IN THE SUPREME COURT OF FLORIDA

NO. 71100

ERNEST CHARLES DOWNS,

Petitioner,

vs.

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

Respondent.

PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT
OF HABEAS CORPUS AND REQUEST FOR STAY OF EXECUTION

Maurice N. Nessen
Stephen N. Young
Kramer, Levin, Nessen, Kamin
& Frankel
919 Third Avenue
New York, New York 10022
(212) 715-9100

Attorneys For Petitioner
Ernest Charles Downs

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I. INTRODUCTION

Petitioner, Ernest Charles Downs ("Downs"), a prisoner on Florida's Death Row scheduled for execution on September 17, 1987, petitions this Court for a stay of execution and requests that a new sentencing hearing be ordered to redress constitutional violations that occurred at his original sentencing.

This petition is based upon Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Lockett v. Ohio, 438 U.S. 586 (1976) ("Hitchcock-Lockett"); Skipper v. South Carolina, 106 S. Ct. 1669 (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982); and this Court's recent decisions in Riley v. Wainright, No. 69,563, slip op. (Fla. Sept. 3, 1987); Morgan v. State, No. 69,104, slip op. (Fla. Aug. 27, 1987); McCrae v. State, No. 67,629 (Fla. June 18, 1987) (LEXIS, States library, Fla. file); see also Lucas v. State, 490 So. 2d 943 (Fla. 1986); Harvard v. State, 486 So. 2d 537 (Fla.), cert. denied, 107 S. Ct. 215 (1986). Specifically, we assert: The narrowing of mitigating circumstances relevant to life or death at the penalty phase of the murder trial of Downs to only those enumerated in the Florida statute violated Downs' constitutional right under the Eighth and Fourteenth Amendments to "individualized consideration of mitigating factors." He had a right to have a jury consider "as a mitigating factor, any aspect of [his] character or record and any circumstances of the offense. . . ." Lockett, 488 U.S. at 604, 606.

Downs' Hitchcock-Lockett claim was previously ruled upon by this Court, sub silentio, in Downs' direct appeal from his 1977 conviction for first degree murder. Downs v. State, 386 So. 2d 788 (Fla.), cert. denied, 449 U.S. 976 (1980). Downs raised the Hitchcock-Lockett claim again in 1984 on appeal from his 3.850 proceeding, but the Court declined to reach the issue

because it had previously been raised on direct appeal. Downs v. State, 453 So. 2d 1102, 1103-04 (Fla. 1984).

First, foremost and dispositive: Downs' sentencing hearing was constitutionally defective under Hitchcock-Lockett [1/] because the trial court, Judge Dorothy H. Pate, precluded the sentencing jury from considering mitigating circumstances beyond those specifically enumerated by Fla. Stat. § 921.141, et seq (P. Tr. 75-76).[2/]

Second, when Judge Pate adopted the jury's recommendation of death and recited her reasons for imposing the death sentence to Downs, she limited herself to the rejection of mitigating factors enumerated by statute and did not consider or allude to other mitigating evidence available to her (S. Tr. 33-35). Only in her formal order is there an off-hand whisper (a two-word throw-away expression "or otherwise") of a suggestion that she thought other circumstances might be relevant to her decision. Upon a reading of the full record and her later rulings, it is clear that, in fact, she did not consider any non-statutory mitigating circumstances in the record but applied and rejected only those set out in the Florida statute.[3/]

1/ The Hitchcock-Lockett prohibition on excluding mitigating evidence is retroactive. Riley, slip op. at 2.

2/ The abbreviation "J. Tr." refers to the transcript of voir dire, dated 12/12/77. The abbreviation "Tr." refers to the transcript of the original trial. The abbreviation "P. Tr." refers to the transcript from the penalty phase of the original trial, dated 12/20/77; "S. Tr." refers to the transcript from the sentencing argument before Judge Pate, dated 1/27/78. "R." refers to the record on appeal from the 3.850 proceeding conducted before Judge Pate. "R.P." refers to the transcript of the 3.850 hearing. We are submitting a separate binder of exhibits, and citations to those exhibits are noted simply as "Exh."

3/ Attached hereto as Exh. 1 is the full transcript of the penalty phase (P. Tr.) and sentencing hearing (S. Tr.) before Judge Pate.

"Prejudice" there was in this thinnest of cases for death; it surely cannot be said that beyond a reasonable doubt the errors were harmless. As a result, Downs' sentencing proceeding falls squarely within the pattern and the legal rules of this Court's Riley and Morgan decisions and a new sentencing proceeding before a jury must take place unless the State agrees to a life sentence.[4/]

We requested an expeditious oral hearing (in advance of the tentative date of September 14, 1987, set by the Court) because of the September 17th execution date. We wanted to give the Court as full an opportunity to consider this petition as could be -- with as little pressure as could be.[5/] The Court graciously granted our request.

4/ The penalty charge was also wrong in another key way: Judge Pate charged that the single shooting death without torture of any kind could be a heinous and atrocious crime, a statutory aggravating circumstance, which it could not be under Cooper v. State, 336 So. 2d 1133, 1141 (Fla. 1976), cert. denied, 431 U.S. 925 (1977); State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), cert. denied sub nom. Hunter v. Florida, 416 U.S. 943 (1974). She corrected herself in her own judgment -- but, alas, too late to cure her error before the jury (S. Tr. 37). Heinous and atrocious crime was a prime argument of the prosecutor for death; he spoke long and "hard" about it (P. Tr. 32-35).

5/ We had not read the Hitchcock decision until after Governor Martinez had signed the death warrant for Downs. And we were surprised by Governor Martinez' death warrant in this case, which was signed on August 18, 1987. Downs is one of the longest residents of Death Row. He has been there since November of 1977 -- nearly 10 years. We have appeared here on post-direct appeal applications twice -- without the issuance of a death warrant (on a regular 3.850 application and a 1984 habeas corpus dealing with representation on appeal.) Former Governor Bob Graham had declined to sign a death warrant. We had presented Governor Graham with several "troubling" points, among them: (i) the great disparity of fates of the various participants in the single killing here (pp. 21-22, infra), (ii) the likelihood that Downs was not the triggerman (pp. 20-21, 24, infra), (iii) the reprimand from the Florida Bar Association of Downs' trial and appellate counsel because of his actions in this case and (iv) the mitigating facts, presented and not presented to the jury on punishment (pp. 16-22, 22-26, infra) (see, e.g., Memo to Gov., Exh. 2). All these factors and more were "visited" again by us in a face-to-face conference with a member of Governor Martinez' staff on June 4, 1987. We had believed that the new legal staff was impressed that Downs was "different."

