ORIGINAL

IN THE

SUPREME COURT OF FLORIDA

WILLIAM MELVIN WHITE, Applicant/Petitioner,	)	
vs.	)	CASE NO. 71184
STATE OF FLORIDA, RICHARD L. DUGGER, Secretary, Florida Department of Corrections, Respondents.	)	(Former Appeal No. 55,875)

APPLICATION FOR RELIEF PURSUANT TO HITCHCOCK V. DUGGER

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida

CRAIG S. BARNARD
Chief Assistant Public Defender

STEVEN H. MALONE
Assistant Public Defender

The Governmental Center/9th Floor
301 North Olive Avenue
West Palm Beach, Florida 33401
(305) 820-2150; Suncom 245-2150

Counsel for Applicant/Petitioner

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The Applicant, WILLIAM MELVIN WHITE, through his undersigned counsel, respectfully requests this Honorable Court to grant him relief from his sentence of death as required by Hitchcock v. Dugger, 107 S.Ct 1821 (1987), and as grounds states:

JURISDICTION

1. This Court's original jurisdiction is invoked pursuant to Article V, Sections 3(b)(1), (7), and (9), Florida Constitution; and Rules 9.030(a)(3) and 9.040(a), Florida Rules of Appellate Procedure.

2. Review is sought to correct the prior judgment of this Court upholding Mr. White's death sentence, for it resulted from an "error that prejudically denies fundamental constitutional rights." Kennedy v. Wainwright, 483 So.2d 424, 426 (Fla. 1986).

3. Specifically, Mr. White presents the issue of the restricted consideration of mitigating circumstances disapproved by Hitchcock v. Dugger, 107 S.Ct. 1821 (1987). This Court has recently held Hitchcock to be a fundamental change in Florida law, so as to permit correction by way of original action in this Court. Riley v. Wainwright, ___ So.2d ___, 12 FLW 457 (Fla. September 3, 1987); Downs v. Dugger, ___ So.2d ___, 12 FLW 473 (Fla. September 9, 1987).

4. The Application for Relief procedure followed in this case is based on this Court's jurisdiction over its own judgments as well as its authority to issue all writs necessary for the complete exercise of its jurisdiction and to issue writs of habeas corpus. It has sound and reasonable precedent. The application for relief procedure was previously utilized by this Court to correct a significant change of law emanating from the Supreme Court's decision in Gardner v. Florida, 430 U.S. 349 (1977). The procedure has the practical benefit of judicial economy by permitting expedited and narrowly focused review of a single issue that likely will control or moot any other sentencing issues. For example, when Gardner was announced this Court deemed it more efficient to correct the error itself by application for relief rather than relegate the cases to future post-conviction challenges. The same is true for the Hitchcock issue presented here, for it is a "record issue" (i.e. needs no further evidentiary development) and can be decided as a matter of law. Cf. Dallas v. Wainwright, 175 So.2d 785 (Fla. 1965).

COURSE OF PRIOR PROCEEDINGS

5. On July 11, 1978, three persons were indicted for first degree murder in the Ninth Judicial Circuit of Florida. R 1376.[1] The cases were severed for trial. Richard Dimarino was convicted of third degree murder. R 466, 470. Guy Ennis Smith was convicted as charged and sentenced to death; the sentence was reduced by this Court, Smith v. State, 403 So.2d 933 (1981). After trial in November, 1978, Mr. White was convicted as charged. R 1582. The sentencing trial was held on December 20, 1978 and resulted in jury recommendation of the death sentence. R

[1] The symbol "R" is used to denote references to the record on appeal filed in the direct appeal in this case (Case No. 55,875).

