SUPREME COURT OF FLORIDA

JOHN O'CALLAGHAN,	:	Circuit Court Case No. 80-9519-CF-10-B (Broward)
Petitioner,	:	Case No. 71,949
-against-	:	
RICHARD L. DUGGER, SECRETARY, DEPARTMENT OF CORRECTIONS, STATE OF FLORIDA,	:	
Respondent.	:	

PETITIONER'S REPLY TO RESPONDENT'S RESPONSE IN OPPOSITION TO PETITION FOR A WRIT OF HABEAS CORPUS

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I. Introduction

In its response in opposition to John O'Callaghan's petition for a writ of habeas corpus ("Response"), the State argues that, even though this case presents a clear violation of Hitchcock v. Dugger, 107 S.Ct. 1821 (1987), O'Callaghan is not entitled to the writ because (1) the record does not show that the jury or judge limited consideration to statutory mitigating factors (Response at 9), and (2) in any event, the Hitchcock error was "harmless" (Response at 10). Respondent is wrong on both counts.

II. Discussion

A. Respondent Has Failed to Distinguish This Case From Hitchcock

The State's attempt to distinguish this case from Hitchcock amounts to little more than the "presentation" approach that was clearly rejected by the Supreme Court in Hitchcock.

The State argues (Response at 9) that there was no constitutional violation because:

(i) "[t]he court initially instructed the jury, at sentencing, that it could consider evidence, heard at both trial and sentencing, in considering O'Callaghan's appropriate penalty";

(ii) the trial evidence included evidence that the co-defendant Tucker shot the victim or that the victim died of the beating administered by Tucker;

(iii) "the court freely permitted defense counsel's presentation and argument, without limitation and with the State's stipulation, of non-statutory mitigating evidence at sentencing, detailing Tucker's pointing of a gun at the victim's head" (emphasis original);

(iv) "the court referred to having considered further non-statutory mitigation, at sentencing, in the form of a post-sentencing [sic] memorandum by defense counsel [which adverted to certain purported non-statutory mitigation]"; and

(v) "[t]he Court additionally referred to, and, along with the State, relied on, consideration of a pre-sentence investigation report...which contained considerable references to non-statutory mitigating information."

Items (ii) and (iii) are plainly identical to the presentation of evidence that was held insufficient in Hitchcock without a proper instruction. They could not save the instruction in Hitchcock (see 107 S.Ct. at 1824); nor can they do so here.

Items (i), (iv) and (v) show how deeply respondent's misunderstanding of Hitchcock runs. That the judge told the jury to consider all evidence (item i) in sentencing is not a startling instruction, nor could it satisfy Hitchcock without an instruction as to how the evidence was to be considered. Similarly, that the judge (not the jury) referenced O'Callaghan's "post-sentencing [sic] memorandum" (item iv) and a pre-sentence investigation (item v) -- both items that are often present in capital

cases -- merely shows that the judge did what was done in many capital cases.[1] The trial judge never mentioned what, if anything, he considered from these materials, or how he considered them. As the State concedes here, the trial judge's findings "did not specifically discuss any non-statutory mitigating factors." Response at 7.

Thus, a fundamental fault runs through respondent's argument, as the State confuses two completely different issues: (1) the evidence the sentencer considers, and (2) the purposes for which that evidence may be considered. The record was replete with the evidence (see Petition for Habeas Corpus ("Petition") at 17-21), but the jury was precluded by the instructions from using it for the proper purpose -- to establish non-statutory mitigating circumstances. The mere existence of the evidence in the record is of less than constitutional value if the sentencer can consider it as bearing on statutory mitigating

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[1]Respondent's reliance on the pre-sentence investigation is particularly puzzling, as the State concedes that the psi was replete with non-statutory mitigating evidence. See Response at 9, n.6.

circumstances only, instead of "giving [it] independent mitigating weight." Lockett, supra, 438 U.S. at 605.[2]

In sum, no matter how much evidence, of whatever type, the sentencer hears, Hitchcock and Lockett remain unsatisfied if the purpose for which the sentencer considers the evidence is limited to statutory circumstances only. And this is true regardless of whether the evidence considered could bear upon non-statutory circumstances, as it clearly did in both Hitchcock (107 S.Ct. at 1824) and Lockett (438 U.S. at 608).

