

IN THE SUPREME COURT OF FLORIDA

NO. SC00-660

CLARENCE JONES,

Petitioner,

v.

MICHAEL W. MOORE, Secretary,
Department of Corrections,
State of Florida,

Respondent.

REPLY TO RESPONSE TO
PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, Clarence Jones, through counsel, submits this reply to Respondent's response to Mr. Jones' Petition For Writ Of Habeas Corpus. As to matters not addressed in this reply, Mr. Jones relies upon the discussion presented in the petition.

CLAIM I

MR. JONES WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL TO THE FLORIDA SUPREME COURT AS REQUIRED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I §§ 9, 16(a) AND 17 OF THE CONSTITUTION OF THE STATE OF FLORIDA.

Respondent argues that direct appeal counsel need not raise every conceivable claim to be effective because doing so may dilute the impact of the stronger issues (Response at 3). However, Respondent makes no argument that the issues appellate counsel neglected to raise in Mr. Jones' direct appeal would have diluted the impact of the issues appellate counsel did raise nor that the issues appellate counsel raised were stronger than those appellate counsel failed to raise. As Mr. Jones' petition argues, appellate counsel's direct appeal presentation demonstrates a lack of advocacy rather than a decision to emphasize certain issues over others. Indeed, as this Court pointed out in its direct appeal opinion, in the first issue raised on direct appeal, appellate counsel failed to even identify the jurors whose exclusion counsel was challenging. Jones v. State, 580 So. 2d 143, 145 (Fla. 1991).

Respondent argues appellate counsel should be presumed not to have been ineffective because appellate counsel was also Mr. Jones' trial counsel (Response at 3-4). To the contrary, the fact that appellate counsel was also trial

counsel illustrates appellate counsel's ineffectiveness: as trial counsel, he raised objections which he believed were supported by the law; however, then as appellate counsel, he simply omitted these meritorious issues, a decision born of neglect rather than of any reasonable strategy.

A. THE STATE'S INTRODUCTION OF IRRELEVANT, PREJUDICIAL AND INFLAMMATORY EVIDENCE OF OTHER CRIMES AND BAD ACTS DEPRIVED MR. JONES OF A FAIR TRIAL, UNDERMINED THE RELIABILITY OF THE JURY'S GUILT/INNOCENCE AND SENTENCING DETERMINATIONS, AND VIOLATED THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

While Respondent castigates Mr. Jones for addressing the merits of the issues omitted by appellate counsel (Response at 4-5), the merits of these issues necessarily inform the decision whether appellate counsel was ineffective. A petitioner alleging ineffective assistance of appellate counsel is required to identify the specific act or omission which the petitioner contends establishes ineffectiveness. See Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985). This is what Mr. Jones' petition does. In assessing a claim that appellate counsel was ineffective, this Court looks to the merits of the issues which the petitioner alleges were omitted. For example, in Wilson, the Court determined

appellate counsel was ineffective because, inter alia, counsel failed to raise a meritorious issue. 474 So. 2d at 1163-64. In Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986), the Court found appellate counsel ineffective because the merits of the omitted issue required a new sentencing proceeding. Thus, it is entirely appropriate that a habeas corpus petition address the merits of omitted issues.

Respondent argues that evidence regarding Mr. Jones' and his codefendants' escape from a Maryland prison was "fundamental to an understanding of this crime" (Response at 8). According to Respondent, the facts that were "fundamental" were "[t]he fact that the defendants were escapees, and their expressed determination not to go back alive" (Id.).

Respondent does not argue that the details of the prison escape were "fundamental" to understanding the crime, and thus makes Mr. Jones' point: the details of the escape were irrelevant and highly inflammatory. After all, as Respondent points out, the state had already admitted

evidence on the points that Mr. Jones and his codefendants were prison escapees and that they had said they were not going back to prison. The details of the escape do nothing to establish these facts and thus were irrelevant.

Respondent argues Mr. Jones' present argument is a Williams rule argument, not a relevancy argument (Response at 9). However, Mr. Jones is arguing both (See Petition at 12 ("the evidence had no similarity to the charges against Mr. Jones and was irrelevant to the facts in issue at trial")) (emphasis supplied).

