IN THE SUPREME COURT OF FLORIDA

NO. 75846

ETHERIA V. JACKSON,

Petitioner,

v.

Richard Dugger
~~HARRY L. SINGLETARY~~, Secretary,
Department of Corrections,
State of Florida,

Respondent.

**MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR EXTRAORDINARY RELIEF AND FOR A WRIT OF HABEAS CORPUS**

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

MARTIN J. MCCLAIN
Chief Assistant CCR
Florida Bar No.

KENNETH D. DRIGGS
Assistant CCR
Florida Bar No. 304700

DEBORAH K. NIMMONS
Assistant CCR
Florida Bar No. 0872423

OFFICE OF THE CAPITAL
COLLATERAL REPRESENTATIVE
1533 South Monroe Street
Tallahassee, FL 32301
(904) 487-4376

COUNSEL FOR PETITIONER

## INTRODUCTION

A petition for habeas corpus relief was filed on September 5, 1990, to address substantial claims of error under the Fifth, Sixth, Eighth, and Fourteenth Amendments--claims demonstrating that Mr. Jackson was deprived of the effective assistance of counsel on direct appeal and that the proceedings resulting in his capital conviction and death sentence violated fundamental constitutional requirements.

Since the original petition was filed, there have been numerous appellate opinions issued (e.g. Espinosa v. Florida, 112 S. Ct. 2926 (1992); Parker v. Dugger, 111 S. Ct. 731 (1991)) which directly affect the issues raised in Mr. Jackson's petition for writ of habeas corpus. This memorandum is necessary in order to discuss the new case law in an orderly fashion so as to aid this Court in addressing the issues. In addition, counsel were unable to adequately brief some claims due to the fact that CCR was defending several outstanding death warrants at the time the original habeas petition was filed.

In the instant memorandum, the record of courtroom transcript on direct appeal to this Court is cited as (T. ___); the record of documents and pleadings on direct appeal to this Court is cited as (R. ___); and the record on 3.850 appeal to this Court is cited as (PC-R. ___). Other references used in this memorandum are self-explanatory or otherwise explained. It should be noted that the circuit clerk included the Rule 3.850

appendix in the record on appeal, but did not paginate the appendix.

**A. PARKER V. DUGGER.**

In Parker v. Dugger, 111 S. Ct. 731 (1991), the Supreme Court of the United States reversed a Florida death sentence because both the trial court and the Florida Supreme Court had failed (in findings and opinion, respectively) to properly determine whether the death sentence met the requirements of the constitution. In both Mr. Parker's and Mr. Jackson's cases, the problem was the failure to properly analyze mitigation. This improper analysis constituted unconstitutional error in sentencing and appellate review of that sentencing.

As in Parker, the trial court's and this Court's conclusion that no mitigating circumstances were present[1] flies in the face of the record. Both statutory and nonstatutory mitigating circumstances were presented by the defense.[2] The mitigating

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[1](T. 738; 1534) and Jackson v. State, 530 So. 2d 269, 274 (Fla. 1988).

[2]The unrefuted evidence clearly established that Mr. Jackson maintained good relationships with his siblings (T. 1312, 1366-1367), parents (T. 1334, 1360-1361), friends (T. 1316-1317), and neighbors (T. 1364); paid his debts (T. 1312); cared for his children and others' (T. 1313, 1317-1318, 1338-1339, 1362, 1367); cared for his wheelchair-bound sister and father (T. 1335-1337, 1360-1361, 1366-1367); was very intelligent and talented (T. 1313); was conscientious, thoughtful of others (T. 1318-1320, 1364, 1367); worked to help out his family as soon as he was able and did chores around the house before that time, since his father could not work (T. 1334); had a drug problem (T. 451-452, 596-597, 1341-1342); turned himself in peacefully (T. 1345); helped elderly neighbors (T. 1364); and received disparate treatment as compared to Linda Riley, who, the jury may have found, was his accomplice (T. 1342-1345).

evidence was unrefuted. Unrefuted mitigating evidence must be accepted and weighed against the aggravating circumstances. Maxwell v. State, 17 F.L.W. 396 (Fla. 1992). The circuit court's refusal to find mitigation was error of law which skewed this Court's appellate analysis when aggravation was struck on direct appeal. Moreover, in closing argument to the jury the State conceded mitigation was present (T. 1439, 1453).

Despite the presence of uncontested mitigation and despite the State's concession that mitigation was present, the sentencing judge concluded no mitigation was present (R. 738; T. 1534). On direct appeal this Court struck the cold, calculated, and premeditated aggravating factor and then relied on the trial court's ruling that there was no mitigation in its harmless error

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The penalty phase contained unrefuted testimony that Mr. Jackson was a loving, attentive father to his four children and had a good relationship with their mothers (T. 1317-1318; 1338-1340; 1362).

The trial court heard testimony of Mr. Jackson's devotion to his family and his important assistance to both his father and a sister, Toyetta Jackson, who were confined to wheelchairs (T. 1360-1362; 1366-1368).

