IN THE SUPREME COURT OF FLORIDA

NO. 76,307

JERRY WHITE,

Petitioner,

v.

RICHARD L. DUGGER, Secretary,
Department of Corrections,
State of Florida,

Respondent.

REPLY TO STATE'S RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, JERRY WHITE, through counsel, submits the instant reply to the State's response to his petition for a writ of habeas corpus. In reply and in support of his requests for habeas corpus relief Mr. White respectfully submits as follows:

This is Mr. White's first and only petition for a writ of habeas corpus. He is requesting that in his case, as in the case of every other capital petitioner who has presented for the Court's consideration valid claims for habeas corpus relief, the Court review the petition and grant the relief to which he is entitled. By his petition, Mr. White simply seeks the review which this Court has provided to every other capital petitioner. Nevertheless, apparently unable to contend with the

substantiality of Mr. White's claims for relief, the Respondent resorts to facile procedural arguments which are totally inapposite in this case and contrary to this Court's settled standards. Indeed, regarding the first two claims presented in Mr. White's petition, the Respondent makes no argument that the substantial issues presented in those claims lack merit or do not warrant the granting of relief. On the basis of Mr. White's petition, and now the State's response, a stay of execution and relief are certainly proper, for the State has presented no valid reason demonstrating that relief should be denied. In essence, the State has failed to carry its burden to show cause why relief should not be granted on the basis of the valid claims which Mr. White has presented, and the Court's Writ of Habeas Corpus should therefore issue.

THE RESPONDENT'S PROCEDURAL ARGUMENTS

Initially, the Respondent argues that Mr. White's first petition for habeas corpus relief is "untimely," constitutes an abuse of process, and should be summarily dismissed (Response at 6). As support for this strange proposition, the Respondent relies upon White (Beauford) v. Dugger, 511 So. 2d 554 (Fla. 1987). In this first habeas corpus proceeding in this case, the Respondent's arguments of "abuse" are difficult to fathom. The situations in Jerry White's and Beauford White's cases are vastly

different. In Beauford White's case, the Governor had issued a death warrant which set the execution date for 60 or more days after the date of the warrant. Thus, under Fla. R. Crim. P. 3.851, this Court held that Beauford White's habeas corpus petition had not been timely filed. White, 511 So. 2d at 555. Jerry White's death warrant, setting an execution date for 35 days after the signing of the warrant, is not only remarkably short for a capital petitioner in his position, but also does not invoke the provisions of Rule 3.851. Why the Respondent would even attempt to characterize the petition as "untimely" is thus beyond comprehension.

The Respondent also argues that the claims presented in Mr. White's petition have been "withheld" until now (Response at 7). This argument is patently absurd, and is supported by no facts.[1] Until March 15, 1990, Mr. White's appeal of the denial of his Rule 3.850 motion was pending before this Court. White v. State,

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[1] Indeed, the supposed "abuse" issue argued by the Respondent would be the ultimate example of a procedural "trap for the unwary." Lefkowitz v. Newsome, 420 U.S. 283, 293 (1975). The Respondent is in this case attempting to create a procedural impediment to review which simply does not exist, and which therefore certainly cannot be deemed one regarding which Mr. White had any notice, cf. Adams v. State, 543 So. 2d 1244, 1247 n. 3 (Fla. 1989) (procedural rules cannot be invoked unless the petitioner has had fair notice of their existence), or which in any way can be deemed to be fair or to comport with due process.

15 F.L.W. 151 (Fla. March 15, 1990). After this Court issued its opinion denying relief, Mr. White filed a motion for rehearing. That motion was denied on May 24, 1990, and very shortly thereafter, on June 12, 1990, the Governor issued a death warrant against Mr. White. The responsibility for the emergency nature of these proceedings thus lies squarely with the Governor's office, not with Mr. White or undersigned counsel. See Davis V. Dugger, 829 F.2d 1513, 1520-21 (11th Cir. 1987).[2]

Habeas corpus is a "high prerogative writ" which will lie for any illegal restraint of liberty. Anglin V. Mayo, 88 SO. 2d 918, 919 (Fla. 1955). When such an illegal restraint is asserted, "it is the responsibility of the court to brush aside

