

IN THE SUPREME COURT OF FLORIDA  
NUMBER

71960

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CARL JACKSON,

Petitioner,

vs.

*W*  
Deputy Clerk

RICHARD L. DUGGER, Secretary  
Department of Corrections, State of Florida;  
ROBERT MARTINEZ, Governor, State of Florida,

Respondents.

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PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

Separately bound and made a part of this Petition for Writ of Habeas Corpus is an Appendix containing exhibits "A" and "B".

Exhibit "A" consists of the trial court's findings upon which sentence of death was based. Exhibit "B" consists of pages from the trial proceedings in this cause. References to exhibit "B" in said appendix shall refer to the page numbers as indicated in the trial record.

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## INTRODUCTION

The Petitioner, Carl Jackson, is under two sentences of death and is an indigent prisoner on Florida's death row. He has proceeded in forma pauperis in all prior Court proceedings.

Through undersigned counsel, he requests this Court to grant him relief from the sentences of death imposed after his jury trial, based on the holdings in Hitchcock v. Dugger, \_\_\_\_ U.S. \_\_\_\_, 107 S.Ct. 1821, 95 L.Ed.2d 347(1987); Skipper v. South Carolina, 476 U.S. \_\_\_\_, 106 S.Ct. 1669, 90 L.Ed.2d 1(1986); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1(1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973(1978) and this Court's recent decisions in Riley v. Wainwright, 12 F.L.W. 457(Fla. Sept. 3, 1987), Morgan v. State, 515 So.2d 975(Fla. 1987); McCrae v. State, 510 So.2d 880 (Fla. 1987); see also, Lucas v. State, 490 So.2d 943 (Fla. 1986); Harvard v. State, 486 So.2d 537 (Fla.), cert. denied, 107 S.Ct. 215 (1986).

Based on this precedent, the Petitioner requests this Court to grant him a resentencing before a jury, insofar as the sentencing trial court precluded both the jury and himself from consideration of non-statutory mitigating circumstances during the penalty phase of Mr. Jackson's 1975 trial. Such a limitation of mitigating circumstances to only those enumerated in Section 921.141 of the Florida Statutes constitutes a violation of Jackson's rights under the Eighth and Fourteenth Amendments to the United States Constitution because such limitation precluded

an individualized sentencing and consideration, "as a mitigating factor, [of] any aspect of [Mr. Jackson's] character or record and any circumstances of the offense...." Lockett v. Ohio, 438 U. S. at 606.

The impermissible limitation of mitigating circumstances infected the entire proceeding in Mr. Jackson's case. First, the prosecutor argued that the jury was limited to only those mitigating circumstances "mentioned under the law". Second, the trial judge instructed the jury on those mitigating circumstances it could consider and instructed only on those listed in Section 921.141(6) of the Florida Statutes. Lastly, the trial Judge constrained his own sentencing consideration to only the mitigating circumstances enumerated in section 921.141(6), Florida Statutes.

The impermissible arguments by the prosecutor, the faulty instructions to the jury and the unconstitutional limitation by the Judge upon his ultimate sentencing decision were compounded by the fact that significant non-statutory mitigating evidence was suggested at trial. These non-statutory mitigating factors, as well as others that may have been available, were not considered by the jury or the trial court in Mr. Jackson's case, all in violation of the holdings in Hitchcock and Lockett.

Prejudice results from the complete failure to afford the Petitioner his constitutionally protected right to have all mitigating factors considered at sentencing.

## JURISDICTION

This is an original action under Rule 9.100(a), Florida Rules of Appellate Procedure. This Court has original jurisdiction pursuant to Rule 9.030(a)(3), Florida Rules of Appellate Procedure and Article 5, Section 3(b)(9) of the Florida Constitution.

This Petition seeks relief on an issue that directly affects this Court's prior judgments upholding Mr. Jackson's death sentence. Mr. Jackson requests this Court to revisit the claim that the imposition of the death sentences was fundamentally and constitutionally flawed in view of Hitchcock and this Court's post-Hitchcock decisions. This Court has determined that the holding in Hitchcock is a fundamental change in the law and permits retroactive correction by way of an original proceeding in this Court. Demps v. Dugger, 12 F.L.W. 547 (Fla. Oct. 30, 1987); Delap v. Dugger, 12 F.L.W. 517 (Fla. Oct. 8, 1987); Downs v. Dugger, 12 F.L.W. 473 (Fla. Sept. 9, 1987); Thompson v. Dugger, 12 F.L.W. 409 (Fla. Sept. 9, 1987); Riley v. Wainwright, supra.