This case stands in sharp distinction to the cases cited in the State's Response. Here, it is not even disputed by the State that there was a substantial amount of evidence that could have been used, absent the Hitchcock error, to establish non-statutory mitigating

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[2]The very Ohio statute invalidated in Lockett provided that the sentencer should "consider...the nature and circumstances of the offense and the history, character, and condition of the offender" in addressing the statutorily-defined issues in mitigation. 438 U.S. at 612. Nonetheless, the Court rejected the argument that the Ohio statute was saved "because the sentencing judge or judges may consider factors such as the age and the criminal record of the defendant in determining whether any of the mitigating circumstances is established," id. at 608, referring to the Ohio Supreme Court's discussion of the subject in State v. Bell, 48 Ohio St.2d 270, 281, 358 N.E.2d 556, 564 (1976) (q.v.).

circumstances. See Response at 9. Nonetheless, the State asserts that, without an affirmative indication that the jury was limited in its consideration of mitigating factors, no Hitchcock error occurred. This argument ignores the fact that the charge given in O'Callaghan's case has been found as a matter of law to be an affirmative restriction upon the jury. Hitchcock; Thompson v. Dugger, 515 So.2d 173 (Fla. 1987); Foster v. Dugger, 518 So.2d 901 (Fla. 1987), cert. denied, 56 U.S.L.W. 3647 (March 22, 1988). The State's attempt to rely on several recent Florida Supreme Court cases to establish its proposition can only be the result of a misreading of Hitchcock, and a failure or unwillingness to discern crucial differences between O'Callaghan's case and the other cases cited.

For example, in Johnson v. Dugger, 13 F.L.W. 167 (Fla. Feb. 24, 1988) (Response at 10), this Court refused a request for a new sentencing where it was "undisputed that the judge instructed the jury properly under Hitchcock, and Lockett..." Id. at 167. Johnson merely holds that, when a proper jury charge is given, the absence of an explicit reference to non-statutory mitigating circumstances in the judge's sentencing order is not enough to establish a Hitchcock violation. In contrast,

here the State concedes that the charge to the jury was similar or identical to the one found to be erroneous in Hitchcock. Response at 8.

Booker v. Dugger, 520 So.2d 246 (Fla. 1988) (Response at 9), in fact supports O'Callaghan's position on whether Hitchcock error occurred here. In Booker, the court found that "a sentencing error occurred under the rationale of Hitchcock" (520 So.2d at ___, 13 F.L.W. at 33) on instructions and comments substantially similar to those here. (Although the Court found the error to be harmless, the case is distinguishable in that regard as well. See infra at 17-18.)

Delap v. Dugger, 513 So.2d 659 (1987), does not support the State's position either. In Delap, the record showed that the judge -- by visiting the prison to observe how the defendant was adjusting -- evidenced his consideration of and reliance on non-statutory mitigating circumstances. 513 So.2d at 662. Thus, Delap is easily distinguished from O'Callaghan's case, which contains no indication that the judge knew of the pertinence of non-statutory mitigating circumstances or even considered them. See Delap, 513 So.2d at 662, n.5. Accord, Morgan v. State, 515 So.2d 975, 976 (Fla. 1987). "Unless there is something in the record to suggest to the contrary, it

may be presumed that the judge's perception of the law coincided with the manner in which the jury was instructed." Zeigler v. Dugger, No. 71,463 (Fla. April 7, 1988), slip op. at 2.

Despite respondent's attempts to distinguish it, this case is in fact identical to Hitchcock. The evidence that was presented was only considered as bearing upon statutory circumstances. The instructions and findings are the same as those in Hitchcock, and the result should be the same as well.