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[2]The Respondent deems it significant that CCR has been involved in Mr. White's case since 1985. What the Respondent should but does not recognize is that, as this Court well knows, because of CCR's impossible work load, there has been significant and constant turnover in CCR's staff over the years. Mr. White was initially represented by volunteer pro bono counsel who was assisted by CCR. Following the Rule 3.850 proceedings in the circuit court, volunteer counsel and the Assistant CCR assisting him withdrew from Mr. White's case. Shortly thereafter, the Assistant CCR left the CCR office. Another attorney with CCR represented Mr. White in his Rule 3.850 appeal. After briefing and oral argument, and while the appeal was pending before this Court, that attorney also left CCR. Current counsel then became involved. The reality of CCR's existence is that because a meritorious appeal was pending and because of CCR's impossible caseload, no attorney was familiar with Mr. White's case or actively working on it. There has been no "withholding" of claims and no abuse of process, which Mr. White and undersigned counsel will readily establish at an evidentiary hearing, should the Court allow one.

formal technicalities and issue such appropriate orders as will do justice." Id. Mr. White's petition certainly has presented such claims, and the Respondent has not countered them but has resorted to facile procedural arguments which are inapposite to Mr. White's case. As the discussions below and in Mr. White's petition demonstrate, the Writ should issue.

MR. WHITE'S CLAIMS FOR RELIEF

CLAIM I

Mr. White's petition asserted that because of trial counsel's violation of his duty of loyalty to his capital client, his obvious racism while representing his black client, his complete indifference to his client's fate, his interest in protecting himself rather than his client, and his grossly improper, tragic, unprofessional, and unethical penalty phase actions, Mr. White was deprived of the assistance of counsel and of the effective assistance of counsel. The Respondent has not denied the truth of any of these assertions, or of any of the facts supporting them. Nor can the Respondent do so: the assertions and their underlying facts are plainly evident on the face of the direct appeal record in Mr. White's case. The assertions entitle Mr. White to relief from his unconstitutional capital conviction and death sentence.

The Respondent does no more regarding this issue than to

repeat its "abuse" arguments. It must be remembered that this claim is based entirely upon the direct appeal record and that it asserts ineffective assistance of appellate counsel and fundamental error. It is thus appropriately brought in a habeas corpus proceeding, for the fundamental constitutional errors challenged by this claim involved the appellate review process. See, e.g., Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985). Further, this Court has held that "in limited circumstances, we have previously addressed ineffective assistance of [trial] counsel claims when presented in an appeal on the merits. See Stewart v. State, 420 So. 2d 862 (Fla. 1982), cert. denied, 460 U.S. 1103 (1983); Foster v. State, 387 So. 2d 344 (Fla. 1980)." Ventura v. State, 560 So. 2d 217, 220 (Fla. 1990). Mr. White's unique case presents the "limited circumstances" in which a claim of ineffective assistance of trial counsel should and would have been addressed on direct appeal, had appellate counsel presented the issue for the Court's review, and would have warranted the granting of relief -- the trial and capital sentencing in this case are not reliable, because of what trial counsel did. What counsel did is evident from the record on direct appeal which reflects the blatant'improprieties that this case involves.

In this case, "counsel's ineffectiveness cries out from a reading of the transcript." Douglas v. Wainwright, 714 F.2d 1532, 1557 (11th Cir. 1983). No one reading this record could

miss trial counsel's violation of his duty of loyalty, his racism, his conflict of interest, his lack of professionalism, his thoroughly unreasonable actions, and his complete lack of advocacy, for they literally "leap[] out" of the record. See Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). In such circumstances and based on the unique facts presented in this case, the claim should be heard and the Court should "issue such appropriate orders as will do justice." At the very least, a stay of execution to allow for deliberate consideration of this unusual and substantial issue is warranted. Thereafter, habeas corpus relief would be more than proper.

CLAIM II

In his habeas corpus petition, Mr. White contended that he was effectively denied his right to a meaningful direct appeal by trial counsel's unreasonable failures to preserve meritorious issues for appellate review and by appellate counsel's unreasonable failure to urge trial counsel's blatant ineffectiveness as requiring consideration of these meritorious issues. Again, the Respondent does not contend that Mr. White's conviction and death sentence satisfy the sixth, eighth, and fourteenth amendments. Rather, the Respondent argues that Mr. White is "seek[ing] to present issues which this Court has twice rejected before" (Response at 10)(emphasis in original). That,

however, is precisely the point of Mr. White's claim: this Court has never considered, much less "rejected," the issues discussed in this claim because of trial and appellate counsel's unreasonable failures.

Because of trial and appellate counsel's failures, Mr. White's direct appeal was little more than a formality. Clear and substantial errors were not meaningfully considered, and Mr. White's capital conviction and death sentence lack the reliability and fundamental fairness required by the sixth, eighth and fourteenth amendments. The Writ should issue.

