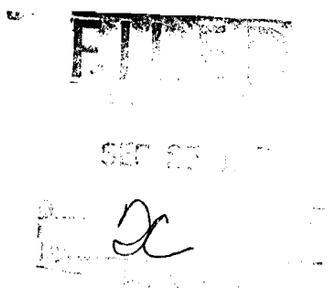
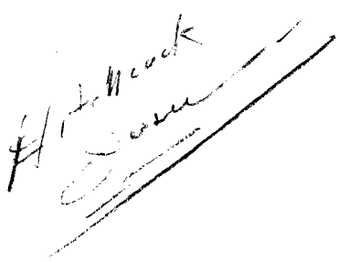
IN THE SUPREME COURT OF FLORIDA

CASE NO. 71194

DAVID ROSS DELAP, SR.,	)
	)
Petitioner,	)
	)
vs.	)
	)
RICHARD L. DUGGER, Secretary Department of Corrections, State of Florida	)
	)
Respondent.	)



PETITION FOR WRIT OF HABEAS CORPUS



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INTRODUCTION AND STATEMENT OF JURISDICTION

1. This Court's original jurisdiction is invoked pursuant to Rule 9.030(a)(3) of the Florida Rules of Appellate Procedure and Article V, Section 3(b)(9), Florida Constitution. As allowed under Kennedy v. Wainwright, 483 So.2d 424 (Fla. 1986), Mr. Delap asks the Court to utilize its habeas corpus jurisdiction to reexamine its prior appellate judgment in the direct appeal from his conviction and sentence of death. The exercise of habeas corpus jurisdiction is required and proper here since this case presents a situation where there has been "error that prejudicially denies fundamental constitutional rights" so that this Court should revisit a matter previously settled by the affirmance of a conviction or sentence. Kennedy, supra, 483 So.2d at 426.

2. In September, 1983, this Court affirmed on direct appeal Mr. Delap's conviction of murder in the first degree and sentence of death. Delap v. State, 440 So.2d 1242 (Fla. 1983), cert. denied, 467 U.S. 1264, 104 S.Ct. 3559, 82 L.Ed. 2d 860 (1984). In his direct appeal, among other grounds, Mr. Delap asserted in this Court as he had in the lower court, that the trial judge's instructions had improperly restricted the jury's consideration of mitigating circumstances during his penalty trial in violation of Lockett v. Ohio, 438 U.S. 568, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). See Initial Brief of Appellant, Point IX. Following then-extant precedent, this Court rejected Mr. Delap's Eighth Amendment assertion on two bases. First, it noted that the judge apparently did not restrict the defense in its presentation of nonstatutory mitigating factors. Second, the standard jury instruction was found to be constitutionally adequate. The Court's reasoning on both bases was as follows:

> The standard jury instructions were given to the jury. Defendant contends that the trial court committed error when it denied a requested instruction that mitigating circumstances other than the statutory ones could be considered. Defendant relies upon Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). It does not appear that the trial judge precluded defendant from offering any evidence of nonstatutory mitigation. The

> trial judge correctly ruled that the standard jury instruction adequately covered the instructions on mitigating circumstances. Buford v. State, 403 So.2d 943 (Fla. 1981), cert. denied, 454 U.S. 1164, 102 S. Ct. 1039, 71. L.Ed.2d 320 (1982).

440 So.2d at 1254. (emphasis added).

3. Review on habeas corpus is appropriate in this case because the law has changed since the judgment on direct appeal. The decision of the United States Supreme Court in Hitchcock v. Dugger, 107 S.Ct. 1821 (1987) ruled contrary to this Court's reasoning on both of the bases for its decision in Mr. Delap's case. On the precise issue presented by this petition, this Court has held habeas corpus to be appropriate. Riley v. Wainwright, ____ So.2d ____, 12 F.L.W. 457 (Fla. September 3, 1987) (hereinafter cited as Riley IV); Downs v. Dugger, ____ So.2d ___, 12 F.L.W. 473 (Fla. September 9, 1987). In Downs, the Court specifically held that "a substantial change in the law has occurred that requires us to reconsider issues first raised on direct appeal." 12 F.L.W. at 473. Similarly, in Riley IV, this Court said that the same law change would require habeas corpus relief where the issue "had been squarely and adequately presented on direct appeal." 12 F.L.W. at 459. The change in law in both cases was Hitchcock and the issue was the restriction upon consideration of mitigating circumstances resulting from the same standard jury instruction at issue in Mr. Delap's case.

