IN THE SUPREME COURT OF FLORIDA

NO. 71946

JESSE JOSEPH TAFERO,

Petitioner,

v.

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

Respondent.

EMERGENCY PETITION FOR WRIT OF HABEAS CORPUS, MOTION FOR STAY OF EXECUTION, AND, IF NECESSARY, MOTION FOR STAY OF EXECUTION PENDING PETITION FOR WRIT OF CERTIORARI

(EXECUTION SET FOR MARCH 9, 1988)

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ORAL ARGUMENT REQUESTED

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I. JURISDICTION

This is an original petition for writ of habeas corpus, based upon error in the appellate process. Mr. Tafero seeks relief from a sentence of death based upon, inter alia, Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). This Court has jurisdiction to entertain the petition pursuant to Article V, Section 3(b)(9) of the Florida Constitution. See White v. Dugger, 13 F.L.W. 59 (Fla. Jan. 28, 1988).

II. PRIOR PROCEEDINGS

Mr. Tafero was convicted and sentenced to death for two homicides that occurred at the same time. 1/ This Court affirmed. Tafero v. State, 403 So. 2d 355 (Fla. 1981), cert. denied, 455 U.S. 983 (1982) (Tafero I). A motion seeking relief pursuant to Rule 3.850, Florida Rules of Criminal Procedure, was denied, and that denial was affirmed. Tafero v. State, 459 So. 2d 1034 (Fla. 1984) (Tafero II). Federal habeas corpus relief was denied. Tafero v. Wainwright, 796 F.2d 1314 (11th Cir. 1986), cert. denied, ___ U.S. ___, 107 S. Ct. 3277 (1987). While the 1987 certiorari petition was pending, Mr. Tafero filed a 3.850 motion, because under the time constraints imposed by an amendment to Rule 3.850, it was possible that claims not brought would be forfeited. Mr. Tafero asked that action on the motion be held in abeyance until the Supreme Court ruled on the pending certiorari petition. The trial court refused and denied the motion. This Court affirmed the trial court's ruling. Tafero v. State, ___ So. 2d ___ (Fla. 1987 (Tafero III). The Governor signed a death warrant. Tafero's execution is set for March 9, 1988.

III. ISSUES PRESENTED

During the pendency of Tafero III, the Supreme Court of the United States decided Hitchcock v. Dugger, 107 S. Ct. 1821 (1987),

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1. This case involved three defendants. Mr. Tafero is the only one with a death sentence. He was convicted after highly conflicting state evidence concerning which of the three defendants actually killed the victims (only a co-defendant said Mr. Tafero did -- independent eyewitnesses said he did not), and pursuant to a felony-murder and accomplice jury instructions which allowed petitioner's first-degree murder conviction even if one or both of the co-defendants was (were) the dominant actors and the actual killers. See footnote 7, supra This is but an example of the non-statutory mitigating evidence that the jury could have considered at sentencing (disparate treatment; same or more complicity by others), but which was based on Hitchcock error.

and the Eleventh Circuit Court of Appeals decided Mann v. Dugger, 817 F.2d 1471 (11th Cir.), vacated and rehearing en banc granted, 828 F.2d 1498 (11th Cir. 1987). Those cases form the basis for the issues raised by this petition:

I.

DID THE TRIAL JUDGE'S BELIEF THAT HE WAS LIMITED ONLY TO CONSIDERATION OF STATUTORY MITIGATING CIRCUMSTANCES, THE TRIAL JUDGE'S ADVISORY JURY INSTRUCTIONS LIMITING THE JURY TO CONSIDERATION OF ONLY STATUTORY MITIGATING CIRCUMSTANCES, AND THE PROSECUTOR'S STATEMENT THAT THE STATUTORY MITIGATING LIST WAS EXCLUSIVE, VIOLATE HITCHCOCK V. DUGGER, LOCKETT V. OHIO, AND THE EIGHTH AND FOURTEENTH AMENDMENTS?

II.

ARE THE EIGHTH AMENDMENT PROTECTIONS EMBODIED IN HITCHCOCK V. DUGGER AND LOCKETT V. OHIO SUBJECT TO HARMLESS ERROR ANALYSIS?

III.

IF HARMLESS ERROR IS RELEVANT TO A HITCHCOCK/ LOCKETT VIOLATION, CAN IT BE SAID THAT THE ERROR HAD NO EFFECT ON SENTENCING WHEN: (1) NON-STATUTORY MITIGATING EVIDENCE AROSE DURING THE GUILT/INNOCENCE PROCEEDING; (2) TRIAL TESTIMONY FROM DISINTERESTED WITNESSES SHOWS THE DEFENDANT DID NOT KILL; (3) THE DECISION AFFIRMING THE CONVICTION CONCEDES THAT DEFENDANT MAY HAVE BEEN CONVICTED AS AN ACCOMPLICE OR UNDER A FELONY-MURDER THEORY; (4) TWO OF THE TRIAL JUDGE'S AGGRAVATING FACTOR FINDINGS HAVE ALREADY BEEN OVERTURNED AND NOW HIS MITIGATION ANALYSIS HAS BEEN FOUND TO BE CONSTITUTIONALLY DEFECTIVE AND (5) ONE AFFIRMED AGGRAVATING FACTOR IS BASED UPON TRIAL EVIDENCE WHOSE ADMISSIBILITY AT TRIAL WAS SUSTAINED ON APPEAL VIA HARMLESS ERROR ANALYSIS, BUT HAS NEVER BEEN ANALYZED FOR THE PURPOSE OF DETERMINING ITS ADMISSIBILITY AT SENTENCING.

