IN THE SUPREME COURT OF FLORIDA

CASE NO.: 70,836

LEO ALEXANDER JONES,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

ROBERT J. LINK, ESQUIRE
5327 Emerson Street
Jacksonville, Florida 32207
Phone: (904) 399-4453

Attorney for Appellant

TOPICAL INDEX

TABLE OF CITATIONS

PRELIMINARY STATMENT

References to the Brief of Appellee will be by this symbol: "A.G. _____". References to the parties will be as the appeared in the lower court.

REPLY TO "STATEMENT OF THE CASE AND FACTS"

The State's brief alleges factual inaccuracies in Mr. Jones' brief. (A.G. 1). The record, however, clearly shows that the State's "actual facts" are themselves inaccurate.

Reply to FACTS: POINT I

Mr. Fallin indeed went to the scene with Assistant State Attorney Dennis Guidi, (A.G. 3), but the visit was on the same morning as the homicide, and it occurred while the police were hiding the defendant from his lawyer. (TP. 205-9).

Though the State alleges that Mr. Fallin "took the depositions of all known relevant witnesses" (A.G. 3), the record shows that he deposed witnesses he thought were relevant, based upon what the prosecutor told him. (TP. 210). It is self-evident that Mr. Fallin did not depose all known relevant witnesses, because he did not depose eyewitnesses Homer Spivey and Phillip Anderson, both of whom were listed, by name and address, on the state's discovery response.

The State alleges reasons that Mr. Fallin did not hire a private investigator to locate and interview witnesses (A.G. 2), but Fallin was asked the question specifically at the hearing, and provided this response:

> "I didn't think I needed one. I thought this was a very restricted frame within which all this took place. The majority fo these people on here (discovery response) had no knowledge whatsoever of the case and under our theory of the case there was no point in running around town." (TP. 214-5)

The State alleges Fallin located witnesses who placed the source of the gunfire at many locations. (A.G. 3). This is simply untrue. Fallin said that all witnesses in the tavern believed the shot came from the south, but that that did not really help because the defendant's apartment building, as well as the vacant lot with the tree, were both to the south of the tavern. (TP. 211; RP. 502). The witnesses were consistent, but most could not tell how far to the south the shots had been fired from.

The State infers that Homer Spivey, Phillip Anderson, and Marion Manning's testimony was incredible or unreliable, and infers that it would have been of no moment. (A.G. 4). Fallin, however, readily conceded that he would have used these witnesses had he found them for the trial. (TP. 322, 328-9, 331, 476). The State further misrepresents the testimony of these witnesses, especially that of Spivey, by stating that the gunshot flash was behind him when his back was towards Davis Street. (A.G. 4). Reference to Anderson's testimony, and the sketch of the scene, clearly demonstrates that Anderson was facing the area at the back of the vacant lot when the gunshot was fired from there. (RP. 502). The gunshot was in front of him, fired towards Davis Street, which was where the police car was driving. The police car was behind Phillip Anderson, not the flash from the gunshot at the back of the vacant lot. The State misapprehends the testimony of the "credible" witnesses Fallin did present, stating that they put the gunshot further to the north than

Spivey and Anderson. (A.G. 5). These witnesses, Betty Jackson and Nathaniel Hamilton, placed the gunshot in the vacant lot between the tavern and the defendant's apartment building, and would actually have supported Spivey and Anderson's testimony. (T. 1160-2; 1192-3). This, of course, is why Fallin would have used the witnesses if he had found them.

Contrary to the assertion in the state's brief, the state's case was in no way hurt by Fallin's objection to calling Bobby Hammond as a court's witness. (A.G. 5). Bobby Hammond testified just as the state wanted him to, and the prosecutors wre able to limit his cross-examination. (TP. 467-8). As Ed Austin said,

> "I think that we proscribed the area that we wanted to ask him based upon the Judge's ruling. I think it would have been a lot more free-flowing if he had been a Court's witness." (TP. 468).

Though the state alleges that impeachment of Officer Mundy was "vital," (A.G. 5), no one has yet explained why. When asked why it was relevant why Mundy happened to go to the defendant's apartment house, Mr. Austin failed to provide a coherent answer. (TP. 464-5). This is because there was no reason to question Mundy about why he went to Jones' building. It was apparent from discovery that he went there because he believed a prior sniper shot had come from that building. (T. 855-6, 859-60).

