IN THE SUPREME COURT OF FLORIDA

LEO JONES,

Appellant,

v. CASE NO. 78,907

STATE OF FLORIDA,

Appellee.
_____/

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

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

On May 23, 1981, Leo Jones shot and killed Officer Thomas Szafranski of the Jacksonville Sheriff's Office. Jones was arrested at the scene and later confessed. The details of the crime are adequately set forth in Jones v. State, 440 So.2d 570 (Fla.1983) and were concurred with federally in Jones v. Dugger, 928 F.2d 1020 (11th Cir.1991). Therefore, they will not be restated here.

Jones was tried by jury and convicted on October 2, 1981. In keeping with the suggestion of the advisory jury Mr. Jones was sentenced to death.

The death sentence was supported by three aggravating factors:

(1) Jones had a prior conviction for a violent felony.

(2) Jones' crime qualified as a disruption of a government function.

(3) Jones' crime was cold, calculated and premeditated.

Jones appealed his conviction and sentence to the Florida Supreme Court, raising seven claims; to wit:

(1) Whether the trial court erred in denying Jones' pretrial motion to suppress physical evidence.

(2) Whether the trial court erred in denying Jones' motion to suppress his confession.

(3) Whether the trial court erred in allowing Officer Mundy to testify to his opinion regarding the origin of a dent on the windowsill from which the sniper fired his gun.

(4) Whether the trial court erred in allowing Officer Mundy to explain why he entered Jones' apartment building.

(5) Whether the trial court improperly limited the scope of cross-examination.

(6) Whether the trial court erred in admitting into evidence a promise made by Leo Jones to "kill a pig."

(7) Whether the evidence supported the three aggravating factors.

Jones lost his direct appeal. Jones v. State, 440 So.2d (Fla.1983) [Jones I].

Jones filed a petition for writ of habeas corpus in the Florida Supreme Court alleging "ineffective assistance of appellate counsel." Relief was denied. Jones v. Wainwright, 473 So.2d 1244 (Fla.1985). [Jones II].

In 1985 Jones petitioned for post-conviction relief pursuant to Fla.R.Crim.P. 3.850, raising these issues:

(1) "Witherspoon v. Illinois" error.

(2) Ineffective assistance of trial counsel.

(3) Statistical disparities in the application of capital punishment.

(4) "Police misconduct" in obtaining Jones' confession.

(5) "Improper exclusion of black venire members."

Jones stated that he could not prevail on issues (1), (3) and (4) under current caselaw, and was granted a full evidentiary hearing on claim (2). Jones was denied relief and again appealed

(without success) to the Florida Supreme Court. Jones v. State, 528 So.2d 1171 (Fla.1988). [Jones III].

In response to a death warrant, Jones filed a successive petition for habeas corpus in the Florida Supreme Court. The petition raised seven (7) claims:

(1) A claim of error under Booth v. Maryland, 482 U.S. 492 (1987).

(2) A challenge to the "prior conviction" aggravating factor.

(3) A claim of "misuse" of psychiatric reports.

(4) A Caldwell v. Mississippi, 472 U.S. 320 (1985) claim.

(5) A challenge to the "disruption of government function" aggravating factor.

(6) A Maynard v. Cartwright, 486 U.S. 356 (1988) claim.

(7) A claim that the "burden of proof shifted" during the penalty phase.

All seven issues were rejected as procedurally barred. Jones v. Dugger, 533 So.2d 290 (Fla.1988) [Jones IV].

At this point Jones filed his first and only petition for federal "habeas corpus" relief pursuant to 28 U.S.C. § 2254. Jones raised the following claims:

(1) A "Booth" claim.

(2) A "Caldwell" claim.

(3) A "misuse of psychiatric report" claim.

(4) A "limitation of cross-examination" claim.

(5) A challenge to the aggravating factors.

(6) Ineffective assistance of trial counsel.

(7) A "Miranda" claim.

(8) Ineffective assistance of appellate counsel.

(9) "Improper" admission of his promise to "kill a pig" at trial.

(10) A challenge to the admission of opinion testimony.

(11) A claim that the jury instructions "shifted the burden of proof."

(12) A claim of factual innocence. (This claim was abandoned.) (See order and opinion, U.S.D.C., pg. 27.)

The federal district court denied relief and an appeal was taken to the Eleventh Circuit Court of Appeals. Claims (12) was not raised, having been abandoned. Jones was denied relief. Jones v. Dugger, 928 F.2d 1020 (11th Cir.1991). [Jones V].

