IN THE SUPREME COURT OF FLORIDA

CARL JACKSON,

Petitioner,

v. CASE NO. 71,960

RICHARD L. DUGGER, etc.,

Respondents.

_____/

RESPONSE TO PETITION
FOR WRIT OF HABEAS CORPUS

The Respondent, Richard L. Dugger, answers as follows:

Introduction

Petitioner, Carl Jackson, is a prisoner awaiting execution pursuant to two sentences of death imposed for the murders of Ann Butler and Mary Price. His conviction and sentence of death was upheld in Jackson v. State, 359 So.2d 1190 (Fla. 1978), cert. denied, 439 U.S. 1190 (1979).

Mr. Jackson has twice before sought post-conviction and habeas corpus relief. Jackson v. State, 437 So.2d 147 (Fla. 1983), cert. denied, 104 S.Ct. 1016 (1984); Jackson v. State, 452 So.2d 533 (Fla. 1984). As noted by Mr. Jackson, a federal habeas corpus proceeding has been abated due to this action.

This successive petition raises a claim pursuant to the decision of the United States Supreme Court in Hitchcock v. Dugger, 481 U.S. ____, 95 L.Ed.2d 347, 107 S.Ct. 1821 (1987).

Statement of the Facts

Carl Jackson, after an 11-1 jury recommendation of death, was sentenced to death for the first-degree murders of Ann Butler and Mary Price.

The trial judge (Judge Turner) carefully considered all aggravating and mitigating evidence prior to passing sentence. In sentencing Jackson to die, Judge Turner found the existence of five aggravating factors. Those factors were:

(1) The murder of Ann Butler was committed in the course of a robbery.

(2) The murder was committed for pecuniary gain.

(3) The murder of Mary Price was committed while Jackson was in flight from the robbery.

(4) The murder of Mary Price took place while Jackson was committing the crime of kidnapping.

(5) Both murders were intended to avoid lawful arrest.

On appeal, grounds (1) and (2) were deemed "doubled", leaving four actual aggravating factors and no mitigating factors. Jackson v. State, 359 So.2d 1190 (Fla. 1978).

During the penalty phase of Jackson's trial, the defense called the following witnesses:

(1) Dr. "Cleo Warner":[1] Mr. "Warner", a clinical psychologist, visited Jackson three times for a total of just over three hours. (T-741). He took a history from Jackson and ran a battery of tests. (T-741). The psychologist discussed Jackson's views on violence and religion (as related to him by Jackson), Jackson's "general discharge" from the army and his post-service work record.

[1]The State believes this is an error on the transcript. The examiner, we believe, was Dr. Clell Warriner, who also issued a written report now in your files.

On cross, "Warner" stated he had not studied Jackson's actual record (criminal or personal) and he was not testifying to suggest "mercy" as opposed to death. (T-750-1).

(2) Vera Nichols: Jackson's girlfriend, (T-753), who has an incomplete knowledge of Jackson's life history. She said Jackson was not violent to her or her kids. (T-753-64).

(3) Eleanor Callaway: Jackson's niece, (T-764), who was unaware that Carl had a criminal record (T-765), yet claimed she was "close" to him. (T-766). She said Jackson was religious but did not need church. (T-767-8).

(4) Reverend Rhone: A friend of Jackson's who contended that Jackson was interested in religion. (T-769-73).

No other witnesses were called by either party.

During Jackson's appeal, this Honorable Court sought and received from Judge Turner a statement regarding any other evidence considered by him and not disclosed on the record. Judge Turner notified this Court that he received two mental health evaluations on Jackson. One report came from Dr. Mason (a psychiatrist), the other came from Dr. Warriner (a psychologist). The reports and Judge Turner's letter are part of the Court's file in Case No. 48,165 and may be considered at this time.

The State waived its opening penalty phase argument, thus allowing Jackson to go first. Jackson's counsel argued for consideration of the following non-statutory mitigating factors:

(1) The jury's "conscience". (T-755).

(2) Jackson is a veteran. (T-775).

(3) Jackson served in Vietnam. (T-776).

(4) Jackson is "religious". (T-776).

(5) Society is to blame for his crime. (T-776).

(6) Life-prisoners can live useful lives. (T-777).

(7) Religious opposition to the death penalty. (T-780).