IV.

DID THE TRIAL COURT AND PROSECUTOR IMPERMISSIBLY DIMINISH THE JURY'S SENSE OF RESPONSIBILITY FOR IMPOSING THE DEATH PENALTY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS?

IV. ARGUMENT

I.

MR. TAFERO'S SENTENCING PROCEEDING VIOLATED FUNDAMENTAL EIGHTH AMENDMENT PRINCIPLES PURPOSED TO ENSURE THE ENFORCEMENT OF INDIVIDUALIZED CAPITAL SENTENCING

In Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), the Supreme Court wrote:

> We have held that in capital cases, "the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'" Skipper v. South Carolina, 476 U.S. ___, ___, 106 S. Ct. 1669, 1671, 90 L. Ed. 2d 1 (1986) (quoting Eddings v. Oklahoma, 455 U.S. 104, 114, 102 S. Ct. 869, 876, 71 L. Ed. 2d 1 (1982)). See also Lockett v. Ohio, 438 U.S. 586, 604, 98 S. Ct. 2954, 2964, 57 L. Ed. 2d 973 (1978) (plurality opinion).

107 S. Ct. at 1822. Because in Hitchcock "the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of non-statutory mitigating circumstances, . . . the proceedings did not comport with [Skipper, Eddings and Lockett]." Id., 107 S. Ct. at 1824. The Hitchcock Court remanded for a new sentencing proceeding which complied with Lockett, and in which the sentencer could not be precluded from considering "any relevant mitigating evidence that could justify a lesser sentence." Sumner v. Shuman, 107 S. Ct. 2716, 2727 (1987). The same result is required here.

A. THE TRIAL JUDGE RESTRICTED THE JURY, AND BELIEVED HE WAS RESTRICTED.

Sonia Jacobs was one of Mr. Tafero's co-defendants. At a separate trial, conducted after Mr. Tafero's, Judge Futch, who had already sentenced Mr. Tafero to death, revealed his unconstitutional understanding of the eighth amendment. As this Court wrote in Ms. Jacob's appeal: "The trial judge held the mistaken belief that he could not consider nonstatutory mitigating circumstances." Jacobs v. State, 396 So. 2d 713, 718

(Fla. 1981). One of the nonstatutory mitigating circumstances Judge Futch failed to consider at Jacob's trial was that Jacobs was a mother. Id. at 718. Mr. Tafero was a father, of one of Ms. Jacob's children.

Even if this Court were not already on record as knowing Judge Futch's restriction, the record in Mr. Tafero's case would compel that conclusion. Before the jury sentencing proceeding began, the judge told the jurors 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 that you may consider." ROA Supp., p. 46 (emphasis added). After evidence a argument, and after the judge instructed the jury as to the limited aggravating statutory list, he instructed the jurors on the limited mitigating statutory list:

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

Id. at 55. In his sentencing order, the judge clearly clung to the statutory list:

> This Court makes the additional finding that pursuant to F.S. 921.141(6), there are no mitigating circumstances present in this case.

Id. at 175 (emphasis added). "[I]t could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of non-statutory mitigating circumstances . . . ." Hitchcock, 107 S. Ct. at 1824.

B. THE PROSECUTOR ENFORCED THE JUDGE RESTRICTION.

In closing argument during the jury sentencing proceeding, the prosecutor told the jury that which the judge had already told them, and would tell them again -- the consideration of mitigating circumstances was restricted:

> When the judge reads to you, and I will go over with you, eight aggravating circumstances, six of those eight aggravating circumstances are present in this case.
>
> Look at the mitigating circumstances. None of the mitigating circumstances are applicable to this case.

ROA Supp., p. 48. This is fundamental eighth amendment error, requiring resentencing.

II.

> FUNDAMENTAL EIGHTH AMENDMENT ERROR SHOULD NOT BE SUBJECT TO A HARMLESS ERROR ANALYSIS AND, AT LEAST, SUCH AN ANALYSIS SHOULD NOT BE TRIGGERED BY THE LIGHTNING-LIKE ARBITRARINESS OF WHETHER THE STATE ARGUES HARMLESS ERROR
>
> Whatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record. This inability to confront and examine the individuality of the defendant would be particularly devastating to any attempt for consideration of what this Court has termed "[those] compassionate or mitigating factors stemming from the diverse frailties of humankind."

Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 2646 (1985), quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

A capital sentencer's decision to dispense mercy is frequently "difficult to explain," McCleskey v. Kemp, ___ U.S. ___, 107 S. Ct. 1756 (1987), based, as it must be, on innumerable factors, id., including "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 v. Ohio, 480 U.S. 586, 604 (1978)(plurality opinion of Burger, C.J.). This is the hallmark of jury input at capital sentencing: "it is the jury's2/ function to make the difficult

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2. While apparently a jury is not constitutionally required for capital sentencing, Florida provides for one. Lockett error before a Florida "sentencing" jury renders a sentence as constitutionally defective as the same error before the actual Florida sentencer judge, because the jury is

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and uniquely human judgments that defy codification and that 'buil[d] discretion, equity, and flexibility into a legal

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"sentencer" in Florida is very critical ways. As this Court recently explained:

> This Court has long held that a Florida capital sentencing jury's recommendation is an integral part of the death sentencing process. Lamadline v. State, 303 So. 2d 17, 20 (Fla. 1974) (jury recommendation can be 'critical factor" in determining whether or not death penalty should be imposed). Under Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975), a jury's recommendation for life must be given "great weight" by the sentencing judge. A recommendation of life may be overturned only if "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Id.
>
> This Court also has recognized that the jury's determination of the existence of any mitigating circumstances, statutory or nonstatutory, as well as the weight to be given them are essential components of the sentencing process. . . . [I]mproper, incomplete or confusing instructions relative to the consideration of both statutory and nonstatutory mitigating evidence does violence to the sentencing scheme and the jury's fundamental role in that scheme.
>
> . . . .
>
> Clearly, our prior cases indicate that the standards imposed by Lockett bind both judge and jury under our law. We reject the state's argument that a new advisory jury upon resentencing is not constitutionally required under Florida's sentencing scheme. If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process is tainted by that procedure.