It should also be noted that Mr. Jones filed a demand for production of state records pursuant to Ch. 119, Fla. Stat., at the time of his last death warrant. Jones ultimately obtained a writ of mandamus which was affirmed on appeal. State v. Jones, ___So.2d___ (Fla.1st DCA, case no. 88-2937, 1988). The state fully complied with the writ and Jones has made no effort to contest the state's compliance or renew any previous request.

In response to his latest death warrant, Mr. Jones filed a two-count, successive, motion for post-conviction relief on Friday, November 8, 1991. A hearing was held on Sunday, November 10, 1991, at which time Jones served an "amendment" upon the state which included a third count.

Relief was denied on procedural grounds as to all counts after Mr. Jones failed to qualify his new evidence as "newly discovered" evidence as defined by law. This appeal ensued.

The facts relevant to each of the three issues raised in circuit court are as follows:

FACTS: CLAIM I
(Ineffective Assistance of Counsel)

Mr. Jones' first claim was a renewal of his claim of "ineffective assistance of counsel" for "failure to investigate" the details of the crime. This same charge, with different witnesses, was raised in Jones' first Rule 3.850 petition.

Mr. Jones alleged that counsel failed to contact witnesses who were either known prior to trial (such as Mrs. Owens) or were easily and readily discoverable prior to trial. These witnesses are described by Mr. Jones' petition as follows:

> (1) Mrs. Owens (Nee Ferrell) - A girlfriend of a known suspect, Glen Schofield - who was listed as a witness.
>
> (2) Linda Atwater - A girlfriend of Leo Jones; discoverable through Mrs. Owens, who was allegedly with Jones on the night of the offense.

(3) Catherine Dixon - A girlfriend of Schofield's friend Tony Brown.

(4) Tony Brown - Schofield's friend.

(5) Early Gaines - A name from the police reports.

(6) Arty Hammonds - The brother of witness Bobby Hammonds.

(7) Jones' mother.

Jones did not argue this claim in the Rule 3.850 hearing despite having the opportunity to do so. The claim was dismissed as both untimely and procedurally barred as a successive claim.

FACTS: COUNT II
(New Evidence/Innocence)

Jones' second contention was that his current collateral counsel, after a "superficial investigation" (petition, pg. 48) uncovered new evidence of factual innocence. This "new" evidence is described as follows:

(1) Linda Atwater (at pg. 40) - Ms. Atwater was the same "readily discoverable" girlfriend and alibi witness of Leo Jones mentioned in claim one.

(2) Daniel Cole - Claimed to see Glen Schofield running from Leo Jones' house carrying a gun. Cole said his girlfriend, Denise Reed, knew Schofield and Jones. Cole did not state how he knew Schofield was running from "Jones' house." (pg. 41)

(3) Denise Reed - Denise Reed has known Schofield since he was a child (R 42) and thinks she saw him running down Madison

Street that night, a decade ago. She claimed that she has kept silent for a decade out of fear, although Schofield has been in prison.

(4) Patricia Owens - This is the same witness, listed in pretrial discovery, who has been "continuously available."

(5) Catherine Dixon - The person who, in Count I, was "readily available" prior to trial.

(6) Frank Pittro - An inmate who, in 1985, heard Schofield "confess" while the two men were at U.C.I. Pittro accused Schofield of being the kind of inmate who liked to "talk big and brag." (pg. 46)

(7) Donorena Harris - A CCR investigator who spoke with an inmate named Paul Marr, who, in turn, also alleged that Schofield confessed. Paul Marr, of course, was known at the time of Jones' 1986 Rule 3.850 proceeding and even testified at that time.

(8) Franklin Prince - Another inmate who alleges that Schofield "confessed" "during 1985 or 1986."

Procedurally, all of these witnesses except Pittro, Ms. Harris and Prince were known to the defense as "readily discoverable" (according to Mr. Jones) in 1981 or 1985-1986. Ms. Harris is simply a CCR investigator and not a witness to any events.

Mr. Jones, in his first Rule 3.850, alleged that Paul Marr could establish that other witnesses (Spivey and Anderson) who

thought "someone else" was the killer were correct. Jones, orally, sought to amend his Rule 3.850 petition in mid-hearing to include claims of "newly discovered evidence" but was told his oral, mid-hearing request was untimely. (TR 368).

Jones never filed a "second" Rule 3.850 petition (as he now has) nor did Jones petition for coram nobis relief. In 1988, however, Jones petitioned for federal habeas corpus relief, and in Claim XII, alleged factual innocence based upon the fact that Glen Schofield confessed to Paul Marr. (Petition, at 242).

This issue, although known and available, was not brought to the attention of the state courts until last Friday, November 8, 1991.

