IN THE SUPREME COURT OF FLORIDA

JIMMY LEE SMITH,

Applicant/Petitioner,

v.

STATE OF FLORIDA, RICHARD L. DUGGER, Secretary, Florida Department of Corrections,

Respondents.
_____/

FILED
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Case No. 90
71367

PETITION FOR WRIT OF HABEAS CORPUS

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October 26, 1987

APPLICATION FOR RELIEF PURSUANT TO HITCHCOCK V. DUGGER

A. INTRODUCTION

> [I]t is your duty to follow the law which will now be given by the Court, and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty, and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.
>
> Jury Instructions
> TR. 603.

> [T]he mitigating circumstances which you may consider shall be the following: [listing statutory mitigating circumstances].
>
> Jury Instructions
> TR. 606-7.

1. This petition presents one question: Whether Jimmy Lee Smith's ("Smith") death sentence suffers from the same infirmity that caused a unanimous United States Supreme Court to vacate the death sentence in Hitchcock v. Dugger, 107 S.Ct. 1821 (1987).[1] Like Hitchcock, the judge and jury below limited their consideration of mitigating factors to those enumerated in Section 921.141(6), Florida Statutes (1977). Like Hitchcock, the jury and judge portions of the capital sentencing proceeding below occurred prior to this Court's decision in Songer v. State, 365 So.2d 696 (Fla. 1978)(on rehearing), cert. denied, 441 U.S. 965 (1979). Like Hitchcock, the penalty-phase jury and judge below understood the law to limit them to consider only the statutory list of mitigating circumstances. Like Hitchcock,

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[1] In a unanimous decision, the United States Supreme Court held in Hitchcock that "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, based on the following instruction. The jury was to render its advisory opinion by determining:

> (a) [W]hether sufficient aggravating circumstances exist as enumerated in [Section 921.141(5), Florida Statutes]; (b) [w]hether sufficient mitigating circumstances exist as enumerated in [Section 921.141(6), Florida Statutes] which outweigh the aggravating circumstances found to exist; and (c) [b]ased on these considerations, whether the defendant should be sentenced to life [imprisonment] or death.

Id.

substantial nonstatutory mitigating evidence was available in the record below; but, like Hitchcock, it was not considered. Like Hitchcock, the death sentence imposed in the proceeding below violated the Eighth Amendment to the United States Constitution. Consequently, Smith must be resentenced.

B. JURISDICTION

2. Smith invokes this Court's original jurisdiction pursuant to Article V, Sections 3(b)(1), (7) and (9), Florida Constitution, and Rules 9.030(a)(3) and 9.040(a), Florida Rules of Appellate Procedure. Pursuant to Kennedy v. Wainwright, 483 So.2d 424, 426 (Fla. 1986), Smith asks this Court to exercise its habeas corpus jurisdiction to examine the constitutionality of his sentencing which denied him fundamental constitutional guarantees.

3. The State may argue that Smith's failure to challenge the jury instructions concerning mitigating factors on direct appeal constitutes procedural default. That argument is no longer meritorious. Prior to the United States Supreme Court decision in Hitchcock, 107 S.Ct. 1821, Florida courts dismissed this type of challenge if mitigating evidence was merely presented to the jury. In Hitchcock, however, the United States Supreme Court deemed Florida's "mere presentation" approach a violation of Lockett v. Ohio, 438 U.S. 586 (1978) which held that all mitigating circumstances must be considered in capital sentencing proceedings. Hitchcock, 107 S.Ct. 1821. Thus, a substantial change in the law has occurred, invalidating a procedural default challenge. Thompson v. Dugger, 12 F.L.W. 469, 470 (Fla. Sept. 9, 1987). Recognizing that fact, this Court has repeatedly defeated the State's claim of procedural default in Hitchcock cases. Downs v. Dugger, 12 F.L.W. 473, 474 (Fla. Sept. 9, 1987); Thompson v. Dugger, 12 F.L.W. at 470; Riley v. Wainwright, 12 F.L.W. 457, 459 (Fla. Sept. 3, 1987). This Court's decisions in Downs, Thompson and Riley make clear that this Court has juris-

diction of this appeal and that procedural default does not preclude the challenge presented here.

