IN THE SUPREME COURT OF FLORIDA

CASE NO. 75909

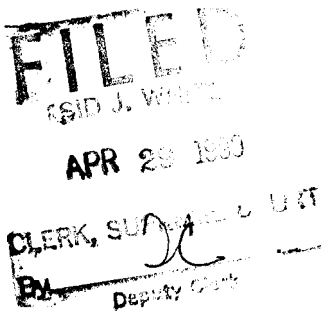
JESSE JOSEPH TAFERO,

Petitioner

vs.

STATE OF FLORIDA,

Respondent



ON APPEAL FROM THE CIRCUIT COURT FOR
THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

SUPPLEMENT TO APPELLANT'S SUMMARY BRIEF ON DENIAL OF MOTION FOR RELIEF PURSUANT TO RULE 3.850, DENIAL OF REHEARING, AND DENIAL OF AMENDED RULE 3.850 MOTION, AND MOTION FOR STAY OF EXECUTION, AND, IF NECESSARY, MOTION FOR STAY OF EXECUTION PENDING THE FILING AND DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

MARK E. OLIVE
920 Ponce de Leon
Atlanta, GA 30306
(404) 898-2072
(904) 681-6499

Counsel for Appellant

Petitioner submits this Reply Brief in order to address one matter not mentioned by Respondent, and two matters that were, in the Answer Brief of Appellee. The one matter not mentioned by Respondent is the plain holding in Hall v. State, 541 So.2d 1125 (Fla. 1989), that makes Petitioner's "non-record Hitchcock" claim cognizable in this proceeding. The two matters mentioned by Respondent are 1) defense counsel, Robert McCain's testimony in 1984, at a hearing on ineffective assistance of counsel, and 2) previous rulings of the courts in Petitioner's case regarding ineffective assistance of counsel and Hitchcock. With regard to McCain's testimony, a careful reading of it reveals that McCain and petitioner operated within the confines of the death penalty statute as it was interpreted in 1976, and McCain's 1989 affidavit is consistent with his 1984 testimony. With regard to previous opinions in this case, those opinions dealt either with a different legal standard than is proper here, or with a different record than is presented here. The state's contentions are either without merit or inapplicable, and this Court should grant a stay of execution to allow judicious review of the substantial issues presented.

I. The State Will Not Discuss Hall v. State, 541 So.2d 1125 (1989)

The state writes that "where Tafero elected to file a petition for writ of habeas corpus [first] instead of a Rule 3.850 motion regarding his Hitchcock claim, he should not and cannot be heard to complain that he chose the wrong vehicle with

which to air same." Answer Brief, p. 8. The state cites Hall at two places in its brief, but nowhere acknowledges its holding -- that one who "elects" to raise a Hitchcock claim in a petition for writ of habeas corpus instead of a Rule 3.850 Motion has not forfeited the right to present a "non-record Hitchcock" claim in a Rule 3.850 motion. Petitioner is in the same procedural posture as was Hall, and he is no more barred than Hall was.

11. McCain's 1984 Testimony Reveals that Petitioner was Operating Pursuant to the Statutory Prescription on Sentencer Consideration of Non-Statutory Mitigating Circumstances

In 1984 at a state post conviction evidentiary hearing on ineffective assistance of counsel, McCain testified about his discussions with Petitioner vis-a-vis sentencing. The state writes that

> [T]he record reflects that defense counsel, Robert McCain, at the state evidentiary hearing, testified on November 13, 1984, that he and Jesse Tafero reviewed the entire matter regarding the sentencing phase of his trial and that they agreed not to put on any witnesses. (TR 60). Mr. McCain also testified that he spoke with Mr. Tafero about the closing argument, in fact, specifically reviewed the language of his closing argument with Tafero. (TR 61, 66, 67, 70, 103, 107). Mr. McCain stated that Tafero could not provide any character witnesses and that after discussing the strategy at the penalty phase, agreed that no witnesses would be called to testify. (TR 89). Mr. McCain's testimony at the Rule 3.850 hearing reflects that he discussed strategy with Tafero, also reviewed the options of calling witnesses, knew about Jesse Tafero's background and his family, and did not feel restricted with regard to the presentation of any statutory or non-statutory mitigating evidence (TR 60).

Answer Brief, at 3. What defense counsel in fact reviewed with Petitioner was the statute:

A. I explained the statute to him and what we could do, what the State can do, what the jury would do, or could do, and what the Judge could do.

Q. Tell me in more detail what you mean.

A. That's all I recall. Generally, I explained to him the proceeding and the purpose. I can't give you any recollection, any detail about what I said to him and what he said to me from eight years ago.

(R. 38).

Q. What did you talk to him about?

A. The sentencing.

Q. What did you talk to him about the sentencing?

A. About what to do.

Q. What was to do?

A. What we're going to do at the sentencing.

Q. What was to do at the sentencing? What did you tell him he could do?

A. I told we could put on witnesses if we had any.

Q. Had you prepared to call any witnesses?

A. There weren't any.

(R. 65).

