IN THE SUPREME COURT OF FLORIDA

WARDELL L. RILEY, Petitioner, v. LOUIE L. WAINWRIGHT, Secretary, Department of Corrections, State of Florida, and R. L. Dugger, Superintendent, Florida State Prison, Respondents.	)	CASE NO. 69,583

INITIAL BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

A. Introduction: Question Presented

On November 4, 1986, this Court issued the following Order:

> We hereby direct the parties to brief the issue of whether or not this Court can give retroactive application to Lockett v. Ohio, 438 U.S. 586 (1978), as it affects a jury's recommendation of sentence.

Petitioner's brief on this issue was to be served on or before December 2, 1986, but, upon agreement of the parties, the Court ordered this brief to be filed on or before December 12, 1986.

While there are many issues in Mr. Riley's case, Mr. Riley assumes for purposes of this brief, based on this Court's order, that the sole issue upon which this Court seeks and will allow further input from the parties at this point is the narrow Lockett/jury recommendation issue. This brief is, accordingly, so restricted.

The question presents itself because Mr. Riley's death sentence is predicated upon a jury recommendation which occurred well before Lockett, and at a time when judges, lawyers and jurors could reasonably have believed that the only mitigating circumstances available to a defendant in a Florida capital sentencing proceeding were those mitigating circumstances specifically listed in the statute. Lockett, coming later,

condemned sentencing proceedings which were conducted under such unconstitutional restraints. Following this Court's directive, Petitioner herein assumes, as the Court appears to assume, that had the exact same jury proceeding which occurred herein been conducted post-Lockett, resentencing would be ordered. The issue is whether Mr. Riley is entitled to the same restraint-free capital sentencing proceeding afforded Ms. Lockett.

References to the record below will be designated herein as follows: "R" = trial record; "S" = jury sentencing proceeding; "RS" = resentencing proceeding; "SROA" = supplemental record on appeal.

B. Procedural History

While perhaps unnecessary for the purpose of responding to this Court's inquiry, counsel will repeat the procedural history so as to present with more precision how the Lockett issue arose, and why its resolution now is constitutionally mandated.

1. Proceedings before the "sentencing" jury

The jury recommendation in this case arose from proceedings before the trial court and jury in February, 1976. Beginning with voir dire, the prosecutor enlightened the jury regarding that which was axiomatic to the lawyers and the judge:

> The Court gives instructions on what are and what are not mitigating or aggravating circumstances.

(R. 282).

> Now, the Court will instruct you as to what are aggravating and mitigating circumstances .... [Y]ou ought to have certain guidelines.

(R. 377). "What are mitigating circumstances" was defined when the trial court instructed the jury as follows:

> The mitigating circumstances which you may consider if established by the evidence are these:

(R. 1320). The seven meager statutory mitigating circumstances were then read. The trial judge indicated that he would provide the jury with written jury instructions which set "forth the mitigating and aggravating circumstances" (R. 1345). In closing argument the prosecution discussed "the mitigating circumstances" to see if "they exist" (R. 1326), and then checked off the statutory list.

In sentencing Mr. Riley to death in 1976, the trial judge stated "I have searched in vain for sufficient mitigating circumstances under the law which would justify a sentence other than the death penalty in this case" (S.R.2) (emphasis added). In finding only one (statutory) mitigating circumstance applicable, the judge explained:

> The only mitigating circumstance under Florida statute is the fact that the Defendant had no prior criminal conviction.

(S. 9) (emphasis added).

2. Proceedings upon remand

In January, 1979, this Court remanded Mr. Riley's case, on other grounds,

> [f]or the sole purpose of allowing the trial judge to reconsider the imposition of the death sentence .... in accordance with Section 921.141 as construed in this opinion.

366 So. 2d at 22. (emphasis added). "As construed" included the following restrictive view of the statute:

> The one mitigating factor found to exist in this case was appellant's lack of any significant history of prior criminal activity. All other mitigating factors in Section 921.141(6) were properly found to be absent.

Id. This Court also noted that "Appellant's principal argument to us is that a death sentence is not warranted for his crime, . . . and second because the statutory mitigating circumstances outweigh in significance the statutory aggravating factors." Riley v. State, supra at 21.