STATEMENT OF THE CASE AND FACTS

A. Procedural History: How the Hitchcock Issue Was Raised in Prior Litigation.

4. The Hitchcock issue has not previously been addressed. On direct appeal of his conviction and sentence, Smith did encourage this Court to overturn the trial court's conclusion that two statutory mitigating circumstances did not exist. Smith v. State, 407 So.2d 894, 901 (Fla. 1981). This Court affirmed the trial court's decision. Id. No other court has addressed this Hitchcock claim.

5. Smith's conviction and sentence were affirmed on appeal. Smith v. State, 407 So.2d 894 (Fla. 1981), cert. denied, 456 U.S. 984 (1982). Smith's first death warrant was signed on February 15, 1983. The trial court denied relief without an evidentiary hearing and this Court affirmed. Smith v. State, 445 So.2d 323 (Fla. 1983). The United States Supreme Court subsequently denied certiorari. Smith v. State, 467 U.S. 1220 (1984).

6. During the pendency of the state proceedings, Smith filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Florida. Smith v. Wainwright, Case No. MCA 83-2041. Judge Stafford entered a stay of Smith's execution on March 11, 1983. On Smith's motion, the petition was later dismissed without prejudice by order of Judge Paul on July 11, 1983. On June 15, 1984, former Governor Graham signed Smith's second death warrant. Smith filed a second motion for post-conviction relief with the trial court on July 9, 1984. The trial judge summarily denied relief and on appeal this Court affirmed. Smith v. State, 453 So.2d 388 (1984).

7. On July 9, 1984, Smith filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Florida, Panama City Division. A hearing was

held on the petition on July 11, 1984, but the requested relief was denied. On the following day, the Eleventh Circuit Court of Appeals entered an order staying Smith's execution. Smith v. Wainwright, 737 F.2d 1036 (11th Cir. 1984). Subsequently, the Eleventh Circuit Court of Appeals reversed the trial court's denial of the petition and remanded for an evidentiary hearing on the ineffective assistance rendered by defense counsel. Smith v. Wainwright, 777 F.2d 609 (11th Cir. 1985), reh. denied, 785 F.2d 1037, cert. denied, 106 S.Ct. 3275 (1986). An evidentiary hearing was held before Judge Roger Vinson in Panama City, Florida during September, 1986.

8. Both the guilt determination and sentencing phases of Smith's case were concluded prior to this Court's decision in Songer, 365 So.2d 696.[2] The United States Supreme Court decided Lockett on July 2, 1978. The advisory sentencing proceeding in Smith's case occurred on September 20, 1978; the jury recommended death.[3] The trial court sentenced Smith to death on October 4, 1978. This Court rendered its opinion in Songer on December 21, 1978.

9. The United States Supreme Court decided Hitchcock on April 22, 1987, just six months before this petition is being filed.

B. Facts in Support of Hitchcock Claim

10. At every stage of Smith's trial -- from the guilt determination phase voir dire to the penalty phase jury

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[2] The relevant time period covered by Hitchcock begins in December 1972, when Florida's post-Furman v. Georgia, 408 U.S. 238 (1972) statute was enacted, and ends in December 1978, when this Court decided Songer. See Lucas v. State, 490 So.2d 943, 945 (Fla. 1986) ("Lucas' trial, as well as Harvard's, took place prior to the filing of this Court's opinion in Songer."); Thompson v. Wainwright, 787 F.2d 1447, 1457 (11th Cir. 1986), cert. denied, 107 S.Ct. 1986 (1987).

