71,363

IN THE SUPREME COURT OF FLORIDA

NO. _____

BENNIE DEMPS,

Petitioner,

vs.

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

Respondent.

PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF HABEAS CORPUS, REQUEST FOR STAY OF EXECUTION, AND APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

LARRY HELM SPALDING
Capital Collateral Representative

MARK E. OLIVE
Chief Assistant Capital Collateral Representative

OFFICE OF THE CAPITAL COLLATERAL REPRESENTATIVE
Independent Life Building
225 West Jefferson Street
Tallahassee, FL 32303
(904) 487-4376

ROBERT AUGUSTUS HARPER
Law Firm
317 East Park Avenue
Tallahassee, Florida 32301
(904) 224-7900

Counsel for Petitioner

1/12

I. INTRODUCTION

Capital sentencing occurred in this case April 17, 1978, before the United States Supreme Court decision in Lockett v. Ohio, 438 U.S. 586 (1978). Defense counsel for Mr. Demps requested that the jury be instructed that evidence which could be considered in mitigation of punishment was not restricted to the statutory list (R. 996, 1044), but the trial Court, stating "our Supreme Court has said that judges don't vary from the charges that we have approved for the jury . . . . and I'm going to stick with the charge that is recommended by the Supreme Court in these cases" (R. 1044), refused to so instruct the jury. There was "mere presentation" of non-statutory mitigating evidence before the jury, the jury was precluded from considering that evidence, Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), and "the entire sentencing process necessarily is tainted by that procedure." Riley v. Wainwright, No. 69,563 (Fla. Sept. 9, 1987), slip op. at 5. See also Downs v. Dugger, No. 71,100 (Fla. Sept. 9, 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). A stay of execution, and resentencing before a jury, is required.

II. JURISDICTION

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents issues which directly concern the judgment of this Court on appeal and hence jurisdiction lies in this Court. See, e.g., Smith v. State, 400 So.2d 956, 960 (Fla. 1981). The issue presented was previously ruled upon by this Court in this case, and Petitioner requests that this Court revisit the claims in light of errors of constitutional magnitude in the prior treatment of the claims: "[I]n the case of error that

prejudicially denies fundamental constitutional rights . . . this Court will revisit a matter previously settled . . . ." Kennedy v. Wainwright, No. 68,264 (Fla. February 12, 1986).

III. FACTS UPON WHICH PETITIONER RELIES

This case involves a prison killing. Mr. Demps was tried with co-defendant's James Jackson and Harry Mungin. The evidence at guilt/innocence was that Mungin told another inmate before the killing that "he was fixing to get rid of a snitch" (R. 719). Inmates Jackson, Mungin, and petitioner Demps were later observed in the victim's cell. Mungin was in the cell, and was holding the victim while defendant Jackson struck him (R. 725-726). According to testimony, petitioner was also holding the victim, but was not striking him. The victim was later found in his cell with a knife wound in the chest.

Petitioner did not state that he intended to kill a snitch -- Mungin did. Jackson did the actual stabbing. Jackson received a death recommendation from the jury, which the judge overrode (R. 205; see also April 17, 1978, sentencing hearing transcript, p. 4). Mungin received a life recommendation, and a life sentence. Thus the planner (Mungin) and the stabber (Jackson) each received a life sentence. Mr. Demps alone was sentenced to death.

Mr. Demps had been convicted of two murders in 1971, which undoubtedly figured into the death recommendation and sentence in this case. However, as defense counsel argued at sentencing, there were mitigating circumstances (albeit, outside of the statute) to mitigate his conduct:

> Let's talk about his record and let's talk about why the State is saying that in this case he should get the death penalty. Bennie Demps was convicted of murder, he was convicted of murder in the same incident on February 15th, 1971. Two people were killed. His record also shows that from 1958 [sic] to 1971 he was in the United States Marine Corps; that he was wounded in combat and that

> when he returned to the States he committed the crime. It also shows that when he was admitted into the correctional system that he was addicted to narcotics. I ask you to put yourself where he was in 1971 - not excuse this crime in any way, shape or form, but think about what may have motivated it. I ask you to consider further that for seven years he existed at Florida State Prison with no problem. Then this incident occurred and for that reason the State wants you to kill him.

(R. 1091). Counsel also argued that the prison environment itself was a mitigating circumstance (R. 1091-92). The prosecutor's and judge's comments, and the judge's charge, however, precluded juror consideration of such evidence, and violated Mr. Demps eighth and fourteenth amendments rights. See Hitchcock, 107 S. Ct. at 1824 (counsel presented and argued non-statutory mitigating evidence, but jury instruction precluded consideration).

A. The Judge's Charge to the Jury is Condemned by Hitchcock

Just before the jury was presented with evidence at sentencing, the trial judge instructed them:

> At the conclusion of the taking of the evidence and after argument of counsel you will be instructed on the factors in aggravation and mitigation you may consider.

