IN THE SUPREME COURT OF FLORIDA

ROBERT BRIAN WATERHOUSE)

vs.) No. 70,459

RICHARD DUGGAR, et al.)

REPLY TO RESPONSE TO

PETITION FOR WRIT OF HABEAS CORPUS

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TABLE OF CASES

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COMES NOW, ROBERT BRIAN WATERHOUSE, and files this reply to the Attorney General's Response to his Petition for a Writ of Habeas Corpus.

This Court has the inherent authority, "in the case of error that prejudicially denies fundamental constitutional rights . . . [to] revisit a matter previously settled . . . ." Kennedy v. Wainwright, 483 So.2d 424, 426 (Fla. 1986).[1] Indeed, any issue may be cognizable in this Court where it "involve[s] fundamental error." Martin v. Wainwright, 497 So.2d 872, 874 (Fla. 1986). The violation of Mr. Waterhouse's rights presented here cries out for such equitable treatment.

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1. As the Eleventh Circuit Court of Appeals recently noted, this Court "independently review[s] the record to assure . . . the propriety of the conviction [in capital cases]." Mann v. State, ___ F.2d ___, No. 86-3182, Slip Op. at 4 (11th Cir. May 14, 1987), quoting, Mann v. State, 420 So.2d 578, 580 (Fla. 1982). There can be no doubt, therefore, that on direct appeal this Court did not overlook the issues of fundamental constitutional importance raised in Mr. Waterhouse's present habeas petition. Furthermore, this Court should alternatively consider every allegation under Mr. Waterhouse's claim of ineffective assistance of counsel on appeal since, even if the claims were not fundamental and cognizable as plain error, they "undermine confidence in the fairness and correctness of the appellate result." Wilson v. Wainwright, 474 So.2d 1162, 1163 (Fla. 1985).

I. BECAUSE OF THE LIMITATION OF MITIGATING CIRCUMSTANCES WHICH THE JURY COULD CONSIDER, MR. WATERHOUSE IS ENTITLED TO A NEW SENTENCING HEARING.

In his petition for a Writ of Habeas Corpus, Mr. Waterhouse pointed out that the trial judge restricted the mitigating circumstances to those enumerated in the statute,[2] and the prosecutor specifically denigrated Mr. Waterhouse's alcohol abuse, arguing that it was not a statutory circumstance, in violation of Hitchcock v. Duggar, ___ U.S. ___, 41 Cr. L. Rptr. 3071 (1987).

Respondent counters by arguing that "any confusion as to whether or not the statute precluded presentation and/or consideration of non-statutory, mitigating evidence was put to rest by this Court's opinion in Songer v. State, 365 So.2d 696

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2. The trial court instructed the jury as follows:

> The mitigating circumstances which you may consider, if established by the evidence, are these:
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> One, that the defendant has no significant history of prior criminal activity;
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> Two, that the crime for which the defendant is to be sentenced was committed while the defendant was under the influence of extreme mental or emotional disturbance;
>
> Three, that the victim was a participant in the defendant's conduct or consented to the act;
>
> Four, that the defendant was an accomplice in the offense for which he is to be sentenced, but the offense was committed by another person and the defendant's participation was relatively minor;
>
> Five, that the defendant acted under extreme duress or under the substantial dominion of another person;
>
> Six, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;
>
> Seven, the age of the defendant at the time of the crime.

(R. 2295-96) This is taken almost verbatim from the limiting enumeration of mitigating circumstances in the statute. See, Fla. Stat. § 921.141(6).

(Fla. 1978)." This misinterpretation of Hitchcock well illustrates the novel implications of the case.

In Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982), the Supreme Court held facially invalid statutes which operated to exclude mitigating evidence. This Court quickly responded, construing the statute to permit introduction of unenumerated mitigating evidence. Songer, supra. This is the theory which Respondent continues to address.

However, in Hitchcock, the Supreme Court eschewed this line of reasoning:

> Respondent contends that petitioner has misconstrued Cooper [v. State, 336 So.2d 1133, 1139 (Fla. 1976)], pointing to the fact that the Florida Supreme Court's subsequent decision in Songer . . . which expressed the view that Cooper had not prohibited sentencers from considering mitigating circumstances not enumerated in the statute. Because our examination of the sentencing proceedings actually conducted in this case convinces us that the sentencing judge assumed such a prohibition and instructed the jury accordingly, we need not reach the question whether that was in fact the requirement of Florida law.