[3] Two death warrants have been issued against Smith. The first was stayed by the United States District Court, Northern District of Florida, Smith v. Wainwright, No. MCA 83-2041 (N.D. Fla. March 11, 1983), the second was stayed by the United States Court of Appeals for the Eleventh Circuit, Smith v. Wainwright, 737 F.2d 1036 (11th Cir. 1984).

instructions -- the advisory sentencing jury was unequivocally instructed that in recommending a sentence for Smith it could consider only the mitigating factors set out in Florida's capital sentencing statute. That message was hammered home by both the judge and the prosecutor.[4] As a consequence, although nonstatutory mitigating evidence was introduced at Smith's trial, the jury and judge considered that evidence only as it impacted the statutory factors -- or not at all.

a. Voir Dire

11. Throughout voir dire the prosecutor repeatedly reminded the jury that its sentencing recommendation could be based only on "the law as given to you by Judge McCrary."[5] TR. 54-55. See also TR. 49, 65, 110, 130, 131, 143, 144, 156, 157, 181. Further, his advice to the jury about the penalty phase resounded with a limitation to enumerated factors. In his words:

> The judge will put you under certain guidelines. These things either exist from the facts or these things do not. Then you use these guidelines to decide your recommendations.

TR. 429.

b. Penalty Phase of Trial

12. Following the jury's finding of guilty, the judge

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[4] In Delap v. Dugger, No. 71-194, slip op. at 2 (Fla. October 8, 1987), this Court most recently considered a Hitchcock instruction challenge. Although the instruction given was similar to the one in Hitchcock, the court deemed its use harmless because of statements made by the prosecutor that nonstatutory mitigating circumstances should be considered.

Delap established that prosecutor's arguments are important with respect to a Hitchcock analysis. In Smith's case, the prosecutor reinforced the Hitchcock error in his comments to the venire during voir dire, and especially in his closing argument to the jury at the penalty phase. Smith's prosecutor -- item by item -- discussed the statutory mitigating factors and refuted each. He referred to the final statutory factor as the "last one." TR. 587. Under Delap, those prosecutional comments critically infected the sentencing process.

[5] The actions of Smith's prosecution are the reverse image of the actions of Delap's prosecutor. In Delap, the prosecutor told the jury that nonstatutory mitigating evidence should be considered. In contrast, beginning during voir dire, Smith's prosecutor repeatedly admonished the jury that it was constrained to the statutory factors.

instructed the jury that "[a]t 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." TR. 437 (emphasis added).[6] This instruction clearly defined the limits for the jury's understanding of the evidence it could consider at the penalty phase. That limitation to specific statutory factors was reinforced by the final jury instructions, discussed infra at paragraphs 19-20.

13. As evidence pertaining to sentencing, the prosecution and defense jointly presented a videotape of Smith confessing to a police investigator. The potentially mitigating factors contained in that videotape were almost exclusively matters not included within the statutory list. Intangible factors that, if considered, may have swayed jurors and the court included: Smith's demeanor; his tearful expressions of regret for the direction his life had taken; his adamant expressions of repentance and lack of self-worth demonstrated by his requests that he be put to death for his acts. Tangible factors that, if considered, may have swayed jurors and the court included: his traumatic and unstable childhood; his childhood sickliness, including rheumatic fever which caused permanent deterioration of his sight in one eye; his father's sudden death in an automobile accident which occurred while he was en route to visit Smith at the hospital; the fact that as a child he was stabbed by a young neighbor; physical abuse and neglect by his grandfather, apparently due to his dubious paternity; abuse from his first step-father; the fact that he was the victim of sexual abuse and rape while imprisoned on property violations. TR. 448-89, 541-46. Any or all of those factors may have been sufficient in the sentencers' minds to mitigate against imposition of the death

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[6] In the introductory jury instruction in Hitchcock, the jury was told it would be instructed "on the factors in aggravation and mitigation that you may consider under our law." Hitchcock, 107 S.Ct. at 1824.

penalty. Yet all were excluded from consideration in sentencing Smith to death.