FACTS: COUNT III
("BRADY")

Long after trial (May 12, 1990) an inmate apparently contacted an Assistant State Attorney in Jacksonville alleging that he had information about Leo Jones. The prosecutor (Laura Starratt) was not involved in this case. This inmate, Mr. Richardson, was trying to trade information for a deal with the state. He was interviewed by the police.

This information was discovered by the newly assigned prosecutor (Mr. Jolly) late last week and was immediately disclosed to Mr. Jones without Jones having made any demand. During the Rule 3.850 hearing, Jones' attorney commended the state for this voluntary disclosure.

Apparently another inmate, Mr. Prince, contacted CCR. Mr. Prince was interviewed by investigator Harris. Prince allegedly told Ms. Harris that another inmate, John Davis, wrote to Governor Chiles several weeks ago. (ROA 202).

SUMMARY OF ARGUMENT

Mr. Jones filed an untimely and successive motion for post-conviction relief which, in three counts, raised two basic issues.

First, Jones alleged the ineffective assistance of trial counsel. This issue was essentially the same as the issue raised in Jones' first Rule 3.850 proceeding, although some additional "uncontacted" witnesses are mentioned. This claim is both time and procedurally barred.

Second, Jones alleged "factual innocence" based upon evidence he had or could have had either during his last 3.850 proceeding or at least prior to January 1, 1987 (the cutoff date for Rule 3.850 petitions). Jones tries to circumvent the procedural bars by alleging his evidence is "newly discovered." After careful review, it was determined that his evidence did not qualify as "newly discovered."

Jones also alleged "Brady" error by the state in (1) "failing" to disclose the name of an inmate who allegedly wrote to the Governor's Office (Davis) and (2) belatedly revealing the name of a second inmate who called the state, but not the prosecutor in this case, last year. Both "witnesses" were reviewed under the "newly discovered evidence" test and the court found that there was no Brady violation.

ARGUMENT: CLAIM I

WHETHER COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS CAPITAL PROCEEDING IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Jones asserts that trial counsel rendered ineffective assistance of counsel for failing to investigate and present evidence that Glen Schofield was guilty of the murder of Officer Szafranski as evidenced by the fact that Schofield in the years since Jones' conviction and death sentence "bragged to numerous people that he murdered Officer Szafranski and that Leo Jones is on death row for something he did not do."

On November 10, 1991, Judge A.C. Soud, Jr., Circuit Judge, entertained Jones' successive Rule 3.850 motion. Following oral argument on said claim, the Court concluded in his order dated November 10, 1991, as follows:

> C. Count I of the Petition (Ineffective Assistance of Counsel) alleges the names and statements of witnesses which this Court finds were known, or could have reasonably become known, by the Defendant, his attorney at trial, and/or his attorney at the collateral level at the time of his first Petition for relief filed and heard in the latter part of 1986, particularly since the Defendant, Jones, used family members to pursue investigative leads. Under the allegations of Count I, the Petition is procedurally barred by the two-year limitation proscribed in Florida Rules of Criminal Procedure 3.850.

Jones' claim that counsel rendered ineffective assistance of counsel is clearly procedurally barred and constitutes an abuse of process. The record reflects that Jones raised, investigated and litigated trial counsel's alleged failure to point an accusatory finger at Glen Schofield as the real murderer in his first Rule 3.850 petition. Jones v. State, 528 So.2d 1171 (Fla.1988). The instant claim is identical to the earlier claim wherein Jones asserted that witnesses such as Marion Manning and others, supported by the "newly discovered" Paul Marr, (who would say that Schofield had bragged about killing a Jacksonville police officer) could prove Jones' innocence. In order to enhance this previously raised claim, Jones has produced additional affidavits from individuals who allegedly saw Glen Schofield or Leo Jones that night.

It is well established that a Defendant is procedurally barred from filing a successive claim of "ineffective assistance of counsel" which alleges facts or errors known by a petitioner or reasonably discoverable by him during his prior proceeding. In Sullivan v. State, 441 So.2d 609, 612 (Fla.1983), this court observed that a Rule 3.850 may be summarily denied when it is based on grounds that have been raised in a prior post-conviction motion and decided adversely to the moveant on the merits. In Sullivan the court noted:

> Sullivan's claim of ineffective assistance of counsel was clearly raised in his previous

> motion and was decided against him on the merits. The fact that he may raise somewhat different facts to support his legal claim does not compel a different result. The Third District reached the same conclusion in Slattery v. State, 433 So.2d 615 (Fla. 3d DCA 1983). Therein Slattery sought to set aside conviction and sentence on the basis of a claim of ineffective assistance of counsel and that his guilty plea was coerced. The district court determined that these allegations had been raised in a prior motion and had been properly denied by the trial court. The district court correctly concluded: "In his second motion the appellant has raised different facts to support his allegation of ineffective assistance of counsel which are not permitted under existing Fla.R.Crim.P. 3.850. Therefore the order denying the appellant's motion is appropriate . . . ." 433 So.2d at 616.
>
> Sullivan v. State, 441 So.2d at 612-613.

