IN THE SUPREME COURT OF FLORIDA

WILLIAM LEE THOMPSON,

Appellant,

vs.

CASE NO. 70139

STATE OF FLORIDA,

Appellee.

ON PETITION FOR
WRIT OF HABEAS CORPUS

ANSWER TO STATE'S RESPONSE IN OPPOSITION TO STAY OF EXECUTION

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Mr. Thompson has this day filed a brief in this Court concerning appeal from summary merits denial of his Rule 3.850 motion. One part of the discussion in Appellant's brief is especially relevant to the State's Response to the habeas corpus petition filed in this Court. The State contends that since the Eleventh Circuit Court of Appeals addressed the Hitchcock issue presented here, "this Court is estopped from deciding this constitutional claim." Response, p. 6.

This Court is hardly so helpless. The basis for the Eleventh Circuit's decision has evaporated, with the issuance of an unusual unanimous United States Supreme Court Court opinion. Respondent's protestations notwithstanding, this Court may read and apply the law.

In fact, parts of this claim were denied by the Eleventh Circuit, as the State argues, but the denial was based upon the following state of the law:

> This court recently has described the method for analyzing Lockett claims such as the one advanced by Thompson. Hitchcock v. Wainwright, 770 F.2d 1514 (11th Cir. 1985) (en banc). A court should consider all the circumstances, including the status of florida law at the time of sentencing, the trial record, and proffers of nonstatutory mitigating evidence claimed to be available. 770 F.2d at 157

Thompson, 787 F.2d 1447. The en banc court's Hitchcock analysis and result was unanimously rejected by the United States Supreme Court after the Thompson opinion. The Thompson analysis and result is consequently flawed.

Specifically, the requirement of a "proffer[ ] of nonstatutory mitigating evidence claimed to be available" is not the law. Under Hitchcock, as this court has noted, once a restriction on the consideration of mitigating circumstances is identified, "[t]his finding based on the record, is sufficient to require a new sentencing hearing." McCrae, 12 F.L.W. at 313. The Eleventh Circuit's prejudice test -- "Thompson has not shown

any excluded evidence that could have affected the sentence," 787 F.2d at 1457 -- is not the law.

If not for one special factor, the state would be required to show that the error "had no effect on the jury or the sentencing judge." Hitchcock, 55 L.W. at 4569. With two statutory aggravating and two statutory mitigating circumstances found, it cannot be said that the exclusion of consideration of non-statutory, mitigating circumstances had no effect. The special factor in this case that makes even that inquiry irrelevant is that the jury that was chosen was not impartial, a fact which renders the proceedings unconstitutional and requires reversal without regard to what the state might show.

A condition of service on petitioner's jury was that the jurors agree to violate Mr. Thompson's fundamental eighth amendment rights. The state relentlessly tied the participants to consideration of only the statutory mitigating factors. The education process was simple: according to the judge and prosecutor, it is the judge who provides the law, the law is that only certain factors are mitigating, and the jurors could not supplement the law with extra circumstances they thought to be mitigating.

For example:

MR. McHALE: All right. His Honor will outline certain circumstances for you. You have heard them referred to as aggravating and mitigating circumstances, and he will instruct you how you should apply them and how you should weigh and compare them.

Will you abide by the circumstances which he gives you as a formulation for your decision in this case?

MR. EDGMAN: Yes.

MR. McHALE: And will that be the case, even though you may feel that other circumstances are far more important in deciding a case of this type?

MR. EDGMAN: Well, I will follow whatever the law is.

MR. McHALE: You may feel that the circumstances he outlines to you are unwise or perhaps unfair, whatever; can you still follow them and apply them in reaching your decision?

(R. 246) (emphasis added).

MR. McHALE: Judge Tanksley, at the end of the evidence that will be presented, will instruct you as to what the law is and I believe he'll tell you that your decision must be based upon the circumstances of law which he'll instruct you on. Can you, if you are selected as a juror, follow the law in reaching your decision?

(R. 272) (emphasis added).

MR. McHALE: There will be evidence presented as to the type of murder that he committed, how it happened, what his role in it was, and why it happened. There will also be instructions by the Judge as to what you should consider in making your recommendation as to whether he be executed or sentenced to life imprisonment.

(R. 283).

MR. McHALE: . . . His Honor will instruct you as to certain factors which will be considered by the jury in determining what sentence to recommend to him.

Can you follow the law that he instructs you on, even though you may disagree with that law?

(R. 285)(emphasis added).

MR. McHALE: Of course, and His Honor will instruct you as to certain factors which should be considered by the jury in making the determination. Will you follow the law in making your determination as to what sentence should be recommended to the Court?

(R. 289)(emphasis added).