14. Other potentially mitigating evidence was available in the psychological report of Elizabeth McMahon submitted during the sentencing proceeding. TR. 547-48. That report reviewed Smith's psychological responses to several of the events in his life. Those responses include immaturity, repressed affectional needs, weak emotional controls which give way under stress, early problems in self-identification, intense familial conflict and alienation. McMahon Report. Furthermore, the report suggested that Smith's responses indicated the possibility that he sometimes experienced a subcortical, limbic system seizure which may medically account "for some of the more bizarre details of his behavior." Id.[7]

15. At his own request, Smith was permitted to deliver a closing address to the jury following the videotape and prosecutor's closing statements. TR. 601-603. Smith told the jury that he had

> begun to seek God. And I've asked God to forgive me -- to give me the words, you know, to put the knowledge in my head, to talk to you people. And all I can think of is to pay for what I have done with my life. There's no other way to pay for it. Two life sentences wouldn't do it, because I know that going to prison again, I know what I'm capable of doing. I know the pressures that are put upon you. And I just know that by going to the east unit and sitting on death row, waiting for my day to be taken out of the population, I would be taken out of society and I won't have a chance to hurt anyone else again, especially innocent people. I again thank you for your patience and the duty that you are doing, and I hope that you can go in

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[7] The report "strongly recommended that [Smith] receive an electro-encephalographic examination" (emphasis in original) to determine whether organic causes were to blame for Smith's social dysfunctioning. McMahon Report. The report suggested that a finding of organic disorder would have permitted McMahon to render another opinion regarding possible mitigating circumstances. Id. The failure of Smith's counsel to follow up on that recommendation is one aspect of Smith's claim in a pending habeas petition that he was denied effective assistance of counsel. A hearing was held by the District Court for the Northern District of Florida on that claim on September 17 and 18, 1986, but no decision has been rendered. Smith v. Wainwright, No. MCA 83-2041 (N.D. Fla).

there and -- go in there with an easy conscience and reach a verdict of death. Thank you.

TR. 602-603. Smith's words exhibit repentance and remorse. Smith's statements reveal his ability and desire to function within the norms of this society. They reveal the functioning of a normal conscience, along with an understandable lack of self-trust at the acts he committed. All of these factors, if considered in mitigation by the sentencers, may have altered the conclusion that Smith should be put to death. Denying the sentencers that consideration relegated Smith's repentance to only one purpose: easing the consciences of his sentencers.

16. The prosecutor's closing argument to the jury stressed, item by item, the statutory list of aggravating and mitigating circumstances. TR. 572-587.[8] During closing arguments in the penalty phase of the case, the prosecutor advised the jury of the seven mitigating circumstances referred to in Section 921.141(6)(a)-(g), Florida Statutes (1977).[9] In fact, in his argument to the jury, he quoted the statutory mitigating circumstances virtually verbatim. He specifically referred to the mitigating circumstances as "A--B--C--D--E--F--G," consistent with their denomination in the statute. TR. 582-588. Further, when the prosecutor arrived at mitigating circumstance "G," he advised the jury that this was the "last one" (emphasis added), TR. 587, clearly implying that no other factors could be considered. Id.

17. When referring to the mitigating circumstances to be considered, the prosecutor would initially quote the statutory

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[8] The prosecutor in Hitchcock "told the jury that it was to 'consider the mitigating circumstances and consider those by number' and then went down the statutory list item by item." Hitchcock, 107 S.Ct. at 1824 (citations omitted).

[9] Delap is most clearly implicated by the prosecution's closing argument during the penalty phase. In Delap, the prosecutor argued that nonstatutory circumstances could be considered, prompting this court to deem Delap's Hitchcock instruction harmless. Smith's prosecutor did the opposite in his argument, clearly advising the jury it was limited to the statutory factors. Delap recognized the importance of the prosecutor's statements with respect to Hitchcock error. Smith's prosecutor fatally exacerbated the Hitchcock error.

mitigating circumstance and then argue evidence to rebut it. In the statutory sequence, he discussed the mitigating circumstances and then told the jury, (with regard to "B"), "He doesn't have 'B.'"; (with regard to "C"), "Certainly that is not there."; (with regard to "D"), "You see, so that doesn't apply."; (with regard to "E"), "That is not here."; (with regard to "F"), "That is not here."; (with regard to "G"), "He doesn't come under that." TR. 582-587 And, in summarizing his argument on the statutory mitigating circumstances, the prosecutor told the jury, "So, Ladies and Gentlemen, there it is. There are no mitigating circumstances." TR. 587.

