IN THE SUPREME COURT OF FLORIDA

ETHERIA V. JACKSON,

Petitioner,

v. CASE NO. 75,846

HARRY K. SINGLETARY,

Respondent.

_____/

RESPONSE TO PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF HABEAS CORPUS

COMES NOW Respondent, Harry K. Singletary, by and through undersigned counsel and files this his Response to Petition for Extraordinary Relief, for a Writ of Habeas Corpus, et al., and would show:

(1) Respondent would deny all allegations contained in the instant petition for writ of habeas corpus and would demand strict proof thereof.

Procedural History

The statement of the case and facts contained in the State's Answer Brief on appeal from the denial of Jackson's Rule 3.850 motion, provides a clear and concise accounting of the circumstances leading to the instant pleading. The record reflects that Jackson's conviction and sentence were affirmed in Jackson v. State, 530 So.2d 269 (Fla. 1988), cert. denied, 109 S.Ct. 882 (1989). He filed a Rule 3.850 motion on September 5,

1990, on the same day he filed his petition for writ of habeas corpus before this Court. Relief was denied on his Rule 3.850 motion on March 25, 1991, rehearing denied on September 30, 1991, and his notice of appeal was filed in this Court on October 28, 1991.

Reasons For Denying All Relief

Point I

WHETHER THIS COURT'S DISPOSITION OF JACKSON'S CASE ON DIRECT APPEAL AFTER STRIKING AN AGGRAVATING FACTOR IS IN CONFLICT WITH CLEMONS v. MISSISSIPPI, AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE STATE LAW PLACED EXCLUSIVE SENTENCING AUTHORITY WITH THE TRIAL COURT JURY AND JUDGE AND THIS COURT THUS COULD NOT, AND IN THIS CASE DID NOT, REWEIGH AGGRAVATION AND MITIGATION, AND DID NOT ENGAGE IN ANY APPROPRIATE HARMLESS ERROR REVIEW UPON THE STRIKING AN AGGRAVATING CIRCUMSTANCE

Citing Clemons v. Mississippi, 108 L.Ed.2d 725 (1990), Jackson argues this Court failed to either reweigh or properly conduct a harmless error analysis after an aggravating factor was held to be invalid based on a lack of evidence. Such a conclusion is without merit. In fact, this Court has repeatedly held as evidenced in Johnson v. Florida, ___ So.2d ___ (Fla. October 1, 1992), __ F.L.W. S___, Slip opinion, pg. 19, that the striking of an aggravating factor does not necessarily require reversal where this Court does a harmless error analysis.[1] See also Pettit v. State, 591 So.2d 618 (Fla. 1991). In the instant case, the court, after determining that the cold, calculated and

[1] This Court has not elected to pursue a course of reweighing as of this date. Certainly no bar exists in either caselaw or statute that would prevent such an appellate reweighing however.

premeditated aggravating factor was not proven beyond a reasonable doubt in light of Rogers v. State, 511 So.2d 526 (Fla. 1987), held:

> Although we have rejected the cold, calculated and premeditated aggravating factor, four valid aggravating circumstances remain. After reviewing this record, we are convinced that the elimination of the cold and calculated aggravating factor would not have resulted in a life sentence for this Appellant. We note the trial judge found no mitigating circumstances. (cites omitted).

530 So.2d at 274.

Albeit, this Court's opinion does not specifically use the "magic words" that the error was harmless error beyond a reasonable doubt, there can be no doubt that in fact this Court engaged in a harmless error analysis in ascertaining that striking of one aggravating factor would not have affected the correctness of the sentence and that any error was harmless beyond a reasonable doubt. This Court has consistently applied a harmless error analysis to circumstances similar to the instant cause. No Clemons v. Mississippi, supra, violation has occurred sub judice. Should there be any doubt with regard to the application of the harmless error doctrine, a clear statement should be made to enforce the earlier finding by this Court. See Martin v. Singletary, 599 So.2d 119 (Fla. 1992).

