IN THE
SUPREME COURT
OF FLORIDA

NO. 71,946

JESSE JOSEPH TAFERO,

Petitioner,

v.

RICHARD L. DUGGER,

Respondent.

RESPONSE TO PETITION FOR HABEAS CORPUS

(EXECUTION SET FOR MARCH 9, 1988)

JOY B. SHEARER
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
(305) 837-5062

RICHARD G. BARTMON
Assistant Attorney General

Counsel for Respondent.

IN THE
SUPREME COURT
OF FLORIDA

NO. 71,946

JESSE JOSEPH TAFERO,

Petitioner,

v.

RICHARD L. DUGGER,

Respondent.

RESPONSE TO PETITION FOR HABEAS CORPUS

Comes now the Respondent, Richard L. Dugger, through his undersigned counsel, and responds to the Petition for Habeas Corpus filed by the Petitioner, Jesse Joseph Tafero, a prisoner whose execution is set for March 9, 1988, and states:

I. PROCEDURAL HISTORY

The Petitioner was sentenced to death nearly twelve years ago, on May 18, 1976, for two first degree murders, committed on February 20, 1976. Since that time, there has been thorough state and federal review of his convictions and sentences. A brief review of these decisions follows:

1. The judgments and sentences were affirmed on direct appeal. Tafero v. State, 403 So.2d 355 (Fla. 1981), cert. denied, 455 U.S. 983 (1982).

2. An original petition for writ of error coram nobis was denied by the Florida Supreme Court in 1983. Tafero v. State, 440 So.2d 350 (Fla. 1983); cert. denied 465 U.S. 1084 (1984).

THE GOVERNOR OF FLORIDA SIGNED THE PETITIONER'S FIRST DEATH WARRANT ON NOVEMBER 2, 1984.

3. On November 15, 1984, the State trial court, following a two-day evidentiary hearing, denied the Petitioner's first Fla.R.Crim.P. 3.850 motion. The Florida Supreme Court

affirmed the order and denied a stay of execution. Tafero v. State, 459 So.2d 1034 (Fla. 1984).

4. The Petitioner filed a Petition for Habeas Corpus in the United States District Court, Tafero v. Wainwright, No. 84-6957-Civ-NESBITT. The District Court denied the petition and denied a stay of execution on November 28, 1984.

5. In order to consider the Petitioner's appeal, the United States Court of Appeals for the Eleventh Circuit granted a stay of execution but ultimately affirmed the District Court's denial of the petition. Tafero v. Wainwright 796 F.2d 1314 (11th Cir. 1986), cert. denied ___ U.S. ___, 107 S.Ct. 3277 (1987).

6. The Petitioner filed a second Fla.R.Crim.P. 3.850 motion in December 1986. The trial court summarily denied the motion as an abuse of the procedure provided by the rule, and its order was affirmed by the Florida Supreme Court on December 23, 1987. Tafero v. State, 13 FLW 8 (Fla. Dec. 23, 1987).

ON JANUARY 27, 1988, THE GOVERNOR OF FLORIDA SIGNED THE PETITIONER'S SECOND DEATH WARRANT.

7. The Petitioner filed an original petition for habeas corpus in this Supreme Court of Florida on February 18, 1988. The present pleading is filed in response.

II.

The decision in Hitchcock v. Dugger, does not afford Tafero any basis for relief from his death sentences.

A. INTRODUCTION

Tafero, relying on the United States Supreme Court's decision in Hitchcock v. Dugger, ___ U.S. ___, 107 S.Ct. 1821, 95 L.Ed.2d 347, (1987), seeks a reversal of his two death sentences, imposed nearly twelve years ago. Many of the underlying arguments[1] advanced by Tafero are no more than new twists on

[1] e.g., Tafero's parental status as mitigating, the disparate treatment of Rhodes, the alleged ineffectiveness of trial counsel, the applicability of Enmund v. Florida, 458 U.S. 782 (1982), and the use of Haskew's testimony.

issues that have been previously addressed and resolved. The State will respond to Tafero's arguments, but wishes to make it clear at the outset that the law of the case doctrine precludes reconsideration of these matters. Preston v. State 444 So.2d 939, 942 (Fla. 1984).

B. PROCEDURAL BAR

The State acknowledges that this Court has found Hitchcock to be the type of change in law contemplated by Witt v. State, 387 So.2d 922 (Fla. 1980), so as to preclude application of a procedural bar in a successive collateral petition, Thompson v. Dugger, 515 So.2d 173 (Fla. 1987). Nevertheless, the instant case is distinguishable and a procedural bar should apply because at the time Tafero filed his second Fla.R.Crim.P. 3.850 motion, December 30, 1986, Hitchcock had been accepted for review by the United States Supreme Court.[2] The present petition is therefore an abuse of Florida's collateral procedure.