Riley v. Wainwright, ___ So. 2d ___ 12 F.L.W. 457 (Fla. 1987), reh'g denied February 1, 1988. See also Adams v. Wainwright, 804 F.2d 1526, 1529 (11th Cir. 1986)("Because of the deference given the jury's recommended sentence [in Florida], that recommendation establishes the 'parameters' for all subsequent consideration of the appropriate sentence, including that of the trial judge, and makes '[t]he jury's role in an advisory sentencing proceeding. . . . critical.'")(citations omitted). Constitutional error before a jury is reversible error "if the judge actually were required to consider the jury's sentence as a recommendation as to the sentencer the jury would be appropriate, cf. Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L. Ed. 2d 913 (1976), and if the judge were obligated to accord some deference to it." Baldwin v. Alabama, 105 S. Ct. 2727, 2733 (1985).

system.'" McCleskey, 107 S. Ct. at 1777 (citations omitted). Consequently, Florida's early attempts to squeeze the "compassionate or mitigating factors stemming from the diverse frailties of humankind" into an embarrassingly meager statutory list of seven received thunderous condemnation from this Court in Hitchcock v. Dugger, ___ U.S. ___, 107 S. Ct. 1821 (1987).

This Court should decide that a harmless error analysis has no place in an eighth amendment capital sentencing setting. It was "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty" that caused Sandra Lockett's sentence and all others similarly situated to be reversed. Lockett, supra, 438 U.S. at 605. "When the choice is between life and death, that risk is unacceptable." Id. In Green v. Georgia, 442 U.S. 95 (1979), the exclusion of relevant evidence as hearsay was found to have "denied petitioner a fair trial on the issue of punishment." Id. at 97. Significantly, harmless error was never considered. In Eddings v. Oklahoma, 455 U.S. 104 (1982), the Court looked to see whether mitigating evidence excluded from consideration was "relevant", id. at 115, but expressly refused to apply a harmless error analysis. "We are concerned here only with the manner of the imposition of the ultimate penalty." Id. at 116 (emphasis supplied). Justice O'Connor went on to reply to the dissent's view that the error was only "semantics," emphasizing that Lockett "require[s] us to remove any legitimate basis for finding ambiguity concerning the factors actually considered." Id. at 119 (O'Connor, J., concurring). In Skipper v. South Carolina, ___ U.S. ___, 106 S. Ct. 1669, 1673 (1986), answering an argument that the excluded evidence was cumulative and harmless, the Court said it could not "confidently conclude" that the evidence "would have had no effect upon the jury's deliberations." The Court vacated the

death sentence because the excluded mitigation "impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender. The resulting death sentence cannot stand." Id. The question is not whether an appellate court may believe death would regardless have occurred, but is whether a defendant was presented the opportunity to avoid it:

> Although a sentencing authority may decide that a sanction less than death is not appropriate in a particular case, the fundamental respect for humanity underlying the eighth amendment requires that the defendant be able to present [and have considered] any relevant mitigating evidence that could justify a lesser sentence.

Sumner v. Shuman, ___ U.S. ___, 107 S. Ct. 2716, 2727 (1987) (footnote omitted).

The Court in Hitchcock noted that the State had not argued that the Lockett error was harmless, "or that it had no effect . . . ." Hitchcock, supra, 107 S. Ct. at 1874. That one sentence is what has allowed the spat over harmless error cases. Currently, the success of Hitchcock claims depends upon when, where, and before whom the claim is or has been presented, and whether the state relies on harmless error. This is the height of arbitrariness, and this Court should stop it. For example, this Court sometimes applies a per se reversal rule,3/ and sometimes applies a harmless error rule, with the harmless error

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3. In McCrae v. State, 510 So. 2d 874, 888 (Fla. 1987), the Court resolved the issue thusly: "[W]e find that the trial judge who sentenced appellant to death did not believe he was obliged to receive and consider evidence pertaining to non-statutory mitigating factors. This finding, based on the record, is sufficient to require a new sentencing hearing" (emphasis added). In Harvard v. State, 486 So. 2d 537, 539 (Fla. 1986), which was followed in Riley, supra, and Thompson, infra, the Court held that "an appellant . . . is entitled to a new sentencing proceeding when it is apparent from the record that the sentencing judge believed that consideration was limited . . . ." In Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987), the Court reversed because "we have no alternative," and the Court did not mention one single non-statutory mitigating circumstance that existed, and did not mention harmless error.

rule creeping in as Hitchcock apparently fades with time.4/ Interestingly, a petitioner's life may be saved based upon whether the state arbitrarily chooses not to argue harmless error: "Because the state declined to argue that the error complained of was harmless, we will not pass judgment on that issue." Waterhouse v. Dugger, No. 70,459, slip op. at 6, fn.* (Fla. February 11, 1988). Mr. Tafero's eighth amendment challenge should be treated like Mr. Waterhouse's, and new sentencing should occur.