Upon resentencing, the trial judge followed the Florida Supreme Court order. "Section 921.141 as construed" had not been amended, and the trial judge restricted consideration to the statute. The prosecutor argued to the trial court that the Florida Supreme Court's opinion set forth what could be considered:

> We have two aggravating circumstances. One mitigating factor that the Supreme Court told the Court it could consider.

(RS 36). The trial court agreed, after examining "the" mitigating circumstances:

> As to the mitigating circumstances: 1. The defendant has no significant history of prior criminal activity (Section 921.141(6)(a) Florida Statutes). There are no other mitigating circumstances.

(SROA 20).

3. Appeal after resentencing

On appeal after resentencing, Mr. Riley rightly urged that the statutory mitigating circumstances read to the 1976 jury were only exemplary, but that neither the jury nor the judge believed matters outside the "list" could be considered in mitigation. About the jury, Mr. Riley said:

> The defendant's jury was not so instructed [about unlimited mitigation]. (R. 1320). However, this Court has held that the instructions provided the jury do not impermissibly restrict consideration of mitigating evidence. Ruffin v. State, ___ So. 2d ___ (Fla. 1981) (Case Nos. 55, 684; 56,741, Opinion filed March 26, 1981); Peek v. State, ___ So.2d ___ (Fla. 1980) (Case No. 54, 226, Opinion filed October 30, 1980). While the defendant does not waive the contrary contention under the Eighth and Fourteenth Amendment requirements set forth in Lockett v. Ohio, supra, this point will not be belabored in this brief. But see Chenault v. Stynchcombe, 581 F.2d 444, 448 (5th Cir. 1978) (Lockett requires that trial judge must clearly instruct the jury about mitigating circumstances and option to recommend against death).

Initial Brief of Appellant on Resentencing, p. 22, n.4. This Court held that with regard to all matters, "[t]here is no

question that the jury was properly instructed at the sentencing hearing." See also Riley v. State, 433 So. 2d 976 (Fla. 1983) ("We have already determined that the jury in this case was properly instructed at the sentencing hearing.") About the judge, Mr. Riley said: "The record before this Court demonstrates that the trial judge thusly restricted his consideration because he deemed the mitigating circumstances to be circumscribed by the provisions of Section 921.141 (6), Florida Statutes." Appellant's brief, p. 26. This Court rejected this contention.

After other proceedings, Mr. Riley was scheduled to be executed November 5, 1986. On November 2, 1986, Mr. Riley filed a petition for writ of habeas corpus in this Court, and requested a stay of execution. The stay was granted, and the Court requested that the parties brief the Lockett issue.

II.

SUMMARY OF ARGUMENT

Lockett requires reliable, individualized capital sentencing determinations. Because the Lockett rule that the failure to allow consideration of any and all factors which might militate for life over death is central to eighth amendment jurisprudence, the rule has been retroactively applied. Since Lockett applies

in proceedings which produce capital sentencing recommendations, it must be applied retroactively to such proceedings, just as it is applied retroactively in other contexts.

III.

ARGUMENT

THIS COURT CAN AND MUST GIVE RETROACTIVE APPLICATION TO LOCKETT AS IT AFFECTS A JURY'S RECOMMENDATION OF SENTENCING

Since Lockett, it has become plain that the most fundamental eighth amendment requirement applicable to capital sentencing is that the process for selecting those who will die must provide for reliable individualization. Lockett invalidated a statute that restricted the independent consideration of mitigating factors to a narrow statutory list, because the failure to weigh all relevant individuating circumstances concerning the defendant and his crime created the constitutionally "unacceptable" "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett v. Ohio, 438 U.S. at 605 (plurality opinion). The United States Court has consistently demanded adherence to the Lockett principles.

Therefore, today "[t]here is no disputing," Skipper, 106 S. Ct. at 1670, the force of the constitutional mandate. "What is important at the selection stage is an individualized

determination on the basis of the character of the individual offender and the circumstances of the crime." Zant v. Stephens, 462 U.S. 862, 879 (1983).