This Petition is also founded upon this Court's jurisdiction over its own judgments and its authority to issue all writs necessary for the complete exercise of its jurisdiction and its power to issue writs of habeas corpus.

The issue raised here, pursuant to the holding in Hitchcock, is a "record issue" (i.e., needs no further evidentiary presentation) and can be decided as a matter of law.



HISTORY OF PRIOR PROCEEDINGS

On September 19, 1975, the Petitioner, Carl Jackson, was sentenced to death. The Petitioner's convictions were affirmed by this Court upon direct appeal in Jackson v. State, 359 So.2d 1190 (Fla. 1978), cert. denied, 439 U. S. 1102 (1979).

Mr. Jackson filed a Petition pursuant to Rule 3.850, Florida Rules of Criminal Procedure, seeking post-conviction relief, in which he alleged that consideration of non-statutory mitigating circumstances, during the penalty phase proceedings, was impermissibly limited. Mr. Jackson's Motion for Post-Conviction Relief was denied by the trial Court, which denial was affirmed by this Court in Jackson v. State, 437 So. 2d 147 (Fla. 1983), cert. denied, 104 S.Ct. 1016(1984).

Thereafter, Jackson filed a second Petition for post-conviction relief, again asserting (among other grounds) the impermissible limitation of mitigating circumstances. The trial court denied relief and this Court affirmed in Jackson v. State and Jackson v. Wainwright, 452 So.2d 533 (Fla. 1984).

On 18 June 1984 the United States District Court, Northern District of Florida entered a stay of execution in Jackson v. Wainwright, Case No. MCA 84-2087-RV (Petition for Writ of Habeas Corpus) based on several issues then pending before the United States Court of Appeals for the Eleventh Circuit. Recently, that District Court has dismissed the Federal habeas corpus petition, without prejudice, thereby permitting Mr. Jackson to pursue in

State Courts, in the interest of comity, otherwise "exhausted" claims, including the Hitchcock issue that has arisen during the pendency of the Federal stay. The instant proceeding is, therefore, presented to this Court for its initial determination of the Hitchcock claim.

#### FACTUAL BASIS OF HITCHCOCK CLAIM

##### Introduction

The facts of this case squarely present the impermissible restriction of the jury's and the trial court's consideration of mitigating factors. For the jury, this resulted from a reading of the 1975 standard jury instruction on mitigation which precluded the jury's consideration of any mitigating factors outside those specifically enumerated in Section 921.141(6) of the Florida Statutes. Just as importantly, the sentencing judge similarly limited himself, as reflected in his specific finding that he considered only those mitigating factors listed in the statute.

##### Jury

The Jury's consideration of only those mitigating circumstances enumerated in 921.141(6) of the Florida Statutes began with the trial Court's earliest instructions in this case. During preliminary instructions the Court told the Jury that:

"Following the arguments of counsel, the Court will instruct you on the law applicable to the case." (Appendix, Exhibit B, 286).

The prosecutor during his penalty phase closing argument pursued the Judge's preliminary instruction and told the jury that:

"...and the Judge is going to instruct you on what mitigating is." (Appendix Exhibit B, 782).

The prosecutor explained his earlier comment by telling the jury that:

"One out of about seven or eight mitigating circumstances said it would be mitigation if the defendant has no significant prior criminal activity. Then I want you to listen closely and see if there is any other mitigations that have been proved here, that is mentioned under Florida Law." (Appendix, Exhibit B, 787).

In closing his comments the prosecutor emphasized one last time:

"All I'm saying to you is to listen to the mitigations, see if there is significant mitigation under the law." (Appendix, Exhibit B, 787).

The trial Judge foreshadowed the impermissible limitation of mitigating circumstances the jury could consider at the penalty phase through its final instructions at the guilt phase. The jury was instructed:

"Before the sentence can be determined upon the adjudication of guilt of a capital felony, such as murder in the first degree, the Court must conduct a separate sentencing proceeding before this trial jury, at which evidence may be presented as to any matter the Court deems relevant to the sentence, and shall include matters relating

to any aggravating or mitigating circumstances enumerated in the Statute governing such hearings; and both the State and the Defendant are permitted to present argument for or against a sentence of death." (Appendix, Exhibit B, 697) (emphasis added).

Finally, during the penalty phase instructions the trial Judge cemented the impermissible limitation of mitigating factors the jury could consider in arriving at its advisory verdict. The trial court began its instructions by telling the jury that:

"At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors in aggravation and mitigation that you may consider." (Appendix, Exhibit B, 739).

The trial Court then gave the jury the critical sentencing instruction regarding mitigating circumstances, advising the jury on only statutory mitigation. (Appendix, Exhibit B, 795).