III.

UNDER A HARMLESS ERROR ANALYSIS, THE HITCHCOCK ERROR HERE REQUIRES REVERSAL

A. THERE WAS NON-STATUTORY MITIGATING EVIDENCE IN THE RECORD THAT COULD NOT BE CONSIDERED

1. If There Is Non-Statutory Mitigation Present, Reversal Is Required.

If a pure or "technical" eighth amendment capital sentencing error involves, additionally, the introduction of irrelevant or inflammatory evidence, Booth v. Maryland, 107 S. Ct. 2529 (1987), or involves, additionally, preclusion of sentencer consideration of relevant mitigating evidence in the record, Hitchcock reversal is required. Even if reversal is not automatic upon a "technical" violation, it is required when that violation effects evidence. Thus, in every previous Hitchcock case in the Eleventh

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4. The disagreement appears to be over what to do when non-statutory mitigation is somehow plucked from the record by the Court. In Delap v. Dugger, 513 So. 2d 659 (1987), Demps v. Dugger, 514 So. 2d 1092 (Fla. 1987), and Booker v. Dugger, ___ So. 2d ___, 13 F.L.W. 33 (Fla. 1988), five members of the court have written that the error did not require reversal, while two judges have found that when there is non-statutory mitigating evidence, there must be a resentencing. Any other result would be predicated upon "sheer speculation." Delap, 513 So. 2d at 664 (Barkett, J., Kogan, J., dissenting).

Circuit Court of Appeal, and in every case that has been reversed by this Court, reversal either ipso facto followed the finding of eighth amendment error, or reversal occurred if there was any non-statutory mitigating evidence presented. See Stone v. Dugger, No. 86-3644 (11th Cir. February 5, 1988) (ipso facto); Hargrave v. Dugger, 832 F.2d 1528, 1534 (11th Cir. 1987) (en banc) ("some evidence in mitigation which did not fit within the confines of the Florida Statutes . . . was introduced . . . ."); Magill v. Dugger, 824 F.2d 879, 894 (11th Cir. 1987)("We cannot say that adding evidence of nonstatutory mitigating circumstances . . . would not have affected the jury's recommendation."); Messer v. Florida, No. 85-3124, slip op., p. 9 (11th Cir. November 30, 1987)(court reversed without mentioning harmless error analysis at all, after finding there was some non-statutory mitigating evidence, and after finding that the "jury was instructed what to consider, and his sentencing judge did not consider, evidence of non-statutory mitigating evidence"); Mikenas v. Dugger, ___ So. 2d ___, No. 71,129, slip op., p. 3 (Fla. January 21, 1988)(jury heard "considerable nonstatutory evidence"); Foster v. Dugger, ___ So. 2d ___, No. 70,597, slip op., pp. 2-3 (Fla. Dec. 3, 1987)("The fact that the judge, the ultimate sentencing authority, did not consider nonstatutory mitigating evidence settles the issue because there was some mitigating evidence that the court could have considered."); Downs v. Dugger, 514 So. 2d 1069, 1072 (Fla. 1987)("This Court previously has recognized as mitigating the fact that an accomplice . . . received a lesser sentence than the accused . . . . This, along with other mitigating evidence was presented . . . ."); Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987) (no harmless error analysis attempted; no discussion of the non-statutory evidence presented; ipso facto reversal); Riley v. Wainwright, ___ So. 2d ___, 12 F.L.W. 457, 458 (Fla. September 3, 1987)(per se: "Thus, a judge who fails to consider or is precluded from considering nonstatutory mitigating

evidence commits reversible error . . . ."); Morgan v. State, ___ So. 2d ___, 12 F.L.W. 433 (Fla. August 27, 1987); McCrae v. State, 510 So. 2d 874, 880, 888 (Fla. 1987)(per se: some non-statutory evidence presented, but "[w]e are not convinced . . . that it was given serious consideration"); Waterhouse, supra (per se).5/ If the record reveals a restriction, and if there was some non-statutory evidence, no harmless error affirmance of the sentence is countenanced, because it is impossible to tell whether the evidence would have affected the sentence. Hitchcock, supra, Skipper, supra. See also Booth v. Maryland, supra; Caldwell v. Mississippi, 472 U.S. 320 (1985).

There was a restriction in this case. There was also non-statutory mitigating evidence in this case.

2. The Non-Statutory Mitigating Evidence In This Record Compels Resentencing.

While no mitigating evidence was introduced in this case at sentencing,6/ plenty of mitigation arose at guilt/innocence.

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5. This Court has rejected other Hitchcock claims because the Court found no Hitchcock violation. See Agan v. Dugger, 508 So. 2d 11 (Fla. 1987); Card v. Dugger, 512 So. 2d 829 (Fla. 1987); Martin v. Dugger, 515 So. 2d 185 (Fla. 1987).

6. This is the case in which later convicted and disbarred defense counsel, dressed from head to toe "In black[,] I had a black suit, black shirt, black boots," seeking to convey to the jury that "[j]ustice had died" with their verdict (3.850 Tr, Nov. 1987, p. 104), told the jury only:

> May it please the Court and the ladies and gentlemen of the jury, I will be very brief here today in that I have consulted with Jessie Tafero and he feels very strongly that he did not receive a fair trial.
>
> He feels very strongly that this verdict was not fair, and he feels that to participate in the sentencing argument in any way would be a charade.
>
> He will not beg for his life, nor mercy. Thank you.
>
> Supplemental R
> Appeal No. 49,535, p.54.