Q. Did you at the time know the statutory aggravating factors?

A. You mean know the statute?

Q. Did you know what factors were enumerated by the Florida legislature as aggravating factors?

A. Sure.

Q. Did you know the mitigating ones?

A. Sure.

Q. Did you talk to the Defendant about them?

A. Yes. sir.

Q. Did you show him the statute?

A. I think I showed him a copy of it.

(R. 84). Thus, Petitioner was told the "factors . . . enumerated by the Florida legislature . . . [as] mitigating," and shown "a copy of" the statute. Everyone else who read this statute in 1976, including the Florida Supreme Court, believed that its plain language precluded sentencer consideration of non-statutory mitigating evidence.

Regarding the state's averment that, notwithstanding that the sentencer could not consider non-statutory mitigating circumstances, counsel "did not feel restricted with regard to the presentation of any . . . non-statutory mitigating circumstances," Answer Brief, p. 3, in fact what counsel said was that if he had any such evidence, he would try to get it introduced, but the judge would surely have been an obstacle:

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.

(R. 60). Hence, counsel knew he could try to present non-statutory mitigating circumstances. But he also knew it would not be considered, and that is what effected his investigation:

> 1. In 1976, I knew that I should try to present any mitigating factors during the penalty phase proceeding whether they were enumerated in the statute or not.
> 2. I also knew that the jury instruction limited the jurors and judge's consideration of mitigating factors to those enumerated in the Florida Statute.
>
> 3. I, therefore, knew that neither the jury nor the judge would consider any non-statutory mitigating factors.
> 4. Had I known that the jury could consider non-statutory mitigating factors and that they would have been instructed to do so, I and my investigator would have performed a complete investigation into Mr. Tafero's background and life history and my strategy at the penalty phase would have been dramatically different.

(Appendix S).

It is simply inaccurate for the state to suggest that counsel and Petitioner were not constrained by the statute.

> 11. The Previous Opinions on Hitchcock Related Issues in this Case Applied Different Legal Standards From the One Required Here, to a Different Record From the One Presented Here.
>
> A. The Washinaton v. Strickland Standard does not Apply

The state cites "Tafero v. Wainwright, 796 So. [sic] 2d at 1320," Answer Brief of Appellee, p. 4, for the proposition that testimony presented in the context of an ineffective assistance of counsel setting did not result in a reversal, so no reversal

should occur now. The test for eighth amendment error is whether the state can show beyond a reasonable doubt that the error had no effect on sentencing. The sixth amendment test is whether the petitioner can show that but for the error, there is a reasonable probability that the result would have been different. If the petitioner had the burden of proof in an eighth amendment setting, and he definitely does not, it would be to show that an error might have some effect, in comparison with the much weightier reasonable probability test required in ineffectiveness settings. A previous finding that counsel was not ineffective is not relevant to the eighth amendment issue here.

In any event, the evidence considered in that case is not the evidence presented here. Most notable is the difference between what the psychologist Esther Cauliflower would have said and what Dr. Fisher, clinical psychologist, would show. Cauliflower would have discussed volunteer work in prison. Dr. Fisher's testimony -- abuse, torture, physical deprivation, drug addiction, etc. -- is much different.

Eighth amendment error -- even in the face of four aggravating circumstances -- is seldom harmless. In Hallman v. State, No. 70,761 (April 12, 1990) this Court addressed a case with four aggravating circumstances. The court found that a divorce, separation from a child, the death of a loved one, and a driving under the influence arrest could provide a reasonable basis to outweigh those aggravating circumstances. The mitigating evidence presented here is much more substantial.

The following chart may help in sorting out what has come before:

Dates	Proceeding	Issue	Ruling
1981	Direct Appeal **403** So.2d **355**	Lockett restriction	Denied on the merits
1984	**3.850** Appeal **459** So.2d **1034**	1. ineffective 2. Lockett	Not ineffective waived
1986	federal habeas appeal **796** F.2d **1314**	1. ineffective 2. Lockett	Not ineffective merits
1987	Hitchcock		
1988	state habeas 520 So.2d **287**	Hitchcock record-based	merits denied
1989	Hall		
1989	**3.850**	non-record based Hitchcock	

In the **1981** direct appeal proceeding, the "Hitchcock" issue was raised and ruled upon. There was no waiver. In the **1984** proceeding, this Court denied an ineffectiveness challenge, and ruled that the record-based Lockett challenge had been rejected in Proffit v. Wainwriaht, **428** U.S. 242 (1976), Ford v. Strickland, **696** F.2d **804** (11th Cir. 1983), and Spinkellink **v.** Wainwriaht, **978** F.2d 582 (5th Cir. 1978), it could or should have been raised on appeal, "and his failure to do so precludes making this claim now." Tafero, **459** So.2d at **1036**. In fact, the claim had been raised on appeal. Regardless, the ineffectiveness denied and the "Hitchcock" denied do not affect the claim now presented, the former being inapposite, and the latter being pre-

Hitchcock. The 1988 state habeas corpus decision, while a Hitchcock decision, did not address the issues presented here. See Hall.

Conclusion

WHEREFORE, Petitioner respectfully requests that this Court issue a stay of execution and, upon judicious consideration of the issues, grant a new sentencing proceeding.

Respectfully submitted,

Mark Evan Olive
920 Ponce de Leon Avenue N.E.
Atlanta, Georgia 30306
(404) 898-2060
(904) 681-6499

Certificate of Service

I hereby certify that a true and correct copy of the foregoing has been furnished by hand delivery to Carolyn Snurkowski, Assistant Attorney General, Office of the Attorney General, Tallahassee, Florida, this 25th day of April, 1990.

Mark Evan Olive