See also In Re Shriner, 735 F.2d 1236 (11th Cir.1989); Francis v. State, 581 So.2d 583 (Fla.1991); Squires v. State, 565 So.2d 318 (Fla.1990) and Clark v. State, 569 So.2d 1263 (Fla.1990).

Jones has offered no cogent argument in support of reopening his procedurally barred claim. In fact, at the evidentiary hearing held November 10, 1991, no additional argument was made regarding the ineffective assistance of counsel claim. Moreover, the record reflects that the allegations made herein concern counsel's failure to contact witnesses who were either known prior to trial such as Mrs. Owens (Ferrell) or other individuals who were easily and readily discernible prior to trial. Jones alleges that witnesses Atwater, Ferrell, Brown, Dixon, et al.,

were either revealed in pretrial discovery or friends of Leo Jones or were readily discoverable by trial counsel. As such, their appearance at this late hour in support of a claim previously raised and adjudicated brings into question the earnestness in which this claim has been raised. In light of the forgoing, it is clear the trial court properly concluded that the claim was procedurally barred and Jones had not overcome said bar.

Relief should be denied as to this claim.

ARGUMENT: CLAIM II

THE TRIAL COURT DID NOT ERR IN DENYING RELIEF ON THE PETITIONER'S CLAIM OF "NEWLY DISCOVERED EVIDENCE."

Count II of the petition was presented as a claim of "actual innocence," supported by alleged "newly discovered evidence." Inasmuch as the claim of actual innocence was one which could have been raised in Mr. Jones' first Rule 3.850 petition, by coram nobis, or even by a timely "successive petition" filed prior to January 1, 1987, see Fla.R.Crim.P. 3.850, this claim is both procedurally barred and time-barred. See Francis v. State, 16 F.L.W. S461 (Fla.1991); Glock v. State, 537 So.2d 99 (Fla.1989); Kennedy v. State, 547 So.2d 912 (Fla.1989); Harich v. State, 542 So.2d 980 (Fla.1989); Straight v. State, 488 So.2d 530 (Fla.1986); (procedural bar) and Johnson v. State, 536 So.2d 1009 (Fla.1988); Bundy v. State, 538 So.2d 445 (Fla.1989) (time bar).

To overcome these procedural bars, Mr. Jones had to allege that his theory of "actual innocence" was supported by "newly discovered evidence" as defined by law.

From the outset, Jones had several problems:

(1) Much of the evidence Jones was representing as "newly discovered" was portrayed, in Count I, as evidence which existed and was readily discoverable prior to trial.

(2) In 1986 (at the first Rule 3.850 hearing) Jones' counsel called Paul Marr as a witness. (TR 354 et seq.) Marr testified that he met Schofield at U.C.I. (TR 354) and, as a jailhouse lawyer, spoke with Schofield about his case. (TR 355). Schofield confessed. (TR 356, 358). According to Marr, Schofield claimed he shot the officer, returned to rifle to Leo Jones' apartment and then escaped. (TR 359). Schofield also took time to wipe prints off the gun. (TR 360). This testimony, by Marr, in open court, placed the Schofield issue in the public record in 1986. Mr. Link asked for leave to amend his Rule 3.850 petition ore tenus to include an allegation of newly discovered evidence. (TR 368). The request was denied. (TR 368).

(3) Jones never filed a petition for coram nobis[1] or a pre-January 1, 1987, "successive" Rule 3.850 petition. Jones raised

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[1] A recognized remedy as late as 1988, when Jones raised this general issue in federal court. See Darden v. State, 521 So.2d 1103 (Fla.1988)

this issue ("Schofield has been confessing") in 1988 in federal court, but abandoned the issue as noted above.

Unless Mr. Jones can establish that his evidence qualified as "newly discovered evidence" as defined by law, Jones can not overcome the procedural and time bars confronting him.

The term "newly discovered evidence" is a term of art bearing a precise definition. Not all "new" or "recently uncovered" evidence, even if exculpatory, qualifies as "newly discovered evidence."

To qualify, the evidence must pass a three part test; to wit:

> (1) The facts upon which the petition is based must have been unknown to the defendant, his counsel and the court.
>
> (2) The facts must not have been discoverable by the use of due diligence (by counsel or the defendant).
>
> (3) The new facts must be of such a vital nature that they would conclusively have prevented the judgment.

