IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
MAR 22 1988
CLERK, SUPREME COURT
By
Deputy Clerk

CARL JACKSON,

Petitioner,

vs.

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

Respondents.

CASE NO. 71, 960

# PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS

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## PRELIMINARY STATEMENT

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

References to the State's RESPONSE shall be by the designation: (RESPONSE, p. ___).

## ARGUMENT

Relying on this Court's Opinions in Delap v. Dugger, 513 So.2d 659 (Fla. 1987); Demps v. Dugger 514 So.2d 1092 (Fla. 1987); and Riley v. Wainwright, 517 So.2d 656 (Fla. 1987), the State argues that a "harmless error" analysis should be applied to the instant habeas proceeding. The State concedes that the sentencing jury, in the Petitioner's 1975 pre-Lockett trial, was not instructed properly (RESPONSE, p. 6). The State acknowledges that the prosecutor, during that trial, "tracked the statutory aggravating and mitigating factors" (RESPONSE, p. 4), thereby leading the jury to believe that it could consider only the statutory mitigating circumstances as instructed by the Court.[1] Further, the State recognizes that non-statutory mitigating evidence was presented to the jury (RESPONSE, pp. 3-4), primarily as character evidence regarding the Petitioner's status as a veteran, his experiences in Viet Nam, his religious and

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[1]At page 6 of the original pleading filed by the Petitioner in this proceeding, the Petitioner refers to the prosecutor's statement "[a]ll I'm saying to you is to listen to the mitigations, see if there is significant mitigation under the law." The Record reference to page 787 of Exhibit B is incorrect; that should be a reference to page 791 of Exhibit B. See also the prosecutor's comments at page 791 of Exhibit B which encourage the jury to consider only that mitigation on which it was instructed by the Court ("I've listened to the law, I don't find any significant mitigation to this crime. Therefore, I'm compelled by the law").

philosophical beliefs, his life experiences after he left the Army, and his belief in and propensity for non-violence.[2]

Despite these concessions, the State urges this Court to "look at the evidence considered by the trial judge" because the PETITION FOR WRIT OF HABEAS CORPUS "does not clearly establish error by the sentencer" (RESPONSE, pp. 6, 8). The State's argument is based on the following analysis:

> Judge Turner[3] simply stated that he found no `mitigating' factors without any reference to either statutory or non-statutory mitigating factors. Thus, this case stands in contrast to cases such as Riley v. Wainwright 12 F.L.W. 457 (Fla. 1987), where the sentencer specifically referred only to statutory mitigating factors, thus providing some record indicia of error.

(RESPONSE, p. 9)(emphasis added). This argument, critical to triggering a Delap harmless error analysis, is simply incorrect. Judge Spear specifically stated, both on the Record (Appendix, Exhibit B, p. 811) and in writing (Appendix, Exhibit A; see also the Supplemental Record on Appeal forwarded to the Supreme Court of Florida on 12

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[2]The State attacks the Petitioner's non-statutory mitigation by referring to the Petitioner's "poor service record" (RESPONSE, p. 4 and p. 7). However, the State makes no record references in support of this effort to discredit the Petitioner's mitigating evidence, and, in fact, the Petitioner's evidence was not so discredited during the penalty phase of his trial.

[3]The Honorable Mercer P. Spear, Circuit Judge, sat as the trial judge in 1975, not the Honorable Fred Turner, who presided in the Rule 3.850 proceedings. See, e.g., Jackson v. State, 356 So.2d 1190 (Fla. 1978).

January 1976 by the Clerk of the Court for Bay County, Case No. 48,165, p. 13) that:

> ...sufficient aggravating circumstances exist as enumerated in Subsection (6)(sic) of Section 921.141, Florida Statutes, that justify a sentence of death, and that there are insufficient mitigating circumstances, as enumerated in Subsection (7)(sic) of said Section 921.141, to outweigh the aggravation (sic) circumstances.

The Record "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," Hitchcock v. Dugger, 107 S.Ct. 1821, 1824 (1987), thereby mandating a new sentencing hearing. See, e.g., Foster v. State, 12 F.L.W. 598 (Fla. Dec. 3, 1987). Thus, the instant case is therefore aligned with, and does not stand "in contrast to," Riley v. Wainwright, 517 So.2d 656 (Fla. 1987).

Under Delap and Demps, Judge Spear's failure to consider non-statutory mitigation renders inapposite the harmless error analysis proposed by the State in its RESPONSE. As explained by this Court in Delap:

> Thus, giving the faulty standard jury instruction doe not mandate reversal if the jury is not otherwise directed to ignore non-statutory mitigating evidence and if the judge is aware that such evidence is properly considered.

