IN THE SUPREME COURT OF FLORIDA

WILLIAM THOMAS ZEIGLER, JR.,	:	
Petitioner,	:	Case No. 71463
-against-	:	
RICHARD L. DUGGER, Secretary, Department of Corrections, State of Florida,	:	
Respondent.	:	

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION AND STATEMENT OF JURISDICTION

1. Petitioner, William Thomas Zeigler, Jr., respectfully petitions this Court to vacate his sentence of death imposed in violation of the Eighth Amendment requirement that the sentencer consider all relevant mitigating evidence. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). Mr. Zeigler was sentenced on July 16, 1976, two years before Lockett v. Ohio, 438 U.S. 586 (1978) and one week after this Court's decision in Cooper v. State, 336 So. 2d 1133 (Fla. 1976), which was widely understood by lawyers and judges to hold that evidence of mitigating circumstances was strictly limited to the factors enumerated in Fla. Stat. § 921.141(6). Since then, the United States Supreme Court has held that the sentencer must "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." Lockett, 438 U.S. at 604; Eddings v. Oklahoma, 455 U.S. 104 (1982); Skipper v. South Carolina, 476 U.S. 1 (1986). At Mr. Zeigler's sentencing, Hon. Maurice Paul did limit the introduction of non-statutory mitigating evidence, and refused to consider the mitigating evidence that was proffered. Judge Paul's actions in Mr. Zeigler's trial were precisely those that the Supreme Court recently reversed in Hitchcock v. Dugger, 107 S. Ct. 1821 (1987).

2. This Court's original jurisdiction is invoked pursuant to Article V, Section 3(b)(9) of the Florida Constitution and Rule 9.030(a)(3) and of the Florida Rules of Appellate Procedure to correct the Court's prior judgments affirming Mr. Zeigler's death sentences, because those judgments resulted from "error that prejudicially denied fundamental constitutional rights." Kennedy v. Wainwright, 483 So. 2d 424, 426 (Fla.), cert. denied, 107 S. Ct. 291 (1986). Mr. Zeigler asks this Court to utilize its habeas corpus

jurisdiction to reexamine its prior rulings concerning the refusal of the trial court to allow presentation of or to consider evidence of non-statutory mitigating factors during the penalty phase of his trial in 1976. In the alternative, Mr. Zeigler suggests that he was denied effective assistance of appellate counsel, thus raising other issues appropriate for consideration at this time since they concern acts and omissions before this Court. Knight v. State, 394 So. 2d 997, 999 (Fla. 1981).

3. In June, 1984, this Court affirmed the denial of Zeigler's first Rule 3.850 motion, in which he claimed, inter alia: (a) that the trial judge had improperly limited his consideration of mitigating circumstances to those specified in the death penalty statute, and (b) that the ambiguity in that statute had the effect of preventing the defense from presenting other mitigating evidence, all in violation of Lockett v. Ohio, 438 U.S. 586 (1978). Because these claims had not been raised on direct appeal, however, the Court affirmed their denial on grounds of procedural default. Zeigler v. State, 452 So. 2d 537 (Fla. 1984).

4. In May, 1986 Mr. Zeigler filed a second rule 3.850 motion, renewing his Lockett claim in light of this Court's decision in Harvard v. State, 486 So.2d 537 (Fla.), cert. denied, 107 S. Ct. 215 (1986). Harvard held for the first time that -- prior to the decisions in Songer v. State, 365 So.2d 696 (Fla. 1978) and Lockett -- the Florida death penalty statute could have been read to limit the mitigating factors to those listed in the statute, and that such a claim was cognizable on a rule 3.850 motion despite a previous default. The trial court ordered an evidentiary hearing on this issue; but this Court reversed. It distinguished Harvard on the bases that the trial judge in that case had subsequently expressly stated that he did not consider non-statutory mitigating circumstances in imposing the death sentence and on the further ground that Mr. Zeigler did present some non-statutory mitigating evidence.

In its decision, the Court also noted the similarity between Mr. Zeigler's case and Hitchcock v. State, 432 So. 2d 42 (Fla. 1983) and Hitchcock v. Wainwright, 770 F.2d 1514 (11th Cir. 1985), rev'd sub nom. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), in which this Court and the Eleventh Circuit had both denied relief. Zeigler v. State, 494 So. 2d 957 (Fla. 1986).

