



TABLE OF CONTENTS

	<u>Page</u>
I. PRELIMINARY STATEMENT .....	1
II. STATEMENT OF FACTS .....	2
III. ARGUMENT .....	6
IV. CONCLUSION .....	7

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TABLE OF AUTHORITIES

	<u>Page</u>
 <u>CASES :</u>	
<u>Downs v. Dugger</u> , ___ So. 2d (No. 71,100, Sept. 9, 1987).....	2, 4, 7
<u>Eddings v. Oklahoma</u> , 455 U.S. 104 (1982).....	7
<u>Engle v. State</u> , 438 So. 2d 803 (Fla. 1983), <u>cert. denied</u> , 465 U.S. 1074 (1984).....	4
<u>Hitchcock v. Dugger</u> , ___ U.S. , 107 S. Ct. 1821 (1987).....	7
<u>Lockett v. Ohio</u> , 438 U.S. 586 (1978).....	7
<u>McCrae v. State</u> , So. 2d ___ (No. 67,629, June 18, 1987).....	7
<u>Morgan v. State</u> , So. 2d ___ (No. 69,104, Aug. 27, 1987).....	7
<u>Riley v. Wainwright</u> , So. 2d ___ (No. 69,563, Sept. 3, 1987).....	2, 7
<u>Skipper v. South Carolina</u> , 476 U.S. , 106 S. Ct. 1669 (1986).....	7
<u>Thompson v. Dugger</u> , ___ So. 2d ___ (Nos. 70,739 & 70,781, Sept. 9, 1987).....	7
 <u>CONSTITUTIONAL PROVISIONS:</u>	
8th Amendment, United States Constitution....	7
14th Amendment, United States Constitution....	7
 <u>STATUTE :</u>	
§921.141(6), Fla. Stat.....	2

IN THE SUPREME COURT OF FLORIDA

RUFUS E. STEVENS, )  
Appellant, )  
v. ) Nos. 68,581 & 69,112  
STATE OF FLORIDA, )  
Appellee. )

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APPELLANT'S SUPPLEMENTAL BRIEF

I. PRELIMINARY STATEMENT

This extremely short supplemental brief is occasioned by several recent decisions of this Court which make clear that a court's failure to consider non-statutory mitigating circumstances in imposing a death sentence mandates a resentencing. While this issue was raised in Appellant Rufus E. Stevens' Amended Motion for Post-Conviction Relief (R 284-86)<sup>1</sup> and in Stevens' previously-filed briefs in this matter (AIB 114 n.117; ARB 31-32), we believe that this supplemental

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1. Parenthetical references preceded by "R" are to the appropriate pages of the record on Appeal No. 68,581; references preceded by "TT" are to the stenographer's transcript of the trial, sentence and related proceedings; references preceded by "AIB" are to the appropriate pages of Appellant's Initial Brief; and those preceded by "ARB" are to the appropriate pages of Appellant's Reply Brief.

brief will assist the Court by highlighting the facts essential to this issue.

11. STATEMENT OF FACTS

In imposing a sentence of death upon Stevens, the sentencing judge, Hon. John E. Santora Jr., considered only the mitigating circumstances set forth in §921.141(6), Fla. Stat. He charged the jury during the penalty stage as follows (TT 1286):

Should you find there is sufficient of these aggravating circumstances to exist, it will be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist.

The mitigating circumstances which you may consider, if established by the evidence, are these:<sup>2</sup>

[The court then listed (TT 1286-87) the seven statutory mitigating circumstances without any mention of non-statutory mitigating circumstances.]<sup>3</sup>

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2. The language in this paragraph is verbatim to an instruction this Court has twice held precluded consideration of non-statutory mitigating circumstances. Riley v. Wainwright, So. 2d \_\_\_\_ (No. 69,563, Sept. 3, 1987, p. 5); Downs v. Dugger, \_\_\_\_ So. 2d \_\_\_\_ (No. 71,100, Sept. 9, 1987, p. 5).

3. The emphasis in this and all succeeding quotations is added.

In actually imposing sentence, Judge Santora unambiguously restricted himself to the statutory mitigating factors, stating the following (TT 1303):

I'm also required to consider mitigating circumstances before passing sentence upon you. There are seven of those:

[Judge Santora then discussed (TT 1303-05) the seven statutory mitigating circumstances.]

Nowhere in his sentencing findings and remarks (nor anywhere else in the proceedings) did Judge Santora directly or indirectly refer to non-statutory mitigating circumstances.

In sentencing Stevens' co-defendant, Gregory Scott Engle, on August 17, 1979, the same day upon which Stevens was sentenced, Judge Santora likewise considered only the statutory mitigating circumstances. He stated (Engle trial transcript, p. 1085):

I am required to consider eight aggravating circumstances and seven mitigating circumstances.

[Judge Santora then discussed (pp. 1085-91) the statutory aggravating and mitigating circumstances without any reference to non-statutory mitigation.]