513 So.2d at 662 (emphasis added). See also Foster v. State, supra at 598, in which this Court, addressing virtually identical facts, held:

> The fact that the judge, the ultimate sentencing authority, did not consider non-statutory mitigating evidence settles the issue because there was some non-statutory mitigating evidence that the court could have considered. Hitchcock; Delap v. Dugger;... Harvard v. State.... A new sentencing proceeding is mandated 'when it is apparent from the record that the sentencing judge believed that consideration was limited to the mitigating circumstances set out in the capital sentencing statute.'[quoting Harvard].

Id. (footnote and citations omitted).[4]

The facts of Delap and Demps are distinguished from the case sub judice because it is obvious in those decisions that the sentencing court considered non-statutory mitigating circumstances. In Delap the trial Court referred in his sentencing order to mitigating circumstances and actually traveled to Raiford to examine Delap's prison conduct. 513 So.2d at 662. In Demps a pre-sentence investigation report was ordered by the trial Court which rebutted much of Demps' non-statutory mitigating evidence (unlike the instant case), and more importantly, the sentencing judge expressly stated on the Record during a conversation with defense counsel that he understood he must consider non-statutory circumstances in reaching a sentence. 514 So.2d at 1093-94. In contrast,

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[4]As recognized in Delap, a similar harmless error analysis is employed by the Eleventh Circuit. See, e.g., Elledge v. Dugger, 823 F.2d 1439, 1449 (11th Cir. 1987)("When the trial judge has the proper view of the law --as is evident from the record here -- and imposes a sentence based not only on statutory, but also on non-statutory, factors, the resulting sentence meets the constitutional parameters outlined in Lockett").

the non-statutory mitigating circumstances presented during Petitioner's Jackson's sentencing were not considered by the trial Court, as reflected in his sentencing order.

Finally, the State refers in its RESPONSE to two evaluations of Petitioner conducted pre-trial, apparently for the purpose of determining his sanity at the time of the offense and competency to stand trial.[5] This Record reference is of limited value because it is apparent that the trial Court, in his sentencing order, limited himself to consideration of only statutory mitigation. Even if the trial Court considered the reports for statutory mitigation, there is no indication that the sentencing court considered the testimony of Dr. Warriner during the penalty phase for non-statutory mitigation purposes, and of course there is no indication that the other non-statutory mitigation presented by the Petitioner during the penalty phase was considered by the trial Court. In sum, the State's reference to these pre-trial submissions has little, if any, bearing on the fact that Judge Spear expressly limited himself to consideration of only statutory mitigating circumstances.[6]

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[5]The State has not submitted a supplemental appendix pursuant to Rule 9.100(h), but instead refers this Court and the Petitioner to the original Record in Case No. 48,165.

[6]To the extent that this Court accepts the State's invitation to examine the Record in prior proceedings filed on behalf of CARL JACKSON, the Petitioner directs the Court's attention to the extensive amount of mitigating evidence (both statutory and non-statutory) contained in the records

## CONCLUSION

The facts of this case parallel those in Hitchcock. Because the Petitioner presented non-statutory mitigation during his 1975 trial, he must now be permitted, under this Court's rationale in Riley and Delap, to have that mitigation considered by a sentencing jury and judge.

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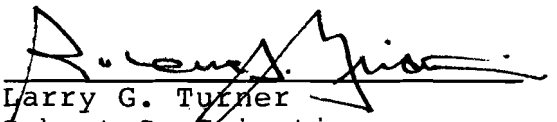
in the Case Nos. 60,202, 65,429, 65,430, and 65,431. That mitigation consists of evidence not presented to the sentencing jury or trial Court regarding the Defendant's childhood, marital history, children (the Petitioner is a father), good and sometimes excellent military record (including decorations for military conduct in Viet Nam), health (including his contracting venereal disease in the service), attempts to obtain a college education, employment history and lack of a prior significant criminal record.

In specific rebuttal of the State's reference to pre-trial evaluations, pages 4-8 of his PETITION FOR WRIT OF EXTRAORDINARY RELIEF, ETC. (Jackson v. State, 452 So.2d 533 (Fla. 1984)), including the Exhibits and Appendices thereto, outline the Petitioner's mental condition since 1980 and relate that mental condition to the Petitioner's military experiences.

It is evident that significant non-statutory mitigation exists which has not been presented to a sentencing jury or judge. Entirely consistent with the rationale of Hitchcock, the Petitioner should now be given the opportunity to present that non-statutory evidence to a sentencing judge and jury, because even if all of that mitigation had been presented in 1975 it would not have been considered by the sentencing jury or Judge Spear.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing PETITIONER'S REPLY IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS has been furnished by regular United States mail to Mark C. Menser, Assistant Attorney General, Office of Legal Affairs, the Capitol, Tallahassee, Florida 32301, this 21st day of March, 1988.

LARRY G. TURNER
ROBERT S. GRISCTI