IN THE SUPREME COURT OF FLORIDA

NO. 70139

WILLIAM LEE THOMPSON,

Petitioner,

vs.

RICHARD L. DUGGER, Secretary,
Department of Corrections, State of Florida,

Respondent.

PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF HABEAS CORPUS, REQUEST FOR STAY OF EXECUTION, AND APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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I. INTRODUCTION

This case was tried shortly after the issuance of the United States Supreme Court opinion in Lockett v. Ohio, 438 U.S. 538 (1978)(plurality opinion). Lockett taught that there can be no preclusion of capital sentencer consideration of proffered mitigating evidence, whether that evidence is within or without the parameters of a state's statutory list of mitigating circumstances. The sentencing proceeding conducted herein did not comport with Lockett:

> MR. SOLOMON: I am going to review with you, just for a moment, certain worse, damaging, aggravating circumstances shall be limited to the following and that's what you heard from Mr. McHale. It says, "Limited to the following."
>
> Although it says, "mitigating circumstances shall be the following," it doesn't say, "Limited to." So, you can consider other elements.
>
> MR. McHALE: Objection.
>
> THE COURT: Sustained.

R. 549, 550 (defense attorney, attempted argument to the jury). This is merely illustrative of the trial-long judge and state emphasis to the "sentencing" jury that consideration of mitigating evidence was restricted. As will be shown, potential jurors in this case could not serve unless they absolutely promised pre-trial to violate Lockett. As this Court has increasingly noted as of late, this type of capital sentencing proceeding cannot stand:

> A defendant in a capital case has a constitutional right to present to and have considered by the sentencing authority any competent evidence that is relevant to the sentencing determination, including information about the character and background of the defendant and the circumstances of the offense. Skipper v. South Carolina, 106 S. Ct. 1669 (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). 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 nonstatutory mitigating circumstances could not be considered. Id. at 1823. Because "the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances. . .the proceedings. . .did not comport with the requirements of Skipper v. South Carolina, 476 U.S. ___, 106 S. Ct. 1669, 90 L.Ed.2d (1986), Eddings v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869, 71 L.Ed.2d 1 (1982), and Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L.Ed.2d 973 (1978)(plurality opinion)." Id. at 1824.

McCrae v. State, No. 67,629, slip opinion, pp. 9-10 (Fla., June 18, 1987). See also 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).

Two statutory aggravating and two statutory mitigating circumstances were found by the sentencer. In light of this balance, this Court may not "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).

II. JURISDICTION

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents issues which directly concern the judgment of this Court on appeal and hence jurisdiction lies in this Court. See, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981). In addition, Mr. Thompson presents, inter alia, issues of ineffective assistance of appellate counsel. Since the claim of ineffective assistance of counsel stems from acts and omissions

before this Court, this Court has jurisdiction. Knight v. State, 394 So. 2d 997, 999 (Fla. 1981). While the extraordinary writ of habeas corpus may not be used as a routine vehicle for a second or substitute appeal, this and other Florida courts have consistently recognized that the writ must issue where the constitutional right of appeal is thwarted on crucial and dispositive points due to the omissions or ineffectiveness of appointed counsel. See, e.g., Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); McCrae v. Wainwright, 439 So. 2d 768 (Fla. 1983); State v. Wooden, 246 So. 2d 755, 756 (Fla. 1971); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); Ross v. State, 287 So. 2d 372, 374-75 (Fla. 2d DCA 1973); Davis v. State, 276 So. 2d 846, 849 (Fla. 2d DCA 1973), aff'd, 290 So. 2d 30 (Fla. 1974). The proper means of securing a belated hearing on such issues in this Court is a petition for writ of habeas corpus. Baggett, supra, 287 So. 2d at 374-75; Powe v. State, 216 So. 2d 446, 448 (Fla. 1968). Petitioner will demonstrate that the inadequate performance of his appellate counsel was so significant, fundamental, and prejudicial as to require the issuance of the writ.

Furthermore, this Court has consistently maintained an especially vigilant control over capital cases. The Court does not hesitate to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings before this Court. Wilson, supra. This Court must and does have the power to do justice. Fundamental error is presented, and this Court should correct the error pursuant to its inherent habeas corpus jurisdiction.

