IN THE SUPREME COURT OF FLORIDA

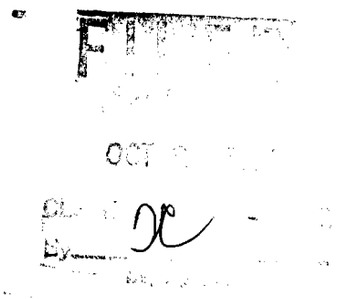
71346

NOLLIE LEE MARTIN,

Petitioner,

-v-

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



PETITION FOR WRIT OF HABEAS CORPUS
AND APPLICATION FOR STAY OF EXECUTION

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NOLLIE LEE MARTIN, Petitioner, v. RICHARD L. DUGGER, Secretary Department of Corrections, State of Florida, Respondent.	)	CASE NO. _____

PETITION FOR WRIT OF HABEAS CORPUS AND
APPLICATION FOR STAY OF EXECUTION

INTRODUCTION AND
STATEMENT OF JURISDICTION

1. This petition presents one question: whether Nollie Lee Martin's pre-Songer death sentenced suffered from the same infirmity that caused a unanimous United States Supreme Court to vacate the death sentence in Hitchcock v. Dugger, 95 L.Ed.2d 347 (1987). Mr. Martin's case is controlled by a series of cases decided by this Court in the wake of Hitchcock: Downs v. Dugger, No. 71,100 (Fla. Sept. 9, 1987); Riley v. Wainwright, No. 69,563 (Fla. Sept. 3, 1987); Thompson v. Dugger, Nos. 70,739 and 70, 781 (Fla. Sept. 9, 1987); and Morgan v. State, No. 69,104 (Fla. Aug. 27, 1987).

2. The limitation upon the jury's consideration of mitigating circumstances in Mr. Martin's case was as profound as the limitation requiring relief in Hitchcock, Downs, Riley, Thompson, and Morgan. It came about, however, through a process different from the limiting processes examined in these other cases. In the other cases, the limitation arose through instructions plainly directing the jury to consider only statutory mitigating circumstances, coupled with arguments by counsel confirming that the jury could consider only such factors. See Delap v. Dugger, No. 71, 194 (Fla. October 8, 1987), slip op. at 6 and n. 5. By contrast, in Mr. Martin's case the limitation came about through an extraordinary conditioning

process that taught the jurors that the mitigating circumstances which would be specified by the judge in his penalty phase instructions (the statutory circumstances) were the only mitigating factors that could be given serious consideration during sentencing deliberations:

(a) During the week-long voir dire, the jurors who ultimately sat in Mr. Martin's case were repeatedly told--indeed, conditioned to think -- that they must "limit their [sentencing] decision to those aggravating and those mitigating factors that the judge instructs you on." R. 2225-26.[1]

(b) In the penalty phase, the closing arguments by the prosecutor and defense counsel, as well as instructions by the judge, focused on the statutory mitigating circumstances as the only mitigating factors that must be given serious consideration in the jury's sentencing deliberations.

(c) Finally, after the jury had been conditioned, and reinforced by the attorneys' arguments and the court's instructions, to limit their consideration of mitigating circumstances, defense counsel and the trial judge suddenly informed the jury at the close of the penalty phase that they were not limited to the statutory circumstances in their consideration of mitigating circumstances. Although potentially corrective of the prior limiting processes, these directions came too late to have any impact on the jury's deliberations and were given as an option which the jury was not obliged to follow. E.g., R 4479 ("[y]ou may, ladies and gentlemen, if you feel it is a mitigating factor, consider [the nonstatutory factors]"). The instruction thus too readily reinforced the jurors' understanding that the statutory mitigating circumstances were the only mitigating factors that must be given serious consideration.

(d) Accordingly, the "totality of the circumstances," Delap v. Dugger, slip op. at 8, shows that Hitchcock error occurred despite the differences between Mr. Martin's case and

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[1] Reference to the record on appeal in Mr. Martin's direct appeal, see Martin v. State, 420 So.2d 583 (Fla. 1982), will be "R___."

the cases thus far decided by this Court in the wake of Hitchcock.

3. A number of similarities between Mr. Martin's case and these other cases also support Mr. Martin's request for habeas corpus relief. As in Hitchcock, Downs, Riley, Thompson, and Morgan, Mr. Martin was sentenced to death prior to this Court's decision in Songer v. State, 365 So.2d 696 (Fla. 1978) (on rehearing). As in Hitchcock, Downs, Riley, Thompson and Morgan, substantial nonstatutory mitigating evidence was presented to the jury; but, as Hitchcock and its progeny make clear, "mere presentation" is not sufficient. As in Hitchcock, Downs, Riley, Thompson and Morgan, Mr. Martin's death sentence violates the Eighth Amendment.

4. Mr. Martin recognizes that the Hitchcock issue is familiar to this Court. We therefore will not extensively re-explore the territory covered by the Court's post-Hitchcock cases.

5. Mr. Martin invokes this Court's original jurisdiction pursuant to Fla. Const. art. V, § 3(b)(9) and Fla. R. App. P. Rule 9.030(a)(3)(1977). Pursuant to Kennedy v. Wainwright, 483 So.2d 424, 426 (Fla. 1986), Mr. Martin asks the Court to exercise its habeas corpus jurisdiction to re-examine its prior appellate judgments in his case. E.g., Delap, slip op. at 2; Downs, slip op. at 2-4; Riley, slip op. at 1-2.

6. In an original proceeding filed and denied in November 1986, Mr. Martin raised the claim he raises now. This Court rejected the claim on the merits. Martin v. State, 497 So.2d 872, 874 & n.3 (Fla. 1986). At that time, Hitchcock was pending decision in the United States Supreme Court. Id. at n.3.

7. This Court should entertain the instant petition. The Court's post-Hitchcock decisions make clear that the United States Supreme Court's decision in Hitchcock was a fundamental change in Florida law and that habeas is the proper procedural vehicle in which to raise the claim. Delap, slip op. at 2; Downs, slip op. at 2-4; Riley, slip op. at 6-7; Thompson, slip

op. at 3-4. The State aggressively asserted procedural default in all of these cases, and in each case this Court cut through the procedural screens to reach the merits.

