IN THE SUPREME COURT OF FLORIDA

NO. 71139

VERNON RAY COOPER,

Petitioner,

v.

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

Respondent.

PETITION FOR A WRIT OF HABEAS CORPUS

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I. INTRODUCTION

This Petition seeks a Writ of Habeas Corpus in light of this Court's recent decisions in Downs v. Dugger, No. 71,100 (Fla. September 9, 1987), Thompson v. Dugger, Nos. 70,739 & 70,781 (Fla. September 9, 1987), and Riley v. Wainwright, No. 69,563 (Fla. September 3, 1987).

At petitioner's capital sentencing hearing, which was held on June 24, 1974, the trial judge excluded non-statutory mitigating evidence in the mistaken belief that mitigating circumstances must be restricted to "those which are actually enumerated in the statutes or those that might be more or less a side issue of those matters." Tr. XIV, at 23.[1] As a result, the jury was not permitted to hear non-statutory mitigating evidence which the defense sought to introduce. At the close of the hearing, the judge instructed the jury in terms indistinguishable from the charges in Downs, Thompson, and Riley, supra and in Hitchcock v. Dugger, 107 S.Ct. 1821 (1987): he directed the jurors to "determine whether sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist", and then informed them that "[t]he mitigating circumstances which you may consider, if established by the evidence are these," listing three statutory mitigating circumstances: mental or emotional disturbance; relatively minor participation in an offense committed by another; and age of the defendant at the time of the crime. T. XIV, at 144. Of course, the same evidentiary rulings also precluded non-statutory mitigating factors from playing any part in the judge's own consideration of sentence: since he severely curtailed the defense's proffers, he never heard all of the non-statutory mitigating evidence that was

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1 The transcript in this case consists of 15 separate volumes, each of which is independently paginated. Accordingly, transcript citations will be to volume and page number.

available. And even to the extent that the judge heard the proffers, he disregarded them and specifically restricted himself to "statutory mitigating circumstances" in the sentencing determination. See Trial Court Report, R. 190; T. XIV, at 62-63.

This Court rejected petitioner's challenge to the exclusion of non-statutory mitigating evidence on direct appeal, Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976), and again in collateral proceedings, Cooper v. State, 437 So.2d 1070 (Fla. 1983). However, as the Court recently stated in Downs v. Dugger, supra, "a substantial change in the law has occurred" with respect to the introduction and consideration of non-statutory mitigating evidence in capital sentencing hearings, and this "change in the law [warrants] . . . reconsider[ation] [of] issues first raised on direct appeal and then in . . . prior collateral challenges." Downs, supra, slip opinion at 2. Reversal of petitioner's death sentence and re-sentencing are mandated by this new standard, which was applied by this Court in Downs, as well as in Thompson and Riley. As this Court has stated, "exclusion of any relevant mitigating evidence affects the sentence in such a way as to render the trial fundamentally unfair." Riley, supra, slip opinion at 7 n.2.

At the present time, petitioner's case is pending before the federal courts on a Petition for a Writ of Habeas Corpus pursuant to 28 U.S.C. §§ 2241-2254. See Cooper v. Wainwright, 807 F.2d 881 (11th Cir. 1986), rehearing denied, 811 F.2d 612 (11th Cir. 1987), cert. denied, 107 S.Ct. 2183 (1987). It is presently scheduled for a hearing before the Honorable Roger Vinson, United States District Court, Northern District, Pensacola Division, on October 14, 1987, but petitioner is advising Judge Vinson of the filing of the instant petition with this Court, and asking that the federal proceedings be held in abeyance while it is considered.

II. JURISDICTION

This is an original action under Fla. R. App. Proc. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. Proc. 9.030(a)(3) and Fla. Const. Art. V, sec. 3(b)(9). 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). As the Court demonstrated in Downs v. Dugger, supra, a petition for a writ of habeas corpus is an appropriate means for seeking reconsideration of Hitchcock claims "first raised on direct appeal and then in . . . prior collateral challenges" in light of the "substantial change in the law [that] has occurred." Downs, supra, slip opinion at 2.