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Disinterested witness testimony supported Tafero's defense that he was not the shooter.7/ This Court recognized that fact:

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Assuming counsel's statement to the jury was true, it was not in substance or form a waiver of juror consideration of non-statutory mitigating evidence that arose at guilt/innocence. If anything, the justice has died speech was an invitation to consider justice, things like co-defendant complicity, disparate treatment, and doubt about who actually killed, but such "justice" was not contained in the statutory list.

7. The independent eyewitness testimony of two citizens demonstrates plainly that petitioner took no part in the shooting that resulted in the deaths of the officers. However, under the instructions given, Mr. Tafero could have been found guilty of first-degree murder because he participated in a robbery in which Jacobs or Rhodes killed. The jury was precluded from considering this.

The jury could readily have believed that petitioner did not personally fire the shots at the decedents. Rhodes never testified as to any prior discussion regarding the shooting and indeed affirmatively stated that there was no prior talk about anything -- not the shooting and not alleged theft of the weapon or car (R IV 301-304). There was clearly no prior scheme to effectuate the deaths of the officers.

The testimony of the only two disinterested witnesses demonstrates virtually without conflict between them that petitioner fired no shots. Both witnesses were truck drivers who had clear unobstructed views of the entire incident. Pierce M. Hyman was parked directly behind the trooper's vehicle at a distance of about 150 feet (R III 18) and he remained in the elevated cab of his truck where he viewed the events (R III 20-21). He testified that at the time of the shooting petitioner was pushed over the patrol car with his hand held behind his back by the Canadian (R III 29-32, 52-55). The shots appeared to have come from the back of the Camaro (R III 5-6). Robert McKenzie also parked behind the two cars (R III 62) and saw the events well (R III 91). He drove as near as fifty feet from the cars to get a closer view (R III 73-75, 81, 91). Mr. McKenzie also saw petitioner pushed over the patrol vehicle with his arm twisted behind his back by the Canadian when the shots were fired (R III 76-78, 81, 94) and only after the shots had been fired did he see petitioner turn around (R III 81, 95).

The only witness to testify that petitioner took part in the shooting was Rhodes, the co-defendant who entered into a plea agreement in return for his testimony. Rhodes admitted that he had been convicted of so many felonies that he had lost count (R IV 309-310). Rhodes' credibility is further weakened by the fact that he had the same possible motive to shoot these persons as the state proposed that petitioner had. He was in violation of his parole, and he was a felon in possession of a weapon (R IV 310). Rhodes' testimony in exchange for a plea should be scrutinized more closely than other such pleas because of its

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> Eyewitness accounts vary as to what occurred next. A truck driver who was stopped at the rest area testified that Rhodes stood with his hands in the air while Irwin grabbed Tafero and held him against the patrol car. The witness then heard a single shot and a cry from the trooper, "I'm shot." Several rapid shots followed, and both the trooper and Irwin fell to the ground. The witness concluded that the shots came from the back seat of the Camaro.

Tafero v. State, 403 So. 2d 355, 358 (Fla. 1981). In the back seat were Sonia Jacobs and her two children, not Mr. Tafero.8/ Clearly, the most compelling non-statutory mitigating circumstances present is that Mr. Tafero did not kill, but was convicted on a felony-murder theory.

Additionally, the jury may have just had doubts. Even if the jury's doubt about the facts of the shooting were not sufficient to acquit, a "defendant might benefit at the sentencing phase of the trial from the jury's 'residual doubts' about the evidence presented at the guilt phase." Lockhart v. McCree, ___ U.S. ___, 106 S. Ct. 1758, 1768 (1986).

> [I]t seems obvious to us that in most, if not all, capital cases much of the evidence adduced at the guilt phase of the trial will also have a bearing on the penalty phase.

Id. 9/ See also, Harvard v. State, 486 So. 2d 537, 539 (Fla. 1986):

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nature. Testimony in exchange for a plea is often self-serving and unreliable. See, e.g., United States v. McCallie, 554 F.2d 770 (6th Cir. 1977). In evaluating the trustworthiness of Rhodes' testimony the jury could also have considered the unique power of the death penalty to coerce pleas and testimony and the life or death inducement for testifying falsely.

> Rhodes' testimony that after some initial shots petitioner went to the Camaro and received a firearm from Ms. Jacobs and then shot the officers is directly contradictory to the testimony of the two separate disinterested eyewitnesses. Such plain conflict together with his record and motives, render Rhodes' testimony unworthy of belief.

8. One of these two children was Mr. Tafero's. This Court found parenthood to be a non-statutory mitigating circumstance in Sonia Jacobs' appeal, and so it is here.

> [N]onstatutory mitigating factors may arise not only from evidence presented in the penalty phase but also from evidence presented and observations made in the guilt phase of the proceeding.

Another guilt phase non-statutory mitigating factor was the treatment accorded co-defendant Walter Rhodes despite the scientific evidence that he was the shooter. Rhodes received life imprisonment for his agreement to testify against Tafero. He naturally testified Tafero did the shooting. Rhodes, who was on probation and had been convicted of crimes so many times that "I lost count; going back to the juvenile days" (R Vol. IV, p. 309), testified he believed he could later seek mitigation of his life sentences. Id., at 337. Yet Rhodes was the only one of the three co-defendants who a forensic chemist could say had recently actually discharged a weapon. (R. Vol. V, pp. 545-46).10/

The State's disparate treatment of Rhodes, on these facts, was a matter the jury could have reasonably considered in its penalty phase calculus. DuBoise v. Florida, ___ So. 2d ___, 12 F.L.W. 107 (Fla. 1987); Brookings v. State, 495 So. 2d 135, 142-43 (Fla. 1986) ("It is clear. . .that the jury's recommendation of life was based on the disparate treatment accorded Murry and Lowery. . . . We are presented here with a factual picture. . . not infrequent. . .when deciding who to prosecute and who to plea

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9. Although Florida apparently abjures lingering doubt about guilt for sentencing purposes, Buford v. State, 403 So. 2d 943, 953 (Fla. 1981), the federal courts disagree. In any event, we posit these facts regarding the shooting not for purposes of innocence or guilt, but to underscore the subtle distinctions which may persuade a jury to recommend sparing a "guilty" defendant from death.

