IN THE SUPREME COURT OF FLORIDA

CASE NO. 70,836

LEO ALEXANDER JONES,

Appellant,

vs.

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF THE
FOURTH JUDICIAL CIRCUIT OF FLORIDA
IN AND FOR DUVAL COUNTY

BRIEF OF APPELLANT

ROBERT J. LINK
353 East Forsyth Street
Jacksonville, Florida 32202
Phone: (904) 354-4641

Attorney for Appellant

TOPICAL INDEX

TABLE OF CITATIONS

RULES AND STATUTES

SUPREME COURT OF FLORIDA

LEO ALEXANDER JONES

Appellant,

v. Case No. 70,836

STATE OF FLORIDA

Appellee.

BRIEF OF APPELLANT

Introduction

The appellant, Leo Alexander Jones, was the defendant and petitioner in the trial court, the Circuit Court of the Fourth Judicial Circuit of Florida, in and for Duval County. The appellee State of Florida was the prosecution. In this brief, the parties will be referred to as they stood in the trial court. All emphasis is supplied unless otherwise indicated. The symbol "R. _____" shall designate the original Record on Appeal; the symbol "T. _____" for the transcript of the original trial; "RP _____" shall designate the Record on Appeal from the post-conviction proceedings; and "TP _____" shall designate the transcript of the hearings conducted in post-conviction proceedings.

STATEMENT OF THE CASE

On May 23, 1981, the same date as the offense, the defendant was arrested in this cause. (R. 1-2) On June 3, 1981, the defendant was indicted by the Duval County Grand Jury and charged with First Degree Murder. (R. 8). The trial

began approximately four months after the offense, on September 28, 1981, before the Honorable A.C. Soud, Judge of the Circuit Court of the Fourth Judicial Circuit, in and for Duval County. (T. 468). On October 2, 1981, the defendant was convicted by a jury of First Degree Murder. (R. 140). On October 6, 1981, the jury returned an advisory sentence of death by a 9-3 vote. (T. 1582-5). On November 6, 1981, the trial court sentenced the defendant to death. (R. 182-224). At all times during the trial proceedings, the defendant was represented by attorney H. Randolph Fallin (TP. 90-1).

On direct appeal, the defendant was also represented by Mr. Fallin. Fallin failed to raise any issues relating to the penalty phase trial in his initial brief to this Court. However, after oral argument, this Court directed Fallin to file a brief directed to the penalty phase of the trial only, whereupon Fallin filed a "Supplemental Brief." This Court then affirmed the judgment and sentence. Jones v. State, 440 So. 2d 570 (Fla. 1983).

The defendant then filed a Petition for Writ of Habeas Corpus with this Court, alleging ineffective assistance of appellate counsel. This Court denied the petition. Jones v. Wainwright, 473 So. 2d 1244 (Fla. 1985).

On October 8, 1985, the defendant filed his Motion to Vacate Judgment and Sentence in the trial court. (RP. 1-358). The defendant later filed a Supplement to Motion to Vacate Judgment and Sentence, on December 30, 1985, (RP 360-85), and an Amendment and Supplement to Motion to Vacate

Judgment and Sentence on June 26, 1986. (RP 421-9). On August 26, 1986, the trial court conducted a status conference in which oral argument was heard regarding the necessity of an evidentiary hearing. (TP. 6-85). An evidentiary hearing was held by the trial court on October 8-10, 1986. (TP. 86-493). On June 9, 1987, the trial court entered its Order Denying Defendant's Motion to Vacate Judgment and Sentence. (RP. 532-6). This appeal follows.

STATEMENT OF THE FACTS

On the evening of May 22, 1981, the defendant's cousin, Bobby Hammond, went to visit Mr. Jones at his apartment. (T. 912-4). Mr. Jones lived in a second floor apartment at 1557 Davis Street in Jacksonville, Florida. (T. 1214). Glen Schofield shared the apartment with the defendant, (T. 1215), and kept his clothes and personal effects there. (T. 1216). The rifles in the apartment belonged to Schofield. (T. 1216).

When Hammond arrived at approximately 11:30 p.m., both the defendant and Schofield were at home. (T. 914) Schofield had a pistol at the time. (T. 922, 1216). Schofield left the apartment at approximately 12:15 a.m. (T. 914-5).

That same night, after having responded to a call on Lee Street, one block west of, and parallel to, Davis Street, three police vehicles left Lee Street and headed east on Sixth Street to turn north on Davis. (T. 708-10). The intersection of Sixth and Davis is slightly north of the apartment building on the east side of Davis, where the

defendant and Schofield were living. (RP. 502). Officer Dyal was driving the second car of the three car procession; Officer Szafranski was driving the last car. (T. 709).

Dyal testified at trial that, as he turned north on Davis Street, he heard a gunshot. (T. 710). Dyal stated he then turned and looked over his right shoulder, out of the rear window of his patrol car, and heard two more shots. (T. 710). Dyal claimed to have seen two flashes of light on the front porch of the apartment building. (T. 711). Dyal was looking through a wire mesh screen that separated the back seat from the front seat of his patrol car. (T. 731-2). Dyal was approximately a hundred feet from the building, driving his car in the opposite direction, at the time he made his observation, and conceded that he could not tell whether the flashes came from the upstairs or downstairs of the building. (T. 732-3).

At approximately the same time, Homer Spivey and Phillip Andeson were going to the tavern located north of the intersection of Sixth and Davis. (TP. 124-5). Between the tavern and Jones' apartment building was a vacant lot. (RP. 502). Anderson was driving, and parked the car in the vacant lot between the two buildings. (RP. 502, TP. 126-9). Before they left the car to go into the tavern, both Spivey and Anderson heard a gunshot and saw a flash of light. (TP. 130-1, 176-7). The flash of light and gunshot came from the back of the vacant lot where they were parked. (TP. 130-1, 176-7). The gunshot did not come from the building where Leo

Jones lived. (TP. 134). Both witnesses saw a police car stopped at the stop sign at the Sixth and Davis intersection. (TP. 132, 177).

Spivey was afraid to move, and remained in Anderson's car until other police arrived at the scene. (TP. 133). Once they arrived, he got out of the car and provided the police with his correct name and address. (TP. 133). Anderson went to the tavern, where he saw a black male run from around the north side of the tavern and jump into a car that was parked in the front of the tavern. (TP. 178). The car later left the scene with a woman driving. (TP. 180). Anderson, like Spivey, provided the police with his correct name and address. (TP. 179).

Nathaniel Hamilton, a resident of the upstairs apartment across the hall from Leo Jones, stated that he heard two gunshots that came from the north side of the apartment building, where the vacant lot is located. (T. 1160-2). Hamilton lived above the only empty apartment in the building. (T. 1165).

Betty Jackson lived upstairs over the tavern on the north side of the vacant lot. (T. 1171). Ms. Jackson heard "a very loud definite (sic) thundering shot," from the vacant lot between her building and the apartment building where the defendant lived. (T. 1172-3). Annie Lee Nelson, lived in the building next to Jones' apartment building to the south. (T. 1192). Mrs. Nelson testified that she heard two shots, and that they did not come from Jones' apartment

building next door, but from further down the street, towards the tavern. (T. 1192-3). Bobby Hammond heard only one gunshot, (T. 918). Leo Jones heard two, both coming from the vacant lot. (T. 1225).

Officer Szafranski's vehicle stopped "abruptly" in the middle of the Sixth and Davis intersection. (T. 736). There was a single bullet hole in the windshield of Szafranski's car, and Szafranski was found leaning forward, not visible from outside the car, with a gunshot wound to the head. (T. 737). Szafranski's foot was pressed down hard on the brake pedal. (T. 738).