III. FACTS UPON WHICH PETITIONER RELIES

The record before this Court upon direct appeal was rife with fundamental eighth amendment error. The error was properly preserved for appellate review, but it was not properly presented

to this Court. Ironically, the facts of this case demonstrate perhaps the clearest restriction on consideration of non-statutory mitigating circumstances contained in any record this Court has ever reviewed.

These facts can be divided into three relevant categories. First, Mr. Thompson will present those "facts" reflecting judge instruction to, and/or in the presence of, the jury regarding what could and could not be considered in mitigation. Second, Mr. Thompson presents those "facts" which demonstrate that the sentencing judge considered himself limited to consideration of those factors contained in the statutory list. Third, Mr. Thompson presents those "facts" surrounding the prosecutor's repeated admonition to the jury (and judge) that the judge instructions regarding mitigation were to be studiously and meticulously followed, with the prosecutor going so far as to have the jurors promise that they would not consider "other" factors in mitigation, even if they believed, morally, that they should.

As the quotes from the transcript will illustrate, the error was properly preserved for appeal.

A. Judge Instructions/Comments to the Jurors and Potential Jurors Precluded Consideration of Non-Statutory Mitigating Circumstances

The judge made it absolutely clear -- it "could not be clearer," Hitchcock, 107 S. Ct. at 1824 -- that the jurors could consider only specific, listed factors in mitigation of punishment. Before sentencing began, the trial court informed the jury:

> THE COURT: The State and the defendant may now present evidence relative to what sentence you should recommend to the Court. You are instructed that this evidence is presented in order that you might determine, first, whether or not sufficient aggravating circumstances exist which

would justify the imposition of the death penalty and, second, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any.

At the conclusion of the taking of the evidence, and after argument of counsel, you will be instructed on the factors in aggravation and mitigation that you may consider.

R. 297-98 (emphasis added).

In the jury sentencing instructions, the Court did just that:

THE COURT: [T]he mitigating circumstances which you may consider, if established by the evidence, are these: [reads statutory list].

R. 556.

Earlier, during voir dire, the judge explicitly told a juror that that juror could not consider a guilty plea to be mitigating:

THE COURT: The fact that you know the defendant has pled guilty, would this enter into your decision in any way, or would you follow the instructions of the Court as to what you should consider?

MR. FREY: I'd follow the instructions.

R. 104. Prosecutor McHale and the trial judge later cut off another non-statutory avenue of mitigation:

MR. SOLOMON: Do each and every one of you in here believe that even in the worst circumstances there is hope for everyone?

MR. McHALE: Judge, I am going to object, because it is a matter which is not part of the law and goes outside of the law as far as a sentencing proceeding.

THE COURT: Sustained.

R. 174. Voir dire was conduced in the presence of all potential jurors, who heard all the questions, objections, and rulings. Later during the taking of evidence, the judge sustained

objections to the admission of evidence which was not contained in the statutory list:

> MR. McHALE: Judge, I'm going to object to anything about intoxication. It's irrelevant to this proceeding.
>
> MR. SOLOMON: I don't know about that, Judge.
>
> THE COURT: Well, she has answered the question; she said no.
>
> MR. SOLOMON: Were they taking any pills during the ongoing period of time?
>
> MR. McHALE: I'm making the same objections on the ground of relevance to this particular proceeding . . .
>
> MR. SOLOMON: I don't know about that, Judge. It strikes me that the jury ought to know the entire physical and mental condition of the defendant. You'll see one of the mitigating circumstances in there points directly to it.
>
> THE COURT: Sustained.

R. 446, 447.

The "correctness" of this restriction was reinforced during closing argument:

> MR. SOLOMON: I am going to review with you, just for a moment, certain worse, damaging, aggravating circumstances shall be limited to the following and that's what you heard from Mr. McHale. It says, "Limited to the following."
>
> Although it says, "mitigating circumstances shall be the following," it doesn't say, "Limited to." So, you can consider other elements.
>
> MR. McHALE: Objection.
>
> THE COURT: Sustained.

R. 549, 550 (defense attorney, attempted argument to the jury).

There is absolutely no denying that the "sentencing" jury

was completely misinformed about its function and about that which could properly be considered in mitigation of punishment.

