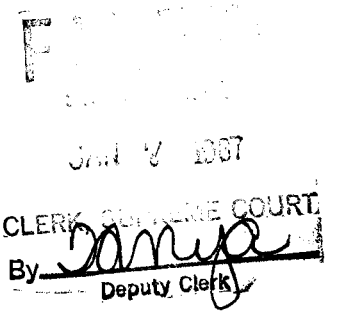
IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,563

WARDELL RILEY,

Petitioner,

vs.



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

Respondents.

* *

ORIGINAL PROCEEDING FOR WRIT OF HABEAS CORPUS

* *

RESPONDENTS SUPPLEMENTAL BRIEF
ON THE QUESTION OF RETROACTIVE
APPLICATION OF LOCKETT V. OHIO
TO THE CASE BELOW

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INTRODUCTION

On November 3, 1986, Petitioner filed a petition for writ of habeas corpus and request for stay of execution. On that date, this Court entered an order staying the scheduled execution of Petitioner until further order of this Court. On November 4, 1986, this Court issued an order directing 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 if affects a jury's recommendation of sentence.

On December 15, 1986, Petitioner filed a brief in response to the question posed and this responsive brief follows.

In this brief, all parties will be referred to as they stand before this Court. All emphasis has been supplied unless the contrary is indicated. The Respondent will make use of the same record references as did Petitioner in his brief.

JURISDICTION

At the outset, it should be noted that this is Petitioner's second petition for writ of habeas corpus filed with this Court. Claim I in this petition concerns the issue of an alleged improper restriction of mitigating factors by

the jury and trial judge. It is undisputed that Petitioner has previously raised the precise issue he now raises in his appeal to this Court from the reimposition of the death penalty following remand for resentencing.

This Court rejected Petitioner's contention that the trial judge limited his consideration of mitigating factors and held that Petitioner had not only waived any right he may have had to a second advisory jury opinion, but had failed to establish that the initial advisory opinion was tainted. Riley v. State, 413 So.2d 1173 (Fla.), cert. denied, 459 U.S. 981, 103 S.Ct. 317, 74 L.Ed.2d 294 (1982).

Thus, the issue presented in this petition was squarely addressed and rejected by this Court. Neither Hitchcock v. Wainwright, 770 F.2d 1514 (11th Cir. 1985) (en banc), Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985) (en banc); Harvard v. State, 486 So.2d 537 (Fla. 1986); nor Lucas v. State, 490 So.2d 943 (Fla. 1986), present changes in the law regarding this issue which would warrant a revisitation. See Thomas v. Wainwright, 788 F.2d 684 (11th Cir. 1986). As will be demonstrated, these cases are factually distinguishable from the instant and do not mandate entertainment of the instant petition for habeas corpus relief. Nor has Petitioner presented an error of fundamental proportions which would justify a revisitation of the claim. See Martin v. Wainwright, ___ So.2d ___, Case No. 69,608 (Fla. November

13, 1986) [11 F.L.W. ___]. Accordingly, this Court should refuse to entertain this successive petition for habeas corpus relief which is an attempt to relitigate a claim previously resolved against the Petitioner. Habeas corpus does not provide an avenue for a second appeal. Straight v. State, 488 So.2d 530 (Fla. 1986); McCrae v. State, 437 So.2d 1388 (Fla. 1983).

QUESTION PRESENTED

WHETHER THE SUPREME COURT OF FLORIDA CAN AND SHOULD GIVE RETROACTIVE APPLICATION TO LOCKETT V. OHIO, 438 U.S. 586 (1978), AS IT AFFECTS A JURY'S RECOMMENDATION OF SENTENCE?

SUMMARY OF THE ARGUMENT

There is no constitutional infirmity to a sentence rendered solely by the trial court. Indeed, the Petitioner enjoys neither a constitutional nor statutory right to a new advisory sentence from a jury upon remand for resentencing. A new advisory jury should be employed in a collateral proceeding only where the defendant can affirmatively demonstrate that his entire sentencing proceeding was rendered constitutionally deficient. This cannot be done sub judice and relief should, therefore, be denied.

ARGUMENT

THE SUPREME COURT OF FLORIDA CAN NOT AND SHOULD NOT GIVE RETROACTIVE APPLICATION TO LOCKETT V. OHIO, 438 U.S. 586 (1978), AS IT AFFECTS A JURY'S RECOMMENDATION OF SENTENCE.

The general question posed by this Court concerning whether this Court can give retroactive application to Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), as it affects a jury's recommendation of sentence, is answered in the negative. As will be demonstrated below, a new advisory jury is not constitutionally required under Florida's capital sentencing scheme upon remand for re-sentencing. As such, there is no constitutional impairment to a resentencing conducted by the trial judge upon remand.

