

LEO ALEXANDER JONES,

Petitioner,

v. CASE NO. 70,836

STATE OF FLORIDA,

Respondent.

_____/

BRIEF OF APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

MARK C. MENSER
ASSISTANT ATTORNEY GENERAL
BAR NO. 239161

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Leo Jones was properly convicted of first degree murder and sentenced to death following his sniper-style murder of a Jacksonville Police Officer. The judgment and sentence were affirmed in Jones v. State, 440 So.2d 570 (Fla. 1983).

Jones later filed a petition for writ of habeas corpus alleging ineffective assistance of appellate counsel which this Court also denied. Jones v. Wainwright, 473 So.2d 1244 (Fla. 1985).

Jones' next ploy was to file a pair of motions for post conviction relief. One of these motions is the subject of this appeal. The other was filed in a felony case (wherein Jones had the same lawyer, Mr. Fallin) which resulted in a guilty plea. In each case the competency of counsel was challenged, without success. The First District Court of Appeal affirmed the lower court finding per curiam, without opinion. Jones v. State, Case No. BP-367 (Fla. 1st DCA 1987).

Mr. Jones' statement regarding the facts of this case is rejected as incorrect. The actual facts are set out, in order, as follows:

FACTS: POINT I

Mr. Fallin was accused of "failing to investigate" Jones' case and "guilt phase ineffectiveness" on a number of claims, set

forth in Jones' brief as follows:

> (1) Fallin failed to hire a private investigator. (Brief, p. 16)
>
> (2) Fallin's "investigation" consisted of going up and down Davis Street 'four or five times' to round up witnesses". (Brief p. 16)
>
> (3) Fallin failed to contact Homer Spivey or Phillip Anderson.
>
> (4) Fallin failed to locate Marion Manning, (p. 18) even after Alberta Brown gave him her address.
>
> (5) Failure to use Bobby Hammond as a witness. (p. 21)
>
> (6) Fallin objected to Hammond being called as a court witness. (p. 21)
>
> (7) Falling inadequately questioned Hammond. (p. 24)
>
> (8) Fallin failed to properly cross-examine Officer Mundy. (p. 27)
>
> (9) Every "failure to object" noted on appeal constituted ineffectiveness.
>
> (10) Failure to contact Jones "at once". (p. 30)
>
> (11) Failure to testify at suppression hearing. (p. 30)

The record shows as to each:

(1) Fallin did not hire an investigator for at least two reasons. First, the neighborhood was uncooperative to outsiders. (See Tr. 488) Second, Jones' family provided extensive legwork, with Leo's brother virtually going door-to-door looking for witnesses. (Tr. 211)

(2) Fallin's investigation was not "limited to going up and down Davis Street four or five times", as trivialized. The truth is, as follows:

Fallin was contacted at 4:00 a.m. by Leo's brother. (Tr. 203) His brother told Fallin that Leo "had been around enough" to keep his mouth shut, so they could see him later that morning. (Tr. 204) The next day, Fallin and Dennis Guidi visited the crime scene. (Tr. 206) Fallin took depositions of all known relevant witnesses. (R 210) Fallin located witnesses who placed the source of the gunfire at many locations (Tr. 211) and had to choose the most credible of these witnesses. (Tr. 224) Fallin travelled to St. Augustine to interview Glen Shofield, who was hostile. (Tr. 217) Fallin had Jones examined by Dr. Miller. (Tr. 234) Fallin was never given Marion Manning's address or last name by Alberta Brown. (Tr. 476) Fallin personally travelled Davis street four or five times, as conceded.

(3) Fallin was unable to locate Homer Spivey or Phillip Anderson, but neither was the Jones family able to do so. Spivey never gave a statement to the police and was not remarkable, although his name was on the witness list. There was no reason to especially seek him out. (see Tr. 135)

At the 3.850 hearing, Spivey testified that on the night of the murder he and Phillip Anderson were drinking. (Tr. 127-30)

They pulled their car into an alley, after which Spivey spilled his beer on the driver's side floor. (Tr. 129-30) Spivey, while crouched down mopping up the beer from the passenger side floor, heard a gunshot and claims to have seen a flash of light. (Tr. 131) How this was physically possible was not explained.

