SUPREME COURT OF FLORIDA

SEP 21
CLERK, SUPREME COURT
By ______
Deputy Clerk

JAMES ARMANDO CARD,

Petitioner,

v. No. 71,118

RICHARD L. DUGGER, Secretary,
Department of Corrections,
State of Florida,

Respondent.

RESPONSE TO AND MOTION TO DISMISS
APPLICATION FOR EXTRAORDINARY RELIEF,
AND WRIT OF HABEAS CORPUS,
AND STAY OF EXECUTION

Comes now Respondent, Richard L. Dugger, pursuant to Fla.R.App.P. 9.100(h) and moves this Court summarily dismiss without argument Petitioner's Application for Writ of Habeas Corpus and deny all further prayers for relief and in support thereof would say the following:

A. STATEMENT OF THE CASE

James Armando Card was sentenced to death following a jury advisory recommendation of death on January 28, 1982. This Court affirmed Mr. Card's conviction and sentence on June 3, 1984 and rehearing was denied on July 19, 1984. Card v. State, 453 So.2d 17 (Fla. 1984). Card filed a petition for writ of certiorari which was denied by the United States Supreme Court on November 5, 1984. Card v. Florida, 105 S.Ct. 396 (1984). Governor Bob Graham signed Mr. Card's death warrant on May 7, 1986 and execution was set for June 4, 1986. On June 2, 1986, Card filed his initial petition for writ of habeas corpus in this Court challenging the jurisdiction of the state trial judge. On June 3, 1986, Card filed a motion for post-conviction relief in state

court raising four claims which motion was summarily denied the same day. This Court granted an immediate stay and ordered supplemental briefing on issue presented in the petition for habeas corpus relative to the trial court's jurisdiction. On October 9, 1986, this Court denied the habeas petition and affirmed the trial court's order denying post-conviction. Card v. Wainwright, 497 So.2d 1169 (Fla. 1986). Card next filed a petition for writ of certiorari to the United States Supreme Court which was denied on May 18, 1987. Card v. Dugger, 95 L.Ed.2d 858 (1987). Governor Bob Martinez signed Mr. Card's second death warrant on August 18, 1987 and execution is set for 7:00 a.m., Thursday, September 17, 1987. Card filed his second petition for habeas corpus in this Court on September 11, 1987. The petition presents five grounds for relief.

B. STATEMENT OF THE ISSUES

Issue I

Mr. Card was deprived of an individualized sentencing determination, and was denied his rights under the Eight and Fourteenth Amendment, because the sentencing Court failed to provide constitutionally required consideration to non-statutory mitigating factors brief.

Issue II

Appellant counsel was prejudicially ineffective for failing to challenging on direct appeal a trial court's failure to conduct a Richardson hearing, per se reversible error, in violation of Mr. Card's Sixth, Eighth, and Fourteenth Amendment rights.

Issue III

During the course of the proceedings resulting in Mr. Card's sentence of death the Court and prosecutor misinformed the jury as to the weight to be accorded their sentencing verdict, and diminished the jury's sense of responsibility for its sentencing decision, in violation of Caldwell v. Mississippi, Tedder v. State, and the Eighth and Fourteenth Amendments.

Issue IV

Mr. Card was denied his rights to a pre-trial competency hearing, to a professionally competent and adequate mental health evaluation, to not undergo criminal judicial proceedings while incompetent, and to an individualized sentencing determination, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

Issue V

The exclusion of critical evidence rendered Mr. Card's sentence of death fundamentally unreliable and violated his rights under the Eighth and Fourteenth Amendments.

C. REASONS FOR NOT GRANTING THE WRIT

Mr. Card files his petition merely to delay the orderly disposition of whatever federal constitutional claims he could raise in a properly filed petition for federal habeas review as provided by 28 U.S.C. §2254. Mr. Card's first ground for relief, an alleged violation of Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982) was presented on direct appeal of the judgment and sentence. Therefore it is clear that this claim would not be proper in an original petition for habeas corpus, Kennedy v. Wainwright, 483 So.2d 424 (Fla. 1986) (habeas

corpus is not a vehicle for obtaining a second determination of matters previously decided on appeal and Card may not avoid this clear prohibition by filing a subsequent state habeas petition.) See Aldridge v. State, 503 So.2d 1257 (Fla. 1987). (Opportunity to present Lockett/Eddings claim in earlier petition or motion for relief precludes raising ground in a subsequent petition.)