18. Although in his penalty phase closing statement the prosecutor referred to negative events in Smith's life, the predicate for these statements was that the jury should not allow its recommendation to be affected by sympathy for Smith. TR. 569-571 Later in the argument, the prosecutor advised the jury that individual jurors should be able to say, "I didn't let sympathy sway me." TR. 599. Clearly, the prosecutor's message was not that family background, for example, fit within any of the mitigating circumstances, but was simply that feelings of sympathy should be summarily rejected, and that nonstatutory mitigating circumstances must be ignored. At the close of his argument, the prosecutor reminded the jury about the limited factors to be considered when he said:

> I say to you, Ladies and Gentlemen of the jury, as I did a while ago, regardless of what Jimmy says, consider what he says, but think of your duty, think of the aggravating, think of the mitigating circumstances, and say to yourself that, 'I've got to do my job.'

TR. 598.

c. Penalty Phase Jury Instructions

19. At the outset of his charge to the jury, the judge advised the panel that it had a duty to follow the law as articulated by the court. TR. 603. The court then advised the jury that it must render an advisory sentence based on "whether sufficient mitigating circumstances exist to outweigh any aggravating

circumstances found to exist." TR. 603. After discussing the statutory aggravating circumstances, the Court stated:

> Should you find one or more of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist. The mitigating circumstances which you may consider, if established by the evidence, are these: [The Court then discussed almost verbatim the statutory mitigating circumstances found in Section 921.141(6), Florida Statutes].

TR. 606-7 (emphasis added).

20. The Court never advised the jurors that they could consider in mitigation any factors other than those identified in the statute and instructed upon. In re-enforcing the previous instruction, the judge advised the jury that its recommendation must be based upon the facts established by the evidence and the law as articulated by the court. TR. 609. The judge memoralized that limiting instruction on mitigation by sending a written copy of his instruction to the jury room. TR. 611. The jury, by a unanimous vote, recommended death.

d. Sentencing

21. The sentencing judge's final Judgment and Sentence is strong evidence that he limited his consideration to the statutory factors. The sentencing order considered and analyzed only the enumerated statutory mitigating circumstances, one by one. TR. 619-620. Smith's extra-statutory mitigating evidence was not considered as relevant to any of the statutory factors and was not even referenced by the Court. The Court initially found that Smith did have a significant history of prior criminal activity. With respect to the other statutory mitigating factors, the Court stated:

> The Court finds no evidence: A. That the capital felonies for which the Defendant is being sentenced were committed while the Defendant was under the influence of extreme mental or emotional disturbance; B. That the victim was a participant in the Defendant's conduct or consented to the act; C. That the Defendant acted under extreme duress or under

> the substantial domination of another person in committing the capital felonies for which he is to be sentenced.

TR. 619-20. The Court found no mitigating evidence consistent with the other statutory criteria. Given the quantity of other evidence, the sentencing order permits no other conclusion but that the judge considered only the statutory factors.

22. The foregoing undisputed facts demonstrate beyond question that substantial nonstatutory mitigating evidence was presented in Smith's case.[10] The constitutional problem here -- as in Hitchcock -- is that, because of the judge's instructions and rulings and the prosecution's arguments, mitigating evidence was not considered by the judge and jury, except as it may have affected the enumerated statutory factors.