8. The Court's opinion in Thompson shows that the "class of petitioners" potentially affected by Hitchcock consists of those sentenced prior to the Songer decision on December 21, 1978. Thompson, slip op. at 2-4. All sentencing proceedings in Thompson occurred in September 1978,[2] three months after Lockett was decided and three months before Songer was decided. Thompson, slip op. at 3. By contrast, the jury portion of Mr. Martin's sentencing proceedings occurred even before Lockett;[3] the final judge sentencing took place during the time period covered by Thompson: after Lockett but before Songer.[4] Mr. Martin clearly is within the Hitchcock "class" -- more so, in fact, than was Thompson.

9. The right to an individualized determination of sentence through a procedure in which all relevant mitigating evidence is given independent consideration is the most consistently enforced and zealously guarded of all Eighth Amendment rights applicable to capital proceedings. As we show below, Mr. Martin was sentenced to death in disregard of this right.

PROCEDURAL HISTORY

10. Mr. Martin was indicted by the State of Florida on August 4, 1977, for his role in the first degree murder, robbery, kidnapping, and sexual battery of Patricia Greenfield. He

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[2] Lockett was decided in July 1978. This Court's opinion in Thompson states that Thompson's sentencing occurred in September of 1978. Thompson, slip op. at 3. Thompson entered a guilty plea on September 18, 1978. An advisory jury recommended death and the trial judge immediately imposed death on September 20, 1978. See Application for Stay of Execution and Summary Initial Brief for Appellant and, if Necessary, Motion for Stay of Execution Pending Filing and Disposition of Petition for Writ of Certiorari in the United States Supreme Court, at 4, Thompson v. State, Nos. 70,739 and 70,781 (Fla. Sept. 9, 1987).

[3] The advisory jury in Mr. Martin's case recommended death on May 15, 1978. Lockett was decided in July 1978.

[4] The trial court sentenced Mr. Martin to death on November 13, 1978. Songer was decided on December 21, 1978.

entered a plea of not guilty and filed a notice of intent to rely on the defense of insanity.

11. Mr. Martin was tried before a jury. The jury returned a verdict of guilty as to all counts in the indictment. The jury recommended, and the judge imposed, a sentence of death. This Court affirmed the conviction and sentence. Martin v. State, 420 So.2d 583 (Fla. 1982), cert. denied, 460 U.S. 1056 (1983).

12. Following the signing of a death warrant, Mr. Martin's motion for post-conviction relief pursuant to Fla. R. Crim. P. 3.850 was denied, without evidentiary hearing, as was an application for stay of execution. This Court affirmed. Martin v. State, 455 So.2d 370 (Fla. 1984).

13. Mr. Martin then filed a petition for writ of habeas corpus in federal district court, as well as an application for stay. Both were summarily denied. The court of appeals granted a stay. A divided panel of the court of appeals ultimately affirmed the denial of the habeas petition. Martin v. Wainwright, 770 F.2d 918 (11th Cir. 1986). The Supreme Court thereafter denied certiorari, over the dissents of Justices Blackmun, Brennan and Marshall. Martin v. Wainwright, 93 L.Ed.2d 281 (1986).

14. Following the denial of certiorari, Mr. Martin's execution was scheduled for November 12, 1986. He filed a petition for writ of habeas corpus in this Court and contended--for the first time in his case -- that his death sentence violated Lockett v. Ohio, 438 U.S. 586 (1978), and that his execution should be stayed pending decision in Hitchcock. He also claimed that he was incompetent to be executed and that Florida had no procedure compatible with Ford v. Wainwright, 91 L.Ed.2d 335 (1986). This Court denied the petition for writ of habeas corpus and request for a stay. Martin v. Wainwright, 497 So.2d 872, 873 (Fla. 1986). Counsel for Mr. Martin then advised the Governor of Florida that Mr. Martin was incompetent to be executed, as required by new emergency Rule 3.811. The Governor stayed the scheduled execution but took no further action to

resolve the competency issue. Thereafter, the Supreme Court of the United States unanimously granted Mr. Martin's previously-filed application for stay of execution pending the filing and disposition of a petition for writ of certiorari. Martin v. Wainwright, 93 L.Ed.2d 426 (1986). Certiorari was subsequently denied. Martin v. Wainwright, 95 L.Ed.2d 536 (1987).

15. On August 3, 1987, Governor Martinez signed Executive order No. 87-118, appointing a commission of three psychiatrists pursuant to Fla. Stat. § 922.07 (1985) to examine the competency of Mr. Martin and two other death-sentenced prisoners. This examination was scheduled for September 29, 1987. On September 24, 1987, Mr. Martin filed a petition for writ of quo warranto in this Court, seeking a stay of the § 922.07 proceedings. This Court denied the petition. Thereafter, counsel for Mr. Martin served notice upon the Governor that he would not permit Mr. Martin to participate in the § 922.07 psychiatric examination because of counsel's belief that Florida's procedure for determining competence to be executed, which under Rule 3.811 still required deference to the § 922.07 determination, was in violation of the constitutional requirements articulated in Ford v. Wainwright. Nevertheless the § 922.07 commission convened at Florida State Prison on September 29, 1987 as scheduled. When counsel for Mr. Martin objected to the Commission's effort to evaluate Mr. Martin on the basis of Ford v. Wainwright, however, the commission terminated its efforts to evaluate Mr. Martin. The Ford question is presently being litigated in a separate proceeding.

16. On October 15, 1987, the Governor signed another death warrant for Mr. Martin. Execution presently is scheduled for November 5, 1987 at 7:00 a.m. No stay is in effect.

GROUNDS FOR HABEAS CORPUS RELIEF

17. At every stage of Mr. Martin's trial -- beginning with the voir dire -- the advisory sentencing jury was told repeatedly that in recommending a sentence for Mr. Martin it could consider

only the mitigating factors set out in Florida's capital statute. That message was hammered home by the judge, the prosecutor, and, ironically, by defense counsel himself. Because this limitation was so powerfully ingrained in the juror's minds, when, toward the conclusion of the penalty trial, defense counsel and the judge told the jury that, if they chose to, they could consider nonstatutory mitigating circumstances, this instruction had no effect on the limitation on the jury's consideration of mitigating circumstances. As a consequence, although substantial nonstatutory mitigating evidence was introduced at Mr. Martin's trial, the jury and judge did not seriously consider that evidence in determining whether Mr. Martin should live or die.