The United States Supreme Court has made clear its pursuit of the "twin objectives" of "measured, consistent application and fairness to the accused" when examining the constitutionality of various capital sentencing statutes. Eddings v. Oklahoma, 455 U.S. 104, 110-111, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). In other words, a constitutionally sound sentencing procedure must rationally distinguish between those for whom death is appropriate and those for whom it is not. Spaziano v. State, ___ U.S. ___. 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984); Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). In addition, the sentence must

consider the individual circumstances of the defendant. Lockett v. Ohio, supra. There is no requirement, however, that these duties be carried out by a jury rather than a judge. As held by the Supreme Court:

> In light of the facts that the Sixth Amendment does not require jury sentencing, that the demands of fairness and reliability in capital cases do not require it, and that neither the nature of, nor the purpose behind, the death penalty requires jury sentencing, we cannot conclude that placing responsibility on the trial judge to impose the sentence in a capital case is unconstitutional.
>
> Spaziano v. Florida, supra, at 82 L.Ed.2d 355.

As such, it is constitutionally acceptable that a judge be vested with the sole responsibility for imposing the death penalty. Spaziano v. Florida, supra.

The Florida capital sentencing statute requires that the trial judge conduct an independent review of the evidence and make his own findings regarding aggravating and mitigating circumstances. Section 921.141 (3), Florida Statutes (1976, 1985). The sentencing scheme imposes upon the trial judge ample safeguards for assuring that the death penalty is not imposed arbitrarily or discriminatorily. If the trial judge imposes a sentence of death, he must prepare specific written findings of fact considering the aggravating and mitigating

circumstances. §921.1412 (3). This Court then reviews the decision of the trial court and reweighs the aggravating and mitigating circumstances to determine independently whether the imposition of the death penalty is warranted. §921.141 (4). Clearly, notwithstanding the provision in the capital sentencing statute wihich allows for an "advisory" sentence by the jury, the statute does not allow for irrational or arbitrary imposition of the death penalty. [1] Accordingly, the "advisory" sentence of the jury is not a fundamental right to which the defendant is entitled.

This is not to say, however, that the recommended sentence of the jury is not a critical part of the Florida capital sentencing statute. Indeed, pursuant to the Florida Statute, the defendant has the right to an advisory opinion of the jury. §921.141 (2); See Floyd v. State, ___ So.2d ___, Case No. 66,088 (Fla. November 20, 1986) [11 F.L.W. 594]. There is no statutory right, however, to a new advisory jury upon remand for resentencing. See Lucas v. State, 490 So.2d 943, 945 (Fla. 1986) ("Our terminology in remanding for resentencing has varied from case to case. E.G. Dougan v. State, 470 So.2d 697, 702 (Fla. 1985) (remanded "for a new sentencing hearing with a new jury"); Lucas 11, 417 So.2d at 252 (remanded "to the trial judge to

[1] As noted in Spaziano v. Florida, supra, in Arizona, Idaho, Montana, and Nebraska, the Court alone imposes the sentence. Ariz.Rev.Stat.Anno. §13-703 (Supp. 1984). Idaho Code §19-2515 (1979); Montana Code Ann. §46-018-301 (1983); Neb.Rev.Stat. §29-2520 (1979).

conduct a new sentencing proceeding") Ross v. State, 386 So.2d 1191, 1198 (Fla. 1980) (remanded "for sole purpose of allowing the trial court to reconsider the imposition" of the death sentence); Lucas 1, 376 So.2d at 1154 ("remanded for re-sentencing with benefit of a new sentence recommendation by a jury"); Menedez v. State, 368 So.2d 1278, 1282 (Fla. 1979) (remanded "for resentencing by the trial court"); Riley v. State, 366 So.2d 19, 22 (Fla. 1978) (same as Ross); Elledge v. State, 346 So.2d 998, 1004 (Fla. 1977) ("remanded to the trial court for a new sentencing trial to be held in accordance with the views expressed herein"). Thus, it would appear that the defendant is entitled to a new advisory jury only if he can demonstrate that the initial recommendation of the jury was invalid. See Menendez v. State, supra. This the defendant cannot do.

Initially, the defendant has never established that there was a Lockett violation. In his instructions to the jury, the trial judge stated:

> During the hearing, you will receive evidence and testimony concerning certain aggravating or mitigating circumstances following the pre-sentation of the testimony the attorneys will be permitted, and then you are required to consider rendering to this Court an advisory sentence based upon your own deter-mination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether such mitigating circumstances exist to outweigh any

> aggravating circumstances found to exist.
>
> Your verdicts should be based upon the evidence, which you have heard while trying the guilt or innocence of the defendant and the evidence which will be presented to you in the proceedings.
>
> (S. 1318).

