IN THE SUPREME COURT OF FLORIDA

NO. 71947

DOUGLAS RAY MEEKS,

Petitioner,

v.

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

Respondent.

REPLY TO STATE'S RESPONSE TO PETITION
FOR A WRIT OF HABEAS CORPUS AND
CONSOLIDATED RESPONSE TO MOTION TO
STRIKE APPENDIX TO PETITION *

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INTRODUCTION

Mr. Meeks' petition discussed how each actor involved in the proceedings resulting in his sentences of death -- jury, judge, defense counsel -- was constrained in the consideration of non-statutory mitigating evidence. The jury was restricted by the judge's preclusive instructions. The judge was restricted by his own statutory interpretation. Defense counsel's investigation, development, and presentation of non-statutory mitigation was restricted by the then-prevailing law.

In its response, the State has said little to overcome Mr. Meeks' entitlement to habeas corpus relief. The State's arguments are addressed below. First, however, Mr. Meeks responds to the State's motion to strike certain portions of his appendix to the petition for a writ of habeas corpus.

RESPONSE TO MOTION TO STRIKE

Mr. Meeks submitted, with his petition, the affidavit of his former trial counsel (Petition, pp. 28-29; App. 3) which related, under oath, how former counsel operated under the then-prevailing restriction on mitigating factors to those enumerated in the statute, as did the trial judge (Petition, pp. 28-29; App. 3), and that he was therefore constrained in his efforts to investigate, develop, and present non-statutory mitigating evidence. Mr. Meeks' appendices also included expert and lay evidence reflecting the type of non-statutory mitigating evidence which could have been developed and presented had counsel not been so constrained (See Apps. 4, 5, 6, 7, 8).

The State has moved to strike. This Court's rules, and the interests of justice, however, demonstrate that the State's motion should be denied and the matters reflected in Mr. Meeks' appendices fully considered.

This Court's original habeas corpus jurisdiction, like the federal counterpart, is grounded on common law equitable

principles. To that end, the Court is empowered to fully hear and adjudicate all the relevant facts and legal analysis which may be pertinent to a petitioner's claim. The rules attendant to habeas corpus actions before this Court therefore make plain that the Court has the authority to consider the materials appended to Mr. Meeks' petition in aid of the exercise of its habeas corpus jurisdiction. See Fla. R. App. P. 9.110(e)(h)(i)(Committee Note)("The appendix [to a habeas corpus petition] should . . . contain any documents which support the allegations of fact contained in the petition." [emphasis added].)

In fact, even the caselaw cited in the State's motion to strike, Johnson v. Wainwright, 463 So. 2d 207, 211 (Fla. 1985), provides precedents demonstrating that consideration of the appended materials is appropriate. In Johnson the affidavit of one of the petitioner's former appellate attorneys was submitted with the habeas petition. Contrary to the Respondent's suggestion, the Court did not rule that the affidavit was improperly submitted but, rather, that on the merits the affidavit by itself was insufficient to support the claim -- i.e., the affidavit was not stricken but fully considered by the Court. Johnson, 463 So. 2d at 211. This, of course, was in keeping with common practice.

Neither does the State's argument that Mr. Meeks was "given the . . . opportunity" to present the testimony of his former counsel at a prior Rule 3.850 evidentiary hearing and that he did not then do so support the State's motion. That hearing, conducted pre-Hitchcock, involved an ineffective assistance of counsel claim litigated under the standards of Knight v. State, 394 So. 2d 997 (Fla. 1981). The then-prevailing caselaw made it clear that an attorney would not be deemed ineffective under the Knight test when his efforts at sentencing were restricted by the statute -- i.e., as a matter oflaw, the view that the statute was restrictive was "reasonable". See Petition, p. 30, citing