B. Even if a Harmless Error Approach Were Appropriate, the Error on This Record Was Not Harmless

The State's argument is premised largely on a "harmless error" theory, which we believe is inappropriate. See Point C, infra, at 19-21. But even if a harmless error standard applied, it could not be satisfied here.

1. The Standard for Finding Harmless Error in a Hitchcock Case is a Strict One

A harmless error standard may only be applied when the error "could not possibly affect the balance." Barclay v. Florida, 463 U.S. 939, 958 (1983). Under this Court's more recent decision in White v. Dugger, 13 F.L.W. 59 (Fla. Jan. 28, 1988), the present standard for a

finding of harmless error appears to be that the evidence "would conclusively have had no effect upon the recommendation of the death sentence...." Id. at 59.

"[A] jury's advisory opinion is entitled to great weight, reflecting as it does the conscience of the community, and should not be overruled unless no reasonable basis exists for the opinion." Richardson v. State, 437 So.2d 1091, 1095 (Fla. 1983). Thus, a finding of Hitchcock error calls presumptively for resentencing and cannot be saved by speculation as to how the majority of a lay jury would have weighed the defendant's non-statutory mitigating evidence. Three considerations forbid the kind of loose, free-wheeling harmless error analysis indulged in by the State.

First, we are dealing with federal constitutional error, which cannot be deemed harmless unless the State demonstrates its harmlessness beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967).

Second, the effect of the Hitchcock error here was to deprive O'Callaghan of a jury's consideration of his non-statutory mitigating evidence. Yet the role of the jury in the capital-sentencing procedure created by the

Florida Legislature has consistently been recognized by this Court as being so crucial as to call for the rule that a jury's recommendation of a life sentence cannot be overridden unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (1975). If a very strong case is demanded before the advice of a jury is to be deliberately overridden, an even stronger case must be required to justify failing even to seek the jury's fully informed advice. Cf. Taylor v. State, 294 So.2d 648, 651 (Fla. 1974).

Third, appellate judges must be most hesitant to speculate about the moral and sympathetic reactions of jurors to kinds of mitigating evidence that by definition -- being non-statutory -- appeal to the conscience of the community in ways that are not fixed by preset legislative categories. "To attempt to assess the effect of error in this legal vacuum is to superimpose one untestable surmise upon another. We must not pile conjecture upon conjecture and posit the decision of life or death upon a pyramid of guesses." People v. Terry, 390 P.2d 381, 392 (Cal. 1964) cert. denied, 379 U.S. 866 (1965).

2. The State Has Failed to Show That the Error Here Was Harmless Beyond a Reasonable Doubt

Usurping the role of the jury, respondent argues that, even with a proper instruction, a death sentence was preordained in this case. To reach this conclusion, the State uses a combination of irrelevant post-sentencing material, miscitation to the record, and flawed logic.

As its first mistake, the State believes that the trial court's findings of aggravating circumstances somehow make the failure to instruct properly about mitigating circumstances harmless. Response at 10. However, it was precisely the finding of aggravating circumstances that made mitigating circumstances -- particularly the non-statutory kind -- critical to O'Callaghan's case. The State's reliance on a three-page recitation of aggravating circumstances (Response at 9-11) only underscores the significance of O'Callaghan's claim to an unfettered right to consideration of all non-statutory mitigating evidence. Once aggravating circumstances are found, the sentencer must be "allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." Jurek v. Texas, 428 U.S. 262, 271 (1976).