827, 1629. The trial court immediately imposed the sentence of death. R 832.[2]

6. On direct appeal this Court affirmed the judgment and sentence. The Court's original opinion was issued on April 1, 1982. The opinion was modified on rehearing to address the question of consideration of mitigating factors and the revised opinion was issued on July 8, 1982. White v. State, 415 So.2d 719 (Fla. 1982), cert. denied, 459 U.S. 1055 (1983). Mr. White had challenged, inter alia, the trial court's failure to consider certain mitigating circumstances, including the nonstatutory mitigating factors of the disparate treatment of the codefendant and Mr. White's intoxication. This Court's original opinion did not discuss mitigation. So, on motion for rehearing Mr. White again challenged the failure to consider nonstatutory mitigating circumstances as being violative of Lockett v. Ohio, 438 U.S. 586 (1978) and the then-recent opinion in Eddings v. Oklahoma, 455 U.S. 104 (1982). Specifically, Mr. White's rehearing included:

> In reviewing the propriety of Appellant's death sentence and evaluating the mitigating factors, this Court may have overlooked the limitation placed upon the jury's consideration by the jury charge regarding mitigating factors. The jury was charged regarding aggravating circumstances as follows:
>
> > "The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence:..."
>
> (R 821). And as to mitigating circumstances, the jury was charged:
>
> > "The mitigating circumstances which you may consider, if established by the evidence are these:..."
>
> (R 823) Only the statutory circumstances are listed. The effect of this charge was to unconstitutionally limit the jury's consideration of mitigating circumstances to only those expressly set out in the statute.... Such a limitation is a constitutional error of the first magnitude.... In addition, the sentencing judge expressly stated in his sentencing order that he limited his consideration of mitigat-

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2 The judge found three aggravating circumstances: during the course of a felony, hindering law enforcement, and heinous, atrocious or cruel. One statutory mitigating circumstance was found: lack of prior criminal record. R 1648-1649.

> ing factors to only those set out in the statute:" ... there are insufficient mitigating circumstances, as enumerated in subsection (6)..." (Emphasis supplied) (R 1638-39).

Appellant's Motion for Rehearing, filed April 16, 1982, page 7 (citations omitted). In response, this Court modified its opinion to add the fact that the trial judge had found the statutory mitigating circumstance of lack of prior criminal record, and to respond to Mr. White's argument that consideration of nonstatutory mitigating factors had been precluded by the trial court. This Court added the following language: "We are satisfied that the trial judge weighed the aggravating circumstances against this [statutory mitigating factor] and any other mitigating circumstances in pronouncing sentence." 415 So.2d at 721 (emphasis supplied).

7. Mr. White filed a motion for post-conviction relief in the trial court in October, 1983. After resolution of discovery questions, a hearing has been ordered and is pending rescheduling. The issue presented by this application was stricken by the trial court on the state's motion because it was found to be appropriate for resolution by the appellate court, not the trial court on a motion for post-conviction relief.

SUMMARY OF ARGUMENT

Since this Court's judgment on direct appeal, the law has materially changed. On a record substantially similar to the present case the Supreme Court ordered resentencing in Hitchcock v. Dugger, 107 S.Ct. 1821 (1987) because the instructions, argument and findings showed that the jury and judge had been precluded from considering nonstatutory mitigating circumstances. This Court has held Hitchcock to be a change in Florida law requiring reconsideration of its prior appellate judgments on this question. Further, this Court has granted relief, ordering resentencing, in cases involving precisely the circumstances of this case -- the same time period (pre-Songer), the same standard jury instructions, substantially similar prosecutorial argument,

the same limiting language in the sentencing findings and the same or similar nonstatutory mitigation. This Court's precedent, following Hitchcock, requires relief be granted in this case.

DISCUSSION

a. Introduction

Both the constitutional error and the need for relief are now well-settled. Recently, this Court has granted relief under precisely the circumstances presented by Mr. White's case.[3] This case involves the restriction upon the jury's consideration of mitigating factors resulting from the standard jury instruction on mitigation which, together with counsels' argument, served to limit the jury's consideration to the statutorily enumerated list of mitigating factors. The same limitation was applied by the judge and is reflected in his sentencing findings. The Eighth Amendment mandate of individualized sentencing[4] has now been fully recognized and because that recognition is fully set forth in this Court's decisions, it will not be restated here. Rather, we will examine the particular circumstances of this case as they relate to this Court's recent opinions.

b. Jury

Mr. White's sentencing trial "took place prior to the filing of this Court's opinion in Songer v. State, 365 So.2d 696 (Fla. 1978) [(on rehearing)]." Lucas v. State, 490 So.2d 943, 946 (Fla. 1986). See also Thompson v. Dugger, 12 FLW at 469 (noting that the September 1978 trial occurred prior to the December 1978 announcement of Songer).[5]

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3 Downs v. Dugger supra, Thompson v. Dugger, ____ So.2d ____, 12 FLW 469 (Fla. September 9, 1987) Riley v. Wainwright, ____ So.2d ____, 12 FLW 457 (Fla. September 3, 1987); Morgan v. State, ____ So.2d ____, 12 FLW 433 (Fla. 1987); McCrae v. State, ____ So.2d ____, 12 FLW 310 (Fla. 1987). Accord, Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987).