See Hallman v. State, 371 So.2d 482 (Fla.1979);[2] Preston v. State, 531 So.2d 154 (Fla.1988); Darden v. State, 521 So.2d 1103 (Fla.1988).

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[2] Hallman, procedurally, addresses this writ of error coram nobis which was presented to an appellate court for "screening" and then referred to a trial court for an appropriate hearing. In Richardson v. State, 546 So.2d 1037 (Fla.1989) this court held that coram nobis has been supplanted by direct applications to the trial courts under Rule 3.850.

In Preston, supra, at 157, this Court held:

> "Thus, the fact that the jury might have reached a different result had it heard the newly discovered evidence does not meet the test for coram nobis. Gilliam v. State, 493 So.2d 56 (Fla. 1st DCA 1986) (third party confession exonerating defendant did not warrant relief); Tafero v. State, 406 So.2d 89 (Fla. 3d DCA 1981) (third party confession to crime and recantation of testimony by important state witnesses to fourth party insufficient)."

If we analyze Jones' proffered "newly discovered evidence" under this three-part test, we find:

> (a) Were the facts unknown by the Defendant, counsel or the court?

At trial, Jones testified on his own behalf. (R 1215 et seq.). Jones said that Glen Schofield was his roommate. (R 1215). Bobby Hammond was an overnight guest. (R 1216). Schofield allegedly owned the rifles in the apartment. (R 1216). On the night of the murder Schofield went out for the evening. (R 1217). Jones said he and Hammond watched television until Hammond became sleepy. (R 1219). Hammond went to sleep on the couch and Jones went to bed. (R 1219). All doors to the apartment were dead-bolted or slide-latched from the inside. (R 1223-1224). Jones was in bed twenty minutes when the shots were heard. (R 1221). The police arrested Jones a short time later and Jones alleged he was repeatedly beaten. (R 1228 et seq.)

At the first Rule 3.850 proceeding, Paul Marr testified that Schofield had confessed (TR 356-60).

Mr. Jones conceded in his claim of "ineffective assistance of counsel" that Mrs. Owens was listed in pretrial discovery and that other witnesses (Atwater, Dixon, Brown, Gaines, Mrs. Jesse Jones and Arty Hammond) were all readily available, even prior to trial.

Linda Atwater, Jones' "girlfriend" and "alibi," allegedly was with Jones at the time - a fact Jones would obviously have "known" if it was true. Oddly, Jones never mentioned Ms. Atwater at trial or on either Rule 3.850 or federal habeas corpus review.

Jones' mother was certainly known by Mr. Jones.

(b) Were the facts discoverable by due diligence?

Count I of this action contended that "new" witnesses Owens (Ferrell), Atwater, Dixon, Brown, Gaines, Hammond and Mrs. Jones were all "readily available," or listed in pretrial discovery. Thus, said Jones, these witnesses were all easily discoverable by due diligence and trial counsel was incompetent for not finding them (just as CCR did after a "superficial investigation"). At the November 10, 1991, hearing Mr. Jones did not even attempt to argue ineffective assistance of counsel because, as the state pointed out, the ineffectiveness allegation on its face repudiated any "due diligence" argument. Any reasoned review of Mr. Jones' "evidence" reveals the fact that it was discoverable either before trial, before his last Rule 3.850 petition or before January 1, 1987. see McClesky v. Zant, 499 U.S. ___, 113 L.Ed.2d 517 (1991). For example:

(1) Mrs. Owens (nee Ferrell)

This witness was listed in pretrial discovery and thus was available to trial and collateral counsel.

(2) Linda Atwater - Leo Jones' alibi was assuredly available through the exercise of due diligence if she was, in fact, there at all.

(3) Catherine Dixon - A witness previously identified as "readily available" through Schofield's friend (Mrs. Owens).

(4) Denise Reed - Another friend of Mr. Schofield whom CCR discovered in a "superficial investigation" ten years after trial.

(5) Daniel Cole - Denise Reed's boyfriend; discoverable through her.

(6) Paul Marr - Donorena Harris - Paul Marr was discovered in 1985 or 86 and even testified in 1986. Ms. Harris is a CCR employee who merely interviewed Mr. Marr. Paul Marr revealed to Jones' investigator that Schofield was puffing, (i.e. a braggart) to inmates at U.C.I. Any reasonable follow-up would have led to cumulative inmate hearsay testimony. (i.e. Pittro, or Prince, or Davis).

(7) Pittro/Prince - Apparently also heard Schofield "puffing" his dangerousness in 1985. Arguably, they or other inmates like them could have been uncovered through Mr. Marr.

(c) Would this evidence have "compelled" an acquittal?