ARGUMENT

23. This Court has repeatedly reversed death sentences where the judge and jury limited their consideration of mitigating evidence as in Smith's case. Downs, 12 F.L.W. 473; Thompson, 12 F.L.W. 467; Riley, 12 F.L.W. 457; Morgan, 12 F.L.W. 434. McCrae v. State, 510 So.2d 874 (Fla. 1987); Lucas v. State, 490 So.2d 943, 946 (Fla. 1986); Harvard v. State, 486 So.2d 537 (Fla. 1986), cert. denied, 93 L.Ed. 2d 611 (1986). These cases represent the culmination of an evolutionary process in which this Court has moved from holding that instructions and findings like those in Smith's case comported with Lockett to holding that they do not. Compare Peek v. State, 395 So.2d 492, 496-97 (Fla. 1981); Songer v. State, 365 So.2d 696, 700 (Fla. 1978) (on rehearing), cert. denied, 441 U.S. 956 (1979), with Downs, 12 F.L.W. 473 and Riley, 12 F.L.W. 457.

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[10] None of this is affected by the fact that at trial Smith asked for the death penalty. No court, either state or federal, has rejected a Hitchcock claim on this basis, and for good reason. There is every reason to believe that the repentance demonstrated by that request is as likely to serve as a factor in mitigation as a justification for the imposition of death.

24. In Peek, for example, this Court held that instructions directing the jury's attention to only statutory mitigating circumstances did not preclude the jury's consideration of nonstatutory mitigating circumstances. 395 So.2d at 496. In Downs, however, this Court held that where the Court instructed the jurors only on the statutory mitigating circumstances, and the prosecutor's argument reinforced the view that only such circumstances could be considered, the jury may well have been limited in its consideration of mitigating circumstances. Downs, 12 F.L.W. at 474.

25. That evolution has been confirmed and mandated by the United States Supreme Court in Hitchcock, 107 S.Ct. 1821. The unanimous Court in Hitchcock held that instructions to the jury -- indistinguishable from the instructions given in Smith's case -- unconstitutionally limited the jury's consideration of mitigating circumstances. Further, Hitchcock held that the judge's sentencing order, which indicated that he considered only the statutorily-enumerated mitigating circumstances in imposing sentence, reflected an unconstitutional limitation on his own consideration of mitigating evidence. This Court has repeatedly followed Hitchcock's analysis of the record evidence. For example, in Downs, the court stated:

> We find this language substantially similar to the improper instruction given the jury in Hitchcock. Moreover, we note that the prosecuting attorney in this case exacerbated the Lockett error . . . The judge further reinforced the impression already laid in jurors minds by providing them with a copy of the statutory aggravating and mitigating factors for use during their deliberations. . .

Downs., 12 F.L.W. at 474 (emphasis added). Thus, Hitchcock, along with Downs, Thompson and Riley, controls the disposition of Smith's case.[11]

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[11] Lockett's Eighth Amendment prohibition on excluding mitigating evidence clearly is retroactive. Truesdale v. Aiken, 107 S.Ct. 1394 (1987) (Lockett retroactively applies to error in excluding prison guards' testimony); and Riley, 12 F.L.W. 457 (retroactive application of Lockett to jury sentencing recommendations). Thus, Hitchcock's application of Lockett to the

26. Both the jury and the judge in Smith's case were constrained in their assessment of mitigating evidence. Instructions given and rulings made by the court effected that constraint. Moreover, the judge's sentencing order reflected that same constraint.[12]

27. The Hitchcock court instructed the jury that the "mitigating circumstances which you may consider shall be the following . . . [listing the statutory mitigating circumstances]." Hitchcock, 107 S.Ct. at 1824. See also Washington v. Watkins, 655 F.2d 1346 (5th Cir.), reh'g denied with opinion, 662 F.2d 1116 (5th Cir. 1981)(invalidating similar instructions). Similarly, Smith's trial judge instructed the jury that "[t]he mitigating circumstances which you may consider, if established by the evidence, are these: [statutory list]." TR. 606-7. The instructions define, and therefore limit, what mitigating circumstances the jury "could" and, consequently, did consider. Id.