4 E.g., Lockett v. Ohio, supra; Eddings v. Oklahoma, 455 U.S. 104 (1982); Skipper v. South Carolina, 106 S.Ct. 1669 (1986); Truesdale v. Aiken, 107 S.Ct. 1394 (1987); cf. California v. Brown, 107 S.Ct. 837 (1987).

5 The Songer opinion on rehearing was filed on December 21, 1978. Mr. White's sentencing trial took place and the death sentence was imposed on December 20, 1978.

In this case, the restriction to statutory mitigating factors actually began at the very outset of the trial. At the beginning of voir dire the judge told the jurors about the second part of the trial where the jury would be called upon to hear mitigating or aggravating circumstances. R 10. The prosecutor, as a preface to his death-qualification questioning, wanted to be certain that the prospective jurors understood the limits:

> I don't mean to be repetitious, but it is important that you understand it.
>
> Each of you understand, in the second phase, assuming we found the person guilty of the First Degree Murder in the first phase; in the second phase, there will be certain guidelines. <u>There is a statute listing aggravating circumstances and some mitigating circumstances. And that you would follow those for the second phase in making your recommendation to the Court</u>.
>
> So, you have some guidelines based again on that law and the evidence presented. Each of you understand that? So, you are not left to wonder what to do. You have some guidelines as to what to do in the second phase.

R 16-17 (emphasis supplied). In his questioning thereafter the prosecutor asked whether the jurors could base their sentencing decision on the law and evidence, reminding them of the statute, <u>e.g.</u> R 28 ("The law ... covers aggravating circumstances that you could consider and mitigating circumstances which you could consider").

At the penalty trial this limitation was express. The judge began by telling the jury that "this is the part in which we will talk about the aggravating and mitigating circumstances." R 803. After completion of argument by counsel, the Court charged the jury that: "[I]t is your duty to follow the law, which will now be given you by the Court." R 820. And the law the jury was to follow in considering mitigation was:

> The mitigating circumstances which you may consider, if established by the evidence, are these: [reciting statutory list of mitigating factors (a)-(g)]

R 823.

"These instructions to the jury unconstitutionally restricted the review of nonstatutory mitigating evidence, in violation of Hitchcock and Lockett." Downs v. Dugger, 12 FLW at 474. Accord Riley v. Wainwright, 12 FLW at 459; Morgan v. State, 12 FLW at 434. Lucas v. State, 490 So.2d at 946. The instructions in this case were identical to those in Downs and Riley.

The unconstitutional restriction found in the jury instructions was "exacerbated" by the prosecutor's closing argument, Downs v. Dugger, 12 FLW at 474. The prosecutor told the jury:

> And again, you are going to be given jury instructions outlining in detail exactly what the aggravating circumstances are that you're to consider. And they will outline in detail those mitigating circumstances that you're to consider. So you'll be told by the judge what they are. You'll have a written copy of them to take back with you and read verbatim as to what he will tell you.

R 805 (emphasis supplied). The prosecutor further prepared a chart to illustrate his argument. The chart listed statutory aggravating circumstances in one column and "the" mitigating circumstances in another column:

> I have prepared for the purpose of our discussion here an outline of the aggravating and mitigating circumstances. And I would like to go through these with you one at a time to show you what we're talking about and what applies and what doesn't.
>
> I don't know if you can see this or not, but, anyway, you'll have these instructions with you.
>
> What we've done is prepared just an outline. And don't go by this verbatim, but go by the instructions. But this is an outline to essentially what they are, with the aggravating circumstances in this column and the mitigating circumstances in this column.

R 806 (emphasis supplied).