18. Mr. Martin's argument will proceed in two parts. First, he will show that a Hitchcock error occurred in his case. Second, he will show that the state cannot carry its burden of demonstrating that the error was harmless.

A. HITCHCOCK ERROR OCCURRED IN THIS CASE

1. The Jury

19. For sentencing purposes, the most important feature of Mr. Martin's trial was the conditioning process through which the jurors went during voir dire. Mr. Martin's defense counsel told the jurors again and again during voir dire that the statute confined their discretion to a consideration of the narrow statutory list of aggravating and mitigating circumstances. Moreover, he extracted promises from the prospective jurors during voir dire that they could and would follow that statutory limit in determining the appropriate sentence.

(a) Early in the jury selection proceedings, defense counsel provided an extended explanation of the limits upon the jury's ability to consider aggravating and mitigating circumstances. The clear message to the jurors was that their sentencing decision could be based only upon the factors specified by the judge, not upon factors that counsel or the jurors might think deserved consideration. Indeed, their

willingness to abide by these limits was made a condition of service.

> MR. LUBIN [defense counsel]: Okay. Mr. Sheldon, in Florida there is a bifurcated trial and you heard about that. First we decided guilt or innocence, and if the jury returns a verdict of guilty on first degree murder, we have a whole separate new trial on the issue of penalty and evidence is taken and so forth.
>
> His Honor will instruct you if we ever get to that stage, and I certainly have to ask questions about it, that there are certain factors that you must base your decision on as to life and death. These are called aggravating and mitigating factors and there is a list, a specified list. It is not just whatever you want to consider or whatever I want you to consider but it is a list, one through six or one through seven on the aggravating and one through six or through seven on the mitigating side.
>
> Aggravating means those factors which militate towards death and mitigating means those which point away from the death penalty. His Honor will instruct you that you have to weigh those factors.
>
> Okay. You hear three on one side or four on the other, and as the triers of the fact, you must weigh the aggravating factors as against the mitigating factors and then decide as to whether or not it is your personal belief that the man should live or die. Can you do that?
>
> MR. SHELDON: Yes
>
> MR. LUBIN: Mr. Wing?
>
> MR. WING: Yes, I think I could.
>
> MR. LUBIN: Miss Kalish?
>
> MISS KALISH: Yes.
>
> MR. LUBIN: Can you all do that? Is there anybody that has any question that they cannot limit their decision to those aggravating and those mitigating factors that the judge instructs you on? Is there anyone?
>
> I am not going to go into them now but there are certain factors. Mr. Whitmer, can you follow those?
>
> MR. WHITMER: Yes, sir.

R 2224-26 (emphasis added).

(b) Thereafter, Mr. Lubin repeatedly reminded the jurors of the limits upon the factors that could be considered in the sentencing process, emphasizing that the jurors could not

consider nonspecified factors even if they seemed deserving of consideration. He continued as well to inquire into each juror's willingness to adhere to these limits:

> MR. LUBIN: Do you think you can follow the judge's instructions when he instructs you that there are certain factors to take into account in the second stage of the trial and you have to weigh the aggravating factors against the mitigating factors and then make a determination?

R. 2244-45.

> MR. LUBIN: Now, His Honor will, as I said, mention to you what the aggravating and what the mitigating factors are. Will you follow those and apply those to your determination if we ever get that far or would you want to apply your own standards for capital punishment when you think it is deserved and when it is not deserved? I would really appreciate your full honesty.

R 2249 (emphasis added).

> MR. LUBIN: At the close of the case if we go to a second stage, His Honor is going to instruct you on certain factors that you have to take into account and you will have to weigh those factors. Will you be able to do that fairly and impartially?

R 2262. See also R 2266-67 (similar reference to the "certain factors" pertinent to the sentencing decision).

> MR. LUBIN: Now, His Honor will instruct you I believe at the close of the case, if we reach the second stage, that there are certain aggravating and certain mitigating factors upon which you must base your decision as to life or death. These are statutory and these are the ones you have to weigh.
>
> He will instruct you how to weigh these. Can you stick to those the legislature has set forth in determining whether or not death should be imposed?

R 2433-34 (emphasis added).

> MR. LUBIN: [W]ill you be able to consider the factors that His Honor instructs you on in determining whether or not death is an appropriate sentence if we get that far, and if His Honor tells you you are to consider these factors and these factors alone, can you do that?

R 2679 (emphasis added).

> MR. LUBIN: . . . do you understand that if we get to that point of the jury deciding that, . . . there will be certain aggravating factors and certain mitigating factors you

> will have to consider and the judge will instruct you on what those are? Do you understand that?
>
> MR. WRIGHT: I understand that.
>
> MR. WEIGEL: Yes, I do.
>
> MR. LUBIN: Do you feel you will be able to weigh those factors and consider them or do you feel you might be guided by some personal feelings as to what factors to consider?
>
> MR. WEIGEL: No, I would go by the guidelines.
>
> MR. LUBIN: You, sir?
>
> MR. WRIGHT: I would follow the guidelines.

R. 2800 (emphasis added).

20. Defense counsel was not alone in teaching the jurors about their limits. The prosecutor was just as explicit:

> MISS VITUNAC: . . . His Honor will read you a list as to what the legislature decides are aggravating circumstances and those that they have decided to be mitigating circumstances and it will be your function to listen to the evidence and weigh one against the other to determine whether or not your recommendation should be death or life imprisonment. Will you agree to follow those, whatever they are?
>
> MR. JORDAN: Yes.

R 2720-21 (emphasis added).

> MISS VITUNAC: Would you weigh the aggravating and mitigating circumstances that His Honor will give you at the close of all the evidence on that issue?
>
> MR. STUCKER: Yes, I would.

R 2823.