Testimony and exhibits demonstrated that Mr. Jackson was an accomplished artist who often shared his creations with friends and family (T. 1318-1320; 1357-1358; 1357-1358).

A neighbor testified that Mr. Jackson had shown unusual kindness to her and her elderly mother (T. 1363-1364).

Finally, testimony from both the guilt phase and penalty phase indicated Mr. Jackson had a serious drug problem (T. 1342). In his opening argument in the guilt phase portion of the trial the Assistant State Attorney promised testimony concerning Mr. Jackson's search for cocaine (T. 451-52). The State's main witness, Linda Riley, testified that on the day of the murder Mr. Jackson had her inject cocaine into his arm (T. 596-597). The State's next witness, Mr. Eddie Doldron, testified that when he picked Mr. Jackson up on a highway they went to buy cocaine, syringes, and "reefer." They returned to Ms. Riley's apartment where they "smoked some of the reefer" and Jackson had Ms. Riley inject him with cocaine (T. 711-716, 722).

analysis: "After reviewing this record, we are convinced that elimination of the cold, calculated, and premeditated aggravating factor would not have resulted in a life sentence for this appellant. We note the trial judge found no mitigating circumstances." Jackson v. State, 530 So. 2d 269, 274 (Fla. 1988). The trial court's findings ignored the mitigation this Court had recognized: poverty, emotional deprivation, lack of parental care, cultural deprivation, and a previous history of good character are mitigating. See, e.g., Perry v. State, 522 So. 2d 817 (Fla. 1988)(non-violent background is mitigating).

The mitigation presented at trial was not inconsequential. It was substantial and legally sufficient to support a life sentence. Hall, 545 So. 2d at 1127-1128. It was enough to persuade almost half of this jury, on a 7-5 vote (R. 704), that a life recommendation was warranted.

The trial court's findings and this Court's direct appeal opinion demonstrate that no "well-reasoned application" of mitigating factors occurred in Mr. Jackson's case. As a result, the trial court's weighing process was skewed, and this Court was unable to conduct a meaningful appellate review. This is constitutional error under Stringer v. Black, 112 S. Ct. 1130 (1992) and Parker.

In Parker v. Dugger, an override case, the United States Supreme Court faced a similar situation. There, the trial court overrode a jury life recommendation, finding six aggravating circumstances and no mitigating circumstances, statutory or

nonstatutory. Parker, 111 S. Ct at 734. On direct appeal, this Court struck two aggravating circumstances, yet upheld the override because the trial court had found no mitigation against which to balance the aggravating factors. Id. In Parker, as in the instant case, this Court "erred in its characterization of the trial judge's findings, and consequently erred in its review of [Mr. Jackson's] sentence." Id. at 738.

The Supreme Court explained in Parker that "[i]t is unclear what the Florida Supreme Court did here. It certainly did not conduct an independent reweighing of the evidence. In affirming Parker's sentence, the court explicitly relied on what it took to be the trial judge's finding of no mitigating circumstances." Id. Because "the Florida Supreme Court did not come to its own independent factual conclusion . . . [and] . . . it relied on 'findings' of the trial judge that bear no necessary relation to this case," id. at 740, the affirmance of the override "deprived Parker of the individualized treatment to which he is entitled under the Constitution." Id.

Mr. Jackson's death sentence is not the result of "well-reasoned application" of mitigating factors. It was imposed in an unreliable weighing process and affirmed without meaningful appellate review. Parker. His death sentence is therefore neither reliable nor individualized. Relief is proper.

**B. ESPINOSA V. FLORIDA.**

Mr. Jackson's jury was read the standard instructions on aggravating factors (T. 1398, 1410).[3] Their discretion to impose the death penalty was never properly limited. Godfrey v. Georgia, 446 U.S. 420 (1980); Gregg v. Georgia, 428 U.S. 228 (1976); Furman v. Georgia, 408 U.S. 238 (1972). Espinosa v. Florida, 112 S. Ct. 2926 (1992), is new Florida law which establishes that Mr. Jackson is entitled to resentencing because of instructional error on aggravating factors. Under Espinosa, if a Florida capital jury does not receive constitutionally adequate instructions on aggravating circumstances, any resulting death sentence violates the Eighth Amendment.

The trial court gave Mr. Jackson's jury the standard instruction on the "heinous, atrocious, or cruel" aggravator (T. 1474). On June 29, 1992, the Supreme Court of the United States issued its opinion in Espinosa, reversing long-standing Florida jurisprudence that Maynard v. Cartwright, 486 U.S. 356 (1988), does not apply to Florida capital sentencing. The Supreme Court further held that Florida's standard jury instruction on heinousness violates the Eighth Amendment.