Jones has two serious obstacles to overcome in this regard. First, he must overcome the proof of his guilt. Second, he must overcome the inconsistencies between the "new" evidence and the defense as put on at trial, thus showing that the jury would have been so impressed with selected, contradictory, portions of his evidence that it would have had no choice but to acquit.

Obviously, some of this "evidence" did not exist at the time of trial (i.e., the inmate-hearsay reports). This "evidence" will be considered separately.

(a) The New Evidence v. The Facts

There was overwhelming evidence of Jones' guilt.

First and foremost, Jones gave a free and voluntary confession that has withstood state and federal review. The validity of Jones' confession is not at issue.

Second, the confession was corroborated by evidence obtained after a thorough police investigation. In particular, we note:

(1) Bobby Hammond saw Jones leave the apartment with a rifle, heard shots, saw Jones return. (R 915-920).[3]

(2) The murder weapon, a 30-30 Marlin lever-action rifle, was found under Jones' bed. (Exhibit 25).

(3) The rifle had Jones' fingerprint on it. (R 1028).

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[3] In Mr. Jones' appendix 13, at (R 138) of the record, it is reported that Hammonds took and passed a polygraph on this point.

(4) An insufficient amount of material was obtained to positively identify the source of the bullet that killed Officer Szafranski; but enough of a bullet was found for the expert to eliminate a second 30-30 rifle found near Jones as the murder weapon, but the expert could not eliminate the 30-30 bearing Jones' prints. (R 1049) "Exhibit 25" "could have" fired the shot that killed Officer Szafranski. (R 1049).

(5) Jones was captured alone, in his bedroom, fully dressed, near the rifle and the rifle had a spent shell inside. (See R 1227).

Taken at face value, Jones' new evidence cannot overcome the evidence, much less "compel" a different verdict, especially since Jones confessed and the state and federal courts have upheld the validity of that confession. Jones v. State, 440 So.2d 570 (Fla.1983); Jones v. Dugger, 928 F.2d 1020 (11th Cir.1991).

Second, even given the version of events reported by Jones at trial, the affidavits would not compel a different verdict.

(1) Ms. Atwater, Jones' "alibi," was never mentioned by Jones at trial nor was she listed as a potential witness in any prior federal or state collateral proceeding.

(2) Patricia Owens did not witness anything. Glen Schofield merely refused to confess to her. (App 1).

(3) Catherine Dixon saw nothing but, the next day, found a gun in her home that she was told was a 30-30 belonging to someone else. (App 3, R 82). This mystery gun later disappeared. She did not know the make of the gun and never saw Schofield with it. (R 81-84).

(4) Daniel Cole allegedly saw Schofield running down Madison Street with a rifle at about the same time Ms. Atwater "saw" Schofield running upstairs to Leo Jones' apartment with a rifle. (R 86).

(5) Denise Reed was with Daniel Cole. (R 86).

(6) Frank Pittro said Schofield confessed to him at U.C.I. in 1985. (R 2). Pittro called Schofield a braggart, contrary to Marr who said Schofield was scared of a possible investigation and was concerned about possible witnesses. (TR 360-61).

(7) Donorena Harris - Investigator Harris again interviewed Paul Marr. At (R 101, App 7) Ms. Harris' summary of Marr's story is not as complete as his testimony in 1986. (See original Rule 3.850 transcript at 359-60). Marr had Schofield returning to Jones' apartment, wiping down the gun, hiding it and escaping without it. Remember, Jones said that Schofield did not return and Jones never said Schofield left with a rifle. Jones said the apartment doors were dead-bolted, and thus Schofield could not have come inside. Also, if Schofield hid the gun as Marr reported, Jones' other affiants could not have seen Schofield running down the road with the rifle.

It is simply not conceivable that Jones would put on evidence that contradicted his own testimony and that a jury would use this "new evidence," ignore Jones' "old evidence" and acquit him despite the strong evidence of guilt.

Finally, we must address the appearance, post trial, of Jones' various hearsay affidavits and potential inmate witnesses.

It is entirely logical to assume that Schofield - if in fact he ever confessed - simply did so in the course of puffing his credentials as a tough guy to his fellow inmates. A cop-killer in prison would enjoy prestige, especially if he got away with it. Remember, Jones' own "new" witness Frank Pittro called Schofield a braggart who claimed he had committed many crimes without getting caught.

It is well settled in Florida that the mere collection of inmate affidavits reporting confessions by third parties simply cannot satisfy the "newly discovered evidence" test. In Preston v. State, 531 So.2d 154 (Fla.1988) four inmates reported a third party confession. In Riley v. State, 433 So.2d 976 (Fla.1983), again, an affidavit from an inmate was insufficient. Third party affidavits were also rejected in Gilliam and Tafero, as discussed in Preston, supra.

