IN THE SUPREME COURT OF FLORIDA

NOLLIE LEE MARTIN, Petitioner, v. RICHARD L. DUGGER, Secretary, Florida Department of Corrections. Respondent.	)	CASE NO. 71,346

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS AND STAY OF EXECUTION

COMES NOW the Respondent, through his undersigned counsel, and responds in opposition to the Petition for Habeas Corpus filed by the Petitioner, Nollie Lee Martin, and states:

INTRODUCTION

The Petitioner asserts he is entitled to a resentencing pursuant to the United States Supreme Court's decision in Hitchcock v. Dugger, ___U.S.___, 95 L.Ed.2d 347 (1987), and the recent decisions by this Court interpreting Hitchcock.

The Respondent maintains the petition is procedurally barred, no Hitchcock error occurred, and any error was harmless.

A. PROCEDURAL BAR

In 1986, this Court rejected Martin's claim that consideration of the mitigating factors was limited to those in the Statute. Martin v. Wainwright, 497 So.2d 872 (Fla. 1986). That decision is the law of the case and the matter is not open to relitigation. Terry v. State, 467 So.2d 761, 763 (4th DCA Fla. 1985). It is only in the case of error that prejudicially denies fundamental constitutional rights that the court will revisit a previously settled matter. Kennedy v. Wainwright, 483 So.2d 424, 426 (Fla. 1986).

Respondent submits that in Downs v. Dugger, No. 71,100 (Fla. September 9, 1987), and Riley v. Wainwright, No. 69,563 (Fla. September 3, 1987), this Court has read Hitchcock too

broadly; it does not represent the type of jurisprudential upheavel contemplated in Witt v. State, 387 So.2d 922 (Fla.) cert. denied 449 U.S. 1067 (1980), as requiring retroactive application. In support of its position, Respondent cites the United States Supreme Court opinion in Darden v. Wainwright, 477 U.S. ___, 106 S.Ct ___, 91 L.Ed.2d 144, 160 (1986). In the Darden case the Court had the opportunity to reach the same result which this Court believes was reached in Hitchcock. However, the Supreme Court specifically overlooked the possibility that the Florida Statute violated the Eighth Amendment by its limitation of aggravating mitigating factors based on the actions of the trial judge on that particular record. Id., at 160. Likewise in Hall v. Dugger, No. 87-5048, cert. denied, October 13, 1987, the Supreme Court denied certiorari where the petitioner attempted to assert a Hitchcock claim that was previously barred. Hall v. Wainwright, 733 F.2d 766, 777 (11th Cir. 1984); Hall v. Wainwright, 805 F.2d 945 (11th Cir. 1986).

B. MERITS - NO HITCHCOCK Error

Assuming arguendo that Martin's claim is at all cognizable on the merits, it is clear that on the Record herein, the trial judge "ha[d] the proper view of the law", and did not limit the jury's consideration to purely statutory mitigation. Elledge v. Dugger, 823 F.2d 1439, 1449 (11th Cir. 1987). The significance of the distinction between the instructions given to the jury herein, and those found offensive in Hitchcock can not be overstated. The basis of the Eighth and Fourteenth Amendment successful challenge in Hitchcock, were instructions which merely listed statutory mitigating circumstances, subsequent to informing the jury that "the mitigating circumstances you may consider, if established by the evidence, are the following." Hitchcock, 95 L.Ed.2d at 353. By contrast, in the instant case, in response to defense counsel's persistent statements, and request for a special jury instruction that would inform the jury that mitigating factors, besides statutory ones, could be

considered (R.4406, 4412), the trial judge and the State expressly agreed that this was a correct interpretation of law.

> THE COURT: Now, whether or not other matters may be mitigating (besides statutory) 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 [State]: Yes.
>
> MR. LUBIN [Defense]: Yes.

(R.4412). (e.c.). Pursuant to this consensus, the trial judge agreed to give an instruction, reflecting the lack of any limitation to statutory mitigation, (R.4413-4414), and ultimately instructed the jury, as follows, in pertinent part:

> The aggravating circumstances 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 factfinder which determines whether or not a factor is mitigating if it is not one enumerated by the statute.

(R.4491), (e.a.). It is thus evident that the jury was not limited, and the judge did not feel himself limited, to consideration of statutory mitigation alone. This factual distinction from Hitchcock, by itself, renders Hitchcock inapplicable, and warrants denial of relief. Elledge, at 1449 (judge stated he did not feel limited to statutory mitigation); Card v. Dugger, No. 71,118 (Fla. September 15, 1987) (jury instructed to consider "any other aspect of the defendant's character or record, or any other circumstance of the offense").