21. There can be little doubt that this conditioning process was effective, for the rules imparted by counsel were rules to which the jurors were peculiarly receptive. These rules removed the burden from the jurors of trying to ascertain what factors should properly be considered in their sentencing deliberations. They thus made the awesome task of sentencing seem more manageable. The sense of relief these rules gave to jurors was particularly well-demonstrated in Mr. Lubin's questioning of Mr. Prescott, Ms. Petrillo, and Ms. Thomas:

> MR. LUBIN: You are willing to weigh the aggravating and mitigating factors?

> MR. PRESCOTT: Definitely.
>
> MR. LUBIN: And then make a decision on that?
>
> MR. PRESCOTT: Yes.
>
> MR. LUBIN: You wouldn't go in --
>
> MR. PRESCOTT: I'm relieved to learn in this courtroom there is mitigating circumstances and there is a set standard. I would not want that responsibility solely upon myself without some kind of guidance.
>
> MR. LUBIN: Are you glad it is not mandatory?
>
> MR. PRESCOTT: Yes.
>
> MR. LUBIN: Are you, Miss Petrillo?
>
> MISS PETRILLO:: Yes.
>
> MR. LUBIN: Are you, Miss Thomas?
>
> MISS THOMAS: Yes. That was the first question I asked myself.
>
> MR. LUBIN: You wouldn't want it to be a mandatory sentence?
>
> MISS THOMAS: I'm glad there is an alternative and I'm glad there are guidelines of aggravating and mitigating circumstances.
>
> MR. LUBIN: Recognizing the enormity of that decision which you would have to make, you would seriously weigh the guidelines?
>
> MISS THOMAS: Yes.

R 2537-39 (emphasis added). Although Ms. Thomas was later struck peremptorily, both Mr. Prescott and Ms. Petrillo ultimately sat on Mr. Martin's jury. See R 4508 (poll of jury after sentence of death recommended).

22. The jurors were thus strongly conditioned to expect the instructions and argument at the penalty trial to limit their consideration of aggravating and mitigating factors. And with one exception -- addressed in ¶¶ 27-29, infra -- these expectations were routinely satisfied. Before they heard the penalty trial evidence the judge explained the factors they were to evaluate in the evidence:

> [Y]ou will hear me explain or recite certain aggravating and mitigating circumstances which you are to consider. I will be giving you a list of those actual aggravating and mitigating circumstances to take back with you when you begin your deliberations on this phase of the trial.

R 4259 (emphasis added).

> At the conclusion of the taking of the evidence and of the argument of the lawyers, you will be instructed on the factors in aggravation and mitigation that you may consider and I am going to do it before as well.

R 4261 (emphasis added). Specifically as to mitigation, the judge then instructed,

> The mitigating circumstances which you may consider, if established by the evidence, are these: [list of statutory factors]

R 4263. The judge reminded the jury that he would give them a written list:

> As I said earlier, ladies and gentlemen, I will be sending these aggravating circumstances and mitigating circumstances back with you when you deliberate and I will repeat this charge in major portion following the argument.

R 4267.

23. Thereafter, both the prosecutor and defense counsel made brief opening statements respecting the penalty phase evidence. The state's argument did not mention mitigation in any fashion. The defense did, drawing a distinction for the jury between the statutory mitigation (R 4269) and the "other mitigating factors which are not listed," and explaining that these "other" factors would be contained in "a letter which was sent by a member of Mr. Martin's family" (R 4270), and (apparently) in the testimony of an expert on the "deterrent value" of the death penalty. R 4270. While these "nonlisted" mitigating factors were clearly factors that the jury had been taught not to consider, at this point counsel made no effort to explain how they might, nevertheless, be properly considered.

24. The jury continued to receive clear signals on the permissible scope of mitigation, consistent with all that had gone before, during the testimony at the penalty phase. For example, the state objected (in the jury's presence) to the deterrence expert's testimony because it was unrelated to the specified aggravating and mitigating circumstances:

> MISS VITUNAC: I object, Your Honor, as to the relevancy of the testimony, and secondly, he is not qualified as an expert because

> there is no expertise in the element of the death penalty. It does not go to the aggravating and mitigating circumstances.

R 4326 (emphasis added). The defense response confirmed the rule that evidence had to be relevant to such factors in order to be considered:

> MR. LUBIN: It will tie into that.

Id. (emphasis added).

25. At the close of evidence, but before closing arguments and final instruction, the judge again told the jury, "After the charge, you will be getting the [list of] aggravating and mitigating circumstances and the evidence that has been received." R 4437.

26. The prosecutor's closing argument confirmed anew the principle that the jury had consistently been told would guide their sentencing deliberations: while they could consider any evidence relevant to the statutory mitigating circumstances, they could not consider mitigating (or aggravating) evidence unrelated to the statutory circumstances. The prosecutor confirmed this principle in two ways. First, when she turned in her argument from the aggravating circumstances to the mitigating circumstances, she made plain that the statute delimited the boundaries of proper consideration:

> Under mitigation, in the statute the law allows and requires you to consider . . . [discussing seriatim only the statutory mitigating circumstances in the evidentiary context of Mr. Martin's case].

R 4446-54. Second, having finished her discussion of the only mitigating circumstances that "the law allows and requires you to consider," R 4446, the prosecutor explained why Mr. Martin's nonstatutory mitigating evidence of the lack of deterrent effect of the death penalty could not be properly considered:

> You heard the professor's testimony, Dr. Zeisel, Professor Zeisel from the University of Chicago Law School with respect to the deterrent effect or the lack of deterrents [sic] of the death penalty.
>
> Ladies and gentlemen, I submit to you the only reason that testimony was offered to you was to ask you not to follow the law as

> it exists in the State of Florida. That was the only reason for that testimony.
>
> The legislature of the State of Florida has found that the death penalty should be the law in the State of Florida and it is the law in the State of Florida. Those same arguments Dr. Zeisel presented here in Court were presented to the Florida State legislature and they declined to adopt that philosophy. The death penalty exists and no where in the aggravating circumstances and no where in the mitigating circumstances will you find any indication or any particular circumstance which says, "That if you find the death penalty is not a deterrent, then you are not to impose the death penalty."
>
> It is not an aggravating circumstance and it is not a mitigating circumstance. That is a matter for the legislature.