In Rolle v. State, 451 So.2d 497 (Fla. 4th DCA 1984) approved 475 So.2d 210 (Fla.1985) the court stated that such affidavits had to do more than merely create conflict, they had

to "directly invalidate an essential element of the state's case." Rolle, at 499. For example, the state's only witness would have to recant. Rolle, at 499.

Given the fact that Mr. Jones' new evidence does not qualify as "newly discovered" evidence under our three part test, the claim this evidence purports to establish (i.e., "actual innocence") cannot be saved from the procedural bars facing it.

First, Jones had notice of this issue and of much of his "new evidence," including inmate evidence, and called Paul Marr as a witness in the Rule 3.850 hearing in 1986. Jones did not petition for coram nobis (though he could have) and he did not bring this successive Rule 3.850 prior to January 1, 1987, even though he had actual notice of this potential issue. In this regard, Jones is in the same procedural posture as Bundy, supra. His claim of innocence and even of "new evidence" is time-barred and is procedurally barred as a claim which could have been raised in his first 3.850 petition.

Given Jones failure to cross the threshold "new evidence test," his claim of innocence is procedurally barred.

ARGUMENT: CLAIM III

MR. JONES WAS NOT ENTITLED TO RELIEF UNDER HIS "BRADY" CLAIM.

Mr. Jones' third issue centers on the issue of whether the state violated Brady v. Maryland, 373 U.S. 83 (1964) by either tardily reporting or failing to report hearsay, but allegedly

exculpatory, information - obtained a decade after trial - to the defense. This so-called Brady material consisted of two late-appearing inmates who reported "confessions" by Schofield. One inmate (Richardson) contacted a prosecutor not involved in this case and offered to pass on information about Schofield in exchange for some benefit in his case. The other inmate, Mr. Prince, contacted Jones' lawyers and was not known to the state at all. The prosecutor in this case passed on Richardson's name to Jones' counsel on his own and without being asked.

In sum, therefore, this is what we have:

> (1) Information that did not exist during trial or any previous (state) collateral proceeding. Thus, there was nothing to ever "suppress" or to "disclose."
>
> (2) Information that was disclosed to the defense prior to the Rule 3.850 proceeding at bar.
>
> (3) Information that was not sufficient to compel relief under United States v. Bagley, 473 U.S. 667 (1986).

Mr. Jones' open-ended "Brady" claim never fully explained the basis for his entitlement to a new trial. Obviously, Jones cannot allege that the state violated his Sixth or Fourteenth Amendment rights "at" trial because this evidence did not exist at that time. Thus, the "Brady" violation had to have happened later. But when? Since the government did not possess this information prior to 1990, no constitutional violation can attach to any earlier Rule 3.850 or other proceeding in state court.

In fact, in the only collateral proceeding held since these witnesses were uncovered (one by the state, one by Jones), Mr. Jones had the relevant information due to state disclosure (Richardson) and an independent source (Prince himself). Therefore, the issue is not a "Brady" claim but, rather, a "newly discovered evidence" as discussed in Argument II above.

"Brady" did not create a rule of discovery but, rather, addressed the obligation of the government to insure a fair trial on the issue of "guilt" as guaranteed by the Constitution. Thus, there cannot be a "Brady" violation if a constitutional right is not violated. United States v. Maniktala, 934 F.2d 25 (2nd Cir.1991); United States v. Beasley, 576 F.2d 626 (5th Cir.1978); United States v. Curtis, 931 F.2d 1011 (4th Cir.1991).

While the constitution guarantees the right to trial by jury and to due process in a criminal case, the Constitution does not create any right to collateral attack nor does it recognize the existence of any special "due process" rights where some statutory collateral attack vehicle exists. That is why, for example, there is no constitutional right to collateral counsel at any stage (state or federal) of a capital case. Pennsylvania v. Finley, 481 U.S. 551 (1987); extended to capital cases in Murray v. Giarratano, 492 U.S. 1 (1989).

Florida agrees with the federal courts in holding that collateral proceedings are independent, non-criminal actions

rather than a continuation of the state's criminal prosecution. State v. Kokal, 562 So.2d 324 (Fla.1990); Provenzano v. Dugger, 561 So.2d 541 (Fla.1990). Kokal, in fact, notes that Brady is not superceded, even pretrial, by the "criminal investigative file" exemption created by § 119.03(o), Fla. Stat. That exemption, however, vanishes as to all files (Brady or not) by the time collateral attack begins.