Other circumstances of the Record, reflect that neither the jury or judge was limited, in consideration of punishment, to purely statutory mitigation. Judge Mounts, in his sentencing order, expressly stated, "I determine from the totality of the evidence that it does not establish any mitigating factor". (R.4840). This statement does not reflect that the court in any way limited its consideration of mitigation. Elledge, supra. This conclusion is substantiated, by reference to the "totality of evidence" considered by the judge.

The trial judge informed the jurors, before and after

evidence was presented at sentencing, that the jury could consider all evidence presented at trial and sentencing. (R.4260-4261; 4490). The evidence at sentencing consisted of, inter alia, defense presentation of non-statutory mitigating factors, in the form of Dr. Zeisel's testimony on the general deterrent effect of the death penalty (R.4322-4338; 4360-4369), and in Martin's brother's letter to the jurors, read aloud to them in open court, asking for mercy; informing them of the merciful nature of God; stating that a death penalty recommendation would hurt or perhaps kill his parents and sister, who had physical problems; and suggesting that Martin's observation of the murder of his older brother, while a small child, "bothered" Martin (R.4387-4394). Defense counsel argued that the jury could consider several non-statutory mitigating factors to the jury, (R.4479), including inter alia, the suggestion that with four life sentences (first-degree murder, sexual battery, kidnapping, robbery), Martin would be in prison, with no guarantees of parole, for a long time (R.4447, 4486); reminding the jury that, according to Zeisel, there was no deterrent effect to the death penalty (R.4480); informing the jury that Martin was a human being (R.4480); suggesting residual doubts, as to Martin's sanity at the time of the crime (R.4481); suggesting that Martin's punishment be compared with his accomplice, Gary Forbes, who pled guilty and did not receive the death penalty (R.4481-4482); and a plea for mercy, arguing that a sentence of death would not bring the victim back (R.4480, 4484). The trial court, with the exception of some irrelevant aspects of Dr. Zeisel's testimony, see Martin v. Wainwright, 770 F.2d 918, at 935-937, (11th Cir. 1986), permitted all such testimony and arguments, of a non-statutory mitigating nature.

Thus, under the facts of this Record, it can not reasonably be suggested that either the jury or the judge was improperly restricted in their consideration of mitigation at sentencing. Hitchcock, Elledge, Card, supra; Delap v. Dugger, No. 71,194 (Fla. October 8, 1987). As noted in Elledge there is nothing in the Record that demonstrates that the trial judge

herein, did not have a proper view of the law in regards to considering statutory and non-statutory mitigating circumstances.

The Petitioner acknowledges that the foregoing matters appear in the record, but nevertheless, contends the jury was "conditioned" to limit its consideration by comments made mainly by defense counsel at voir dire. The Respondent maintains that the cited comments were simply an explanation by counsel that the jury could not just blindly impose the death penalty; it would have to find the existence of aggravating factors and it would have to consider the statutory list as being factors in mitigation to consider. Thus, a juror who might personally believe mental illness does not excuse criminal conduct, would have to, if he found the mental mitigating factors existed, consider them as mitigating under Florida law. Counsel can cite to no statement which explicitly precluded the jury from considering non-statutory factors and in fact, the record shows that on the contrary the jury was specifically instructed that it could. Accordingly, the Petitioner has failed to demonstrate any error under Hitchcock.

C. HARMLESS ERROR (Alternative)

Assuming arguendo the existence of Hitchcock error, such error was clearly harmless, and did not affect Martin's sentencing determination. Hitchcock, at 353; Elledge, at 1448; Delap. The trial judge found the presence of five strong aggravating circumstances (under sentence of imprisonment - on parole from second-degree murder convictions; prior violent felony; murder committed while in course of performing a kidnapping, and/or in flight after committing robbery and rape; committed to avoid arrest; committed in a heinous, atrocious and cruel manner), (R.4833, 4834), and no mitigating factors (R.4834-4840). This finding was upheld on direct appeal. Martin v. State, 420 So.2d 583, 585 (Fla. 1982). This Court further found that the trial court's jury's resolution of the mitigation presented, to recommend and impose the death penalty, was

supported by the Record. Martin, at 584. It is clear that, under the circumstances, Martin's sentence was unaffected by such Hitchcock error, if any, and that his death sentence should thus stand. Hitchcock; Elledge; Delap, supra.

The Petitioner's claim to the contrary is no more than a reargument of the matters determined on direct appeal.

CONCLUSION

Wherefore, based on the foregoing, the Respondent respectfully requests that the Petition for Habeas Corpus be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy has been furnished by United States Mail to MARK E. OLIVE, ESQUIRE, Officer of the Capital Collateral Representative, 225 West Jefferson Street, Tallahassee, Florida 32301 and RICHARD H. BURR, III. ESQUIRE, 99 Hudson Street, 16th Floor, New York, New York 10013, this 23 day of October, 1987.

Joy B Shearer

OF COUNSEL