IN THE SUPREME COURT OF FLORIDA

NO. _____

WARDELL RILEY,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections, State of Florida, and
R. L. Dugger, Superintendent, Florida State Prison,

Respondents.

REPLY BRIEF OF APPELLANT REGARDING THE RETROACTIVITY OF LOCKETT TO A "SENTENCING" JURY RECOMMENDATION

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The Court asked the parties to answer "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 addressed and answered the precise question asked.

Respondent, however, did not "brief" this question at all, choosing instead, and in contravention of the Court's express wishes, to offer weak explanations of why Mr. Riley himself may not be entitled to retroactive application of Lockett, based on purported procedural bars. Such silent sidestepping of the Court's concerns speaks volumes: Respondent does not wish to answer the Court's question because the answer is yes, Lockett must be retroactively applied, which means Respondent loses. While it is common advocacy to answer questions not asked when the on-point answer is painful, even Respondent's avoidance answers do not ring true and are easily dismissed as fatuous.

In this reply, Petitioner will first refocus on the question asked by the Court, and second, will address the "let's change the question" answer by Respondent. Both issues result in resentencing before a jury for Mr. Riley, as his jury was not allowed to consider extant evidence of nonstatutory mitigating circumstances in its pre-Lockett recommendation of death.

I.

THIS COURT CAN GIVE RETROACTIVE APPLICATION TO LOCKETT v. OHIO, 438 U.S. 586 (1978), AS IT AFFECTS A JURY'S RECOMMENDATION OF SENTENCE.

This Court has not belittled jury recommendations, contrary to Respondent's assertion. With more and more frequency, this Court has exalted the function of jury recommendations and found Lockett to be inherent in such settings, both positions being of little apparent constitutional moment pre-Lockett, thus raising the retroactivity query. For example, three weeks ago the Court in perhaps the strongest wording to date pressed home the paramount function of jury recommendations of sentence:

> Although Skipper requires only that we remand to the "sentencer" for consideration of all relevant mitigating evidence, we remand for a new jury recommendation as well. The jury's recommended sentence is given great weight under our trifurcated death penalty system. It is the jury's task to weigh the aggravating and mitigating evidence in arriving at a recommended sentence. Where relevant mitigating evidence is excluded from this balancing process, the scale is more likely to tip in favor of a recommended sentence of death. Since the sentencer must comply with a stricter standard when imposing a death sentence over a jury recommendation of life, a defendant must be allowed to present all relevant mitigating evidence to the jury in his efforts to secure such a recommendation. Therefore, unless it is clear beyond a reasonable doubt that the erroneous exclusion of evidence did not affect the jury's recommendation of death, the defendant is entitled to a new jury recommendation on resentencing. Since we cannot say beyond a

> reasonable doubt that the exclusion did not affect that recommendation, we remand for a new sentencing hearing with a new jury panel.

Valle v. State, No. 61,176 (January 5, 1987), slip opinion, page 3 (emphasis added).

Valle joins what has become a trend in cases from this Court underlining the critical nature of sentencing jury recommendations, and Lockett's application to such deliberations and recommendations. See Lucas v. State, 470 So. 2d 943 (Fla. 1980); Floyd v. State, Case No. 66,088 (Fla. Nov. 20, 1986). What the law used to be in Florida is clung to by the State; it is changing law, however, that prompts retroactivity inquiries.

Lockett is retroactive, and the State must concede as much. See Appellant's initial brief, pages 7-11. If Lockett is retroactive, and if Lockett applies to jury sentencing recommendations, then Lockett is retroactive with regard to jury sentencing recommendations. It is this simple syllogism which the State cannot refute, and so ignores.