Hitchcock v. Dugger, 107 S.Ct. 1821 (1987) merely held that in instances where the state has not argued procedural default or harmless error a capital defendant may obtain relief for his sentence of death upon a proper showing that the jury and the trial judge patently ignored the requirements of Lockett and did not consider evidence of the defendants character or circumstances of the crime which may have mitigated towards a life sentence. The retroactive application of Lockett announced in Hitchcock allows capital inmates in Florida who previously litigated their Lockett claim during the period of confusion between Cooper v. State, 336 So.2d 1133 (Fla. 1976) and Songer v. State, 365 So.2d 696 (Fla. 1978) to reassert this claim if they can demonstrate actual prejudice, Wainwright v. Sykes, 433 U.S. 72 (1977), Engle v. Issac, 456 U.S. 107 (1982). Hitchcock supplies cause for the default but the defendant must prove actual prejudice. This is different than requiring the state to prove harmless error. The relevant time period covered by Hitchcock begins in December, 1972, when Florida's post-Furman statute was enacted, and ends in December, 1978, when this Court decided Songer. See Lucas v. State, 490 So.2d 943, 945 (Fla. 1986) (Lucas's trial took place prior to the filing of this Court's opinion in Songer). Mr. Card's death penalty sentencing phase took place long after the Florida legislature had amended the death penalty statute to comply with Lockett. See Section 921.141, Fla.Stat. (1979). Hitchcock is not an open invitation

by the United States Supreme Court for this Court to resentence everyone on Florida's death row. In fact, Darden v. Wainwright, 91 L.Ed.2d 144 (1986) expressly approved the mere presentation test. Id. at 160. Hitchcock does not mentioned Darden. The opinion cited in Hitchcock are cases of judicial error not jury limitation. Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985) en banc; Lucas v. State, 490 So.2d 943 (Fla. 1985); Harvard v. State, 486 So.2d 537 (Fla. 1986) The best evidence that this Court's opinions, post-Hitchcock, have over read that opinion can be found in Elledge v. Dugger, 1 F.L.W. Fed. C 1074 (11th Cir. August 28, 1987) where Circuit Judge Joseph Hatchett, a former justice on this Court during the relevant period joined in the opinion which narrowly construes Hitchcock consistent with the position taken by the state herein. In Elledge, the focus was on the trial judge as sentencing authority. The Court agreed the jury instructions in Hitchcock were identical but rejected the possibility of error where the so-called tainted jury recommendation is merely advisory citing Proffitt v. Florida, 428 U.S. 242, 252 (1976).

The central focus of Florida's trifurcated capital sentencing scheme was to eliminate the arbitrary and capricious nature of jury death recommendation. Accord Hopper v. Evans, 456 U.S. 605 (1982). In Hopper, Chief Justice Burger reversed the circuit court for over reading the Court's opinion in Beck v. Alabama 447 U.S. 625 (1980) regarding the failure to instruct the jury on the lesser included offense of felony murder where a conviction for first degree murder mandated death. A healthy respect for finality, the essence of justice, demands that this Court close the door and common sense, given this Courts resources, will not allow it. Card is simply trying to relitigate an issue which was correctly presented and decided against him on his direct appeal. The proper place for this

Court to discuss the merits of Mr. Card's claim would be in a case pending direct appeal which has squarely presented the issue. Pronouncements of law should not come in collateral proceedings. See Allen v. Hardy, 82 L.Ed. 199 (1986) where the United States Supreme Court refused to extend Batson v. Kentucky, 90 L.Ed. 69 (1986) to post-conviction proceedings. In Hitchcock, Justice Scalia specifically referred to the State's failure to argue that this error was harmless or that it had no effect on the jury or the sentencing judge. While this is not the case where an harmless error argument is necessary, this Court can rest assured that in future cases especially those where the defendant ask for the death penalty the State of Florida will be arguing harmless error. See Hopper v. Evans, 456 U.S. 605, where the United States Supreme Court specifically held that the error in Beck v. Alabama, 447 U.S. 625 (1982) (a jury hearing in a capital case in Alabama was precluded by statute from considering lesser included offenses) was harmless where the defendant took the stand and poisoned the proceedings and admitted the crime.