Although Hitchock had not been decided at the time of the filing of the second Rule 3.850 motion, its pendency in the Supreme Court certainly served as notice that what is now known as a "Hitchcock claim" was available. In Smith v. Murray, ___ U.S. ___, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986), the Supreme Court held that a procedural bar may be validly applied and that perceived futility alone does not constitute "cause" for excusing the default. Id. at 91 L.Ed.2d 434. The question is not whether subsequent legal developments have made counsel's job easier but whether at the time of the default the claim was "available" at all. Id. at 446. Counsel here were well aware that Hitchcock was pending, for at page 28 of the Rule 3.850 motion (See the record on file in Tafero v. State, No. 70,422), Hitchcock was referred to in support of the race of the victim claim.

---

[2] Hitchcock v. Wainwright, ___ U.S. ___, 106 S. Ct. 2888, 90 L.Ed.2d 976 (1986) [certiorari granted June 9, 1986]; 40 CrLR 4062-4063 [a synopsis of the oral argument held October 15, 1986].

Therefore, in Tafero's stituation, the legal basis for his Hitchcock claim was "reasonably available" to counsel at the time of his December 30, 1986, motion for post-conviction relief. Reed v. Ross, 468 U.S. 1 (1984). The present petition -- Tafero's fourth[3] invocation of Florida's mechanisms for obtaining collateral review -- constitutes an abuse of the procedure which should be summarily denied.

C. HARMLESS ERROR ANALYSIS IS APPLICABLE TO HITCHCOCK CLAIMS

In arguing that there must be a per se resentencing requirement for any Eighth Amendment violation, Tafero must acknowledge the following language in Hitchcock:

> Respondent has made no attempt to argue that this error was harmless, or that it had no effect on the jury or the sentencing judge. In the absence of such a showing our cases hold that the exclusion of mitigating evidence of the sort at issue here renders the death sentence invalid.

Hitchcock at 95 L.Ed.2d 353. (emphasis supplied). Nevertheless, he asks this Court to "say it isn't so". The State maintains that in Hitchcock, the Supreme Court clearly contemplated that there are cases where a limitation on mitigating circumstances can be harmless.

In Hitchcock, as in Lockett v. Ohio, 438 U.S. 586 (1978), Eddings v. Oklahoma 455 U.S. 104 (1982), and Green v. Georgia, substantial mitigating evidence was proffered but not considered by the sentencer. Consequently, the Court had no occasion to consider harmless error in these cases. However, the Court's specific reference to harmless error in Hitchcock can only be read as recognizing the possibility that an Eighth Amendment error can be harmless, just as in the case of other Constitutional error. Chapman v. California, 386 U.S. 18 (1967). This is not arbitrary, as Tafero suggests, because a

[3] (1) Tafero v. State, 440 So.2d 350 (Fla. 1983) [coram nobis]; (2) Tafero v. State, 459 So.2d 1034 (Fla. 1984) [first 3.850 appeal]; (3) Tafero v. State, 13 FLW 8 (Fla. Dec. 23, 1987) [second 3.850 appeal].

harmless error analysis necessarily involves an analysis of the totality of the circumstances in a given case. See, State v. Diguilio, 491 So.2d 1129 (Fla. 1986).

Following Hitchcock, this Court has correctly held the harmless error rule is applicable to an analysis of such claims. In Delap v. Dugger, 513 So.2d 659 (Fla. 1987), the Court viewed the totality of the circumstances and found the giving of the faulty jury instruction was harmless error. In Demps v. Dugger, 514 So.2d 1092 (Fla. 1987), the Court again found the erroneous jury instruction harmless where it was clear beyond a reasonable doubt, in view of the aggravating and mitigating factors, the judge would have properly imposed death regardless of a life recommendation. Recently, in White v. Dugger, 13 FLW 59 (Fla. Jan. 28, 1988), this Court held that if no mitigating evidence existed, the erroneous instruction can clearly be found harmless. See also, Ford v. State, Nos. 70,467 and 70,793 (Fla. Feb. 18, 1988).

Pursuant to these authorities, there can be no doubt that at most any error was harmless because nothing in mitigation was presented. The factors now proposed by Tafero , as discussed in Section II(E) of this pleading, are not mitigating and would not have changed the result in view of the strength of the four valid aggravating factors.[4] If there were ever a case for application of the harmless error rule, it is surely this one.

D. THERE IS NO HITCHCOCK VIOLATION IN THE CASE SUB JUDICE BECAUSE NO NONSTATUTORY MITIGATING EVIDENCE WAS PRESENTED.

In Hitchcock v. Dugger, ___ U.S. ___, 107 S.Ct. 1821 (1981), the Supreme Court granted relief where, after a review of

[4] See also, Tafero v. Wainwright, 796 F.2d 1314, 1320 (11th Cir. 1986), where the Court, in denying the ineffective counsel claim, characterized the evidence proffered as mitigating in 1984 as "weak", concluding, "because of the weak nature of the mitigating evidence and because of the overwhelming evidence of the aggravating circumstances surrounding the murders, we are convinced that no reasonable probability existed that the jury would have reached a different result had Tafero's counsel presented the mitigating evidence which was available, or had he presented a stronger closing argument."