The prosecutor in his argument listed the statutory mitigating factors and no others. See also Thompson v. Dugger, 12 FLW at 469-470 ("the state, in its closing arguments ... listed the statutory mitigating circumstances as those which the jury could consider in its deliberations"). The prosecutor told the jurors that he was "going to go over the mitigating circumstances and show why they apply or why they don't apply." R 805 (emphasis supplied). See Riley v. Wainwright, 12 FLW at 459 ("In closing

argument, the prosecutor discussed 'the' mitigating circumstances to see if 'they' exist and then checked off the statutory list").

As the prosecutor's argument also reveals, the jury was furnished with the written instructions to "read verbatim" during deliberations.[6] Thus, just as in Downs, "[t]he judge further reinforced the impression already laid in the jurors' minds by providing them with a copy of the statutory aggravating and mitigating factors for use during their deliberations." 12 FLW at 474 (original emphasis).

With regard to these written instructions it is also important to point out that the defense counsel's argument did not contradict the limitation to the statutory list because while his argument began with factors that involve nonstatutory mitigation in response to aggravation, he only specifically referred to statutory factors in discussing mitigation, R 819, and then concluded his argument with an entreaty: "When you go back, look at that list in the jury room. Weigh the mitigating factors. Weigh the aggravating factors." R 820 (emphasis supplied).

c. Judge

Although it can be assumed from his instructions to the jury that the judge also restricted his own consideration of mitigating factors to those enumerated in the statute,[7] there is no need to rely on assumption in this case. The judge's restriction is explicit. In sentencing Mr. White the judge made the following finding:

> This Court, after weighing the aggravating and mitigating circumstances, finds that sufficient aggravating circumstances exist as enumerated

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6 The written instructions submitted to the jury are set out at R 1622-28. The written instructions also include the phrase: "after argument of counsel, you will be instructed on the factors in aggravation and mitigation that you may consider." R 1623 (emphasis supplied).

7 See Lucas v. State, 490 So.2d at 946 (the fact that the judge instructed "only on the statutory mitigating circumstances" was found to be objective evidence that the judge too believed he "was restricted to those listed in the statute" (original emphasis)); Adams v. Wainwright, 764 F.2d 1356, 1364 (11th Cir. 1985) ("An erroneous instruction may also provide convincing evidence that the trial judge himself misunderstood or misapplied the law when he later actually found and balanced aggravating and mitigating factors").

> in Florida Statute 921.141(5) to require imposition of the death penalty, and that there are insufficient mitigating circumstances as enumerated in subsection (6) to outweigh the aggravating circumstances.

R 831 (emphasis supplied). The separate written sentence contains the identical reasoning, R 1638-39, and the finding of fact also refers to the "certain enumerated" aggravating and mitigating circumstances, R 1648, and reviews only the statutory mitigating circumstances (referring to them by the corresponding statutory paragraph letter designation), R 1649-50.

The trial court's language in the present case was the same, though even more extensive, as that found in Hitchcock to reveal the judge's failure to consider nonstatutory mitigating circumstances. 107 S.Ct. at 1824. See also Morgan v. State, 12 FLW at 434 ("[T]he court, in its order sentencing appellant to death, examined the list of statutory mitigating circumstances and determined that none were applicable. Nowhere in his order is there any reference to nonstatutory mitigating evidence"); Riley v. Wainwright, 12 FLW at 459 ("In sentencing Riley to death, the judge explained: 'The only mitigating circumstance under Florida statute is the fact that Defendant had no prior criminal conviction'" (original emphasis)).

d. **The need for relief**

The existence of the constitutional error in this case is both obvious and, after Hitchcock, no longer subject to dispute. The instructions, from start to finish, exacerbated by the argument of both counsel, and reinforced by written instructions, precluded full consideration of mitigating factors by the jury. For this restriction upon the jury the need for relief is ordained: "If 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 v. Wainwright, 12 FLW at 459. The record also shows the restriction upon the judge. The constitutional taint that is true for the jury is true also for the sentencing judge: "[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 in determining whether to impose a sentence of death or life imprisonment." Harvard v. State, 486 So.2d 537, 539 (Fla. 1986) See also Thompson v. Dugger, 12 FLW at 469 (quoting Harvard).

As the error in this case cannot be doubted, neither can its effect. Significant nonstatutory mitigation relating to the disparate treatment of the codefendant, Richard DiMarino has gone unconsidered. See Downs v. Dugger, 12 FLW at 474 ("This Court previously has recognized as mitigating the fact that an accomplice in the crime in question, who was of equal or greater culpability, received a lesser sentence than the accused").