The state also alleges that there is no record of police "beatings," "coercion," or misconduct. (A.G. 6). The record amply demonstrates evidence of police beatings and

coercion in the testimony of Leo Jones (T. 1232-5), 1247-8), and in the pre-trial testimony of Bobby Hammond (T. 59-82). The state tries to bootstrap its case with the assertion that Jones' statement would have been suppressed if there were any misconduct. (A.G. 6). Apparently, the state wold have the Court ignore the right of the jury to determine the voluntariness of a confession, which was one of the key issues in this case. See, Crane v. Kentucky, 106 S. Ct. 2142 (1986).

The state infers that Fallin's testimony regarding his attempts to locate his client and his request that his client not be interviewed in his absence, would have been of marginal relevance at a suppression hearing. (A.G. 6). However, it would have been critical to establish the sort of misconduct prohibited by Haliburton v. State, 12 F.L.W. 507 (Fla. 1987). Indeed, had it been presented, it would probably have been accepted by the Court as true, because it was so accepted at the post-trial hearing. (RP. 534).

Reply to FACTS: POINT II

The state alleges that Glen Schofield's confession to Paul Marr is inconsistent with the defense contention that the shot came from the vacant lot. (A.G. 7). This is incorrect. The trial evidence established that both stairways to Jones' apartment were outside, that is, not enclosed within the building. Schofield did not tell Marr that he shot the policeman from inside Jones' building; he simply stated that he took the gun downstairs and shot the

policeman. (TP. 359-60). Marr, of course, could only repeat what Schofield said, whether or not it is consistent with other evidence. What is noticeably absent from the record is any motivation for Paul Marr to fabricate something that Glen Schofield told him.

Reply to FACTS: POINT III

The state's brief represents that there was a strong probability that the defendant would have been convicted of Battery on a Law Enforcement Officer and three firearms charges had he proceeded to trial in that case. (A.G. 8). As to the Battery on Law Enforcement charge, Mr. Fallin considered it only "a technical battery if they believed the officer," (TP. 248), and the defendant himself felt that he would be acquitted. (TP. 92, 99). The other three charges wee not crimes of violence and could not have been used as aggravating circumstances against the defendant in a penalty trial. Lewis v. State, 398 So. 2d 432 (Fla. 1981). Likewise, the nature of these convictions could not have been used against the defendant in the guilt trial. Johnson v. State, 380 So. 2d 1024 (Fla. 1979); McArthur v. Cook, 99 So. 2d 565 (Fla. 1957).

The state's brief describes Dr. Miller's diagnosis as an "anti-social and paranoid personality." (A.G. 8). The record shows that the diagnosis was "paranoid personality with dissociation features." (TP. 143). Dr. Miller clearly stated that this form of mental illness could have been a contributing factor towards the commission of the offense,

and possibly even a controlling factor. (TP. 146-7). Dr. Miller felt that this could have been a mitigating factor if competently presented to the jury. (TP. 162-3).

ARGUMENT I

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.

The authority cited by the State offers little support for its position. In U.S. v. Cronic, 466 U.S. 667 (1984), the Supreme Court merely held that it could not presume ineffective assistance of counsel under the facts of that case without being directed to specific errors or omissions of defense counsel. Contrary to the contention of the State, Cronic did not interpret Strickland v. Washington, 466 U.S. 688 (1984); Cronic reversed for an application of the Strickland standard. In King v. Strickland, 748 F. 2d 1462 (11th Cir. 1984), trial counsel was held ineffective for failure to thoroughly investigate possible mitigating evidence, when such evidence was available, and for failing to be a zealous advocate in the penalty phase summation even though some witnesses were presented in mitigation. If anything, King supports the defendant's position. In Foster v. Strickland, 707 F. 2d 1339 (11th Cir. 1983), defense counsel was held not to be ineffective for failing to present an insanity defense, because the defendant had ordered his counsel not to present such a defense, and