Police responded the scene quickly, and began searching all of the buildings in the area. (T. 1226, 744-5, 1163, 1174-5). While this was occurring, Schofield's girlfriend, Marion Manning, was driving in her car a few blocks south of the scene. (TR. 113-5). She saw Schofield running from the area; when she stopped, he jumped into the car and told her, "Hit the expressway!" (TP. 116). She followed his instructions and drove him away from the area. (TP. 117). Ms. Manning lived in the Blodgett Homes housing project, a few blocks south of the apartment where Jones and Schofield lived. (TP. 112, 487).

When the police entered the defendant's apartment, Bobby Hammond was laying on a couch in the hallway, partially asleep. (T. 57-8). The only light source was from the television and a small light in the living room, leaving most of the inside of the apartment in darkness. (T. 57-8,

1220). According to Hammond, Officer Mundy hit him in the head with a shotgun after ordering him to get up. (T. 59-60). A second officer then hit Hammond with a "blackjack" and knocked him into the bathroom. (T. 60-1). Hammond was then handcuffed and beaten while the police asked him "Where's the gun?" and "Who did it?" (T. 61). Hammond was afraid to resist because a pistol was placed to his head. (T. 62). In addition to being hit with the "blackjack or nightstick," Hammond was kicked as he lay on the bathroom floor. (T. 63). Hammond was not able to see whether Jones was beaten by police in the apartment. (T. 68-9). However, Jones testified that he, too, was beaten about the head with a flashlight, by Officer Mundy. (T. 1232). When Homicide Detective Eason entered the apartment, the beatings stopped, and Eason ordered both Hammond and the defendant to be taken to the police homicide office for questioning. (T. 1233).

Jones testified that he was beaten by Mundy and other officers on the way to the police station, when the police stopped briefly behind a bank. (T. 1234-5).

According to Hammond, when they arrived at the police building garage, he saw two officers, including Mundy, beating the defendant in the stomach and chest. (T. 72-4). Hammond was then "dragged upstairs" and placed in an interview room. (T. 85). Hammond, still handcuffed, was beaten by Mundy and others with a flashlight and a "blackjack." (T. 75-6). One of the officers threatened him by putting a gun to his head and cocking it. (T. 76-7).

During all this, Hammond insisted that he did not know anything about the shooting. (T. 79). The defendant estified to similar beatings in another interview room. (T. 1237-8).

When Detective Eason arrived at the homicide office, he first interviewed Bobby Hammond, at 3:30 a.m., then spoke with the defendant, at 4:15 a.m. (T. 1092). After observing both men's injuries, Eason ordered them taken to a hospital, between 5 and 6 a.m. (T. 1095). When they returned from the hospital, Eason first questioned Hammond, then began a second interview with the defendant at approximately noon. (T. 1095-6).

Hammond said he gave Eason a statement that implicated the defendant "...because I was scared. Man, he was threatening my life and beating me up." (T. 82), and because "(T)hey threatened me, say they was going to kill me if they partner die." (T. 79).

When Eason interviewed the defendant, Eason wrote out the following statement, which the defendant then signed:

> "I, Leo Jones, on 23 May 1981, took a rifle out of the front room of my apartment and went down the back stairs and walked to the front empty apartment and shot the policeman through the front window of the apartment. I then ran back upstairs and hid the gun or rifle and then the police came." (T. 1100).

The defendant testified that he signed the statement because he "was whipped all up" and because he believed Bobby Hammond was going to be charged with the murder if he did not assume responsibility. (T. 1247-8). Eason wrote it out because it was his theory of what had transpired. (T. 1245-6, 1293). The statement was signed at 12:45 p.m. (T. 1100).

Two weeks before the murder trial was to begin, Fallin advised Leo Jones to enter a plea bargain wherein he pleaded no contest to a Battery on a Law Enforcement Officer charge. (TP. 91, 247). Fallin did not tell the defendant that a conviction for B.L.E.O. could be used against him as an aggravating circumstance in the penalty phase of his upcoming murder trial. (TP 91-2, 249).

In his opening statement to the jury, made at the close of the state's case, Fallin told the jury that he would call Bobby Hammond as a witness to verify the beatings that Leo Jones received at the hands of the police. (1154-5). Hammond was not called as a defense witness, however, nor was Homer Spivey, Phillip Anderson, or Marion Manning. The defendant was convicted of First Degree Murder.

In the penalty phase, the conviction for Battery on a Law Enforcement Officer was presented as an aggravating circumstance, and the jury recommended death. The trial court followed the recommendation.

In the spring of 1985, Glenn Schofield was serving time at the Union Correctional Instution in Raiford, Florida (TP. 354). Schofield became friendly with another inmate, Paul Alan Marr. (TP. 354-5). On several occasions, Schofield told Marr that he, not Leo Jones, had killed the police officer in Jacksonville. (TP. 359). Schofield said he had killed the officer by taking a gun from an upstairs apartment, going downstairs, and shooting the officer from the downstairs area. Schofield stated that he then took the gun back

upstairs, wiped the gun down, put it in a gun case, and fled the scene. (TP. 359-60).

In pleadings brought pursuant to Fla. R. Cr. P. 3.850, the defendant moved to set aside his conviction and sentence on the grounds among others, that he did not receive the effective assistance of counsel. After an evidentiary hearing, the motion was denied. (RP. 532-6). This appeal follows.

SUMMARY OF ARGUMENT

The defendant Leo Jones is entitled to a new trial because his attorney failed to provide him the effective assistance of counsel in both the guilt and the penalty phases of his trial. Trial counsel's representation fell below an objective standard of reasonableness in several significant areas: (1) he had Jones provide the prosecution with an additional aggravating circumstance by advising him to plead no contest to a charge of Battery on a Law Enforcement Officer only 2 weeks before the murder trial began; (2) he failed to make any effort whatsoever to determine whether any jurors would automatically vote for the death penalty for someone guilty of first degree murder, or for someone guilty of the murder of a police officer, or for a black man convicted of killing a white man; (3) he opened the door in trial to admission of evidence that another police shooting had occurred at the same location a week earlier; (4) he failed to object to inflammatory and prejudicial prosecutorial comments in both the guilt and

penalty summations; (5) he failed to object to the presentation of inflammatory and irrelevant evidence by the state in the penalty phase trial; (6) he failed to investigate any mental or emotional mitigating circumstances for the penalty phase; (7) he failed to present the testimony of four available witnesses which, if believed, would have compelled the defendant's acquittal.

Though all are serious errors, the failure to present evidence of innocence is clearly the most significant. The defense contention at trial was that the defendant had been co-erced into signing a statement, written by the police, which indicated he had shot a police officer from the inside of a downstairs apartment. The theory of the defense was that the shot had come from a vacant lot between Jones' apartment building and a tavern. Two eyewitnesses to the shooting, whose names and addresses were listed on State's response to discovery, were available to testify that the shot was fired from the back of the vacant lot, not from the apartment building. One of these witnesses also saw a man run from behind the tavern and jump into a car parked in front of the tavern; the car was then driven away by a woman. A third witness, the girlfriend of Glen Schofield, who shared the defendant's apartment, was living a few blocks from the scene. She was available to testify that, on the night of the police shooting, she picked up Glen Schofield running from the scene, and drove him out of the area. (Schofield has admitted the killing to a prison cell

mate). A fourth witness was available to testify that he had seen the police severely beat the defendant before Jones signed the statement. None of this evidence was presented to the jury.

The evidence against Jones was far from overwhelming. Only one witness claimed to have seen gunshot "flashes" come from the front of Jones' apartment building. That witness was driving a moving vehicle away from the scene at the time he made his observations, looking over his shoulder, through a wire mesh screen and through his car's rear window. Jones' "confession" consisted of three sentences and referred to the use of a "rifle or gun," (apparently because ballistics had not been determined at the time.) Jones was admittedly treated at a hospital for injuries that had been inflicted upon him by police. The only other evidence was one Bobby Hammond, who testified at trial and to police that he saw the defendant leave his apartment with a rifle, heard a shot, and saw the defendant return with the rifle. Hammond, however, had previously testified at a suppression hearing that he only gave that statement to police because they had beaten and threatened him, that the statement was not true, and that he had not seen the defendant with a rifle in his hands at all that night. Hammond was condemned by both the state and the defense in post-conviction proceedings as being an extremely unreliable witness.