the record, it found, "the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances" Hitchcock, 95 L.Ed.2d at 353 (emphasis added). In Hitchcock, evidence of nonstatutory mitigating circumstances was introduced but not considered. By contrast, in the instant case, defense counsel introduced no evidence in mitigation and when offered the opportunity to make an argument, simply made a brief statement declining to participate in the sentencing phase of the trial. (Volume labeled "Addendum to appeal", p. 54, Tafero v. State, No. 49, 535). He later testified this decision was made jointly by himself and Tafero. (Transcript of hearing, p. 70, Case No. 66, 156). In short, because there was no evidence in mitigation presented, any error in the instructions or in the trial judge's perception is at most, harmless.

Both this Court and the Eleventh Circuit have refused to grant relief in cases such as this one where it is apparent that a defendant could not have been prejudiced by any limitation on nonstatutory mitigation because he presented no such evidence. In White v. Dugger, 13 FLW 59 (Fla. January 28, 1988), this Court held that in deciding a Hitchcock issue it is necessary to engage in a two part analysis. First, it must be determined from the totality of the circumstances whether or not the jury felt limited. If so, then the next step is to consider whether there was evidence of nonstatutory mitigating circumstances of such a degree that it might have affected the jury's recommendation or the trial court's consideration. If no mitigating evidence existed, an erroneous instruction can clearly be found to be harmless. The Eleventh Circuit, in Clark v. Dugger, 834 F.2d 1561, 1569-1570 (11th Cir. 1987), has likewise concluded that where the defendant did not introduce any nonstatutory mitigating evidence, he was in no position to complain that the jury's ability to consider it was restricted.

This Court has already determined, in its 1984 opinion in the appeal from the denial of Tafero's first rule 3.850

motion, that in the instant case, the defense presented nothing, either statutory or nonstatutory, in mitigation. Tafero v. State, 459 So.2d 1034, 1037 (Fla. 1984). This Court's refusal to grant relief in 1984[5] based on conjecture about the trial judge's hypothetical refusal to consider nonstatutory mitigating evidence that was never presented remains a valid ruling in 1988, post-Hitchcock. White v. Dugger, 13 FLW 59 (Fla. January 28, 1988); Clark v. Dugger, 834 F.2d 1561, 1569-1570 (11th Cir. 1987).

E. THE EVIDENCE SUGGESTED BY THE PETITIONER AS MITIGATING HAS ALREADY BEEN REJECTED BY THIS COURT IN OTHER CONTEXTS.

Tafero acknowledges there was no mitigating evidence, statutory or nonstatutory, presented or argued at the sentencing phase of his trial but asserts it was available. This is no more than an ill disguised attempt to relitigate the ineffective counsel issue which was decided in the 1984 collateral litigation. During the evidentiary hearing conducted on this matter, defense attorney McCain testified he had reviewed the penalty phase with Tafero in advance of the trial and they discussed possible witnesses. (T.[6] 60). The decision was made not to put on evidence. McCain realized the mitigating circumstances were not limited to those in the statute. (T. 60). The closing statement in the penalty phase had been approved by Tafero and it was what he wanted to have said. (T. 67-70). On appeal, this Court approved the denial of relief, find that "defense counsel's performance resulted from considered deliberation and performance and was based on tactical decisions" Tafero v. State, 459 So.2d 1034, 1036 (Fla. 1984). Subsequently, the Eleventh Circuit held that the closing statement was agreed to by Tafero and the claim of ineffective assistance must fail because there was no showing of prejudice. Tafero v. Wainwright, 796 F.2d 1314, 1320 (11th Cir. 1986).

---

[5] Which was subsequently approved by the Eleventh Circuit in Tafero v. Wainwright, 796 F.2d 1314, 1321 (11th Cir. 1986).

[6] See the Transcript on file in Case No. 66,156.

The present claim, nearly twelve years later, that there is nonstatutory mitigating evidence, was never made at trial. It comes too late. Moreover, the mitigating evidence alleged to exist would not be sufficient to alter the death sentences. In such circumstances, Hitchcock does not compel resentencing. Ford v. State, Nos. 70,467 and 70,793 (Fla. Feb. 18, 1988). As the State has already noted, the Court has previously considered and rejected this evidence in other areas.

First, the State will discuss Tafero's status as a parent. In Jacobs v. State, 396 So.2d 713 (Fla. 1981), this Court reviewed the death sentences imposed on Tafero's co-defendant, and reversed for a reduction to life because the trial jduge had overridden the jury's recommendation. This Court found the jury may have considered the fact that Jacobs was a mother of two children for whom she cared, that she was under Tafero's influence, that her actions were what she perceived to be a necessary measure to protect her family, and that she had no prior history of violence. Thus, Jacob's parental status was not viewed as a reason for a life sentence in and of itself, but was considered as one of the reasons which may have in the jurors' minds mitigated her commission of the crimes: she was a parent and was acting to protect her family. By contrast, Tafero's motivation for the murders was to avoid his certain arrest on an outstanding parole violation warrant. There is no suggestion in the record that he was acting to protect his family.