5. Since then, the United States Supreme Court has ruled in Mr. Hitchcock's case that the exclusion of and failure to consider non-statutory mitigating evidence rendered his death sentence invalid. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). This Court has very recently held that Hitchcock represents a "substantial change in the law" that "potentially affects a class of petitoners", which obviates any previous procedural default. Delap v. Dugger, No. 71,194, slip op. at 1 (Fla. Oct. 8, 1987); Thompson v. Dugger, Nos. 70,739 and 70,781, slip op. at 3 (Fla. Sept. 9, 1987).

6. Mr. Zeigler's claims that the trial judge erroneously restricted the presentation and consideration of non-statutory mitigating evidence and that his appellate counsel was ineffective for failing to present that issue on direct appeal are thus appropriate for adjudication on the merits by this Court in the exercise of its habeas corpus jurisdiction in order to correct the earlier judgments and thus give effect to the intervening change in constitutional law.

STATEMENT OF THE CASE AND FACTS

A. Chronology of the Case

7. A grand jury in Orange County returned two indictments against petitioner on March 26, 1976, charging him with four counts of first degree murder in the killings of his wife, her mother and father, and another man on Christmas Eve of 1975.

(Vol. I, pp. 34-36.)* The indictments were consolidated for trial in the Ninth Judicial Circuit. The case was transferred to the Fourth Judicial Circuit as a result of pre-trial publicity. After a three week trial, Mr. Zeigler was convicted of two counts of first degree and two counts of second degree murder on July 2, 1976. (Vol. I, p. 74; Vol. II, pp. 253; TT at 2759-2761.) A sentencing hearing was held on July 16, 1976.** The jury recommended life imprisonment on all counts, but Judge Paul overrode the jury and imposed the death sentence for the two convictions of first degree murder. This Court affirmed the convictions and sentences, Zeigler v. State, 402 So. 2d 365 (Fla. 1981), and the United States Supreme Court denied certiorari. Zeigler v. Florida, 445 U.S. 1035 (1982).

8. An Application for Stay of Execution and a Petition for Writ of Habeas Corpus were filed in this Court on October 15, 1982, and denied on October 18th. The Petition challenged the constitutionality of this Court's practice of reviewing ex parte confidential, extra-record reports about appellants in capital cases.

9. A Petition for a Writ of Habeas Corpus was then filed in the United States District Court for the Middle District of Florida on October 18, 1982. The District Court granted a stay of execution and held the petition in abeyance in order to allow Mr. Zeigler to exhaust all possible claims in State court.

10. Mr. Zeigler then moved for post-conviction relief pursuant to rule 3.850, Fla. R. Crim. P. The trial court denied the motion. On appeal, this Court remanded for an

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* Citations by volume and page number are to the record on direct appeal. (Zeigler v. State, 402 So. 2d 365 (Fla. 1981, No. 50,355.) Citations to pages of the trial transcript will be preceded by "TT." Proceedings after the direct appeal will be referred to individually.

** Thus, Mr. Zeigler was sentenced after Cooper v. State, 336 So. 2d 1133 (Fla. 1976), but before Lockett v. Ohio, 438 U.S. 586 (1978).

evidentiary hearing concerning allegations of judicial bias. Zeigler v. State, 452 So. 2d 537 (Fla. 1984). On remand, the trial court, after the hearing, denied relief, and this Court affirmed. Zeigler v. State, 473 So. 2d 203 (Fla. 1985).

11. Having exhausted his State court remedies, Mr. Zeigler returned to the Federal court. His counsel, however, failed to file an amended habeas corpus petition in the United States District Court by the required date, leading to a summary dismissal by that court on January 3, 1986. Counsel also failed to file a timely appeal. New counsel appeared on Mr. Zeigler's behalf and filed with the District Court a motion under Fed. R. Civ. P. 60(b) to vacate its judgment. The motion was denied, and petitioner appealed. The Eleventh Circuit reversed and remanded the case with instructions that Mr. Zeigler be allowed to file an amended petition. That petition was filed on May 29, 1987, and is now pending in the District Court. Zeigler v. Dugger, No. 86-333-Civ-J-14.*

B. Facts Material to Mr. Zeigler's Claims

12. Unlike most of the other post-Hitchcock cases that have come before this Court, the jury in Mr. Zeigler's case recommended life imprisonment on all counts. The error in this case, then, occurred when the trial judge limited himself to consideration of only the statutory mitigating factors, as will be shown below. See McCrae v. Florida, No. 67,629, slip op. at 10 (Fla. June 18, 1987).