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 Fla. Const. Article V, sec. 3(b)(9). The petition presents issues that directly concern the judgment of this Court on Downs' direct appeal and thus jurisdiction properly lies in this Court. See, e.g., Riley v. Wainwright, supra, and Smith v. State, 400 So. 2d 956, 960 (Fla. 1981). Downs asks the Court to revisit the claim that his sentencing was constitutionally flawed in light of the recent Supreme Court precedent not available to the Court on its prior treatments of Downs' case -- as it did in the Riley and Morgan cases, supra. See also Kennedy v. Wainwright, 483 So. 2d 424, 426 (Fla.), cert. denied, 107 S. Ct. 291 (1986).

There is no possible argument that this Hitchcock-Lockett claim is procedurally barred, for it was raised on direct appeal to this Court in 1978.[6/]

III. FACTUAL BASES FOR THE CLAIM FOR RELIEF

First, we show here that Judge Pate charged the jury that it was only to consider the statutory mitigating circumstances. Second, we note that her charge was further backed by

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6/ Point 6 of Downs' brief on direct appeal to this Court read in part:

> In our instant case the Appellant's 'sentencers' considered only the seven statutory mitigating circumstances exclusively. The Appellants 'sentencers' did not consider any mitigating aspects or circumstances as is required under the Eighth and Fourteenth Amendments under the Lockett case.

(See Exh. 3 at 22).

Lockett had not been decided at the time of sentencing.

the prior strong statements of the prosecutor that the jurors were to follow only Judge Pate's instructions, to disregard extraneous evidence and to weigh only the statutory aggravating and mitigating circumstances.

Third, we will establish that Judge Pate, after the jury finding, only considered the statutory circumstances and that, truly, she did not waiver despite a throw-away line in her written order.

Fourth, we set out briefly the background of the case and the trial -- to show what is obvious: a strong likelihood of prejudice. Fifth, we speak of the evidence of nonstatutory mitigation in the record. And, sixth, we advert to some of the evidence that would be presented at a new hearing to show that your consideration of this petition is far from an academic matter.[7/]

(i) the narrow jury instructions

Judge Pate made it absolutely clear to the jurors that their consideration of mitigating factors was strictly limited by statute. At the outset of the sentencing proceeding Judge Pate told the jury:

> [T]he law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the defendant. The State and the defense may now present evidence relative to what sentence you will recommend to the Court. You are instructed that this evidence, when considered with the evidence you have already heard, is presented in order that you might determine first, whether or not sufficient aggravating circumstances exist which would justify the imposition of the death

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7/ We cling to the hope that we can now persuade the State to agree to a life sentence -- so forceful are the mitigating circumstances here.

> 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.

(P. Tr. 3).[8/]

Later, after the prosecution and defense had put in their evidence of aggravating and mitigating circumstances and argued their points, Judge Pate admonished the jury that it must follow her instructions on aggravating circumstances and whether they are "outweighed" by mitigating circumstances:

> [I]t is your duty to follow the law which will now be given you by the Court, and render the Court an advisory opinion based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether such sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

(P. Tr. 72).

Then she limited the mitigating circumstances to those in the statute:

> The mitigating circumstances which you may consider, if established by the evidence, are these [Judge Pate then read the statutory list].

(P. Tr. 75).

Again, in closing, Judge Pate directed that the jury verdict "must be based" on her instructions:

> The sentence which you recommend to the Court must be based upon the facts as you find them from the evidence and the law as given you by the Court. Your verdict must be based upon your finding of whether sufficient aggravating

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8/ All emphasis in quotations is added by us.

> circumstances exist and whether sufficient mitigating circumstances exist which outweigh any aggravating circumstances found to exist.

(P. Tr. 76-77).

Finally, upon sending the jury out for deliberation, Judge Pate provided the jurors with the statutory list of aggravating and mitigating factors. This guaranteed that the jury did not consider any nonstatutory mitigating factors. Indeed, it is likely that the jury used the instructions as a checklist:

> Alright [sic]. Members of the jury panel, I'm going to ask for you to retire to the jury room at this time to begin your deliberations, and I will send this form back and I will also send a written copy of the instructions, particularly, so that you will have a list of the aggravating and mitigating factors.

(P. Tr. 81).

(ii) the prosecutor's devastating preparation [9/]

In voir dire, at the opening of the entire case, the state's attorney -- as was his right, of course -- relentlessly pressed the jurors to ignore their emotions and sympathies (Exh. 4). He twice elicited promises from each of the jurors that he or she would follow the "law" as recited by Judge Pate, would not be influenced by stray factors and sympathy (Id.).

He began his argument at the penalty phase with a strongly worded reminder of that early "agreement" to follow the law as enacted and as "Judge Pate will give it. . . ." We quote the prosecutor:

9/ Our recitals here of what the prosecutor (Mr. T. Edward Austin) said are not meant to be a criticism of his conduct. He was doing his duty and reciting the law as he saw it.

> But, I asked you if you would set aside your own notions of what you thought the law should be or ought to be, or how it could be more perfect, and follow the law as it was given to you by Judge Pate. And each of you said you would, and I believe that each of you did.
>
> Nothing's changed, you are still under the same oath that you took when you came. You still have the same commitment that you had when you came in, and that is that in this great country that we live in we have the democratic processes, we have the legislature that we elect when we go to the polls and vote and you vote and they enact laws, and then the Judge and the Courts interpret those laws. And we as human beings, as men, follow that law as best we can. We are a nation of laws. No one man, no group of men are above those laws. We agree to follow them. You made that commitment, and I respectfully request you to continue to follow the law in this case as Judge Pate will give it to you.

(P. Tr. 23-24).

Then, he drove the key point home: Judge Pate would tell the jury "all of the factors that the legislature, representing the people of [the] state", prescribed for the jury to consider. Here is a liberal slice of his argument:

> Now, I believe that the Court -- this phase of what we call the bifurcated or two-part trial deals with aggravation and mitigation, and the Court will tell you what the aggravating factors are that you may consider. The Court will tell you what the mitigating factors are that you may consider, and then you have a duty to balance those up. You have a duty to say, 'Does the mitigating outweigh the aggravating circumstances in this case.' And if you find that the mitigating factors outweigh the aggravating factors, you have an absolute duty to go back and recommend that the man be sentenced in life imprisonment. If the mitigating outweighs the aggravating. But, if the aggravating circumstances that you have heard during the evidence of this case and what has come out here today which I'm going to touch on in just a minute, if the aggravating circumstances outweigh the mitigating in your mind, you have a duty under the law to vote for the death penalty. You have a duty under the law to vote for the death penalty if you believe the aggravating circumstances in this case outweigh the mitigating circumstances. And the Judge is

> going to tell you what they are, [is] going to read all of the factors that the legislature, representing the people of this state said that you, the jury, should consider, this is the law that you should consider.