Moreover, in Tafero's case there were four aggravating factors upheld on appeal, Tafero v. State, 403 So.2d 355 (Fla. 1981), as opposed to two in Jacobs. Even if the fact that Tafero fathered a child could be said to be mitigating if it had been presented as such, it is clear beyond a reasonable doubt this could have in no way diminished the force of the four aggravating circumstances. Compare, Demps v. Dugger, 514 So.2d 1092 (Fla. 1987); Delap v. Dugger, 513 So.2d 659, 663 (Fla. 1987).

Second, Tafero asserts there is residual doubt as to who actually did the shooting. This Court has found explicitly

to the contrary. On direct appeal it stated, "Tafero did the shooting and was probably the leader of the group." Tafero v. State, 403 So.2d 355, 362 (Fla. 1981). In the 1984 3.850 appeal, the Court again stated, "The jury, as was its right, obviously believed the testimony of the state's chief witness, Rhodes, that Tafero and Jacobs did all the shooting, rather than Tafero's theory of defense that Rhodes shot the victims." Tafero v. State, 459 So.2d 1034, 1036 (Fla. 1984). The evidence Tafero cites concerning the results of the atomic absorption tests which were consistent with Rhodes' having discharged a weapon was discussed at trial; it was explained that Rhodes' wounds from the shootout at the roadblock could have caused these results. (RV (trial transcript-direct appeal no. 49,535) 546, 548).

Furthermore, two disinterested witnesses, the truck drivers, testified Rhodes was standing with his hands raised in the air throughout the shooting. (R II 30-33;79-81). This corroborated Rhodes' trial testimony that he was in front of the cars with his hands in the air when Sonia Jacobs fired the initial shots and Tafero took the gun from her and fired the rest. (R IV 285, 286-288). Additionally, when he was arrested Tafero had the trooper's gun in his attache' case and the murder weapon on his person. (RV 463-466; RVI 661-674). Thus, Tafero's claim of "residual doubt" can not constitute nonstatutory mitigating evidence, for here, as in White v. State, 13 FLW 59 (Fla. Jan. 28, 1988), "it is absolutely clear that [Tafero] mercilessly killed the victim[s]".

Closely related to the non-meritorious residual doubt claim is the purported disparate treatment of Rhodes despite that atomic absorption test results which indicated he had discharged a weapon. As discussed above, the State proved at trial that Rhodes did not do the shooting. In the direct appeal, this Court held that Rhodes' life sentences did not invalidate Tafero's death sentences because Tafero did the shooting and was the leader of the three. Tafero v. State, 403 So.2d 355, 362 (Fla. 1981). This holding was reaffirmed in 1984. Tafero v. State,

459 So.2d 1034, 1037 (Fla. 1984). The Eleventh Circuit likewise concluded there was no basis for invalidating the death penalty because "Rhodes's [sic] case, in which he received two life sentences based upon his pleas to second degree murder and kidnapping, is clearly distinguishable in that his role in the murders is one of lesser involvement and lesser culpability." Tafero v. Wainwright, 796 F.2d 1314, 1322 (11th Cir. 1986).

Therefore, the treatement of Rhodes would not have afforded a basis for a life sentence in view of his significantly lesser involvement and his assistance to the State in helping to convict Tafero and Jacobs. The same argument was rejected in White v. State, 13 FLW 59 (Fla. Jan. 28, 1988), and should be here. It is the presence of the four aggravating factors, and not the hypothetical failure to consider evidence that was not presented and which in any event would not have outweighed the aggravating factors, which resulted in the jury's recommendation and the trial court's imposition of the death sentences in this case.

The decisions in Riley v. Wainwright, 12 FLW 457 (Fla. Sept. 3, 1987), and Thompson v. Dugger, 515 So.2d 173 (Fla. 1987), relied on by Tafero, are distinguishable and do not require the granting of relief in this case. In Riley, this Court found there was nonstatutory mitigating evidence presented, and there were only two statutory aggravating factors as well as one statutory mitigating factor found by the trial judge. By contrast, as the State has pointed out, here there was no presentation of anything in mitigation and there were four valid aggravating factors. Similarly to Riley, in Thompson there were two statutory aggravating versus two statutory mitigating factors, so the failure to consider nonstatutory mitigation may well have tipped the balance. Unlike Thompson, in this case the four substantial aggravating factors were not balanced by any mitigating factors, statutory or not. The cases which control the outcome here are Clark v. Dugger, 834 F.2d 1561 (11th Cir.

1987), and White v. Dugger, 13 FLW 59 (Fla. Jan. 28, 1988), not Riley and Thompson.

F. TAFERO'S ATTEMPT TO RELITIGATE PREVIOUSLY DECIDED MATTERS MUST BE REJECTED AS THE HITCHCOCK DECISION IN NO WAY AFFECTS THEM.