(R. 1099)(emphasis added). Evidence and argument was presented. The jury was then instructed:

> [I]t is your duty to follow the law which will now be given you by the Court . . . .
>
> The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence.
>
> [statutory list]
>
> The mitigating circumstances you may consider if established by the evidence are as follows:
>
> [statutory list]

(R. 1093-96).

This is a jury instruction deemed insufficient in Hitchcock, because "it could not be clearer that the advisory jury was instructed not to consider . . . evidence of nonstatutory mitigating circumstances . . . ." Hitchcock, 107 S. Ct. at 1824.

B. The Judge's and Prosecutor's Comments to All the Jurors Enforced the Unconstitutional Restriction on Consideration of Mitigation Evidence

> THE COURT: I have such a high regard for the jury system that I believe jurors follow instructions.

(R. 419).

During voir dire, the jury promised the judge and the prosecutor that they would follow and apply only the law that the judge told them to follow, "without any regard to any beliefs you might have as to whether its a good law or a bad law" (R. 268). The prosecutor told the jury the Court would "set out guidelines for you" (R. 240), had the jurors state that they would "operate under the guidelines that the Court has talked about" (R. 274), and told the jurors that they "would have to follow the guidelines of the Court" (R. 303). See also R. 370, 379, 401. The judge impressed upon the jurors the same requirement to follow the guidelines:

> THE COURT: If you were selected as a juror in this case would you follow the Court's instructions on all matters of law and apply that law to the facts as you find them from the evidence.
>
> MR. BANSON: Yes, Sir.

(R. 391, 392; see also R. 370-75)(All potential jurors and actual jurors heard all voir dire comments (R. 313, 325, 342, 351, 362, 384)). The jurors were not to substitute their own beliefs for the law as instructed:

> THE COURT: You heard the Court's explanation of the nature of this case, as far as it could result in two proceedings, the initial proceeding would be that of guilt or innocence and that verdict would have to be unanimous, but should your verdict as to any defendant be guilty as charged in the

indictment then it might result in the bifurcation section where you would both hear mitigating and aggravating circumstances for the purpose of rendering an advisory sentence to the Court, keeping in mind that the Court would not be bound by the advisory sentence, the final decision would rest with the Court as to what disposition would be made of the case. Would that prevent any of you from listening to any of the evidence in this case and applying the law as the Court tells you the law is and would you follow that law without any regard to any beliefs you might have as to whether it's a good law or bad law? Would you be bound by that law as the Court would instruct you?

(All answered in the affirmative)

(R. 268).

C. Trial Counsel Requested, but the Trial Court Refused, Constitutional Juror Instructions

The trial judge, in a juror-out hearing, stated that mitigating evidence not contained in the statute could be presented:

THE COURT: All right. Let me get those in order. I'll go down the mitigating section and cover this.

MR. CARROLL: Before we get that far, Judge, I ought to make some argument about what is admissible in mitigation, and I would refer the Court to State versus Dixon, which I'm sure the Court is familiar with, 283 So.2d 1 at page 10 where it says:

"It must be emphasized that the procedure to be followed by the Trial Judge and the jury is not a mere counting of circumstances and x-number of aggravating circumstances, but rather a reasonable 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 circumstances present."

My argument would certainly be that we are not limited.

THE COURT: That's 283 So.2d 1.

MR. CARROLL: Yes.

THE COURT: All right.

MR. CARROLL: I refer the Court to the Supreme Court opinion of Proffitt versus Florida, wherein the court, the Supreme Court -- I have Lawyer's Edition, the 49 Lawyer's

> Edition, page 922, footnote 8 says, in referencing the Florida Statute, in construing whether or not the statute is constitutional, it says:
>
> "It seem unlikely that a Florida court would allow a death sentence to rest entirely on non-aggravating circumstances since the capital sentencing statute explicitly provides that aggravating circumstances shall be limited to the file and specified factors. There is no such limiting language introduced in the list of statutory factors."
>
> So my contention would be that the State is limited to the introduction of aggravating evidence, as it should be; but that the defendant may in his behalf enter anything, which under the totality of circumstances test would go to mitigation.
>
> THE COURT: There's no doubt that the statute uses the term limited as far as to aggravating circumstances and does not use that term, of course, mitigating. The case law on it boils down to not only the mitigating factors enumerated in the statute, but any relevant information that would go to mitigation.

(R. 994-97).

However, when it came time to tell the jury what the law was, the trial judge balked:

> MR. CARROLL: Another thing, Judge, I read the Court's charge and would ask the Court to charge State versus Dixon on the language I read from this morning concerning what the jury is supposed to do.
>
> THE COURT: Was that charged in Dixon?
>
> MR. CARROLL: No, the language is out of the case itself.
>
> THE COURT: Mr. Carroll, our Supreme Court has said that judges don't vary from the charges that we have approved for the jury unless you can show good cause why you did. You have read that portion in there and I'm going to stick with the charge that is recommended by the Supreme Court in these cases.