Where there is a serious question as to the guilt of the defendant, there can be little confidence in the outcome

of a jury trial where the trial attorney did not provide the jury with the testimony of two eyewitnesses to the shooting, the girlfriend of the real killer, and evidence of a coerced confession. Where trial counsel helped create an aggravating circumstance before trial, did nothing to weed out jurors who were predisposed to recommend death, did nothing to stop the state's presentation of inadmissible evidence in aggravation, and failed to recognize that non-statutory mitigating factors are entitled to individual consideration, there can be little confidence in the jury death recommendation. Leo Jones is entitled to a new trial where a properly selected jury can be presented with all the available and relevant evidence.

POINTS ON APPEAL

POINT ONE

WHETHER THE DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN THE GUILT PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.

POINT TWO

WHETHER THE TRIAL COURT ERRED IN STRIKING RELEVANT TESTIMONY OFFERED TO SHOW THE RELIABILITY OF THE EVIDENCE THAT TRIAL COUNSEL FAILED TO PRESENT IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.

POINT THREE

WHETHER THE DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN THE PENALTY PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, AND 17 OF THE FLORIDA CONSTITUTION.

POINT FOUR

WHETHER THE STATMENTS OF THE DEFENDANT THAT WERE USED AGAINST HIM AT TRIAL WERE OBTAINED IN VIOLATION OF HIS RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.

POINT ONE

THE DEFENDANT WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL IN THE GUILT PHASE OF THE TRIAL, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 9 AND 16 OF THE FLORIDA CONSTITUTION.

Introduction

The United States Supreme Court set forth the standards governing a claim of ineffective assistance of counsel in Strickland v. Washington, 104 S. Ct. 2052 (1984). To prevail on an ineffectiveness claim, the defendant must show that his lawyer's performance was deficient, and that the deficient performance prejudiced the defense. Id., at 2064. The attorney's function "...is to make the adversarial testing process work in the particular case." Id., at 2066. If the attorney's performance was indeed deficient, the Court must determine whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id., at 2068. This does not mean that a defendant has to show that, but for his lawyer's mistakes, the outcome would more likely then not have been different. Nix v. Whiteside, 106 S. Ct. 988, 999 (1986). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, supra, at 2068. The specific instances of deficient performance by the defendant's trial counsel are presented below. When considered in conjunction with one another, it is evident that there is at least a "reasonable probability that, absent the errors, the factfinder would

have had a reasonable doubt respecting guilt." Strickland, id., at 2069.

1. Inadequate Pretrial Investigation

The defendant's trial counsel, H. Randolph Fallin, had one defense to the murder charge: the defendant was innocent, someone else committed the crime, and the confession was co-erced. (TP. 289). This theory included the proposition that:

> "...the police had assumed immediately they had the right people and that they didn't--didn't conduct a search of the area. Once they got Jones, they quit." (TP. 290).

Because Jones had signed a confession stating that he shot the policeman from the downstairs apartment window, an essential element of the defense theory was the shot or shots were fired from the vacant lot between the tavern and the apartment building. (T. 1153-4; TP. 211). The other essential elements of the defense were that the testimony of Bobby Hammond, and the confession of Leo Jones, should not be believed because they were the product of police threats and beatings. (T. 1154-8).

Fallin testified that he did not hire a private investigator to assist him. (TP. 212). His "investigation" consisted of going up and down Davis Street "four or five times" to "round up witnesses." (TP. 319, 479). Both Homer Spivey and Phillip Anderson were listed on the state's witness list with their full names and current addresses. (RP. 499-501; TP. 133-4, 173-4). As the addresses reveal, neither witness lived on Davis Street. Fallin did say he

attempted to interview all of the witnesses on the witness list at the listed addresses on one or two occasions. (TP. 488). However, he did not find either Spivey or Anderson at home. (TP. 221). This is not surprising, because both Anderson and Spivey were employed and would presumably have been at work during business hours. (TP. 124). Fallin did not send a letter, a deposition subpoena, or a trial subpoena to either witness. (TP. 220, 222).

At the post-conviction hearing, both Spivey and Anderson testified that they had seen the shot fired from the back of the vacant lot where they had just parked the car they were in. (TP. 130-1; 176-7). They said that there was only a single shot fired, and that it definitely did not come from Leo Jones' apartment building. (TP. 134). Additionally, Anderson saw a man (not Jones) run from around the side of the tavern and hide in the rear of a parked car that was later driven away by a woman. (TP. 178-80)

Fallin testified that he had heard from numerous sources before trial that Glen Schofield had shot the policeman, and that his girlfriend had picked him up in her car near the scene of the shooting. (TP. 215-7; 483-4). Schofield had shared the apartment with Jones, the rifles belonged to Schofield, and Schofield had been in the apartment just a short time prior to the shooting. Fallin wanted very much to present evidence tending to show that Schofield had committed the crime because "Schofield had a very violent background and Jones did not, and I would have

loved to find someone else we could put the hand on -- wasn't able to develop it." (TP. 320).

To this end, Fallin went to the St. Johns County Jail to talk to Glen Schofield, after he learned Schofield had been arrested for an unrelated crime of violence. (TP. 216). Schofield did not even admit to being at Jones' apartment on the night of the murder, and refused to tell him who his girlfriend was. (TP. 216-7). Fallin did list Schofield and Marian, last name unknown, address unknown, as possible defense witnesses. (TP. 218). Fallin made no other effort to find Marian other than by talking to the defendant's family. (TP. 320). He did not investigate Schofield's background at all to find Schofield's friends or family to obtain information about Marian. (TP. 484-5).

Alberta Brown, the defendant's girlfriend, testified that she had told Fallin Marian Manning's name and address, but that Fallin had told her he "didn't want to use her." (TP. 354-6). Fallin denied that the conversation occurred, stating, "I would have loved to have been able to find her" and indicating that he considered Marion Manning such an important witness that he would have remembered had he been told of her whereabouts. (TP. 475-6).

As Marion Manning's testimony demonstrated, she was indeed an important witness: she had picked up Schofield when he was fleeing the scene of the murder. (TP. 115-6). Ms. Manning has lived at the same address for the past fifteen years. (TP. 112). She made no effort to hide or to

avoid becoming a witness, and even attended Jones' trial. (TP. 122-3). Fallin conceded that her home is in a housing project only a few blocks down Davis Street from the scene of the shooting. (TP. 487).

Fallin also conceded that he would have used Spivey, Anderson, and Manning as witnesses if he had found them for the trial. (TP. 322, 328-9, 331, 476). This is hardly surprising. At trial, the only defense witnesses Fallin had were three citizens who testified that they heard, but did not see, the shot, and it came from the vacant lot. (T. 1159-69, 1170-89, 1190-7). Spivey and Anderson actually saw that the shot came from the vacant lot. Manning showed that, while the defendant was resting in his apartment, Schofield was fleeing the scene. This was particularly significant because Schofield had been placed at the scene shortly before the shooting by a state witness, and because Schofield had access to the apartment and ownership of the weapons in it. These witnesses would have made a weak defense into a compelling one. If believed, the evidence presented by these witnesses not only suggests that Glenn Schofield was the real killer, it proves that the confession the police got Leo Jones to sign was false. That Schofield was in fact the real killer is more than mere speculation; Schofield admitted it to a fellow prisoner several years later. (TP. 354-61). See, Point Two, infra.