Tafero contends harmless error analysis can not be applied to a Hitchcock issue whenever this Court, on direct appeal, has acted to reduce the number of aggravating factors found by the trial judge. In the instant case, since the number of aggravating factors was reduced from six to four, Tafero v. State, 403 So.2d 355 (Fla. 1981) he asserts that he is per se entitled to a resentencing. On the contrary, on direct appeal the fact that four aggravating factors remained led this Court to conclude "because there were no mitigating circumstances, the sentence will not be disturbed." Id. at 362. This is a matter which is law of the case and the decision in Hitchcock is immaterial. Cf, Barclay v. Florida, 463 U.S. 939 (1983).

Tafero next attempts to relitigate the validity of the aggravating factor of avoiding arrest, §921.141(5)(e), Fla.Stats. The trial court's finding on this factor is quoted in this Court's opinion on direct appeal; Tafero v. State, 403 So.2d 355, 362 (Fla. 1981):

> The Murders were committed by MR. TAFERO for the purpose of avoiding or preventing lawful arrest or effecting an escape from custody. Evidence presented to this Court indicated beyond any reasonable doubt that MR. TAFERO was on parole and he had indicated to his friends that he would never again go back to prison and that this desire to avoid any future imprisonment was one of the reasons that MR. TAFERO was personally armed with an automatic pistol on most occasions.

Tafero claims this factor was founded solely on the testimony of Ellis Marlowe Haskew, a witness whose late disclosure allegedly violated the discovery rules and as to whom there was a purported Brady violation regarding the payment of his attorney fees. The admissibility of Haskew's testimony was determined by this Court on direct appeal; there is nothing new which requires re-litigation of the matter. At that time the

Court found the discovery issue trivial and the Brady claim not material under the test in United States v. Agurs, 427 U.S. 97 (1976).

Moreover, the State did not rely just on Haskew's testimony to establish the avoid arrest factor. Heikki Riuttanen, Tafero's parole officer, testified he was wanted for violating his parole and a warrant had been issued (RV 356-357). Rhodes testified that there were guns in the car on the day of the murders. (R IV 362). Two gun dealers from North Carolina, Melvin Honeycutt and Jerry Long, testified Sonia Jacob had purchased firearms from them in 1975 and Tafero was with her when the purchases were made. (RV 494-503). After his arrest, Tafero was found to have a 9MM Teflon-coated armor piercing bullet in his jacket pocket (RV 570) as well as a loaded 9MM automatic on his person. (RV 480-483).

Therefore, Haskew's testimony only confirmed the otherwise established facts that Tafero was wanted for a parole violation and had armed himself, giving rise to a clear inference he did not want to return to prison. There is no reason for this Court to reconsider the validity of the aggravating factor of avoid arrest, because it has been established beyond a reasonable doubt.

Tafero next attempts to reargue the claim, decided against him by both this Court and the Eleventh Circuit,[7] that he was convicted and sentenced on the basis of the felony/murder rule, raising Enmund v. Florida, 458 U.S. 782 (1982), concerns. This Court determined on both direct appeal and again in 1984 that Tafero personally committed the murders. The Eleventh Circuit found these findings were supported by the record and therefore met the requirements of Cabana v. Bullock, 474 U.S. ___, 106 S.Ct. 689, 88 L.Ed.2d 704 (1986).

Moreover, this case was clearly tried on the theory that Tafero personally committed the murders. The prosecutor did

---

[7] Tafero v. State, 459 So.2d 1034, 1035-1036 (Fla. 1984); Tafero v. Wainwright, 796 F.2d 1314, 1317-1318 (11th Cir. 1986).

not argue the jury should find Tafero guilty regardless of who did the shooting. Rather, the prosecutor's references to accomplice liability and the felony murder rule were: (1) to explain to the jury why Walter Rhodes had been charged with and pled guilty to murder, although he testified he did not do any of the shooting (T VIII 390; T IX 412), and (2) to establish that Tafero was guilty of the kidnapping of Mr. Levinson after the murders. (T IX 417). A review of the prosecutor's argument in its entirety shows the prosecutor argued Tafero's liability for the murders was based on his being the triggerman and not on vicarious liability for any co-defendant's actions.

Finally, Tafero again attempts to relitigate the ineffective counsel at sentencing issue, claiming that the strategy to not present or argue mitigation was ineffective when that strategy had been formulated within the trial judge's allegedly erroneous belief that he was limited to consideration of only statutory mitigating circumstances. This argument is refuted by the record of the 1984 Rule 3.850 hearing. McCain testified:

> Q. Well, you knew, or were at least under the impression, that you were not limited in presenting the statutorily enumerated mitigating circumstances, did you not.
>
> A. Yeah. If I had anything to present, I would have attempted to present it.
>
> Q. Okay.
>
> A. Whether it was within the statute or whether it was not and let the Court rule on it.
>
> Q. Uh-huh.
>
> What had you done to prepare for sentencing.
>
> A. Went over the entire matter with Jessie and we concluded then not to put on any witnesses.

