IN THE SUPREME COURT OF FLORIDA

NO. 71363

BENNIE DEMPS,

Petitioner,

vs.

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

Respondent.

RESPONSE TO PETITION FOR EXTRAORDINARY
RELIEF, STAY OF EXECUTION AND STAY
PENDING APPLICATION FOR CERTIORARI REVIEW

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I. INTRODUCTION

As indicated by the Petitioner, capital sentencing occurred in this case on April 17, 1978, prior to Lockett v. Ohio, 438 U.S. 586 (1978), but well after Proffitt v. Florida, 428 U.S. 242 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976) and, of course, Pennsylvania v. Ashe, 302 U.S. 51 (1937).

The trial court specifically permitted non-statutory mitigating evidence to be presented, argued and considered; stating:

> "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 996).

As Mr. Demps pointed out, the trial court did restrict the jury instruction to that promulgated by this Honorable Court, but it is pure speculation on Demps' part to state that non-statutory mitigating evidence was "not considered", and this Honorable Court does not reverse on speculation. Sullivan v. State, 303 So.2d 632 (Fla. 1974).

Despite the jury instruction, which was never objected to (and thus, procedurally barred as a claim, see Demps v. State[1]), the Court considered non-statutory mitigating evidence presented by counsel and considered a Pre-Sentence Investigation ("PSI") as well. Thus, the actual sentencer considered all of the evidence, as did this Court in reviewing aggravating and mitigating factors.

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[1] 395 So.2d 501, 505 (Fla. 1981).

II. JURISDICTION

This Court has jurisdiction over petitions for writs of habeas corpus pursuant to Fla.R.App.P. 9.100(a); 9.030(a)(3) and Article V, Sec. 3(b)(9), Fla.Const.. The petition at bar involves a claim which, though procedurally barred and non-fundamental, is within the jurisdiction of the Court as a habeas corpus action.

III. FACTS

Bennie Demps and his confederates, Jackson and Mungin, murdered a fellow inmate (Sturgis) for being a "snitch", Demps, et al, were part of a prison gang known as "Perjury Incorporated".

Demps and Jackson murdered Sturgis while Mungin served as a lookout, according to witness Larry Hathaway. (See Demps v. State, supra).

Due to his limited involvement, Mungin received a life sentence. Jackson, who stabbed Sturgis, had insufficient statutory aggravating factors to receive a death sentence; but Demps, in his third capital murder, easily qualified for capital justice even when the sentencer and jury considered non-statutory mitigating evidence (there being no evidence that they did not).

Defense counsel (Mr. Carroll) indeed requested a jury instruction pursuant to State v. Dixon, (283 So.2d 1), as Petitioner asserts, thus disproving any claim that Lockett v. Ohio, supra, "changed" the law or could not be "anticipated".

Mr. Carroll, however, failed to object to the giving of the instruction and thus the issue was deemed "procedurally barred" when raised on appeal, with citations to Lockett in the Petitioner's brief.

The Petitioner filed a petition for certiorari review in the United States Supreme Court but failed to raise the allegedly "fundamental" Lockett error.

A death warrant was signed in Mr. Demps' case and his execution was scheduled for June 29, 1982.

Demps filed a motion for post conviction relief pursuant to Fla.R.Crim.P. 3.850 and, upon its denial, appealed to this Honorable Court. Demps v. State, 416 So.2d 808 (Fla. 1982). No "Lockett" issue was raised, but an evidentiary hearing was granted on a different issue. Upon a second review, relief was denied. Demps v. State, 462 So.2d 1074 (Fla. 1984).

Demps filed a petition for federal habeas corpus relief (pursuant to 28 USC §2254) in the United States District Court. The federal court rejected Demps' "Lockett" claim as procedurally barred under Engle v. Isaac, 456 U.S. 107 (1982) and found that Demps had failed to establish either the "cause" or the "prejudice" necessary to raise the issue.

While Demps appealed the denial of his habeas corpus petition to the Eleventh Circuit Court of Appeals, he never raised or briefed a Lockett claim. (Naturally, the issue was omitted from his second petition for certiorari as well).

Thus, Demps could have objected at trial, could have raised the Lockett issue in his certiorari petition, could have raised the claim (arguably) on 3.850 or by habeas corpus in 1982 and could have raised it on appeal to the Eleventh Circuit, but did not. The question before this Court is not only "whether to excuse a procedural bar", but "how many excusals shall be granted?"

IV. RELIEF SOUGHT

The petition should be dismissed as an abuse of the writ inasmuch as it raises, in piecemeal fashion, a claim that is procedurally barred.

V. ARGUMENT

Bennie Demps, by petition for habeas corpus, wishes to reargue a point which was rejected (as barred) on direct appeal. Since we are not addressing a "fundamental" error, nor a claim created by some "change in the law" that compels retroactive application of said law to this case, all that Demps has offered is a reargument of his original appeal. This is not a proper application for habeas corpus and should be summarily dismissed, since habeas corpus is not a vehicle for obtaining a "second" appeal. Steinhorst v. Wainwright, 477 So.2d 537 (Fla. 1985).

Even if Demps was properly before the court, his claim would be subject to dismissal as procedurally barred or, at best, an example of harmless error.

(A) Procedural Bar

As noted above, Lockett v. Ohio, supra, was not a "change" of law but rather was an evolutionary development in a long line of cases beginning with Pennsylvania v. Ashe, supra. Thus, the Supreme Court in Eddings v. Oklahoma, 455 U.S. 104 (1982), held that the procedural bar rule would have applied "but for" preservation of the issue in state court.

