IN THE SUPREME COURT OF FLORIDA

ALVIN BERNARD FORD, or CONNIE FORD, acting as next friend on behalf of ALVIN BERNARD FORD	
Petitioner,	
vs.	
RICHARD L. DUGGER, Secretary, Department of Corrections, State of Florida,	
Respondent.	

CASE NO. 70793

PETITION FOR WRIT OF HABEAS CORPUS

Ineffective Lockhart-Strickland Issues

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INTRODUCTION AND STATEMENT OF JURISDICTION

1. This Court's original jurisdiction is invoked pursuant to Rule 9.030(a)(3), Fla.R.App.P. (1977). As allowed under Kennedy v. Wainwright, 483 So.2d 424 (Fla. 1986), Mr. Ford asks the Court to utilize its habeas corpus jurisdiction to re-examine its prior appellate judgment in his post-conviction proceedings.

2. In December, 1981, the Court affirmed the denial of Mr. Ford's Rule 3.850 motion. Ford v. State, 407 So.2d 907 (Fla. 1981). In that motion Mr. Ford claimed, inter alia, that during the course of his 1975 trial the judge had restricted the jury's and the judge's own consideration of mitigating circumstances in violation of Lockett v. Ohio, 438 U.S. 586 (1978). Mr. Ford did not object to the error at trial, nor present it on direct appeal. The Court held that the error was not a proper subject for a post-conviction motion since it could have and should have been raised on direct appeal. 407 So.2d at 908.

3. Since then, the Court has changed its view on this matter and has decided that this error can be a proper subject for a post-conviction motion even though it was not raised at trial or on direct appeal. See McCrae v. State, ___ So. 2d ___ No. 67,629 (Fla. June 18, 1987). In Copeland v. Wainwright, 505 So.2d 425 (Fla. 1987), the Court recognized, as it had in Harvard v. State, 486 So.2d 537 (Fla. 1986), that prior to its decision in Songer v. State, 365 So.2d 696 (Fla. 1978) and the United States Supreme Court's decision in Lockett v. Ohio, "the Florida death penalty sentencing law could . . . have been read to limit the consideration of mitigating factors to those circumstances listed in the statute." 505 So.2d at 426. In cases tried after Lockett and Songer, when "the Florida statute had clearly been construed to permit consideration of nonstatutory mitigating circumstances, consistent with the dictates of Lockett[,] . . . any confusion in the law had been resolved and clarified." Id. at 427. In these cases Lockett error plainly could have been

raised at trial and on appeal, and thus the Court held that in such cases Lockett error could not be raised for the first time in a post-conviction motion. Id. However, Copeland taught as well that in cases tried before Lockett -- at a time when there was "confusion in the law" -- errors which would later be deemed Lockett error reasonably might not have been raised at trial or on direct appeal. For this reason, the Court recognized that in these cases Lockett error could be raised for the first time in a Rule 3.850 motion. Accord Aldridge v. State, 503 So.2d 1257, 1259 (Fla. 1987).[1] The decision of this Court in McCrae to reverse the dismissal of a 3.850 motion and order a new sentencing proceeding on the basis of the movant's Lockett claim clearly demonstrates the Court's unequivocal commitment to this new rule. McCrae, slip op. at 9-12.

4. Mr. Ford's case was tried in December, 1974.[2] Accordingly, under the teaching of McCrae, Copeland and Aldridge, he should have been permitted to raise the Lockett error for the first time in his Rule 3.850 motion. His failure to have raised the error at trial or on appeal should not have been treated as a default. Nevertheless, when Mr. Ford raised the Lockett error in his Rule 3.850 motion, this Court held that the error was not cognizable because it could have and should have been raised on direct appeal.

5. The Court should entertain the instant petition in order

[1]In Aldridge, where the trial occurred in 1975, the Court recognized that although Aldridge could not be faulted for not having raised the Lockett error at trial or on direct appeal--his appeal having been decided in 1977 -- he could be faulted for not having raised the Lockett error in his first Rule 3.850 motion, which was filed after Lockett was announced. "Aldridge had an opportunity to raise the issue after Lockett in prior [Rule 3.850] proceedings and has failed to do so." 503 So.2d at 1259.