It would seem that Brady would not apply to non-constitutional, non-criminal, proceedings anymore than it attaches to any other civil litigation. After the criminal process ends and all constitutionally protected litigation has ended, Brady is replaced by Chapter 119 and/or ordinary civil discovery. Prosecutors exposed to truly exculpatory evidence, of course, are ethically obliged under the Code of Professional Responsibility to take some appropriate action. There just does not appear to be a true "Brady" obligation that attaches to non-constitutional collateral proceedings.

In Monroe v. Butler, 883 F.2d 331 (5th Cir.1988) the federal courts addressed the State of Louisiana's "failure" to pass on, post-trial, to the defense the name of an inmate (Gallardo) who heard another inmate (Collins) confess to Monroe's crime. (Gallardo and Collins were cell-mates in a Michigan jail. Michigan authorities reported Gallardo's hearsay to Louisiana).

Initially, the federal court felt that Brady had been violated and ordered Louisiana to provide Monroe a collateral "newly discovered evidence" proceeding. A new trial was not ordered because the Brady evidence did not exist at the time of trial. Monroe v. Blackburn, 748 F.2d 958 (5th Cir.1984), cert denied, 476 U.S. 1145 (1986). Since the inmate hearsay would not have compelled the trial jury to acquit Mr. Monroe, his "new evidence" complaint was denied.

Monroe insisted that he was in fact entitled to a new trial and not just to collateral "newly discovered evidence" review. This time around, the federal court made it even more clear (in denying Monroe a new trial) that "Brady" error sufficient to require a new trial cannot exist when the evidence did not exist. Instead, post-trial exculpatory evidence is subject to traditionally coram nobis review. If existing evidence is not revealed, then the "Brady" remedy is coram nobis review, not a new trial. Monroe v. Butler, 883 F.2d 331 (5th Cir.1988).[4]

Even though Monroe implied the existence of a Brady right in a non-constitutional civil proceeding, the case cannot help Mr. Jones. Under Monroe, Jones would be entitled to disclosure of the "new" evidence and then review under Florida's three part

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[4]In Florida, the remedy would be a motion pursuant to Rule 3.850.

test for "newly discovered evidence." If the inmate hearsay cannot pass muster, Jones is not entitled to relief.

Jones had the information and had collateral review. Therefore, he has already had everything required under Monroe.

We will not leave this issue without touching on one final point. Even in an active criminal case, prosecutors are not required to pass along rumors, dry-leads, or other dubious "evidence" to the defense. United States v. Agurs, 427 U.S. 97 (1976); Morgan v. Salamak, 735 F.2d 354 (2nd Cir.1984); Moore v. Illinois, 408 U.S. 786 (1972); Giles v. Maryland, 386 U.S. 66 (1967). This Court takes the same approach. Hegwood v. State, 16 F.L.W. S120 (Fla.1991). The state is not required to actively assist the defense or to fetch evidence discoverable by the defense. Hansbrough v. State, 509 So.2d 1081 (Fla.1987).

When the police inadvertently lose, sidetrack or mishandle evidence (arguably why there was no follow-up on Mr. Richardson until recently) there is still no violation. Arizona v. Youngblood, 488 U.S. 551 (1988).

The prisons are a boundless source of unreliable information offered by unreliable people who are motivated to help themselves even at the expense of other inmates. Mr. Prince and Mr. Richardson are not, on their face, reliable sources per se. Richardson offered up Schofield while trying to negotiate a deal in an unrelated case. He was checked out and the lead was

apparently dry. Even so, his name was passed on to CCR. Mr. Prince only contacted CCR in 1991 although he had this knowledge as early as 1985.

Back in 1986, Jones' lawyers knew (courtesy of Paul Marr) that Schofield was bragging to various inmates. Counsel could have used Mr. Marr to locate other inmates. The information revealed this week was, therefore, independently obtainable even before the state, in 1990 or 1991 learned of it.

Still we return to the fact that Jones had both disclosure of this evidence and collateral review thereof. There was no Brady error, no "newly discovered evidence" and no basis for collateral relief.

CONCLUSION

Mr. Jones is not entitled to relief.

Respectfully submitted,

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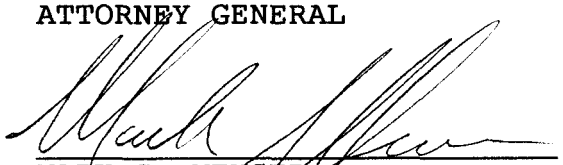
ATTORNEY GENERAL



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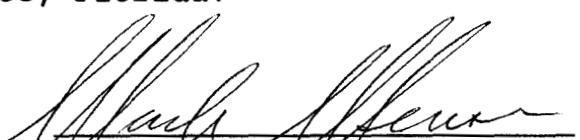
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Hand Delivery to Thomas H. Dunn, Assistant CCR, Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida.



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