As to the photographs of the defendants with guns and money, Respondent first argues, "Judge Padavano did not, as Jones now suggests (Petition at 10), fail to evaluate whether the relevance of these photos was outweighed by unfair prejudice" (Response at 11). It is not clear how Mr. Jones' petition makes such a suggestion, since in order for the photographs to have been admitted, the court had to have ruled on the defense objections that the photographs were irrelevant and unfairly prejudicial.

Respondent next argues that the defense objected to only

one photograph as suggesting additional crimes (Response at 11-12). However, the court clearly understood that all of the photographs suggested additional crimes:

Well, there is no question that there is prejudicial information in these photographs. But the photographs are relevant and, as I say, it's not my function to exclude prejudicial evidence, just that which is irrelevant.

I think all these photographs are admissible with the personal information taken off them which is not relevant and can be deleted. So I am going to deny the Defense objection.

I mean I am not concerned that it suggests the commission of another crime. All of these photographs suggest the commission of another crime for that matter.

(R. 2096). Further, as Mr. Jones' petition points out, the defense objection to the admission of the photographs was that they were not relevant and that they suggested additional crimes (Petition at 10, citing R. 2086, 2092, 2096). Objections to the admitted photographs were preserved for appeal.

Respondent argues that a depiction of the codefendants with money was harmless because Beverly Harris testified about the codefendants doing things which required spending

money (Response at 12). However, such testimony is a far cry in its potential for unfair prejudice from a photographic depiction of the codefendants with a pile of currency.

B. THE TRIAL COURT'S DENIAL OF MR. JONES' MOTION TO SEVER HIS TRIAL FROM THAT OF HIS CODEFENDANT DEPRIVED MR. JONES OF A FAIR TRIAL AND VIOLATED THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Respondent argues that appellate counsel "did not raise the denial of severance *per se*, but did contend in his Issue III that Judge Padavano had erred in admitting Bennett's testimony, and it is plain that the denial of severance was the real issue" (Response at 14). First, this Court did not understand this argument of the direct appeal to be raising a severance issue. The Court's entire discussion of this direct appeal issue was the following:

As his final challenge to the guilt phase, Jones argues that introducing evidence of Griffin's prior attempted murder of a police officer unduly prejudiced him. The court carefully instructed the jury that this evidence went solely to Griffin and had nothing to do with Jones. On the totality of the circumstances we see no error regarding this issue.

Jones, 580 So. 2d at 146.

Second, appellate counsel captioned this issue as "WHETHER OR NOT THE COURT ERRED IN ADMITTING WILLIAMS RULE EVIDENCE AGAINST THE CO-DEFENDANT? (Initial Brief on direct appeal at 24). This is the issue this Court's direct appeal opinion addressed.

Third, while appellate counsel's discussion of this issue mentioned that the trial court denied the motion to sever made after Bennett's testimony (Initial Brief on direct appeal at 24), the brief did not mention the other motions to sever or the rulings on those motions. Rather, the brief discussed only the issue raised by Bennett's testimony and discussed that issue in terms of a Williams rule argument.

Respondent argues appellate counsel's citation to cases raising severance issues means that "[t]he Williams rule issue Jones raised in Claim III of his brief on direct appeal was merely a surrogate for his denial of severance claim" (Response at 14-15). However, this argument does not address appellate counsel's failure to point out the other motions to sever or the bases for those motions. As set

forth in the petition, the bases for the other motions to sever were different from the objection to Bennett's testimony.

According to Respondent's argument, this Court should have divined from Issue III of the direct appeal brief that appellate counsel was challenging the denial of all the motions for severance. However, this Court has explained:

[O]ur judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an art, not a science.

Wilson, 474 So.2d at 1165.

CONCLUSION

Based upon the discussion and citation to authority presented in this reply and in the petition, Mr. Jones respectfully urges this Court to grant habeas corpus relief.

I HEREBY CERTIFY that a true copy of the foregoing Reply to Response to Petition For Writ Of Habeas Corpus has been furnished by United States Mail, first-class postage prepaid, to all counsel of record on May 30, 2000.

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