

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-2424

RANDALL SCOTT JONES,

Petitioner,

v.

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

Respondent.

REPLY TO STATE'S RESPONSE TO
PETITION FOR WRIT OF HABEAS CORPUS

Robert T. Strain
Florida Bar No. 325961
Assistant CCRC

Elizabeth A. Williams
Florida Bar No. 0967350
Staff Attorney

CAPITAL COLLATERAL REGIONAL
COUNSEL - MIDDLE REGION
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619-1136
(813) 740-3544
COUNSEL FOR PETITIONER

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CLAIM I

MR. JONES' COUNSEL CONCEDED GUILT WITHOUT SUBSTANTIALLY CHALLENGING THE STATE'S CASE IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR NOT RAISING THIS ERROR ON DIRECT APPEAL.

In its response to Claim I of Mr. Jones' Petition for Writ of Habeas Corpus, Respondent states that habeas relief on this claim should be denied for the following reasons:

- "this issue could not have been brought on direct appeal"¹; and
- "neither deficiency [of counsel] or prejudice has been shown in this case . . . [therefore, the] current claim would not have been successful even if presented in Jones' direct appeal"²

Petitioner asserts that neither of the above listed reasons for denial are supported by the record or current law as applied to this case.

The Respondent argues that appellate counsel could not seek direct relief from this Court for the error which occurred when trial counsel conceded Mr. Jones' guilt to the jury. While

¹ Response to Petition for Writ of Habeas Corpus, p. 13.

² Id. at p. 12.

claims of ineffective assistance of counsel are most often addressed in post-conviction motions, there exist circumstances in which the deficiencies of trial counsel are so obvious and prejudicial that the harm inflicted rises to the level of fundamental error.³ Petitioner asserts that appellate counsel had a duty to raise the issue of trial counsel's denial of petitioner's fundamental constitutional right to have his guilt or innocence decided by the jury.

The resulting harm to Mr. Jones in the instant case is well recognized by the courts.⁴ In fact, this very issue was considered by this Court on direct appeal in Nixon.⁵ In Nixon, the defendant argued that trial counsel's concession of guilt resulted in a "complete breakdown in the adversarial process which resulted in a complete denial of his right to counsel" and

³ Hargrave v. State, 427 So.2d 713 at 715 (Fla. 1983) ("If an impropriety at trial rises to the level of a due process violation of a fundamental constitutional right, it may be considered fundamental error which can be raised on appeal in spite of a failure to object at trial.").

⁴ See, e.g. United States v. Cronin, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); Wiley v. Sowders, 647 F.2d 642 (6th Cir.), cert. denied, 454 U.S. 1091, 102 S.Ct. 656, 70 L.Ed. 630 (1981); and State v. Harbison, 315 N.C. 175, 337 S.E.2d 504 (1985).

⁵ Nixon v. State, 572 So. 2d 1336 (Fla. 1990).

therefore constituted ineffectiveness *per se* as held in Cronic.⁶ This court, citing Hattery,⁷ which held that defense counsel is *per se* ineffective for conceding defendant's guilt unless the record shows defendant consented to this strategy, sought to supplement the record in Nixon after finding the initial record on appeal insufficient to resolve the issue of consent. Ultimately, the court declined to rule on the claim solely because the Nixon defendant refused to waive attorney-client privilege and thus the court could not determine if the defendant consented to the concession.⁸ Further aggravating the situation in Nixon, the trial court hearing the defendant's subsequent post-conviction motion refused to grant an evidentiary hearing on the issue of the defendant's consent.⁹ Therefore, when this Court considered the matter again in Nixon's post-conviction appeal, the Court "still [did] not have the answer it [had] been seeking for the last eleven years".¹⁰ Consequently, the matter was remanded by this Court for an

⁶ Cronic, 466 U.S. at 658-60.

⁷ People v. Hattery 109 Ill.2d. 449, 94 Ill.Dec. 514, 488 N.E.2d 513 (1985).

⁸ Nixon, 572 So.2d at 1340.

⁹ Nixon v. Singletary, 758 So.2d 618 (Fla. 2000)

¹⁰ Id. at 624.

evidentiary hearing in order to protect Nixon's right to due process.¹¹

In the instant case, Mr. Jones deserves the same protection of his due process rights. Like the defendant in Nixon, Mr. Jones never explicitly consented to trial counsel's concession of guilt during closing argument. However, unlike the defendant in Nixon, Mr. Jones was never accorded an opportunity to have this Court consider his lack of consent because his appellate attorney failed to raise the issue.

