IN THE SUPREME COURT OF FLORIDA

FILED
NOV 19 1987
CLERK, SUPREME COURT
By Deputy Clerk

No. 71,284

FREDDIE LEE HALL,

Petitioner,

v.

RICHARD L. DUGGER, Secretary, Florida Department of Offender Rehabilitation; TOM BARTON, Superintendent of Florida State Prison at Starke, Florida; and ROBERT A. BUTTERWORTH, Attorney General of the State of Florida,

Respondents.

PETITIONER'S REPLY TO RESPONSE TO PETITION FOR HABEAS CORPUS

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ARGUMENT IN REPLY TO RESPONSE TO PETITION FOR HABEAS CORPUS

Respondents first assert that no violation of the principles of Hitchcock v. Dugger, ___ U.S. ___, 107 S.Ct. 1821 (1987) occurred at petitioner's pre-Lockett trial. This claim is untenable, and appears to be based on arguments which this Court has only recently rejected in Downs v. Dugger, No. 71,100 (September 9, 1987). Respondents stress that petitioner's own sentencing phase testimony was not limited by the trial judge, and that defense counsel's two-page closing argument includes a brief reference to two of the several nonstatutory mitigating circumstances revealed by the record--petitioner's lesser role in the murder, and his co-operation with the police. Respondents fail, however, to explain how these aspects of the record can be held to fulfill the requirements of Lockett when the considerably more focused defense argument concerning nonstatutory mitigating circumstances in Hitchcock did not. In Downs, this Court expressly recognized that the "mere presentation" of nonstatutory mitigation evidence does not satisfy Lockett if the record does not reflect that the sentencing authorities actually considered the evidence. Downs is controlling here.

Respondents's memorandum fails to so much as mention the instructions on mitigating evidence which were read to the jury at petitioner's trial. This omission is surely explained by the fact that the instructions were materially identical to those found unconstitutional in Hitchcock. On the facts of this case the instructions require reversal regardless of whether fragments of nonstatutory mitigating circumstance was heard by the sentencing jury or mentioned in argument by defense counsel.

Next, respondents argue at length that the Court should not reach petitioner's Hitchcock claim because of an alleged procedural default committed by petitioner's trial counsel. The Court has already rejected this argument in Thompson v. Dugger, Nos. 70,739 & 70,781 (September 9, 1987), and again in Delap v. Dugger, No. 71,194 (October 8, 1987). Accord Hitchcock v. Dugger, ___ U.S. ___, 107 S.Ct. 1821 (1987) (granting habeas relief on second habeas corpus petition based on Lockett claim not raised at

trial); see also Copeland v. Dugger, ___ U.S. ___ (Oct. 5, 1987) (per curiam).[1] While the Attorney General evidently disagrees with these rulings, Resp. at 7-9, they are clearly correct, Copeland v. Dugger, supra, and respondents' extended attack on this Court's very recent decisions fails to show otherwise.

Finally, respondents assert that under Delap v. Dugger, supra, the Hitchcock errors which occurred at petitioner's trial should be disregarded as harmless. Resp. at 9-10. Respondents have not, however, attempted to support this assertion by comparing the facts of Delap with those of petitioner's case. When such a comparison is made, Delap shows that the constitutional errors committed in this case were not harmless, and require reversal of the death sentence imposed.

Delap held that a Hitchcock error in the trial judge's sentencing instructions to the jury can be disregarded as harmless where the record clearly reflects that the judge himself considered nonstatutory mitigating circumstances in passing sentence. The facts of Delap illustrate the stringency of this rule. The sentencing hearing in Delap occurred in 1979, well after this Court's holding in Songer v. State, 365 So.2d 696 (1978) had made clear that Florida's capital sentencing statute imposes no limitation on relevant mitigating factors. The sentencing record plainly showed that the prosecutor, defense counsel, and the trial judge all understood that nonstatutory mitigating circumstances could and should be considered in determining Delap's sentence. The