Anderson, at that moment, was bent over, groping about the inside of the car trunk with his back to Davis Street. (See Tr. 175, 177) Anderson heard the shot and also claimed to see the flash of light, though it was behind him. (Tr. 177)

Anderson claimed to see a man with a rifle run to a car with a woman driver and hide in the back seat. (Tr. 178) He did not tell this to the police because "it's not my job". (Tr. 191) Anderson agreed that, since he never gave a statement, Mr. Fallin had no reason to call him. (Tr. 192)

Anderson's "man with a rifle" story contradicted the fable touted by Paul Marr that Shofield (allegedly) wiped down the rifle and returned it to Jones' apartment prior to fleeing the area. (Tr. 359-60) It also contradicted Marion Manning's story (Tr. 116) to the extent a gun was mentioned and that Marion claimed Schofield entered her car from Lee Street, one block west of Davis (Tr. 116) and not "on" Davis. (Tr. 178) as Anderson reported.

While these stories were in conflict (with each other and with other witness statements) Mr. Fallin developed other, sober,

credible witnesses whose testimony put the sniper further north and did not have anyone running "into the light and towards the crowd" while escaping as Anderson did. (Tr. 224)

(4) Glen Schofield refused to give Marion Manning's name to Fallin and Alberta Brown flatly lied on the witness stand, according to Fallin. (R 476)

(5) Bobby Hammond was too unreliable to use as a witness so the strategic decision was made not to call him. As conceded by Jones, (Tr. 103) Hammond could have hurt his case.

(6) Fallin's objection to the court calling Hammond as a court witness was a solid strategic move which hurt the state's presentation badly. (Tr. 453-455) The state needed Hammond as a court witness so it could control and lead him, according to Ed Austin. (Tr. 455) By blocking this, Fallin hurt the state's case. (Tr. 455-56)

(7) Hammond was unpredictable (which is why the state wanted to lead him) and was tantamount to "Russian Roulette". (Tr. 455-57) He was hard for anyone to question. Hammond could avoid liability by blaming Schofield or Jones, but fingered Jones as the killer.

(8) Officer Mundy, a black policeman, made an excellent witness. (Tr. 450-51) Fallin had to risk "opening doors" because impeachment of Mundy was vital. (Tr. 450-51)

(9) Fallin's failures to object were of two varieties. Fallin did not object to closing arguments because he strategically chose not to enhance the misstatements or let the state rephrase and repeat them. (Tr. 278-80) As conceded by Jones' brief, Fallin mistakenly thought he had preserved another error by making an objection.

(10) Fallin's "failure" to contact Jones "at once" is at least partially attributable to Jones' brother's assurance that they (he and Fallin) could wait to see Leo because, as an experienced criminal, he knew enough to remain silent. (Tr. 204) Fallin did try to contact Jones without success due to Jones' being moved around. (Tr. 205) This certainly was not Fallin's fault.

While Jones resisted arrest, ther is no record of police "beatings", "coercion" or misconduct, this defense rhetoric is not "fact". Had such misconduct been established, supression would have been granted or appellate relief afforded.

(11) Fallin did not testify at the suppression hearing or withdraw as counsel. At most, Fallin would contradict the officer's testimony regarding contact with Jones. the Fifth Amendment was Jones' right to invoke or waive, of course, and not Fallin's. No testimony was proffered that Jones would not have confessed "but for" Fallin or that Jones did not know his rights, even from Jones himself.

FACTS: POINT II

Glen Schofield was never subpoenaed to testify. Jones attempted to proffer the bald hearsay testiminy of Paul Marr that Schofield "confessed" to him. The testimony was apparently proffered to establish "prejudice" under the rubric of Jones' innocence, and thus "ultimate" prejudice. The Court determined that this hearsay was inadmissible on the basis of relevance (not hearsay) because:

> (1) The issue was the reasonableness of Fallin's preparation at the time, based upon facts known then.
>
> (2) Schofield's alleged confession came years after trial, if it ever happened. Marr would never have been a witness.
>
> (3) The "credibility" of Manning, Spivey or Anderson was unrelated to the issue of "why" Fallin did not find them. (Tr. 365)

We would also note that the alleged confession does not enhance Spivey or Anderson's stories because it places the shooter inside the defendant's building and has him disposing of the gun prior to fleeing, contrary to virtually every defense witness including Spivey and Anderson.

FACTS: POINT III

The "competence" of Mr. Fallin's decision to plead Jones guilty to one count of battery on a police officer has been resolved in Jones v. State, supra, and is not properly before this Court.