counsel had received early hospitalization and psychiatric reports that did not support an insanity defense. Of course, Mr. Jones at no time ordered Mr. Fallin not to try to prove his innocence. In Palmes v. Wainwright, 725 F. 2d 1511 (11th Cir. 1984), defense counsel decided not to raise a legal issue concerning the defendant's confession because he had investigated it and decided it was without merit. The Court found the issue to be without merit, and held that counsel was effective. Here, however, Mr. Fallin made no strategic decision not to use defense witnesses Spivey, Anderson, and Manning. Their testimony was consistent with, and much more probative of, his "other man" defense than the witnesses he did present. Finally, Fallin himself agreed that he would have used these witnesses if he had located them. There was no tactical decision not to present their testimony, because he did not know what their testimony was. For this reason, neither Griffin v. Wainwright, 760 F. 2d 1505 (11th Cir. 1985), nor Songer v. Wainwright, 733 F. 2d 788 (11th Cir. 1984), offer any support to the State's contention. In Beckham v. Wainwright, 639 F. 2d 262 (5th Cir. 1981), also cited by the State, defense counsel was held to be ineffective because he did not realize that he was exposing his client to a greater sentence by withdrawing his guilty plea and proceeding to trial. "Ignorance" is not synonymous with "tactical decision," contrary to the State's position.

None of the cases cited by the State offer support for the position it wants this Court to take: that counsel rendered effective assistance to Mr. Jones in his first degree murder trial by failing to present the exculpatory testimony of two eyewitnesses to the crime both of whom were available for trial and whose names and addresses were disclosed in discovery. This omission alone is sufficient to undermine confidence in the reliability of the outcome of this trial; when combined with the other factors, it should be readily apparent that the only proper remedy is a new trial for Leo Jones.

ARGUMENT II

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.

The State argues, first, that Glen Schofield's confession to this homicide was properly excluded as irrelevant, then that it is not true. (A.G. 14-15).

As to the contention that Schofield could have been referring to some police homicide in Jacksonville other than that of Officer Szafranski, this Court is eminently familiar with the only other police homicides in Jacksonville since 1975. Raulerson v. State, 358 So. 2d 826 (Fla. 1978); Jackson v. State, 498 So. 2d 406 (Fla. 1986). In neither of these other cases was there any contention that the defendant was not responsible for the killing. In neither

of these other cases was the police officer shot with a rifle, and in neither of these other cases could Glenn Schofield be placed near the scene. The confession clearly relates to the murder of Officer Szafranski, and it is relevant to demonstrate the reliability of the defense evidence supporting the defendant's innocence.

As to the contention that the confession is a "fable" or "pure hogwash", (A.G. 15), it is significant that the State could present no motive for Paul Marr to manufacture a story to help Leo Jones. Marr, a prison inmate, has absolutely nothing to gain by lying, and there is no reason to believe he is. Other than the testimony of the unreliable and unpredictable Bobby Hammond, there is at least as much evidence against Glen Schofield as there is against Leo Jones. Hammond, as the State points out, could have avoided liability by blaming Schofield or Jones. (A.G. 5). The fact that he placed the blame on Jones could be attributed to the fact that Hammond knew the police already had Jones in custody as a suspect when the police were questioning Hammond, or it could be due to Hammond mistaking Schofield for Jones in a darkened apartment. Given Hammond's character and conduct, Hammond's testimony is too weak a basis for dismissing the Schofield confession to Marr in such a cavalier manner.

ARGUMENT III

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.

The State argues that, because the denial of the defendant's 3.850 petition in the Battery on Law Enforcement Officer case was affirmed by the First District Court of Appeal, the competence of defense counsel in this cause has been determined as to this issue. (A.G. 16). While Mr. Fallin's effectiveness in that case may have been decided, his effectiveness in this case as a result of what he did in that case has not. The defendant would admittedly be hard pressed to show prejudice from a plea bargain in which three felony charges were dropped in exchange for a conviction on another, if that case were viewed in isolation. The issue here, however, is how that plea bargain affected the murder case. When viewed in this context there can be little question but that the result was to substantially increase the chances for a death sentence. To ignore the effect this would have on the defendnat's chances to avoid the death penalty, as Mr. Jones' lawyer did, certainly falls below the level of competence of reasonably effective assistance.

ARGUMENT IV

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.

The State's first response to this point is a thinly-veiled attack on this Court's decision in Haliburton v.

State, 12 F.L.W. 507 (Fla. 1987), under the guise of applying the criteria set forth by this Court in Witt v. State, 387 So. 2d 922 (Fla. 1980):

1. Purpose served by the new rule;
2. Extent of reliance upon the old rule;
3. Effect upon the administration of justice of retroactive application of the new rule. Id., at 926.