#### The Judge

The trial Judge completed the circle of impermissible limitation of mitigating circumstances by explicitly restricting his own consideration of mitigating circumstances to those enumerated in the applicable statute. The self-imposed limitation was that:

"...there are insufficient mitigating circumstances as enumerated in Sub-Section seven (sic) of said Section 921.141, to outweigh the aggravating circumstances." (Appendix, Exhibit B, 811).

The trial judge's self-imposed limitation to statutory mitigation is highlighted by a complete absence in the record of any

reference by the Court to non-statutory mitigation.

#### ARGUMENT

The trial Judge's preclusion of consideration of non-statutory mitigating circumstances violated the Eighth and Fourteenth Amendments to the United States Constitution. Lockett, supra at 604. In Hitchcock, the United States Supreme Court ordered resentencing because, as here, the jury had been instructed not to consider, and the trial judge refused to consider, evidence of non-statutory mitigating circumstances. This Court has reversed death sentences where the trial jury's and the trial judge's consideration of non-statutory mitigating circumstances were similarly limited. See, Riley, Morgan, McCrae, Lucas, and Harvard, supra.<sup>1/</sup>

The impermissible charge to the jury constitutes a constitutional deprivation because "a Florida capital sentencing jury's recommendation is an integral part of the death sentencing process." Riley, supra at 458. This Court also held that, "If the jury's recommendation, upon which the Judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure." Id. at 459.

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See also Mann v. Dugger, 817 F.2d 1471 (11th Cir.1987)

Just as importantly, the record in this cause demonstrates an improper restriction upon the trial Judge's consideration of mitigating circumstances. That there is a constitutional flaw resulting from a trial judge's limiting himself to only statutory mitigating circumstances has been confirmed by this Court. "[A]n appellant seeking post-conviction relief is entitled to a new sentencing proceeding when it is apparent from the record that the sentencing judge believed that his consideration was limited to the mitigating circumstances set out in the capital sentencing statute when determining whether to impose a sentence of death or life in prison." Harvard v. State, 486 So.2d at 539. See also Thompson v. Dugger, supra at 469 (quoting Harvard).

The record in this case suggests the existence of significant non-statutory mitigation regarding Mr. Jackson. For example, at trial there was the testimony of Cleo C. Warner (Appendix, Exhibit B, 740-752), a psychologist who briefly described Mr. Jackson's psychological background, his army career including three tours in Vietnam, and his strong religious beliefs. Dr. Warner testified to Jackson's struggle with the effects of war that is now recognized (since the petitioner's 1975 trial) as post-traumatic stress disorder, his attempts to obtain a college degree and his background since leaving the armed forces. There was the testimony of Vera Nichols (Appendix, Exhibit B, 753-763); Eleanor Callaway (Appendix, Exhibit B, 764-768); and the Reverend Rhone, (Appendix Exhibit B, 769, 773).

None of these non-statutory mitigating factors were considered by the jury or the trial judge based on the erroneous jury instructions and the trial Court's limitation of mitigation.

The jury's advisory sentence is a critical factor in determining whether or not the death penalty should be imposed. Lamadline v. State, 303 So. 2d 17(Fla. 1974). The proper sentence to be imposed on Mr. Jackson should be determined by a jury and a Judge upon full consideration of all relevant mitigating factors. Lucas supra at 946; Downs supra at 473-74. This Court has never hesitated to reverse for resentencing for erroneous limitation of mitigating circumstances. Under Florida law, it is the jury's task to weigh all relevant aggravating and mitigating evidence in order to afford Mr. Jackson every opportunity to secure a jury's recommendation of life. Valle v. State, 502 So.2d 1225,1226 (Fla.1987).

The sentencing proceeding in Mr. Jackson's case was virtually identical to that in Hitchcock, in which "it could not be clearer that the advisory jury was instructed not to consider, and the sentencing Judge refused to consider, evidence of non-statutory mitigating circumstances." \_\_\_U.S. \_\_\_, 107 S.Ct. at 1824, 95 L.Ed.2d. at 353. Thus, resentencing before a new jury is a constitutional requirement due to the fatally deficient sentencing procedure.

#### NATURE OF RELIEF SOUGHT


Mr. Jackson requests this Court to grant a full and


complete consideration of his Petition for Writ of Habeas Corpus and upon such consideration, to vacate his sentence of death and remand to the trial Court for a resentencing before a jury.

I HEREBY CERTIFY that a true copy of the foregoing was furnished by U.S. Mail to Mark C. Menser, Assistant Attorney General, Office of Legal Affairs, The Capitol, Tallahassee, Florida 32301.

Dated this 19<sup>th</sup> day of FEBRUARY, 1988.

Respectfully submitted,

  
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