Fallin's efforts to interview or locate these witnesses was woefully inadequate. There was no strategic decision

made to not interview these witnesses, nor was there any strategic decision not to use their testimony. The addresses of two of the witnesses were known, and Manning could have been located with reasonable effort. (Indeed, all of the witnesses were found and able to testify over five years later.) Fallin did not use Spivey or Anderson because he had not talked to them to find out what they knew, even though he had their addresses and knew they had been at the scene on the night of the shooting. Fallin did not use Manning because he did not find her before trial.

Inadequate investigation can be a basis for a finding of ineffective assistance of counsel. Code v. Montgomery, 799 F. 2d 1481 (11th Cir. 1986); Williams v. State, 507 So. 2d 1122 (Fla. 5th DCA 1987). A failure to locate or present defense witnesses is particularly egregious when their testimony relates directly to the asserted theory of defense. Code, supra, at 1483; Gomez v. Beto, 462 F. 2d 596, 597 (5th Cir. 1972). In Code, defense counsel was found ineffective where he had interviewed only one defense witness and attempted to interview another by telephone, but pursued no leads to develop other alibi witnesses. In Sullivan v. Fairman, 819 F. 2d 1382 (7th Cir. 1987), a case citing Code with approval, defense counsel was found ineffective for failing to present the testimony of five witnesses whose names and addresses were listed in the state's discovery. As in this case, the witnesses in Sullivan would have contradicted the state's theory of the

case because all were present at the scene, and they would also have cast doubt on the defendant's confession. As in this case, defense counsel in Sullivan made an unsuccessful effort to interview the witnesses (sending letters, trying to telephone them, and relying on the defendant's relatives), then failed to subpoena them for trial. As the appellate court did in Sullivan, this Court should find that trial counsel's performance "did not conform to the standard of professional conduct which, under all of the circumstances, might reasonably be expected of trial defense counsel." Sullivan, supra, at 1391.

2. Failure to present testimony of Bobby Hammond either by cross or direct examination.

At trial, the state called the defendant's cousin, Bobby Hammond, as a witness. (T. 911). Prior to putting him on the witness stand, the State asked the trial court to declare Hammond a Court's witness, "allowing both the State and the defense to cross-examine him as they see fit..." (T. 906). The state's concern was well founded. Hammond had initially told Detective Eason he knew nothing of the shooting, then provided a statement that he had seen the defendant take a rifle downstairs, heard a shot, and then saw the defendant return with the rifle in his hands. (T. 97-100). However, at the hearing on Jones' motion to suppress, Hammond testified as a defense witness that he had not seen the defendant with a rifle at all that night, and that he had only made those statements because the police

had beaten and threatened him. (T. 82, 90-95). Hammond had testified that the police had not only beaten him, but that they had beaten the defendant, as well. (T. 72-4, 84-5).

Fallin objected to Hammond being called as a court's witness. It appeared from Fallin's testimony at the post-conviction hearing that he misunderstood the significance of a witness being called as a court's witness. Fallin understandably did not want the state to be able to lead or impeach Hammond, but he believed that his own examination would be limited to the scope of the state's examination even if Hammond were a court's witness. (TP. 260-1). Fallin's argument at trial indicates confusion over the difference between a "hostile" witness and a Court's witness. (T. 906-7). The Court's response to the objection indicated the Court's understanding that Hammond was going to be called as a witness by both sides:

> "I was also informed at that time (suppression hearing) that Bobby Hammond had evidence to offer both possibly beneficial and detrimental to the defendant and beneficial and detrimental to the state. There was, you know -- I recall the dialogue between Mr. Greene and Mr. Fallin that, well, I'll call him as my witness up to a certain point, then at a certain point he becomes your witness. So apparently both of you are wanting him to testify. (T. 908).

The trial court declined to call Hammond as a court's witness, and Hammond testified just as the prosecution desired, saying that he had seen the defendant leave the apartment with a rifle, heard a shot, then saw the defendant come back in with the rifle. (T. 911-20). The prosecutor stopped his direct examination at the point that Hammond

said Jones returned to the apartment with the rifle. (T. 920).

On cross-examination, Fallin attempted to ask Hammond about events that occurred after the police arrived, and was met with a "beyond the scope" objection. (T. 931-2). Fallin conceded that there could be "some problems" due to "a scope situation," and agreed that he would only cross-examine Hammond on things that happened "prior to the time the police walked in the front door." (T. 932-3). Later, Fallin attempted to bring out the fact that Hammond had given a statement to Detective Eason because he was beaten and threatened. (T. 951-6). The court correctly ruled that this was not impeachment by prior inconsistent statement, because it did not specifically contradict any trial testimony. (T. 956).

Fallin failed to bring out on cross-examination that Hammond had been arrested along with the defendant and that Hammond had initially told police that he was unaware of anyone being involved in the shooting (T. 61, 76-7, 79). Fallin failed to bring out on cross-examination that Hammond had changed his story to implicate the defendant because the police had beaten him and threatened to kill him. (T. 79, 94-5, 111, 120-2). Fallin's cross-examination left the impression that Hammond had only stated one time that he had not seen the defendant leave and re-enter the apartment with a rifle. (T. 945-6). In reality, Hammond had sworn time and time again that Jones had not left the apartment, and that

he had not seen any rifle in Jones' hands. (T. 92, 94-5, 111, 120-2, 127, 131, 134, 136, 141-2). The prosecutor was able to give the impression that Hammond had provided an exculpatory story only after being frightened by the defendant's family. (T. 966). Fallin failed to bring out on cross that Hammond's original story had been exculpatory, and that he changed it because of police threats and beatings. (T. 79). Fallin also failed to bring out that it was just as likely that Hammond changed his story from exculpatory to inculpatory at the suppression hearing due to intimidation, not from the defendant or his relatives, but from the prosecutor (T. 117, 120), and from the trial judge (T. 146-7).

All of the evidence described above could have been presented to the jury by a cross-examination aimed at showing the bias, interest, and motivation of the witness. Hammond had a motive to pin the blame on the defendant, because Hammond was himself under arrest for the offense and was himself being beaten and threatened. At the suppression hearing, he had tried to correct what he had said, but had been frightened into re-asserting his inculpatory story. As long as he told his inculpatory story, he was sure of staying out of trouble with the law, because he knew that that was the story "the law" wanted to hear. Fallin's failure to present the compelling evidence to support this contention falls well below the standard of reasonably effective assistance.

Fallin's cross would not have been so restricted had he attempted to go into these areas to show the bias, interest, and motiviation of the witness, rather than to simply show a prior inconsistent statement. There is an absolute right to cross-examine in the area of bias and interest. Davis v. Alaska, 94 S. Ct. 1105 (1974). Matters tending to show bias or prejudice in a criminal prosecution may be inquired about even though not mentioned on direct examination. McDuffie v. State, 341 So. 2d 840 (Fla. 2nd DCA 1977); Lewis v. State, 335 So. 2d 336 (Fla. 2nd DCA 1976). Unlike with a prior inconsistent statement, one need not lay a foundation or predicate before showing bias, interest, or motive on the part of the witness. Telfair v. State, 56 Fla. 104, 47 So. 863 (1908), aff'd 50 So. 573; Alford v. State, 41 Fla. 1, 36 So. 436 (1904). In this area of impeachment, the general rule is to permit great latitude in cross-examination. Harmon v. State, 394 So. 2d 121 (Fla. 1st DCA 1980).

Fallin did not argue bias, interest, or motive for lying as a basis for being permitted to examine in other areas. Indeed, later in the trial, Fallin told the trial court that he did not question Bobby Hammond's truthfulness! (T. 1113-4).

The failure to elicit this compelling impeachment material was exacerbated when, at the close of the state's case, Fallin gave his opening statement. In his opening statement, Fallin told the jury that Bobby Hammond would be called by the defense to show that Hammond had been arrested

and beaten by the police until he gave a story that fit the police theory. (T. 1154-5). Fallin did not mention that Hammond had also observed the police beating the defendant. Fallin then proceeded to present his defense witnesses, but did not call Hammond.