(Transcript, on file in FSC No. 66,156, p. 60). Tafero's codefendant, Jacobs, was tried after Tafero, in July, 1976 (Tafero's trial was in May). This Court's statement in Jacobs v. State, 396 So.2d 713 (Fla. 1981) about the trial court's mistaken

belief that it could not consider nonstatutory factors was based on statements which were made after Tafero's trial. In light of McCain's testimony that he did not believe he was limited and that he had reviewed the entire matter with Tafero, there is no basis for concluding that the Hitchcock decision now entitles Tafero to relief on a ineffective counsel claim which he has previously urged unsuccessfully.

Thus, the four valid aggravating factors which were sustained by this Court on direct appeal continue to mandate that Tafero's sentence be carried out. Tafero, a parole violator who had past convictions for violent felonies, mercilessly killed two law enforcement officers in order to avoid returning to prison and to prevent them from enforcing State law relative to the firearms and controlled substances the officers had discovered in his car. Nothing has happened in the twelve years of litigation since that day to alter these stark facts. Tafero has failed to show error under Hitchcock, since there was no presentation of mitigation. Accordingly, any limitation in the jury instruction or in the trial judge's perception can not possibly be deemed any more than harmless error beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967), White v. Dugger, 13 FLW 59 (Fla. Jan. 28, 1988); Clark v. Dugger, 834 F.2d 1561 (11th Cir. 1987).

III. CALDWELL

Tafero has additionally maintained that the trial court's voir dire and penalty phase instructions to the jury, Unconstitutionally diminished the jury's capital sentencing responsibilites, in violation of the principles of Caldwell v. Mississippi, 472 U.S. 320 (1985). This claim has been repeatedly rejected by this Court, on both procedural and substantive grounds, and mandates the same denial of relief in this case.

It is apparent, from the Record, that Tafero did not raise this claim, as an objection at trial, or an issue on direct

appeal.[8] This Court has consistently applied a procedural bar, to consideration of a Caldwell claim, based on the procedural default resulting from such failure to raise the claim at trial, or on direct appeal. Ford v. State, Case No. 70,467 (Fla. Feb. 18, 1988, slip op. at 2); Phillips v. Dugger, 515 S.2d 227, 227-228 (Fla. 1987); Card v. Dugger, 512 S.2d 829, 831 (Fla. 1987); Copeland v. Wainwright, 505 S.2d 425, 427-428 (Fla. 1987), vacated, other grounds, ___, U.S. ___, ___ S.Ct. ___, 98 L.Ed.2d 19 (October 5, 1987); Aldridge v. State, 503 S.2d 1257, 1259 (Fla. 1987); State v. Sireci, 502 S.2d 1221, 1223-1224 (Fla. 1987); Middleton v. State, 465 S.2d 1218, 1226 (Fla. 1985). Such a clear procedural bar must similarly be applied to defeat Tafero's claim.

Tafero has clearly not alleged or demonstrated any reason or basis, that meets his burden to show that this Court can excuse the application of procedural bar to the Caldwell claim. Smith v. Murray, 477 U.S. ___, 106 S.Ct. 2661, 91 L.Ed.2d 434, 446 91986); Engle v. Isaac, 456 U.S. 107 (1982); Wainwright v. Sykes, 433 U.S. 72 (1977); Christopher v. State, 489 S.2d 22 (Fla. 1986). However, it's anticipated that, based on his present pleading, and a prior brief in his past proceeding before this Court, Tafero v. State, Case No. 70,422, Initial Brief, at 13, Petitioner will rely on the decisions in Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified on rehearing, 816 F.2d 1493

---

[8] Tafero has never raised this claim, as a specifically articulated ground for relief, prior to this pleading, which represents his fourth state collateral pleading, to date. Although initially referring to the speculative possibility of a Caldwell claim, in his brief on appeal from the denial of his second Rule 3.850 Motion, Tafero v. State, 13 FLW 8 (Fla. December 23, 1987), Initial Brief, at 13-14, Tafero thereafter clearly and definitively stated that his brief was "not designed to argue the merits" of such a claim. Reply Brief, Tafero v. State, supra, at 6, n. 3. Tafero did not raise the Caldwell claim, in either of his two Rule 3.850 motions, the appeals from denials of those motions, or in his prior error coram nobis proceeding before this Court. Tafero, 13 FLW, supra, at 8; Tafero v. State, 459 S.2d 1034 (Fla. 1986); Tafero v. State,440 S.2d 350 (Fla. 1983).