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* The State, having been granted successive extensions of time, has not yet responded to the Amended Petition on the merits. On October 15, 1987, however, it moved to dismiss on the ground that Zeigler's claim of ineffective assistance of appellate counsel had never been presented to the Florida courts and that the petition was therefore "mixed". The State suggested that the ineffective assistance of appellate counsel claim was related to the Lockett/Hitchcock claim, and that both claims should therefore be brought to this Court together. We have now withdrawn the ineffective assistance of appellate counsel claim from the federal petition. Copies of the State's motion and petitioner's response are annexed hereto in the Appendix as Exhibit 1 and 2 respectively.

13. In preparation for the sentencing hearing in this case, defense counsel had arranged to have a considerable number of community members and leaders available to testify about Mr. Zeigler's character, reputation and background. Their witness list contained nineteen names with addresses and telephone numbers and, in many cases, a brief summary of their expected testimony. Many of the potential witnesses also executed affidavits at a later time. These materials show that the defense was ready and able to present extensive and detailed testimony about Mr. Zeigler's charitable and community works, his active role in the church, his family life, his personal history, his business dealings and reputation, his dealings with other members of the community and his compassionate nature. In short, the defense would have shown that Mr. Zeigler had led a valuable and decent life which was entitled to substantial weight in balancing the factors relevant to his sentence. (Appendix, Exhibits 3 and 4.)

14. Just before the penalty hearing was to begin, however, the trial judge met with counsel in chambers, without a court reporter. After being advised of the evidence that petitioner planned to introduce in mitigation, Judge Paul instructed defense counsel instead to limit their evidence strictly to the mitigating factors listed in Fla. Stat. § 921.141(6). (Appendix, Exhibit 5.) As a result, only two witnesses were called on Mr. Zeigler's behalf, Dr. Allen Zimmer and Reverend Fay DeSha. Rev. DeSha, who had performed the ceremony when Mr. Zeigler married Eunice in 1967, testified about his personal knowledge of Mr. Zeigler and described Mr. Zeigler's activities as a church volunteer and as a member of the Winter Garden Housing Authority. (TT at 2780-2783.)* Dr. Zimmer, a psychiatrist who had interviewed Mr. Zeigler

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* The transcript of the penalty phase of the trial is contained in the Appendix, Exhibit 6.

over a period of several days, described him as "extremely compassionate" and loyal to family members and others close to him. He testified that he found no evidence of rationalization on the part of Mr. Zeigler. He further testified that Mr. Zeigler had no "appreciation of the magnitude of the crimes he was being charged with. It was his feeling, because of his idealistic nature, that this was just a misunderstanding and that it would all be resolved in the end." (TT at 2794.) Dr. Zimmer then expressed the opinion that if Mr. Zeigler were imprisoned he would not pose any future threat to society. (TT at 2798.)

15. The State did not present any evidence during the penalty phase of the trial. Instead, the prosecutor argued that "There are no mitigating circumstances that apply to the defendant in this case. They are set forth in the statute." (TT at 2810).

16. At the beginning of the penalty phase, Judge Paul instructed the jury, as he had in Mr. Hitchcock's case:

> The State and the Defense may now present evidence relative to what sentence you should recommend to the Court. You are instructed that this evidence when considered with the evidence you have already heard is presented in order that you might determine first whether or not sufficient aggravating circumstances exist which will justify the imposition of the death penalty, and, second, whether there are mitigating circumstances to outweigh the aggravating circumstances, if any.
>
> At the conclusion of the taking of the evidence and after argument of the attorneys you will be instructed on the factors in aggravation and mitigating that you are to consider.

(TT at 2777) (emphasis added).

17. At the conclusion of the sentencing hearing, the judge further limited the jury from consideration of non-statutory mitigating evidence, as he also did in Hitchcock, when he said:

> "The mitigating evidence which you may consider, if established by the evidence, are these . . . [reads statutory list].

(TT at 2820.)