The defense opened in the morning, and rested that afternoon. The prosecution, in summation, commented that Hammond had no reason to lie about the defendant, (T. 1364), and commented on the failure of the defense to present evidence that Hammond was beaten by the police. (T. 1379).

Fallin, at the post-conviction hearing, testified that he did not feel he could call Hammond back as his own witness after Hammond had testified for the state. (TP. 258-9). Fallin acknowledged the importance of maintaining credibility with the jury, but had nevertheless promised the jury they would hear from Hammond as a defense witness. (TP. 261-2). Fallin conceded, "Maybe I shouldn't have mentioned it." (TP. 263).

Hammond was the only witness who placed a rifle in Leo Jones' hands on the night of the murder. He was the only real corroboration to the confession Jones signed. He was also the only corroboration to the police misconduct that caused the confession to be given. Trial counsel failed to provide the jury with any evidence showing why Hammond would lie; he failed to show that Hammond had changed his story to incriminate Jones only after threats and beatings; and he failed to present the only testimony that corroborated

Jones' reason for signing the confession. Hammonds' credibility, and the reliability of the confession, were the most critical issues in the trial. The defendant's trial counsel was ineffective for failing to present this crucial evidence, whether it was on cross or on direct.

In Smith v. Wainwright, 799 F. 2d 1442 (11th Cir. 1986), a defendant's trial attorney was found to be ineffective for failing to show that an accomplice witness had originally told police that he killed the deceased, making no mention of the defendant. The appellate court found that, due to counsel's ineffectiveness, the defendant was "...deprived of evidence which was critical to the determination of his guilt or innocence." Smith, id., at 1443. The failure to use impeachment evidence was alone a basis for a finding of ineffectiveness in Smith. Here, not only was there a failure to present impeachment evidence similar in nature to that in Smith, there was a failure to present other evidence that would have enhanced the defendant's credibility, and discredited the testimony of the police. Counsel's errors here were, if anything, more egregious than in Smith. Indeed, in affirming Jones' conviction on direct appeal, this Court noted that it was Jones' counsel, not the trial court, that prevented Hammond's crucial testimony from being heard. Jones v. State, 440 So. 2d 570, 576 (Fla. 1983).

3. Cross-examination of Officer Mundy

During cross-examination of Officer Mundy, the arresting officer, the defendant's attorney "opened the door" to evidence of another sniper shooting of a police car at the same intersection, 6th and Davis, only five to seven days earlier. (T. 838, 840). The state had not intended to use this evidence because they had no evidence connecting the defendant to it. (T. 858-61). Certainly, it would have been error to present such collateral crimes evidence without connecting it to the defendant. See, Diaz v. State, 467 So. 2d 1061 (Fla. 3rd DCA 1985); Chapman v. State, 417 So. 2d 1028 (Fla. 3rd DCA 1982). Fallin indicated that he though Mundy's testimony to be "incredible," "amazing," and "not believable." (TP. 269, 303), so attacking the witness would certainly be understandable. However, the questions that opened the door to Mundy's testimony appear to have no bearing on Mundy's credibility; they are recited by this Court in its original opinion. See Jones v. State, 440 So. 2d 570, 575-6 (Fla. 1983).

Fallin testified that the reason for this examination was to show that "other people other than Leo Jones had access to it." (T. 271). However, Mundy was not asked whether the apartment was open, or readily accessible to any member of the public who wanted to go in. He was asked if, based on prior experiences, he assumed that the shot came from Jones' apartment building. Such a question clearly opened the door to what the officer's prior experiences at that location were that justified his assumption.

Fallin was well aware of what Mundy's experience had been in the prior sniper shooting. (T. 855-6, 859-60). Why he would risk the introduction of such prejudicial and otherwise irrelevant evidence by asking the questions he did defies logical explanation. It would have been a simple matter to ask if that vacant apartment was readily accessible to anyone who wanted to go into it without asking the officer about his prior experiences or about the reasons he assumed the shot came from the apartment. The end result was a situation not unlike that in Chapman, supra:

> Although a collateral crime was not specifically identified in the jury's presence, the occurrence of an uncharged act of violence to the person of the victim was conveyed with certainty. It was reasonable for the jury to infer that the other horrible act was committed by the accused, since no one else was on trial. Id., at 1032.

Clearly, there was no reasonable tactical decision to open the door to this evidence. Just as clearly, the impact of the evidence of the other sniper shooting at the same location, coming from the same building, was devastating. See, Wright v. State, 446 So. 2d 208 (Fla. 3rd DCA 1984).

4. Guilt Phase Summation

The specific comments that defense counsel should have objected to are described in the original Motion to Vacate Judgment and Sentence, (RP. 8-9). As this Court noted in its opinion in Jones v. Wainwright, 473 So. 2d 1244 (Fla. 1985):

> (T)hese arguments concerned, inter alia, the prosecutor's personal belief in the guilt of the defendant, appeals to sympathy for the victim and his family, and "golden rule" arguments that presented the shooting of a police officer as a crime against the jurors themselves. Most of the prosecutor's comments

about which Jones complains were not objected to at trial; therefore, in the absence of fundamental error, appellate review is precluded. Id., at 1245.

It is well settled that a prosecutor may not argue his personal belief in the guilt of the defendant. Grant v. State, 171 So. 2d 361 (Fla. 1965); Harris v. State, 414 So. 2d 557 (Fla. 3rd DCA 1982); DR 7-106, Canon 7, Code of Professional Responsibility. Nor was it permissible to present an emotional appeal to the sympathy of the juror as was done here. Harper v. State, 411 So. 2d 235 (Fla. 3rd DCA 1982); Lucas v. State, 335 So. 2d 566 (Fla. 1st DCA 1976). Mr. Fallin's "tactical decision" was to refrain from objecting to the remarks that he agreed were "inflammatory" and an "emotional appeal," (T. 307) because he wanted to "let them get it over with as soon as possible to minimize the effect for the jury." (T. 308). This reasoning is hardly persuasive when one considers that Fallin did object to some other remarks (T. 1462) and did ask for a mistrial based on two other comments in the same summation. (T. 1389-90, 1463-4).

5. Failure to immediately contact the defendant and prevent further interrogation.

The lead detective in the case was Hugh Eason, who went to the scene of the shooting at 1:28 a.m. on May 23, 1981. (T. 319). Leo Jones and Bobby Hammond were already under arrest. (T. 1091-2). Eason returned to the Jacksonville Sheriff's Office to interview Hammond and Jones at approximately 3:30 a.m. (T. 1092). Between 4:00 and 5:00

a.m., he interviewed Hammond, then Jones. (T. 1092, 1108). At that time, Eason and his partner, Frank Japour, interviewed Jones; Japour actually read the defendant his rights. (T. 1093). According to Eason, Leo Jones "stated that he understood his rights, at that time he refused to say anything." (T. 1093-4). Jones also refused to sign a written Miranda rights form. (T. 1106). Eason then had Jones and Hammond transported to a hospital to be treated for the injuries the police had inflicted, between 5 and 6 a.m., (T. 1095). Hammond and Jones were returned to the interview rooms from the hospital by 8 or 9 a.m. (T. 1109). Eason did not conduct a second interview with the defendant until 12:00 noon. (T. 1095-6). Again, Japour advised Jones of his Miranda rights, and again Jones refused to sign the rights form. (T. 1111). Japour left the room after about 10 minutes, but Eason continued to try to get a statement. (T. 1111). At 12:45 p.m., Eason succeeded. (T. 1100).

