IN THE SUPREME COURT OF FLORIDA

CASE NO. SC99-37

LLOYD M. JONES,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

ANSWER BRIEF

ROBERT A. BUTTERWORTH
Attorney General

MARK ROSENBLATT
Assistant Attorney General
Florida Bar Number 0664340
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 950
Miami, Florida 33131
(305) 377-5441

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INTRODUCTION

The petitioner, Lloyd M. Jones, was the defendant in the trial court and appellant in the third district court of appeals. The respondent, the State of Florida, was the prosecution in the trial court and appellee before the third district. The parties will be referred to in their capacity before this Court. The symbol "Ex." refers to exhibits contained in the appendix to this brief.

CERTIFICATE OF TYPE-SIZE

This brief is composed in 14 point Times New Roman.

SUMMARY OF THE ARGUMENT

Petitioner is entitled to be resentenced pursuant to this Court's decision in *State v. Thompson*, 25 Fla.L.Weekly S1 (Fla. December 22, 1999). Petitioner was sentenced as a violent career criminal. He committed his crimes during the period in which the statute providing for such a sentence was held unconstitutional as violative of the single subject requirement.

Petitioner, however, cannot prevail on his ineffective assistance of counsel claim. Petitioner contends that his counsel acted deficiently by failing to present, alleged, exculpatory evidence through two potential witnesses at trial.

The proffered testimony of one of the witnesses would not have directly contradicted the State's case and therefore, would not have exculpated petitioner nor changed the outcome of the trial. Similarly, the testimony of the second witness, now deceased, would not have altered the outcome of the trial in light of the victim's unequivocal direct testimony of petitioner's guilt in combination with petitioner's own admissions to police.

ARGUMENT

ISSUE I

PETITIONER IS ENTITLED TO A RESENTENCING PURSUANT TO THIS COURT'S DECISION IN *STATE v. THOMPSON*, 25 FLA.L.WEEKLY S1 (FLA., DECEMBER 22, 1999).

In *State v. Thompson*, 25 Fla.L.Weekly S1 (Fla. December 22, 1999), this Court struck, as unconstitutional, the violent career criminal portion of Fla.Stat.§ 775.084 because it violated the single subject rule contained in Article III, Section 6 of the Florida Constitution. Although this Court declined to determine the parameters of the window period during which the provision was invalid, the defendant's offense was committed within the time period during which the two adopted window periods overlap.[1] Accordingly, he has standing regardless of which window period is proper. Since petitioner was sentenced to an extended term as a violent career criminal and because his offenses were committed during the period when the statute was invalid he is entitled to be resentenced either as a habitual felon, if he qualifies, or under the guidelines, i.e., the valid laws in effect on the date petitioner committed his offense. *See, Thompson, supra*.

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[1]The window period adopted in *Thompson v. State*, 708 So.2d 315 (Fla. 2d DCA 1998) is October 1, 1995, until May 24, 1997. In *Salters v. State*, 731 So.2d 826 (Fla. 4th DCA 1999) the fourth district determined the window period to run from October 1, 1995 until October 1, 1996. The petitioner committed his offense on April 15, 1996.

ISSUE II[2]

WHETHER COUNSEL ACTED DEFICIENTLY BY NOT PRESENTING CERTAIN WITNESSES AT TRIAL.

The question before this Court is whether the petitioner's claim of ineffective assistance warrants an evidentiary hearing. The petitioner raised the ineffectiveness claim in his post conviction motion. The trial court summarily denied the claim without an evidentiary hearing and the third district affirmed.

Petitioner's specific contention is that counsel acted deficiently by failing to call two potential defense witnesses to the stand. In order to prevail on a claim of ineffective assistance petitioner must establish that counsel's alleged omissions are of such a magnitude as to constitute a serious error or substantial deficiency falling outside the range of professionally acceptable performance. *Haliburton v. Singletary,* 691 So.2d 466 (Fla. 1997). Petitioner must also demonstrate that there is a reasonable probability the deficiency altered the outcome of the proceeding. *Haliburton, supra*. Stated otherwise, the error must be so serious as to deprive defendant of a fair trial whose result is reliable. *Cherry v. State*, 659 So.2d 1069 (Fla. 1995). Finally, a court considering a claim of

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[2]Since this Court may consider all issues properly raised, once the court accepts jurisdiction, in addition to the legal issue in conflict, the respondent addresses the second issue raised by petitioner. *Jacobson v. State*, 476 So.2d 1282, 1285 (Fla. 1985); *Savore v. State*, 422 So.2d 308 (Fla. 1982).

ineffective assistance need not determine whether counsel's performance was deficient when it is clear that the alleged deficiency was not prejudicial. *Torres-Arboleda v. Dugger*, 636 So.2d 1321 (Fla. 1994).

The facts of the case are as follows as outlined in the decision below:

> The appellant was charged with and convicted of burglary of an unoccupied conveyance. Simply stated, he was charged with breaking into the victim's car and stealing a toolbox. His defense was misidentification. The case proceeded to trial by jury where the victim, Stirling Baker, testified that on the date in question, he had fallen asleep in his home in the afternoon hours, and was awaken-ed to the sounds of breaking glass outside of his home. When Baker looked out of the window, he saw that the driver's side window to his car had been shattered and saw the appellant, whom he recognized from the neighborhood, running away with his (Baker's) toolbox. Baker initially yelled out at the appellant and later decided to pursue the appellant in his automobile. After his efforts to locate the appellant were

unsuccessful, Baker returned to his home. He testified that it was "late" when he decided to call the police.