B. The Trial Judge Believed He Was Precluded From Considering Non-Statutory Mitigating Circumstances

The instructions and comments outlined in subsection A, supra, demonstrate "that the sentencing judge assumed . . . a prohibition" against the consideration of non-statutory mitigating circumstances. Hitchcock, 107 S.Ct. at 182. As is obvious, "[a]n erroneous instruction may . . . provide convincing evidence that the trial judge himself misunderstood or misapplied the law when he [or she] later actually found and balanced aggravating and mitigating factors." Adams v. Wainwright, 764 F.2d 1356, 1364 (11th Cir. 1985).

It should be noted that the sentencing judge stated, on the record, that "I told you I would accept the recommendation of the jury . . . ." (R. 586). This the Court did, and the defects in the jury recommendation consequently adhered in the judge's sentence.

Secondly, the trial court's sentencing order mentions that sentencing was conducted "[u]nder the provisions of Section 921.141, Florida Statutes"; and that testimony was taken before the jury regarding "the aggravating circumstances and the mitigating circumstances" (Sentencing Order)(emphasis added). The trial court's written sentence of death then found two statutory mitigating circumstances applicable. The findings include no mention of nonstatutory mitigation.

C. The Jurors Were Required To Promise To Violate Lockett, And To Do The Opposite Of What Is Required At Capital Sentencing

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. Will you abide by that law and use those factors to determine what your recommendation will be, . . .

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.

D. There Was No Strategic Or Tactical Reason For Not Raising This Issue.

This is fundamental error. It leaps from the record. It was objected to by trial counsel. If the issue was raised on appeal, it could be revisited now, in light of Hitchcock. If it was not raised, no reasonable tactic or strategy prompted the unreasonable omission of this claim from the direct appeal proceedings. If this is not fundamental basic error, if counsel could reasonably have omitted it, then the statute as written, much less as applied, is defective and violated the eighth and fourteenth amendments.

IV. NATURE OF RELIEF SOUGHT

Petitioner requests that this Court stay his scheduled execution, so as to allow full and complete consideration of his petition for writ of habeas corpus. In the alternative, Petitioner requests that a new appeal be granted, a stay of execution be entered, and a briefing schedule be ordered. Finally, Petitioner requests that his sentence be vacated and that this matter be remanded to the trial court for resentencing

before a jury.

V. LEGAL BASIS FOR RELIEF

Petitioner's contention is that the restriction on consideration of non-statutory mitigating circumstances apparent from the record violates the eighth and fourteenth amendments to the United States Constitution. Further, the repeated misinformation provided to the jury regarding their function and role violated the same constitutional provisions. These substantive claims are cognizable in this petition based on a) this Court's failure to have corrected the error pursuant to its direct appeal, plenary review function, and b) appellate counsel's unreasonable failure to bring the error to this Court's attention. The basis for relief will be addressed in this section.

A. Mr. Thompson Was Denied A Meaningful And Individualized Capital Sentencing Proceeding, In Violation Of The Eighth And Fourteenth Amendments, And The Jury Was Selected Unconstitutionally.

Hitchcock does not turn on the date of sentencing, but on whether the actual language in the record shows that sentencer consideration of mitigation was limited. The history of this claim is well known to the Court, but highlights of this history bear repeating in order for the issue properly to be framed.

Today, "[t]here is no disputing," Skipper v. South Carolina, 106 S. Ct. at 1670 (1986), the force of the constitutional mandate: "[w]hat is important at the selection stage is an individualized determination on the basis of the character of the individual offender and the circumstances of the crime." Zant v. Stephens, 462 U.S. 862, 879 (1983). The constitutional necessity of individualized sentencing in capital cases was not always so clear. The nine separate opinions in Furman v. Georgia, 408 U.S. 238 (1972), "[p]redictably . . . engendered confusion as to what

was required in order to impose the death penalty in accord with the Eighth Amendment." Lockett, 438 U.S. at 599. States responded differently. Those that chose "guided discretion" statutes were "[c]onfronted with what reasonably appeared to be the questionable constitutionality of permitting discretionary weighing of mitigating factors after Furman," Lockett, 438 U.S. at 599 n.7, and as a consequence, some included provisions to limit the mitigating factors that could be considered. See, e.g., Lockett, supra; State v. Richmond, 144 Ariz. 186, 560 P.2d 41, 50 (1976), cert. denied, 433 U.S. 915 (1977); State v. Simants, 197 Neb. 549, 250 N.W.2d 881, 889, cert. denied, 434 U.S. 878 (1977); People v. District Court, 586 P.2d 31, 33 (Colo. 1978).

