IN THE SUPREME COURT OF FLORIDA

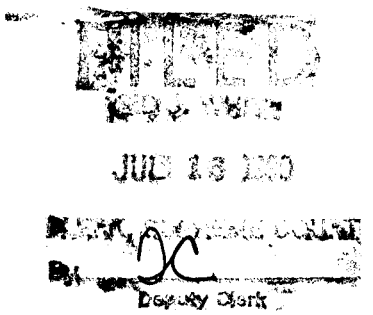
OSCAR MASON,

Appellant,

v. CASE NO. 75,797

STATE OF FLORIDA,

Appellee,



INITIAL BRIEF OF APPELLEE


ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

CANDANCE M. SUNDERLAND
Assistant Attorney General
Florida Bar I.D. No. 0445071
2002 North Lois Avenue
Westwood Center, 7th Floor
Tampa, Florida 33607
(813) 873-4739

COUNSEL FOR APPELLEE

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## STATEMENT OF THE CASE

Oscar Mason, Jr., appellee herein, was charged by indictment with murder in the first degree on September 3, 1980. After trial by jury he was found guilty, and the jury further advised that he be given a sentence of death. The trial court entered an order imposing death. An appeal was taken to the Florida Supreme Court raising the following issues:

> I. THE TRIAL JUDGE ERRED IN ADMITTING EVIDENCE OF THE COLLATERAL UNRELATED CRIME UNDER THE WILLIAMS RULE WHEN THE FACTS OF THE INSTANT CRIME AND THE COLLATERAL CRIME HAD MATERIALED DISTINCTIONS AND WERE NOT SO UNUSUAL AS TO POINT ONLY TO THE APPELLANT, BUT RATHER SERVE TO PROVE ONLY TWO THINGS -- PROPENSITY AND BAD CHARACTER.
>
> II. THE PROSECUTOR'S COMMENTS DURING THE CLOSING ARGUMENTS BOTH THE GUILT AND PENALTY PHASE CONSTITUTED FUNDAMENTAL ERROR WHEN SUCH COMMENTS WERE TO THE EFFECT THAT APPELLANT WOULD REPEAT HIS CRIMINAL CONDUCT IF ACQUITTED AND/OR NOT PUT TO DEATH SINCE HE COULD NOT BE REHABILITATED.
>
> III. THE TRIAL JUDGE ERRED IN DENYING THE APPELLANT'S MOTION FOR JUDGMENT OF ACQUITTAL SINCE THE EVIDENCE OF IDENTIFICATION WAS INSUFFICIENT.
>
> IV. THE TRIAL JUDGE ERRED IN FINDING THAT APPELLANT'S PRIOR CONVICTIONS OF ARSON, BURGLARY AND MISDEMEANOR BATTERY CONSTITUTED "PRIOR FELONIES INVOLVING THE USE OR THREAT OF VIOLENCE."
>
> V. THE TRIAL JUDGE ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE DEFENDANT KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS.
>
> VI. THE TRIAL JUDGE ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE KILLING WAS "ESPECIALLY HEINOUS, ATROCIOUS AND CRUEL."
>
> VII. THE TRIAL JUDGE ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE KILLING WAS "COLD, CALCULATED AND PREMEDITATED, WITHOUT

> ANY PRETENSE OF MORAL OR ILLEGAL JUSTIFICATION," SINCE THE EVIDENCE WAS INSUFFICIENT THEREOF AND IT MERELY "DOUBLE-UP" OF THE HEINOUS, ATROCIOUS AND CRUEL AGGRAVATING CIRCUMSTANCE.
>
> VIII. THE TRIAL JUDGE ERRED IN FAILING TO FIND A STATUTORY MITIGATING CIRCUMSTANCE.
>
> IX. THE TRIAL JUDGE ERRED IN FAILING TO CONSIDER NOM-STATUTORY MITIGATING CIRCUMSTANCES, AND IN FAILING TO INSTRUCT THE JURY ON THE EXISTENCE OF SUCH FACTORS.

The Florida Supreme Court affirmed the judgment and sentence. Mason v. State, 438 So.2d 374 (Fla. 1983).

A petition for writ of certiorari was filed in the United States Supreme Court alleging:

> WHETHER THE SUPREME COURT OF FLORIDA HAS ADOPTED SUCH A BROAD AND VAGUE CONSTRUCTION OF SECTION 932.141(5)(I), FLORIDA STATUTES, WHICH PROVIDES FOR AN AGGRAVATING CIRCUMSTANCE IF THE CAPITAL MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION, AS TOO VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS?

The petition for writ of certiorari was denied by the United States Supreme Court. Mason v. Florida, 104 U.S. 1330, 465 S.Ct. 1051, 79 L.Ed.2d 725 (1984).