(P. Tr. 27-29).

Next, prefacing his detailed argument against finding sufficient mitigating circumstances, the State's attorney said:

> The Judge is also going to talk to you and instruct you about the mitigating factors. Now, let me go down the mitigating factors with you very briefly. [He then went through the statutory list and "rebutted" the items.]

(P. Tr. 36).

In closing his argument-in-chief, the prosecutor reiterated that the jury must not allow any outside evidence, not within the scope of the enumerated mitigating factors, to create sympathy for the defendant.

> Now, ladies and gentlemen, I'm about through. I didn't think I was going to take this long, but it's an important case, it's a difficult case, it's a difficult time of the year to be deciding this case. I ask you again about the law and remind you that you agreed that you wouldn't decide this case on sympathy . . . . It's going to be repugnant to you to make the recommendation, but you agreed that the only possible reason Mr. Brown [Downs' attorney] could have had [t]hen for putting the people on the stand today was to get your sympathy, and you agreed that you wouldn't let sympathy decide this case, that you would let the law and the evidence decide this case. I don't want you to be sympathetic to that defendant.

(P. Tr. 50-51).

* * *

Again he pressed:

> Ladies and gentlemen, I submit to you that the people of the State of Florida have a right in this case, have a duty in the case to ask you to follow the law, to go back and carefully consider the testimony of those witnesses and to vote and recommend in this case, based on

> the law, the aggravation that outweighs the mitigation, and to recommend the death penalty.

(P. Tr. 52-53).

Finally, in rebuttal to the defense argument that non-statutory mitigating factors could be considered, he said:

> Ladies and Gentlemen, I've given you my best version of what I think the Judge is going to instruct you on the law. I'm not going to recite it, it's not my duty. The Judge will instruct you on the law, and it's her responsibility, but I believe she will tell you that your verdict must be based upon your findings of whether sufficient aggravating circumstances outweigh the mitigating, must be based on the evidence. I believe the Judge will tell you that. That's not me, that's the law. And I ask you one more time, and one final time, to follow the law and to give the people of the State of Florida what they are entitled to, that is, an enforcement of their laws in this State . . .

(P. Tr. 68-69).

The judge, following the law as she then understood it and rejecting Downs' counsel's argument, charged only the statutory mitigating circumstances. The prosecutor was right -- not Downs. The record is unequivocal, both judge and prosecutor combined to preclude the jury from considering all evidence.

(iii) the judge's sentencing statements

After the jury came in with its verdict of death (unanimously), Judge Pate confronted Downs at sentencing. She read her judgment. She confined herself to the statutory list of mitigating circumstances. She told Downs:

> I am going to review briefly the mitigating and aggravating factors as the Court finds them.
>
> First, as to the mitigating elements. [Judge Pate then read through the statutory list and alluded to nothing else].

(S. Tr. 32-33).

In her written findings, Judge Pate unequivocally limited herself to mitigating factors enumerated by statute:

> Based upon the above described matters, the Court, before determining the sentence to impose in this case, has carefully examined and written its following described findings as to each of the elements of aggravation and mitigation which are specifically set forth in Section 921.141 (5) and (6), Florida Statutes.
>
> The findings of fact required by Section 921.141 (3), Florida Statutes, are incorporated in the following sections discussing the mitigating and aggravating elements. [Judge Pate then read through statutory list of seven mitigating elements without mentioning or considering any of the nonstatutory mitigating evidence introduced at sentencing].

(Exh. 5 at 2-4).

Beyond cavil, then, in examining the facts and issuing her findings, Judge Pate followed the statutory scheme to the letter.

Towards the end of her formal order (perhaps following a form), Judge Pate said "that there are no mitigating circumstances, statutory or otherwise." But it is clear on this record that the "or otherwise" is a throw-away line. The overwhelming evidence is that Judge Pate believed herself bound by the statute to base her findings only on the enumerated mitigating circumstances.

Whatever doubt there could be on her state of mind was removed later. At the trial of John William Barfield (the man who hired Johnson and Downs) after the Downs sentencing, she repeated verbatim the sentencing charge she had used at Downs' trial (See Exh. 6). For instance, before counsel began argument at the sentencing phase Judge Pate instructed the Barfield jury:

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

(Exh. 6 at 1398). Before the jury began its deliberations she limited the mitigating factors the jury could consider as follows:

> The mitigating circumstances which you may consider, if established by the evidence, are: [She read the statutory list].

(Id. at 1451). And, as in Downs' case, Judge Pate gave the written limiting instructions to the Barfield jury when they retired to deliberate (Id. at 1454-55). Finally, in pronouncing sentence (Judge Pate overruled the jury's recommendation of a life sentence and imposed death -- which this Court later overturned) she considered only the seven statutory mitigating factors and did not comment on nonstatutory mitigating factors raised at the sentencing hearing (Id. at 1493-96).

(iv) the background of the case and the trial

In April of 1977 Forrest Jerry Harris disappeared (Tr. 28-30). Three and one-half months later, Larry Johnson made a statement to the police implicating himself and Downs as participants in the murder of Harris. Johnson also said that three others were involved in the conspiracy to murder Harris -- Barfield, Gerry Ralph Sapp and Huey Austin Palmer. The State's Attorney gave Johnson immediate and total immunity from prosecution -- but only on the condition, set in advance of his telling the story, that he not be the triggerman (Tr. 184-186).

On August 4, 1977, Downs and Barfield were indicted for the first degree murder of Harris. The indictment was amended on August 11, 1977, to include a second count charging Downs,

Barfield, Sapp and Palmer with a "conspiracy to commit first degree murder." Barfield's brother, a man in his twenties, who had -- according to the State's witnesses (Tr. 252, 370, 410-411) -- participated in the conspiracy for over a year, was not indicted. And, of course, neither was Johnson.

As Downs testified at the 3.850 hearing, while in jail, he was seen briefly by an attorney, Richard Lovett Brown, who told Downs that Downs' friends at the Magic Shack (where defendant purchased magic tricks for his shows) had asked him to help Downs. Brown then appeared in court on August 9th with a retainer agreement, dated the 6th, which he had Downs sign. The retainer agreement provided for a $5,000 minimum fee, $50 an hour, and an unethical $10,000 contingency fee if Brown got Downs off without a felony conviction (R. 1951-52, 2090; R.P. 337, 552, 815, 899-900).