4. Habeas corpus jurisdiction is thus properly invoked. This Court must entertain the instant petition in order to remedy its appellate judgment in Mr. Delap's direct appeal to effectuate the intervening change in constitutional law.

STATEMENT OF THE CASE AND FACTS

A. Chronology of the Case

5. After jury trial, Mr. Delap was convicted of one count of premeditated murder on February 27, 1976 and sentenced to death by the Circuit Court for the Nineteenth Judicial Circuit. This conviction and sentence was reversed for the

State's failure to produce a trial transcript sufficient for appellate review. Delap v. State, 350 So.2d 462 (Fla. 1977). Thereafter, venue was changed to the Ninth Judicial Circuit due to prejudicial pretrial publicity. In the Ninth Judicial Circuit, Mr. Delap was tried and convicted of premeditated murder on October 13, 1978. The penalty trial was held the following day, October 14, 1978, and resulted in a nonunanimous jury verdict recommending the death sentence. The trial judge imposed the death sentence on February 20, 1979. This Court affirmed the conviction and sentence. Delap v. State, 440 So.2d 1242 (Fla. 1983), cert. denied, 467 U.S. 1264, 104 S.Ct. 3559, 82 L.Ed.2d 860 (1984).

6. In 1985, Mr. Delap filed a Rule 3.850 motion to vacate his conviction and sentence. The trial court denied the motion without an evidentiary hearing and without a statement of any reason for the denial. This Court affirmed the denial of the Rule 3.850 motion. Delap v. State, 505 So.2d 1321 (Fla. 1987).

B. The Facts Material to Mr. Delap's Lockett Claim

7. Throughout the penalty trial, jurors were repeatedly told first, that they were compelled to rigorously follow the trial judge's instructions on aggravating and mitigating circumstances and secondly, that only statutory mitigating circumstances could be considered. At the outset of the penalty trial, the jurors were instructed by the trial court as follows:

> The State and the defendant may or may not present evidence relative to what sentence you should recommend to the Court. You are instructed that this evidence when considered with the evidence you have already heard, you will determine whether or not there have been sufficient aggravating circumstances which would justify imposition of the death penalty or second, whether there are mitigating circumstances to outweigh the aggravating circumstances, if any. After the taking of evidence and argument of counsel, you will be instructed on the factors of aggravation and mitigation that you may consider. Are you ready Mr. Young?

R. 1059 (emphasis added).

8. At the conclusion of the sentencing phase, the trial judge read the following instruction to the jury limiting the mitigating circumstances which the jurors could consider to determine whether a life sentence or the death penalty should be recommended for Mr. Delap to those specified by statute:

> THE COURT: Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the defendant for his crime of murder in the first degree. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge. However, it is your duty to follow the law which will now be given you by the Court and render to the Court an advisory sentence based upon your determination as to 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 sufficient of these 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 defendant has no significant history of prior criminal activity;
>
> B, 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;
>
> C, that the victim was a participant in the defendant's conduct or consented to the act;
>
> D, that the defendant was an accomplice in the defense [sic] for which he is to be sentenced, but the offense was committed by another person, and the defendant's participation was relatively minor;
>
> E, that the defendant acted under extreme duress or under the substantial domination of another person;
>
> F, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;
>
> G, age of the defendant at the time of the crime.
>
> * * *

> If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence which should be imposed.
>
> 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 circumstances exist and whether sufficient mitigating circumstances exist which outweigh any aggravating circumstances found to exist. Based on these considerations, you should advise the Court whether the defendant should be sentenced to life imprisonment or to death.

R. 1256 - 1260.

9. After the charge conference between the trial judge and counsel, but before the instructions were read to the jury or final argument, there was an unreported bench conference. What transpired during the bench conference was later made a matter of record. R. 1263. During this bench conference, Mr. Delap's attorney offered a written instruction (R. 2245) in order to correct the restriction in the Standard Jury Instructions which limited the jury's consideration of mitigating circumstances to those enumerated in Section 921.141(6)(a)-(g), Florida Statutes (1977). R. 1263. The jury instruction requested by Mr. Delap's attorney would have advised the jury that they could, as a matter of law, consider as mitigating circumstance "(h)", "such other mitigating circumstances as you may find to exist." R. 1263-64. During the bench conference, the trial judge refused to give this requested instruction. R. 1264.[1/]

1/ The judge said he considered the request and objection to have been "too late." R. 1264. However, by submitting his request in writing and stating his grounds prior to final argument, prior to the jury charge and before the jury retired to deliberate, Mr. Delap plainly met the preservation requirements of Rule 3.390 (d), Fla.R.Crim.P. That the preservation was proper is shown by the State's decision not to advance such an argument on direct appeal and by this Court's reaching and deciding the merits of the issue. Even so, Hitchcock changed Florida law so as to remove preservation as a question. Thompson v. Dugger, ____ So.2d ____, 12 F.L.W. ___ (Fla. September 9, 1987).