This Court has summarized what needs to be said about DiMarino: "a disreputable felon who had been granted favors by the state and who admitted that he lied when it would 'suit [his] fancy.'" Smith v. State, 403 So.2d at 935.

DiMarino was sentenced to 15 years imprisonment for third degree murder. Other felony charges against him were dismissed and still others were disposed of by concurrent sentences. DiMarino had been arrested 40-50 times and had been convicted of serious felonies 5-10 times that he remembered, including rape, robbery, kidnapping, resisting arrest, weapons, and drugs. R 674-75. See also Smith v. State, 403 So.2d at 934. Mr. White in contrast had no criminal record.

DiMarino was the motivating force in this offense. He called the shots. DiMarino was of equal or greater culpability than Mr. White -- even under DiMarino's uncorroborated version. It was DiMarino who initiated the assault. It was DiMarino who led and carried the deceased to the car. It was DiMarino who drove the car to the location where the killing occurred. By even his own testimony, DiMarino fully and voluntarily participated in every part of the offense. But for DiMarino's urgings and actions Mr. White most certainly would not have been involved and most likely the offense never would have taken place.

Moreover, these facts come from DiMarino himself, but he was wholly uncorroborated on his description of the actual killing -- and his credibility is seriously in doubt considering his "discrediting characteristics," and his prior inconsistent and inculpatory statements. He is unworthy of belief and if he was lying about what occurred and he actually struck all of the fatal blows, the inequity of the disparate sentences would be extreme. DiMarino told his brother that he was the one who stabbed the victim alone and that Mr. White did not assist him at all. R 605-606.[8]

The record plainly reveals that DiMarino's culpability at a minimum was equal and most probably greater considering his motivating role. In Smith this Court said that it was "with little comfort" that a conviction could stand on DiMarino's testimony. 403 So.2d at 934. So too, it is not difficult to see that the jury also could have been equally discomforted by DiMarino's role and the disparate treatment he received from the system and yet precluded by law from considering those factors in deliberating life or death.

DiMarino, his credibility, the disparate treatment he received, the remaining questions as to who instigated and struck the fatal blows, were primary themes of defense counsel's argument:

> So, if you can say to yourselves, "there's no question in my mind but what DiMarino said was the whole and complete truth," then you can follow what he [the prosecutor] is saying.

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8 We acknowledge this Court holds that residual doubts about the defendant's guilt, as a matter of Florida law, cannot be considered in mitigation by either judge or jury. E.g. Buford v. State, 403 So.2d 943, 953 (Fla. 1981); Burr v. State, 466 So.2d 1051, 1054 (Fla. 1985). Therefore, we hasten to emphasize that here we do not propose doubt about guilt in mitigation. Rather the focus is upon DiMarino's role in the offense as the motivator and actual killer. Mr. White could have been found guilty under the technical theory of felony murder without a determination of his role. The only evidence of DiMarino's purported role is from DiMarino alone and is contradicted by other testimony and by evidence of Mr. White's extreme intoxication. So it is DiMarino's dominant role together with his disparate treatment that is mitigating. As to the broader question of residual doubts about guilt, although we acknowledge this Court's precedent here, we do submit that such holdings are contrary to the Eighth Amendment and will eventually have to be revisited and changed by this Court. See Melendez v. State, 498 So.2d 1258, 1262-63 (Fla. 1986) (Barkett, J., concurring).

> But, if there is some hesitation in your mind as to any part of what the man said, then that's the only person who suggests what may have happened at Sea World.
>
> Peculiar enough, the man who took the witness stand and told you this fantastic story faces a minimum of fifteen years in the penitentiary. Now, as to whether or not A slashed B or A did seven stabs or B did seven stabs, I don't know. I wasn't there. But if, in fact, his statement is true, he is equally guilty of the offense charged. And you have to say to yourselves, isn't it peculiar that defendant A will serve fifteen years and some day walk out of that penitentiary alive and well, and defendant B, for some reason known only to Mr. Hart [the prosecutor] seeks the supreme penalty, as he calls it, the death penalty.