Without doubt, the Court is asking about and is prepared to address the last remnants of a Lockett impure system. Certainly, a judge who fails to consider nonstatutory mitigating circumstances commits reversible eighth amendment error whether he or she fails today, or failed pre-Lockett. Harvard v. State, 486 So. 2d 537 (Fla. 1986). Thus, Lockett is retroactive vis-a-vis the "sentencer" judge. Valle tells us that a capital jury is

a "sentencer" as well in Florida, because the jury's recommendation sets certain strict parameters within which a "sentencer" judge must operate. An impure recommendation by the "sentencer" jury to a sentencer "judge" skews the entire Florida process into eighth amendment Lockett error, and reversal is required. Since the "sentencer" jury is inextricably meshed in the "sentencer" judge function, error before the jury of necessity creates error in sentencing. Valle. Just as the Harvard judge "sentencer" was retroactively corrected, a Riley jury "sentencer" must be retroactively corrected.

II.

RESPONDENT'S "ANSWER" TO THE COURTS INQUIRY IS NONRESPONSIVE, MISLEADING AND INCORRECT.

The State says "No" to the Court's inquiry: the Court cannot apply Lockett retroactively to a jury's recommendation of sentence. But one searches in vain for the rationale for this State response. The State never writes that Lockett is not retroactive. Instead, the State suggests that jury recommendations are not a fundamental right (while at the same time being "a critical part of the Florida capital sentencing statute," (State's brief, p. 8), that Mr. Riley's sentencing jury was instructed consistent with Lockett, id., pp. 9-13 and that, through either procedural default or "successor" problems, Mr. Riley has forfeited his right to a constitutional death sentence,

especially since Lockett error does not involve a "fundamental right to which the defendant is entitled." Id., p. 8. While these responses miss the mark, and while counsel is not inclined to take the bait, the contentions are so easily brushed aside that a brief reply is almost demanded.

A. The "Sentencing" Jury is a Fundamental Right of the Defendant

Unless waived, a sentencing jury must recommend punishment to the judge, and the judge must follow that recommendation absent extraordinary circumstances. Tedder v. State, 322 So. 2d 908 (Fla. 1979); Richardson v. State, 437 So. 2d 1091, 1095 (Fla. 1983); Adams v. Wainwright, 764 F.2d 1356, 1364 (11th Cir. 1985); Lamadline v. State, 303 So. 2d 17 (Fla. 1974); Lucas, Valle, Harvard, supra. So fundamental is the jury "sentencer" that it must be clear beyond a reasonable doubt that a jury recommendation is not tainted by Lockett error before resentencing by judge only is allowed. Valle. When sentencing error occurs before the jury, resentencing before the jury is required. Lucas.

It is difficult to imagine a more fundamental right than one which must exist and be proven untainted beyond an unreasonable doubt.

B. The Jury Sentencing Proceeding Was Lockett Impure

The transcript makes it plain: the trial judge, the

attorneys, and the jury operated within a system at a proceeding about which it cannot be said beyond a reasonable doubt that nonstatutory mitigating circumstances could be considered. While nonstatutory mitigation was in the record from the guilt/innocence phase, mitigation which is properly considered by a sentencer, Harvard, the inquiry is whether the sentencer was allowed to consider such evidence. It does not matter whether introduction of such evidence was allowed, if consideration of the evidence was disallowed. Under the circumstances surrounding Mr. Riley's sentencing recommendation pre-Lockett, it cannot be said beyond a reasonable doubt that the jury was not precluded from considering nonstatutory mitigation, and it certainly cannot be said that there is no "'legitimate basis for finding ambiguity concerning the factors actually considered by the' jury." California v. Brown, No. 85-1563, slip opinion at 3 (U.S. S. Ct., January 27, 1987) (O'Connor, J., concurring) (quoting Eddings).

Mr. Riley's jury recommendation proceeding occurred during a period of time when it was generally believed by bench and bar that the statutory list of mitigation was exclusive. See Habeas Petition, pp. 27-45. Proceedings simply operated within this framework, the record in this proceeding must be read with an understanding of that backdrop, and the record in this proceeding reinforces the existence of this constitutionally fatal overlay.

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 seached 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.R.2) (emphasis added).

The judge and jury were simply following the law in 1976. However, there was significant nonstatutory mitigating evidence presented for the jury's consideration whichh by law went unconsidered: Wardell Riley himself. Virtually nothing about Mr. Riley fit into the statute. Mr. Riley was twenty-six years old and had been married to Martha Riley for six years. This was not in the statute. He had two daughters, ages two and four, whom both Martha and Wardell worked hard and regularly to support. This was not in the statute. Martha had worked for the State Division of Family Services for some time. Wardell was a good and dependable worker, who was cordial with customers and fellow employees. These items were not in the statute.