Florida was among those states that followed the "reasonable" view that Furman required restriction of the mitigating factors. Prior to Furman, in March 1972, the Florida Legislature had enacted a new capital sentencing statute which provided a bifurcated trial and "contained lists of aggravating and mitigating circumstances, but only as guidelines for matters to be considered during the sentencing proceeding." Ehrhardt and Levinson, Florida's Legislative Response to Furman: An Exercise in Futility?, 64 J. Crim. L. & Criminology 10 (1973). Furman supervened, and this statute was never used. In the months after Furman, a mandatory sentencing scheme was seriously considered, but after intense debate over the meaning of Furman, the Florida Legislature chose the Governor's proposal, consisting of a modified version of the Model Penal Code. The statute that emerged restricted discretion by listing certain exclusive aggravating and mitigating factors. The statute's plain terms mandated that the jury and judge determine first whether "sufficient aggravating circumstances exist as enumerated in subsection [(5)]" and whether "sufficient mitigating circumstances exist as enumerated in subsection [(6)]"; then,

"[b]ased on these considerations, whether the defendant should be sentenced to life or death." Sections 921.141 (2) and (3), Fla. Stat. (1973) (emphasis supplied). In listing the aggravating and mitigating factors that could be considered, the Legislature said that both were "limited to" those listed in the statute. "Thus the enumerated circumstances are intended to be the exhaustive list of sentencing considerations." Florida's Legislative and Judicial Responses to Furman v. Georgia: An Analysis and Criticism, 2 Fla. St. U. L. Rev. 108, 139 (1974).

In Cooper v. State, 336 So. 2d 1133 (Fla. 1976), cert. denied, 431 U.S. 925 (1977), the Florida Court affirmed exclusion of mitigating evidence (stable employment record) because: "the Legislature chose to list the mitigating circumstances which it judged to be reliable . . . and we are not free to expand that list." Id. at 1139. It stressed the clarity of the statutory language restricting consideration of mitigating factors to those "as enumerated" in the statute's list, emphasizing that these were "words of mandatory limitation." Id. at 1139 n.7. It explained, consistent with the legislature's "reasonable" view, that such a result was required by Furman: "This [holding] may appear to be narrowly harsh, but under Furman undisciplined discretion is abhorrent whether operating for or against the death penalty." Id. (emphasis in original). Accordingly, "[t]he sole issue in a sentencing hearing under section 921.141, Florida Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have (sic) no place in that proceeding." Id. at 1139 (emphasis supplied).

Thereafter, the Florida Supreme Court's opinions continued to reflect this "narrowly harsh" "mandatory limitation" confining consideration of mitigating factors to the statutory "list." It was not until after Lockett that another view was recognized.

There was, at the very least, tension between Cooper and

Lockett. After Lockett, the Florida Supreme Court decided Songer v. State, 365 So. 2d 696 (Fla. 1978). Said Songer: "Obviously, our construction of section 921.141 (6) has been that all relevant circumstances may be considered in mitigation." Id. at 700. Both the holding of Cooper affirming the preclusion of nonstatutory mitigating character evidence, and its rationale that the nonexpandable "list" of mitigating factors was a "mandatory limitation" required by Furman, was said to be "not apropos to the problems addressed in Lockett." Id. Cooper was said to have been concerned only with whether the mitigating evidence was "probative," not whether the evidence fell outside the statutory list of mitigating factors. Id.