Police Officer Luis Fernandez then testified that he responded to the victim's call at about 3:55 a.m. and it was his understanding that the crime had been committed a short time before his arrival. After the victim gave him a description of the appellant, he and another police officer canvassed the neighborhood. Some individuals in the neighborhood informed them where the appellant might be located and the police proceeded to that location. Upon their arrival, they arrested the appellant and administered *Miranda* warnings.[3] Officer Fernandez testified that after the *Miranda* warnings were administered, the appellant offered to return the toolbox to the victim the following day.[4]

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[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[4] The arresting officer testified:

> Q. And did he make any statements to you?
>
> A. While in custody the defendant stated that -- let's see. He said -- basically he said I'll get his tools back because they're closed now and

> After the appellant made the offer, the officer transported the appellant to the victim's home where the victim made a positive identification. While at the victim's home, on his own accord and without any prodding by the officers, the appellant offered to return the toolbox if the victim agreed not to press charges. The victim declined this offer.
>
> After the state rested, the appellant took the stand to testify on his own behalf. Although he denied burglarizing the victim's car and stealing the toolbox, he acknowledged that after his arrest, he offered to return the toolbox to the victim. The defense rested. The jury returned a guilty verdict and the appellant was sentenced as a violent career criminal pursuant to section 775.084, Florida Statutes (1995).

Petitioner contends that trial counsel should have investigated and possibly called two witnesses at trial, namely, Robin Chimilio and Johnny Morill. According to petitioner, both witnesses would allegedly have provided exculpatory evidence.

> he couldn't get them at this time. This is about 3:30 in the morning or possibly a little later. He couldn't get his tools, he couldn't get the old man's tools at this time, if you wait he would get them back tomorrow.

According to the petitioner, the first witness, Robin Chimilio, would have testified that he was with her at the time of the crime. However, the affidavit filed by Chimilio (attached to the post-conviction motion) states only that the petitioner was with her after 5:00 p.m. on the day of the offense. In her deposition before the Assistant State Attorney, Chimilio likewise stated that the petitioner arrived at her home around 5:00 p.m. More importantly, however, she stated that she did not know about the petitioner's activities prior to his arrival. Since the victim testified that the crime took place sometime during the afternoon, while it was still daylight, (T. 114) and, thus, could have taken place before 5:00 p.m., Chimilio's testimony would not necessarily have contradicted the victim's testimony, nor would it have established that defendant could not have committed the crime sometime before 5:00 p.m. Accordingly, Chimilio's affidavit does not support an alibi defense and any testimony inconsistent therewith would not have changed the outcome of the trial. *Strickland v. Washington*, 466 U.S. 668 (1984). Therefore, petitioner cannot establish he was prejudiced by counsel's alleged failure to call Chimilio to the stand.

Furthermore, petitioner acknowledged in his motion for post conviction relief that his counsel chose not to call Chimilio because she had an extensive criminal record. (*See* motion at page 7a). This has been held to be a sound strategic reason for not calling a witness. *See Stacy v. Solem*, 801 F.2d 1048 (8th Cir. 1986)(Counsel not ineffective for

failing to call witness where attorney discovered before trial that witness was convicted felon whose credibility was questionable). *See also generally Cooley v. State*, 642 So.2d 108 (Fla. 3d DCA 1994)(Absent extraordinary circumstances, failure of counsel to call witnesses is not ground for collateral attack).

In *Cooley*, the third district concluded that the failure to call witnesses does not constitute ineffective assistance when there is ample evidence contradicting the testimony the witnesses would have given. At trial, the victim testified that he personally witnessed the petitioner, with whom he was very familiar since the petitioner was his neighbor, running from his vehicle with a tool box in hand immediately after he heard the window on his car shatter. (T. 107-109). In addition, the defendant himself made admissions to the police when he informed one of the officers, upon being arrested, that he would return the stolen tool box to the victim the following day. (T. 125-126). These admissions and the victim's testimony would not have been overcome by the testimony of the witnesses petitioner contends should have been called.

The evidence, thus, renders meritless any claim regarding the failure to call the second witness, Johnny Morill, who is now deceased, to the stand.[5] According to an affidavit filed by the defendant's brother, Morill had told him that he was the person who

[5] It is noted that even if the failure to secure Morill as a witness constitutes ineffective assistance, it would be futile to grant a retrial because Morill is deceased and his statements would constitute inadmissible hearsay.

informed the victim about the burglary after seeing the broken car window. If this is true it could mean that the victim did not witness the petitioner fleeing from the scene.

In the first instance, the victim's highly credible testimony directly contradicts Morill's version of events. Second, the petitioner essentially admitted to having committed the burglary by informing the police he would return the stolen tools to the victim. This evidence serves to render harmless any inadequacy on the part of counsel in failing to secure the presence of Morill as a witness. Accordingly, petitioner has wholly failed to establish the requisite prejudice necessary to support an ineffective assistance claim.

CONCLUSION

The petitioner is entitled to have his sentence as a violent career criminal vacated because he committed his offense during the period in which that portion of Fla.Stat. §775.084 providing for such sentencing was held unconstitutional. Petitioner's ineffective assistance of trial counsel claim, however, is without merit. Counsel's decision not to call the alleged witnesses was sound trial strategy. More importantly, petitioner is unable to establish the requisite prejudice from the failure to call the witnesses to testify.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

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MARK ROSENBLATT
Assistant Attorney General

Florida Bar Number 0664340
Office of the Attorney General
Department of Legal Affairs
444 Brickell Avenue, Suite 950
Miami, Florida 33131
(305) 377-5441
Fax: 377-5655

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief was mailed this ____ day of February, 2000 to Lloyd M. Jones, DC# 083987, Everglades Correctional Institution, 1601 S.W. 187th Avenue, P.O. Box 659001, Miami, Florida 33185.

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MARK ROSENBLATT
Assistant Attorney General

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