Hitchcock, 41 Cr. L. Rptr. at 3072 (emphasis supplied). The new focus is not on the statute itself, but the interpretation of the statute made by the trial judge and imparted to the jury.

Clearly, the Hitchcock decision is new law.[3] Certain variations on the Lockett theme have percolated through the lower courts since 1978. However, the theory that a trial judge's misperception of the law is per se reversible had been uniformly

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3. There can be little dispute that Hitchcock represented a change in the law. For example, on January 28, 1985, James Raulerson raised an identical issue. He was denied relief, and was executed. Raulerson v. Wainwright, 753 F.2d 869 (11th Cir. 1985). At almost precisely the same time, Mr. Hitchcock's case was taken en banc by the Eleventh Circuit, and he was subsequently denied relief. Hitchcock v. Wainwright, 745 F.2d 1332 (11th Cir. 1984), rehearing en banc, Hitchcock v. Wainwright, 770 F.2d 1514 (11th Cir. 1985)(en banc), rehearing denied with opinion, 777 F.2d 628 (1985), rev'd sub nom. Hitchcock v. Duggar, ___ U.S. ___, 41 Cr. L. Rptr. 4071 (1987). If the en banc court of the Eleventh Circuit, and this Court, rejected the challenge throughout the time immediately prior to the decision in Hitchcock, how can it be said that the issue was not "new"?

rejected by the courts.[4] As new law, this is the type of fundamental issue which requires that this Court exercise jurisdiction in the habeas procedural context, rather than remand for a second Rule 3.850 action in the Court below. Cf. Jones v. Estelle, 722 F.2d 159, 165 (5th Cir. 1983)(en banc)(a "change in the law" justifies second collateral action).

II. MR. WATERHOUSE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL.

Respondent also argues that this Court should gloss over appellate counsel's failure to raise a multitude of fundamental issues on direct appeal. Certain arguments made by Respondent require Mr. Waterhouse's response.

First, the State argues that the highly prejudicial and inflammatory testimony regarding Mr. Waterhouse's purported "propensity" to engage in acts of anal intercourse was properly admitted at trial because "the sexual evidence was relevant to the issues in the case." Response at 5. Of course, this wholly misses the point of this Court's ruling in Williams v. State, 110 So.2d 654 (Fla.), cert. denied, 361 U.S. 847, 80 S.Ct. 102, 4 L.Ed.2d 86 (1959).

If the mere fact that a prosecutor could think of some pretext upon which other-crimes evidence might conceivably be

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4. Lockett challenges had been raised in various forms, some similar to the issue in Hitchcock. No petitioner was successful. A challenge to the facial constitutionality of the statute was rejected in Spinkellink v. Wainwright, 578 F.2d 582, 620-21 (5th Cir. 1978), cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979). A challenge to the limiting jury instructions was rejected. Foster v. Strickland, 707 F.2d 1339 (11th Cir. 1983); see also, Ford v. Strickland, 696 F.2d 804, 813 (11th Cir. 1983)(en banc), cert. denied, ___ U.S. ___, 78 L.Ed.2d 176, 104 S.Ct. 201 (1983), relief granted on successive petition on other grounds sub nom. Ford v. Wainwright, 477 U.S. ___, 106 S.Ct. ___, 91 L.Ed.2d 335 (1986). The claim has alternatively been rejected when the failure to investigate and present mitigating evidence has been framed as a denial of the effective assistance of counsel. Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982), modified on rehearing, 706 F.2d 311 (1983), cert. denied, ___ U.S. ___, 78 L.Ed.2d 697, 104 S.Ct. 508 (1983); see also, Proffitt v. Wainwright, 756 F.2d 1500 (11th Cir. 1985), rehearing denied, 774 F.2d 1179 (1985).

relevant were sufficient to justify the inclusion of the evidence, it would always be admissible. However, the fact that such evidence is so devastating to the accused, while being of minimal probative value, justifies the rule that "[w]hen such irrelevant evidence is admitted it is 'presumed harmful error because of the danger that a jury will take the bad character or propensity to crime thus demonstrated as evidence of guilt of the crime charged.'" Keen v. State, 504 So.2d 396, 401 (Fla. 1987), quoting, Straight v. State, 397 So.2d 903, 908 (Fla.), cert. denied, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981).