Mr. Mason filed a Motion to Vacate Judgment and Sentence pursuant to *Florida Rule of Criminal Procedure 3.850* which was heard and denied on May 31, 1985. An appeal of that motion resulted in the Supreme Court's decision in Mason v. State, 489 So.2d 734 (Fla. 1986), wherein the Court ordered an evidentiary hearing on the question of Mr. Mason's competency. The other issues raised in Mr. Mason's motion were not considered by the Florida Supreme Court, pending the resolution of the competency claim.

Until that time, Mr. Mason's collateral efforts were assisted by attorney Luis Pratts. Attorney Pratts was allowed to withdraw in an order dated January 15, 1987. The office of the Capital Collateral Representative, specifically attorney Billy Nolas, was appointed to represent Mr. Mason on January 23, 1987. Mr. Nolas has continuously represented Mr. Mason since that appointment. Attorney Nolas, with assistance from attorneys Judith Daugherty and Marty McClain, represented Mr. Mason in the evidentiary hearing held before acting Circuit Judge Edgar Hinson in April and May, 1988.

The trial court denied Mr. Mason's claim regarding his competency. Timely appeal was taken of that decision. That appeal remains pending before this Honorable Court.

Mr. Mason filed a second Motion to Vacate Judgment of Conviction and Sentence dated April 24, 1989. This Honorable Court granted jurisdiction to the circuit court to resolve the second motion.

On March 1, 1990, the circuit court vacated the sentence based on a Hitchcock claim raised as Claim I in the second motion. Claims II through IX were denied. (R 119)

A timely notice of appeal was filed by the state on March 19, 1990. (R 120) A notice of Cross-Appeal was filed by Mason on April 5, 1990. (R 128)

## STATEMENT OF THE FACTS

The following facts were taken from the opinion of this Honorable Court in Mason v. State, 438 So.2d 374 (Fla. 1983).

In the early morning hours of March 19, 1980, eleven year old Missy Chapman woke her two brothers telling them that something was the matter with their mother, Linda Sue Chapman, who lay in bed making choking sounds. Mrs. Chapman, who had been stabbed, died before the police and ambulance arrived. None of the children reported having seen or heard anyone in their home the night of the killing.

A few days after the killing, Missy contacted a detective working on the case and told them that she had seen her mother being stabbed and had acted asleep until the man left the house. Fear that the killer would return had kept her from disclosing what she saw, claimed Missy. She described the assailant as a skinny black male, seventeen to nineteen years old, with short, dark hair. At a later deposition, however, Missy stated that she could not "actually see what [the killer] looked like." She was also unable, at a lineup or from photographs, to identify petitioner or anyone else as the killer. At trial, nevertheless, Missy pointed out Mason, stating that she was "sure" he was her mother's murderer.

Two of Mason's fingerprints were found on the siding of the Chapman home, but none were found inside. A state's witness also testified that in his opinion, hairs found at the scene were Mason's.

At trial, the judge held admissible evidence concerning petitioner's conviction for a rape and robbery committed two days after the Chapman murder. The collateral crime evidence was found relevant to the issue of identity on the basis of the similarity of the modus operandi used in each instance."

After a finding of guilt by the jury, the jury recommended a sentence of death. The judge followed the recommendation and imposed a sentence of death finding the following aggravating circumstances:

> 1. The defendant was previously convicted of another felony involving the use or threat of violence to the person.
>
> 2. The defendant knowingly created a great risk of death to many persons.[1]
>
> 3. The capital felony was committed while the defendant was engaged in a burglary.
>
> 4. The capital felony was especially heinous, atrocious or cruel.
>
> 5. The capital felony was committed in a cold, calculated and premeditated manner.

The court did not find any mitigating circumstances.

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[1] This factor was struck by this Court as unsupported by the evidence. Mason v. State, 438 So.2d 374 (Fla. 1983).

## SUMMARY OF THE ARGUMENT

The court below vacated Mason's sentence of death based upon a Hitchcock violation. The state conceded below that the record established a Hitchcock error, but argued that the error was harmless and that the claim was procedurally barred because it was filed untimely. The record establishes beyond a reasonable doubt that, after weighing the aggravating factors against the statutory and nonstatutory mitigating factors, the judge would have properly imposed death.

## ISSUE I

WHETHER THE TRIAL COURT ERRED IN VACATING MASON'S SENTENCE OF DEATH WHEN THE MOTION WAS UNTIMELY AND THE ERROR WAS HARMLESS.

The court below vacated Mason's sentence of death based upon a Hitchcock[2] violation. The state conceded below that the record established a Hitchcock error, but argued that the error was harmless and that the claim was procedurally barred because it was filed untimely.

"Rule 3.850"

The rule provides in pertinent part:

> No other motion shall be filed or considered pursuant to this rule if filed more than two years after the judgment and sentence become final unless it alleges (1) the facts upon which the claim is predicated were unknown to the movant or his attorney and could not have been ascertained by the exercise of due diligence, or (2) the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.
>
> Any person whose judgment and sentence became final prior to January 1, 1985, shall have until January 1, 1987, to file a motion in accordance with this rule.