The United States Supreme Court and this Court have recognized the Cooper/Songer peccadillo:

> Petitioner claims that the advisory jury and the sentencing judge were precluded by law from considering some of the evidence of mitigating circumstances before them. The Florida death-penalty statute in effect at the time (which has since been amended in various respects) provided for separate post-conviction proceedings to determine whether those convicted of capital felonies should be sentenced to death or to life imprisonment. Those proceedings were typically held before the trial jury, which heard evidence "as to any matter that the court deem[ed] relevant sentence." Fla. Stat. sec. 921.141(1) (1975). After hearing that evidence, the jury was to render an advisory verdict by determining "(a) [w]hether sufficient aggravating circumstances exist as enumerated in [sec. 921.141(5)]; (b) [w]hether sufficient mitigating circumstances exist as enumerated in [sec. 921.141(6)], which outweigh the aggravating circumstances found to exist; and (c) [b]ased on these considerations, whether the defendant should be sentenced to life [imprisonment] or death." Sec. 921.141(2). The trial court then was to weigh the aggravating and mitigating circumstances itself and enter a sentence of life imprisonment or death. If it imposed a sentence of death, it was required to set forth in writing its findings "(a) [t]hat sufficient aggravating circumstances exist as enumerated in [sec. 921.141(5)], and (b) [t]hat there are insufficient mitigating circumstances, as enumerated in [sec. 921.141(6)], to outweigh the aggravating circumstances." Sec.

921.141(3).

> Petitioner argues that, at the time he was sentenced, these provisions had been authoritatively interpreted by the Florida Supreme Court to prohibit the sentencing jury and judge from considering mitigating circumstances not specifically enumerated in the statute. See, e.g., Cooper v. State, 336 So. 2d 1133, 1139 (1976) ("The sole issue in a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have [sic] no place in that proceeding. . ."), cert. denied, 431 U.S. 925 (1977). Respondent contends that petitioner has misconstrued Cooper, pointing to the Florida Supreme Court's subsequent decision in Songer v. State, 365 So. 2d 696 91978) (per curiam, which expressed the view that Cooper had not prohibited sentencers from considering mitigating circumstances not enumerated in the statute. Because our examination of the sentencing proceedings actually conducted in this case convinces us that the sentencing judge assumed such a prohibition and instructed the jury accordingly, we need not reach the question whether that was in fact the requirement of Florida law. We do note, however, that other Florida judges conducting sentencing proceedings during roughly the same period believed that Florida law precluded consideration of nonstatutory mitigating circumstances. At least three death sentences have been overturned for this reason. See Songer v. Wainwright, 769 F.2d 1488 (CA11 1985) (en banc) (per curiam), cert. pending, No. 85-567; Lucas v. State, 490 So. 2d 943, 946 (Fla. 1986); Harvard v. State, 486 So. 2d 537 (Fla.) (per curiam), cert. denied, 479 U.S. ___ (1986). We also note that the Florida Legislature has since removed the phrase "as enumerated [in the statutory list]" from the provisions requiring the advisory jury and the sentencing judge to consider mitigating circumstances. See Fla. Stat. sec. 921.141(2)(b), (3)(b) (1985).

Hitchcock, 107 S.Ct. at 1824-25.

Indeed, this Court has, as of late, recognized the constitutional shortcoming of sentencing proceedings conducted with Cooper-type language constraints on mitigating circumstances:

> In Harvard v. State, 486 So.2d 537 (Fla. 1986), we remanded for a new sentencing hearing in a post-conviction relief proceeding because Harvard's trial court believed that the mitigating factors were

> restricted to those listed in the statute. Lucas' trial, as well as Harvard's, took place prior to the filing of this Court's opinion in Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956 (1979). Although Lucas' original judge cannot now say what he thought section 921.141 required, the record shows that he instructed the jury only on the statutory mitigating circumstances. Our review of the record shows a scant twelve pages devoted to the presentation of evidence by both the state and the defense at the sentencing proceeding. Moreover, in arguing to the jury defense counsel stated:
>
> > As the judge will explain to you, the law is very specific in spelling out what you may consider in making your decision. You may not go outside the aggravating and mitigating circumstances in reaching your decision. . . . But you may not go outside the specifically enumerated aggravating and mitigating factors.
>
> Because we would rather have this case straightened out now rather than, possibly, in the far future in a post-conviction proceeding, we remand for a complete new sentencing proceeding before a newly empanelled jury.

Lucas v. State, 490 So.2d 943 (Fla. 1986).

In this proceeding, the jurors were not merely instructed to restrict their consideration to the list. The jurors could not serve until they agreed to do so. The test for jury service was that the jurors violate Lockett. The jurors received completely incorrect information about their jobs, and the state cannot demonstrate that this error had "no effect" on sentencing. Caldwell v. Mississippi, 105 S.Ct. 2633 (1985). Further, the jurors entered the proceeding biased against petitioner and in favor of the state -- they promised not to consider matters that would benefit petitioner. This violates the right to an unbiased factfinder, in violation of the fifth, sixth, eighth, and fourteenth amendments.