III. FACTS UPON WHICH PETITIONER RELIES

Petitioner was charged in a two-count indictment with first-degree murder and robbery. This Court described the evidence in the following manner in its decision on direct appeal:

> Cooper admitted at trial that he and one Steve Ellis robbed the grocery store, and that as they were making their escape in Cooper's black Camaro they were stopped by Deputy Wilkerson, who had stationed himself close to Interstate 10 in order to close off a possible escape route. There was conflicting testimony as to what then transpired. After being stopped, either Cooper or Ellis walked to Deputy Wilkerson's patrol car and fired two shots into his head.

Cooper v. State, supra, 336 So.2d at 1136. Because co-defendant Steve Ellis was killed in an ensuing gunfight with the police,

> No one saw the actual shooting except, of course, Cooper. . . . Cooper testified that Ellis followed the Deputy to the patrol car, fired two shots, returned to the Camaro, and drove off.

Id. at 1141. The only evidence to the contrary was that:

> [A] witness, who was driving past the scene, saw a man coming from the direction of the patrol car enter the passenger's side of the Camaro. . . . Cooper said he was in the passenger's seat, where he was later found, at all relevant times.

Id. On the other hand, another witness remembered seeing the man "run from the driver's side of the patrol car to the driver's side of the Camaro." Id. Moreover, when the car was halted in a second police stop of the vehicle (which resulted in the gunfight with and killing of co-defendant Steve Ellis), Ellis approached the police deputies in precisely the same manner as was used to approach the slain deputy in the first stop.

The jury returned a general verdict of guilty on both counts of the indictment, which does not reflect whether the jury accepted the theory that petitioner committed the killing or the alternative felony-murder theory that petitioner aided and abetted an escape in which his co-defendant killed the officer. "The trial judge believed Cooper fired the fatal shots," Cooper v. State, supra, 336 So.2d at 1140, and made a finding to that effect in his Findings of Fact on the issue of sentence. See R. 190. On direct appeal, this Court observed that "[t]here was conflicting testimony on this point," 336 So.2d at 1141, but explained that "[s]ince we have concluded that the proper evidence was considered by the trial court in determining whether Cooper fired the fatal shots, we have no basis to reverse his conclusions." Id.

In the sentencing hearing, the trial judge found that there were four aggravating circumstances present in the case: prior conviction "'of two felonies involving the use of threat or violence to persons; namely, armed robbery;'" "'[t]he murder was committed while the defendant was in the perpetration of a robbery and in flight after committing a robbery;'" "'[t]he murder was committed for the purpose of avoiding or preventing the lawful arrest of the defendant;'" and "'[t]he capital felony was especially heinous, atrocious and cruel.'" Cooper v. State, supra, 336 So.2d at 1140. See R. 187-190. On direct appeal, this Court reversed the finding of the aggravating circumstance of a "heinous, atrocious or cruel" killing, explaining that "we

agree that Deputy Wilkerson was not murdered in the 'especially heinous' manner contemplated by the statute." 336 So.2d at 1140.

In the sentencing hearing, defense counsel attempted to introduce several items of non-statutory mitigating evidence, each of which was excluded by the trial court. The first of these was evidence of the petitioner's employment history (see, e.g., T. XIV, at 22-24), including a job he had held as a glass-cutter (see id. at 24, 130) and employment in the tuberculosis center of Memorial Hospital in Mobile, Alabama (see id. at 77, 130). The jury had heard petitioner mention his glass-cutting job when he testified during the guilt phase of the trial (see T. XIII, at 100) but that reference was necessarily cursory since employment was not relevant to the issue of guilt or innocence. In the sentencing phase, defense counsel sought to elaborate upon that brief reference by eliciting a complete description of petitioner's employment history from four separate witnesses: a life-long friend of petitioner (T.XIV at 22-27, 32, 52); petitioner's father (T. XIV, at 60-61); petitioner's niece (T. XIV, at 85); and petitioner's sister (T. XIV, at 90). Each time, the judge sustained the prosecutor's objection to the evidence as irrelevant to the statutory mitigating factors and therefore inadmissible in a capital sentencing hearing. See T. XIV, at 22-27, 32, 60-61, 85, 90. Defense counsel argued that the evidence concerning petitioner's employment, particularly his work history following release from a prior period of incarceration, would demonstrate petitioner's potential for rehabilitation and the inappropriateness of the irrevocable sentence of death. See T. XIV, at 24. The judge refused to allow the defense to present any of this evidence of employment because "the seeking of rehabilitation" does not relate to any of the statutory "guidelines". T. XIV, at 32. The judge explained that the hearing had to be governed by the "guidelines . . . which are actually enumerated in the statutes or those that might be more

or less a side issue of those matters." T. XIV, at 23. Indeed, the judge would not even hear a proffer of the evidence of employment outside the presence of the jury. See T. XIV, at 32.