[2]Although the Court announced its opinion on Mr. Ford's direct appeal after the Lockett decision and some months after the Songer decision, the appeal had been briefed, argued, and submitted for decision well before the decision in Lockett. Thus, there was no meaningful opportunity to present the Lockett error on appeal. In addition, the error had not been raised at trial; even if there had been an opportunity to present the error on appeal, before the change in law articulated in McCrae, Copeland, and Aldridge the lack of objection would have foreclosed review. Maxwell v. State, 490 So.2d 927, 934 (Fla. 1986).

to remedy this error in its appellate judgment. While the Court's original habeas jurisdiction is generally not "a vehicle for obtaining a second determination of matters previously decided on appeal," Messer v. State, 439 So.2d 875, 879 (Fla. 1983), in very narrow circumstances, it is a vehicle for reconsidering matters previously decided on appeal. "It is only in the case of error that prejudicially denies fundamental constitutional rights that this Court will revisit a matter previously settled by the affirmance of a conviction or sentence." Kennedy v. Wainwright, 483 So.2d at 426. The error of this Court in denying Mr. Ford's Lockett claim on the grounds of procedural default -- a ruling which is plainly in error in light of McCrae, Copeland and Aldridge -- unquestionably denied Mr. Ford a fundamental constitutional right. The right to an individualized determination of sentence through a procedure in which all relevant mitigating evidence is given independent consideration is the most consistently enforced and zealously guarded of any Eighth Amendment right applicable to capital proceedings. As we show herein, Mr. Ford was sentenced to death in disregard of this right. The Court's error in 1981 in precluding review of the violation of this right should not now stand in the way of acknowledging Mr. Ford's legitimate constitutional claim.

STATEMENT OF THE CASE AND FACTS

Case Chronology

6. Mr. Ford was convicted of first-degree murder on December 17, 1974. Record on Direct Appeal [hereafter "R"] 4,6. The following day, after a sentencing proceeding, the trial jury recommended a death sentence, and, on January 6, 1975, the judge followed the recommendation and sentenced Mr. Ford to die. R 8, 18. Judgment and sentence were affirmed by this Court on July 18, 1979. Ford v. State, 374 So.2d 496 (Fla. 1979). The United States Supreme Court denied a petition for writ of certiorari on April 14, 1980. Ford v. Florida, 445 U.S. 972 (1980).

7. In 1981, this Court denied relief on a petition for writ of habeas corpus joined by Mr. Ford and all other inmates then on death row. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), cert. denied 454 U.S. 1000 (1981).

8. Also in 1981, Mr. Ford filed a 3.850 motion to vacate his conviction and sentence; the Circuit Court denied relief and this Court affirmed the denial. Ford v. State, 407 So.2d 907 (Fla. 1981). This Court held, inter alia, that the Mr. Ford had defaulted his Lockett claim by not raising it at trial or on appeal. Id. at 908.

9. In April, 1982, the United States District Court for the Southern District of Florida denied a petition for writ of habeas corpus in an unreported opinion. A divided panel of the Eleventh Circuit affirmed the dismissal. Ford v. Strickland, 676 F.2d 434 (11th Cir. 1982); the opinion was vacated, and the Eleventh Circuit, sitting en banc, again affirmed the District Court. Ford v. Strickland, 696 F.2d 804 (11th Cir. 1982). A petition for writ of certiorari was denied. Ford v. Strickland, 464 U.S. 865 (1983).

10. Thereafter, a sanity commission, appointed pursuant to Florida Statutes 922.07 (1983), examined Mr. Ford's competence to be executed and reported to the Governor, who signed Mr. Ford's death warrant in April, 1984.

11. On May 21, 1984, the trial court dismissed Mr. Ford's Motion for a Hearing and Appointment of Experts for Determination of Competency to be Executed. This Court affirmed the dismissal and rejected an original petition for writ of habeas corpus on May 25. Ford v. State, 451 So.2d 471 (Fla. 1984) The petition did not raise any issue respecting the restriction of consideration of mitigating evidence.

12. On May 29, 1984, the United States District Court for the Southern District of Florida denied a petition for habeas corpus. The Eleventh Circuit stayed Mr. Ford's execution, but a divided panel later affirmed the denial of the petition on January 7, 1985. Ford v. Wainwright, 752 F.2d 526 (11th Cir.

1985). The United States Supreme Court granted certiorari, reversed, and remanded the case to the United States District Court for an evidentiary hearing on Mr. Ford's competency to be executed. Ford v. Wainwright, 91 L.Ed.2d 335 (1986). Mr. Ford's competence is still under consideration by the United States District Court.

Facts Material To The Present Lockett Claim

13. Discussing the sentencing procedure prior to the jury's return to the courtroom for the sentencing phase, the trial judge stated:

> "The Court is of the view that the jury should be and proposes to instruct on the mitigating circumstances as set forth in the statute, but at the request of the defendant I will not give them the written charge if you wish me not to do so." T.T. at 1309-10(emphasis added).