By contrast, when Judge Santora resentenced Engle on March 28, 1986,<sup>4</sup> he made clear that he had considered non-statutory mitigating circumstances, stating as follows:

After careful consideration of all statutory aggravating circumstances and statutory and non-statutory mitigating circumstances, this court finds there are four aggravating circumstances and no mitigating circumstances.

Judge Santora's failure to consider non-statutory mitigating circumstances in 1979 was consistent with the prosecution's view as expressed in the State Attorney's penalty-stage summation (TT 1247-48):

The Court is going to also instruct you on the mitigating circumstances and the Florida Legislat[ure, r]epresentatives of the people of this state[,] ha[s] seen fit to make certain aggravating and mitigating factors which are to be controlling and which you are to consider in applying the evidence in this case.<sup>5</sup>

After discussing (TT 1248-62) the statutory aggravating and mitigating circumstances, the State Attorney said (TT 1262):

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4. This Court ordered Engle resentenced because of Judge Santora's unconstitutional reliance in his initial sentencing findings upon statements made by Stevens. Engle v. State, 438 So. 2d 803 (Fla. 1983), cert. denied, 465 U.S. 1074 (1984).

5. An extremely similar statement was made by the prosecutor in Downs v. Dugger, supra at 5.

... I've run through all of the aggravating and all of the mitigating circumstances that Judge Santora is going to tell you about. He's going to say that these are the aggravating circumstances that you should consider and these are the mitigating circumstances that you can and should consider and, based on those, you have a duty to make a recommendation to the Court ....

The prosecution also failed to refer in any way to non-statutory mitigating circumstances in its influential "Brief ... Demanding ... Death," stating in pertinent part (p. 3):

An examination of the record in this case discloses the following mitigating and aggravating circumstances as recognized by Florida Statute 921.141[.]

After discussing the seven statutory mitigating circumstances and no others, the prosecution argued (p. 17):

Based on the foregoing the State respectfully submits that the Court can find no evidence whatsoever as to any mitigating circumstances applicable to either defendant.

There was considerable evidence of non-statutory



mitigating evidence before Judge Santora.<sup>6</sup> Most important were the facts that all the evidence pointed to Engle's knife --- which he always carried --- as being the murder weapon and that Engle was seen in possession of and hid that knife after the crime (TT 573-79, TT 582-83, TT 592-93, TT 610-14, TT 630-39, TT 644-49, TT 797-98, TT 803-05, TT 829-35). Thus, the evidence pointed strongly to Engle as the actual killer. Moreover, there was evidence that Stevens was drinking heavily on the night of the crime and that Stevens generally drank to excess (TT 567, TT 584-86, TT 948). The psychiatric report showed that Stevens' father, who had a drinking problem, severely beat him as a child, sending him to the hospital on one occasion: that Stevens had learning disabilities, was in the borderline intellectual range and had only a fifth-grade education; that Stevens was loath to associate with others as a child because he had no decent clothes to wear; and that Stevens got into trouble because he was a follower who took others' ideas.

#### 111. ARGUMENT

There can be no doubt from the record that Judge Santora restricted his consideration of mitigating circum-

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6. This evidence was in the record by and large despite Stevens' counsel's failure to develop or argue it.

stances to those listed in the statute and that he did not consider any non-statutory mitigating circumstances. See Hitchcock v. Dugger, \_\_\_ U.S. , 107 S. Ct. 1821 (1987); Downs v. Dugger, supra; Thompson v. Dugger, \_\_\_ So. 2d \_\_\_ (Nos. 70,739 & 70,781, Sept. 9, 1987); Riley v. Wainwright, supra; Morgan v. State, \_\_\_ So. 2d \_\_\_ (No. 69,104, Aug. 27, 1987); McCrae v. State, \_\_\_ So. 2d \_\_\_ (No. 67,629, June 18, 1987). This violated the Eighth and Fourteenth Amendments to the United States Constitution. Skipper v. South Carolina, 476 U.S. , 106 S. Ct. 1669 (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

#### IV. CONCLUSION

For the foregoing reasons and those set forth in our prior briefs, this matter should be remanded for a new sentencing hearing --- without the empaneling of a new advisory jury. See McCrae v. State, supra at 10-11.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing brief has been furnished by United States Express Mail to Hon. Robert A. Butterworth, Attorney General, State of Florida, The Capitol, Tallahassee, Florida 32399-1050 (Att: Bradford L. Thomas, Esq.), and by United States mail to Hon. T. Edward Austin, State Attorney, 600 Duval County Courthouse, Jacksonville, Florida 32202, and Gerald R. Schneider, Esq., General Counsel, City of Jacksonville, 1300 City Hall, Jacksonville, Florida 32202, this 21st day of September, 1987.

  
\_\_\_\_\_  
Oren Root Jr.

Attorney for Appellant