On August 12, 1977, Downs pleaded not guilty to both counts. The Court severed the Barfield case, and Sapp and Palmer made separate deals with the State. The State, in fact, never pressed charges against Palmer and gave him complete immunity (Tr. 255). Sapp was promised the State's recommendation of a five-year cap on any conviction (Tr. 379-380) and was eventually sentenced to four and one-half years imprisonment for conspiracy to commit murder. Barfield was tried after Downs, but before Downs was sentenced.

The jury trial of Downs began on December 14, 1977. At the trial, the prosecution charged that Barfield had offered Downs and Johnson $5,000 to murder Harris so that another person, Ronald B. Garelick, could recover some $500,000 in "key man" life insurance procured by Garlick on Harris' life (Tr. 745-748).

In support of its theory, the prosecution called 15 witnesses, but in fact only 3 of them gave any testimony linking Downs to that crime. Johnson was the key witness -- the only witness giving testimony on Downs' alleged shooting of Harris. His testimony was the State's case for Downs being the trigger-man.

His version of the crime was a simple one, laying the brunt of it on Downs and satisfying the no-triggerman condition of his immunity. While Johnson admitted actually "setting up" Harris for the killing, and being present at the shooting, helping to dispose of evidence and fleeing, he claimed he had tried to dissuade Downs from the venture and Downs had fired the fatal shots (Tr. 115-119).

To the amazement of the trial judge and prosecution, defense counsel rested at the close of the prosecution's case, without calling a single witness (Tr. 648). He did so, despite the large number of defense witnesses subpoened for trial (at Downs' insistence) waiting about the courthouse; including one to establish that Downs was actually not present at the killing, others who were prepared to do damage to Johnson's credibility, several to establish Johnson's violent nature and Johnson's playing with guns and two to present a confession by Johnson that he was the triggerman. As all of these witnesses stated at the 3.850 hearing, they had expected to testify at the trial, although Brown had not prepared them to do so. Brown did not tell them that they would not testify until after the defense had rested.

Although Brown chose not to present a defense, the jury submitted one written question to the trial Court that all but conclusively shows that the jurors did not believe Johnson's story of who the triggerman was. They asked:

> In regard to the question as to whether the defendant did or did not use a firearm, must the defendant be guilty of actually pulling the trigger, or is he guilty of using the firearm through association of being an accomplice in a murder of which a firearm was used.

(P. Tr. 828).

The jury was told to ignore the instruction relating to the use of a firearm (Tr. 385-36). In the end, Downs was convicted on both counts -- although a number of jurors were visibly upset and in tears as the verdict was read (S. Tr. 4-5).

(v) the penalty phase and the evidence of nonstatutory mitigating factors

The sentencing hearing did not take place until four days later, which gave the jurors time to distance themselves from their painful decision to convict Downs. Downs' trial counsel -- inexperienced in death cases -- did a most inadequate job at the penalty phase. We have called it "ineffective" -- and constitutionally so. Nonetheless, there was in the record ample and compelling nonstatutory mitigation evidence, any part of which could have swayed a jury.

First, Brown did put in two articles from newspapers that gave the jury a clue to Downs' real character and "his record" (Exhs. 7-8). In them, there was a touch of the lack-of-violent nature of Downs; there was a touch of his talent to make people happy; there was some of his history as a child of artistic talent -- lost by a splintered family and a nomad's existence.

One of the articles was from the Jacksonville Journal and was titled "Portrait of an Accused Triggerman." It led off with:

> Accused murder Ernest Charles Downs is a 'nice guy who made friends wherever he went,' persons around him say.

(Exh. 7).

It quoted his mother and girlfriend:

> 'He could make you laugh when your'e down in the dumps. He's just that type of person,' Downs' mother, Mrs. Jacqueline Peters, told the Journal.
>
> His girlfriend, Debbie Griffin, said of Downs, 'He's the type who will go into a restaurant and start joking with a waitress and he will have everybody laughing.'

(Id.).

One of his employers was quoted:

> An official with the Ripley's Museum in St. Augustine where Downs worked described him as 'a model person.'

(Id.).

It quoted his grandmother and mother on the effects of the separated home:

> The problems started for Downs when he was 16 and his parents separated. 'It tore the child apart,' said Downs' grandmother, Mrs. Bobbie Michael.
>
> 'He was a pretty good kid,' Downs' mother, Mrs. Peters said. 'He went to school good. Everything went fine until me and his father separated. It seems like that was just it for him. Ernest was at the age when he needed his daddy. He was torn between his father and me.'

(Id.).

The second article, a feature story in a 1962 edition of a Cocoa City paper dealt with Downs and a friend at age 14. Young Ernest was on his way to being a cartoonist. Here are a few paragraphs from it:

> [Ernest Downs'] life ambition is to be a cartoonist and the career was started long ago. Says the 14 year old lad with all the seriousness in the world 'I've been a cartoonist all my life.'
>
> He has a portfolio of about 100 cartoons and has even invented his own character, named Oscar, who is a pudgy man with a fringe of black hair around his balding head.
>
> Some of the poster customers included the Cocoa City Police Dept., a cosmetic studio at Byrd Plaza, a drug store at Five Points and a lady's apparel shop in Cocoa.
>
> 'I plan to make cartooning my life career,' Earnest said, 'It don't pay much, but I don't care much anyway because I'm going be a bachelor.'

(Exh. 8).

Second, there was the quite sparse live testimony offered by Brown for Downs at the penalty phase;[10/] yet, as foolishly sparse as it was, it had moving ingredients that could have persuaded and surely should have been considered by the jury.

Downs himself testified about the "robbery" committed by him in Kansas when he was 16, which was the only prior offense used by the State to establish one of its two aggravating factors. Downs revealed that he had used a toy gun and never used or threatened to use physical force or violence in committing the "hold-up" (P. Tr. 7-8). That is an unquestioned fact.

10/ We note here that Brown did not use the four-day interlude between trial and sentencing to prepare (R. 2123; R.P. 844). Although he called three witnesses on Downs' behalf and Downs himself, he interviewed none of them during the four-day interval. In fact, as they asserted at the 3.850 hearing, he did not even tell them they were going to testify until they were called to the stand (R. 2122-23; R.P. 699-70, 846-47). In fact, Brown's questioning of the three witnesses other than Downs is recorded in 6 pages of transcript (P. Tr. 13-15, 17-20); the prosecution's direct case fills over 600. And Brown's questioning of Downs covered less than 4 transcript pages and related solely to the issue of one allegedly aggravating circumstance (P. Tr. 7-10).