28. Recently, this Court decided Downs v. Dugger, 12 F.L.W. 473, mandating resentencing on facts parallel to Smith's. Like Smith's, the Down's instructions were similar to those in Hitchcock. Like the Smith prosecutor, Down's prosecutor exacerbated the error by reading all the factors enumerated by the Legislature. Both Smith's and Down's judge sent the jury to deliberate with a copy of the statutory factors. Based on facts parallel to those present in Smith's case, this Court required resentencing in Downs. Smith should also be resentenced.

29. Similar to Hitchcock, Lucas, and Riley, the limitation communicated to the jury in Smith's case was also applied by the

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Florida sentencing procedure is retroactive. Accord, Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985)(en banc).

[12] Even where a judge's sentencing order is free of error -- which is not the case here -- an error in capital sentencing jury instructions requires resentencing with a new jury. Floyd v. State, 497 So.2d 1211 (Fla. 1987); Robinson v. State, 487 So.2d 1040 (Fla. 1986); Toole v. State, 479 So.2d 731 (Fla. 1985); see also Garcia v. State, 492 So.2d 360 (Fla. 1987); Mann v. Dugger, 817 F.2d 1471, 1482-83 (11th Cir. 1987); Adams v. Wainwright, 804 F.2d 1526, 1529-30 (11th Cir. 1986); reh'g denied with opinion, 816 F.2d 1493 (11th Cir. 1987).

judge in the actual determination of Smith's sentence. The jury instructions themselves demonstrate that, as in Hitchcock, "the sentencing judge assumed . . . a prohibition" against the consideration of nonstatutory mitigating circumstances. Hitchcock, 107 S.Ct. at 1824. See Lucas, 490 So.2d 946; See also Adams v. Wainwright, 764 F.2d 1356, 1364 (11th Cir. 1985)("An erroneous instruction may . . . provide convincing evidence that the trial judge himself misunderstood or misapplied the law when he later actually found and balanced aggravating and mitigating factors.") Moreover, the judge's sentencing findings revealed that he considered only statutory mitigating circumstances in deciding to sentence Smith to death. See supra ¶ 21. The order considered each statutory mitigating factor in turn -- but only the statutory factors -- revealing that the judge actually considered only those factors. As this Court has held, "a judge who fails to consider or is precluded from considering nonstatutory mitigating circumstances commits reversible error." Riley, 12 F.L.W. at 458. Accord, McCrae, 510 So.2d 874. Harvard, 486 So.2d at 537.

30. For those reasons, as in Hitchcock, Downs, and Riley, "it could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances," in violation of the requirements of the Eighth Amendment. Hitchcock, 107 S.Ct. at 1824.

31. As discussed above, significant evidence of nonstatutory mitigating circumstances was available to the jury and the judge before Smith's sentencing order was entered.[13] In these circumstances, the Court cannot "confidently conclude that [the

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[13] The compelling nonstatutory mitigating evidence before Smith's sentencers should be compared to the relatively insignificant nonstatutory mitigating evidence before Hitchcock's sentencers: That "as a child petitioner [Hitchcock] had the habit of inhaling gasoline fumes from automobile gas tanks; that he had once passed out after doing so; that, thereafter, his mind tended to wander; that petitioner had been one of seven children in a poor family that earned its living by picking cotton; that his father had died of cancer; and that petitioner had been a fond and affectionate uncle to the children of one of his brothers." Hitchcock, 107 S.Ct. at 1824.

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, 106 S.Ct. 1669, 1671 (1986). See also Hitchcock, 107 S.Ct. at 1824. Smith'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 introduced.[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 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.

CONCLUSION

For the foregoing reasons, the appellant/petitioner, Jimmy

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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 (Fla. 1983); Gilvin v. State, 418 So.2d 996, 999 (Fla. 1982); Welty v. State, 402 So.2d 1159, 1164-65 (Fla. 1981). Had Smith'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.

Lee Smith, respectfully requests that this Court grant his petition for issuance of a writ of habeas corpus directing the trial court to conduct a complete new capital penalty proceeding.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail on this 26th day of October, 1987, to John Tiedemann, Esquire, Assistant Attorney General, The Capitol, Suite 1502, Tallahassee, Florida 32301.

Attorney

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