In Straight v. Wainwright, ____ U.S. ____, 90 L.Ed.2d 683 (1986), the Supreme Court rejected as procedurally barred a "Lockett" claim just two weeks prior to granting review in Hitchcock v. Dugger, 107 S.Ct. 1821 (1987). In Straight, the state argued procedural bars, in Hitchcock it did not.

This Court, of course, has long recognized the applicability of procedural bars to Lockett type claims. Demps v. State, supra; Stone v. State, 481 So.2d 478 (Fla. 1986); Steinhorst v. State, 412 So.2d 332 (Fla. 1982); Jacobs v. Wainwright, 450 So.2d 200 (Fla. 1984) as have the federal courts, Straight, supra; Antone v. Wainwright, 706 F.2d 1534 (11th Cir. 1983), cert. denied, 79 L.Ed.2d 147 (1984).

The single decision[2] which goes against this trend appears to be Harvard v. State, 486 So.2d 537 (Fla. 1986), but the dissent in Harvard correctly states the holding in Eddings, supra, and, we suggest, the proper resolution. Of course, after Harvard, this Court again upheld the procedural bar in State v. Zeigler, 494 So.2d 957 (Fla. 1986). Harvard was explained in Zeigler as "distinguishable" because the judge (in Harvard) gave a sworn statement that he did not consider all Lockett evidence while sentencing Harvard to death.

It is clear that Demps' "Lockett" claim was not preserved for appellate review. It is equally clear that Demps could have obtained federal review of this issue by petition for writ of habeas corpus (attempted) and by appeal to the Eleventh Circuit (waived) or by petition for certiorari following direct appeal (waived).

Demps should not be granted this opportunity for piecemeal litigation of a known claim absent proof of cause and prejudice. Smith v. State, 445 So.2d 223 (Fla. 1983). This has not been attempted, much less accomplished, by Demps.

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[2]Excluding those currently pending rehearing; to-wit: Riley, Downs, Thompson and Morgan. We would also note that the United States Supreme Court has recently refused to review yet another Lockett claim due to the fact that it is procedurally barred. See Hall v. Dugger, Case No. 87-5048 (slip op. October 15, 1987). See also State's response in White v. Dugger, filed October 20, 1987 in this Court.

(B) Harmless Error

Without waiving the procedural bar (thus inviting federal intrusion) the State submits that Mr. Demps is not entitled to relief on the basis of harmless error, as recognized by this Court in DeLap v. Dugger, Case No. 71,194 (Fla. October 8, 1987) and by the Eleventh Circuit in Elledge v. Dugger, ____ F.2d ____ (11th Cir. 1987)(slip opinion 86-5120).

The "error" of which Demps complains is the giving of a particular jury instruction to an advisory jury during the sentencing phase of a capital case. The instruction has been deemed improper in Hitchcock, but, as the Elledge court noted, no per se rule of reversal was created. Instead, the Supreme Court left open the defense of harmless error.

The preservation of this defense is only proper. First, the instruction was not being given to a body vested with actual, binding, decision making power. Second, the advisory jury does not render findings as to what aggravating or mitigating factors it considered. Thus, we can not know if the "error" was the source of the final decision, and we in Florida do not reverse on the basis of conjecture as to "what" juries did or thought. Sullivan v. State, 303 So.2d 632 (Fla. 1974).

We would note that in Engle v. Isaac, 456 U.S. 107 (1982), a procedural bar was upheld even though a court's unobjected-to jury instruction "shifted the burden of proof" to the defense in the guilt phase of a trial. It is submitted that if this serious an error can be deemed "non-fundamental", an instruction to a mere "advisory jury" can be determined to be "harmless". Indeed in McCrae v. State, 12 F.L.W. 310 (Fla. 1987), this Court correctly looked to the prospect of "harmless error"

in a jury override case, given the jury's life recommendation. Elledge, supra, also recognizes that the merely advisory nature of capital juries renders "Hitchcock" error subject to harmless error analysis.

Demps petition incorrectly contends that his involvement was minimal and that the trial court sentenced him to death "solely" on his background rather than his crime.

While this Court rejected the trial court's finding that the crime itself was heinous, atrocious and cruel, the fact remains that the trial court did consider the crime itself in addition to Demps' two prior capital murders. As far as Demps latest attempts to minimize his involvement (especially compared to Jackson), the argument is improper at this point and it fails to consider the aggravating and mitigating factors applicable to Jackson, against whom the State also sought a death sentence.

Demps' petition fails to spell out what, if any, non-statutory mitigating evidence the Court "failed" to consider. In addition to hearing the penalty phase evidence, the trial court judge also received a "PSI" which included Demps' sordid prison record of fights, disciplinary confinements, assaults and destruction of state property. This, plus his criminal record, hardly portrays a man worthy of being saved, even if he abused drugs while in the service, prior to his dishonorable discharge. (R 213-218). Demps is not the kind of defendant who would benefit under Skipper v. South Carolina, 476 U.S. ____, 90 L.Ed.2d 1 (1986).

To the extent Demps might rely upon his (prior) drug habit as "mitigation", we would suggest that the notion is not viable to most people. To mitigate murder on the basis of a prior criminal act (drug use) is absurd. It is akin to excusing

DUI-manslaughter on the ground that the defendant was drunk at the time, or patricide on the "mitigating factor" that the defendant is fatherless. It is, in a word, absurd.

CONCLUSION

Demps has not attempted to, and can not, overcome the fact that his Lockett claim is procedurally barred. Even if he could, his case can not withstand a "harmless error" analysis under Hitchcock and, again, the claim of harmless error has not been overcome by any showing of "evidence" which, if considered, would have prompted a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Mr. Mark Evan Olive, Esq., Office of Capital Collateral Representative, 225 West Jefferson Street, Tallahassee, Florida 32302, this 27th day of October, 1987.

MARK C. MENSER

OF COUNSEL