R 4454-55 (emphasis added). The argument that lack of deterrence could not be considered in mitigation since it was not specified by the Florida legislature as a mitigating circumstance plainly would have seemed right to the jury, whose members had been taught and retaught that the legislature had indeed delimited the aggravating and mitigating circumstances to be considered in capital sentencing deliberations.

27. Defense counsel's argument, by contrast, began to give the jury the first conflicting information about the factors they could consider in their sentencing deliberations. For the first time during the course of Mr. Martin's trial, defense counsel, who along with the prosecutor and the trial judge had consistently and repetitively informed the jury that they could not consider nonstatutory mitigating circumstances, suggested that they could consider such circumstances if they wanted to. In providing this information, Mr. Lubin drew a sharp distinction between statutory and nonstatutory mitigating circumstances. Statutory mitigating circumstances were "mandated" by the legislature as "very important," and "must be considered" in the sentencing process:

> The Florida legislature has mandated that there are certain factors which are very important and which factors must be considered in deciding whether or not someone should live or someone should die and these are called the aggravating and mitigating factors and we have been referring to them at various times throughout this trial.

R 4456-57. Nonstatutory mitigating circumstances, by contrast, were not required to be considered but could, nevertheless, be considered if the jury chose to:

> There are other factors which you ladies and gentlemen can consider in mitigation which are not listed in the statute and in the jury instructions. You may, ladies and gentlemen, if you feel it is a mitigating factor, consider [each of several nonstatutory factors].

R 4479-82 (emphasis added). In discussing each of the nonstatutory factors thereafter, Mr. Lubin each time re-emphasized that the jury had no obligation whatsoever to consider any of these factors:

> You may consider [the evidence of lack of deterrence].... If you feel that is a mitigating factor, you may consider it.
>
> You may consider [the harm to Mr. Martin's family if he were executed]....
>
> If you feel [there is a slight doubt as to whether Mr. Martin was insane, in a guilt-innocence sense]..., you can consider that.
>
> You may also consider if you feel it is a mitigating factor, the [lesser] sentence, the deal received by [codefendant] Gary Forbes.

R 4479-80, 4480, 4481.

28. In order to support his argument, Mr. Lubin requested a special instruction to the jury that there was no limitation on the mitigating factors. R 4412. The court agreed to give a modified version of such an instruction, giving the jury discretion whether to even consider in mitigation the factors not listed in the statute. The discussion of this proposed instruction during the charge conference shows that all participants thought the legislatively-listed factors were the only "true" mitigation. The jury did not even have to consider factors not listed. The jury's judgment of what was mitigating was to be relegated to second-guessing the Florida legislature, but only if the jury wanted to.

> THE COURT: What the State and I are talking about is, I have the notion that the sense of those decisions, the legislature told you that A through E or whatever it is, are mitigating. There is no question about that. They are mitigating by operation of law.

> Now, whether or not other matters may be mitigating is a matter for the jury to decide and the defense is not restricted. In other words, he may argue other things are mitigating and the jury decides whether or not they are. Isn't that the sense of it?
>
> MISS VITUNAC: Yes.
>
> MR. LUBIN: Yes.
>
> THE COURT: Is there some nice way we can say that?
>
> MR. LUBIN: I thought I said it reasonably nicely.
>
> THE COURT: I am not demeaning your instruction.
>
> MR. LUBIN: How about there is no such limitation upon which factors?
>
> THE COURT: However, the jury is the fact finder which determines whether or not a factor is mitigating, if it is not one of the enumerated ones by the statute....

R 4413-14 (emphasis added).

29. Following the closing arguments by counsel, Mr. Martin's jury was charged in accord with this understanding of the law. In relevant part, the jury was first charged as follows:

> The aggravating circumstances which you may consider are limited to those upon which I will instruct you. However, there is no such limitation upon the mitigating factors which you may consider. However, the jury is the fact finder which determines whether or not a factor is mitigating if it is not one enumerated by the statute.

R 4491. Following this instruction, the standard instruction -- the jury instruction condemned in Hitchcock -- was read to the jury, listing only the statutory aggravation and mitigation, prefaced for each section by the following:

> Now, the aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence:

R 4491.

> The mitigating circumstances which you may consider if established by the evidence are these:

R 4492. Only the statutory list was sent back with the jury,

R 4259, 4267, reinforcing the jury's focus on the statutory mitigating factors. Downs, slip op. at 2 ("the 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 to use during their deliberations").

30. These instructions could not effectively have cured the Lockett error which had been building throughout Mr. Martin's trial. A reasonable juror, hearing these instructions in the context of all that had preceded them, could well have been left with an understanding of the law that violated Hitchcock and Lockett. See Sandstrom v. Montana, 442 U.S. 510, 514 (1979) ("whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable jury could have interpreted the instructions"). Faced with these instructions, a reasonable juror could have believed that he or she need not consider -- in any respect -- nonstatutory mitigating circumstances.

(a) Throughout voir dire and through the trial up until defense counsel's closing argument in the penalty phase, the jurors were told by both lawyers and by the judge, without exception, that they could -- and must -- consider only statutory mitigating circumstances. Factors outside this list were repeatedly characterized as unavailable for consideration.

(b) Moreover, throughout voir dire, the jurors pledged that they would not consider aggravating or mitigating factors beyond the statutory lists.

(c) Some jurors expressed a great sense of relief that they could not consider factors beyond the list, because they felt the appropriate identification of such factors on their own, without guidance, would be an enormous responsibility. They were relieved not to have that responsibility.

(d) The instructions actually given, especially in light of Mr. Lubin's argument, plainly communicated to the jury that they were under no obligation to consider nonstatutory mitigating circumstances. They communicated as well the very

clear message that nonstatutory mitigating factors were relatively insignificant as compared to the statutory circumstances, since the legislature, by omitting them from the statutory list, had not found the various categories of nonstatutory factors "clearly" mitigating.

(e) Given these circumstances, a reasonable juror could easily have decided that he or she was not obliged to consider the nonstatutory mitigating circumstances. Further, he or she could reasonably have decided not to give any consideration at all to such factors, even though it was permissible, because the "de novo" determination of what was mitigating or not was too great a responsibility or because the weight of these circumstances would simply be too insignificant -- in the absence of statutory mitigating circumstances -- to offset the weight of the aggravating circumstances.