10. Q. As to State Exhibit 73, which is supposedly the swabs of Jessie Joseph Tafero, were you able to draw any conclusion from your examination?
A. Yes, sir.
Q. What was your conclusion?
A. The concentrates and distribution patterns of the metals involved are consistent with subject having handled an unclean or recently discharged weapon; or possibly discharging a weapon.

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bargain with. In this case the testimony of [co-defendants] was essential. . . . This kind of deal making is simply a fact of life . . . that the jury could reasonably consider . . . ."") (emphasis added). The co-defendant's disparate treatment would have provided a reasonable basis for a life recommendation in this case, which should not have been overridden,11/ but the jury was not allowed to consider it.

There was a clear Eighth Amendment Lockett-Hitchcock violation in this case. The decisions of this Court compel the conclusion that Jessie Tafero is entitled to a new sentencing hearing. See, e.g., McCrae v. State, 510 So. 2d 874, 888 (Fla. 1987): "[W]e find that the trial judge who sentenced appellant to death did not believe he was obliged to receive and consider

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Q. So, you couldn't reach a definite conclusion, either way?

* * *

Q. How about State Exhibit No. 75?
A. 75, being from Walter Rhodes, Jr., the concentrates and distribution patterns of the metals are consistent with the subject having discharged a weapon.
Q. How about State Exhibit 76?
A. State Exhibit 76, being from Sonia Linder, the concentrates and distribution patterns of the metals are consistent with the subject having handled an unclean or recently discharged weapon.

(emphasis added)

11. If a Florida jury recommends life, death may not be imposed if there is any "reasonable basis in the record" for the recommendation. Ferry v. State, 507 So. 2d 1373, 1376 (Fla. 1987); see also Hansbrough v. State, 509 So. 2d 1081, 1086 (Fla. 1987) ("a reasonable basis for the jury to recommend life" cannot be overridden); Fead v. State, 512 So. 2d 176, 178 (Fla. 1987) ("[O]nly when there are no 'valid mitigating factors discernible from the record' is an override warranted"); Wasko v. State, 505 So. 2d 1314, 1318 (Fla. 1987) (no override "unless no reasonable basis exists for the opinion"); DuBoise, supra (If a "fact could reasonably have influenced the jury," no override is proper). If any valid mitigating circumstances exists in the record, an override cannot be sustained. Fead, supra. The truth of this lies in co-defendant Sonia Jacob's appeal -- her jury recommended life, and the judge imposed death. This Court reversed, discussing the non-statutory mitigating circumstance in the record.

evidence pertaining to non-statutory mitigating factors. This finding, based on the record, is sufficient to require a new sentencing hearing" (emphasis added). In Harvard v. State, 486 So. 2d 537, 539 (Fla. 1986), which was followed in Riley v. Wainwright, ___ So. 2d ___, 12 F.L.W. 417 (Fla. 1987), the Court held that "an appellant . . . is entitled to a new sentencing proceeding when it is apparent from the record that the sentencing judge believed that consideration was limited . . . ."

B. THE ERROR COULD NOT BE HARMLESS IN LIGHT OF THE OTHER ERRORS IN THE RECORD

Four other major reasons counsel against harmless error being applicable here. First, not only did the trial judge erroneously believe he was limited to statutory mitigating factors, he (as could have the jury) erroneously found two aggravating factors. This Court rejected two of the trial court's six enumerated aggravating factors. Tafero v. State, 403 So. 2d at 361-62. "Harmless error" should not be applied where the sentencer's death sentence is riddled with error on both sides of the penalty equation.

Second, a central facet of the state's death demand was the late produced testimony of Marlowe Haskew, a contract police killer. Haskew testified Tafero had told him "he had no intention of returning to prison." Vol. VI, p. 642. Despite the violations of state discovery rules, and the violation of Brady v. Maryland, 373 U.S. 83 (1963) (Haskew's attorney fees were being secretly paid by the Florida Department of Criminal Law Enforcement), this Court found the errors emanating from Haskew's testimony were "harmless" and that "no new trial is required." (emphasis added). But while Haskew's testimony may have been harmless error in the guilt phase, its impact at sentencing was

much more focused and damaging, requiring a much different analysis. This Court capsulized Haskew's testimony:

> In essence he stated that a few weeks prior to the shooting Tafero told him that he would never go back to prison.

403 So. 2d at 355. The prosecutor, in his sentencing phase jury argument, emphasized Haskew's testimony as a basis for imposing the death penalty:

> You heard Haskew testify from the stand that he wasn't going back to prison. You can take that into consideration.

Supplemental R., p. 52.

The trial judge used Haskew's testimony as an aggravating factor:

> Evidence presented to this Court indicated beyond any reasonable doubt that Mr. Tafero was on parole and he indicated to his friends that he would never again go back to prison . . . .