Muhammad v. State, 426 So. 2d 533 (Fla. 1983); Jackson v. State, 438 So. 2d 4 (Fla. 1983). The issue presented by Mr. Meeks' petition, on the other hand, is whether, post-Hitchcock, the "reasonable", officially-sanctioned, preclusive view of the statute under which counsel operated resulted in an unconstitutional violation of Mr. Meeks' rights to an individualized and reliable capital sentencing determination. See Petition, p. 30, citing United States v. Cronic, 466 U.S. 648 (1984). There was no reason to call counsel to the stand on this issue at that pre-Hitchcock hearing. Pre-Hitchcock, as a matter of law, the issue involved no claim for relief; it was not part of that hearing. Post-Hitchcock, the viability of the claim, and Mr. Meeks' entitlement to relief are plain. Post-Hitchcock, it is clear that the State's "procedural default" argument is without merit, as this Court has recognized. See, e.g., Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987). It is only now that Mr. Meeks' claim can properly be brought, for only now has it been recognized that Hitchcock has changed the law. See, e.g., Mikenas v. Dugger, No. 71,129 (Fla., Jan. 21, 1988), slip op. at 2 (Hitchcock claim not barred because Hitchcock "represented a sufficient change in the law to defeat the application of procedural default."), citing, Thompson v. Dugger, 12 F.L.W. 409 (Fla. Sept. 9, 1987).[1]

The sworn affidavit of former trial counsel relates how he, the judge, and the prosecutor were restricted by the statutory construction. The expert and lay accounts included in Mr. Meeks'

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[1]Neither does the State's citation to this Court's footnote in Johnson v. Dugger, No. 71,824 (Feb. 24, 1988), defeat Mr. Meeks' request that the Court consider the appended materials. Johnson involved the affidavit of the former trial judge. Obviously, just as a jury cannot impeach its verdict after the fact, a judge cannot extra-judicially impeach, supplement, or explain an already rendered ruling. Cf. Van Royal v. State, 497 So. 2d 625 (Fla. 1986); Patterson v. State, 513 So. 2d 1257 (Fla. 1987). Johnson thus presents a unique situation not involved in Mr. Meeks' case.

appendices reflect the type of significant non-statutory mitigation which went undeveloped because of the restrictive statutory interpretation. These matters are very relevant and very material to the issues raised in this original habeas corpus action. The appendix is properly before the Court, and should be considered in aid of the Court's habeas corpus jurisdiction. See Fla. R. App. P. 9.110(e)(h)(i) and Committee Note; Johnson v. Wainwright, supra, 463 So. 2d at 211.

REPLY ARGUMENT

I. MR. MEEKS IS ENTITLED TO RELIEF UNDER HITCHCOCK V. DUGGER

The State concedes Hitchcock error, Response, p. 18, and concedes that this Court has recognized that Hitchcock v. Dugger, 107 S. Ct. 1821 (1987) represents a substantial change in law mandating post-conviction merits review. Response, p. 11.

Although this Court's precedents make clear that no procedural bar can be applied against Mr. Meeks' claim, the State goes on to present the inconsistent argument that this Court should apply the harmlessness/prejudice standard announced by United States v. Frady, 456 U.S. 152 (1982). The argument is inherently illogical: the Frady standard only applies to procedurally defaulted claims, i.e., claims that are not cognizable on the merits due to a procedural bar.[2] Because Hitchcock represents "a sufficient change in law to defeat the application of procedural default," Mikenas, supra, slip op. at 2; Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987), Mr. Meeks' claim is fully cognizable on the merits. See also, Downs v.

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[2] Frady and its counterpart Engle v. Isaac, 456 U.S. 107 (1982), established the standard of "cause and prejudice" which a habeas petitioner must meet in order to obtain relief on a procedurally defaulted claim in the federal courts. As discussed herein, those standards are wholly inapplicable to Hitchcock claims such as the one presented by Mr. Meeks for such claims are cognizable on the merits. Mikenas, supra, slip op. at 2.

Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987). Since there is no bar to merits review, i.e., no procedural default or bar, the Frady harmlessness/ prejudice test developed for application only to barred claims is wholly inapplicable. The Frady standard is not, see Downs, supra; Riley, supra, and cannot, see Mikenas, supra; Thompson, supra, be applied to this Court's Hitchcock analysis.