(f) Such an interpretation by the juror of his or her duty, though reasonable, would have violated Lockett. Indeed it would have established a violation that was factually indistinguishable from the violation in Lockett itself. In Lockett, the Ohio statute permitted the consideration of nonstatutory mitigating factors but precluded the sentencer from basing a sentence upon such factors. A nonstatutory factor was "relevant for mitigating purposes only if it [was] determined that it shed[] some light on one of the three statutory mitigating factors." 438 U.S. at 608. It was this aspect of the statute that was unconstitutional: it "prevent[ed] the sentencer . . . from giving independent mitigating weight to" nonstatutory mitigating factors, id. at 605, thus "creat[ing] the risk that the death penalty [would] be imposed in spite of factors which ... call[ed] for a less severe penalty." Id. While the instructions in Mr. Martin's case did not explicitly preclude the sentencer from giving independent mitigating weight to nonstatutory mitigating factors, taken together, the instructions, the voir dire, and the arguments of counsel, not only permitted but manifestly discouraged reasonable jurors from

doing so. These instructions, along with the voir dire and the argument of counsel accordingly, violated Lockett and Hitchcock.

31. "Perhaps an extraordinarily attentive juror might rationally have drawn [from these instructions] an inference" that "his consideration of mitigating factors was not limited to those announced by the trial court." Washington v. Watkins, 655 F.2d 1346, 1370 (5th Cir. 1981). At best such reasoning would suggest that there is more than one reasonable interpretation, but that is not the test. The test is whether a reasonable juror could have interpreted the instructions in Mr. Martin's case in a manner so as to violate the constitution. Id. (citing Sandstrom v. Montana, supra); accord Cronin v. State, 470 So. 2d 802, 804 (Fla. 4th DCA 1985) (standard of review is "whether there was a reasonable possibility that the jury could have been misled").[5] Plainly a reasonable juror could have.

32. This is especially so in light of Delap v. Dugger, No. 71, 194 (Fla. October 8, 1987), where the Court stressed that prosecutorial argument obviated the harm of a jury instruction that violated Hitchcock. See also Downs, slip op. at 5 (prosecutor's argument "exacerbated" improper jury instructions); Thompson, slip op. at 4 ("the state, in its closing arguments . . . listed the statutory mitigating circumstances as those which the jury could consider in its deliberations"); Riley, slip op. at 5 ("in closing argument, the prosecutor discussed 'the' mitigating circumstances to see if 'they' existed and then checked off the statutory list"). Counsel's directions to the jurors during voir dire and counsel's subsequent arguments were equally relevant here. This case is the mirror image of Delap: Here the harm of the attorneys' voir dire directions and

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[5] See also Godfrey v. Georgia, 446 U.S. 420, 428-29 (1980) (reviewing how a "person of ordinary sensibility could" interpret an instruction and finding that "the jury's interpretation . . . can only be the subject of sheer speculation" (emphasis added)); Andres v. United States, 333 U.S. 740, 752 (1948) (Noting "[t]hat [since] reasonable men might derive a meaning from the instructions given other than the proper meaning" relief was required, because "[i]n death cases doubts such as those presented here should be resolved in favor of the accused" (emphasis added)).

subsequent arguments was not cured by the subsequent jury instructions. The "totality of circumstances" show that a Hitchcock error occurred in the jury phase of Mr. Martin's sentencing trial. Delap, slip op. at 8.

2. The Judge

33. The sentencing judge's final "Findings and Sentence" is strong evidence that he limited his own consideration as well to the statutory factors. Like the sentencing orders in Hitchcock and its progeny, the sentencing order here considered and analyzed only the enumerated statutory mitigating circumstances, one by one. Mr. Martin's mitigating evidence was considered as relevant only to the statutory factors.

34. The crucial portion of the sentencing order was captioned "AGGRAVATING AND MITIGATING CIRCUMSTANCES PURSUANT TO FLORIDA STATUTE 921.141." R 4833 (emphasis added). The order discussed mitigation in this way:

> The only mitigating circumstances that could arguably apply are:
>
> (b) The capital felony was committed under the influence of extreme mental or emotional disturbance, and
>
> (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.
>
> Mitigating circumstances (a), (c), (d), (e) and (g) do not apply.
>
> A considerable portion of this case was devoted to the defendant's assertion that he was not guilty by reason of insanity; that evidence obviously relates to mitigating circumstances (b) and (f).

R 4834. The Court later referred to "the two mitigating circumstances under consideration." R 4836. The Court placed particular reliance upon the jury's recommendation of death, R 4836 -- a recommendation which, we have shown, was infected with Hitchcock error.

35. The trial court's language in the present case is thus indistinguishable from the language found in Hitchcock to reveal

the judge's failure to consider nonstatutory mitigating circumstances. 95 L.Ed.2d at 353. See also Morgan, slip op. at 2 ("[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, slip op. at 5-6 ("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'" (emphasis in original)). Based on the penalty phase charge conference and the penalty phase instructions, Mr. Martin's trial judge plainly believed that there was no obligation to consider nonstatutory mitigating circumstances. His sentencing order reveals that he gave no consideration to such factors.

B. THE HITCHCOCK ERROR WAS NOT HARMLESS

36. Evidence and argument relating to nonstatutory mitigating factors were presented in Mr. Martin's case. The State was absolutely correct when it argued in opposition to Mr. Martin's certiorari petition earlier this year that evidence of nonstatutory mitigating circumstances was presented to the jury and judge.[6] Far more, in fact, was presented here than was presented in Hitchcock, 95 L.Ed.2d at 353, or in Downs, slip op. at 5-6. But as this Court's post-Hitchcock cases demonstrate, "mere presentation" is not enough. Riley, slip op. at 7; Downs, slip op. at 3-4. The jury and judge must be permitted to consider the evidence that is presented. They must be permitted to listen.

37. While in this case some statutory aggravating circumstances were arguably present, substantial nonstatutory mitigating circumstances were manifestly present. On a far less compelling record, this Court has emphasized that "we cannot know

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[6]Respondent's Brief in Opposition to Petition for Writ of Certiorari, Martin v. Dugger, 95 L.Ed 536 (1987).