We would note, however, that Jones was being forced to go to trial, prior to this trial, on four counts which included three firearms charges. There was a strong probability of conviction, and Jones would have had "more" priors, including firearm convictions, used against him during the capital case sentencing phase had he gone to trial.

Since Jones alleged the guns in his apartment were Schofield's, Mr. Fallin did the right thing in getting the possession and concealed firearms charges dismissed, according to the lower court in both proceedings.

As to jury selection, Mr. Fallin testified to strategic choices made regarding voir dire based upon sound experience with juries in his circuit. The same voir dire strategy, by Mr. Fallin, was upheld as competent in the case of Ronald Straight. (Tr. 300)

He strategically chose not to object to the state's closing argument.

Jones' brief misstates Dr. Miller's position and its usefulness to Mr. Fallin. Dr. Miller testified that Jones had an anti-social and paranoid personality, (Tr. 143-146) but would not attribute the crime to the personality disorder! (Tr. 146) When asked if the "disorder" could have affected the crime Miller's best answer was "maybe', depending upon Jones' particular mood. (Tr. 146)

Miller noted that Fallin, unlike most lawyers, attended Jones' tests and provided lots of collateral support material. (Tr. 148-149)

Miller concluded that a paranoid personality did not diminish Jones culpability, or competence, or guilt. (Tr. 152-158) Indeed, Miller stated that if Jones had used his report in the penalty phase he could have hurt Jones' case! (Tr. 162)

FACTS: POINT IV

Point four is an improper reargument to Jones direct appeal.

SUMMARY OF ARGUMENT

Despite being given a full evidentiary hearing, the Appellant failed to establish any facts tending to establish the ineffective assistance of counsel. The charges levelled against counsel all proved to be false or merely tactical criticisms, spawned by hindsight.

Mr. Jones has also failed to establish error by the court in striking irrelevant and prejudicial hearsay testimony, or any legal basis for renewed review of his previously rejected "suppression" issue.

Mr. Jones is simply not entitled to relief.

ARGUMENT

POINT I

THE LOWER COURT DID NOT ERR IN DENYING APPELLANT'S INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM

The Appellant's brief rests heavily upon an imcomplete and incorrect set of factual assumptions and an egregious trivialization of his burden under Strickland v. Washington, 466 U.S. 688, 80 L.Ed.2d 674 (1984).

Jones alleges that he does not have to show more than error and a "possible" effect on the outcome. This is not correct.

Strickland holds that mere error by counsel does not establish ineffectiveness. Furthermore, since every "error" by a lawyer has an agruable impact on the outcome of the case, more than a "possible" impact must be shown. Thus, the actual Strickland test, as Jones well knows, is:

(1) Serious error by counsel so that counsel did not function as the counsel envisioned by the Sixth Amendment.

(2) Resulting in prejudice to the defense creating "a reasonable probability that the outcome would have been different". Id., at 695. See King v. Strickland, 748 F.2d 1462 (11th Cir. 1984).

Cases interpreting Strickland uniformly reject Jones' theory. In United States v. Cronic, 466 U.S. 648 (1984), the Court held that even demonstrable error by counsel does not compel a finding of ineffectiveness. In Foster v. Strickland,

707 F.2d 1339 (11th Cir. 1983) "street investigations", even if "incomplete", were upheld. In Palmes v. Wainwright, 725 F.2d 1511 (11th Cir. 1984) a strategic decision not to use an investigated defense was upheld. In Griffin v. Wainwright, 760 F.2d 1505 (11th Cir. 1985), no weight was given to the fact that a different lawyer would use a different strategy. In Beckham v. Wainwright, 639 F.2d 262 (5th Cir. 1981), the courts refused to second guess strategic decisions (anticipating Strickland). See Songer v. Wainwright, 733 F.2d 788 (11th Cir. 1984).

Jones' case, as noted above, is so totally devoid of a factual base that the legal arguments are almost unnecessary. The fact is, even if it was not perfect, Mr. Fallin's investigation and trial performance satisfied Strickland. Fallin extensively investigated tha case. Fallin handled the volatile and dangerous witness Hammond competently. (Even Jones testified that Hammond could easily have hurt his case. Also, Hammond had no motive to blame Jones as opposed to Schofield, especially if Schofield was the actual killer). Jones hindered the state's case by keeping Hammond from becoming a Court witness. He competently cross examined Mundy and laid the groundwork for a claim that the police were predisposed to search Jones' building. He chose, tactically, not to object to closing argument, a valid choice under Anderson v. State, 467 So.2d 781 (Fla. 3rd DCA 1985). Finally, a reasonable basis for his "delay"

in contacting Jones was established on the record. If nothing else, the police prevented earlier contact.