Mr. Meeks' entitlement to relief under the proper harmlessness analysis is as clear as the inapplicability of Frady. The United States Supreme Court has held that Lockett/Hitchcock error cannot be deemed harmless when the reviewing court cannot "confidently conclude" that the non-statutory mitigating evidence which the sentencing tribunal did not hear or consider "would have had no effect upon the [sentencer's] deliberations." Skipper v. South Carolina, 106 S. Ct. 1669, 1673 (1986)(emphasis added). This Court has held that when it is unclear whether mitigating factors were fairly considered, Lucas v. State, 490 So. 2d 943, 946 (Fla. 1986), when the Court is "not convinced . . . that [non-statutory mitigation] was given serious consideration by the [sentencing] court," McCrae v. State, 510 So. 2d 874, 880 (Fla. 1987), and "unless it is clear beyond a reasonable doubt" that the non-consideration of non-statutory mitigation could not have affected the sentencer, Riley v. Wainwright, 517 So. 2d 656, 659 (Fla. 1987), citing, Valle v. State, 502 So. 2d 1225 (Fla. 1987), Hitchcock error cannot be harmless. In this regard, because the "exclusion of any relevant mitigating evidence affects the sentence in such a way as to render the trial fundamentally unfair," Riley, 517 So. 2d at 660 n.2, this Court has also applied a per se reversal rule in cases involving clear Hitchcock error. See Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Morgan v. State, 515 So. 2d 975 (Fla. 1987). Mr. Meeks' is such a case. Under any of the

harmlessness standards discussed above, relief is more than proper.

In Mr. Meeks' case, as the petition explains, the jury was precluded, and important non-statutory mitigation was ignored. The sentencing judge was also constrained, as demonstrated by his jury instructions, see Zeigler v. Dugger, No. 71,463 (Fla., April 7, 1988), his sentencing order, McCrae, supra; Morgan, supra, and by trial counsel's account (App. 3) of the judge's interpretation at the time[3] ("It was apparent to me that the prosecutor and the judge followed the same basic [preclusive] interpretation." App. 3. "It was apparent to me that he considered the evidence before him only as it related to the mitigating circumstances listed in the statute." Id. "[T]o the best of my recollection, it was understood that the mitigating circumstances in the statute were to be the only things considered at the sentencing portion of the proceeding." Id.) Mr. Meeks' former trial counsel's view is important for, as in McCrae, it makes "a substantial showing through [his former trial counsel's (n. 3)] testimony that the judge . . . did not believe he was obliged to receive and consider evidence pertaining to non-statutory mitigating factors." Id., 510 So. 2d at 880 n.3 and accompanying text.[4]

Finally, defense counsel was clearly restricted (App. 3), and this too is extremely relevant and important -- because of the restriction on counsel, a wealth of available non-statutory

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[3]An account based on what occurred in court and during meetings with the prosecutor and judge not reflected in the record (App. 3).

[4]As discussed in Mr. Meeks' petition, the judge's efforts to squeeze "low intelligence" into the statutory "age" mitigating factor itself reflects the restrictive interpretation under which he operated. Had the judge not been constrained, age and low intelligence would have been given the independent mitigating weight to which they were entitled, and the other substantial non-statutory mitigation discussed in Mr. Meeks' petition would not have been ignored. However, due to the then-prevailing statutory strictures, none of those factors were provided the meaningful, Riley, supra, and "serious", McCrae, supra, 510 So. 2d at 880, consideration to which they were entitled.

mitigation (Apps. 4, 5, 6, 7, 8) never got to the judge and jury charged with deciding whether Douglas Ray Meeks should live or die.[5] Important non-statutory mitigation before the jury and judge, as discussed in the petition, was not given "serious", McCrae, supra, 510 So. 2d at 580, or any consideration.