Bobby Joe Michaels, Downs' maternal grandmother, described how Downs' father had left the family in Florida and the resulting destitution that caused the Red Cross to take the family under its care. Downs was only a teenager at the time and this traumatic separation had a profound affect (P. Tr. 13-15). His grandmother then described how Downs enlisted in the Army at the age of 16 and was doing quite well until the authorities discovered he was under age. After being forced out of the Army, Downs had nowhere to go, and his "trouble" in Kansas, with only a toy gun, followed (P. Tr. 15).

Downs' former wife, Dorothy Sue Downs, also testified. She related Downs' gentle nature during five years of marriage and how he provided for both her and their daughter. Mrs. Downs also stated that she had never known Downs to have been violent in any way (P. Tr. 16-18). The fact that she came to testify said something about Downs.

Finally, Downs' mother, Jacqueline Peters, testified about what a good son Downs was and how he had never been in trouble before the separation between his mother and father occurred. Mrs. Peters related how Downs left Kansas as a teenager, on his own, to return to Florida to try and find his father. According to Mrs. Peters the broken home severely affected Downs, and he made every attempt to bring the family back together (P. Tr. 19-20). Downs' mother also related how her son had helped raise the other siblings and provided money to the family to get them through hard times (P. Tr. 20).[11/]

11/ In its brief to this Court in the 3.850 hearing, the State lauded Brown for introducing all of this mitigation evidence from the live witnesses and the two articles that "alluded to Mr. Downs in favorable terms. . . ." See Brief of Appellee, Downs v. State, Supreme Court of Florida, Case No. 64-184, at 10-11.

Third, there was ample evidence for the jury to doubt -- as it did and more -- that Downs was the triggerman and to believe that Johnson was. The prosecutor recognized this and argued to the jury that even if Johnson was the triggerman Downs should still be executed because he was a major participant and not entitled to the statutory mitigating circumstance of a minor role (Fla. Stat. § 921.141(6)):

> But even if [Johnson] had been [the triggerman], even if he had been, that man [Downs] still arranged this murder, that man still took the money, that man still lured Harris out there, and is still guilty of first degree murder. . . . There were no minor participants.

(P. Tr. 40).

In effect, the prosecutor, and later Judge Pate through her limiting instructions, directed the jury that their earlier obvious doubt about Downs being the triggerman was irrelevant to sentencing.

The record, for all its other inadequacies, is quite conclusive here. The jury had evidence, from the outset, that Johnson had an irresistible temptation to lie. For his immunity -- and consequently his life -- depended on him not being the triggerman. In addition, he testified that he (not Downs) had played with guns and practiced muffling them (Tr. 173). No doubt the jury's suspicions about Johnson lying on the triggerman issue peaked when the only disinterested eyewitness of the events of the night of Harris' death described the driver of the pick-up truck that carried Harris away as someone who resembled Johnson not Downs. Last on this issue, there was that short but persistent live evidence of Downs' non-violent nature and gentleness (P. Tr. 13-20.)

Fourth, there was the evidence of the different fates of all who were involved in the plot to kill Harris: a startling disparity.

Johnson, the colleague of Downs, was not only immunized, not only went scott free, but was given the monetary and other benefits of the federal immunity program (P. Tr. 66). Freedom for Johnson: despite his admitted setting up of Harris, presence at the shooting and disposal of the body. Freedom: despite the jury's apparent belief that Johnson was the triggerman not Downs (and well they should have).

And while Barfield had not yet been tried,[12/] the fates of others were brought out at Downs' trial. Gerry Ralph Sapp, Barfield's lieutenant, who had plotted with Barfield for over a year, received a five-year cap on his sentence in exchange for testifying. Yet, Sapp admitted conspiring to kill Harris for over a year, and together with John Barfield, Huey Palmer, and Ricky Barfield, went to Harris' house and about town several times "with intent to kill the man" (Tr. 90-93). Moreover, his pre-sentence report revealed him as a rather despicable person. In fact, he was found guilty of rape while in a time-release program.

Huey Palmer, who was as implicated as Gerry Sapp, who had also been conspiring with Barfield for over a year and who had been prepared to kill Harris, went free; all charges were dropped against him for his testimony (Tr. 80-87, 96). Barfield's brother was not prosecuted at all.

12/ The prosecutor told the jury that Barfield was to be tried for first degree murder (P. Tr. 44), in a context that implied that he would get the same harsh fate as Downs. He got life imprisonment.

In sum, the jury could have understood, as part of the "moral" judgment it had to make, that three out of the six men who were involved in the plot to kill Harris received no punishment, one received less than 5-years sentence and one was subject to what a jury would find.

Fifth and finally, there was a single killing here of a man who was involved in illegal drug and other wrongdoings; and, contrary to the judge's charge to the jury it was not a heinous or atrocious slaying (S. Tr. 37).

(vi) the future hearing (if there is one)

In the 3.850 hearing and in our clemency petition to Governor Graham, we sampled some of the proof that Downs' counsel should have used and that we surely will use if granted a new sentencing. This proof shows that in granting a new hearing the Court will be doing something very meaningful, life-preserving probably, and, at very least, something that dignifies the process.

First, it is a fact -- not used by Brown -- that young Downs in prison as a result of his Kansas "robbery" saved the life of a prison guard during a riot (Exh. 9).

Second, there would be the substantial evidence -- available to Downs' counsel at sentencing that he did not use -- of Johnson being the triggerman. For instance:

- There was Bobbie Jo Michael to testify that Downs was at her house at the time of the murder (R. 2101-11). She only was asked to briefly describe Downs' childhood.

- But even if Brown would forswear Bobbie Jo Michael's testimony, there were Sharon Darlene Perry and Bobbie Jo Michael to testify to Johnson's confession that he

was the triggerman (R. 2134; R.P. 732-34, 739).

- But even if Brown would reject this, there was Jackie Downs, Glenda Dale Smith, Sharon Darlene Perry and Barbara Jean Marion to testify to Johnson's violent nature, his use of guns and hand grenades, his threats to kill others, and his boasting of already having done so (R. 2129-32; R.P. 653-55, 695-98, 732-37, 801-02).

- And there was Downs himself, who would have testified although he participated in the preparatory stages of the scheme to murder Harris, he was unwilling to go through with it; Johnson did the actual murder alone (R.P. 880-881).

Third, there would be ample evidence to rebut the State's evidence of the two aggravating factors -- evidence that was also available to Brown but not used.