18. Judge Paul overrode the jury recommendation of mercy. In announcing his sentencing decision, he stated that he had applied the evidence "to the standards set forth in the Florida statutes relative to aggravating and mitigating circumstances which must be considered and applied by this Court in determining the sentence that will be appropriate under all the circumstances in this case." (TT at 2863.) Judge Paul stated:

> "Notwithstanding the recommendation of a majority of the Jury, this Court, after weighing the aggravating and mitigating circumstances, find [sic] that sufficient aggravating circumstances exist as enumerated in Florida Statutes 921.141(5) and there are insufficient mitigating circumstances as enumerated in subsection 6 of that statute to outweigh the aggravating circumstances."

(TT at 2865) (emphasis added.) Judge Paul then sentenced Mr. Zeigler to two sentences of death.

19. On September 15, 1976, Judge Paul entered written Findings of Fact in support of the previously imposed sentences. (Appendix, Exhibit 7.) In those Findings, he wrote:

> ". . . it is recognized that the Florida Supreme Court has set forth, in addition to the enumerated statutory factors relative to 'aggravating' and 'mitigating' circumstances, the admonishment that '. . . in order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.' Tedder v. State, 322 So.2d 908, 910 (1975). In following the statute (Fla. Stat. 921.141), the trial judge is directed to weigh the statutory aggravating and mitigating circumstances when determining the appropriate sentence to be imposed in light of all the facts adduced. In short, the trial judge must justify imposition of a sentence of death, which must be in writing, applying the facts of the case to legislatively mandated criteria."

(Appendix, Exhibit 7). Judge Paul found that "[o]nly one mitigating factor is present -- the Defendant has no significant history of prior criminal activity . . ." (Appendix, Exhibit 7.) He made no mention of the evidence presented in the sentencing phase, or of any aspect of Mr. Zeigler's character or background other than the circumstances listed in Fla. Stat. § 921.141(6). The Findings of Fact, together with the statements Judge Paul made to the jury, show that he precluded the admission of almost all non-statutory mitigating

evidence and did not himself consider any of the mitigating evidence that was presented.

20. Although petitioner's counsel had attempted to present non-statutory mitigating evidence at the penalty phase of the trial, he did not raise the issue on direct appeal and argued only two points with regard to the sentences imposed: that the trial court erred in ignoring the jury recommendation of mercy and imposing the death penalty, and that the sentences of death were unconstitutional and void.

21. On August 30, 1984, the Circuit Court held an evidentiary hearing concerning allegations in the first rule 3.850 motion of judicial bias at Mr. Zeigler's trial. Judge Paul testified at that hearing. During cross-examination, he was asked why he decided to override the jury recommendation of life, and instead to impose death. He responded that:

> "After considering all the evidence and weighing it in my mind and the testimony and the culpability, all the requirements the statute impose [sic] of mitigating, you know aggravating and mitigating circumstances. I listed them."

(Appendix, Exhibit 8.) (Emphasis added.) As indicated above, Judge Paul's written findings show that absolutely no non-statutory mitigating factors were listed or considered by him.

NATURE OF THE RELIEF SOUGHT

22. Mr. Zeigler requests that his sentence be vacated and that his case be remanded to the trial court for resentencing. In the alternative, he requests that a new appeal be granted.

LEGAL BASIS FOR RELIEF

A. Mr. Zeigler Was Sentenced to Death in Violation of the Eighth and Fourteenth Amendments Because the Trial Judge Refused to Consider Non-Statutory Mitigating Evidence

23. It is now clear that "an appellant seeking post-conviction relief is entitled to a new sentencing proceeding when it is apparent from the record that the sentencing judge believed that consideration was limited to the mitigating circumstances set out in the capital sentencing statute." Harvard v. State, 486 So.2d 537, 539 (Fla.) cert. denied, 107 S. Ct. 215 (1986). In the past few months, this Court has vacated a number of death sentences and remanded for resentencing because the trial judge improperly limited himself and the jury to consideration of only the statutory mitigating circumstances. Thompson v. Dugger, Nos. 70,739 and 70,781, slip op. (Fla. Sept. 9, 1987); Downs v. Dugger, No. 71,100, slip op. (Fla. Sept. 9, 1987); Riley v. Wainwright, No. 69,563, slip op. (Fla. Sept. 3, 1987); Morgan v. State, No. 69,104, slip op. (Fla. Aug. 27, 1987); McCrae v. State, No. 67, 629, slip op. (Fla. June 18, 1987).