Point II

WHETHER IN LIGHT OF THIS COURT'S RECENT DECISIONS THAT (1) THE SENTENCING COURT MUST EXPRESSLY EVALUATE ALL MITIGATING FACTORS PROPOSED BY THE DEFENDANT, MUST FIND EACH PROPOSED FACTOR THAT HAS BEEN RECENTLY ESTABLISHED BY THE EVIDENCE AND IS MITIGATING IN NATURE, AND MUST WEIGH THOSE MITIGATING CIRCUMSTANCES AGAINST THE AGGRAVATING CIRCUMSTANCES; (2) THAT THE SENTENCER MAY FIND THAT SOME AGGRAVATING CIRCUMSTANCES ARE ENTITLED TO LITTLE WEIGHT; AND (3) THAT THE AGGRAVATING FACTOR OF ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL DOES NOT APPLY UNLESS THE CRIME WAS MEANT TO BE DELIBERATELY AND EXTRAORDINARILY PAINFUL, THIS COURT SHOULD REVISIT ITS EARLIER DECISION THAT THE TRIAL COURT CORRECTLY FOUND THERE WERE SUFFICIENT AGGRAVATING CIRCUMSTANCES TO SUPPORT A SENTENCE OF DEATH AND NO MITIGATING FACTORS

First and foremost, a petition for writ of habeas corpus, like a Rule 3.850 motion, may not be used as a substitute or as a second direct appeal. That is precisely what is being sought sub judice. With regard to Jackson's assertion that he is entitled to relief pursuant to Campbell v. State, 571 So.2d 415 (Fla. 1990), the State would submit that Campbell is not a significant change of law that would entitle him to reconsideration. See Gilliam v. State, 582 So.2d 610 (Fla. 1991). Moreover, it is essential to note that no objection was raised on direct appeal to the trial court's order or the "failure" of the trial court to find mitigating factors in Jackson's case. As such, he is procedurally barred from asserting in any collateral attack concerns regarding whether the trial court found no mitigation in this case.

Second, with regard to the finding that this crime was especially heinous, atrocious or cruel, Jackson never raised the

sufficiency of this aggravating factor on direct appeal. Rather, Jackson argued that there was an improper doubling because the trial court found both heinous, atrocious and cruel and cold, calculated and premeditated murder as aggravating factors. This Court, on direct appeal, concluded that in light of Rogers v. State, supra, the aggravating factor that the murder was committed in a cold, calculated and premeditated manner was not proven beyond a reasonable doubt. Jackson is procedurally barred from raising collaterally any complaint with regard to the sufficiency of the evidence as to the heinous, atrocious and cruel aggravating factor. Third, there can be little doubt with regard to the facts of this case that Mr. Moody's death was heinous, atrocious and cruel.

Terminally, Jackson complains "the trial court said little about the weight accorded to any of the aggravating factors it found." (Petitioner's Petition, pg. 34). Nowhere is it required that the trial court must provide detailed accountings of every aspect of each aggravating factor found. Moreover, as previously noted, Campbell does not apply sub judice since the written order of the trial court preceded Campbell. Additionally, the trial court is presumed to have accorded the proper weight to the aggravating factors found. See Lopez v. State, 536 So.2d 226 (Fla. 1988), and Grossman v. State, 525 So.2d 833 (Fla. 1988).

Based on the foregoing, no relief should be forthcoming as to this claim.

Point III

WHETHER JACKSON'S RIGHT TO INDIVIDUALIZED AND RELIABLE CAPITAL SENTENCING DETERMINATION WERE DENIED BY THE SENTENCING COURT'S REFUSAL TO ALLOW ACCURATE EVIDENCE AND TO PROVIDE INSTRUCTIONS REGARDING THE CONSEQUENCES OF THE JURY'S VERDICT, IN CONTRAVENTION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

Jackson next argues that his counsel attempted to present information to the jury that the twenty-five year minimum mandatory term of a life sentence meant exactly that: "that the defendant would indeed serve at least twenty-five years before being paroled." (Petitioner's Petition, pg. 36). The record reflects that this issue was raised on direct appeal and therefore is not properly before the Court. In fact, this Court decided the very issue in holding:

> . . . Appellant maintains he was prohibited from presenting the philosophy of the present Parole Commission to not grant parole to defendants convicted of capital offenses as a mitigating circumstance. We find that claim without merit. The fact does not concern the Appellant's character and, in any event, it is probable that none of the present Parole Commission would be serving at the time Jackson could be eligible for parole in twenty-five years had a life sentence been imposed.

530 So.2d at 274.

Jackson is procedurally barred from raising this claim in his petition for writ of habeas corpus.

Point IV

WHETHER JACKSON'S JUDGE AND JURY CONSIDERED AND RELIED ON THE VICTIM'S PERSONAL CHARACTERISTICS AND THE IMPACT OF THE OFFENSE ON THE VICTIM'S FAMILY IN VIOLATION OF MR. JACKSON'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS, BOOTH v. MARYLAND, SOUTH CAROLINA v. GATHERS, AND JACKSON v. DUGGER

Jackson next argues that impermissible victim impact evidence was presented to the jury which violated his rights under Booth v. Maryland, 482 U.S. 496 (1987), and South Carolina v. Gathers, 490 U.S. 805 (1989).