The facts of the case were, when combined with Jackson's poor service record (general discharge, disciplinary problems) and criminal record, more than sufficient to support four aggravating factors as defined by statute. In its responsive argument, the State tracked the statutory aggravating and mitigating factors. (T-780, et seq.).

The trial judge gave the following relevant instructions:

> "The aggravating circumstances which you may consider are limited to such, are the following, as may be establsihed by the evidence . . " (T-793).
>
> "The mitigating circumstances which you may consider, if established by the evidence, are these . . " (T-795).

After an 11-1 jury recommendation of death, which did not reveal what the jury considered (or did not consider), Judge Turner sentenced Jackson to death. Judge Turner's order found five aggravating factors (reduced to four on appeal due to "doubling"), and no mitigating factors at all. The Judge's order does not discuss the mitigating factors (statutory or nonstatutory) or why none were found.

On direct appeal Jackson complained (brief, pg. 50) that the death penalty is "unconstitutional" because the advisory jury and Judge Turner were <u>not limited</u> in their ability to consider <u>mitigating factors</u>.

Jackson "switched tracks" on collateral attack and, on 3.850, raised a claim under Lockett v. Ohio, 438 U.S. 586 (1978), which this Court properly rejected as procedurally barred.

ARGUMENT

Inasmuch as Mr. Jackson was tried prior to the 1979 amendment to Section 921.141, Fla.Stat., and given this Court's decision not to apply procedural bars to "Hitchcock" claims, the State will discuss the merits of Mr. Jackson's claim though it does not waive its procedural arguments.

At this point the proper inquiry focuses upon the issue of harmless error. Delap v. Dugger, 513 So.2d 659 (Fla. 1987); Demps v. Dugger, 514 So.2d 1092 (Fla. 1987). In discussing this issue the State shall rely both upon the record and the various pleadings filed by Mr. Jackson.

The trial judge obviously did not give the advisory jury the post-amendment jury instruction which specifically permitted consideration of nonstatutory mitigating evidence. Again, under Delap, supra, and Demps, supra, the case does not stop here. Instead, we must look at the evidence considered by the trial judge to see if Mr. Jackson had a reasonable basis for believing that, but for the court's instruction, he would have been sentenced differently.

As this Court noted in Jackson v. State, 359 So.2d 1190 (Fla. 1978), the evidence against Jackson, although circumstantial, was strong. Jackson, carrying a gun, had a friend drive him to the Junior Food Store and told his friend to drive around the block and pick him up. Instead, the friend (Harris) left and, later, went to the police. After Jackson murdered the clerk, he abducted a customer's wife (stealing her car) and them abandoned the car and his second murder victim in a cemetery. Jackson's fingerprints were found in the car (on a cigarette pack) and his jacket was found near the abandoned car. As Jackson fled the scene of the second

murder, he was picked up by a friend. No one as yet knew about the killing in the cemetery but Jackson asked his friend if he had heard about said murder.

In addition to the facts of the case, the trial court had mental health evaluations from a psychiatrist (Dr. Mason) and a psychologist (Dr. Warriner). Dr. Mason concluded:

> "In general, in the psychiatric examination Mr. Jackson was oriented to time, place and person. His apperception was intact, he was able to understand what he was charged with and seems able, though unwilling, to help his attorney in his defense.
>
> At the present time he shows no evidence of suffering from any psychiatric illness and other than being somewhat suspicious and guarded there is nothing to suggest that he has suffered from psychiatric illness in the past".

Dr. Warriner simply stated that Jackson was sane and competent at the time of his offense.

Very little in the way of mitigating evidence was actually presented.

If a "Cleo Warner" testified, or if in fact the witness was Clell Warriner, the witness did not attribute Jackson's crime specifically to any mental disorder and stated on the record he was not seeking mercy for Mr. Jackson.

Jackson's three character witnesses were ignorant of his criminal record and poor service record and, indeed, may have appeared somewhat foolish in calling Jackson "religious" and "non-violent" in the wake of his trial.

While Mr. Jackson's petition attempts to inflate Warriner's testimony and his dubious service record into a claim of "post traumatic stress disorder" (without a medical or legal

basis), this tired rubric can no more work for Carl Jackson than it did for Larry Joe Johnson. See Johnson v. State, 463 So.2d 207 (Fla. 1985); see Johnson v. Dugger, ____ So.2d ____ (Fla. February 26, 1988), Case No. 71,824. PTSD claims have the veracity of the fabled cry of "wolf", and little more basis in fact.