MR. McHALE: In this particular case, Judge Tanksley will instruct you at the end of this case as to certain factors, aggravating factors and mitigating factors, and I think he'll tell you that you may hear and weigh those and use those factors to determine what sentence to recommend to him.

Can you follow the instructions of law that he will give you, and base your verdict on those instructions as well as to the evidence that you'll hear?

(R. 293)(emphasis added).

MR. McHALE: . . . The Court will instruct you as to mitigating circumstances, and I will point out to you, at this very moment, that there is no evidence of any mitigating circumstances. I believe His Honor will tell you that the mitigating circumstances you should consider, if established by the evidence, if established by the evidence are these: [reads and argues against each statutory mitigating circumstance].

(R. 538-40)(emphasis added).

MR. McHALE: Let me also say something else: at the conclusion of the evidence that you will hear in this case, Judge Tanksley will instruct you as to what the law is in the State of Florida, and any recommendation by the jury will not be based upon your personal opinion, but will be based upon the law, and I believe he'll tell you that it is your duty to follow the law in reaching your recommendation.

Can you follow the law in this case, or will you come back with a personal opinion, a desire to see your own personal justice done in this case?

(R. 90, 91).

MR. McHALE: The question is: will you fairly listen to the evidence and will you follow the law that His Honor instructs you on so that you will return a just sentence and a sentence

that reflects what the law in the State of Florida is, whether that sentence is life or death in the electric chair, but it is based on the law? Will you follow the law that the Court gives you as to what your sentence should be . . . there are certain circumstances which the law calls aggravating circumstances, and there are others which the law calls mitigating circumstances. It will be your duty to weigh and evaluate all the circumstances in this case, and His Honor will instruct you as to how they should be compared so that you can return a correct verdict . . .

(R. 101)(emphasis added).

MR. McHALE: Do you have any opinions at this time as to what type of case the death penalty should be imposed, or is your mind open at this time?

MS. MAMMANO: Well, it's . . . as I said, I would follow the law.

MR. McHALE: Would you follow the law His Honor gives you?

MS. MAMMANO: I'll follow the law.

(R. 114).

MR. McHALE: . . . Would you try to satisfy yourself in this case whether there might have been any type of mental illness on the part of the defendant?

MS. BYRNE: No, not if they already pled guilty.

MR. McHALE: If His Honor's instructions of law did not include that for your consideration in any way, would you try to consider it? Would you go outside of his instructions?

MS. BYRNE: No.

MR. McHALE: To bring something else into the case?

MS. BYRNE: No.

MR. McHALE: Can you follow His Honor's instructions of law in reaching your final

determination, whether it be life or death?

MS. BYRNE: Sure.

(R. 118, 119)(emphasis added).

MR. McHALE: In this case, will you follow His Honor's instructions? He'll give you aggravating and mitigating circumstances to form the basis for your decisions. Will you base your decision on the law, rather than trying to come out with some type of personal opinion or a personal justice as to what should happen in this particular case?

Will you follow the law?

MS. RAMBO: Yes.

(R. 121).

MR. McHALE: I believe in this case His Honor's instructions of law will not provide for the use of any sympathy or compassion for this defendant, but there will be a number of factors which you can consider in determining your recommendation.

Can you put aside your feelings that you are called upon to use in your everyday job, in this case and not allow any feelings of sympathy and compassion for the defendant in this case to enter into a just determination of what sentence he should receive?

Can you do that?

MS. RAMBO: Yes.

(R. 122)(emphasis added).

MR. McHALE: . . . Will you follow the law that he gives you as the basis for your decision and by that I mean not using personal sympathy or compassion or your own idea of what justice should be, your own personal justice in this case, but to follow the law in coming to your decision?

MS. PETRY: I think I could.

(R. 125).

MR. McHALE: The question is: will you be bound by it, remain bound by the law and the evidence and not attempt to, for any personal reasons, to go outside of it?

(R. 126).

MR. McHALE: Do you feel you can base your decision, whether it be a recommendation of life or death, on the instructions that Judge Tanksley were to give you on the law? . . .

Can you do that? I say, can you do that, as opposed to just going into the jury room and doing what you wanted to do, period? Can you accept the responsibility of being a juror and base your decision on the law and on the evidence and not on your own feelings about what the law should be or what the sentence should be in this case, based just on your own thoughts? Can you put yours aside and follow . . .

(R. 145).

MR. McHALE: The law he instructs you on -- you feel you can follow that law in arriving at a just recommendation of the penalty?

MRS. McMILLON: Yes.

(R. 147).

MR. McHALE: Can you do it, even though the law that he gives you, the law in the State of Florida, may be different than what you think it is or what you think it should be as far as whether a person is sentenced to death or is given a life sentence?