14. In fact, the judge's instructions to the jury regarding mitigating circumstances did just that:

> "As to mitigating circumstances, in considering whether sufficient mitigating circumstances exist which outweigh any aggravating circumstances to justify a sentence of life imprisonment rather than a sentence of death, you shall consider the following . . . [followed by a list of the statutory mitigating circumstances]." T.T. at 1348.

15. The record plainly shows that the jury did consider only statutory mitigating circumstances. Pursuant to agreement of counsel, the trial judge did not give the jury a written copy of the sentencing charge. Without a copy of the charge, the jury asked for reinstruction:

> "Judge Lee, we would like the list of charges regarding the definitions of aggravating circumstances and mitigating circumstances. Signed L. Pati, foreman." T.T. at 1351.

16. The judge proposed to counsel "to read the mitigating and aggravating circumstances again." T.T. at 1353. When the jury came in, the exchange between the jury foreman and judge revealed the thinking of the judge and the jury:

> "THE COURT: You sent me a request for a list of the charges regarding the definitions of aggravating and mitigating circumstances; is that correct, sir?
> MR. PATI: Yes.

> THE COURT: Mr. Pati . . . if you wish, and you may check with your fellow jurors on this, I am prepared and will be pleased to read the mitigating and aggravating circumstances to you again.
> MR. PATI: Yes. You want to hear them again; what they consider the aggravating circumstances; what they consider the mitigating circumstances." T.T. at 1354.

The judge then repeated the constitutionally faulty instructions quoted above. T.T. at 1356.

17. The jury returned a sentence of death, and the judge so sentenced Mr. Ford. His sentencing order explained his thought processes as follows:

> "[T]he court hereby makes its findings as to each of the elements of aggravation and/or mitigation which are set forth in Florida Statutes and which were guidelines for the jury in considering its Advisory Sentence. The Court has summarized the facts as brought out in the Trial and in the pre-sentence investigation report and applied them to each element of aggravation or mitigation where such elements are applicable." R at 8.

The Court then considered each statutory mitigating and aggravating factor in turn and concluded that Mr. Ford deserved the sentence of death.

ARGUMENT

18. This Court has recently reversed death sentences where the judge and jury were limited in their consideration of mitigating evidence as they were in Mr. Ford's case. McCrae v. State, No. 67,629 (Fla. June 18, 1987); Lucas v. State, 490 So.2d 943, 946 (Fla. 1986); Harvard v. State, 486 So.2d 537 (Fla. 1986), cert. denied, 479 U.S. ___ (1986). These cases represent the culmination of an evolutionary process in which this Court has moved from holding that instructions and findings like those in Mr. Ford's case comported with Lockett to holding that they do not. Compare Peek v. State, 395 So.2d 492, 496-97 (Fla. 1981); Songer v. State, 365 So.2d 696, 700 (Fla. 1978)(on rehearing), cert. denied, 441 U.S. 956, 91 S.Ct. 2185 (1979), with Lucas v.

State, supra and McCrae v. State, supra. In Peek, for example, the Court held that instructions directing the jury's attention only to statutory mitigating circumstances did not preclude the jury's consideration of nonstatutory mitigating circumstances. 395 So.2d at 496. In Lucas, however, the Court recognized that where the court "instructed the jurors only on the statutory mitigating circumstances," and defense counsel's argument reinforced the view that only such circumstances could be considered, the jury may well have been limited in its consideration of mitigating circumstances. 490 So.2d at 946 (emphasis in original). Between the decisions in Peek and Lucas, the Court began to recognize that in directing the sentencer to consider a delimited list of mitigating circumstances, "the Florida death penalty sentencing law [and instructions pursuant to it] could previously [before the decision in Lockett] have been read to limit the consideration to those circumstances listed in the statute." Copeland v. Wainwright, 505 So.2d at 426. With this recognition, the evolution from Peek to Lucas could -- and did -- take place.[3]

19. The correctness of this evolution has recently been confirmed and its conclusion mandated by the United States Supreme Court in Hitchcock v. Dugger, 95 L.Ed.2d 347 (1987). A unanimous Court in Hitchcock held that instructions to the jury, indistinguishable from instructions given in Mr. Ford's case, unconstitutionally limited the jury's consideration of mitigating circumstances. Further, Hitchcock held that the judge's sentencing order, stating that he considered only the statutorily