The state recognizes that Hitchcock has been held by this Honorable Court to represent the kind of fundamental constitutional right which was not established prior to the passing of the two year period and has been held to apply retroactively. However, the state submits that this claim should still be procedurally barred. Hitchcock became final on April

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[2] Hitchcock v. Dugger, 107 S.Ct. 1821 (Fla. 1987).

22, 1987. Present counsel for Mr. Mason were already representing him at this time. They have continuously represented Mr. Mason. The second motion was dated April 24, 1989. Thus, over two years have passed between Hitchcock becoming final and the second motion being filed. Mr. Mason should not be allowed to sit on possible claims and file them piecemeal. At no time during the pendency of the evidentiary hearing or at any other time has counsel for Mr. Mason indicated an intent to file a new motion to vacate. To allow counsel for Mr. Mason to represent Mr. Mason for over two years and to be aware of potential legal issues for over two years before filing them contradicts the intent of the rule. The state further acknowledges, however, that in Adams v. State, 14 F.L.W. 235 (Fla. May 3, 1989), this Court, although accepting the logic of the state's position, refused to bar consideration of Adams' claim. The Court set a deadline of June 30, 1989 for such claims to be made. Mr. Masons's motion meets that deadline.

Assuming, arguendo, that this claim is not procedurally barred, the state further asserts that the error was harmless. In Hitchcock, the United States Supreme Court found it was error for the trial court to instruct the jury to consider only statutorily enumerated mitigating circumstances and for the court to sentence a defendant to death if the trial judge only considered those same statutory mitigating circumstances. In prior cases involving Hitchcock claims, this court has recognized that errors may require a new sentencing hearing while in others this Court applied the harmless error rule. See, e.g., Riley v.

Wainwright, 517 So.2d 656 (Fla. 1987); Thompson v. Dugger, Morgan v. State, 515 So.2d 975 (Fla. 1987), *cert. denied,* 108 S.Ct. 1024 (1988); *But see* Delap v. Dugger; Demps v. Dugger; Tafero v. Dugger, 520 So.2d 287 (Fla. 1988).

The state concedes that the record establishes a Hitchcock violation, but maintains the error is harmless. The record establishes beyond a reasonable doubt that, after weighing the aggravating factors against the statutory and nonstatutory mitigating factors, the judge would have properly imposed death. Demps 514 So.2d at 1094.

The court below vacated the sentence because the jury did not hear or consider what the court perceived as substantial nonstatutory mitigating evidence about the defendant including, but not limited to, the defendant's long history of mental illness, the fact that he suffered from organic brain damage, that he suffered from mental retardation, had a history of drug abuse, that he attempted suicide on four occasions during 1980, and that he had a history of suffering from depression and hallucinations.

The existence of this potentially mitigating evidence is insufficient to outweigh the existing aggravating circumstances. The sentencing court found five aggravating circumstances; (1) the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence (including convictions for rape and attempted murder); (2) great risk to many persons -- victim's three children were in close proximity; (3) capital felony committed while defendant was engaged in the

perpetration of a burglary; (4) especially heinous, atrocious or cruel -- victim knew death was impending; choking on her own blood; (5) cold, calculated and premeditated without any pretense of moral or legal justification.

On direct appeal, this Court rejected only the second aggravating factor (great risk to many persons). The four remaining factors substantially outweigh the potentially mitigating evidence that counsel now presents.

The record shows that appellant broke into Mrs. Chapman's home, armed himself in her kitchen, and attacked her as she lay sleeping in bed. Nothing indicates that she provoked the attack in any way or that appellant had any reason for committing the murder. Mrs. Chapman's son, Westley, testified that when he went to check on his mother she was first looking at the ceiling and then turned to look at him, all the while making choking and gurgling sounds. A medical examiner testified that the victim probably lived from one to ten minutes after being stabbed, that the sounds that Westley heard were of Mrs. Chapman choking on her own blood, and that she was probably aware of her impending death. She was not killed quickly and painlessly, but instead lingered, unable to breathe and aware of what was happening to her. Mason v. State, supra.

Further, the evidence shows that this was not Mr. Mason's only violent attack on a defenseless woman. The defendant's mental problems do not outweigh these substantial aggravating factors. The Hitchcock error is harmless in light of the foregoing.

## CONCLUSION

Based on the foregoing, the State of Florida requests this Honorable Court to reverse the granting of appellant's motion for post conviction relief as to Claim I (the Hitchcock error).

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

Candance M. Sunderland

CANDANCE M. SUNDERLAND
Assistant Attorney General
Florida Bar ID# 0445071
2002 North Lois Avenue
Westwood Center, 7th Floor
Tampa, Florida 33607
(813) 873-4739

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to the Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 13 day of July, 1990.

C M Sunderland

OF COUNSEL FOR APPELLEE.