During the sentencing hearing, petitioner also sought to present non-statutory mitigating evidence indicating that the co-defendant, Steve Ellis, was a violent and easily enraged individual and that petitioner was afraid of and dominated by Ellis. Defense counsel attempted to elicit testimony concerning Ellis' reputation for violence (T. XIV, at 53, 81); specific prior acts of violence by Ellis, such as beating his son and shooting at his employer's automobile (T. XIV, at 74-76); Ellis' propensity for abruptly "act[ing] like a crazy person" and committing acts of violence or threatening others in rage (T. XIV, at 75-76); and Ellis' practices of openly keeping guns in his apartment (T. XIV, at 70) and carrying a gun in his car (T. XIV, at 76-77). Counsel also sought to introduce testimony that petitioner was afraid of Ellis, that he consciously avoided Ellis, and went to places "where Steve couldn't find him" to hide from Ellis. T. XIV, at 69-70, 77. Counsel explained that he wished to introduce this evidence in order to show that Ellis likely played the leading role in committing the robbery and was the triggerman in the murder, and that petitioner "acted under substantial domination by Mr. Ellis [and] . . . duress." T. XIV, at 70-71, 79, 81. The trial judge refused to allow any of this testimony to be presented to the jury. T. XIV, at 54, 71, 81.

Finally, defense counsel also sought to introduce other non-statutory mitigating evidence of petitioner's character and his potential for rehabilitation. While presenting the testimony of petitioner's girlfriend, counsel sought to ask her about their marital plans. T. XIV, at 51. The prosecutor objected, on the grounds that such evidence "is of no value in determining any mitigating factors in this murder," id. at 51-52, and the court sustained the objection. Id. at 52. See also T. XIV, at 62-63.

Counsel also sought to elicit testimony about petitioner's "feelings concerning his incarceration" from a life-long acquaintance of petitioner's. T. XIV, at 34-35. Counsel explained that the "[d]efendant's attempt to rehabilitate himself since he was released from jail" was relevant to the appropriateness of a death sentence. T. XIV, at 22. The court rejected the evidence as having "no bearing on the case." T. XIV, at 35.

At the conclusion of the sentencing hearing, the judge gave the following instructions to the jury with respect to mitigating circumstances:

> it is your duty to follow the law which will be given you now by the Court and to render to the Court an advisory sentence based upon your determination of whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist. . . .
>
> Should you find one or more . . . aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist. The mitigating circumstances which you may consider, if established by the evidence are these:
>
> (a) That the crime for which the defendant is to be sentenced was committed while the defendant was under the influence of extreme mental or emotional disturbance;
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> (b) That the defendant was an accomplice in the offense for which he is to be sentenced, but the offense was committed by another person and the defendant's participation was relatively minor;
>
> (c) The age of the defendant at the time of the crime.

T. XIV, at 142, 144.

In his written Findings of Fact on sentence, the trial judge made no reference to non-statutory mitigating factors. Consistently with his ruling that mitigation was limited to the factors "actually enumerated in the statutes" (T. XIV, at 23), he imposed the sentence of death because "no statutory mitigating circumstances are presented by the evidence to be weighed against the aggravating circumstances." R. 190 (emphasis added).

IV. NATURE OF RELIEF SOUGHT

Petitioner seeks the relief that this Court in Downs, supra, Thompson, supra, and Riley, supra, ruled was the appropriate relief for violations of the capital defendant's right to present and receive consideration of non-statutory mitigating circumstances: "vacat[ing] [of the] . . . sentence of death [and] remand[] for a new sentencing proceeding before a jury that complies with Hitchcock [v. Dugger, supra]." Downs v. Dugger, supra, slip opinion at 6.