We have already discusssed the unusual circumstances surrounding the Kansas robbery; but Brown's was a thoroughly niggardly presentation that never marshalled the facts of a scared, hungry, AWOL 16-year old kid in Kansas (compare R.P. and Exh. 2 with the meagre P. Tr.).

The State's other aggravating factor, murder for pecuniary gain was rebuttable also. While it is true that Downs was offered money to kill Harris, there was strong evidence that this had little to do with Downs' decision to go along with the Barfield plot as far as he did. Up to the date of Harris' murder, Johnson's violent and antisocial tendencies never led Downs to do an act of violence. A few weeks before the murder, something happened to shatter Downs' self-image, caused him to doubt his manhood and to grasp at ways to restore it. Downs' landlord showed him a heap of pictures he had found while working in Downs' apartment (R.P. 702, 871-72). The explicit photographs showed Downs' second wife, Robin Downs, having sex with other

women and men (R.P. 699, 720-21, 871-74). As Downs, his mother, sister, aunt, and even Johnson (in a sworn statement) said, Downs became enraged and then despondent (R. 45; R.P. 656-57, 698-99, 726, 874). Indeed, even when in a drugged and battered state in an Alabama jail, Downs bemoaned his wife's actions. Downs felt emasculated and needed in some way to rebuild his pride in himself as a man (R.P. 698-700, 706, 877). It was just a few weeks later that Barfield first told him about his year-old plot to murder Harris (R.P. 874, 876).

Fourth, there is new and devastating evidence uncovered after trial, from ringleader Barfield, that points explicitly to Johnson as the triggerman. Barfield, with no motive to lie, has said that Johnson admitted to him that he, Johnson, was the triggerman. Consider:

- a State's witness, Harry Felder Murray, with no motive to lie, testified at the trial of Barfield, that Barfield had told him that Johnson, not Downs, was the actual triggerman (Exh. 10);

- Murray later testified at Downs' 3.850 hearing and confirmed Barfield's statement that Johnson was the self-confessed triggerman (Exh. 11); and

- Barfield himself executed an affidavit in 1982 that said that Johnson admitted to him that he was the triggerman, not Downs (Exh. 12).

Further, we would show that it was Johnson, not Downs, who was the antisocial character: the person who constantly disrupted Downs' attempt to lead a productive life; the person most likely to have fired the fatal shots.

Downs did not drink, and he did not smoke; he did not take drugs (R.P. 655, 694, 704). As a hobby, he became a truly expert magician (R.P. 868). And in 1975, he went to work as a magician at the Ripley's Believe-It-Or-Not Museum in St.

Augustine, Florida (R.P. 869). Then he and a friend bought a magic shop in St. Augustine (R.P. 869-70). After the business turned sour, Downs returned to Jacksonville and the construction trade. He first worked for a small company and then formed his own enterprise (R.P. 652-53, 870). Downs prospered until Johnson returned to Florida (R.P. 870).

Beginning in 1970, Johnson would barge into Florida, after periods of wandering and trouble with the law involving violence or guns, and intrude into Downs' life. He helped put an end to Downs' first marriage (Downs' wife could not tolerate Johnson about their house) (R.P. 653-54, 695-96, 719, 866-69). It was Downs, out of loyalty (so misplaced), who got jobs for Johnson (R.P. 867-68). It was Johnson who drank and caroused; it was Johnson -- not Downs -- who carried guns and toyed with them (R.P. 654-55). It was Johnson, not Downs, who lost jobs and then would drift on, only to return (R.P. 653). Finally, shortly before the crime here, it was Johnson who was hired by Downs to work for him (R.P. 651, 870-71). In sum, the stable person, the person who held jobs, the person who was not violent, was Downs. The disrupter was Johnson. The first sentencing jury heard none of this.

Finally, there would be the remorse shown by Downs in his interview for clemency before the Florida Parole and Probation Commission:

> I am thankful that I have had this opportunity to speak. This has been my first chance to talk, and I am thankful for that.
>
> What led me to be here is my own pass in life. I am aware of that. I am aware that I become involved in something, something very criminal. I know that.

> And if there was anything I could do, I would. I am thankful for this opportunity. I have felt at ease with y'all, and you, Mr. Commissioner, and you, Mr. Peterson, and everybody here.
>
> I wish to thank each and every one of y'all from the bottom of my heart for allowing me to speak. Thank you.

(Exh. 13).

All of this bespeaks mercy -- and that a new sentencing hearing would be meaningful.

IV. NATURE OF RELIEF SOUGHT

Downs requests that the Court stay his scheduled execution so as to allow full and complete consideration of his petition for writ of habeas corpus.[13/] And, of course, Downs requests that his sentence be vacated and that this matter be remanded to the trial court for resentencing before a jury.

V. LEGAL BASES FOR RELIEF

Point 1

The Judge's Charge to the Jury Limiting It to Considering Statutory Mitigating Circumstances Requires Resentencing.

Judge Pate's preclusions of nonstatutory mitigating factors violated the Eighth and Fourteenth Amendments to the United States Constitution. Hitchcock, supra; Lockett, supra; Eddings, supra; Skipper, supra. This Court has consistently

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13/ If the Court determines that Downs' petition here is not well-taken, we respectfully request a stay until September 21, 1987, so that we can present a full writ to the United States District Court for the Middle District of Florida. As the Court undoubtedly knows a writ to the District Court would have to raise every point known to us -- not just Hitchcock-Lockett. The papers we would have to prepare to cover the entire picture are voluminous. And the further needed research will be very time-consuming. The death warrant for Downs does not expire until September 23, 1987.

reversed death sentences where a jury considered only nonstatutory mitigating evidence under instructions functionally identical or, indeed, identical to those given in this case -- before and after Hitchcock. See Riley, supra; Morgan, supra; McCrae, supra; Lucas, 490 So. 2d at 946 (Fla. 1986); Harvard; supra, see also Mann v. Dugger, 817 F.2d 1471 (11th Cir. 1987).

The flawed charge to the jury, without more, constitutes the constitutional deprivation because of the central position of the jury in the Florida sentencing scheme and the great weight and deference given to it. This Court recently so held and made the point:

> [T]he jury's determination of the existence of any mitigating circumstances, statutory or nonstatutory, as well as the weight to be given them are essential components of the sentencing process.
>
> * * *
>
> [Thus], improper, incomplete or confusing instructions relative to the consideration of both statutory and nonstatutory mitigating evidence does violence to the sentencing scheme and the jury's fundamental role in that scheme.

Riley, slip op. at 3-4.

Because of that weight and deference, a flawed instruction to the jury amounts to a constitutional deprivation -- an impermissible arbitrariness and, here, a lack of individualization of the procedure. Id.; Magill v. Dugger, No. 85-3820, slip. op. at 35 (11th Cir. July 28, 1987) (Exh. 14); Eddings, 455 U.S. at 111-112.

