

ORIGINAL

IN THE SUPREME COURT OF FLORIDA

ALWIN J. JACOBS

PETITIONER / DEFENDANT

FILED
THOMAS D. HALL

APR 29 2002

CLERK, SUPREME COURT
BY

v.

CASE NO: SC02-107

DISTRICT COURT NO: 3D01-573

STATE OF FLORIDA

RESPONDENT / PLAINTIFF

AMENDED INITIAL BRIEF
FLORIDA SUPREME COURT
"DIRECT CONFLICT"

ALWIN J. JACOBS, 230659
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STATEMENT OF CASE AND FACTS

PETITIONER WAS TRIED AND CONVICTED IN THE ELEVENTH JUDICIAL CIRCUIT COURT IN AND FOR DADE COUNTY FLORIDA.

TRIAL COMMENCED ON JUNE 8 1999 AND THE JURY RETURNED A GUILTY VERDICT ON JUNE 9, 1999. FINDING THE PETITIONER GUILTY OF: BURGLARY OF AN UNOCCUPIED DWELLING PETITE THEFT AS REDUCED AND CRIMINAL MISCHIEF 200⁰⁰/LESS

ON AUGUST 11, 1999 THE PETITIONER WAS ADJUDICATED AS AN HABITUAL FELONY OFFENDER AND SENTENCED TO 67 MONTHS IMPRISONMENT FOLLOWED BY 24 MONTHS COMMUNITY CONTROL FOLLOWED BY 60 MONTHS PROBATION AND TIME SERVED ON THE TWO MISDEAMEANOR COUNTS.

THE PETITIONER FILED A DIRECT APPEAL TO THE THIRD DISTRICT COURT OF APPEAL WHICH WAS PER CURIAM AFFIRMED ON APRIL 19 2000.

ON SEPTEMBER 10, 2000 THE PETITIONER FILED A PETITION FOR WRIT OF HABEAS CORPUS IN THE THIRD DISTRICT COURT OF APPEAL WHICH WAS ALSO PER CURIAM AFFIRMED.

ON NOVEMBER 1, 2000 THE PETITIONER FILED HIS INITIAL MOTION 3.850 PURSUANT TO F. R. APP. P. 3.850 2000 IN THE ELEVENTH JUDICIAL CIRCUIT COURT IN

AND FOR DADE COUNTY FLORIDA. THIS MOTION WAS DENIED AT THE CIRCUIT COURT LEVEL AND APPEALED TO THE THIRD DISTRICT COURT OF APPEAL WHO PER CURIAM AFFIRMED HIS CONVICTION BY MAJORITY WITH OPINION AND ONE DISSENTING OPINION BY SENIOR JUDGE COPE.

PETITIONER FILED A NOTICE TO INVOKE DISCRETIONAL JURISDICTION IN THE FLORIDA SUPREME COURT ON JANUARY 15, 2000

PETITIONER FILED A MOTION TO REINSTATE HIS APPLICATION FOR DISCRETIONAL JURISDICTION OF THE SUPREME COURT AND RECEIVED A RULING ALLOWING HIM TO DO SO ALONG WITH AN ORDER TO FILE AN AMENDED BRIEF, RECEIVED BY THE PETITIONER ON APRIL 19 2002.

THIS TIMELY FILED AMENDED BRIEF FOLLOWS;

SUMMARY OF ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL ERRED WHEN IT FAILED TO COMPLY WITH THE RULING IN HIGHSMITH VS. STATE, 613 SO.2D 825 (1ST D.C.A. 1993) AND FURTHER CREATED CONFLICTS IN RULINGS IN PALMER V. STATE 683 SO.2D 678 (FLA 4TH DCA); FLORES V. STATE, 662 SO.2D 1350 (FLA 2ND DCA 1995) AS WELL AS THE THIRD DISTRICT COURT OF APPEAL'S OWN DECISION IN PHILLIPS VS. STATE, 687 SO.2D 915 (FLA 3RD DCA 1997)