V. LEGAL BASIS FOR RELIEF

In Riley v. State, supra, this Court made clear that "exclusion of any relevant mitigating evidence affects the sentence in such a way as to render the trial fundamentally unfair." Riley, supra, slip opinion at 7 n.2 (explaining the implicit holding of Harvard v. State, 486 So.2d 537 (Fla.), cert. denied, 107 S.Ct. 215 (1986)). This Court explained in Riley that "the fact that judge and jury heard nonstatutory mitigating evidence is insufficient if the record shows that they restricted their consideration only to statutory mitigating factors." Riley, supra, slip opinion at 7. Under Riley and the decisions that followed in Thompson and Downs, a finding that the "jury recommendation proceeding violated Lockett . . . is sufficient to require a new sentencing hearing." Riley, supra, slip opinion at 6.

In the present case, it is clear that the judge excluded the defense's non-statutory mitigating evidence on the basis of a mistaken belief that capital sentencing proceedings must be limited to statutory mitigating factors. Whenever defense counsel attempted to present the above-described non-statutory mitigating evidence, the State objected on the grounds that the defense was limited to the mitigating factors expressly

enumerated in the statute. See, e.g., T. XIV, at 22, 24, 26. The trial court repeatedly sustained the prosecutor's objections and explained:

> I think the guidelines though are necessarily those which are actually enumerated in the statutes or those that might be more or less a side issue of those matters.

T. XIV, at 23. See also, e.g., T. XIV, at 32 (excluding evidence of employment and "the seeking of rehabilitation" because it doesn't "fall[] within the category of any of the guidelines given to us"); Trial Court Findings of Fact, R. 190 (declaring that the death sentence was being imposed because "no statutory mitigating circumstances are presented by the evidence to be weighed against the aggravating circumstances"); T. XIV, at 62-63.[2] The effect of this exclusion upon the jury was precisely

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2 It is true that the trial court did not wholly exclude all non-statutory mitigating evidence. Observing that "we have nothing from the Supreme Court and we don't know where we are" (T. XIV, at 26), the judge issued a narrow ruling permitting the defense to present evidence on the petitioner's "general reputation" in the community for being a "peaceful law-abiding citizen." T. XIV, at 27. But the judge stringently restricted this evidence to the traditional category of general character evidence:

> this is as to general reputation, and not a personal opinion, as you well know. It's not what she personally thinks of him, but what other people think of him so far as [being a] peaceful law-abiding citizen.

T. XIV, at 27. When defense counsel attempted to elicit evidence of specific incidents illustrating the petitioner's character, the trial court prohibited the testimony and would not even hear a proffer outside the presence of the jury. T. XIV, at 39. When counsel attempted to have witnesses amplify on the nature of petitioner's character, the judge excluded such details, as personal opinion. See, e.g., T. XIV, at 38-39, 42. As a result, the character evidence presented to the judge and the jury was reduced to its smallest and least significant form: rather than describing specific and concrete mitigating facts, the witnesses were only permitted to speak in general terms about what they had heard in the community. See, e.g., T. XIV, at 38-40, 42 (court makes clear that witness cannot describe events, things she saw, or her personal opinion, but can only relate conversations she had with others concerning petitioner's "general reputation"). And, of course, even under this procedure, the trial court excluded

that which was condemned by this Court in Riley, Thompson, and Downs. Because the jury was prevented from hearing the non-statutory mitigating evidence, the jurors necessarily "restricted their consideration only to statutory mitigating factors." Riley, supra, slip opinion at 7. Indeed, the prosecutor urged the jury to return a sentence of death precisely because "not a single mitigating factor has been discussed today or any other day throughout this trial" that could be weighed against the aggravating circumstances. T. XIV, at 114-15; see also id. at 118. Of course, the reality was that non-statutory mitigating factors had been discussed -- but those discussions took place outside the presence of the jury, and the judge precluded the jury from ever hearing of the non-statutory factors.