These cases are the result of Hitchcock. In Hitchcock, the United States Supreme Court held that the instructions and findings of fact clearly showed that Judge Paul "refused to consider evidence of non-statutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of Skipper v. South Carolina, 476 U.S. 1 (1986), Eddings v. Oklahoma, 455 U.S. 104 (1982) and Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion)." Hitchcock, 107 S. Ct. at ___. As noted in paragraph 4 above, this Court has previously called attention to the similarity between the sentencing procedures which led to the death sentences imposed on Mr. Zeigler and those followed in the Hitchcock case. Indeed, Judge Paul was the trial judge in both cases and he employed almost identical jury sentencing instructions, and closely similar findings of fact in each.

24. The United States Supreme Court has made it clear that the sentencer must consider any and all evidence which the defendant proffers of mitigating circumstances of background or character. See Lockett, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Skipper v. South Carolina, 476 U.S. 1 (1986). Mr. Zeigler was sentenced before Lockett, during that time when both lawyers and judges alike reasonably assumed that Fla. Stat. § 921.141(6), as construed, imposed a mandatory limitation upon the consideration of mitigating factors. In this case, the unconstitutionally excluded evidence would have given persuasive support to the jury's recommendation of life imprisonment. Had it been received, Judge Paul surely could not have concluded that: "no reasonable person could differ" on whether death was the appropriate punishment. In any event, it is clear from the record of this case, as it was in Hitchcock, that Judge Paul refused to consider even the mitigating evidence which was offered in Mr. Zeigler's behalf because it did not fit within the statutorily enunciated categories.

25. Although the Hitchcock issue was not raised on direct appeal in this case, it should nonetheless be considered by the Court on this petition, because Hitchcock "represents a substantial change in the law" since this Court first affirmed Mr. Zeigler's sentence on direct appeal. Delap v. Dugger, No. 71,194, slip op. at 2 (Fla. Oct. 8, 1987); Thompson v. Dugger, slip op. at 3. Accordingly, as Thompson makes explicit, the ordinary bar of procedural default does not apply.

26. The record of this case unequivocally shows that Judge Paul, as in the Hitchcock case, thought he was unable to, and therefore did not, consider any non-statutory mitigating circumstances or evidence when sentencing Mr. Zeigler. That being so, Mr. Zeigler was denied an individualized sen-

tencing as required by the Constitution, and his death sentences must be vacated.

B. In the Alternative, Mr. Zeigler Was Denied The Effective Assistance of Counsel On His Direct Appeal

27. When the Lockett/Hitchcock issue was raised last year in the 3.850 proceedings, this Court refused to consider it on grounds of procedural default, saying that it could and should have been raised on direct appeal. The injustice of that result seems evident, especially in light of Harvard v. State, 486 So. 2d 537 (Fla.), cert. denied, 107 S. Ct. 215 (1986), and we respectfully submit that this Court should correct it in the light of its recent decisions following Hitchcock.

28. Mr. Zeigler believes that Hitchcock was a substantial change of law, sufficient to defeat a claim of procedural default, a belief which is borne out by this Court's recent decisions in Thompson and Delap. However, should this Court adhere to its last decision in Mr. Zeigler's case, denying him relief on this issue, in spite of the recent decisions granting relief to other prisoners in the same circumstances, then the conclusion is inescapable that appellate counsel was ineffective for not raising the Lockett/Hitchcock issue on direct appeal. One would then be driven to the conclusion that the representation received by Mr. Zeigler was not consistent with what must be expected of an attorney representing a prisoner sentenced to death. Prejudice is obvious given Hitchcock and its progeny.

29. The right to effective assistance of counsel includes the right to effective assistance of counsel on appeal. Evitts v. Lucey, 469 U.S. 387 (1985). If Mr. Zeigler is refused relief because of procedural default, then it necessarily follows that counsel's ineffectiveness "so undermined the proper functioning of the . . . adversarial process that the [appeal] . . . cannot be relied on as having pro-

duced a just result." Strickland v. Washington, 466 U.S. 668, 686 (1984).

CONCLUSION

For the above reasons, Mr. Zeigler's sentences of death should be vacated with directions that a new sentencing hearing be held. In the alternative, Mr. Zeigler should be granted a new appeal.

Dated: New York, New York
November 17, 1987

Respectfully submitted,

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