10. After the jury had retired to consider its recommendation on the sentence to be imposed upon Mr. Delap, it requested a written copy of the instructions "so we can make absolutely sure of our decisions." R. 1265. A copy of the instructions was provided to the jury for use during deliberations although defense counsel objected that this would reinforce the jurors' impression that they were restricted to consideration of only the specific statutory mitigating factors which had been read to them:

> [By defense counsel]. The only thing we are objecting to is the fact that if they start reading and studying it over, they are going to see that it limits them to the mitigating circumstances that are enumerated.
>
> THE COURT: You have got that objection in the record. If not, we will concede that it is now.

R. 1265-1266.

11. During the penalty trial, the defense presented the testimony of Dr. Michael Gilbert, a board certified neurologist. Dr. Gilbert testified that Mr. Delap suffers from trauma-induced brain damage. Among other effects, the brain damage made Mr. Delap more susceptible than normal to the influence of alcohol or drugs. Dr. Gilbert testified that this problem, coupled with emotional instability and a past history of drug use had created "a horrendous combination" so that, "One can't expect any human being to function sensibly and adequately cognitive in such a situation." R. 1122-1123. Dr. Gilbert told the jury that Mr. Delap was so emotionally disturbed that he was disabled from coping with the ordinary stresses of life: "What to us or a reasonable man would be an average amount of stress or strain, to him, it would be an overwhelming thing." R. 1123. R. 1114-1123. Dr. Gilbert was allowed to testify about Mr. Delap's capacity for rehabilitation. R. 1137. However, the trial judge refused to permit Dr. Gilbert to testify about whether he believed it would be worthwhile to put Mr. Delap through a rehabilitation program to address his emotional problems. R. 1137. Dr. Gilbert testified that Mr. Delap told

him that on the day of the crime in question, he had talked to the body of the victim and apologized, and had returned to the scene the next day for the same purpose. R. 1146-1147. Dr. Gilbert confirmed that on the several occasions on which he had interviewed and examined Mr. Delap he expressed remorse for the death of the victim and his feeling of guilt over her death. R. 1156-1157.

12. Dr. Mordecai Haber, a psychiatrist, testified for the state during the penalty phase. R. 1187-1208. He testified that over time and with extended proper care, Mr. Delap's emotional and character disorders could be treated. R. 1214. On cross-examination concerning his opinion about Mr. Delap's emotional and psychiatric disorders, Dr. Haber testified that in committing the crime for which he had been convicted, Mr. Delap "was performing an act which had been built into this man's conscious long before he performed it." R. 1198.

13. At the sentencing hearing after the jury had rendered its advisory opinion, Mr. Delap's counsel urged the trial judge to consider his client's demonstrated remorse over the crime of which he had been convicted, the fact that Mr. Delap cooperated with police and led them to the body of the victim, and the three years he had already spent on death row. R. 1331-1332; R. 1335. At that same time, Mr. Delap made a statement on his behalf, pointing out his realization that he needed mental health treatment before the crime and his repeated, unsuccessful efforts to obtain treatment. Mr. Delap also expressed sorrow and remorse for his conduct to the trial judge. R. 1332-1333.

14. At the time of sentencing, the trial judge announced for the first time that he had conducted his own private investigation into Mr. Delap, which included a visit to Raiford and interviews with certain unnamed "cage mates" of Mr. Delap at the prison. R. 1336. On direct appeal, this Court found that this conduct violated Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). However, this Court ruled that this constitutional error was harmless, because the

trial judge used the information from his ex parte presentence investigation to find a nonstatutory mitigating factor. Delap v. State, 440 So.2d 1242, 1257 (Fla. 1983), cert. denied, 467 U.S. 1264, 104 S.Ct. 3559, 82 L.Ed.2d 860 (1984).