[3]Indeed, it is this same evolution that has resulted in the change in the Court's procedural default rule concerning Lockett error in cases decided before Lockett. So long as the Court maintained that the Florida Statute comported in all respects with Lockett, the Court could justifiably expect claims of Lockett error to have been raised at trial or on appeal. With the recognition that prior to Lockett the statute could have been read to limit the consideration of mitigating circumstances, the Court has properly held that defendants tried before Lockett cannot be faulted for failing to raise Lockett-based claims at trial or on appeal. Thus, the Court's recent determinations that Lockett error can properly be raised for the first time in a Rule 3.850 motion by defendants sentenced prior to Lockett is a reflection of the evolution of the Court's Lockett-related jurisprudence.

enumerated mitigating circumstances in imposing sentence, reflected an unconstitutional limitation of his own consideration of mitigating evidence. This Court recently followed Hitchcock's analysis of the record evidence in McCrae v. State, No. 67,629 (Fla. June 18, 1987). "The record of the sentencing proceeding in this case shows a situation similar to that found in Hitchcock v. Dugger, 107 S.Ct. 1821 (1987). There, the Supreme Court found that 'the sentencing proceedings actually conducted' showed that the sentencing judge operated under the assumption that non-statutory mitigating circumstances could not be considered." McCrae, slip op. at 10, quoting Hitchcock, 95 L.Ed.2d at 352. Thus, Hitchcock, along with McCrae, Lucas and Harvard, controls the disposition of Mr. Ford's case.[4]

20. Both the judge and the jury in Mr. Ford's case were constrained in their assessment of mitigating evidence. Instructions given by the court and then repeated at the request of the jury constrained the jury's consideration. The judge's understanding of the law, as reflected by the jury instructions, his comments in court, and his written findings, constrained him as well.

21. In Lucas v State the trial court had "instructed the jury only on the statutory mitigating circumstances," which impermissibly curtailed consideration of mitigating evidence and required a new sentencing proceeding. 490 So.2d 946. The trial court in Mr. Ford's case also instructed the jury exlusively on statutory mitigating circumstances." T.T. at 1348. These instructions are functionally identical to those disapproved in Hitchcock. The Hitchcock court instructed the jury that "'[the] mitigating circumstances which you may consider shall be the following ...' [listing the statutory mitigating circumstances]." Hitchcock, 95 L.Ed.2d at 353. Similarly, Mr. Ford's trial judge

[4] Lockett's Eighth Amendment prohibition on excluding mitigating evidence is clearly retroactive. Truesdale v. Aiken, 94 L.Ed.2d 539 (1987) (Lockett retroactively applies to error in excluding prison guard's testimony). Thus, Hitchcock's application of Lockett to the Florida sentencing procedure is retroactive. Accord Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985)(en banc).

instructed the jury "[a]s to mitigating circumstances, in considering whether circumstances exist which outweigh any aggravating circumstances to justify a sentence of life imprisonment rather than a sentence of death, you shall consider the following . . . [followed by the statutory list]." T.T. at 1348. The instructions define and therefore limit what mitigating circumstances the jury "could" consider. Moreover, the jury's actions during deliberations in Mr. Ford's case demonstrated that they believed themselves limited to considering only the stautory mitigating circumstances. On the stipulation of counsel, the judge did not give the jury a copy of his charge on sentencing. After retiring for deliberation, the jury through its foreman sent a note to the court requesting "the list of charges regarding the definitions of aggravating circumstances and mitigating circumstances." T.T. at 1351. When the jury returned, upon hearing the foreman request reinstruction on "what they consider the mitigating circumstances," T.T. at 1354, the judge again read them only the statutory factors. T.T. 1356. Since an "examination of the sentencing proceedings actually conducted in this case" establishes that "the sentencing judge assumed ... a prohibition [against considering nonstatutory mitigation] and instructed the jury accordingly," the jury's consideration of mitigating evidence was constrained in violation of the Eighth Amendment. Hitchcock, 95 L.Ed.2d at 352; see McCrae slip op. at 10.

22. Similar to Hitchcock, McCrae, Lucas, and Harvard, the limitation communicated to the jury in Mr. Ford's case was also clearly applied by the judge in the actual determination of Mr. Ford's sentence. The instructions themselves demonstrate "that the sentencing judge assumed ... a prohibition" against the consideration of nonstatutory mitigating circumstances. Hitchcock, 95 L.Ed.2d at 352. See Lucas v. State, supra; see also Adams v. Wainwright, 764 F.2d 1356, 1364 (11th Cir. 1985) ("An erroneous instruction may ... provide convincing evidence that the trial judge himself misunderstood or misapplied the law