The restrictions on counsel (App. 3) precluded an overwhelming case for life (see Apps. 4, 5, 6, 7, 8) from being developed or presented. Under no construction can the absence such factors -- i.e., the failure "to receive" some because of the restriction and failure to "consider" others which made their way into the record because of the same statutory restriction, McCrae, 510 So. 2d at 880; see also, Morgan, supra -- be said to have had "no effect" on the sentences in either case. Skipper, 106 S. Ct. at 1673. Even when it is unclear whether non-statutory mitigation was fully and fairly considered resentencing is proper. Lucas, 490 So. 2d at 946. Here, the Hitchcock errors are simply not harmless under any standard and certainly not harmless beyond a reasonable doubt. Mr. Meeks' sentencing proceedings were "fundamentally unfair," Riley, supra, and unreliable. The Writ should issue.

II. APPELLATE COUNSEL WAS INEFFECTIVE

The State argues that "[c]ounsel's failure to divine judicial development . . . does not constitute ineffective assistance of counsel." Response, pp. 22-23. Appellate counsel had to "divine" nothing -- a basic review of the leading precedents was all that was required.

With regard to the "doubling of aggravating circumstances" issue, State v. Dixon, 283 So. 2d 1 (Fla. 1973) on which the

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[5]In this regard it is noteworthy that the experts who examined Mr. Meeks pretrial, Dr. Barnard and Dr. Carrera, were never asked to consider non-statutory mitigation. Again, the restrictions on counsel were reflected by what went undone prior to trial.

Court relied in Provence v. State, 337 So. 2d 783 (Fla. 1976),[6] provided counsel with the key. Counsel failed to use it. (Obviously, no contemporaneous objection bar applied to this claim, since it was based on the sentencing orders themselves.)

With regard to "use of confidential and privileged psychiatric reports" issue, Parkin v. State, 238 So. 2d 817 (Fla. 1970) had long-been standing precedent in Florida at the time of Mr. Meeks' direct appeals. Again, counsel failed to use the key. (Obviously, no contemporaneous objection bar applied to this claim -- it was based on the sentencing orders.)

What a reading of the briefs counsel did file makes clear (Apps. 15 and 16) is that counsel was simply ignorant of the law. Prejudice is also plain, as discussed in sections III and IV, infra, and immediately below.

As discussed in the petition, pp. 65-70, this Court has consistently reversed the defendant's sentence in cases in which aggravating circumstances were improperly "doubled" and mitigation was found: this was the precise situation in Mr. Meeks' cases. As also discussed in the petition, pp. 70-80, Parkin and its progeny made clear that reversal was and is required in proceedings such as those resulting in Mr. Meeks' sentences of death.

The fact that Mr. Meeks did not receive the reversal to which he was entitled is the prejudice. See, e.g., Johnson (Paul) v. Wainwright, 498 So. 2d 938 (Fla. 1987).

III. THE IMPROPER "DOUBLING" OF AGGRAVATING FACTORS

The improper doubling of aggravating factors in this case rendered Mr. Meeks' sentences of death fundamentally unreliable

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[6] Provence was issued during the same year (1976) as Mr. Meeks' direct appeals.

and unfair. A defendant cannot waive a reliable sentencing determination. This claim therefore involves fundamental error.

The bedrock principle upon which the Supreme Court's modern capital punishment jurisprudence is founded is that a capital sentencing determination must be individualized. To this end,

> an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.

Zant v. Stephens, 462 U.S. 862, 876 (1983). An aggravating circumstance which fails under that test results in an arbitrary, freakish, and wrongful sentence of death.

In Mr. Meeks' case, the aggravating circumstances found fail that test. Consequently, Mr. Meeks' death sentences are wrongful.[7] See also Godfrey v. Georgia, 446 U.S. 420 (1980)(overbroad application of aggravating factors abrogates the eighth amendment).

Given the fundamental wrongfulness of these death sentences, the State's alleged procedural bars do not overcome Mr. Meeks' right to habeas corpus relief. The Supreme Court has held that "where a constitutional violation has probably resulted in the conviction of one who is actually innocent, . . . the writ [may issue] even in the absence of a showing of cause for the procedural default." Murray v. Carrier, 106 S. Ct. 2639, 2650 (1986). Clearly, the errors in this case (the sentencing court's wrongful [overbroad] application of aggravating circumstances) meet that test, for Mr. Meeks has been sentenced to death although he is "innocent" in the only sense meaningful to a capital sentencing determination:

> In the context of death penalty habeas corpus litigation, one may be guilty of murder and

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[7]Since statutory mitigation was found, these errors cannot be deemed harmless beyond a reasonable doubt. See Elledge v. State, 346 So. 2d 998 (Fla. 1977).