This error was compounded by the giving of jury instructions essentially identical to those condemned in Hitchcock v. Dugger, supra -- instructions exclusively enumerating "[t]he mitigating circumstances which you may consider" as three, all statutory. T. XIV, at 144. Here, as there and in Riley, "it is apparent that the judge believed that he was limited to consideration of the mitigating circumstances set out in the statute and instructed the jury accordingly." Riley, supra, slip opinion at 6. Thus, even though the jurors heard petitioner briefly mention in his guilt phase testimony that he had been employed as a glass-cutter (T. XIII, at 100), and defense counsel reminded them

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numerous non-statutory mitigating factors -- such as petitioner's employment history, marital plans, and the nature of his relationship with the co-defendant -- because they didn't fall within either "the category of general reputation" or the statutory roster of mititgating circumstances. See, e.g., T. XIV, at 32.

In the wake of Skipper v. South Carolina, 106 S.Ct. 1669 (1986), of course, the error of these limitations is manifest. And the error can no longer be insulated from correction by the circumstance that petitioner's counsel was permitted to present and argue some nonstatutory mitigating evidence. For in Hitchcock v. Dugger, supra, "[t]he United States Supreme Court clearly rejected this 'mere presentation' standard." Riley, supra, slip opinion at 7.

of that fact during his closing argument in the sentencing phase (T. XIV, at 130), the jury "was instructed not to consider . . . [this] evidence of nonstatutory mitigating circumstances." Hitchcock v. Dugger, supra, 107 S.Ct. at 1824. For the same reason, the jury would have excluded from their consideration the very limited non-statutory mitigating evidence that they heard regarding petitioner's good reputation in the community (see T. XIV, at 51-52, 57-58; see also n.2 supra) and the fact that petitioner supported his father with his earnings (see T. XIV, at 60, 130). And, although defense counsel told the jury during closing argument that "I think, I believe the testimony disclosed that he worked at Memorial Hospital in Mobile" (T. XIV, at 130) -- a fact which actually had emerged only during a proffer outside the presence of the jury (see T. XIV, at 77) -- the jury would have also excluded that statement from its consideration, both because of the directive to ignore non-statutory mitigating evidence and because of the judge's instructions that the attorneys' arguments are not to be viewed as evidence. See T. X, at 3; T. XIII, at 196, 233.

The record in this case also shows that the trial judge, in making his ultimate determination of sentence, "restricted [his] consideration only to statutory mitigating factors." Riley, supra, slip opinion at 7. The judge's statements in imposing sentence are equivalent to those that led the Supreme Court in Hitchcock v. Dugger, supra, to conclude that "it could not be clearer that . . . the sentencing judge refused to consider . . . evidence of nonstatutory mitigating circumstances. 107 S.Ct. at 1824. The Court in Hitchcock pointed to the sentencing judge's declarations that "'there [were] insufficient mitigating circumstances as enumerated in Florida Statute 921.141(6) to outweigh the aggravating circumstances'" and that "he reached the sentencing judgment" by "'apply[ing] the facts to certain enumerated "aggravating" and "mitigating" circumstances.'" 107

S.Ct. at 1824 (emphasis in original). In the present case, the judge announced that mitigating evidence would be restricted to the factors "actually enumerated in the statutes" (T. XIV, at 23) and imposed a sentence of death because "no statutory mitigating circumstances are presented by the evidence to be weighed against the aggravating circumstances." R. 190 (emphasis added).

The "exclusion of . . . relevant mitigating evidence affect[ed] the sentence in such a way as to render [petitioner's] . . . trial fundamentally unfair." Riley, supra, slip opinion at 7 n.2. Because the jury was precluded from hearing non-statutory mitigating evidence and instructed to consider only enumerated statutory mitigating circumstances, the "jury recommendation proceeding violated Lockett [and] [u]nder Hitchcock, this finding is sufficient to require a new sentencing proceeding." Id. at 6. The judge's refusal to permit complete proffers of the non-statutory mitigating evidence similarly tainted the judge's sentencing determination by excluding non-statutory mitigating evidence. Finally, even to the extent that the judge heard some of the non-statutory evidence in the limited proffers, "the fact that the judge . . . heard [this] nonstatutory mitigating evidence is insufficient [since] . . . the record shows that [he] restricted [his] consideration only to statutory mitigating factors." Id. at 7.

CONCLUSION

Petitioner respectfully requests that this Court apply its rulings in Riley, supra, Thompson, supra, and Downs, supra, to the present case, vacate the sentence of death, and remand this case for a new sentencing hearing before a jury.

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 Mark C. Menser, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301, this 15 day of September, 1987.

Judith J. Dougherty