Since the time Jackson filed his petition for writ of habeas corpus, the United States Supreme Court decided Payne v. Tennessee, 115 L.Ed.2d 720 (1991), wherein the court receded from its previous decisions in Booth and Gathers. Appellate counsel did not render ineffective assistance of counsel where, as here, cases regarding victim impact evidence were overturned by a later decision of the United States Supreme Court. Moreover, this Court has repeatedly held that an objection is necessary at the trial level in order to preserve any claim such as Booth error. See Jackson v. Dugger, 547 So.2d 1197 (Fla. 1989). Appellate counsel may not be held to have been ineffective for failing to raise a claim which is not preserved below. No relief should be forthcoming as to this issue.

Point V

WHETHER JACKSON'S SENTENCING JURY WAS REPEATEDLY MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING, CONTRARY TO HITCHCOCK v. DUGGER, 107 S.Ct. 1821 (1987); CALDWELL v. MISSISSIPPI, 105 S.Ct. 2633 (1985); AND MANN v. DUGGER, 844 F.2d 1446 (11th Cir. 1988) (EN BANC), AND IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. JACKSON RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO ZEALOUSLY ADVOCATE AND LITIGATE THIS ISSUE

Citing Caldwell v. Mississippi, 472 U.S. 320 (1985), and the Eleventh Circuit's en banc decision in Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988), Jackson argues he was denied an individualized sentencing proceeding because the trial court improperly diminished the jury's role when he instructed them as to their responsibilities. The record reflects that while the court informed the jury sub judice that their role was important, the court further informed the jury that he, as the sentencing entity, would sentence. The record reflects that no objection was raised below with regard to the instructions given. Appellate counsel can not be held to be wanting for failing to raise this claim on direct appeal. Moreover, since the claim was not preserved below, Jackson cannot use the vehicle of a petition for writ of habeas corpus to raise claims which are procedurally barred. This Court has continually held that Caldwell does not apply to Florida, however, the merits of his claim may not be addressed since the claim was not preserved below. Dugger v. Adams, 109 S.Ct. 1211 (1989); Atkins v. State, 541 So.2d 1165 (Fla. 1989). Jackson is entitled to no relief as to this claim.

Point VI

WHETHER THE PROSECUTOR'S INFLAMMATORY, EMOTIONAL, AND THOROUGHLY IMPROPER COMMENT ON THE EVIDENCE DURING THE TRIAL RENDERED JACKSON'S CONVICTION AND RESULTANT DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

Terminally, Jackson argues that the prosecutor improperly made a comment on the evidence when he asked a witness if he needed assistance in rolling up a carpet which was on display before the jury as evidence against Jackson. This issue was objected to by trial counsel at the point when the prosecutor asked the witness, "Mr. Delaney: Do you need some help, detective?; THE WITNESS: Yeah, we're going to need probably one more." (TR 557). Although the trial court agreed that the prosecution should not have made the statement or asked the question, the court told the State to refrain from making similar comments. (TR 559). The court denied defense counsel's motion for mistrial.

Defense counsel's theory at trial was that Linda Riley committed the murder and that she might not have done it alone. The mere fact that the prosecutor asked the bailiff to assist the witness in unrolling the rug that was to be presented before the jury, was not a statement or comment on the evidence presented. Even assuming for the moment that the prosecutor had meant exactly what defense counsel has accused him of doing, the fact remains the jury would have seen the size of the rug and could have easily gaaged for themselves without any comment by the prosecutor whether one or more persons were needed to roll or

unroll the rug. Moreover, evidence had already been presented to the jury prior to this point that it took two people to help pull Moody's body out of the car when it was found. Patrolman Godbee testified that when he found the body on December 5, 1985, he sought back-up (TR 505). He testified that Officer Guthrie arrived on the scene and that they called for a flatbed truck to take the whole crime scene to the crime lab (TR 514). Mr. Godbee testified it took two people to get the carpet out of the car and two people to roll it open so that the body could be photographed (TR 515). No objection was made regarding this testimony. In fact, photos were introduced at trial which reflected same (TR 524).

To the extent that any error may have occurred as a result of the prosecutor's comments, the State would submit said error was harmless error beyond a reasonable doubt in light of the fact the jury already had information that went unobjected to prior to the State Attorney's comment on this point.

Conclusion

Based on the foregoing, the State would submit that this Court should deny all relief.

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. Martin J. McClain, Esq., Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 6th day of October, 1992.

CAROLYN M. SNURKOWSKI
Assistant Attorney General