Equally important, as it has done since the trial in

this case, the State continues to mischaracterize and multiply its alleged aggravating circumstances of "carnal knowledge of a female; carnal knowledge of a female child." Response at 11. First, the State has misread the transcript and apparently not even looked at the trial exhibits. There was only one "carnal knowledge" conviction admitted (erroneously, we believe) in evidence as an aggravating circumstance, not two as the State suggests. See Exhibit A hereto, which is composed of the three prior convictions referenced at T.R. 1151; two are for concurrent robbery convictions which were then eleven years old, only one is for carnal knowledge. More importantly, as O'Callaghan has already demonstrated in his pending Rule 3.850 proceedings, the one 1963 carnal knowledge conviction that was admitted should never have come into evidence, as it did not involve violence as required by Fla. Stat. Ann. § 921.141(5)(b). See Conn. Gen. Stat. § 53-238, as contained in the Historical Note to former Conn. Gen. Stat. Ann. § 53a-72 (repealed by P.A. 75-619, § 7, 1975) a copy of which is attached hereto as Exhibit B.[3]

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[3]The State was made aware of this prejudicial error at the Rule 3.850 hearing in January 1986. Nonetheless, the State continues to mischaracterize this prior conviction in a seeming attempt to lead the Court to believe that O'Callaghan was convicted of a prior violent sexual assault against a minor, when in fact the prior conviction was for nothing more than statutory rape. See Exhibit B hereto.

Respondent's interpretation of the non-statutory mitigating circumstances is equally flawed, for at least two reasons. First, respondent is again confused about what Hitchcock and Lockett require, arguing, for example, that because evidence about the co-defendant's greater culpability and lesser sentence was in the record, the jury and judge must have considered it. Response at 12-13.[4] This argument ignores the jury instruction, which limited consideration of any evidence to the statutory mitigating circumstances. It also ignores the distinction between elements required for statutory mitigating circumstances -- such as relatively minor participation (Fla. Stat. Ann. § 921.141(b)(d)) and extreme duress (id. § 921.141(b)(e)) -- and the much broader universe of non-statutory mitigating circumstances. See Petition at 18-19. It is precisely to avoid the curtailment of mitigation by artificial strictures that Lockett and Hitchcock require mitigating evidence to be given independent weight.

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[4]Respondent's concommitant reliance on this Court's decision in O'Callaghan's direct appeal, O'Callaghan v. State, 429 So.2d 691, 697 (Fla. 1982) (Response at 12-13), is also unavailing, as the case on direct appeal preceded Hitchcock by five years.

The non-statutory mitigating evidence here makes this case particularly appropriate for remand under Hitchcock. For example, O'Callaghan's case involves a serious question of the relative culpability of the co-defendant Tucker and the disparately light treatment he received. In Downs v. Dugger, 514 So.2d 1069, 1072 (Fla. 1987), this Court remanded the case for new sentencing proceeding after it found that the charge prevented the jury from properly weighing evidence as to the relative culpability of the co-defendants.

That evidence with potential independent mitigating weight was reviewed and found insufficient by a sentencer whose consideration was confined to statutory mitigating circumstances (which the evidence also tended to show) does not make a Lockett/Hitchcock violation harmless. For example, in Bell v. Ohio, 438 U.S. 637 (1978), the Supreme Court applied Lockett to invalidate the death sentence of a mentally deficient youngster who contended that "the Ohio death penalty statute ... severely limited the factors that would support an argument for mercy." Id. at 641. The Supreme Court noted:

> Bell contended that his youth, the fact that he had cooperated with the police, and the lack of proof that he had participated in the actual killing strongly supported an argument for a penalty less

> than death in this case. He also contended that Ohio's ... death penalty statute precluded him from requesting a lesser sentence on the basis of those factors.

Id. In light of Bell's testimony that he was under the influence of drugs on the night of the crime, and that "he had viewed his co-defendant Hall as a 'big brother' and had followed Hall's instructions because he had been 'scared'" (id. at 641), it is plain that all of the evidence which Bell contended could not, under Ohio law, be urged upon his sentencer as the basis for a sentence less than death was in fact presented to, and considered by, the sentencer as relevant to one of Ohio's statutory mitigating circumstances, including the circumstance that "[i]t is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion or strong provocation." See Lockett, 438 U.S. at 607 (quoting Ohio Rev. Code § 2929.04 (B)(2) (1975)). The reason the Supreme Court sustained Bell's claim despite the fact that his mitigating evidence had failed to convince his sentencer of a statutory mitigating circumstance to which it was clearly pertinent was that, by denying it "independent mitigating weight" (Lockett, 438 U.S. at 605), the Ohio courts had deprived it of a significant part of its mitigating force and therefore impaired "'the type of individualized consideration of mitigating

factors'... required by the Eighth and Fourteenth Amendments." Bell, 438 U.S. at 642.