when he later actually found and balanced aggravating and mitigating factors"). Other comments by the judge also show he believed himself limited. Before the jury was brought in for the sentencing phase, a discussion ensued over the sentencing procedures, and the judge stated, "The Court is of the view that the jury should be and proposes to instruct on the mitigating circumstances as set out in the statute ...." T.T. at 1309-1310 (emphasis added). Moreover, the judge's sentencing findings revealed that he considered only statutory mitigating circumstances in deciding to sentence Mr. Ford to death. In his sentencing order, Judge Lee noted the sources of his evidence and stated, "[T]he Court hereby makes its findings as to each of the elements of aggravation and/or mitigation which are set forth in Florida Statutes . . . ." R at 8 (emphasis added). The order then considered each statutory mitigating factor in turn -- but only the statutory factors -- revealing that the judge actually considered only those factors. As this Court has held, "[A]n 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." Harvard v. State, 486 So.2d at 539. Accord McCrae v. State, supra.

23. For these reasons, as in Hitchcock and McCrae, "it could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances," in violation of the requirements of the Eighth Amendment. 95 L.Ed.2d at 353.[5]

24. Significant evidence of nonstatutory mitigation was available, to the jury and the judge, before Mr. Ford's

[5]These fundamental constitutional errors were neither recognized nor corrected in Mr. Ford's direct appeal. Indeed, this Court compounded the errors when it limited its own review of the sentencers' consideration of mitigating circumstances to the statutory factors. "Our duty under section 921.141, Florida Statutes (1975) ... is to apply fairly the aggravating and mitigating circumstances duly enacted by the representatives of our citizenry to the facts of the capital cases which come before us." 374 So.2d at 503.

sentencing order was entered. This evidence included the following:

(a) Mr. Ford had the capacity to lead a productive and responsible life, demonstrated by his: taking over the role of father figure in his family after his father's alcoholism became apparent, T.T. at 1314, 1320, 1328; his sending money to his mother to help the family after he left the home, T.T. at 1315, 1328; his responsible work history until a short time before the crime, T.T. 1334.

(b) Mr. Ford was suicidal, depressed, and frustrated at the time of the murder. T.T. 1317, 1333.

(c) Mr. Ford was ambitious, but became frustrated by an undiagnosed condition of dyslexia which made it difficult for him to find good work. T.T. 1330-1331.

(d) Mr. Ford had a strong potential for rehabilitation. T.T. 1339.

25. Any possible combination of these factors could have influenced the jury's and judge's assessment of Mr. Ford's moral culpability, character, and potential for rehabilitation, rendering their constrained sentence unreliable. The evidence showed that Mr. Ford had made sincere attempts at leading a stable and productive life. It showed that he was depressed and frustrated at the time of the crime. Although evidence of suicidal tendencies might not have been considered by the jury to fall within the statutory aggravating circumstance of being under extreme mental or emotional distress, it could have been considered to reduce Mr. Ford's level of moral culpability in the eyes of the jury. Such evidence, singularly or in the aggregate, could well have influenced a properly instructed jury in making a "reasoned moral response to the defendant's background, character, and crime," California v. Brown, 479 U.S. ___, 93 L.Ed.2d 934, 942 (1987) (O'Connor, J., concurring) (emphasis in original), resulting in a sentence less than death.

26. In these circumstances, the Court cannot "confidently conclude that [the jury's and judge's consideration of

nonstatutory mitigating evidence] would have had no effect upon the jury's [and judge's] deliberations." Skipper v. South Carolina, 90 L.Ed.2d 1, 9 (1986). See also Hitchcock v. Dugger, 95 L.Ed2d at 353. Mr. Ford's case is not one in which the only reasonable sentence would have been death. While statutory aggravating circumstances were present, substantial nonstatutory mitigating circumstances were also present. On just such a record, this Court has emphasized, "We cannot know ... [whether] ... the result of the weighing process by both the jury and the judge would have been different" in the absence of factors unconstitutionally skewing the jury's sentencing deliberations. Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977). This is so because

> 'the procedure to be followed by trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present....'

Id. (quoting State v. Dixon, 283 So.2d 1, 10 (Fla. 1973)). Accordingly, this Court cannot hold that the limitation upon the jury's and judge's consideration of mitigating circumstances was harmless error.

CONCLUSION

28. For these reasons, the Court should reconsider Petitioner's appeal from the denial of his first post-conviction relief motion, reverse the denial and remand for a new sentencing proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy hereof has been furnished by mail to Joy B. Shearer, Assistant Attorney General, Department of Legal Affairs, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401, this 1st day of July, 1987.

Richard H. Burr III

ATTORNEY FOR PETITIONER