1. Lockett is retroactive.

The retroactivity of Lockett has never been in doubt in the federal courts. Although the United States Supreme Court has not expressly written that Lockett applies retroactively, the Court has repeatedly vacated death sentences which were imposed before the Lockett decision, and under procedures forbidden by Lockett. Mr. Eddings himself was sentenced before Lockett was announced, only to have his sentence vacated several years later on the authority of Lockett. See Eddings v. Oklahoma, 455 U.S. 116, at 118 (O'Connor, J., concurring) (Eddings's sentencing "occurred about one month before Lockett was decided"); Eddings v. State, ___ Okla. Crim. ___, 616 P.2d 1159, 1164 (1980) (sentencing concluded in May, 1978; Lockett decided in July, 1978). See also Downs v. Ohio, 438 U.S. 909 (1978); Shelton v. Ohio, 438 U.S. 909 (1978); Roberts v. Ohio, 438 U.S. 910 (1978); Hall v. Ohio, 438 U.S. 910 (1978); Black v. Ohio, 438 U.S. 910 (1978); Lytle v. Ohio, 438 U.S. 910 (1978); Bates v. Ohio, 438 U.S. 910 (1978); Strodes v. Ohio, 438 U.S. 911 (1978); Bayless v. Ohio 438 U.S. 911 (1978); Osborne v. Ohio, 438 U.S. 911 (1978); Hancock v. Ohio, 438 U.S. 911 (1978); Edwards v. Ohio, 438 U.S. 911 (1978); Royster v. Ohio, 438 U.S. 911 (1978); Perryman v. Ohio, 438 U.S.

911 (1978); Miller v. Ohio, 438 U.S. 911 (1978); Jackson v. Ohio, 438 U.S. 911 (1978); Williams v. Ohio, 438 U.S. 911 (1978); Weind v. Ohio, 438 U.S. 911 (1978); Cooper v. Ohio, 438 U.S. 911 (1978); Wade v. Ohio, 438 U.S. 911 (1978); Jordan v. Arizona, 438 U.S. 911 (1978). The Eleventh Circuit Court of Appeals' precedent is the same. See, e.g., Spivey v. Zant, 661 F.2d 464 (5th Cir. Unit B 1981) (Lockett applied retroactively); Washington v. Watkins, 655 F.2d 1346 (5th Cir. Unit A 1981) (same). Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985, en banc) ("There is no doubt today about this question. Lockett is retroactive.")

This Court likewise has applied Lockett to vacate death sentences imposed before Lockett was decided. Mines v. State, 390 So. 2d 332 (Fla. 1980) (sentence imposed January 11, 1977); Moody v. State, 418 So. 2d 989 (Fla. 1982) (sentence imposed October 25, 1977); Perry v. State, 395 So. 2d 170 (Fla. 1980) (sentence imposed November 18, 1977). In short, neither the United States Supreme Court nor this Court has permitted an individual to be executed after a sentencing hearing which violated Lockett.

This Court has applied Lockett retroactively in several recent cases. In Harvard v. State, 486 So. 2d 537 (Fla. 1986), this Court first referred to the Eleventh Circuit opinion in Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985):

> In an en banc decision, a unanimous court of appeals held that, in light of the judge's statements, and its view that the United States Supreme Court decision in Lockett is retroactive, Songer, 769 F.2d at 1489 (citing Eddings v. Oklahoma, 455 U.S. 104, 118, 102 S.Ct. 869, 878, 7 L.Ed.2d 1 (1982); Jordan v. Arizona, 438 U.S. 911, 98 S.Ct. 3138, 57 L.Ed.2d 1157 (1978); Spivey v. Zant, 661 F.2d 464 (5th Cir. 1981), cert. denied, 458 U.S. 1111, 102 S.Ct. 3495, 73 L.Ed.2d 1374 (1982)), Songer is entitled to a new sentencing hearing. A majority of that court ruled the case should be remanded to the trial judge for resentencing to permit Songer the opportunity to present non-statutory mitigating circumstances.

Harvard, at 538-539. This Court then concluded:

> It is our independent view that an appellant seeking post-conviction relief is entitled to a new sentencing proceeding when it is apparent from the record that the sentencing judge believed that consideration was limited to the mitigating circumstances set out in the capital sentencing statute in determining whether to impose a sentence of death or life imprisonment without parole for twenty-five years. See Lockett; Eddings; (citations omitted).

Id. at 539.