. . . [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 consideration of nonstatutory mitigating circumstances] would have had no effect upon the jury's deliberations." Skipper v. South Carolina, 90 L. Ed.2d 1, 9 (1986).

38. Even before Riley, Thompson, Downs and Morgan, this Court had not hesitated to reverse for resentencing where the mitigating circumstance instructions were erroneous.[7] This is so because 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).

39. Substantial nonstatutory mitigation was presented for Mr. Martin's jury and judge to consider and weigh. Mr. Martin's brother wrote a letter which was read to the jury making an impassioned plea for mercy, informing the jury that Mr. Martin's parents were quite ill and that Nollie's execution would kill them, too. The letter details the family's strong Christian heritage,[8] the numerous medical problems suffered by all of them, their love for Nollie, and other family history persuasive to the fact finder. R 4387-4395.

40. Mr. Martin was mentally ill. However, without any obligation to consider mental illness as a nonstatutory mitigating circumstance, the jury very likely weighed, and the

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[7] 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 factors, 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).

[8] See Fead v. State, No. 68,341 (Fla. Sept. 3, 1987)(facts that defendant was a hard worker and a responsible family member were valid nonstatutory mitigating factors).

judge plainly did weigh, the extensive testimony of Mr. Martin's mental illness solely against the strict criteria of the statutory "mental" mitigating circumstances, Fla. Stat. §§ 921.141(6)(b),(f). Hitchcock and Lockett nevertheless require any infirmity to be considered.[9] Even the State's experts testified that Mr. Martin was mentally ill and that he was under the influence of an emotional disturbance at the time of the crime. R 3773, 3855, 3766-7, 3850.

41. The evidence of Mr. Martin's mental disorders was substantial. Every psychiatrist and psychologist who interviewed Mr. Martin agreed that he was mentally ill. Dr. Barnard, who appeared at both the hearing on competency to stand trial and at the advisory sentencing proceeding, testified that in his opinion Mr. Martin at the time of the offense, was under the influence of mental or emotional disturbance, acted under duress and his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired. R 4299. He diagnosed Mr. Martin as a manipulative chronic paranoid schizophrenic. R 176, 4294. Dr. Barnard related Mr. Martin's obsessional thinking, delusions and hallucinations which he indicated were symptomatic of psychosis. R 183-184, 4296-4297. He also testified about his observation of Mr. Martin's inappropriate behavior -- he would laugh and grimace and at times shake. R 204. Dr. Barnard believed that the concurrence of opinion that Mr. Martin was a psychopath was interfering with some of the experts' ability to see that he was also psychotic. R 187, 221, 4301-4302.

42. Dr. Scherer, a psychologist, appeared at the competency hearing and at trial. His opinion was that Mr. Martin was not psychotic (R 3912); however, the tests he administered indicated

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[9] This Court has held, similarly, that mental illness or disorder can be a nonstatutory mitigating circumstance. See e.g., Huddleston v. State, 475 So.2d 204 (Fla. 1985)(troubled personal life, including suicidal impulses, depression and deep frustration, are valid nonstatutory mitigating factors); Amazon v. State, 487 So.2d 8 (Fla. 1986)(personality disturbance is valid nonstatutory mitigating factor); Moody v. State, 418 So.2d 989 (Fla. 1982)(same).

either that Mr. Martin was faking or suffering from extreme psychosis. R 309-310, 3935. Drs. Fueyo and Blackman also testified at the competency hearing and at trial. They diagnosed Mr. Martin as a psychopath or sociopath. R 343, 390, 3766-3769, 3850. Both however concluded that Mr. Martin was mentally ill. Dr. Fueyo believed that Mr. Martin was a sick individual whose actions were the product of his mental illness. R 3767-3768. Further, he believed the offenses were committed while Mr. Martin was under the influence of mental or emotional disturbance as a result of his disordered personality. R 3773. Dr. Blackman characterized Mr. Martin as a sick man and agreed that Mr. Martin was mentally ill. R 3855. He also believed that Mr. Martin's actions were the product of his mental illness. R 3872.

43. Dr. Vaughn, who testified at trial and during the advisory sentencing proceedings, was also the one doctor who spent the most time interviewing and evaluating Mr. Martin. Dr. Vaughn examined Mr. Martin on seven occasions. R 1100, 3649. Dr. Vaughn testified that in his opinion Mr. Martin at the time of the offense, was under the influence of mental or emotional disturbance, acted under duress and his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. R 4376-4377. His opinion would be the same even if hypothetically Mr. Martin were not, as he believed him to be, psychotic, since even a psychopath could have a great deal of internal emotional turmoil. R 4379.[10] Dr. Vaughn believed Mr. Martin suffered from pseudo-psychopathic schizophrenia, an illness where the psychopathy masks the symptoms of the underlying schizophrenia. R 1109. Dr. Vaughn's opinions were based on a variety of symptoms he recorded during his interviews. Mr. Martin showed disorders in the four "A's" of schizophrenia -- affect, autism, association and ambivalence. R 3656-3658. Mr. Martin believed he was controlled by Satan (R 1102, 3668), experienced hallucinations and delusions and would hear voices. R 1104, 1106, 3667, 3684.

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[10] Amazon, supra; Moody, supra.

This was also found in Mr. Martin's confession, where Mr. Martin saw the deceased become a beast or monster (R 3697), and as the statement progressed Mr. Martin began to deterioriate and became more in touch with his inside world. R 3732. The doctor observed frequent trembling unrelated to the conversation (R 3674) and Mr. Martin's eyes were symptomatic of autism -- a preoccupation with the self. R 3676. An important factor was a history of severe headaches going back at least ten years.[11] R 3663-3664. Of great significance was the fact that when given thorazine, a powerful anti-psychotic medication, Mr. Martin never experienced any side effects as he would if he were not psychotic. R 365-3654.