ARGUMENT THREE IN THE DEFENDANTS 3.850 MOTION FOR POST-CONVICTION RELIEF MET ALL THE REQUIREMENTS OF A PROPER "HIGHSMITH" CLAIM AND THE THIRD DISTRICT COURT OF APPEAL FAILED TO REMAND FOR AN EVIDENTIARY HEARING AS PER PALMER, FLORES, AND PHILLIPS, SUPRA;

IN THE THIRD DISTRICT COURT OF APPEAL'S WRITTEN OPINION JUDGE COPE ADDRESSES THIS CONFLICT IN HIS DISSENTING OPINION.

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL ERRED IN NOT REMANDING THE DEFENDANTS FOR AN EVIDENTIARY HEARING ON GROUND THREE OF HIS 3.850 MOTION FOR POST-CONVICTION RELIEF, AND CREATED A CONFLICT IN RULINGS IN OTHER DISTRICT COURT OF APPEAL AS WELL AS IN THE THIRD DISTRICT ITSELF.

WHERE COUNSEL NEGLECTED TO PROPERLY INVESTIGATE THE CASE PRIOR TO TRIAL THE ISSUE IS PROPERLY RAISED IN POST-CONVICTION PROCEEDINGS. SEE: CAMPBELL V STATE, 616 SO.2D 995 (FLA 2ND DCA 1992)

WHERE A DEFENDANT PRESENTS A FACIALLY SUFFICIENT CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL FOR INADEQUATELY INVESTIGATING HIS CASE AND PREPARING FOR TRIAL AT A MINIMUM AN EVIDENTIARY HEARING MUST BE HELD, SEE: HARRIS V. STATE, 704 SO.2D 1067 (FLA 1ST DCA 1997)

WHERE A DEFENDANT RAISES AN ISSUE OF COUNSEL'S FAILURE TO PRESENT ALIBI WITNESSES A PROPER "HIGHSMITH" CLAIM IS COGNIZABLE: SEE: HARRIS, SUPRA IN HIGHSMITH V. STATE, 617 SO.2D 825 (FLA 1ST DCA 1993) HIGHSMITH AT 826 SETS FORTH THE REQUIREMENTS TO STATE A FACIALLY SUFFICIENT CLAIM:

[1] IN CASES INVOLVING CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL BASED ON COUNSEL'S ALLEGED FAILURE TO INVESTIGATE AND TO INTERVIEW WITNESSES. A FACIALLY SUFFICIENT MOTION MUST INCLUDE THE FOLLOWING ALLEGATIONS:

- (1) THE IDENTITY OF THE PROSPECTIVE WITNESSES;
- (2) THE SUBSTANCE OF THE WITNESSES TESTIMONY;
- (3) AN EXPLANATION AS TO HOW THE OMISSION OF THE EVIDENCE PREJUDICED THE OUTCOME OF THE TRIAL:

SEE: SOREMAN V. STATE 549 SO.2D 686 (FLA 1ST DCA 1989)

WHERE A SUFFICIENT "HIGHSMITH" CLAIM IS PLED, AN EVIDENTIARY HEARING MUST BE HELD. SEE: PALMER V. STATE 683 SO.2D 678 (FLA. 4TH DCA 1996); FLORES V. STATE, 662 SO.2D 1350 (FLA 2ND DCA 1995) AND THE THIRD DISTRICT COURTS OWN DECISION IN PHILLIPS V. STATE 687 SO.2D 915 (FLA 3RD DCA 1997) AND COHEN V STATE, 775 SO.2D 336 (FLA 2ND DCA 2000) AND HONORS V STATE, 752 SO.2D 1234 - 1236 (FLA. 2ND DCA 2000)

IN PALMER, SUPRA: THE FOURTH DISTRICT SUPPORTED THE PETITIONER'S ALLEGATION WHEN HE ALLEGED THAT COUNSEL WAS INEFFECTIVE FOR FAILING TO CALL WITNESSES WHOSE TESTIMONY WOULD HAVE BEEN FAVORABLE TO THE DEFENSE.