In Lucas v. State, 490 So. 2d 943 (Fla. 1986), this Court addressed the situation where, as with Mr. Riley, (1) death was imposed after being recommended by a jury that was improperly limited in its consideration of non-statutory mitigating factors, (2) this Court remanded for re-sentencing on other grounds, and (3) death was re-imposed after a re-sentencing proceeding without a jury. The court in Lucas remanded again "for a

complete new sentencing proceeding before a newly impanelled jury," reasoning:

> In Harvard v. State, 486 So.2d 537 (Fla. 1986), we remanded for a new sentencing hearing in a post-conviction relief proceeding because Harvard's trial court believed that the mitigating factors were restricted to those listed in the statute. Lucas' trial, as well as Harvard's, took place prior to the filing of this Court's opinion in Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956 (1979). Although Lucas' original judge cannot now say what he though section 921.141 required, the record shows that he instructed the jury only on the statutory mitigating circumstances. Our review of the record shows a scant twelve pages devoted to presentation of evidence by both the state and the defense at the sentencing proceeding.

Lucas at 946.

Thus, there is no question that "this Court can give retroactive application to Lockett . . . ." Indeed, this Court has applied Lockett retroactively. The next issue is whether such retroactivity should apply to a jury recommendation.

2. A jury recommendation is an integral part of capital sentencing in Florida and Lockett error affecting that recommendation requires retroactive application of Lockett.

This Court has long held that the jury is "an integral part of the death sentencing process," Teffeteller v. State, 439 So. 2d 840, 845 (Fla. 1983), and that a jury's advisory sentence must be given "great weight" by the sentencing judge. Tedder v. State, 322 So. 2d 908 (Fla. 1975). Error before the jury infects the

ultimate sentencing decision: the trial judge is required to give "great weight" to a factor (the jury recommendation) which was produced in an unconstitutional manner.

The crucial and fundamental right to jury recommendation on sentence has been repeatedly underlined by this Court, most recently in Floyd v. State, Case No. 66,088, slip opinion, November 20, 1986 (Fla. 1986):

> Under our capital sentencing statute, a defendant has the right to an advisory opinion from a jury. see Section 921.141(2), Fla. Stat. (1985); Richardson v. State, 437 So.2d 1091, 1095 (Fla. 1983); Lamadline v. State, 303 So.2d 17, 20 (Fla. 1974). In determining an advisory sentence, the jury must consider and weigh all aggravating and mitigating circumstances. See Section 921.141(2). The aggravating factors to be considered are limited to those enumerated in section 921.141(5). Drake v. State, 441 So.2d 1079, 1082 (Fla. 1983), cert. denied, 466 U.S. 978 (1984); Purdy v. State, 343 So.2d 4, 6 (Fla.), cert. denied 434 U.S. 847 (1977). The mitigating factors, however, are not so limited. King v. State, 390 So.2d 315, 321 (Fla. 1980), cert. denied, 450 U.S. 989 (1981); Songer v. State, 365 So.2d 96, 700 (Fla. 1978) (on rehearing), cert. denied, 441 U.S. 956 (1979). The United States Supreme Court has held that a sentencer must not be precluded from considering any aspect of a defendant's character or record or any of the circumstances of the offense. See Lockett v. Ohio, 438 U.S. 586 (1978). See also Eddings v. Oklahoma, 455 U.S. 104 (1982). The jury must be instructed, either by the applicable standard jury instructions or by specially formulated instructions, that their role is to make a recommendation based on the circumstances of the offense and the character and background of the defendant.

Cf. Herring v. State, 446 So.2d 1049, 1056 (Fla., cert. denied, 469 U.S. 989 (1984).

The instructions to the jury in this case were incomplete. Although the trial judge instructed the jury on the relevant aggravating factors, and stated that the jury was to "weigh the aggravating circumstances versus the mitigating circumstances," he failed to give any instructions on what could be considered as a mitigating circumstance. Although one of the statutory mitigating factors were applicable, the jurors, having been told that they were to weigh mitigating factors, were not instructed that they were permitted to consider nonstatutory mitigating factors. This not only confused the jury (as evidenced by their questions during deliberations), but may have precluded from their consideration relevant nonstatutory mitigating circumstances in violation of Lockett and Eddings. As we said in Cooper v. State, 336 So.2d 1133, 1140 (Fla. 1976), cert. denied, 431 U.S. 925 (1977), a trial judge should not be permitted in any way to inject his preliminary views of a proper sentence into the jurors' deliberations:

> The Legislature intended that the trial judge determine the sentence with advice and guidance provided by a jury, th one institution in the system of Anglo-American jurisprudence most honored for fair determinations of questions decided by balancing opposing factors. If the advisory function were to be limited initially because the jury could only consider those mitigating and aggravating circumstances which the trial judge decided to be appropriate in a particular case, the statutory scheme would be distorted. The jury's advice would be preconditioned by the judge's view of what they were allowed to know.