44. Evidence of Mr. Martin's severe mental disorders was not limited to the testimony of medical experts. [12] An interrogating police officer, Detective Glover, stated that Mr. Martin's behavior during the interrogation was abnormal or weird even compared to someone being questioned for first degree murder. R 649. These unusual signs became more and more pronounced as the interrogation proceeded. R 647. Specifically Mr. Martin was observed by Detective Glover to be very emotional; wringing his hands, shivering, crying, grimacing, shaking or trembling, abnormally staring, and depressed. R 647-649. Mr. Martin also used words out of context and inappropriately at times. R 666. John Scarola, another of Mr. Martin's interrogators, described Mr. Martin during the giving of the taped statement as under emotional strain, having emotional difficulty and emotionally disturbed. R 818, 818, 820. And prior to the July 11th statement, after Mr. Martin had been subdued and sustained a cut on his forehead, Detective Glover described Mr. Martin as wild, frustrated, trembling and in a very

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[11]Harry Martin, Mr. Martin's older brother testified that when Mr. Martin lived at home he would lock himself up in his room and would eat alone. Mr. Martin would also have terrible headaches and during these periods he would shake. R 3630-3631.

[12] This testimony, however, was available only to the judge, since it was presented only in the hearing on the motion to suppress Mr. Martin's confessions, not at trial.

emotional state. R 638-642. Throughout the interrogation Mr. Martin's mental problems were discussed. Mr. Martin complained about uncontrollable forces which would come over him. He said that he had not had peace of mind for years, that he would alternate between feelings of depression and euphoria. At times his body would disintegrate and his mind would go into the clouds. R 665-66. Scarola promised Mr. Martin that he would tell the Court of Mr. Martin's desire for psychiatric help. R 658, 796.

45. While this enormous variety of evidence respecting Mr. Martin's mental and emotional state would have permitted reasonable factfinders to find either way as to the presence of the statutory mental mitigating circumstances, the evidence would not have allowed a reasonable factfinder to find nothing in mitigation. At the very least, all of the expert and lay witnesses testified that Mr. Martin suffered mental and emotional disorders that substantially influenced his behavior. Such evidence manifestly established a nonstatutory mitigating circumstance, see n. 9, supra, which under Lockett and its progeny had to be given serious consideration in the process of deciding Mr. Martin's sentence.

46. In addition to Mr. Martin's substantial mental problems there was unrefuted testimony that he was an alcoholic.[13] Gary Forbes, the state's chief witness, stated that Mr. Martin consumed grain alcohol on a daily basis. R 3287-3288. When defense counsel recited Detective Glover's observations to John Parr, an expert on alcohol addiction, Mr. Parr gave his expert opinion that Mr. Martin was undergoing withdrawal during his interrogation. R 1068. Dr. Vaughn testified that Mr. Martin's alcoholism exacerbated his psychosis and may have brought on psychotic episodes. R 3685-3686.

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[13] Amazon, supra (history of drug and alcohol abuse valid nonstatutory mitigating factor); Huddleston, supra (same); Norris v. State, 429 So.2d 688 (Fla. 1983); Fead, supra (crime committed while under influence of alcohol was valid nonstatutory mitigating factor).

47. Finally, there was evidence from which the jury might have concluded that Mr. Martin's codefendant, Gary Forbes, who received a lesser sentence, was of equal culpability. See R 4481-82 (defense counsel's closing argument, noting that Gary Forbes, "who admittedly was suffering no mental infirmity and no emotional disturbance at the time, . . . voluntarily went along and partook in this, . . . raped Patricia Greenfield and testified that he did"). "This Court 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." Downs v. Dugger, slip op. at 5.

48. Thus, significant evidence of at least four nonstatutory mitigating factors was available to the jury and the judge before Mr. Martin's sentencing order was entered. Under these circumstances, the Court cannot "confidently conclude that [the jury's and judge's consideration of nonstatutory mitigating evidence] would have had no effect upon the jury's [and judge's] deliberations." Skipper v. South Carolina, 90 L.Ed.2d at 9. See also Hitchcock, 95 L.Ed.2d at 353. Mr. Martin's case is not one in which the only reasonable sentence would have been death. While statutory aggravating circumstances were present, substantial nonstatutory mitigating circumstances were also present.[14] On such a record, this Court has emphasized, "we cannot know . . . [whether] . . . the result of the weighing process by both the jury and the judge would have been different" in the absence of factors unconstitutionally skewing the jury's

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[14] In dealing with questions of harmless error in the context of a Hitchcock violation, it might be helpful to draw on this Court's Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975), standard governing jury overrides. A jury's life recommendation may be reasonable (and thus not subject to override) even if based on mitigating circumstances not enumerated in the capital statute. Herzog v. State, 439 So. 2d 1379, 1381 (Fla. 1983); Washington v. State, 432 So. 2d 44, 48 (Fla. 1983); Gilvin v. State, So. 2d 996, 999 (Fla. 1982); Welty v. State, 402 So. 2d 1159, 1164-65 (Fla. 1981). Had Mr. Martin's jury recommended life imprisonment, the nonstatutory mitigating evidence before the jury would have made an override improper under Tedder. Consequently, the exclusion of such nonstatutory mitigating evidence from consideration by the jury means that the Hitchcock error that actually occurred could not be harmless.

sentencing deliberations. Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977). This is so because

> the procedure to be followed by trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present . . . .

Id. (quoting State v. Dixon, 283 So.2d 1, 10 (Fla. 1973)). Accordingly, this Court cannot hold that the limitation upon the jury's and judge's consideration of mitigating circumstances was harmless error.

49. As the State correctly argued in its opposition to Mr. Martin's certiorari petition,[15] nonstatutory mitigating evidence was presented to Mr. Martin's judge and jury. As in Hitchcock, Downs, Riley, Thompson and Morgan, substantial nonstatutory mitigating evidence was presented to the jury; but, as Hitchcock and its progeny make clear, "mere presentation" is not sufficient. As in Hitchcock, Downs, Riley, Thompson and Morgan, Mr. Martin's death sentence violates the Eighth Amendment.

CONCLUSION

50. For these reasons, the Court should grant a stay of execution, consider anew Mr. Martin's Hitchcock claim, and remand for a new sentencing proceeding with a jury.

Respectfully submitted,

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[15] See supra note 6 .

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CERTIFICATE OF SERVICE

I, Richard H. Burr, III certify that a copy hereof has been served upon counsel for respondent by sending a copy by overnight delivery to Joy B. Shearer, Assistant Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 3401, this 22d day of October, 1987.

Richard H. Burr III

Of Counsel