(11th Cir. 1987);[9] Mann v. Dugger, 817 F.2d 1471 (11th Cir. 1987), vacated, for rehearing en banc, 828 F.2d 1498 (11th Cir. 1987); and Harich v. Dugger, 813 F.,2d 1082 (11th Cir. 1986), vacated for rehearing en banc,[10] 828 F.2d 1497 (11th Cir. 1987), as fundamental changes in the law, which "breathed new life" into Caldwell claims. Tafero, Case No. 70,422, Initial Brief, supra, at 13; Petition for Habeas Corpus, at 16. This exact argument has been most recently rejected in Card, supra, where this Court specifically observed that Mann and Adams, supra, since not United States or Florida Supreme Court decisions, were not "changes in law" decisions, excusing procedural default under Witt v. State, 387 S.2d 922 (1980), cert. denied, 449 U.S. 1067 (1980). Card, 512 S.2d, supra, at 831. More recently, this Court characterized the Caldwell decision itself, as a case "based in part on prior Florida case law", as insufficient "change in law", to qualify under the Witt exception. Phillips, 515 S.2d, supra, at 228; see also Copeland,supra. Assuming arguendo that the Caldwell, Adams, Mann or Harich decisions could somehow be conceivably classified as Witt "changes in law", all of these decisions were available, and known to Tafero's counsel by his own admission in prior pleadings, when he filed his second Rule 3.850 motion, in December, 1986, and his briefs on appeal, from denial of said motion, in July and September, of 1987. Phillips, 515 S.2d, at 228; Card, 512 S.2d, at 831; Delap v. Dugger, 513 S.2d a050, 1052 (Fla. 1987). Thus, since the claim was clearly "available" to Tafero, both at the time of trial and direct appeal, Copeland, 505 S.2d, supra, at 427; Phillips; and at the time of Tafero's second post-conviciton motion, and appeal

---

[9] The State of Florida has challenged the Eleventh Circuit's decision in Adams, supra, as erroneously decided on the Caldwell procedural bar issue, by seeking certiorari with the United States Supreme Court, where a decision on whether to accept certiorari has been pending since July, 1987. Dugger v. Adams, Case No. 87-___, filed July, 1987.

[10] The precedential value of Mann, or Harich, supra, is nil, since said panel decisions of the Eleventh Circuit, were vacated, upon the grant of en banc rehearing consideration, Eleventh Circuit, Rule 35-11.

therefrom, Phillips; Card; Delap, supra, can not reasonably sustain any claim that he can show "cause", excusing default.[11] Smith v. Murray, supra; Sykes, supra; Christopher, supra; Witt, supra.

It should additionally be observed that Tafero has abused post-conviction procedure, in asserting claims that were known or discoverable by Tafero, at the time of his trial and direct appeal, and his prior collateral proceedings. Christopher, supra. It is further apparent that Tafero is using the vehicle of habeas corpus, as a means of circumventing any procedural bar that would be applied to another Rule 3.850 motion, and as a substitute for direct appeal. White v. Dugger, 511 S.2d 554, 555 (Fla. 1987); Martin v. Wainwright, 497 S.2d 872, 874 n.2 (Fla. 1986); Steinhorst v. Wainwright, 477 S.2d 537, 539 (Fla. 1985); Harris v. Wainwright, 473 S.2d 1246, 1247 (Fla. 1985). Thus, Tafero's Caldwell claim should be barred, on the additional procedural grounds, of abuse of post-conviction procedure.

Petitioner has suggested that this Court, in rejecting the Caldwell claim, has acknowledged its jurisdiction to hear such a claim, in an original habeas corpus forum, and that this Court's rejection of the claim in previous cases, makes such a forum appropriate. Petitioner's position, that "futility" somehow excuses otherwise barred claims, is ludicrous, and has no support in any Florida Supreme Court decision. This view would permit all successive petitions to be considered on their merits, in a habeas forum, on the basis that this Court might "change its mind". Petition, at 24. Acceptance of this position, by this Court, would result in exactly what this Court has previously and consistently rejected -- use of habeas, as a form of collateral attack, to circumvent procedural bars, and to litigate and/or re-litiate claims that should have been addressed on direct

---

[11] Because his claim has no merit, as will be discussed, infra, Petitioner can not successfully maintain his additional burden, to show he was "prejudiced" by such default. sykes, supra.

appeal. White, supra; Steinhorst, supra; Martin, supra.

From a substantive standpoint, the trial court's instructions do not even remotely entitle Tafero to relief, under Caldwell. Tafero's references to the transcript herein (R, Vol. VIII, 293-294; 54; AA,, 54, 58, 59), demonstrate the appropriate division of responsibilities in capital sentencing, between the court as ultimate "sentencer", and the jury as "advisory" sentencer, under valid Florida law.[12] Combs v. State, Case No. 68,477 (Fla. Feb. 18, 1988); Ford, supra; Rose v. Dugger, 508 S.2d 321, 324 (Fla. 1987); Aldridge, 503 S.2d, supra, at 1259; Pope v. Wainwright, 496 S.2d 798, 805 (Fla. 1986); see also, Mulligan v. Kemp, 818 F.2d 746, 748 (11th Cir. 1987); Dutton v. Brown, 812 F.2d 593, 597 (10th Cir. 1987) (en banc). In addition to advising the jury of its "advisory" role, the trial court informed the jurors, on voir dire, that they would hear "mitigating and aggravating circumstances; where both sides, the State and the defense, have an opportunity to make their arguments to you as to why or why not the death penalty should be imposed". (R. Vol. VIII, p. 292. The trial court's rendition of standard jury instructions, see Penalty Proceedings--Capital Cases, Florida Standard Jury Instructions in Criminal Cases (2nd ed. 1975), at 77-82; §421.141(2)(b), Fla.Stat. (1972), advising the jury of its appropriate role in capital sentencing, did not minimize the jurors' task, or actively mislead them in any way. Pope, supra,; Caldwell, supra; Darden v. Wainwright, 477 U.S. ___, 106 S.Ct. ___, 106 S.Ct. ___, 91 L.Ed.2d 144, 158-159, n. 15 (1986).