14. In his order sentencing Mr. Delap to death, the trial judge did find nonstatutory mitigating circumstances, which he found to be outweighed by aggravating factors:

> MITIGATING CIRCUMSTANCES
>
> (a)-(g) none
>
> (h) The Defendant's behavior at his second trial and during his stay on death row (as determined by the court's own personal investigation) was acceptable. Perhaps there was some remorse. It is unfortunate that the law upon the conviction of the first offense does not allow for castration in cases of this nature for then neither the school teacher nor the defendant would be in their current predicament.
>
> This Court finds from the evidence the aggravating circumstances exceed the mitigating circumstances in this case, thus warranting both the jury and the court's death sentence.

R. 2460.

REASONS FOR GRANTING THE WRIT

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. Delap's case.[2/] This case involves the restriction upon jury's consideration of mitigating factors resulting from the standard jury instruction on mitigation which, together with counsel's argument, served to limit the jury's consideration to the statutorily enumerated list of mitigating factors. The Eighth Amendment mandate of individualized sentencing[3/] has now been

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2/ Downs v. Dugger, supra, Thompson v. Dugger, supra; Riley IV; Morgan v. State, ____ So.2d ____, 12 F.L.W. 433 (Fla. 1987); McCrae v. State, ____ So.2d ____, 12 F.L.W. 310 (Fla. 1987). Accord, Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987).

3/ 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).

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.

Mr. Delap's October, 1978 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 F.L.W. at 469 (noting that the September, 1978 trial occurred prior to the December, 1978 announcement of Songer). At trial, Mr. Delap requested the judge to alter the standard jury instruction on mitigating circumstances to include "such other mitigating circumstances as you may find to exist." R. 1263-64. This request came before final arguments by counsel and, as will be seen, its denial helped to shape counsels' argument to the jury.

Instead of the requested instruction the court gave the standard instruction ("[t]he mitigating circumstances which you may consider, if established by the evidence, are these: [reciting the statutory list]"). R. 1256-60. This is the same instruction that has been found to be "in substantially identical form," Downs v. Dugger, 12 F.L.W. at 474, and "nearly identical" Magill v. Dugger, 824 F.2d at 893, to the instruction given in Hitchcock. It is the instruction that required relief in Downs and Magill, as well as in Riley IV, supra, and Thompson v. Dugger, supra.

The error was repeated (again over specific objection) in this case when, after deliberations had begun, the jury requested a written copy of the instructions "so we can make absolutely sure of our decision." R. 1265. That written instruction listing the statutory factors was sent in to the jury. Therefore "[t]he judge further reinforced the impression already laid in the juror's minds by providing them with a copy of the statutory aggravating and mitigating factors for use during their deliberations." Downs v. Dugger, 12 F.L.W. at 474. (emphasis by the Court). As Downs held, "[t]hese instructions to

the jury unconstitutionally restricted the review of nonstatutory mitigating evidence, in violation of Hitchcock and Lockett." Id.

The restriction found in the jury instructions was "exacerbated" by the prosecutor's final argument at the conclusion of the penalty phase. Downs v. Dugger, 12 F.L.W. at 474. The prosecutor admitted to the jury that the evidence presented of Mr. Delap's remorse and his sad appearance at trial might cause them to refuse to impose a death sentence. The prosecutor knew well that what the jury had heard and seen at trial might convince them to recommend a life sentence, not the death penalty. However, the prosecutor told the jury that consideration of Mr. Delap's remorse had no place in the proceedings since the legislature had imposed "guidelines" the jurors were bound to follow pursuant to the instructions given by the Court "to help us take out emotional or sympathetic aspects [in recommending a life sentence or death]":

> Certainly, to sit here and look at David Delap today as the man who has lost a considerable amount of weight, a man who is, as stated by the psychiatrists, remorseful for the acts he had done, but an act he did over three years ago, to see him here in this courtroom would cause us all to have sympathy for him.
>
> At the same time, we would be in a situation where we tried this case immediately after this incident, and our feelings and emotions might be the other way where remorse had not set in, or he might look quite a bit different than he does today. We don't want that influence at all. Base it on the evidence that we have heard and on the guidelines that we have.
>
> It is not an issue now of whether or not we believe morally in the death penalty. That has been decided for us. That is the penalty of the State under certain circumstances.
>
> Your advisory opinion now is to decide, as I say, not in a callous and indifferent way, but decide if the guidelines that have been given to us by our elected officials, by our State legislature, and the belief we have in the constitutionality of this provision which has been upheld by the Supreme Court of the United States and the Supreme Court of the State of Florida, as to whether or not this is a circumstance and a type case where we want to advise this Court to impose the death penalty.