At the hearing on Jones' motion to suppress his statement, Japour testified that he received a call at the Sheriff's Office from Mr. Fallin, at approximately 5:00 on the morning of May 23. (T. 352). According to Japour, Fallin told him that he had been retained by the family to find out what was going on, what was the condition of Officer Szafranski, and where was Leo Jones. (T. 358). Japour acknowledged that he understood that Fallin was going to represent Jones, "pursuant to the family's wishes." (T. 356-7). According to Japour, Fallin did not tell him not to talk

to the defendant, nor did he tell Japour that he wanted to talk to Jones before the police talked to him. (T. 357). Japour did tell Fallin that Szafranski was in critical condition and not expected to live, and also told him that Jones was in custody, but that he did not know where he was. (T. 352). Japour said he saw Fallin at the police station some time later, but did not talk to him again until just moments before Eason emerged from the interview room with Jones' signed statement. (T. 355-6). Japour conceded that he had at no time told Eason or Jones that Fallin had called, that Fallin had been retained, or that Fallin was at the station looking for Jones. (T. 353-4).

Based on this evidence, the trial court found, in its order denying the motion to suppress:

> I. The family of the defendant hired H. Randolph Fallin, Esquire, between 4:00 a.m. and 5:00 a.m. on May 23, 1981, and the said attorney called the police around 5:00 a.m., but was not denied access to his client as he admits on the record at the time of argument on this motion. It does not appear that the said attorney or anyone on his behalf or the family of the suspect was seeking to interrupt the defendant during questioning, or seek to intercede in the interview.
>
> J. At 12:00 noon, the said attorney went to police headquarters and arrived after questioning had been completed. (R. 103).

In stark contrast, however, is the finding of the same trial court judge when ruling on the defendant's motion for post-conviction relief:

> The evidence indicates that defense counsel acted with diligence in contacting the police and telling them not to interview the defendant before counsel saw him. (RP. 534).

Apparently, the second conclusion was based upon Fallins' testimony at the post-conviction hearing. Fallin testified that he told Japour at 5:00 a.m. that he did not want the police talking to Jones until he got there. (TP. 203-4). Fallin arrived at the police headquarters at 9:00 a.m., trying to find the defendant, but both the police and an assistant state attorney told Fallin they didn't know where he was. (TP. 205-9). At one point, Fallin was told that Jones was at the hospital, and that Fallin would be given access to him as soon as he got back. (TP. 206). However, Fallin was not given access to the defendant until after Eason obtained Jones' statement. (TP. 207).

Fallin did not testify at the hearing on the motion to suppress, so the trial court was not able to consider it in ruling. The defendant must, at this point, ask this Court to consider the corollary to this issue: if Mr. Fallin did what he said he did, then was he not ineffective for failing to withdraw and become a witness at the suppression hearing?

If the trial court's original findings are accepted as true, then Fallin's failure to try to gain immediate access to his client must be considered deficient. Every lawyer knows that the earlier one gets involved in a case, the better. The devastating effect of a signed confession as evidence can hardly be over-stated. Any competent lawyer would have realized that the police were going to vigorously interrogate the suspect of a police shooting. The only way to prevent a client from providing damning evidence against

himself is to request the authorities to cease questioning, and to affirmatively request access to the client. Indeed, one rationale behind the Miranda warnings is that an accused has the right to the assistance of counsel during interrogation. It is the duty of counsel to provide that assistance if he can. Mr. Fallin did not provide such assistance to Mr. Jones. The prejudice is obvious: at 12:45 p.m., seven to eight hours after Fallin had been retained, Jones signed a written confession.

Conclusion

Leo Jones deserves a new trial because his lawyer's mistakes not only led to the admission of damaging evidence at trial that would otherwise not have been presented, but also led to the omission of crucial evidence from the jury's consideration. Had Mr. Jones received the effective assistance of counsel, a confession, a prior police shooting, and an inflammatory summation would not have been heard; exculpatory eyewitness testimony, and substantial impeachment of a critical witness would have been presented. Due to counsel's blunders, substantial evidence of guilt was provided the jury, and substantial evidence of innocence was not.

POINT TWO

THE TRIAL COURT ERRED IN STRIKING RELEVANT TESTIMONY OFFERED TO SHOW THE RELIABILITY OF THE EVIDENCE THAT TRIAL COUNSEL FAILED TO PRESENT, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.

At the post-conviction hearing, the defense presented the testimony of Paul Alan Marr, a prison inmate who testified that he came to know Glen Schofield when both were inmates at the Union Correctional Institution in Raiford, Florida. (TP. 354-5). Marr had several conversations with Schofield between March and June of 1985 in which Schofield was inquiring about his own legal liability. (TP. 357). In those conversations, Schofield told Marr that Leo Jones, "the man on death row," was not the person who killed the officer in Jacksonville. Schofield said that he himself had killed the officer because he hated police. Schofield further described how he had taken a rifle from a gun case in an upstairs apartment, gone downstairs and shot the officer, then returned upstairs, wiped off the gun, put it back in the case, and fled the area. (TP. 359-60).

The defense offered the testimony to support the credibility of defense witnesses Spivey, Anderson, Manning, and Brown, whose credibility had been attacked by the prosecutor. (TP. 362-4). The clear inference from the testimony of those witnesses was that Glen Schofield had done the shooting. Marr's testimony showed that the inference that Glen Schofield killed Officer Szafranski is well-founded, and that the evidence that trial counsel

failed to present is indeed reliable. As the Supreme Court has said:

> The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. Strickland, supra, at 2064.

Despite this contention, the trial court struck Marr's testimony as "immaterial and irrelevant." (T. 365-6). The trial judge stated that he was "...not going to consider the underlying fairness of the original verdict in this proceeding as to whether there was an effective assistance of counsel." (T. 366).

In the Florida Evidence Code, "(r)elevant evidence is evidence tending to prove or disprove a material fact." Fla. Stat. 90.401; and "(a)ll relevant evidence is admissible, except as provided by law." Fla. Stat. 90.402. The confession of a third party to the murder is relevant to show that other evidence linking Schofield to the crime is reliable, and it is relevant to support the defendant's claim of innocence. The reliability of the omitted evidence is a factor the Court should consider in deciding the performance prong of the Strickland standard for ineffectiveness. The innocence of the defendant is a factor that should be considered with regards to the prejudice aspect of the test. The testimony of Mr. Marr was relevant. This cause should be remanded for the trial court to reconsider its ruling in light of the testimony of Paul Alan Marr.

POINT THREE

WHETHER THE DEFENDANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN THE PENALTY PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 9, 16, AND 17 OF THE FLORIDA CONSTITUTION.

Introduction

The performance of Jones' defense counsel in the penalty phase of the trial, and in the preparation for it, was only slightly better than his performance in the guilt phase. The specific acts or omissions will be discussed chronologically.

1. Pleading to an aggravating circumstance prior to trial.

During the pendency of the murder charge, Jones also had pending another felony case in which Fallin was his attorney. (TP. 247). In that case, Jones was charged with four felonies, one of which was Battery on a Law Enforcement Officer, in violation of Fla. Stat. 784.03 and 784.07. (TP. 90-1). Though this was the only crime of violence charged, Fallin advised the defendant to plead no contest to the B.L.E.O. charge only two weeks before the beginning of Jones' murder trial. (TP. 91). It had been the defendant's intention to go to trial on the charge, because he felt like he "could be exonerated from the case." (TP. 92, 99). However, he entered the nolo plea to the B.L.E.O. charge based on Fallin's advice. (TP. 91).

Fallin did not tell the defendant that his conviction for B.L.E.O. could be used against him in the sentencing portion of his upcoming murder trial as an aggravating

circumstance to justify the death penalty. (TP. 92, 249). The defendant would not have entered the nolo plea had he known a B.L.E.O. conviction could be used as an aggravating circumstance. (TP. 92). At the penalty phase, the jury was instructed that B.L.E.O. was a crime of violence within the meaning of the statutory aggravating circumstances. (R. 146). At sentencing, the trial judge found this aggravating circumstance in sentencing the defendant to death. (R. 205-7).