(R. 1044). Thus, there was "mere presentation" of mitigating circumstances, with precluded consideration. Then, when the trial court entered its own findings on the sentence, the Court addressed only statutory mitigation: "In considering the aggravating and mitigating circumstances, the Court will list

them in reverse order considering first the elements of mitigation" (R. 229). The Court's action is the epitome of the "mere presentation" procedure long accepted but recently rejected by this Court. Presentation of mitigating evidence is not enough. Meaningful consideration of such evidence is required, by the eighth and fourteenth amendments.

IV. NATURE OF RELIEF SOUGHT

Petitioner requests that this Court stay his scheduled execution, so as to allow full and complete consideration of his petition for writ of habeas corpus. In the alternative, Petitioner requests that a new appeal be granted, a stay of execution be entered, and a briefing schedule be ordered. Finally, Petitioner requests that his sentence be vacated and that this matter be remanded to the trial court for resentencing before a jury.

V. LEGAL BASIS FOR RELIEF

This issue was incorrectly resolved by this Court on direct appeal.

> With regard to the imposition of the death sentence, appellant takes issue with the trial court's instructions on mitigating circumstances in two respects, that they improperly mandated the death penalty if no mitigating circumstances were found, and they limited consideration of mitigating factors to those statutorily enumerated. Since these issues were not raised by defense counsel at trial, they are not reviewable here. Castor v. State, 365 So.2d 701 (Fla.1978); McCaskill v. State, 344 So.2d 1276 (Fla.1977); Douglas v. State, 328 So.2d 18 (Fla.1976). In any event, we note that the instructions tracked Florida's Standard Jury Instructions and in no way called for a mandatory death sentence. And as we have recently stated on two separate occasions, the instructions do not limit jury consideration to the statutorily enumerated mitigating circumstances. Peek v. State, 395 So.2d 492 (Fla.1980); Songer v. State, 365 So.2d 696, 700 (Fla.1978).

Demps v. State, 395 So.2d 501, 505 (Fla. 1981)(emphasis added). The Court has recognized that Hitchcock is a change in law which

directly addresses and condemns "the instructions." In addition, as pointed out in Section III(c), supra, defense counsel did raise the issue at trial. In any event, no procedural default is appropriate under these circumstances. See Thompson, supra.

New law requires resentencing. 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. Demps' case. Downs v. Dugger, supra, Thompson v. Dugger, supra; Riley IV, supra; 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). This case involves the restriction upon jury's consideration of mitigating factors resulting from the standard jury instruction on mitigation which, together with the Court's and prosecutor's statements, served to limit the jury's consideration to the statutorily enumerated list of mitigating factors. The Eighth Amendment mandate of individualized sentencing, 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), has now been 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. Demps' April 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). Indeed, the sentencing was before Lockett. At trial, Mr. Demps requested the judge to alter the standard jury instruction on mitigating circumstances

to include other mitigation. See Section III(C), supra. Instead 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]"). 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. "These instructions to the jury unconstitutionally restricted the review of nonstatutory mitigating evidence, in violation of Hitchcock and Lockett." Id.

The nature of the error is no longer subject to dispute. 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.

The trial court determined that the crime did not warrant death. The judge overrode a jury death recommendation for the person who did the stabbing, and followed a life recommendation for the person who did the planning. The only defendant to receive death was Mr. Demps, and this was because of his background -- the 1971 murder convictions -- not this crime. Non-statutory mitigating evidence was thus crucial if Mr. Demps' background was to be explained, and such ameliorative evidence was presented -- he was a wounded veteran who came to prison addicted, after committing the 1971 crime. The hell of prison life was also argued as a mitigating circumstance. All of this was "presented", but the jury was instructed not to consider it.

Furthermore, this Court reversed the finding of two of the four statutory aggravating circumstances on appeal. Demps, 395 So.2d at 505. If, as this Court noted, the jury was to "engage

in a character analysis," Id., 395 So.2d at 506, n. 11, the non-statutory factors excluded from consideration could have offset the two valid statutory aggravating factors. The nonstatutory mitigating factors are therefore relevant and persuasive. 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).

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). See also Thompson, supra. 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).

This Court has never hesitated to reverse for resentencing where the mitigating instructions were erroneous, 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, under the facts of this case.

CONCLUSION

Mr. Demps requests a stay of execution, unhurried and judicious consideration of his claims, and a new sentencing proceeding. If this is denied, he requests a stay of execution pending filing and disposition of a petition for writ of certiorari in the United States Supreme Court.

Respectfully submitted,

LARRY HELM SPALDING
Capital Collateral Representative

MARK E. OLIVE
Litigation Director

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE
Independent Life Building
225 West Jefferson Street
Tallahassee, Florida 32301
(904) 487-4376

ROBERT AUGUSTUS HARPER
Law Firm
317 East Park Avenue
Tallahassee, Florida 32301
(904) 224-7900

By: _____
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by U.S. Mail/Hand Delivery to Mark Menser, Assistant Attorney General, The Capitol, Tallahassee, Florida 32399, this 26 day of October, 1987.

_____
Attorney