We submit that two mental health evaluations declaring Jackson "sane and competent" are not overcome by the mixed an non-committal testimony of Dr. Warriner during the penalty phase. We also submit that the cold blooded and ruthless crimes at bar were so obviously pre-planned and goal oriented that they can not, in good faith, be called a "stress reaction". The only "stress" Jackson has ever suffered was the stress of confinement after getting convicted.

When the four statutory aggravating factors present in this case are stacked against Jackson's dubious "mitigating" evidence it is obvious that the case for death is one with which no reasonable person could differ. We can not see how a different jury instruction could add weight or substance to the testimony offered by Mr. Jackson.

Mr. Jackson's petition not only fails to fluff up the mitigating evidence offered on his behalf, it suffers from two other facial deficiencies:

(1) It does not clearly establish error by the sentencer; and

(2) It contradicts Jackson's own direct appeal.

The judge did not use the current jury instruction on nonstatutory mitigating evidence since it obviously did not exist. Judge Turner did, however, permit counsel to present

and argue nonstatutory mitigating evidence. While this Court does not accept "mere presentation"; without more, as a defense, we suggest that, in this case, "more" exists.

While Judge Turner referred to statutory aggravating factors in his sentencing order, Judge Turner 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.

Mr. Jackson would have this Court read "failure to consider nonstatutory evidence" into Judge Turner's silent order. We submit that this assumption, in the face of the entire record, is as unrealistic as assuming Judge Turner also failed to consider "statutory" factors; since they, too, are not addressed in the order. Indeed, once again we find ourselves faced with an improper request to reverse a lower court on the basis of idle speculation and comjecture about what someone "thought", a decade ago, without even asking the accused Judge "what" in fact he actually thought. In Sullivan v. State, 303 So.2d 632 (Fla. 1974), this Court disallowed "reversal on speculation" and even in Riley, this Court sought record indicia of error beyond the merely erroneous jury instruction. See also Demps, supra; Delap, supra.

In Mr. Jackson's second post conviction proceeding he accused this Court of not reviewing all relevant claims and/or evidence in upholding his death sentence. In response to the charge, this Court stated:

> "Our capital sentencing statute, Section 921.141, Florida Statutes (1981) requires this Court to review the entire record in each capital case to determine if the judgment of conviction and sentence was proper. The absence of discussion in our written opinion in this case is not an indication that we did not carefully review the entire record and each argument made by appellate counsel in the direct appeal. We did not abrogate our duty in this case; therefore, we see no reason to disturb appellant's conviction and sentence". Jackson v. State, 452 So.2d 533, 34 (Fla. 1984).

Unlike this Court, Judge Turner can not defend himself simply be declaration. In addition, an affidavit from Judge Turner would be disallowed. See Johnson v. Dugger, ____ So.2d ____ (Fla. 1988), Case No. 71,824. It would be decidedly unjust to reverse Judge Turner on the very sort of speculation that was not applied against this Court itself, in this same case.

Judge Turner gave the "wrong" instruction, but only because he tracked the standard instruction as judges often do. Thus, the instruction may or may not reflect the weight given to the evidence. We do, however, know that Judge Turner permitted both evidence and argument on non-statutory factors. Can it clearly be said he did not listen to the witnesses or counsel?

Finally, we return to Mr. Jackson's complaint, on direct appeal, that Judge Turner did consider non-statutory mitigating factors (and thus exercised "unguided discretion"). We, of course, are chagrined by the effect of Hitchcock on Mr. Jackson's position, and offer these two non-sequitur arguments as yet another example of the reason why "Hitchcock" claims can not

be taken seriously. These claims are based upon opportunism, not fact, and will be filed as long as they are given the dignity of real claims based upon record fact.

Mr. Jackson can not demonstrate any error by Judge Turner. Mr. Jackson can not demonstrate any reasonable basis to believe he would have received a life sentence. Indeed, he can not overcome the defense of harmless error.

Habeas corpus relief should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Larry G. Turner, Esq., and Mr. Robert Griscti, Esq., 204 W. University Avenue, Suite 7, Gainesville, Florida 32602; and to Mr. Bill Salmon, Esq., 204 W. University Avenue, Suite 8, Gainesville, Florida 32602, this 4 day of March, 1988.

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OF COUNSEL