Mr. Thompson's sentencing proceeding was unconstitutionally conducted, and he did not receive individualized and meaningful consideration of whether he should receive life or death. This

is the most fundamental of errors and is properly raised in this proceeding.

B. COUNSEL WAS INEFFECTIVE

The Lockett/Hitchcock claim was presented at trial, but was not raised properly on appeal, through no tactic or strategy. This was an unreasonable omission by counsel. Harvard and Lucas demonstrate that there is a reasonable probability that but for the unreasonable omission, the result in this case would have been different.

This Court is especially vigilant in its policing of counsel's performance on appeal. When this Court learns of unreasonable attorney omissions, it does not hesitate to act:

> [T]he role of an advocate in appellate procedures should not be denigrated. Counsel for the state asserted at oral argument on this petition that any deficiency of appellate counsel was cured by our own independent review of the record. She went on to argue that our disapproval of two of the aggravating factors and the eloquent dissents of two justices proved that all meritorious issues had been considered by this Court. It is true that we have imposed upon ourselves the duty to independently examine each death penalty case. However, we will be the first to agree that our judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of the advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged derivations from due process.

Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985).

The appellate-level right to counsel also comprehends the sixth amendment right to effective assistance of counsel. Evitts v. Lucey, __ U.S. ___, 105 S. Ct. 830 (1985). Appellate counsel must function as "an active advocate on behalf of his client," Anders v. California, 386 U.S. 738 (1967), who must receive "expert professional . . . assistance . . . [which is] necessary in a legal system governed by complex rules and procedure. . . ."

Lucey, 105 S. Ct. 830 n.6. An indigent, as well as "the rich man, who appeals as of right, [must] enjoy[] the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf. . . ." Douglas v. California, 372 U.S. 353, 358 (1965) (equal protection right to counsel on appeal).

The process due appellant is not simply an appeal with representation by "a person who happens to be a lawyer. . . ." Lucey, 105 S. Ct. at 835 (quoting Strickland v. Washington, 104 S. Ct. 2052 (1984)). The attorney must act as a "champion on appeal," Douglas, 372 U.S. at 356, not "amicus curiae." Anders, 386 U.S. at 744. Regardless of what appellate counsel may have accomplished competently or effectively, a single error by counsel may be sufficient for relief to be granted under the right to effective assistance of appellate counsel guaranteed by the sixth, eighth, and fourteenth amendment. Strickland.

C. Thompson v. Wainwright, 787 F.2d 1447 11th Cir. 1986), Has No Effect On This Petition

Parts of this claim were presented to the federal courts in a federal habeas corpus petition filed by petitioner. A panel of the United States Court of Appeals for the Eleventh Circuit rejected the claim in Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1980). However, that panel expressly and heavily relied upon the Eleventh Circuit en banc decision in Hitchcock v. Wainwright, 770 F.2d 1514 (11th Cir. 1985)(en banc), to deny relief to petitioner. Thompson, 787 F.2d at 1457.

The unanimous United States Supreme Court decision in Hitchcock reversed the en banc Eleventh Circuit. Thus, the precedent relied upon by the panel in Thompson no longer exists. The Hitchcock precedent now warrants relief, rather than speaking against it.

Mr. Thompson filed in the United States Supreme Court a petition for writ of certiorari to the Eleventh Circuit Court of Appeals, seeking review of the panel opinion. After the Hitchcock opinion was released by the United States Supreme Court, this petitioner's petition for writ of certiorari was denied. While his petition did contain certain facets of the presently pled Lockett claim, the denial of certiorari "imports no expression upon the merits of the case, as the bar has been told many times." United States v. Carver, 260 U.s. 482, 490 (1923); see also Stern, R., Gressman, E., and Shapiro, S., Supreme Court Practice, pp. 269-273 (6th Ed. 1986).

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 U.S. Mail/hand delivery to Calvin Fox, Assistant Attorney General, Ruth Bryan Owen Rhode Building, Dade County Regional Service Center, 401 NW Second Avenue, Suite 820, Miami, Florida, 33128, this 17 day of June, 1987.

Attorney