Can you still follow that law?

MS. REILLY: Yes, I believe I can.

(R. 148).

MR. McHALE: In this case, will you be able to follow the law that Judge Tanksley instructed you and the rest of the jury on, in making your determination?

MRS. MAIRS: Yes, I will.

(R. 167).

MR. McHALE: Do you feel that you could follow His Honor's instructions in recommending the sentence to the Court, whether it be life imprisonment or death in the electric chair?

MR. LINGLE: I feel I could, yes.

MR. McHALE: Could you still follow those instructions of law even though you may not personally agree with them, or think they should be otherwise in determining or as a determinant of what sentence should be imposed?

MR. LINGLE: I feel I can.

MR. McHALE: Will you accept the law in this state as it is; accept the law from Judge Tanksley and follow it based on the evidence that you hear in this case?

(R. 182-83)(emphasis added).

MR. McHALE: And by that I mean not decide what sentences should be from your own opinions or your own beliefs, but the instructions the Court gives you, and base that on the evidence that you hear about what happened.

(R. 187).

MR. McHALE: In this particular case, His Honor will instruct you on what the law is as to what sentence you should return. I believe he will tell you that your decision must be guided by the law that he gives you.

Will you follow it, even though, perhaps, you may, after hearing the law, say to yourself, "I don't like it. I think it should be something else," or whatever you may say -- will you still follow what he tells you the law is and use that to base your decision to?

(R. 196)(emphasis added).

MR. McHALE: Will you follow it even though you disagree with it, and you

feel that the law should be otherwise -- that it is too strict or too harsh or whatever feelings you may have against what the law is that he tells you, would you still follow it?

(R. 204).

MR. McHALE: . . . which means that you are not completely a free man; that you are bound to follow the law . . .

(R. 205).

MR. McHALE: Will you follow His Honor's instructions of what the law is, in arriving at your recommendation? Will you base your recommendation on the law and the evidence?

MR. PORTELA: Yes.

MR. McHALE: Can you still do that, even though you may say to yourself, "I don't like the law, and I think it is too harsh. I think it is stupid, and I don't believe that anyone should have to come under this set of laws"? Would you still follow it, even though you might say that to yourself?

(R. 211).

MR. McHALE: Let me ask you this, Mr. McMillian, Judge Tanksley is going to give you the law and that law will include certain factors which must be considered in determining what sentence the defendant should receive. <u>Will you abide by that law and use those factors to determine what your recommendation will be,</u> . . .

(R. 217, 218)(emphasis added).

MR. McHALE: In this particular case, will you follow the instructions of the Court in making your determination as to what recommendation to give to Judge Tanksley, as a punishment?

MR. SHERF: Yes.

MR. McHALE: And can you follow the instructions that he gives you

as to the law, even though you may very strongly disagree with the law as it is today, and may feel that it is unfair and it should be something very different? Can you and will you still follow the instructions of the law and use it to base your decision on?

MR. SHERF: Yes.

(R. 223, 224).

MR. McHALE: . . . Do you understand that if there is any mercy to be given in this case, only Judge Tanksley can do that? Do you understand that, and that as a juror, you are not allowed to offer mercy, but you must follow the law in this case? . . .

MR. SOLOMON: Objection . . . we feel that it is not improper to say that a man seeks mercy and that the Court will, even though not bound to follow the jury, will follow the jury . . .

THE COURT: . . . I think the State has a right to ask individual jurors if they will follow the law as given by the Court . . . the question is that they must follow -- ask them if they agree to follow the law as given by the Court and apply it to the facts . . .

(R. 237-39).

A juror could not serve unless he or she agreed to violate Lockett. Mr. Thompson's sentencing proceeding was doomed before it began. The jurors were required to promise that they would not consider the things they thought should be mitigating. A guilty plea could not be considered to be mitigating. "[F]eelings that you are called upon to use in your everyday job" were forbidden. Intoxication, drug ingestion, "any type of mental illness" -- these could not be considered. Mercy, compassion, understanding, were all precluded.

This is not just Lockett error: Mr. Thompson was denied a fair and impartial fact-finding proceeding. Imagine the

following juror promises:

> "I will not consider the defendant to be innocent until proven guilty."
>
> "I will require the defendant to prove innocence."
>
> "I will presume that the defendant is guilty."
>
> "I will not require all the elements of the offense to be proven beyond a reasonable doubt."
>
> "I will require the defendant to testify, or I will convict him or her."
>
> "I will convict the defendant because he did not confess."
>
> "I will convict the defendant because he is represented by counsel."

None of these promises could be required, and if they occurred, reversal would be automatic.