Respondent counters this assertion regarding appellate counsel's ineffectiveness by stating that, in any event, the claim is without merit. Relying on Atwater, Respondent argues that the concession of guilt during closing argument is an acceptable trial strategy and, therefore, does not deny the accused effective assistance of counsel.¹² However, in Atwater, this court also made it clear that "not every situation permits trial counsel to make a concession on a defendant's behalf without the defendant's consent."¹³ This Court emphasized that

¹¹ Id.

¹² Response at p. 14.

¹³ Atwater, 788 So.2d at 231.

the concession in Atwater occurred during rebuttal and after a "meaningful adversarial testing of the State's case."¹⁴

However, unlike the trial counsel in Atwater, Mr. Jones' trial counsel did not make a concession only in rebuttal to the State's closing argument. Mr. Jones is more similarly situated to the defendant in Nixon, whose trial counsel conceded guilt in the first address to the jury during the opening statement.¹⁵ Mr. Jones' trial counsel completely waived opening statement and then in the first address to the jury, during closing argument, stated both that the evidence "has been clear and . . . without much controversy" and that the evidence "proves beyond a reasonable doubt" that Randy Scott Jones killed the victims.¹⁶ Furthermore, as set out in detail in his post-conviction appeal briefs, Mr. Jones did not have benefit of "a meaningful adversarial testing" of the State's case during his original trial proceedings.¹⁷ To the contrary, trial counsel effectively bolstered the State's witnesses and the evidence against Mr. Jones. This performance by trial counsel did not provide effective assistance of counsel as guaranteed to Mr. Jones by

¹⁴ Id.

¹⁵ Nixon, 572 So.2d at 1339.

¹⁶ Record on Direct Appeal, p. 1580.

¹⁷ Reply Brief of Appellant, (SC 00-1492), pp. 14-23.

the Sixth and Fourteenth Amendments to the United States Constitution. Therefore, Mr. Jones' appellate counsel was ineffective for failing to raise this fundamental error on direct appeal.

CLAIM II

MR. JONES' EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS MR. JONES MAY BE INCOMPETENT AT THE TIME OF EXECUTION.

In reply to the State's Response, Petitioner relies on the argument set forth in his initial Petition for Writ of Habeas Corpus.

CLAIM III

THE FLORIDA DEATH SENTENCING STATUTE AS APPLIED IS UNCONSTITUTIONAL UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

In reply to the State's Response, Petitioner relies on the argument set forth in his initial Petition for Writ of Habeas Corpus.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Jones respectfully urges this Honorable Court to grant habeas relief.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing **Reply to State's 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 December _____, 2001.

Robert T. Strain
Florida Bar No. 325961
Assistant CCRC

Elizabeth A. Williams
Florida Bar No. 0967350
Staff Attorney
CAPITAL COLLATERAL REGIONAL
COUNSEL - MIDDLE REGION
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619-1136
(813) 740-3544
COUNSEL FOR PETITIONER

Copies furnished to:

The Honorable A.W. Nichols III
Circuit Court Judge
P.O. Box 26
Palatka, Florida 32178

Assistant State Attorney
Office of the State Attorney
251 North Ridgewood Avenue
Daytona Beach, Florida 32114

Rosemary Calhoun

Carol M. Dittmar
Assistant Attorney General
Office of the Attorney General
2002 North Lois Avenue
Suite 700, Westwood Center
Tampa, Florida 33607

Randall S. Jones
DOC# 111508; P2105S
Union Correctional Institution
Post Office Box 221
Raiford, FL 32083

CERTIFICATE OF COMPLIANCE

I hereby certify that a true copy of the foregoing Reply to State's Response to Petition for Writ of Habeas Corpus has been typed in Courier, Font Size 12, pursuant to Fla. R. App. 9.210.

ELIZABETH A. WILLIAMS
Florida Bar No. 0967350
Staff Attorney
CAPITAL COLLATERAL REGIONAL
COUNSEL-MIDDLE REGION
3801 Corporex Park Drive
Suite 210
Tampa, Florida 33619
(813) 740-3544

COUNSEL FOR PETITIONER