IN THE SUPREME COURT OF FLORIDA

CASE NO. 71,194

DAVID ROSS DELAP, SR.,

Petitioner,

vs.

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

Respondent.

REPLY TO RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

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Petitioner, DAVID ROSS DELAP, SR., respectfully replies to the Response In Opposition to Petition for Writ of Habeas Corpus filed by Respondent, and states:

INTRODUCTION

This case is controlled by five recent decisions of this Court issued in the wake of Hitchcock v. Dugger, 107 S.Ct. 1821 (1987): Downs v. Dugger, ____ So.2d ____, 12 F.L.W. 473 (Fla. September 9, 1987); Thompson v. Dugger, ____ So.2d ____, 12 F.L.W. 469 (Fla. September 9, 1987); Riley v. Wainwright, ____ So.2d ____, 121 F.L.W. 457 (Fla. September 3, 1987); Morgan v. State, ____ So.2d ____, 12 F.L.W. 433 (Fla. August 27, 1987); McCrae v. State, ____ So.2d ____, 12 F.L.W. 310 (Fla. June 18, 1987). Respondent's answer to these cases is to ignore their force and contend that "with all due respect to this Court's sentiments therein," Resp. at 10, the cases were wrongly decided.

Mr. Delap recognizes that Hitchcock is a familiar issue to this Court and that Mr. Delap's case presents the same legal and record posture as those cases in which relief has been granted. Respondent apparently also acknowledges the controlling nature of that precedent since his only response is a plea to change that precedent. We therefore will not extensively re-explore the territory covered by this Court's post-Hitchcock cases, nor reargue the points covered in the petition.

DISCUSSION

There are two primary arguments advanced by Respondent in his effort to overturn this Court's decision: (1) Hitchcock did not change Florida law sufficiently enough to permit this Court to grant relief in cases where Hitchcock's principles have been violated; and (2) the jury is unimportant under the Florida scheme since the judge is the final sentencer.

-A-

The decision in Hitchcock, as this Court repeatedly has held, did change Florida law. Downs v. Dugger, 12 F.L.W. at 473;

Thompson v. Dugger, 12 F.L.W. at 469. Respondent, however respectfully, says that these decisions were wrongly decided because, in essence, Hitchcock evolved from Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). Respondent's reasoning therefore is that Hitchcock was evolutionary, and not the earthquake in the law that would allow this court to redress Hitchcock violations. The flaw in that reasoning is that it fails to address what was occurring in Florida law, as contrasted with eighth amendment jurisprudence. As to Florida law, Hitchcock did represent an abrupt change. This Court explained that Florida law change in both Downs and Thompson. We need not repeat this Court's analysis again here except to recall that the Florida precedent was long and established in rejecting claims like Mr. Hitchcock's. Indeed, one example of that prior precedent is the decision on direct appeal in this case. In the direct appeal, this Court held that the standard instruction was adequate to inform the jury of its ability to consider mitigation beyond the statutory list, and that in any event, there was no error because it did not appear that the trial court restricted the presentation of mitigation evidence. Delap v. State, 440 So.2d 1242, 1254 (Fla. 1983). The Hitchcock decision, as this Court has held, rejected both bases of the Delap ruling. And Delap was only one of "a prior line of cases issued by this Court." Downs v. Dugger, 12 F.L.W. at 473. See, e.g. Peek v. State, 395 So.2d 492 (Fla. 1981) (mitigating instruction is adequate).

This Court's holdings that Hitchcock changed Florida law are well-based -- and so too is the need for relief because Hitchcock error, restricting individualized sentencing, goes to the core of the capital sentencing determination. This Court need not overrule its recent decisions as Respondent requests.

- B -

The second argument by Respondent would require overruling even more deeply held precedent: the importance of the jury in our capital sentencing system. Respondent argues

that since the jury is merely advisory and the judge is the final sentencer, restricting the jury's ability to consider relevant mitigating evidence is harmless.

That position is of course untrue and has never been true in Florida. It is not the first time Respondent has made that argument. However, each time Respondent has raised the argument, it has been rejected:

> Under the state's theory there would be little or no need for a jury's advisory recommendation since this Court would need to focus only on whether the sentence imposed by the trial court was unreasonable. That is not the law.

Ferry v. State, 507 So.2d 1373, 1377 (Fla. 1987) (emphasis supplied).

> We reject the state's argument that a new advisory jury upon resentencing is not constitutionally required under Florida's sentencing scheme. 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 F.L.W. 459.

Despite these holdings, Respondent still advances the argument, asserting support in two federal decisions:

The only authority attached to the response is a report from a federal magistrate in the case of Jones v. Wainwright, Case No. PCA 82-0697. Respondent is apparently unaware that magistrate's opinion was rejected and overruled by the district judge on September 29, 1987. The federal district court granted habeas corpus relief on the basis of Hitchcock and ordered resentencing. Jones v. Wainwright, No. PCA 82-0697/RV (N.D. Fla. September 29, 1987). (A copy is attached hereto).

The other case Respondent uses for support is Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987). There are six things to say about the Elledge case:

1. The comments Respondent relies upon were dicta, since the case was reversed for resentencing on other grounds;

2. The dicta is directly contrary to a decision of that same court issued only a week later, Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987);

3. The dicta is directly contrary to the law established by this Court regarding the Florida sentencing scheme and is therefore erroneous because the law established by this Court controls;

4. The dicta is directly contrary to prior precedent of the Court of Appeals;

5. The dicta is contrary to the reasoning of the Supreme Court in Baldwin v. Alabama, 472 U.S. 372, 382, 105 S.Ct. 2727, 86 L.Ed.2d 300 (1985);

6. Finally, the dicta is the subject of a rehearing petition filed by Mr. Elledge (copy attached hereto).

Respondent has wholly failed to distinguish Mr. Delap's case from those in which relief has been granted. By its attempt to overturn that precedent, Respondent implicitly acknowledges its controlling nature. There being no reason in law to upset this Court's decisions, relief must be granted.

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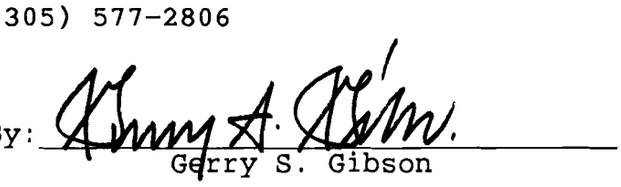
By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was provided by Federal Express this 3d day of October, 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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