The trial court gave a defective instruction on the "cold, calculated and premeditated" aggravator as well. (T. 1474). Again, the instruction did not contain this Court's limiting

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[3]Although the trial court did attempt to define cold, calculated, and premeditated beyond the language of the standard jury instruction, the instruction given did not tell the jury of the need for a preexisting plan. See Porter v. State, 564 So. 2d 1060 (Fla. 1990).

construction that a preexisting plan must exist.[4] Therefore, the instruction given was "so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." Espinosa, 112 S. Ct. at 2928. In Hodges v. Florida, 52 Cr. L. 3015 (U.S. 1992), the Supreme Court of the United States reversed a Florida death sentence solely on the basis of an improper instruction on the coldness aggravator.

Mr. Jackson's jury was also instructed that a verdict of life must be made by a majority of the jury (T. 1476-1477), that their role in sentencing was insignificant (T. 1242, 1454, 1472-1473, 1475-1476), that the mitigating circumstances must outweigh the aggravating circumstances (T. 1473-1476), and that nonstatutory aggravating circumstances could be considered (T. 469, 493, 1168-1169, 1436-1447). These instructions further skewed the sentencing recommendation. See Rose v. State, 425 So. 2d 521 (Fla. 1982); cert. denied, 471 U.S. 1143 (1985); Harich v. State, 437 So. 2d 1082 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984); Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc); Caldwell v. Mississippi, 472 U.S. 320 (1985); State v. Dixon, 283 So. 2d 1 (Fla. 1973); Hitchcock v. Dugger, 481 U.S. 393 (1987); Maynard v. Cartwright, 486 U.S. 356 (1988); Jones v. State, 569

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[4]This Court has held that "coldness" is reflected by a "deliberate plan formed through calm and cool reflection," Santos v. State, 591 So. 2d 160, 163 (Fla. 1992); that "calculated" means "a careful plan or prearranged design," Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987); and that "premeditated" refers to a "heightened" form of premeditation which is greater than the premeditation required to establish mens rea for first degree murder. Hamblen v. State, 527 So. 2d 800, 805 (Fla. 1988).

So. 2d 1234 (Fla. 1990); Welty v. State, 402 So. 2d 1159 (Fla. 1981); Taylor v. State, 583 So. 2d 323 (Fla. 1991). Improper "extra thumbs" were placed on death's side of the scale of justice. Stringer v. Black, 112 S. Ct. 1130 (1992).

**C. APPELLATE INEFFECTIVE ASSISTANCE OF COUNSEL.**

Though addressed in part on direct appeal, these issues of fundamental, constitutional import did not receive full review due to appellate counsel's ignorance of relevant law. To the extent this Court's longstanding jurisprudence repudiating this claim brought about appellate counsel's failure to present this issue in its entirety, counsel was rendered prejudicially ineffective. Blanco v. Singletary, 943 F.2d 1977 (11th Cir. 1991); United States v. Cronic, 466 U.S. 648 (1984). Counsel overlooked a number of issues. Atkins v. Attorney General, 932 F.2d 1430 (11th Cir. 1991). Counsel failed to raise preserved speedy trial error, trial counsel's conflict of interest arising from counsel's investigator's romantic relationship with the prosecuting attorney, fundamental error in the penalty phase proceedings regarding the facially vague and overbroad statutory language, and the failure to adequately instruct the jury on the elements of the aggravating circumstances. Had appellate counsel raised these issues, Mr. Jackson would have been entitled to relief. Accordingly, Mr. Jackson was prejudiced by appellate counsel's deficient performance. It simply cannot be said that Mr. Jackson was not prejudiced as a result this ineffective assistance. Habeas relief is warranted.

**D. CONCLUSION.**

These errors cannot be harmless beyond a reasonable doubt. Mr. Jackson's jury recommended death by the narrowest margin--seven (7) to five (5). Mitigation exists in the record which would have provided a reasonable basis for a life recommendation. Hall v. State, 541 So. 2d 1125 (Fla. 1989). Habeas relief is required.

## CONCLUSION

For all of the reasons discussed in his petition and herein, Petitioner respectfully urges that the Court grant habeas corpus relief.

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by United States Mail, first class postage prepaid, to all counsel of record on January 26, 1993.

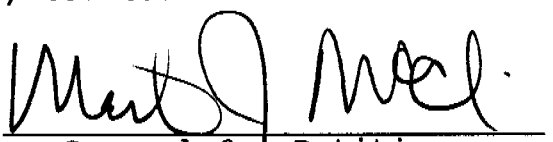
LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

MARTIN J. MCCLAIN
Chief Assistant CCR
Florida Bar No. 0754773

KENNETH D. DRIGGS
Assistant CCR
Florida Bar No. 304700

DEBORAH K. NIMMONS
Assistant CCR
Florida Bar No. 0872423

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE
1533 South Monroe Street
Tallahassee, FL 32301
(904) 487-4376

By: 
Counsel for Petitioner

Copies furnished to:

Carolyn Snurkowski
Assistant Attorney General
Department of Legal Affairs
The Capitol
Tallahassee, FL 32399-1050