The trial court then proceeded to advise the jury that the aggravating circumstances which they may consider are limited to such of the following as may be established by the evidence. A list of the limited aggravating circumstances was read. (S. 1318). The trial court thereafter advised the jury that if it should find one or more aggravating circumstances, it should determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist. The court then advised the jury of mitigating circumstances which it may consider if established by the evidence. (S. 1320). In addition, the jury was instructed that it should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as the jury feels it should receive in reaching its conclusion. (S. 1322). Accordingly, the instructions given by the trial court did not limit the jury's consideration of any mitigating evidence as this Court has consistently so held.

In Peek v. State, 395 So.2d 492 (Fla. 1980) cert. denied, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981), this Court stated regarding a similar jury instruction:

> [W]e note at the outset that it in no way restricts the jury to a consideration of the statutorily enumerated mitigating circumstances. Indeed, the instruction on mitigating circumstances, when read in conjunction with the express limitation on consideration of aggravating circumstances, advises the jury that the list of statutory mitigating factors is not exhaustive. See Songer v. State, 365 So.2d 696, 700 (Fla. 1978) (on rehearing). It strikes a constitutional balance by directing, but not limiting, scrutiny to those areas of mitigation considered vital by the legislature in determining the fairness of a life or death sentence, thereby assuring that the death penalty will be applied in a consistent and rational manner. . . .
>
> Contrary to appellant's assertion, the instruction given here is consistent with Lockett v. Ohio. Lockett holds only that a sentencing body must not be precluded from considering, as a mitigating factor, aspects of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. As noted above, our death penalty statute does not limit consideration of mitigating circumstances to those statutorily enumerated.

Peek v. State, supra, at 496-497. (footnote omitted). See also Proffitt v. Florida, 428 U.S. 242, 250 n.8, 96 S.Ct.

2960 2965 n.8, 49 L.Ed.2d 913 (1976); Songer v. State, 463 So.2d 229 (Fla. 1985).

Courts have permitted relief pursuant to Lockett only where there is a clear indication that the mitigating evidence was limited or the sentence imposed pursuant to a misinterpretation of the law. See Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985) (Defendant granted new sentencing hearing by the sentence judge where the trial judge stated that he interpreted §921.141 (6) at the time of the defendant's trial as limiting consideration of mitigating evidence to those enumerated items. Trial judge also stated that he did not give consideration to any evidence dealing with nonstatutory mitigation); Harvard v. State, 486 So.2d 537 (Fla. 1986) (Case remanded to the trial judge for resentencing where trial judge provided evidence that he did not believe that he had the authority to consider non-statutory mitigating factors). Compare Lucas v. State, 490 So.2d 943 (Fla. 1986) (Defendant granted complete new sentencing proceeding before a newly empanelled jury where trial judge, who was deceased at time of appeal from second sentence, instructed jury only on the statutory mitigating circumstances and defense counsel advised jury that they were not permitted to go outside the aggravating and mitigating circumstances in reaching its decision and where trial judge had not engaged in any real, meaningful consideration of sentencing upon remand where he failed to allow the defendant

to present additional evidence at second sentencing hearing). Indeed, relief pursuant to Lockett has been denied where the defendant provided an affidavit of trial counsel that he was of the opinion that while representing the defendant he perceived that mitigating circumstances were limited to the factors enumerated by the statute. Hitchcock v. State, 432 So.2d 42 (Fla. 1983) and Hitchcock v. Wainwright, 770 F.2d 1514 (11th Cir. 1985).

In the instant case, the defendant has failed to provide any evidence whatsoever that the trial judge restricted his consideration of the mitigating circumstances to those suggested in the statute.[2] Nor has he offered evidence that trial counsel considered himself bound by those mitigating circumstances. Moreover, the trial judge did not preclude the defendant from offering any mitigating evidence. [3] The fact that the defendant chose not to offer mitigating evidence and instead chose to continue the strategy employed

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[2] This discussion only concerns the initial sentencing proceeding. At the second sentencing proceeding, the defendant offered, and was permitted to introduce, testimony from various character witnesses in the nature of non-statutory mitigating circumstances. The trial judge considered the evidence and rejected same. Riley v. State, 413 So.2d 1173 (Fla.), cert. denied, 459 U.S. 981, 103 S.Ct. 317, 74 L.Ed.2d 294 (1982).