R. Vol. II, p. 174. This Court approved the aggravating factor, which was founded on Haskew's testimony, without mentioning Haskew as the basis for the factor. 403 So. 2d at 362.

In the larger guilt phase context the harmless error view of Haskew's testimony may be justified. But in the narrow, and then unconstitutionally circumscribed penalty phase, Haskew's testimony cannot be viewed as harmless error nor can harmless errors be pyramided to sustain an otherwise constitutionally defective sentencing.

Third, a substantial portion of the prosecution, including jury selection, the evidence, the jury charge and the final arguments, were directed toward felony murder as the basis for convicting Mr. Tafero for first degree murder. Such a proceeding

raises Enmund v. Florida, 458 U.S. 782 (1982) problems.12/ This Court acknowledged the duality of the State's effort to seek death:

> Tafero had sufficient notice of the charges against him. Proceeding on a felony-murder theory might have been superfluous because the facts clearly demonstrated premeditation. Nevertheless, by the evidence the jury could have found that the homicides were committed for the purpose of forcefully taking the trooper's car to make an escape. There was no error in proceeding under both theories.

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12. The prosecutor's closing argument underscores the Enmund specter in this case:

> You will remember, in the beginning on voir dire, I asked several of you, "Have you ever heard of the felony murder rule?" The felony murder rule, as his Honor, Judge Futch, is going to instruct you, is that when there is a felony being committed, or attempting to be committed, all parties involved in that felony are guilty of murder, even if an innocent bystander, or an innocent person, is killed during the commission of that felony.
>
> So, if a person is killed during the commission of a felony, or one of the eight numerated felonies -- of which robbery is one -- all parties are guilty of first degree murder, no matter whether they pull the trigger, or stood there.

(R. Vol. VIII, p. 390)

* * *

> He [Rhodes] has been already sentenced. He has already gotten three life sentences. That's no cookie; and the reason he got three life sentences is because he is guilty of murder, because he took part in that robbery, and that makes him guilty of murder; and he took part in that kidnapping, and there is no question about that.

Id., 394.

* * *

> Ladies and gentlemen, don't get caught in a spiderweb. Look to the robbery. They are all responsible for that robbery. Mr. McCain wants to tell you, "Hey, folks, we are only interested in who did the shooting."
>
> You are not only interested in who did the shooting. You are interested in the totality of the circumstances that happened. They are all responsible for the death of those two....

(footnote continued on following page)

403 S.2d at 361. Where a record reflects the specter of a guilt conviction which could have been based upon felony-murder, one cannot firmly say that the jury's death recommendation is harmless beyond a reasonable doubt in the face of a clearly erroneous sentencing instruction, which precluded the jurors from considering that someone else was the shooter.

Finally, any attempt to apply harmless error raises a question about the effectiveness of Tafero's counsel at sentencing in light of the now known Hitchcock violations and the validity of the Eleventh Circuit's finding that Tafero "agreed" to McCain's strategy.

> In this case, any inquiry into whether this closing argument amounted to ineffective assistance is rendered easy because Tafero agreed to the strategy.

Tafero v. Wainwright, 796 F.2d 1314, 1320 (11th Cir. 1986). The Eleventh Circuit decision preceded Hitchcock. Now the question must be asked whether Tafero could have knowingly and intelligently agreed to McCain's strategy of not presenting any

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(footnote continued from preceding page)

> Look at that. They are all responsible for that. I don't think there is any question in your mind that a robbery happened; and during the course of the robbery, the Trooper lost his Smith & Wesson .357 revolver, and his patrol car.
>
> Id., 411-412
>
> * * *
>
> If two guys go into a 7-11, and one blows the store clerk away, if he shoots the store clerk, they are both guilty of felony murder. It doesn't matter who fired the weapon, they are both responsible.
>
> Id., 417

The Eleventh Circuit (Tafero v. Wainwright, 796 F.2d 1314, 1318) found that this Court's pre-Enmund, 403 So. 2d 1318, statement affirming Tafero's conviction ("proceeding on a felony-murder theory might have been superfluous because the facts clearly demonstrated premeditation") met the Cabana v. Bullock, ___ U.S. ___, 106 S. Ct. 689 (1986) means of avoiding Enmund. We do not challenge that finding here, but raise the Enmund matter to demonstrate how slippery a foundation exists for this death sentence.

argument in mitigation when that "strategy" had to be formulated within the trial judge's erroneous and unconstitutional belief that he was limited to consideration of only statutory mitigating evidence?

Put another way, would Tafero have "agreed" to a penalty phase argument attacking the jury if he had known that his lawyer could have spoken of the trial issues -- who did the shooting, who tested positive for gun discharge, who was getting a benefit from testifying? The trial judge's instructions to the jury and his order leave no doubt that that argument could not have legally been considered by the jury. How can a decision to disdain an argument which, at the time, could not be legally considered, now form the basis for harmless error in light of Hitchcock's lesson that such an argument should have been allowed. How could Jesse Tafero agree to forego a right which he could not have asserted because the trial court did not believe he possess the right to argue non-statutory mitigation?13/

In the face of all these considerations one cannot say of Tafero's sentencing "unhesitatingly" that the non-statutory mitigation "would conclusively have had no effect upon the recommendation" of death imposed here. White v. Dugger, 13 F.L.W. at 59.

IV.