> The legislature is trying to help us take out emotional or sympathetic aspects and has set forth certain circumstances under which the death penalty should be considered. These are enumerated in the statute, and the Court will instruct you on them later. . . . If you feel that there are sufficient aggravating circumstances to where the death penalty should be recommended, the Court will instruct you that you should go on then and consider, and you may consider, but you are not limited to considering, certain mitigating circumstances which this Court will enumerate what the mitigating circumstances are.

R. 1237-1239 (emphasis added).

The prosecutor thus left no doubt that the jurors were to stick to "certain circumstances ... enumerated in the statute." Defense counsel too repeatedly urged the jury in his argument to carefully listen to and follow the instructions.[4/]

The nature of the error is no longer subject to dispute. These instructions, from start to finish, exacerbated by the argument of both counsel, and reinforced by written instructions, precluded full consideration of mitigating factors and thereby violated Lockett and Hitchcock. The relief that must follow 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 IV, 12 F.L.W. at 459.

4/ In his final argument during the penalty phase Mr. Delap's attorney urged the jury as follows:

> In any event, I would ask you again to listen to the instructions that the judge is going to give you . . . . Listen to the judge's instructions. I realize you are not lawyers, and these terms that been put down in these instructions are written by lawyers. Each word, each paragraph, each preposition has a meaning. It has been gone over and over and over again by greater minds than here today as far as the lawyers are concerned.
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> * * *
>
> Again, really from the first time that I talked to you in voir dire examination until now, it all comes down to the fact that you listen to the instructions of the judge and pay attention to the evidence. Consider both and do the best you can. Thank you.

R. 1248-1255 (emphasis added).

Just as the constitutional error in this case cannot be doubted, the effect of the error cannot be shunted aside.[5/] The prosecutor knew the power of at least one of the nonstatutory mitigating factors -- Mr. Delap's sincere remorse and profound sorrow -- and, as quoted above, told the jurors not to consider it because it was not a factor "enumerated in the statute." When the judge imposed the death sentence, in February, 1979 he found what this Court said was nonstatutory mitigation. 440 So.2d at 1257. The judge found remorse to be mitigating. This case therefore presents the situation where there was nonstatutory mitigating evidence that the jury was precluded from considering but that the judge did consider and find. The jury should have had the same opportunity.[6/]

There of course was much more evidence of nonstatutory mitigation presented both in the guilt phase,[7/] and the penalty phase. Much of this evidence was detailed above in the factual statement and includes remorse, capacity for rehabilitation[8/] and to live peaceably in prison (the judge's "private" investigation at the prison also confirmed this

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5/ The State has never argued that the error was not harmful. Rather, on direct appeal the State emphasized that the record revealed no restriction on the presentation of nonstatutory mitigating evidence and that the standard instruction was adequate to meet Lockett requirements. See Answer Brief of Appellee, Point IX. As this Court has recently held, Hitchcock ruled to the contrary on both arguments.

6/ See Messer v. State, 330 So.2d 137 (Fla. 1976); Miller v. State, 332 So.2d 65 (Fla. 1976). What both of these cases stand for is the settled principle that the jury and judge must consider the same evidence. Both Miller and Messer held that a judge's consideration of mitigating evidence cannot substitute for the consideration of that evidence by the jury.

7/ [N]onstatutory mitigating factors may arise not only from evidence presented in the penalty phase but also from evidence presented and observations made in the guilt phase of the proceedings." Harvard v. State, 486 So.2d 537, 539 (Fla. 1986).

8/ The trial judge had permitted general expert testimony regarding Mr. Delap's capacity for rehabilitation, but precluded the same expert from testifying specifically as to the prospect or likelihood for success of Mr. Delap's participation in a rehabilitation program. R. 1137.

mitigating factor),[9] and Mr. Delap's serious mental and emotional problems that may not have met the statutory standard of "extreme,"[10] and his unique vulnerability to alcohol caused by trauma-induced organic brain damage. Also available for consideration was Mr. Delap's status as a father of young children,[11] that he was attending college, his cooperation with authorities, and other observations from the evidence and his demeanor.

In evaluating the harm of the constitutional error it cannot be overlooked that the jury was not unanimous in its decision.[12] It is also noteworthy that the aggravating factors were not beyond question.[13]

9/ The judge's visit to the prison revealed to him that Mr. Delap's stay in prison prior to the retrial had been "acceptable." Of course, adjustment to and the ability to live peaceably in prison is a significant nonstatutory mitigating circumstance. Skipper v. South Carolina, supra, Valle v. State, 502 So.2d 1225 (Fla. 1987); Craig v. State, ___ So.2d ___, 12 FLW 269, 275 (Fla. 1987).