In Hill v. Lockhart, 106 S. Ct. 366 (1985), the Supreme Court applied Strickland to guilty pleas and held, that, in order to obtain relief, the defendant must show that counsel's representation fell below an objective standard of reasonableness, and that, but for counsel's unprofessional errors, there is a reasonable probability that the defendant would have proceeded to trial rather than enter a plea. Id., at 370. The prejudice aspect of this test is clear; but for Fallin's advice, Jones would have gone to trial. Considering that the offense was a "technical battery if they believed the officer," (TP. 248), there is at least some reason to believe that Jones could have been acquitted of that charge. As to whether this advice was professionally deficient, this too should be apparent. The consequences of creating an aggravating circumstance where one did not previously exist are, to say the least, significant. At the very least, Jones should have been made aware of those consequences before he entered his plea. The failure of Fallin to advise his client

that the was creating an aggravating circumstance that could be used against him in his pending murder trial was, as a defense expert testified, "absolutely unconscionable." (TP. 405).

2. Inadequacies in Jury Selection.

During the jury selection process, the record reveals that defense counsel asked no questions of any venireman about the death penalty, or about racial prejudice. (T. 467-684). Fallin said he asked no questions about the death penalty because "I don't like to re-inforce the death penalty aspects." (TP. 239). Fallin stated that he would have been concerned about jurors who would automatically vote for the death penalty for first degree murder, or for the murder of a police officer. (TP. 240). However, he made absolutely no effort to find out whether any such jurors were on the panel. Fallin said he relied upon the state's voir dire, (TP. 242), but the record shows that the prosecutors asked no questions that would have exposed an "automatic death" juror. Fallin said he asked no questions about death for the murder of a police officer because "I was trying to stay away from that as much as I could." (TP. 242). In the same vein, Fallin explained his failure to ask any questions designed to expose racial prejudice as an area that was not "proper" for voir dire. (TP. 244).

Prospective jurors who would automatically vote for the death penalty are subject to challenge for cause. O'Connell v. State, 480 So. 2d 1284 (Fla. 1985); Thomas v. State, 403

So. 2d 371 (Fla. 1981). It has long been error to refuse to permit defense counsel to question jurors as to their willingness to recommend life instead of death. See, Poole v. State, 194 So. 2d 903 (Fla. 1967). This Court has recognized the critical importance of eliminating automatic death jurors from a capital trial; the failure of trial counsel to even attempt to do so cannot be considered a minor omission. Fallin did not provide any strategic reason for not excusing jurors who would automatically vote for the death penalty; indeed, he said he was aware that "automatic death" jurors should be excused for cause. (TP. 240-1). He simply made no effort to find out who they were.

Likewise, Jones' lawyer made no attempt to determine if any jurors were racially prejudiced. Fallin was representing a black man from a ghetto area who was charged with killing a white police officer. Jones was tried before an all-white jury. (TP. 348). The case was the subject of such publicity and generated such emotion that the trial court judge sequestered the jury. (T. 468). The United States Supreme Court, as well as this Court, have recognized the critical necessity of permitting such questions in a capital case. See, Turner v. Murray, 106 S. Ct. 1683 (1986); Pinder v. State, 27 Fla. 370, 8 So. 837 (1891). A "tactical" decision to forego trying to ferret out racially prejudiced jurors is so unreasonable that no competent attorney would ascribe to it. In a capital case where a black defendant is tried by an all white jury, such tactics are professionally deficient. A

"tactical" decision may be so unreasonable as to constitute ineffectiveness. See, Williams v. State, 507 So. 2d 1122 (Fla. 5th DCA 1987); Douglas v. Wainwright, 714 F. 2d 1532, 1556 (11th Cir. 1983).

Fallin defended his failure to voir dire about the death penalty by stating that he did the same thing in his only previous capital trial in 1976, and that there his tactics had been upheld by this Court. (TP. 299-300). See, Straight v. Wainwright, 442 So. 2d 827 (Fla. 1982).

This Court's decision in Straight is distinguishable, because there the issue was whether Fallin was ineffective for failing to try to "rehabilitate" jurors who said they could not vote for the death penalty. Straight, id., at 831. Regardless, trial counsel's reliance on a tactic that doomed another client five years earlier can hardly be commended. Obvious deficiencies in performance cannot be insulated from a finding of ineffectiveness by a claim of "tactics." A tactical decision not to excuse death prone and prejudiced jurors is so patently unreasonable that no competent attorney would have made it. Prejudice here should be presumed, just as prejudice was presumed in Turner, supra, and Pinder, supra, from the failure of the trial court to permit such questions.

3. Failure to object to the testimony of the Sheriff of Jacksonville

During the penalty phase of the trial, the state called Jacksonville's elected Sheriff, Dale Carson, as a witness,

ostensibly to prove the aggravating circumstance described in Fla. Stat. 921.141(5)(g), that the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws. (T. 1497-1505). The Sheriff, without objection, was permitted to discuss how the killing of a police officer affects the police department, described the police force as a family, stated that violence against police is on the increase, offered his opinion that the aggravating circumstance existed and even told the jury that nothing had happened to the last person who killed an officer from his department, "his killer is still on death row."

In Jackson v. State, 498 So. 2d 406 (Fla. 1986), similar, though less inflammatory, testimony from Sheriff Carson was presented. This Court recognized that, while Carson's testimony tended to show that the killing of a police officer does disrupt normal police activities, it did not prove that the defendant killed the officer for that purpose. Id., at 411. This Court found the testimony to be harmless error in Jackson because it was offered to prove an aggravating circumstance that was doubled with another, unquestionably valid aggravating circumstance. Id. Such is not the case here.

Fallin did not disagree that Carson's testimony was inflammatory and inadmissible; he stated that he thought he had objected to it by objecting to the trial court's decision to instruct the jury on the "disruption of

governmental function" aggravating circumstance. (TP. 272, 276-7). Fallin conceded that he did not object to the admissibility of Carson's testimony to prove the aggravating circumstance, only to the instruction on the aggravating circumstance. (TP. 274-5). The admissibility of Carson's testimony was not raised as an issue by Fallin on direct appeal. This Court held that Fallin was not ineffective for failing to raise it because "(t)his testimony was not objected to at trial...." Jones v. Wainwright, 473 So. 2d 1244, 1245-6 (Fla. 1985).

Once again, there was no tactical decision by defense counsel not to object; Fallin thought he had objected. Instead, he waived the issue and allowed the jury to hear irrelevant and inflammatory testimony from an elected public official. The failure to make proper objections is an established ground for a finding of ineffectiveness. See, Gordan v. State, 469 So. 2d 795 (Fla. 4th DCA 1985); Colts v. State, 429 So. 2d 353 (Fla. 2nd DCA 1983). Such a finding is compelled in this instance.

4. Failure to object to inflammatory and prejudicial remarks in penalty phase summation

The comments that should have been objected to are identified in the Motion to Vacate Judgment and Sentence. (R. 9-12). Fallin agreed that the remarks were improper, but excused his failure to object by stating, " I thought we would have lost more ground by calling attention to it." (TP. 278). Apparently, it did not occur to him that proper

objections can prevent further inappropriate remarks. The failure to object here was particularly egregious in a penalty phase setting, where the average citizen has no idea what is or is not a lawful consideration in deciding whether someone should live or die. The jury was permitted to consider improper matters in sentencing, because of what it was told by the prosecutor. See, Caldwell v. Mississippi, 105 S. Ct. 2633 (1985).