R 816-817 (emphasis supplied).[9]

The question as to whether DiMarino was actually the killer in this case is a substantial one, and one that makes the disparity in treatment more extreme and persuasive. The only testimony as to the offense itself came from the "disreputable" DiMarino and other testimony showed that DiMarino was the killer and that Mr. White, though in the car with DiMarino, was so drunk that he could barely function and did not aid DiMarino at all.

Mr. White's intoxication too stands as independent nonstatutory mitigation. The prosecutor sought to head off reliance upon intoxication as mitigating by reference to the statutory requirement that "extreme mental or emotional problems," must be shown to make out the mitigating circumstance. R 813 (emphasis

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[9] Counsel's argument here, though presenting substantial nonstatutory mitigating factors, actually was not presented by counsel as mitigation but rather only to undercut the prosecution's argument on aggravation. See Morgan v. State, 12 FLW at 434 ("While ... the appellant was permitted to proffer evidence to rebut, explain, or refute aggravating circumstances presented by the state, this does not comport with the requirements of Lockett or Hitchcock"). A review of counsel's argument shows that he also followed the restriction on mitigating factors. After counsel argued against aggravation he said "Now we get to the mitigation." R 819. Counsel then tried to fit intoxication and DiMarino's questionable role into statutory mitigating factors. R 819. He mentioned no nonstatutory mitigation and then concluded by telling the jurors to "look at that list in the jury room. Weigh the mitigating factors." R 820 (emphasis supplied). This argument too, contributed to the Lockett error. See Lucas v. State, 490 So.2d at 946 (quoting defense counsel's argument limited to statutory factors and noting the "scant twelve pages" devoted to sentencing, as showing that all parties, including the judge, believed that consideration was restricted to the statutory mitigating list).

supplied).[10] The prosecutor admitted that Mr. White "was intoxicated or he was drinking or had some alcohol and it affected him," R 812, but argued (probably pointing to his chart) that it did not rise to the level of the statutory mitigating circumstance, R 813. Defense counsel urged intoxication in mitigation, attempting to shoehorn it into a statutory category. R 819. Even had the jury not found the intoxication met the stiff statutory standard, it nevertheless was unquestionably present as a circumstance of the offense that would have been strongly mitigating had such considerations not been statute-bound.[11] The same situation is true with regard to the domination of Smith and DiMarino over Mr. White. While it may not have been found to meet the statutory threshold, the evidence

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10 In Johnson v. State, 438 So.2d 774 (Fla. 1983) this Court denied a claim that the use of modifiers such as "'extreme,' 'significant,' 'relative,' and 'substantial'" served to preclude consideration of mitigating evidence "if the threshold defined by the limiting words is not met." Id. at 779. It did so, however, only with a recognition of "'the jury's ability to consider other elements in mitigation.'" Id. (quoting Peek v. State, 395 So.2d 492 (Fla. 1981)). It is worthy of note that the Peek reasoning that the standard instructions did not limit consideration of mitigation has now been rejected by Hitchcock as recognized by this Court's subsequent decisions. Nevertheless, Johnson does stand for the proposition that evidence not necessarily meeting the statutory threshold is to be considered as nonstatutory mitigation.

11 It is settled that evidence of mental or emotional problems not necessarily meeting strict statutory criteria nonetheless may form the basis for nonstatutory mitigation. Cf. Hansbrough v. State, 509 So.2d 1081, 1086 (Fla. 1987) (evidence that the trial judge found "did not rise to the level of statutory mitigating circumstances" was considered as nonstatutory mitigation). Intoxication has been, on its own, repeatedly considered to be mitigating without reference to statutory mitigating circumstances. E.g. Fead v. State, ____ So.2d ____, 12 FLW 451, 451-52 (Fla. September 3, 1987); Buckrem v. State, 355 So.2d 111, 113 (Fla. 1978); Norris v. State, 429 So.2d 688, 690 (Fla. 1983). It is so powerful in mitigation because it goes to the core issue of capital sentencing. Since it acts upon mental state affecting intent, it reaches the bottom line question -- moral culpability. "[T]he individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant." California v. Brown, 107 S.Ct. at 841 (O'Connor, J., concurring). "[E]vidence that lessens the defendant's culpability for the crime ... [bears] strongly on the degree to which the defendant was morally responsible for her crime." Skipper v. South Carolina, 106 S.Ct. at 1675 (Powell, Jr., concurring). Thus, evidence of "reduced capacity for considered choice ... bear[s] directly on the fundamental justice of imposing capital punishment." Id. at 1675-76.

nevertheless is mitigating since DiMarino was the motivator and director and Smith was convicted on the theory that he "ordered" DiMarino to carry out the killing, Smith v. State, supra.