Jones has failed to establish any factual or legal basis for relief.

ARGUMENT

POINT II

THE TRIAL COURT DID NOT ERR IN STRIKING MARR'S TESTIMONY

Paul Marr, not Glen Schofield, was called as a witness by Mr. Jones.

Marr alleged that Schofield confessed to killing a police officer and that someone else was convicted of the crime. Schofield did not specifically identify this killing as the one or Jones as the "innocent man". Officer Szafransky is, of course, not the only policeman to have been killed in Jacksonville.

Relevance is a matter of judicial discretion, of course, even under Sec. 90.401 and 90.402, Fla.Stat..

Marr took this nebulous "confession" four and a half years after Fallin prepared Jones' defense. Thus, Marr could not have helped Fallin. (Mr. Fallin, of course, interviewed Schofield himself). Thus, if Schofield confessed to Marr, it is irrelevant to the specific question of Fallin's pretrial preparation.

What Schofield's confession relates to has never been alleged or shown by Jones. It does not discuss physical evidence that "could have been located". It does not elevate Manning to the status of a "witness to Schofield's guilt" (since Schofield never confessed to Manning). When specifically asked by Fallin,

Marr confession adds nothing to the "quest" for Marion Manning. So what does Marr's hearsay fable establish in terms of Fallin's preparation? At most, nothing. It does not establish one shred of evidence or testimony that Fallin could have uncovered.

The court properly excluded this irrelevant hearsay testimony. The evidence had no probative value at all and was intended merely to taint and prejudice the proceedings by raking up the fable that Schofield was the actual killer. Jones wishes to rely upon the illusion of Schofield's guilt, knowing full well that it can not be proven, with an all too convenient story that Schofield shot offier Szafransky, went to Jones' apartment, wiped down the gun to eliminate all prints an then took off with Marion. The fable is pure hogwash and entirely too convenient.

Absent any showing of an abuse of discretion by the trial court in excluding hearsay "evidence" of no probative value, Jones is not entitled to relief.

ARGUMENT

POINT III

THE TRIAL COURT DID NOT ERR IN REFUSING TO FIND COUNSEL INEFFECTIVE IN THE PENALTY PHASE

This claim by Jones is pure speculative fluff, unsupported by facts, law or common sense.

(1) The Plea

Jones pled to a charge of battery on a police officer prior to going to trial in this case. By pleading, Jones avoided convictions on three (dismissed) firearms charges. Since Jones was alleging that Schofield owned the murder weapon and he was uninvolved and unarmed, these dismissals helped his murder case.

The competency of counsel in the unrelated felony case has been upheld on appeal and, we submit, is res judicata. By renewing the issue here, Jones is seeking indirect Supreme Court review of the First District's decision, for which discretionary review was not granted (or sought). This is improper. Johns v. Wainwright, 253 So.2d 873 (Fla. 1971).

(2) Jury Selection

Mr. Fallin made considered tactical choices in conducting voir dire. There is no "cause" established by the record and, assuredly, no "prejudice" (absent proof that an improper juror

was seated). Not one juror has been challenged in Jones' petition.

There is no presumption that "death qualified" jurors are "biased", Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978) thus, the "failure" to question jurors on issues of death proneness or racial bias does not create any assumption that an unfair or biased juror was seated.

(3) Failure to Object

Various "failures to object", noted on direct appeal, have been touted as "proof of ineffectiveness" by virtue of the appellate decision. A failure to object, even if it leads to appellate "waiver" of a claim, does not automatically create a valid claim of "ineffective assitance of counsel". Anderson v. State, 467 So.2d 781 (Fla. 3rd DCA 1985); Sireci v. State, 469 So.2d 119 (Fla. 1985); Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985).

(4) Failure to Investigate Mental Mitigating Evidence

Mr. Fallin had Jones examined by Dr. Miller, whose value as a witness, even during the penalty phase, was dubious.

Dr. Miller has testified for both the state and the defense and was considered reliable. Although "defense stable" psychiatrists are available, there is no legal requirement that

counsel use them or promote deception. Straight v. Wainwright, 442 So.2d 827 (Fla. 1982).