In addition to inflammatory remarks, the prosecutor told the jury that there were only two mitigating circumstances they could consider against three aggravating circumstances. The prosecutor specifically told the jury that "any other aspect of the defendant's character or record" could only be considered as one mitigating circumstance. (T. 1553). Fallin did not object or argue to the contrary, apparently because he agreed with the prosecutor's interpretation of the law. (TP. 284-5). Evidence had been presented that the defendant had grown up in a crime-ridden ghetto, that he was the father of four children for whom he cared, that he supported the children even though he did not live with them and had not married their mother, that he was well-liked by respected citizens in his community, and that he had been the victim of police harassment. All of these factors were lumped together as one mitigating circumstance. The result was that the jury was permitted to consider improper matters in aggravation, and was told that the only mitigating circumstances of any

substance had to be lumped together and considered as one. The improper argument, and the ineffective failure to correct it, resulted in an unreliable jury verdict. See, Caldwell, supra; Lockett v. Ohio, 98 S. Ct. 2954 (1978)

5. Failure to investigate or present mental or emotional mitigation

The testimony of Dr. Miller, a well-respected psychiatrist, established that the defendant suffered from a severe personality disorder that could have been the causative factor in the offense, if it were assumed that Jones committed it. (TP. 140-171). Miller had examined Jones to determine his competence to stand trial, and his sanity at the time of the offense, after the trial court had appointed him pursuant to Fla. R. Cr. P. 3.210. (TP. 230) Fallin had never retained his own expert to explore the possible existence of mental mitigating factors (TP. 231-3). He instead requested a court-ordered examination that would be provided to both parties and to the Court. (TP. 232). This examination was later used against the defendant on cross-examination by the state. (T. 1275-83).

Fallin conceded that he never asked Dr. Miller about possible psychiatric mitigating factors for a penalty phase trial. (TP. 233). His concern was with sanity as a legal defense. Fallin felt that he would lose credibility to present psychiatric evidence in mitigation, choosing instead to rely on any lingering doubt as the basis for a jury life recommendation. (TP. 234-5).

Though this Court upheld a similar decision by Mr. Fallin in Straight v. Wainwright, supra, it is submitted that the decision to forego even investigating the existence of psychiatric mitigation was unreasonable under the circumstances of this case.

Conclusion

Defense counsel advised Jones to create an aggravating circumstance that did not previously exist by pleading no contest to B.L.E.O. He selected a jury without making any effort to eliminate those who would automatically vote for the death penalty, and without making any effort to eliminate jurors who were racially prejudiced. At the penalty phase, Jones' lawyer allowed the jury to hear inflammatory, irrelevant, and misleading evidence and argument without objection. He never considered presenting psychiatric mitigation, and did not. Overall, the performance of Jones' lawyer was deficient, to Jones' detriment, and meets the Strickland test for ineffectiveness. A new penalty trial, before a properly selected jury, is in order.

POINT FOUR

THE STATEMENTS OF THE DEFENDANT THAT WERE USED AGAINST HIM AT TRIAL WERE OBTAINED IN VIOLATION OF HIS RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS TO THE U.S. CONSTITUTION AND ARTICLE I, SECTIONS 9 AND 16 OF THE FLORIDA CONSTITUTION.

In Ground Four of the defendant's Motion for Post-Conviction Relief, the defendant alleged that his confession should have been suppressed due to a violation of the Fifth

and Sixth Amendment and Fourteenth Amendments to the U.S. Constitution, and Article I, Sections 9 and 16 of the Florida Constitution, as interpreted by this Court in Haliburton v. State, 476 So. 2d 192 (Fla. 1985). However, at the status conference on August 26, 1986, counsel stated to the trial judge that the holding in Haliburton had been drawn into question by the United States Supreme Court decision in Moran v. Burbine, 106 S. Ct. 1135 (1986). (TP. 18-20). Indeed, the decision of this Court in Haliburton had been vacated and remanded by the United States Supreme Court for reconsideration in light of Moran. Florida v. Haliburton, 106 S. Ct. 1452 (1986). The trial court judge reviewed Moran and denied relief on this ground on June 8, 1987. (RP. 532-3). At the time, neither counsel nor the trial court had the benefit of this Court's decision in Haliburton v. State, 12 ~~FLW 506~~ (Fla. 1987). (Haliburton II). 514 So.2d 1088

At the hearing on the defendant's post-conviction motion, Jones' lawyer testified that he had called homicide detective Frank Japour at 5:00 a.m., informed Japour that he was representing Jones and told him that the police should not question Jones until he got there. (TP. 203-4). Fallin arrived at the police station at 9:00 a.m. and tried to find the defendant until 12:45 p.m., when Detective Eason emerged from an interview room with a signed confession. (TP. 205-9). Eason conceded that Jones had been returned to the police station from the hospital by "8 or 9 a.m." (T. 1109).

However, when Fallin arrived at 9:00 a.m., he was told that Jones was still in the hospital, and that he would be given access to the defendant as soon as he was brought back from the hospital. (TP. 206). The trial judge found that Fallin "...acted with diligence in contacting the police and telling them not to interview the defendant before counsel saw him." (RP. 534).

If the trial court's finding is correct, then it is clear that Jones' confession should have been suppressed under Haliburton II. As in Haliburton, defense counsel was retained by the defendant's relatives, called the police, and requested that no questioning occur until counsel arrived. As in Haliburton, the attorney went to the police station, but was not permitted to see the defendant until after a statement was obtained. As in Haliburton, the police never informed the defendant that his family had retained counsel for him. (Unfortunately, these facts were not presented to the trial judge in 1981. That the failure of defense counsel to present this evidence is a basis for a finding of ineffectiveness is relevant to Point One, above.)

This Court must determine whether Haliburton II is a change of law that should be retroactively applied to this case, within the parameters set out in Witt v. State, 387 So. 2d 922 (1980):

> ...an alleged change of law will not be considered in a capital case under Rule 3.850 unless the change: (a) emanates from this Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance. Id, at 931.

Of course, Haliburton II is a decision of this Court, based on Article I, Section 9 of the Florida Constitution, so (a) and (b) above are satisfied. The defendant in Witt raised the admissibility of his confession based upon the change in law in Brewer v. Williams, 97 S. Ct. 1232 (1977). This Court stated that this claim "could qualify for relief under Rule 3.850," but that the factual predicate prevented relief even if Brewer were retroactively applied. Witt, supra, at 930. As indicated above, the facts of this case are remarkably similar to Haliburton, so the factual predicate is there. As in Brewer, the issue relates to the admissibility of a confession obtained by police misconduct. It is submitted that Haliburton II is a development of fundamental significance in our state, and that it should be retroactively applied in this cause. Indeed, had Jones' attorney presented the factual predicate he described to the trial court judge in 1981, this Court might well have decided the Haliburton rule in Jones' original appeal.

Leo Jones should not be penalized for his attorney's failure to present relevant facts to the trial court in 1981 concerning the circumstances of Jones' statement. Those circumstances have now been presented to the trial court judge, and he has found them credible. This is the first time this Court has had the opportunity to rule upon this factual predicate in this case, and the facts show a violation of due process under Haliburton II. A new trial is in order.

CONCLUSION

Leo Jones' conviction was based upon the testimony of a witness described by all parties as unreliable, and based upon a confession that was at best obtained by police misconduct, and at worst by police co-ercion. His attorney failed to discover and present evidence that would have shown the confession to be false, that would have impeached the credibility of the crucial witness, and that would have tended to show who the real killer is. Jones' lawyer's shortcomings in the penalty phase trial led to a death recommendation by a jury selected without regard to racial prejudice, and without regard to whether they would automatically vote for death. The jury was exposed to irrelevant and inflammatory evidence and comments without objection from Jones' counsel. There can be no confidence in the underlying fairness of the verdict or sentence; Leo Jones deserves a new trial.

Respectfully submitted,

Robert J. Link, Esquire
353 East Forsyth Street
Jacksonville, Florida 32202
Phone: (904) 354-4641
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to the Office of the Attorney General, The Capitol, Tallahassee, Florida 32301 by mail this 13 day of October, 1987.

Attorney