CLAIM III

As to this claim, the Respondent again argues procedural bar, "in that, given Elledge[v. State, 346 So. 2d 998 (Fla. 1977)], this claim was plainly available at the time of White's direct appeal" (Response at 11). The point of Mr. White's claim -- and the reason the claim is presented in a habeas corpus proceeding -- is that this issue was presented on direct appeal, was incorrectly decided then, and Clemons v. Mississippi, 110 S. Ct. 1441 (1990), now shows why the direct appeal decision was fundamentally flawed and incorrect.

The Respondent has obviously failed to review Mr. White's direct appeal brief. In arguing that the trial court had improperly "doubled" aggravating factors, appellate counsel also

argued:

> [W]hen coupled with the factors presented below, the doubling does appear to have impaired the weighing process as discussed in Armstrons v. State, [399 So. 2d 953 (Fla. 1981)], and Elledse v. State, 346 So. 2d 998 (Fla. 1977).

(Initial Brief of Appellant at 11). The phrase "factors presented below" referred to, inter alia, the improper application of the "cold, calculated, and premeditated" aggravating factor (Initial Brief at 11-12), which this Court struck, and the trial court's failure to find mitigation clearly set out in the record (Id. at 13-14). The issue is thus properly presented in these habeas corpus proceedings in light of Clemons. See Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989)(where an intervening decision of the United States Supreme Court demonstrated that the Florida Supreme Court's disposition of the issue on direct appeal was erroneous, the issue warranted reconsideration and the granting of relief in a habeas corpus action).

The Respondent also argues that this claim is without merit because "[t]here was no mitigation found in this case" (Response at 11). Although the trial court did not specifically "find" any mitigating factors, there was mitigation present, which even the trial court's sentencing order recognized: "Although there was evidence that the Defendant had been drinking alcoholic beverages before the crime there was no evidence that he was substantially

impaired in his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law" (R. 1195). The court only considered the evidence of intoxication in terms of a statutory mitigating factor and did not consider it as nonstatutory mitigation. However, the court's order reflects that mitigating evidence was present, which is in accord with what the record reflects. Several State witnesses testified that Mr. White appeared to be intoxicated immediately before and after the offense (R. 433, 460, 469, 473), and that he had been drinking throughout the night before the offense (R. 661-62). Mr. White still appeared disoriented, confused, and under the influence of alcohol several hours after the offense (R. 681). Mr. White's uncle testified that Mr. White blanks out and loses time and memory when he drinks (R. 1053). Mr. White's mother testified that Mr. White did not know his natural father and that his stepfather died violently when Mr. White was about 12 years old (R. 1055). The jury heard this mitigating evidence, and thus relief is proper, just as relief was proper in Preston v. State, 15 F.L.W. 337, 338 (Fla. 1990)(consideration of invalid aggravating circumstance not harmless beyond a reasonable doubt because, inter alia, "there was mitigating evidence introduced at the trial, even though no statutory mitigating circumstances were found").

This issue was presented on direct appeal. It was

incorrectly decided then. Jackson, supra. There was mitigation in the record. Preston, supra. Relief is proper.

REMAINING CLAIMS

As to the remaining claims in his petition, Mr. White relies upon the discussion in the petition, noting only that these claims either were raised on direct appeal and require reconsideration in light of new precedents, and/or involve fundamental error or ineffective assistance of appellate counsel. No procedural bars apply, and the claims demonstrate that relief is proper.

CONCLUSION

Mr. White's petition demonstrates that his capital conviction and death sentence violate the fifth, sixth, eighth, and fourteenth amendments. The Respondent has truly presented nothing to argue otherwise. On the basis of Mr. White's petition and this reply, relief is warranted.

Respectfully submitted,

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. **0125540**

BILLY H. NOLAS
Chief Assistant CCR
Florida Bar No. **806821**

GAIL E. ANDERSON
Staff Attorney
Florida Bar No. **0841544**

JUDITH J. DOUGHERTY
Assistant CCR
Florida Bar No. **0187786**

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

By: Gail E. Anderson
Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true and correct copy of the foregoing has been furnished by United States Mail, first-class, postage prepaid, to Richard B. Martell, Assistant Attorney General, Department of Legal Affairs, Magnolia Park Courtyard., **111-29** North Magnolia Street, Tallahassee, FL **32301** this 14th day of July, **1990**.

Gail E. Anderson
Attorney