Respondent's contention that "the defendant himself, through his statements, put the sexual motive at issue" is frivolous and misleading. The statements taken by the police were put in evidence during the prosecution's case in chief. The fact that a defendant -- through a statement, a guilty plea, or whatever -- might have conceded a prior crime obviously could not justify the use of such evidence to show a propensity for crime, else Williams would be reduced to a nullity. The truth of the matter is that prosecutor Merkle attempted to turn the jurors' presumed prejudices against deviant sexual behavior into "evidence" that Mr. Waterhouse committed the crime of murder. This simply cannot be permitted.

Second, with regard to the violation of Mr. Waterhouse's right to confront the witnesses against him, Respondent entirely misses the point. The State argues that nothing in the statute prohibits evidence of the specifics of a prior conviction. However, Mr. Waterhouse's contention concerns the manner in which that "evidence" was introduced -- by incompetent, unreliable hearsay testimony, instead of by competent evidence.

The officer who testified was not even the arresting officer in New York, and had a very limited role in the prosecution. However, he was allowed to testify extensively to reports and Mr. Waterhouse's purported confession, about which he had no first-hand knowledge, in violation of Mr. Waterhouse's right to con-

frontation.

The right to confrontation implies more than the right to cross-examine the witness delivering the information. For example, in Cruz v. New York, 481 U.S. ___, 95 L.Ed.2d 162, 109 S.Ct. ___ (1987), the prosecutor introduced the testimony of a third party, Norberto, that Cruz's co-defendant had confessed. The defendant clearly had the opportunity to cross-examine Norberto. Nevertheless, the United States Supreme Court reversed the conviction, citing the "'devastating' practical effect" of such evidence, which is effectively unrebuttable. Id. at 170, citing, Bruton v. United States, 391 U.S. 123, 20 L.Ed.2d 476, 88 S.Ct. 1620 (1968). The entirely hearsay testimony of the officer in this case was similarly devastating, similarly unreliable, and similarly unconstitutional.

In assessing the admissibility of such unconstitutional evidence, an elementary rule of construction requires that this Court first turn to the plain terms of the statute. In delineating the evidence admissible in a capital sentencing proceeding, the Florida legislature ordered:

> [T]his subsection shall not be construed to authorize the introduction of any evidence . . . in violation of the constitutions of the United States and the State of Florida.

Fla. Stat. § 921.141(1).

In implementing this statute, this Court has required that, prior to permitting the admission of evidence concerning the prior felony, it must be shown that "the defendant ha[s] the opportunity to . . . explain, rebut or deny [it]. . . ." Brown v. State, 473 So.2d 1260, 1266 (Fla. 1985).

This Court's decision in Brown received further force in Skipper v. South Carolina, 476 U.S. ___, 90 L.Ed.2d 1, 7 n.1 (1986), where the Supreme Court reiterated:

> [I]t is also [an] elemental due process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.'

Quoting, Gardner v. Florida, 430 U.S. 349, 362, 51 L.Ed.2d 393,

97 S.Ct. 1197 (1977).

Precisely the issue presented by Mr. Waterhouse lead to the recent reversal of a death sentence in Beltran v. State, ___ S.W.2d ___, 41 Cr. L. Rptr. 2130 (Tex. Ct. Crim. App. 1987). In Beltran, the prosecution introduced the FBI "rap sheet" of the accused, which contained "multiple hearsay . . . including information from unnamed sources." Id. The Court held:

> While the facts contained in the FBI 'rap sheet' and some of the documents may have been relevant to punishment, the manner in which the State sought to prove these facts denied the [defendant] his constitutional rights to confrontation and cross-examination.

Id. Precisely the same fault tainted Mr. Waterhouse's sentencing hearing.

The admission of this evidence was therefore fundamental error, and the omission of the issue on direct appeal "undermine[s] confidence in the fairness and correctness of the appellate result." Wilson v. Wainwright, 474 So.2d 1162, 1163 (Fla. 1985).[5]

Conclusion

For the aforegoing reasons, as well as those set forth in his initial Petition, this Court should grant Mr. Waterhouse a new trial.

Respectfully Submitted,

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8. Since the evidence introduced was unconstitutional, there can be no harmless error analysis. See, supra, note 7.

Certificate

I hereby certify that I have this day mailed a true and accurate copy of the aforegoing document, first class postage pre-paid, to the following:

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This 12th day of June, 1987.