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[1] In pressing their procedural default claim, respondents go so far as to suggest that this Court should interpret the United States Supreme Court's recent denial of Hall's certiorari petition as authority in support of respondents' argument. Response to Petition for Writ of Habeas Corpus (hereinafter cited as "Resp.") at 8. This suggestion is frivolous. "The denial of a writ of certiorari imports no expression upon the merits of the case, as the Bar has been told many times." United States v. Carver, 260 U.S. 482 (1923); see also Darr v. Burford, 339 U.S. 200, 226-228 (1950) (Frankfurter, J., dissenting); Stern & Gressman, Supreme Court Practice 269-273 (6th ed. 1986). Nevertheless, if petitioner were to join respondents in speculating as to the reasons for the Supreme Court's action, he would point out that the Supreme Court presumably denied further review of his federal habeas petition in full awareness that petitioner has an adequate Hitchcock remedy in this Court. Thompson v. Dugger, supra; Downs v. Dugger, No. 71,100, supra; Riley v. Wainwright, No. 69,563 (Fla. September 3, 1987); Morgan v. State, No. 69,104 (Fla., August 27, 1987); McCrae v. State, No. 67,629 (June 18, 1987).

prosecutor advised the jury that it was entitled to consider such circumstances. The trial judge went so far as to travel to the state prison in an effort to investigate the possible existence of nonstatutory mitigating circumstances, and his sentencing order expressly reflected that he found two such nonstatutory mitigating factors to have been established. Under these circumstances, and given the paucity of mitigating evidence and the extreme brutality of the kidnapping, rape and murder of which Delap was the sole perpetrator, the Court concluded that the inadequacy of the jury instructions on nonstatutory mitigating circumstances was harmless beyond a reasonable doubt.

The only similarity between this case and Delap is that the trial judge's jury instructions in both cases were materially identical to those held unconstitutional in Hitchcock. See Petition for Habeas Corpus at 6. On the other hand, none of the factors which led the Court to find the Hitchcock error in Delap to be harmless are present here. Petitioner's trial occurred before Lockett and Songer. There is no doubt that at the time of petitioner's trial, the trial judge understood Florida law as limiting mitigating circumstances to those enumerated by statute. Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985) (en banc); Motion to Vacate, Set Aside or Correct Conviction and Sentence, App. A., Record at Vol. I, p. 94, Hall v. State, 420 So.2d 872 (Fla. 1982).[2] The prosecutor's jury argument in no way suggested that the jury was entitled to consider nonstatutory mitigating

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[2]Respondents deprecate this evidence as showing only that the trial judge "may have misunderstood the law in another trial involving another homicide." Resp. at 3 n. 2. In so doing, respondents omit to mention that the "other trial" was conducted just one month before this one, involved the same judge, the same prosecutor, the same attorneys and the same defendant, and arose from a homicide which occurred just hours after the murder in this case. Hall v. State, 403 So.2d 1319 (Fla. 1981). Under these circumstances, and given that no change in the applicable law occurred in the month between petitioner's first trial and this one, respondents' implicit assumption that the trial judge's views on the law governing mitigating circumstances had somehow changed between petitioner's first and second trials is not convincing.

circumstances.[3] And contrary to respondents' assertions, Resp. at 9, the trial judge's sentencing order does not reflect that he gave any consideration to nonstatutory mitigating evidence. The references to petitioner's own testimony contained in the judge's sentencing order occurred not during a discussion of mitigating evidence, but in the course of a summary of the evidence underlying his finding of a statutory aggravating circumstance, which was that the murder was especially heinous, atrocious or cruel. R. 350-351. The only references to mitigation contained in the entire sentencing order are the judge's statements that petitioner "failed to establish by evidence any mitigating circumstances," R. 349, and that "there are no mitigating circumstances." R. 351.[4] Under these circumstances, respondents' assertion that the trial judge's sentencing order actually reflects consideration of the nonstatutory mitigating circumstances present in petitioner's case is wholly unsupported by the record.