Mr. Card claims that he may litigate an allege violation of Richardson v. State, 246 So.2d 771 (Fla. 1971) in this second habeas petition on basis of ineffective assistance of appellate counsel. Respondent need only remind the Court that in the initial habeas petition Mr. Card challenged ineffective assistance of his appellate counsel regarding his failure to raise the issue of the trial court's jurisdiction. This is merely raising a second claim of ineffective assistance of counsel on different facts which were known at the time of the original habeas petition. In Francois v. State, 470 So.2d 687 (Fla. 1985) this Court held that:

> In collateral proceedings by habeas corpus, as imposed-conviction proceedings under Fla.R.Crim.P. 3.850, successive petitions for the same relief are not cognizable and maybe

> summarily denied. Sullivan v. State, 441 So.2d 609, 612 (Fla. 1983). . . .

Id. at 686.

Respondent ask this Court to deny relief on this ground.

Mr. Card's third claim raises the infamous Caldwell v. Mississippi, 472 U.S. 320 (1985). This claim was not presented at trial or on direct appeal or in the prior collateral motions. It has long been recognized in Florida law that habeas corpus may not be used as a vehicle to raise for the first time question that Petitioner had fair and adequate opportunity to raise and could have and should have raised during formal trial of the cause or on direct appeal. State v. Mayo, 87 So.2d 501 (Fla. 1956). In State v. Mayo, the defendant filed a successive petition challenging the racially discriminatory application of the Florida death penalty and this Court stated:

> In none of these proceedings has the question now raised been presented. Since the point now presented has not been previously raised, despite ample opportunity to do so, under well settled rules of decisions we are driven to the conclusion that he has waived or forfeited the right to raise it.

Id. at 503.

The claim fashioned out of Caldwell v. Mississippi is eternally barred from consideration in any Court state or federal based on the adequate and independent state ground cited above.

Mr. Card raises in Ground Four a claim which he admits has been decided adverse to him in Card v. State, 497 So.2d 1169 (Fla. 1986). Respondent will say no more about Mr. Card's argument that this Court's opinion was fundamentally flawed.

Finally, Mr. Card argues that the trial court's refusal to admit the blatant hearsay testimony of Cameal Caldwell prevented

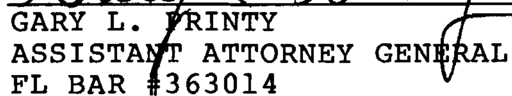
the jury from hearing non-statutory mitigating evidence. This is an argument that either could have been or should have been or was presented in Card's direct appeal or in a prior collateral proceeding and may not be presented now. Kennedy v. Wainwright, supra, Francois v. State, supra. Moreover the so-called lingering unreasonable doubt has been rejected as non-statutory mitigating factor in this State. Burr v. State, 466 So.2d 1051, 1054 (Fla. 1985). Aldridge, 503 So.2d at 1259.

CONCLUSION

Petition for Writ of Habeas Corpus should be dismissed. The Application for Extraordinary Relief and Stay of Execution should be denied.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

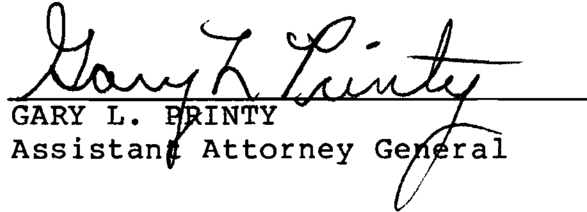


GARY L. PRINTY
ASSISTANT ATTORNEY GENERAL
FL BAR #363014

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-1050
(904) 488-0290

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been hand delivered to Larry Helm Spalding, Office of the Capital Collateral Representative, Independent Life Building, 225 West Jefferson Street, Tallahassee, Florida 32303 this 14th day of September, 1987.



GARY L. PRINTY
Assistant Attorney General