THE DIMINUTION OF THE JURORS' SENSE OF RESPONSIBILITY IN THE SENTENCING PHASE VIOLATED CALDWELL V. MISSISSIPPI, 472 U.S. 320 (1985)

In Caldwell v. Mississippi, 472 U.S. at 329, 105 S. Ct. at 2639, the Supreme Court held that "it is constitutionally

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13. Is not the right Tafero allegedly agreed to forego (the right to argue for his life) a "basic right that the attorney cannot waive without the fully informed and publicly acknowledged consent of the client"? Taylor v. Illinois, ___ U.S. ___, 56 L.W. 4118, 4123 (1987). How could Tafero be "fully informed" of a right which he did not possess at the time and could not have asserted given the judge's view.

impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." Caldwell error occurred here. The trial judge, in voir dire, told the jury:

> That is just an advisory sentence, and that is not binding upon the Court.
>
> The Court can accept your advisory sentence, if it so desires; or the Court can refuse to accept your advisory sentence, because the last word as to the sentence is right here. Do you understand that?
>
> MRS. SHAMBAUGH: Yes, sir.

(R. 293, Vol. VIII).

> [Judge] An advisory sentence is not binding upon the Court. It is an advisory sentence, but the final decision in Florida is left up to the Judge. Do all of you understand that?
>
> . . . .
>
> The Court can then sentence the defendant to life imprisonment or to death; and the Court not being required to follow the advice of the jury.
>
> That is what I was just telling you off the top of my head.
>
> Thus, the jury does not impose the punishment, if such a verdict is rendered. The imposition of punishment is the function of the Court, rather than the function of the jury.

(R. 295, Vol. VIII).

> . . . .
>
> The State and the defendant present arguments for and against the sentence of death; and a jury renders an advisory sentence to the Court as to whether the defendant should be sentenced to life imprisonment, or to death, which may be by a majority vote of the jury.
>
> The Court then sentences the defendant to life imprisonment or to death, the Court not being required to follow the advice of the jury. Thus, the jury does not impose punishment, if such a verdict is rendered.

The imposition of punishment is the function of the Court, rather than the function of the jury.

. . . .

(Tr. 13-14, Vol. VII). The prosecutor told the jury the same thing:

MR. SATZ: In other words, we have a two-phase trial. If you find the defendant guilty of first degree murder -- and if you do -- then you have to render an advisory opinion to the Court by a majority --

MRS. QUESADA: (Affirmative nod.)

MR. SATZ: -- as to life or death, and the Judge will determine what he has to do.

MRS. QUESADA: Right.

(R. 68-69, Vol. VII).

MR. SATZ: Do you understand, even if you don't believe in capital punishment, his Honor, Judge Futch, is the final determiner?

MRS. KIELBASA: I understand that.

(R. 247, Vol. VIII).

Just before the sentencing proceeding, the Court told the jury:

As I told you, the punishment for this crime is either death, or life imprisonment.

The final decision as to what punishment shall be imposed rests solely with the Judge of this Court. However, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the defendant.

(R. 47, ROA Supp.).

As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge. However, it is your duty to follow the law which will now be given to you by the Court, and render to the Court an advisory sentence based upon your

(R. 47, ROA Supp.). Then the jury was charged:

As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge.

(Id. at 54).

Thus, throughout the critical phases of the case concerned with sentencing, the jury was misled regarding the critical nature of its role under Florida law. This violated Caldwell and requires resentencing before a properly instructed jury. Compare, Mann v. Dugger, 817 F.2d 1471 (11th Cir.) vacated and rehearing en banc granted, 828 F.2d 1498 (1987); Harich v. Wainwright, 813 F.2d 1082 (11th Cir.) vacated and rehearing en banc granted, 828 F.2d 1497 (1987); Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1987).

The claim is cognizable in this habeas corpus action because no remedy is available pursuant to Rule 3.850 -- this Court has rejected the merits of the Adams/Caldwell claim (and has embraced its jurisdiction to do so, Pope v. Wainwright, 496 So. 2d 798, 804-05 (Fla. 1986)), which means no relief is available in Florida courts unless this Court changes its mind. See Garcia v. State, 492 So. 2d 360, 367 (Fla. 1986); Aldridge v. State, 503 So. 2d. 1257, 1259 (Fla. 1987); Card v. Duggger, 512 So. 2d. 829, 831 (Fla. 1987); Delap v. State, 513 So. 2d. 1050, 1050-51 (Fla. 1987); Smith v. State, 515 So. 2d 182, 185 (Fla. 1987); Foster v. State, 12 F.L.W. 598 (Fla. 1987). The allocation of some habeas corpus jurisdiction to the trial court under Rule 3.850 does not divest this Court of its constitutionally authorized jurisdiction, if a ruling under Rule 3.850 is unavailable. See, e.g., Mitchell v. Wainwright, 155 So. 2d 868, 870 (Fla. 1963).

CONCLUSION AND REQUEST FOR STAY OF EXECUTION

The Petition for Writ of Habeas Corpus should be granted. Alternatively, a stay of execution should be granted to allow the Court to carefully consider the issues presented, or to permit the petitioner to seek further review. Since the Supreme Court of the United States granted a stay in Clark v. Dugger on February 5, 1987, a case which raises issues similar to those

raised here, a stay of execution should be granted by this Court pending the Supreme Court of the United States' decision on the certiorari petition submitted by Clark, should relief be denied here.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Emergency Petition for Writ of Habeas Corpus and Motion for Stay of Execution" has been furnished by U.S. Mail to Joy B. Shearer, Assistant Attorney General, Department of Legal Affairs, Room 204, 111 Georgia Avenue, West Palm Beach, Florida 33401, this 18 day of February, 1988.

Attorney