Accordingly, "[i]f the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure,

then the entire sentencing process necessarily is tainted by that procedure." Riley, slip op. at 5.[14/]

Here, Judge Pate specifically instructed the jury to ignore nonstatutory mitigating factors in words that cannot be gerrymanded into something else. To requote a portion of the charge:

> [I]t is your duty to follow the law which will now be given you by the Court. . . .

(P. Tr. 72).

* * * *

> The mitigating circumstances which you may consider, if established by the evidence, are these [Jury shall read the statutory list].

(P. Tr. 75).

* * * *

> The sentence which you recommend to the Court must be based upon the facts as you find them from the evidence and the law as given you by the Court.

(P. Tr. 76).

These instructions are almost identical in words and are identical in substance to those disapproved by the United States Supreme Court in Hitchcock, and by this Court in Morgan and McCrae. The Hitchcock trial court instructed the jury that

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14/ The importance of the jury's role is illustrated in the trials stemming from the killing involved here. In the trial of Barfield, the major domo of the killing plot, the jury recommended life imprisonment. Judge Pate, believing that Barfield deserved no different treatment from Downs, sentenced him to death. This Court reversed because of the rule that only irrationality provides a cause to ignore the jury's recommendation of clemency; to overturn the recommendation, the facts justifying death must be so clear and convincing that virtually no reasonable person could differ as to the appropriateness of the death penalty. Barfield v. State, 402 So. 2d 377 (Fla. 1981). See Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975).

"'[the] mitigating circumstances which you may consider shall be the following . . . ' [listing the statutory mitigating circumstances]." Hitchcock, 107 S. Ct. at 1824 (citations omitted).

Judge Pate's instructions were identical in every way to the instructions disapproved by this Court in Riley:

> Turning now to the facts of this case, we must conclude that the jury proceedings in the original sentencing process were not consistent with the dictates of Lockett. The trial court instructed the jury, that "[t]he mitigating circumstances which you may consider if established by the evidence are these," and then read the list of seven statutory mitigating factors.

Riley, slip op. at 5.

And, as in Riley, Judge Pate provided the jury with written instructions so that they would "have a list of the aggravating and mitigating factors" (P. Tr. 81).

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 -- as it turned out -- was that the jurors violate the Lockett principle. The jurors were barred from fulfilling their constitutional duty. And the prosecutor dramatically paved the way for -- what we have learned since -- the wrong charge, emphasizing repeatedly that the jury was to ignore extraneous evidence and to follow the judge's instructions to the root.

The fact that nonstatutory mitigating evidence was there "and presented," if only the jury would look, does not cure the defect of telling them not to look. You have written:

> The United States Supreme Court clearly rejected the "mere presentation" standard, finding that a Lockett violation had occurred. 107 S. Ct. at 1824. The Court made clear that

> the fact that the judge and jury heard non-statutory mitigating evidence is insufficient if the record shows that they restricted their consideration only to statutory mitigating factors.

Riley, slip op. at 7 (footnote omitted); accord Magill, slip op. at 31-32 (Exh. 14) (it dramatizes the prejudice).

In sum, Downs' sentencing proceeding before the advisory jury was unconstitutionally conducted.

Point 2

Moreover, Judge Pate Limited Herself to Statutory Mitigating Circumstances, Too; and That Also Was a Constitutional Violation.

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, 486 So. 2d at 539; accord Morgan, supra; and McCrae, supra. Judge Pate's instructions to the jury, combined with her parroting of the statute at sentencing and use of the same instruction in the later Barfield case, leaves no question that she narrowed her consideration in a manner prohibited by Hitchcock-Lockett.

At the crucial times, when (i) she confronted Downs face-to-face and (ii) made her written findings, Judge Pate glued herself to the statute's words (S. Tr. 32-35; Exh. B at 2-4). There is no mention by her at any time of any nonstatutory mitigating circumstance considered, rejected or out-balanced. And the instructions themselves demonstrate "that the sentencing judge assumed . . . a prohibition" against the consideration of nonstatutory mitigating circumstances. Hitchcock, 107 S. Ct. at 1823. See Lucas, supra; see also Adams v. Wainwright, 764 F.2d

1356, 1364 (11th Cir. 1985), cert. denied, 106 S. Ct. 834 (1986) ("An erroneous instruction may . . . provide convincing evidence that the trial judge [herself] misunderstood or misapplied the law when [she] later actually found and balanced aggravating and mitigating factors").

No doubt, the State will rely on Judge Pate's statement at the end of her written sentencing order "that there are no mitigating circumstances statutory or otherwise." But this catch-all phrase at the end of Judge Pate's order cannot seriously be deemed an expression of a meaningful consideration of nonstatutory factors. This Court has repeatedly held that such statements by a trial judge after explicitly following the statutory factors -- where each factor is listed and discussed -- cannot be taken as an indication that nonstatutory factors were considered. See, e.g., McCrae, LEXIS slip op. at 6 (trial court's reference to nonstatutory matters in aggravation, after listing of statutory factors, deemed "surplusage"); Goode v. Wainwright, 410 So. 2d 506, 508-09 (Fla. 1982) (judge's remarks after making specific findings relating to the aggravating and mitigating factors, which revealed consideration of future dangerousness, not deemed to be improper consideration of non-statutory aggravating factors). When the trial court focused here, she never once mentioned any kind of nonstatutory mitigating fact. Then, a few months later, she was to evidence again in the Barfield case her strict adherence to the statutory factors -- to the law, indeed, as it then was in Florida.

Moreover, even if this Court concludes that Judge Pate's findings are ambiguous, any doubt about whether she considered nonstatutory factors must be resolved in favor of Downs. As Justice O'Connor has written: "Woodson and Lockett require us to

remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court." Eddings, 455 U.S. at 119 (concurrence). And this Court has vacated a death sentence and ordered a new consideration where the trial judge failed to specify the mitigating circumstances that he considered in imposing the death sentence. See McGill v. State, 386 So. 2d 1188 (Fla. 1980), cert. denied, 450 U.S. 927 (1981).