> yet not subject to the death penalty. Thus, when I advocate that a district judge ought to be able to hear a petition brought by one claiming innocence, I would interpret "innocence", where the death penalty is involved as being innocent of any statutory aggravating circumstance essential to eligibility for the death penalty.

Moore v. Kemp, supra, 824 F.2d at 878 (Hill, J., with Fay and Edmondson, JJ., dissenting)(emphasis added). Mr. Meeks' "claim of innocence" meets the test enunciated by the dissenting judges, as well as the majority, of the Moore v. Kemp en banc Court. See 824 F.2d at 856-57 (majority opinion), citing Murray v. Carrier and Smith v. Murray. In Mr. Meeks' case, the wrongful application of aggravating factors "perverted" the sentencer's weighing process, i.e., the sentencing judge's consideration "concerning the ultimate question whether in fact [Douglas Ray Meeks should have been sentenced to die]." Smith v. Murray, 106 S. Ct. 2661, 2668 (1986)(emphasis in original). Accordingly, the State's procedural default contentions must fail, for this Court's "refusal to consider the defaulted claim . . . [would] carr[y] with it the risk of a manifest miscarriage of justice." Smith v. Murray, 106 S. Ct. at 2668.

Mr. Meeks' claim must be determined on the merits. The merits call for habeas relief.

IV. THE IMPROPER USE OF CONFIDENTIAL AND PRIVILEGED PSYCHIATRIC REPORT

The unconstitutionality involved in these proceedings was detailed in Mr. Meeks' petition and will not be repeated again herein.

The State, however, presents a curious argument on the merits of Mr. Meeks' claim. There, the State argues that "the lack of merit of he claim is evidenced," Response at p. 29, by the Fifth Circuit's opinion in Riles v. McCotter, 799 F.2d 947, 953 (5th Cir. 1986). We also urge this Court to rely on the Riles opinion. Contrary to the State's assertion, Riles

demonstrates that Mr. Meeks is clearly entitled to habeas corpus relief.

Riles held that when a defendant requests a psychiatric examination and relies on an insanity defense, Estelle v. Smith is not violated by the prosecution's introduction of the psychiatric examination's results: "By pursuing this avenue of defense, and by offering psychiatric evidence to support this defense, Riles opened the door to the State's evidence and waived his Fifth Amendment privilege . . ." Riles, 799 F.2d at 953 (emphasis added). Mr. Meeks' counsel waived an insanity defense and never presented, introduced, or even alluded to any psychiatric evidence. Thus, under this Court's long-settled precedents, Parkin v. State, supra, as well as under Riles and Estelle v. Smith, the sentencing court's orders' reliance on the statements Mr. Meeks made during his confidential pretrial psychiatric evaluations clearly violated the fifth, sixth, eighth, and fourteenth amendments.

This Court made clear in Parkin that proceedings such as those resulting in Mr. Meeks' death sentences are fundamentally unfair and unreliable. The fundamental unfairness requires merits review, and habeas corpus relief.

VI. OTHER CLAIMS

Mr. Meeks relies on the discussion presented in his petition.[8]

WHEREFORE, because the proceedings resulting in Douglas Ray Meeks' capital convictions and sentences of death violated the fifth, sixth, eighth, and fourteenth amendments, habeas corpus relief is proper, and the Writ should issue.

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[8]We note that the failure to instruct on the elements of an underlying felony in a felony-murder case is fundamental error. Cf. Bryant v. State, 412 So. 2d 347 (Fla. 1982)(and cases cited therein).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail, first class, postage prepaid, to Mr. Richard Doran, Assistant Attorney General, Magnolia Park Courtyard, 111-29 North Magnolia Street, Tallahassee, Florida 32301, this 11th day of April, 1988.

By: _____
Attorney