The trial court must at the very least instruct in accordance with the standard jury instruction that the jury may consider

in mitigation:

> 8. any other aspect of the defendant's character or record, and any other circumstance of the offense.

Floyd, slip op. at 6-7 (emphasis added.)

This Court then concluded:

> In view of the inadequate and confusing jury instructions, we believe Floyd was denied his right to an advisory opinion. We cannot sanction a practice which gives no guidance to the jury for considering circumstances which might mitigate against death. See Peek v. State, 395 So.2d 492, 496-497 (Fla. 1980), cert. denied, 451 U.S. 964 (1981). Accordingly, we vacate Floyd's death sentence and remand for a resentencing hearing before a jury in accordance with this opinion.

Id. at p. 8 (emphasis added)

As noted above, this brief, pursuant to the Court's order, assumes that a Lockett violation occurred in proceedings before Mr. Riley's "sentencing" jury, and the issue for resolution here is whether Lockett, decided after Mr. Riley's jury recommendation, should nevertheless control. Since Lockett is retroactive, see subsection 1, supra, the instant inquiry must be whether, and to what extent, proceedings which produce a jury recommendation in Florida are controlled by Lockett. If Lockett principles apply to such proceedings, retroactive application is proper; if Lockett principles do not apply, retroactivity is not even an issue.

Lockett does apply to proceedings which produce a jury

recommendation. Floyd makes that clear. After citing Lockett and Eddings, this Court held that "[t]he jury must be instructed, either by the applicable standard jury instructions or by specifically formulated instructions, that their role is to make a recommendation based on the circumstances of the offense and the character and background of the defendant." Slip op. at 6-7. Thus, when a jury is "not instructed that they were permitted to consider nonstatutory mitigating factors," id., Lockett controls, Lockett is retroactive, and Lockett requires reversal.

Lockett should apply. The judge is required to follow a sentencing jury recommendation, absent extraordinary circumstances. If that recommendation is the result of an unconstitutional procedure, then the judge is required to and does rely on unconstitutional factors (the recommendation) when imposing sentence, which is eighth amendment error in its own right. See Zant v. Stephens, supra.

CONCLUSION

The Lockett issue upon which the Court requested briefing may "spin off" many subsidiary issues, but Petitioner has here attempted to succinctly and directly answer the Court's single inquiry. In the original petition for writ of habeas corpus, Mr. Riley addressed some possible "spin-off" matters, for example: (1) the evidence which the sentencing jury was prevented from

considering because of the Lockett error was strongly mitigating, while admittedly nonstatutory, pp. 1, 7; (2) Mr. Riley is entitled to a jury recommendation and did not waive that right, pp. 13-15; (3) proceedings after the jury error did not cure the Lockett error, pp. 46-50; and (4) no procedural default should bar review of this fundamental eighth amendment error, pp. 50-53.

If the Court deems these or other subsidiary issues to be important, Petitioner requests the opportunity to address the matters at a later date. Certainly, Petitioner does not hereby waive these or any other matters contained in the original petition, but instead has attempted to answer the Court's question.

The answer must be that Lockett is retroactive, and that Lockett controls proceedings which produce jury sentencing recommendations. While the question was not asked, it must nevertheless follow that Mr. Riley's 1976 jury recommendation proceeding violated Lockett, and resentencing before a jury is required.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been forwarded by U.S. Mail, first class postage prepaid, to Julie Thornton, Assistant Attorney General, Department of Legal Affairs, Ruth Bryan Rhode Building, Florida Regional Service Center, 401 NW 2d Avenue, Suite 820, Miami, FL 33128, this 12th day of December, 1986.

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