Respondent's next mistake arises from the State's extensive disputation (Response at 13-18) of the other evidence profferred by O'Callaghan -- family history, psychological factors, drug and alcohol problems -- factors in many ways similar to those present in Bell, supra. See 438 U.S. at 641.

At best, the State has raised questions of fact that can only be resolved by a jury, and not by this Court applying a harmless error theory. The State spends much of its effort placing itself in the jury box and reaching conclusions like: "there is ... no question that the jury could not have reasonably recommended life, based on such non-statutory mitigating circumstances, and [the State now elevating itself to the bench] that an override death sentence would have been appropriate." Response at 18. In fact, these are questions for a jury to decide, and questions that the State may test by proper cross-examination.

We submit that the non-statutory evidence was compelling; it showed that O'Callaghan was not the prime mover

in Vick's death, and that others were let off much more easily (Cox and LaPointe with no penalty at all). The psychiatric and family evidence would show that O'Callaghan was prone to follow others irrationally and was swept along by events in this unfortunate crime. See, e.g., 3.850 R. 369, 372. It also would demonstrate a very difficult childhood (as evidenced by his own mother's affidavit [Petition, Exh. D]), a drug and alcohol problem (see Petition at 20 and record citations therein), and a substantial likelihood of rehabilitation (see id. at 21 and record citations therein). All of these factors are relevant, non-statutory mitigating circumstances, and any one of them may form the basis of a recommendation of life. See, e.g., Fead v. State, 512 So.2d 176, 178-79 (Fla. 1987); Amazon v. State, 487 So.2d 8, 13 (Fla. 1986), cert. denied, 107 S.Ct. 314 (1986). It is not for the State to say that a jury would find otherwise.

This case is easily distinguished from those relied upon by respondent (Response at 10), in which there were substantial aggravating circumstances and little or no colorable evidence in the record to support non-statutory mitigating circumstances. For example, in Booker v. Dugger, supra (Response at 13), this Court concluded that "[t]here was simply no non-statutory mitigating evidence

sufficient to offset the aggravating circumstances...." 520 So.2d at ___, 13 F.L.W. at 34. In Booker, the defendant acted alone[5] and raped, assaulted and brutalized the victim. The aggravating circumstances were numerous and severe, and the mitigating circumstances were few and tenuous. Nothing in the crime for which O'Callaghan was convicted suggests the substantial imbalance of aggravating circumstances in Booker, at least as found by the Court in its opinion in that case.

For similar reasons, Tafero v. Dugger, 13 F.L.W. 161 (Fla. Feb. 26, 1988) (Response at 13), and Ford v. Dugger, 13 F.L.W. 150 (Fla. Feb. 18, 1988)[6] (Response at 16-17), are both inapplicable here. In Tafero, the defendant waived presentation of mitigating evidence and thus there was no such evidence at all. 13 F.L.W. at 161. In Ford, the five aggravating circumstances (reduced from eight) were found greatly to outweigh the three questionable mitigating circumstances (13 F.L.W. at 151), so that the

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[5]Because Booker acted alone, the State's citation of Booker (Response at 13) as bearing upon O'Callaghan's disparate treatment/ relative culpability evidence is disingenuous at best.

[6]We are informed that a petition for rehearing is pending in Ford v. Dugger.

Court concluded that, even taking the mitigating evidence into account, it was "beyond a reasonable doubt" that, even with a proper instruction, "the jury could not have reasonably made a recommendation for life imprisonment" (id.).