We would also note that Jones' defense of non-involvement would render ludicrous and unbelieveable a guilt phase defense of "OK, he did do it, we lied, but take our word for it, Jones was demented at the time", a fact noted by Mr. Fallin. Indeed, in Moore v. Kemp, 809 F.2d 702 (11th Cir. 1987), the federal court held that such hypocritical "evidence" could even be excluded by the court if proffered.

Again, Jones can not satisfy Strickland.

ARGUMENT

POINT IV

THE SUPPRESION ISSUE IS NOT PROPERLY BEFORE THE COURT

Jones raised the suppression issue before trial, appealed it, and lost. He now seeks to exploit the decision in Haliburton v. State, 12 F.L.W. 507 (Fla. 1987) as a basis for reargument of his 1983 appeal. It is, of course, improper to use 3.850 proceedings as "second appeals". Tafero v. State, 459 So.2d 1034 (Fla. 1984); Adams v. State, 484 So.2d 1216 (Fla. 1986).

Jones apparently feels that the Court's adoption, in Haliburton II, of a "tougher" test than that used in Moran v. Burbine, ___ U.S. ____, 106 S.Ct. 1135 (1986), somehow reopens every Fifth Amendment case ever litigated in Florida. We disagree. Such a theory can not, we submit, survive the "change of law" test for retroactivity set forth in Witt v. State, 387 So.2d 922 (Fla. 1980); to-wit:

(1) Purpose served by new rule.

(2) Extent of reliance upon old rule.

(3) Effect upon the administration of justice of retroactive application of the new rule.

The purpose served by the "new rule" is unclear. If the purpose is to avoid Moran v. Burbine and hinder law enforcement to an extent deemed unnecessary by even the federal courts then it is served by Haliburton II. There is, frankly, no reason to

restrict Florida authorities to a greater extent than their federal counterparts, nor is there any need to provide greater protection to "Florida murderers" than "federal criminals". Are Florida criminals "less intelligent" or somehow in need of paternalistic state intervention?

Florida has applied federal standards to Fourth Amendment questions without causing its citizens to suffer any "loss" under our own declaration of rights. We submit that applying the federal standard in this case would also wreak no havoc.

The second prong of the Witt analysis, extent of reliance upon the old rule, provides the most important reason to refuse to entertain Jones' claim. The orginal Haliburton decision was reversed when the United States Surpeme Court found proper compliance with Fifth Amendment law by the Florida authorities. When the case was remanded to this Court, the Court, rather than simply follow the federal standard, saw fit to sua sponte "reinterpret" the Florida Constitution and, once again, give Haliburton relief in spite of the Fifth Amendment if not because of it. Now, however, the "chickens have come home to roost". By changing a law that did not need changing, the spectre of having to reopen very criminal case (not just capital cases) looms large. The spectre is not an illusion, as recent experience with "Hitchcock" claims has proven.

Jones can not satisfy the second Witt prong for retroactivity.

The third prong; the effect on the administration of justice, has been partialy alluded to above. The legal system could easily be choked with Haliburton claims. Another danger arises with the ability of law enforcement to handle Haliburton claims.

If a judge calls and/or issues a writ to compel production of a defendant the solution is simple, but where, as here, no writ exists, no request for counsel is made by Jones, no verification regarding the caller and his status as the suspect's lawyer (and not just an ambulance chaser, for example) exists, and where a voluntary confession may be aborted as a result - possibly causing additional loss of life - serious problems arise.

Balanced against there concerns we have only a desire to make life easier for "Florida criminals" than their federal counterparts, for no constitutional reason. Clearly, Jones can not satisfy the third prong.

Without waiving the impropriety of relitigating Jones' appeal here or his failure to allege or show satisfaction of Witt, we would note that this case is so factually unlike Haliburton that no basis for relief exists.

First, Officer Japour says Mr. Fallin did not tell the police to refrain from questioning his client. Mr. Fallin says he did. There is no clear error by the police.

If Fallin did so advise the police, it is still apparent that Jones was not misled by the police, was not "hidden" from counsel and not beaten or coerced into confessing. No matter Fallin's presence, Jones was free to voluntarily confess.

CONCLUSION

The Appellant is not entitled to relief.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

MARK C. MENSER
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Robert J. Link, Esq., 353 East Forsyth Street, Jacksonville, Florida 32202 on this 30th day of November, 1987.

MARK C. MENSER
ASSISTANT ATTORNEY GENERAL

COUNSEL FOR RESPONDENT