Assuming arguendo there was Caldwell error, it is more than abundantly clear that any such error had no impact on the jury's advisory recommendation, or the court's sentence. This Court, on direct appeal, upheld four aggravating circumstances, quoting the trial court's factual findings, agreed there were no

---

[12] This statutory scheme, assigning such division of responsibilities, has been consistently upheld, against Constitutional challenges. Spaziano v. Florida, 468 U.S. 447 (1984); Proffit v. Wainwright, 428 U.S. 242 (1976).

mitigating circumstances, and further affirmed Tafero's death sentence as proportionate, to his murder of two police officers. Tafero, 403 S.2d, supra, at 362. Compare, Adams, 804 F.2d, at 1533 (presence of three aggravating, three mitigating circumstances). In view of the circumstances of the crime, Tafero, 403 S.2d, at 358-359, 362, and the decision by Tafero not to present any mitigation evidence or argument at sentencing, AA, at 54, it is apparent that, in this case, "the only reasonable sentence would have been death." Adams, 804 F.2d, at 1533; Tafero, 403 S.2d supra.

IV.

CONCLUSION AND RESPONSE IN OPPOSITION TO REQUEST FOR STAY OF EXECUTION

Based on the foregoing reasons and authorities, the Petitioner is not entitled to relief on either the Hitchcock or Caldwell claims.

This Court has previously reviewed the instant case on direct appeal, Tafero v. State, 403 So.2d 355 (Fla. 1981), cert. denied 455 U.S. 983 (1982), and in two appeals from the denial by the trial court of Fla.R.Crim.P. 3.850 Motions. Tafero v. State, 459 So.2d 1034 (Fla. 1984); Tafero v. State, 13 FLW 8 (Fla. Dec. 23, 1987). Tafero has also had the benefit of federal habeas corpus review. Tafero v. Wainwright, 796 F.2d 1314 (11th Cir. 1986), cert. denied 107 S.Ct. 3277 (1987). Not one judge in the cited decisions, state or federal, has found merit in any of Tafero's claims.

In view of this history, Tafero's request that a stay be granted to allow the Court to "carefully consider the issues presented, or to permit [him] to seek further review" (Petition p. 24), must be denied. Tafero has raised no substantial grounds in support of relief, and the present petition is an abuse of Florida's collateral procedure. Adams v. State, 484 So.2d 1216 (Fla. 1986). The mere fact that a stay of execution was granted in Clark v. Dugger by the United States Supreme Court does not

entitle this Petitioner to one. In 1986, the federal Courts determined that absent a direct mandate from the United States Supreme Court to the effect that "race of the victim" claims required stays of execution due to the then-pending cases of McClesky v. Kemp and Hitchcock v. Dugger, no stays were warranted. Evans v. McCotter, 805 F.2d 1210, 1215 (5th Cir. 1986); Wicker v. McCotter, 758 F.2d 155 (5th Cir. 1986); Rook v. Rice, 783 F.2d 401 (4th Cir. 1986). There has been no such directive regarding the claims raised here. Clark has only been given a stay pending action on his certiorari petition; there is no case accepted for merits review on the same issues as Taffero's.

As the State has demonstrated, Tafero has failed to present any meritorious claims. His execution is presently scheduled for March 9, 1988, over twelve years since the two officers were murdered. There is sufficient time for this Court to resolve the instant petition in advance of the execution. The State has a legitimate interest in the finality of litigation. §27.7001 Fla.Stat. (1985).

WHEREFORE, the Respondent respectfully requests that the Petitioner's Petition for a Writ of Habeas Corpus be denied and that his request for a stay of execution be denied as well.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General
Tallahassee, Florida

Joy B. Shearer

JOY B. SHEARER
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
(305) 837-5062

Richard G. Bartmon

RICHARD G. BARTMON
Assistant Attorney General

Counsels for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Response to Petition for Habeas Corpus has been furnished by overnight mail to BRUCE ROGOW, 2097 S.W. 27th Terrace, Fort Lauderdale, Florida 33312 and LARRY HELM SPALDING and MARK EVAN OLIVE, Office of the Capital Collateral Representative, 1535 South Monroe Street, Tallahassee, Florida 32301 this 18th day of February, 1988.

Of Counsel