These nonstatutory mitigating factors as well as others that may have been available "from evidence presented and observations made in the guilt phase," Harvard v. State, 486 So.2d at 539, could not be considered by judge or jury in determining the appropriate sentence.[12] That violated Hitchcock, for its point is that no such factors may be precluded from consideration as independent mitigating factors with independent mitigating weight. On appeal in this case, the state did not argue that the available nonstatutory mitigation would have no effect on the sentencing decision. Rather, it argued that these considerations were "within the province of the jury to determine" and that the Court should defer to the findings of the judge. Brief of Appellee, pgs. 34-35. It is now known, however, that those findings by both the judge and jury can be given no deference, for they are infected with constitutional error.

The unconstitutional preclusion of the jury's consideration of such factors reaches to the heart of the fairness and accuracy of the sentencing determination. The proper sentence should be determined by a jury and a judge upon full consideration of all relevant mitigating factors "rather than by this Court on the face of a cold record." Harvard v. State, 486 So.2d 539. This Court has never hesitated to reverse for resentencing where the

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[12] In assessing the effect of the constitutional error, it should not be overlooked that defense counsel also was operating under the same understanding of the statute's restrictions as were the judge and prosecutor. See footnote 9, supra. The very record under review and the nonstatutory mitigation it reveals are necessarily limited by counsel's view of what could be considered in sentencing. Cf. Lucas v. State, 490 So.2d at 946 (noting defense counsel's restricted argument and scant presentation as indications of the Lockett error).

mitigating instructions were erroneous[13] for under Florida law "[i]t is the jury's task to weigh the aggravating and mitigating evidence." Valle v. State, 502 So.2d 1225, 1226 (Fla. 1987).

The sentencing proceedings in Mr. White's case are substantially identical to those faced in Hitchcock where "it could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances." 107 S.Ct. at 1824. The sentencing also is the same in all material respects as that faced by this Court in Lucas v. State, supra, where the record revealed that all parties, including defense counsel, understood and adhered to the statutory restriction on mitigating circumstances at the original pre-Songer sentencing trial. In Lucas "a scant twelve pages" was devoted to sentencing. 490 So.2d at 946. The record in Mr. White's case just as completely as Mr. Lucas', was abbreviated and restricted to statutory mitigation.

Resentencing before a new jury is the constitutional mandate, for the pre-Songer sentencing is fatally flawed. As shown by its recent decisions, this Court has given full effect to Hitchcock, and it must do so again here.

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13 Floyd v. State, 497 So.2d 1211 (Fla. 1986) (failure to instruct on mitigation denied "the right to an advisory opinion from a jury" even though this Court affirmed the trial judge's rejection of mitigation); Toole v. State, 479 So.2d 731 (Fla. 1985) (failure to instruct on § (6)(b) mitigating factor though the judge did instruct on § (6)(f) and this Court upheld the judge's rejection of §(6)(b) as mitigating); Robinson v. State, 487 So.2d 1040 (Fla. 1986) (failure to instruct on two of the statutory mitigating factors because while the judge "may not have believed it, ... others might have"). See also Patten v. State, 467 So.2d 975 (Fla. 1985) (Allen charge); Rose v. State, 425 So.2d 521 (Fla. 1983) (same).

CONCLUSION

For the foregoing reasons, the sentence of death imposed upon William Melvin White must be vacated.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida

CRAIG S. BARNARD
Chief Assistant Public Defender

STEVEN H. MALONE
Assistant Public Defender

The Governmental Center/9th Floor
302 North Olive Avenue
West Palm Beach, Florida 33401
(305) 820-2150; Suncom 245-2150

BY _____

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy hereof has been furnished by mail to MARGENE A. ROPER, Assistant Attorney General, 125 North Ridgewood, Beck's Building, 4th Floor, Daytona Beach, Florida 32014 this 23rd day of September, 1987.

_____
Of Counsel