The state asserts that the only purpose to be served by the new rule is to hinder law enforcement. (A.G. 19). The purpose to be served by the rule, however, was well-stated by this Court in Haliburton, supra, at 507, in quoting Justice Stevens:

> (D)ue process requires fairness, integrity, and honor in the operation of the criminal justice system, and in its treatment of the citizen's cardinal constitutional protections...(P)olice interference in the attorney-client relationship is the type of governmental misconduct on a matter of central importance to the administration of justice that the Due Process Clause prohibits...Just as the government cannot conceal from a suspect material and exculpatory evidence, so too the government cannot conceal from a suspect the material fact of his attorney's communication.

As to the second prong of the Witt test, the extent of reliance upon the old rule, the state predicts a flood litigation, indicating that retroactive application will "re-open every Fifth Amendment case ever litigated in Florida." (A.G. 19). The fact of the matter is that the number of Haliburton type cases is extremely small. It is a rare situation that family or friends will retain an attorney while a suspect is in police custody, before his first appearance in court. It is even rarer that the police will refuse to permit counsel to have access to his client

during that time frame. Indeed, this Court had not even had occasion to address the issue until 1985, when it issued the first Haliburton decision. Haliburton v. State, 476 So. 2d 192 (Fla. 1985). As Justice Stevens has pointed out the weight of authority nationwide is that statements made under circumstances similar to that of Mr. Jones should be excluded. Moran v. Burbine, 106 S. Ct. 1135, 1151, n. 10, 1159 n. 41, (Stevens, J. dissenting). A reading of Escobedo v. Illinois, 378 U.S. 478 (1964), would certainly have led most police departments to err on the side of prudence and permit defense counsel to have access to clients in similiar situation. The situation herein is unique even for the Jacksonville Sheriff's Office: a fellow police officer had been killed, the evidence against the suspect was weak, and obtaining a confession was of great significance. The motivation for denying counsel access to his client could only be enhanced under such circumstances.

There is absolutely no reason to believe that deception of defendants and their lawyers so as to prevent their communicating was a common practice throughout the State of Florida prior to this Court's decision in Haliburton II. Contrary to the assertion of the state, such claims will be few and far between. There was no significant reliance on the old rule.

The third prong of the Witt test, the effect on the administration of justice, is also satisfied. Police interference with an attorney's attempts to speak to his

client are not commonplace, and the system will hardly be "choked with Haliburton claims," as the state contends (A.G. 21). The state further contends, in apparent ignorance of the record, that there was "...no verification regarding the caller and his status as the suspect's lawyer." (A.G. 21). Mr. Fallin identified himself to Detective Japour in a telephone call at 5:00 a.m. (T.P. 203-4). Japour knew it was Fallin. (T. 352, 356-7). Furthermore, Mr. Fallin went to the police station at 9:00 a.m. to speak to his client, but was not permitted to see the defendant until after he had given the incriminating statement after noon. (T.P. 207). The trial court found Mr. Fallin's testimony in this regard to be credible. (R.P. 534).

The shrill nature of the state's argument, with its parade of imaginary horribles if this claim is allowed, serves only to point out the weakness of the state's position. In reality, the effect on the administration of justice by allowing this claim will hardly be deleterious. As stated above, the very heart of the Haliburton decision is the fairness, integrity, and honor of the criminal justice system. As this Court has recognized,

> Consideration of fairness and uniformity make it very "difficult to justify depriving a persn of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases." Witt, Id., at 925 (footnote omitted).

We are hardly suggesting "a desire to make life easier for Florida criminals." (A.G. 21). We do submit that the

fairness and integrity of our system of justice requires no less than a new trial for Leo Jones.

The state argues, alternatively, that this case is factually distinguishable from Haliburton. However, the defendant was hidden from Mr. Fallin, who went to the Sheriff's Office at 9:00 a.m. and was not given access to the defendant until nearly 1:00 p.m. Furthermore the defendant was not told of his attorney's telephone calls, nor was he told of his attorney's presence in the police building, so he was misled by police.

> (T)here can be no constitutional distinction...between a deceptive misstatement and the concealment by the police of the critical fact that an attorney retained by the accused or his family has offered assistance, either by telephone or in person. Moran, Id., at 1158 (Stevens, J. dissenting), quoted with approval in Haliburton II, at 507.

The conduct of the police in this case violated the due process provision of the Florida Constitution. The remedy is a new trial.

CONCLUSION

For the foregoing reasons and authorities, Leo Jones is entitled to a new trial.

Respectfully submitted,

Robert J. Link, Esquire
5327 Emerson Street
Jacksonville, Florida 32207
Phone: (904) 399-4453

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 U.S. Mail this 24 day of December, 1987.

Attorney