[3] In addition to the argument of the prosecuter as to the lack of statutory mitigating evidence, he likewise argued the lack of possible nonstatutory mitigating evidence revealed during trial. (S. 132 8-1331). This argument makes clear that the participants in Petitioner's trial were not proceeding under an improper belief that the mitigating factors were limited to those discussed in the statute.

during the guilt phase of arguing the concept of reasonable doubt as to Petitioner's guilt rather than attempting to gain sympathy from the jury is a tactical choice and does not lead to the conclusion that he believed himself bound by the mitigating evidence discussed in the statute. See Thomas v. Wainwright, 767 F.2d 738 (11th Cir. 1985).

Accordingly, the assumption of Petitioner, that a Lockett violation occurred simply cannot be made in this case. It is not "apparant from the record that the sentencing judge believed that consideration was limited to the mitigating circumstances set out in the capital sentencing statute". Harvard v. State, supra at.

Assuming, however, that this Court is confronted with a habeas corpus petition wherein a Lockett violation has occurred, the case need only be remanded to the trial judge for resentencing unless the Petitioner can establish that his jury perceived that it was denied the use of nonstatutory mitigating circumstances. See Ford v. Strickland, 696 F.2d 804 (11th Cir.) (en banc), cert. denied, ___ U.S. ___. 104 S.Ct. 201, 78 L.Ed.2d 176 (1983). Again, this the defendant cannot do.

Courts have repeatedly refused to allow an entire new sentencing proceeding before a newly empanalled jury where the defendant merely establishes an improper restriction of

the consideration of mitigating evidence by one other than the jury. See Harvard v. State, supra; Songer v. State, supra. The basis for these holdings appears to be that there has been no taint as to the recommendation made by the juries and, as such, no constitutional or statutory right to a newly empanelled jury upon remand. In other words, the defendant was not denied his right to an advisory jury. The same is true in the instant case.

The Petitioner places great reliance upon this Court's recent decision is Floyd v. State, ___ So.2d ___, Case No. 66,088 (Fla. November 20, 1986) [11 F.L.W. 594]. In that case this Court reversed for a new sentencing hearing before a jury where the trial judge did not instruct the jury on mitigating circumstances although there was evidence presented from which the jury could have found nonstatutory mitigating evidence. [4] Confusion was demonstrated by the jury in questions asked during deliberation. Floyd, however, involved a direct appeal from a conviction and sentence. To the contrary, the instant case concerns the second habeas corpus filed with this Court. This successive petition for relief does not state a claim which rises to the level of major constitutional proportions. See McCrae v. State, 437 So.2d 1388 (Fla. 1983); Witt v. State, 387 So.2d 922 (Fla.

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[4] It should be noted that in the instant case the Petitoner did not seek to introduce any mitigating evidence in the first sentencing hearing.

1980), cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980). Nor has Petitioner alleged an error of a fundamental nature. See Martin v. Wainwright, ___ So.2d ___, Case No. 69,608 (Fla. November 13, 1986) [11 F.L.W.]. Thus, Petitioner, who was afforded a jury advisory sentence free of constitutional error, is not entitled to relief. [5]

Moreover, neither on direct appeal nor upon remand for resentencing, did the defendant request that he be allowed a second advisory sentence from a newly empanelled jury. Compare Lucas v. State, supra. As this Court has held, "Riley never argued to the trial court that the jury's recommendation may have been tainted. Riley cannot now raise this point on appeal." Riley v. State, 413 So.2d 1173 (Fla.), cert. denied, 459 U.S. 981, 103 S.Ct. 317, 74 L.Ed.2d 294 (1982). Accordingly, the defendant waived any right to a new advisory jury.

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[5] As indicated earlier, the Petitioner had no constitutional right to an advisory sentence from a jury.

CONCLUSION

From the above, it is clear that the Petitioner has not established a Lockett violation and the defendant is not entitled to a new advisory sentence. As such, the petition for writ of habeas corpus should be denied.

Respectfully submitted

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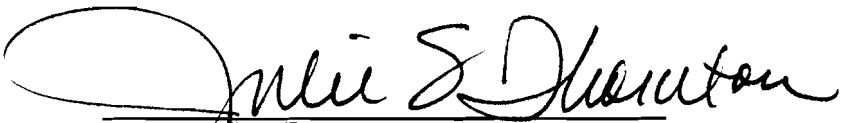
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **RESPONDENT'S BRIEF REGARDING THE RETROACTIVITY OF LOCKETT, IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS, AS ORDERED BY THIS COURT** was furnished by mail to **LARRY HELM SPALDING, MARK E. OLIVE and JAMES LOHMAN** Office of the Capital Collateral Representative, Independent Life Building, 22 West Jefferson Street, Tallahassee, Florida 32303 on this 7 th day of January, 1987.



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