IN HONORS SUPRA THE SECOND DISTRICT COURT OF

APPEAL RULED THAT "FAILURE TO INVESTIGATE OR CALL EXCULPATORY WITNESSES PRESENTS A PRIMA-FACIE SHOWING OF ENTITLEMENT TO RELIEF, SUBJECT TO REBUTTAL BY EVIDENCE FROM THE RECORD OR TESTIMONY AT AN EVIDENTIARY HEARING.

IN THIS INSTANT CASE NO SUCH REBUTTAL EVIDENCE EXISTS. THE DEFENSE COUNSEL FILED A TIMELY MOTION/ NOTICE OF HIS INTENTION TO RELY ON THESE TWO ALIBI WITNESSES. AND FURTHER NO EVIDENTIARY HEARING WAS HELD.

HERE THERE EXISTS A CLEAR CONFLICT BETWEEN THIS DECISION IN THIS INSTANT CASE AND THOSE CASES AFOREMENTIONED.

IN ARTICLE V SECTION 3(B)(3) FLORIDA CONSTITUTIONAL HOLD'S THAT THE FLORIDA SUPREME COURT "MAY REVIEW ANY DECISIONS OF A DISTRICT COURT OF APPEAL ... THAT MAY EXPRESSLY AND DIRECTLY CONFLICT WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL OR THE SUPREME COURT ON THE SAME QUESTION OF LAW."

AS NOTED IN APPENDIX "A" THE PETITIONER'S CLAIM THREE OF HIS 3.850 MOTION FOR POST-CONVICTION RELIEF AND APPENDIX "B" PETITIONER'S MEMORANDUM OF LAW FOR THE ABOVE MENTIONED CLAIM THREE, THE PETITIONER HAS MET ALL THE REQUIREMENTS OF A PROPER "HIGHSMITH" CLAIM THUS CREATING A CONFLICT IN THEIR MAJORITY

RULING AND THE AFOREMENTIONED CASE LAW AND FACTS PRESENTED IN THIS BRIEF AND IN SUPPORT OF THE PETITIONER'S ALLEGATION OF SAID DIRECT CONFLICT.

IN FURTHER SUPPORT FLA. R. APP. P. 9.140 (g) STATES " UNLESS THE RECORD SHOWS CONCLUSIVELY THAT THE APPELLANT IS ENTITLED TO NO RELIEF THE ORDER SHALL BE REVERSED AND THE CAUSE REMANDED FOR AN EVIDENTIARY HEARING."

HERE THE RECORD SUPPORTS NO SUCH CONCLUSION. THERE EXISTS A CLEAR AND DIRECT CONFLICT AS SUPPORTED BY THE DISSENTING OPINION OF THE HONORABLE JUDGE COPE. AND THIS ISSUE SHOULD BE REMANDED TO THE CIRCUIT COURT FOR AN EVIDENTIARY HEARING.

CONCLUSION

BASED ON THE FOREGOING FACTS AND LAW'S
THE PETITIONER MOVES THIS HONORABLE COURT TO FIND
IN HIS FAVOR AND DIRECT THE THIRD DISTRICT COURT OF
APPEAL TO ISSUE AN ORDER TO THE ELEVENTH CIRCUIT
COURT TO HOLD AN EVIDENTIARY HEARING IN LIEU OF
THE EXISTING DIRECT CONFLICT THAT EXISTS IN THIS RULING
UNDER ATTACK AND THOSE IN THE AFOREMENTIONED CASE'S
IN SUPPORT OF THIS PETITION

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A TRUE AND CORRECT
COPY OF THIS FOREGOING BRIEF HAS BEEN MAILED
TO THE OFFICE OF THE ATTORNEY GENERAL AT
THE CAPITOL PL-01 TALLAHASSEE FLA. 32399-1050
ON THIS 24th DAY OF APRIL 2001

RESPECTFULLY SUBMITTED

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