Here, the jurors were required to state that they would ignore just as basic a, or perhaps an even more factual, constitutional right. Jurors were required to say

> "I will not consider all mitigation that I think is important."
>
> "I will not consider something to be mitigating unless it is in the statutory list."
>
> "I will not be compassionate, merciful, or tolerant."

Rather than such ironclad beliefs being a proper reason for juror excusal "for cause," these promises became preconditions for jury service. The jury was consequently biased and skewed in favor of the state, and was chosen in a manner that absolutely violated the sixth, eighth, and fourteenth amendments.

Mr. Thompson was entitled to "jurors who [would] conscientiously apply the law and find the facts." Wainwright v.Witt, 469 U.S. ___ (1985), jurors who were "impartial" and "indifferent", Irvin v. Dodd, 366 U.S. 717, 723 (1961), and jurors who were not death-prone. In fact, the jurors, in order to serve, were required to promise not to follow the requirements

of Lockett, and so not to "apply the law," were required to be partial and favor the state, and, consequently, the jurors were death prone. This is unacceptable in a capital sentencing proceeding, and injected an intolerable degree of risk that death was imposed in this proceeding despite the existence of factors calling for a lesser punishment. This violates the Eighth and Fourteenth Amendments.

The jury plays a critical part in Florida's capital sentencing proceedings. Consequently, the Sixth, Eighth, and Fourteenth Amendment requirement that "[i]n all criminal prosecutions, the accused shall enjoy the right to a ... trial, by an impartial jury ...." applies. Even before Duncan v. Louisiana, 391 U.S. 145 (1968), incorporated the Sixth Amendment's jury-trial right into the Fourteenth, it had long been settled that the Due Process Clause assures every criminal defendant the right to have his trial before an impartial tribunal. "A fair trial in a fair tribunal is a basic requirement of due process." In re Murchison, 349 U.S. 133, 136 (1955). See, e.g., Taylor v. Hayes, 418 U.S. 488, 501 (1974) (citing authorities). Johnson v. Mississippi, 403 U.S. 212, 216 (1971) (per curiam).

Where a State entrusts the determination of guilt or innocence [or sentencing] to a jury, "[d]ue process requires that the accused receive a trial by an impartial jury free from outside influence." Sheppard v. Maxwell, 384 U.S. 333, 362 (1966). "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors ... In the language of Lord Coke, a juror must be... 'indifferent as he stands unsworne.'" Irvin v. Dowd, 366 U.S. 717, 722 (1961); accord, Groppi v. Wisconsin, 400 U.S. 505, 509 (1971).

The courts have long held that any procedure that might predispose a criminal tribunal to convict (or sentence) violates

due process. In Tumey v. Ohio, 273 U.S. 510 (1927) the Court held that:

> "Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused denies the latter due process of law."

Id. at 532. See also, Ward v. Monroeville, 409 U.S. 57 (1972); Connally v. Georgia, 429 U.S. 245, 246 (1977) (per curiam).

Applying this constitutional rule to the record in the present case involves a task analogous to evaluating the consequences of pretrial publicity. In both situations, it is necessary to assess the danger that events preceding the presentation of the evidence will impair the jury's ability to judge that evidence fairly and neutrally. In Sheppard v. Maxwell, 384 U.S. 333 (1966), the Supreme Court held that

> [T]he trial courts must take strong measures to ensure that the balance is never weighed against the accused. And appellate tribunals have the duty to make an independent evaluation of the circumstances.

Id. at 362.

This is so because "our system of law has always endeavored to prevent even the possibility of unfairness." In re Murchison, 349 U.S. 133, 136 (1955); accord, Estes v. Texas, 381 U.S. 532, 543 (1975). That basic canon of due process is recognized in a variety of situations which endanger the impartiality of the trier of criminal charges. Id. at 543-44; Mayberry v. Pennsylvania, 400 U.S. 455 (1971); Estelle v. Williams, 425 U.S. 501, 504 (1976). No specific prejudice need be shown.

And so this Court is not "estopped from deciding this constitutional claim." It is ripe for review and relief is required.

CONCLUSION

Petitioner respectfully requests that this Court enter a stay of his execution scheduled for Thursday, July 23, 1987, and grant the writ so as to allow a new direct appeal. In the alternative, Petitioner requests that his conviction and sentence of death be vacated. If fact resolution is necessary for the decision of this Court, Petitioner requests that a magistrate be appointed to take evidence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by HAND DELIVERY to Robert Butterworth, Assistant Attorney General, Department of Legal Affairs, The Elliot Building, 401 South Monroe Street, Tallahassee, FL 32301, this 2d day of July, 1987.

Attorney