10/ This was the evaluation of the state's expert who argued that his "only quarrel ... is with the adjective 'extreme.'" R. 1211. The prosecutor also agreed that Mr. Delap suffered serious emotional disturbance, his only disagreement was over whether those problems met the statutory requirement of being "extreme." R. 1244-45. Of course it is settled that evidence of mental and emotional disorders not necessarily meeting the strict statutory criteria may nevertheless form the basis for significant nonstatutory mitigation. E.g. Hansbrough v. State, 509 So.2d 1081, 1086 (Fla. 1987) (evidence that the trial judge found "did not rise to the level of the statutory mitigating circumstances" was considered as nonstatutory mitigation and included the defendant's "mental and emotional problems"). See generally Johnson v. State, 438 So.2d 774, 779 (Fla. 1983).

11/ See Jacobs v. State, 396 So.2d 713 (Fla. 1981).

12/ The record does not reflect the precise split in the jury's vote on the sentence at Mr. Delap's trial. The record does reflect, despite efforts to poll the jury only the verdict and not individual votes, that at least one juror voted for life. R. 1268.

13/ This Court struck one of the aggravating factors (pecuniary gain) upon which the jury had been instructed. 440 So.2d at 1257. Another aggravating factor (felony murder) had previously been subject to a judgment of acquittal in the prior trial and was not even submitted to the jury in the guilt phase. Also, the factor of great risk of death to many was so speculative (he could have run into a school bus filled with children) that it would never be upheld today by this Court which firmly holds that "what might have happened," is insufficient to establish this aggravating factor. See Lusk v. State, 446 So.2d 1038 (Fla. 1984); Barclay v. State, 470 So.2d 691 (Fla. 1985); Dougan v. State, 470 So.2d 697 (Fla. 1985); Trawick v. State, 473 So.2d 1235 (Fla. 1985).

The nonstatutory mitigating factors are therefore relevant and persuasive.[14/] The unconstitutional preclusions 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 537, 539 (Fla. 1986).

While in this case some statutory aggravating circumstances were present, so also were substantial nonstatutory mitigating circumstances. On a far less compelling record, this Court has emphasized, "we cannot know ... [whether] ... the result of the weighing process ... would have been different" in the absence of errors unconstitutionally skewing the jury's sentencing deliberations. Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977). In these circumstances, the Court cannot "confidently conclude that [the jury's considerations of nonstatutory mitigating circumstances] would have no effect upon the jury's deliberations." Skipper v South Carolina, 476 U.S. _____, 106 S.Ct. 1669, 1673, 90 L.Ed.2d 1 (1986).

14/ Another indication in the record of the potential impact of the nonstatutory mitigating evidence is a letter written to the trial judge prior to sentencing by Susan L. Jordan, an Associate Press reporter who covered the trial. She wrote:

> It is my opinion that a death sentence is not justifiable in this case in view of mitigating circumstances and psychiatric testimony given during the hearing.
>
> While I cannot comment on the legal aspects of the proceedings, I can say that my communication with Mr. Delap has indicated his remorse (although he denies direct involvement in the victim's death, he has expressed a desire for psychiatric help and rehabilitation for the behavior which led to the situation resulting in the victim's death), recognition of his severe emotional problems, and an understanding of his debt to society, which must be repaid through serving time in prison. Mr. Delap is aware that a prisoner awaiting execution on Death Row cannot receive necessary psychiatric attention.
>
> In Dr. Mordecai Haber's words, "he was performing an act built into this man's character long before." Dr. Haber also said, "Given time and his age, his character structure could show a change."
>
> I believe that a life sentence is appropriate for David Ross Delap.

R.2298

This Court has never hesitated to reverse for resentencing where the mitigating instructions were erroneous[15/] 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).

"There is no disputing that. . . . [Eddings v. Oklahoma, 455 U.S. 704, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)], requires that in capital cases 'the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' "Skipper v. South Carolina, 476 U.S __, 106 S.Ct. 1669, 1670-71, 90 L.Ed.2d 1 (1986) (citations omitted; original emphasis).

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

15/ 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 above reasons, this Court must enter an immediate stay of the scheduled execution and vacate Mr. Delap's sentence with directions that a new sentencing hearing before a jury be held.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was provided by overnight courier this 24TH day of September, 1987 to Lee Rosenthal, Assistant Attorney General, Attorney for Respondent, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401.

Gerry S. Gibson

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