Point 3

The Erroneous Limiting Instructions to the Jury Were Surely Not Harmless.

the test

In this delicate area of error in the death deliberation, the Supreme Court and this Court have recognized that any fact having a potential impact can tip the scales in making a "reasoned moral response to the defendant's background, character, and crime," California v. Brown, 107 S. Ct. 837, 841 (1987) (O'Connor, J., concurring) (emphasis in original). This Court, accordingly, has laid down a heavy, heavy "beyond-a-reasonable doubt" burden to find harmless error: "Unless it is clear beyond a reasonable doubt that the erroneous exclusion of evidence did not affect the jury's recommendation of death, the defendant is entitled to a new jury recommendation on resentencing." Valle v. State, 502 So. 2d 1225, 1226 (Fla. 1987); see Magill, slip op. at 31 (Exh. 14).

And the Supreme Court has defined the burden as one of "confidently conclud[ing] that [the consideration of nonstatutory mitigating evidence] would have had no effect upon the jury's deliberations." Skipper, 106 S. Ct. at 1673 (1986).

So it is that when nonstatutory mitigating circumstances are presented, this Court has emphasized, "[We cannot know if] the result of the weighing process by both the jury and the judge [would] have been different." Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977), cert. denied, 459 U.S. 981 (1982). This is so because:

> '[T]he procedure to be followed by the 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 or death and in light of the totality of the circumstances present. . . .'

Id. (quoting State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973), cert. denied sub nom. Hunter v. Florida, 416 U.S. 943 (1974)).

And to adjudge whether there has been a constitutional error the search is to see whether any fact relevant to either (i) the character or "record" of the defendant or (ii) the circumstances of the crime was precluded. Lockett, 438 U.S. at 606. Any precluded, truly relevant mitigating fact in the record turns the point for the defendant. You have written: "[T]his Court implicitly has recognized that exclusion of any relevant mitigating evidence affects the sentence in such a way as to render the trial fundamentally unfair." Riley, slip op. at 7, ¶ 2.

the test applied

Under the scrutiny and test of harmlessness thus required here, there can be no serious question of "prejudice;" and a new hearing before a jury is required. Relevant mitigating evidence of the circumstances of the case and the character and record of Downs -- quite compelling evidence, indeed -- was

turned into dross by the charge and the preliminaries that led to the charge.

As to the circumstances of the crime, the jury was effectively not allowed to consider that Downs was not the triggerman and that the immunized witness, Johnson, was. Judge Pate -- following the path of the prosecutor -- charged only the statutory mitigating factor about Downs' role in the crime: whether "defendant was merely an accomplice whose participation in the crime was relatively minor. . . ." (Fla. Stat. § 921.141(6); P. Tr. 75). Thus it mattered not that any of the evidence pointing towards Johnson as the triggerman had been introduced. Irrelevant became such evidence as (i) the deal Johnson struck for immunity (he had to say he was not the triggerman or he would have been prosecuted); (ii) the State's disinterested eyewitness identification of a man resembling Johnson, not Downs, as the person who led Harris into the truck and to his death; (iii) Johnson's playing around with guns; and (iv) the nonviolent nature of Downs. Totally irrelevant became the jurors' own clear indication that they believed Downs was not the triggerman and only "an accomplice." The only issue under the judge's charge (as the prosecutor "predicted" in his argument) was whether Downs' role was minor -- and there was no question that it was not "minor."

Whether a person was the triggerman or not has played very heavily in this Court's decisions on life or death. See Barfield v. State, 402 So. 2d at 382. And, of course, it is very important. The error of ignoring the evidence here was egregious.

Gone, too, from the jury's equation were such things as the singleness of the killing and the corrupt nature of the man killed. (Harris believed he was on his way to consummate a drug

deal when he was killed). Indeed, Judge Pate put it the other way: she allowed the jury to find that the aggravating circumstances of the crime "was especially heinous, atrocious or cruel," when she had to confess later that this could not be under the decisions of this Court (P. Tr. 74; S. Tr. 37).

Out of the jury's consideration also were the various fates of all the rest involved in the Harris conspiracy. Yet they have to be relevant -- indeed, of the essence -- to the "moral" response of the jury and the search to overcome "arbitrary and capricious action" and the need for "nondiscriminatory application" of the death penalty. See Gregg v. Georgia, 428 U.S. 153, 198 (1976); Brown, 107 S. Ct. at 841.

As to Downs' character and his record: All the favorable character evidence about Downs and things to be said about him were reduced to a cipher. All the kind of "humanizing" material that we lawyers think is so important in any case was denied Downs in his sentencing hearing, where "the struggle" has been to develop a capital justice system "that is sensible to the uniqueness of the individual." Eddings, 455 U.S. at 110; Brown, 107 S. Ct. at 841. It mattered not a whit, thus, that Downs was a "model employee," considerate to his family, the product of a broken home, a person who helps those in need, a man capable of making people laugh and be happy, a cartoonist of considerable talent and thwarted ambition and a friend even to a former wife. Obviously, that is not right or fair. See Eddings, 455 U.S. at 111-115; Lockett, 438 U.S. at 605.

In sum, compelling evidence there was for the weighing -- even on the abysmal record created by inexperienced and overextended trial counsel. And any part of it could have persuaded the jurors. But all of it was written off. Far from being able

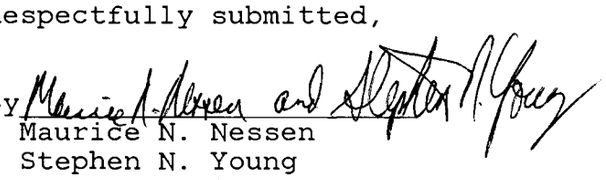
to say that beyond a reasonable doubt the precluded evidence could not have influenced the jury, we must here say that the precluded evidence in all probability would have moved the jury to recommend life instead of death.

We respectuflly submit one final observation. If you ordered a new sentencing hearing before a jury, you would go beyond merely applying the mandates of the Supreme Court. This Court would enable a jury for the first time properly to evaluate a full panoply of evidence -- including (i) the saving of a guard in a prison and (ii) admissions by Johnson to the unbiased that he was the triggerman (p. 24, supra). In myriad ways, then, you would do justice.

Conclusion

For the reasons offered here, Petitioner Downs respectfully requests that the Court enter a stay of his execution scheduled for Thursday, September 17, 1987, reconsider the Hitchcock-Lockett claim raised on his direct appeal, then vacate his sentence of death and remand this case for a new sentencing hearing before a jury.

Respectfully submitted,

By 

Maurice N. Nessen
Stephen N. Young
Kramer, Levin, Nessen,
Kamin & Frankel
919 Third Avenue
New York, New York 10022
(212) 715-9100

Attorneys for Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition for a Writ of Habeas Corpus and Stay of Execution has been served on the Attorney General, Robert Butterworth, The Capitol, Tallahassee, Florida, 32301, this 8th day of September, 1987.

Stephen N. Young

STEPHEN N. YOUNG