In Delap, the Court observed that in each case where Hitchcock relief has been granted, "there was an additional element that required reversal beside the faulty jury instruction." The Court went on to cite, as an example of such an additional element, the absence of any "indication that [the] judge knew that nonstatutory mitigating circumstance was pertinent." Morgan v. State, No. 69,104 (Fla. August 27, 1987). Petitioner's case falls, at a

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[3]The only references to mitigating circumstances in the prosecutor's penalty phase jury argument were the following:

> [A]ny sentence [the judge] gives this defendant, I think he will tell you in his instructions, that the courts have set down certain things that you consider in aggravation, and so what we're doing, we're taking the scale now to see whether there are more aggravating circumstances or mitigating circumstances, and making our respective minds up. . . .
>
> Ladies and gentlemen of the jury, with all due sincerity, I don't see any mitigation in this particular case.

Tr. 690, 693.

[4]The fact that the trial judge did not use the word "statutory" when referring to the absence of mitigating circumstances does not support the inference that he had searched the record for nonstatutory mitigating circumstances and had simply found none to exist. The reason for this is that the trial judge's order also omits the modifier "statutory" when referring to aggravating circumstances. R. 349-351.

minimum, into this category, and reversal is thus clearly mandated by this Court's precedents.

In this connection, it should be kept in mind that by advancing a harmless-error argument in a case involving fundamental constitutional error, respondents assume the burden of establishing the harmlessness of the error. Chapman v. California, 386 U.S. 18, 24 (1967). This elementary principle of constitutional harmless error review means that it is respondents's burden to prove that the sentencing judge actually considered nonstatutory mitigating circumstances in passing sentence. For the reasons set forth above and in his petition, Hall submits that the record clearly shows that the judge did not consider such evidence. But even if the record were silent, as it was in Morgan v. State, supra, respondents' harmless-error argument would fail. In Delap, respondents met their burden of proof. In this case they clearly have not.[5]

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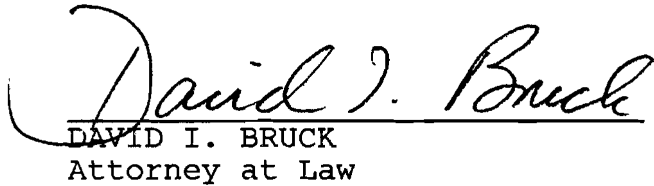
[5]In considering the question of harmless Hitchcock error in Delap, the Court quoted an excerpt from Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987), in which the Eleventh Circuit panel stated that "Hitchcock did not create a per se rule of reversal when the trial judge gives a particular jury instruction." Id. at 1448. On November 10, 1987, the en banc Eleventh Circuit withdrew the portion of the panel opinion in Elledge which this Court cited in Delap. Elledge v. Dugger, ___ F.2d ___ (11th Cir. 1987) (en banc). Thus the validity of the Elledge decision upon which respondents' harmless error argument is based is, to say the least, doubtful. In any event, the validity of the now-withdrawn portion of Elledge dealing with appellate review of Hitchcock errors is immaterial to this case, since reversal is required here "under any standard" of harmless error review. Skipper v. South Carolina, 476 U.S. ___, 106 S.Ct. 1669, 1673 (1986).

CONCLUSION

For the foregoing reasons and for those set forth in his petition for habeas corpus previously filed in this Court, petitioner requests that his sentence of death be vacated.

Respectfully submitted,



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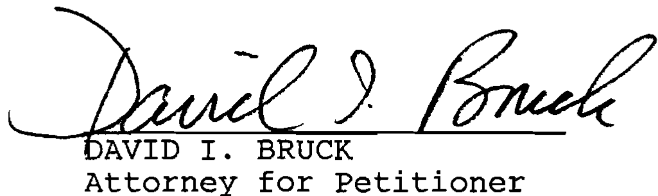
November 12, 1987

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the within Reply to Response to Writ of Habeas Corpus upon counsel for the respondents by depositing one (1) copy of the same in the United States Mail, postage prepaid, and addressed to Mr. Robert J. Landry, Esq., Assistant Attorney General, 1313 Tampa Street, Suite 804, Tampa, Florida 33602.



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November 12, 1987