C. There Can Never be Harmless Error When the Jury Has Been Misled in Violation of Hitchcock and Non-statutory Mitigating Evidence is Present

The thrust of respondent's opposition to the petition is that a "harmless error" analysis precludes relief here. That argument fails to consider whether, given the crucial role that the sentencing jury plays in Florida, Hitchcock error can ever be harmless when non-statutory mitigating evidence is present. We submit it cannot.

This Court has consistently recognized the importance of Florida's capital sentencing jury. Under Florida law, when a jury has recommended a life sentence a judge may not impose a death sentence unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (1975). Accord, Richardson v. State, supra, 437 So.2d at 1095; Toole v. State, 479 So.2d 731, 734 (Fla. 1985). Cf. Robinson v. State, 13 F.L.W. 63, 66 (Fla. 1988) ("the jury is called upon to make a

'highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves'") (citing Turner v. Murray, 106 S.Ct. 1683, 1687 (1986)). Indeed, the United States Supreme Court views the jury's important role and the high standard for a judge override as crucial to the constitutionality of the Florida system and a significant check on any harmless error rule. See Barclay v. Florida, supra, 463 U.S. at 955-56.

Hitchcock holds that presentation of non-statutory mitigating evidence is not enough to satisfy the dictates of Lockett; there must be more. The jury must be instructed to weigh that evidence in considering whether non-statutory mitigating circumstances exist. If, as here, the jury is told that only the statutory mitigating circumstances can defeat a death sentence, the presentation -- indeed, even the consideration -- of the non-statutory evidence becomes meaningless, because the jury lacks the ability to connect the evidence with the non-statutory mitigating circumstances that Lockett requires be considered.

Moreover, Hitchcock cases are peculiarly inappropriate for harmless error analysis, because one effect of the

erroneous instruction is to prevent defense counsel from developing and presenting non-statutory mitigating evidence. As a result, the appellate court can never be certain as to what evidence would have been presented had trial counsel known that jury and judge would consider all available evidence. The nature of the error makes it impossible for the State to show -- beyond a reasonable doubt -- that the error did not affect the result. Cf. Zeigler v. Dugger, No. 71,463 (Fla. April 7, 1988) slip op. at 4 ("[On Hitchcock remand], both parties should be permitted to introduce any pertinent evidence to assist the judge in the sentencing decision") (emphasis added). Thus, any application of a harmless error rule in Hitchcock cases would violate the Eighth Amendment to the United States Constitution.

In sum, Hitchcock error can never be harmless when non-statutory mitigating evidence is present, because the harmless error analysis would usurp from the jury its role, as "conscience of the community" (Richardson v. State, supra), in determining the sentence. Respondent's approach would short-circuit the constitutionally required procedure by having the appellate court, and not the jury, play the pivotal role in deciding O'Callaghan's sentence.

III. Conclusion

The State has failed to show cause why the writ should not be granted. The Hitchcock error here was clear and prejudicial. There is no basis for denying O'Callaghan the right to a constitutional sentencing proceeding in which the sentencer gives all relevant evidence independent mitigating weight. The writ should be granted and the case remanded for a new sentencing proceeding.

Dated: New York, New York
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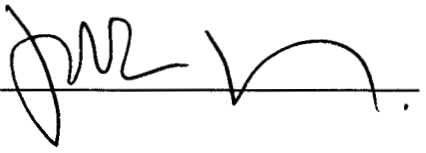
By: 

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply was mailed by first-class mail to the Office of the Attorney General, Attention: Richard Bartmon, Esq., 111 Georgia Avenue, West Palm Beach, Florida 33401, and the State Attorney for the Seventeenth Judicial Circuit, Broward County State Attorney's Office, Attention: Paul H. Zacks, Esq., 201 S.E. 6 Street, Suite 640, Ft. Lauderdale, Florida 33301, on this 14th day of April, 1988.

Jonathan Lang