Wardell was in the process of becoming a police officer, and he had taken about a year of college courses. This was not in the statute. In short, Wardell was a good, non-violent, hard-working, bright, ambitious family person, whose "background and character" suggested that he could advance himself and benefit others, making life imprisonment a viable option for sentencers. The jury was not allowed to consider this.

One other important nonstatutory mitigating circumstance was kept from the jury: lingering doubt about guilt. Wardell's

background alone could cause a juror to have such doubts, which may be the most important mitigating circumstance known. One dissenter in the Florida Supreme Court would have not only changed the sentence, but would have vacated the conviction for insufficiency of the evidence. A juror who felt even a bit of Justice Boyd's hesitancy could not "consider" that hesitancy as mitigation, because: this was not in the statute.

The State writes that Petitioner has offered no evidence that the trial judge believed himself precluded from considering nonstatutory mitigating circumstances, but that is not true. In the original habeas corpus petition, one of the claims was just that. See Habeas Petition, pp. 7-10, 48-50. This "evidence" was not presented in the brief because it did not go to the question asked by this Court. The State also complains that petitioner has offered no evidence that trial counsel considered himself limited, suggesting that an affidavit would help. One is attached as Exhibit A, although it is more appropriately considered in post-conviction proceedings, as is the Harvard claim, supra. Finally, Respondent deems it important that "the petitioner did not seek to introduce any mitigating evidence in the first sentencing proceeding." Respondent's brief, p. 15, footnote 4. This is of no moment, since the mitigating evidence existent from guilt/innocence proceedings cannot be kept from the jury's consideration. Harvard.

C. Mr. Riley Concedes That This Issue Has Been Decided Before; That Is Why This Is A Habeas Corpus Proceeding

Both parties agree that the unconstitutional jury instruction issue has been previously ruled upon by this Court. Respondent writes that this prevents the Court from applying Lockett retroactively. Petitioner contends that the prior erroneous resolution of this claim is the basis for this very action ("[I]n the case of error that prejudicially denies fundamental constitutional rights . . . this Court will revisit a matter previously settled . . . ." Kennedy v. Wainwright, No. 68,264 (Fla. February 12, 1980), and the fact that the issue was previously, and now again, raised, is the reason why a stay of execution was granted, and why briefs are being prepared. Quite the opposite of Respondent's position, relief is available because the issue was previously raised and decided.

Respondent writes that the reason for the prior denial is what is important, and then misstates that reason. The prior denial was predicated only upon this Court's belief that the jury was not improperly instructed. On appeal to the Florida Supreme Court after resentencing, Mr. Riley rightly urged that the statutory mitigating circumstances 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. The 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.")

This case fits squarely within the Kennedy rationale for reconsideration of a claim. The Court did rule with regard to an improper prosecutorial closing argument that the claim was waived, and also that it did not taint the jury recommendation. This is what the State misleadingly refers to at page 2 of their brief: "This Court held that Petitioner had not only waived any right he may have had to a second advisory jury opinion, but

failed to establish that the initial advisory opinion was tainted." No such ruling occurred with regard to the jury instructions, and the issue of whether the jury was improperly restricted.

CONCLUSION

For the reasons stated above, this Court should give retroactive application to the Lockett as it applies to the jury recommendation proceedings.

RESPECTFULLY SUBMITTED,

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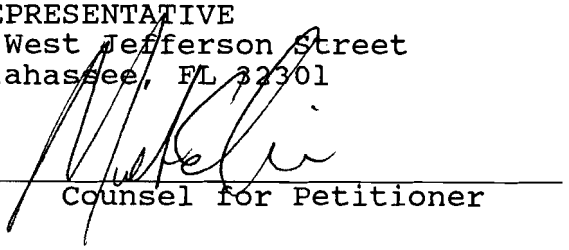

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