

OCT 14 1967
CLERK OF THE COURT
By

IN THE SUPREME COURT OF FLORIDA

No. 71284

FREDDIE LEE HALL,

Petitioner,

v.

RICHARD L. DUGGER, Secretary, Florida
Department of Offender Rehabilitation;
TOM BARTON, Superintendent of Florida
State Prison at Starke, Florida; and
ROBERT A. BUTTERWORTH, Attorney General
of the State of Florida,

Respondents.

PETITION FOR HABEAS CORPUS
PURSUANT TO HITCHCOCK v. DUGGER

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I. INTRODUCTION

In recent weeks, this Court has had occasion to vacate several death sentences imposed in violation of the principles enunciated in Hitchcock v. Dugger, ___ U.S. ___, 107 S.Ct. 1821 (1987). Thompson v. Dugger, Nos. 70,739 & 70,781 (Fla. September 9, 1987); Downs v. Dugger, No. 71, 100 (Fla. September 9, 1987); Riley v. Wainwright, No. 69,563 (Fla. September 3, 1987); Morgan v. State, No. 69,104 (Fla., August 27, 1987); McCrae v. State, No. 67,629 (June 18, 1987). Each of these cases involved capital sentencing trials conducted prior to the decision of the United States Supreme Court in Lockett v. Ohio, 438 U.S. 586 (1978), in which sentencing judges and juries did not accord full independent weight to nonstatutory mitigating factors in the decision to impose death as punishment. For the reasons that follow, petitioner submits that his case is squarely controlled by these very recent decisions of this Court, and that habeas corpus relief should be granted.

II. JURISDICTION

This is an original action under Fla.R.App.P. 9.11(a). This Court has original jurisdiction under Fla.R.App.P. 9.030(a)(3) and Fla. Const. article V, §3(b)(9). The petition presents an issue that directly concerns previous judgments of this Court in petitioner's case. Hall v. State, 403 So.2d 1321 (Fla. 1981); Hall v. State, 420 So.2d 872 (Fla. 1982). Because this case involves error that prejudicially denies fundamental constitutional rights, the Court has jurisdiction to reconsider its prior disposition of the constitutional claim at issue. Kennedy v. Wainwright, 483 So.2d 424, 426 (Fla.), cert. denied, 107 S.Ct. 291 (1986); Downs v. Dugger, No. 71,100 (Fla. September 9, 1987); Riley v. Wainwright, No. 69,563 (Fla. September 3, 1987).

III. FACTS UPON WHICH PETITIONER RELIES

Six days before the United States Supreme Court announced its decision in Lockett v. Ohio, 438 U.S. 586 (1978), the petitioner Freddie Lee Hall was sentenced to death in a Florida state court. In accordance with the then-prevailing interpretation of pre-

Lockett law, Cooper v. State, 336 So.2d 1133 (Fla. 1976), cert. denied, 431 U.S. 925 (1977), petitioner's trial judge, Circuit Judge John W. Booth, instructed the jury that it could consider in mitigation of his punishment only those mitigating factors expressly enumerated by Florida's capital sentencing statute. Fla. Stat. §921.141 (1975). Prior to the start of the sentencing hearing, Judge Booth advised the jury that "[a]t the conclusion of the taking of the evidence and after argument of the attorneys, you will be instructed on the factors in aggravation and mitigation that you may consider." Trial Transcript (hereinafter cited as "Tr.") at 648-649. The instructions, given at the close of the evidence, were as follows:

The mitigating circumstances which you may consider, if established by the evidence, are these:

- A. That the defendant has no significant history of prior criminal activity;
- B. That the crime for which the defendant is to be sentenced was committed while the defendant was under the influence of extreme mental or emotional disturbance;
- C. That the victim was a participant in the defendant's conduct or consented to the act;
- D. That the defendant was an accomplice in the offense for which he is to be sentenced but the offense was committed by another person and the defendant's participation was relatively minor;
- E. That the defendant acted under extreme duress or under the substantial domination of another person;
- F. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;
- G. The age of the defendant at the time of the crime.

If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstances, and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence which should be imposed.

The sentence which you recommend to the Court must be based upon the facts as you find them from the evidence and the law as given to you by the Court. Your verdict must be based upon your finding of whether sufficient mitigating circumstances exist which outweigh any aggravating circumstances found to exist.

Based on these considerations, you should advise the Court whether the defendant should be sentenced to life imprisonment or to death.

Tr. 698-699.

These instructions, which limited the jury's consideration of mitigating factors to the seven enumerated mitigating circumstances of the Florida capital sentencing statute, had the practical effect of precluding the jury from considering the following non-statutory mitigating factors which were supported by record evidence:

- (1) Petitioner was not the triggerman in the murder, and testified that he did not intend the victim's death. Tr. 695.¹
- (2) Petitioner attempted to dissuade his accomplice Ruffin from beating and killing the victim. Tr. 530-531, 678.
- (3) Petitioner assisted the police by bringing them to the victim's body and by making a voluntary statement admitting his involvement in the crime.
- (4) Petitioner, even if not "substantially impaired" within the meaning of the applicable statutory mitigating circumstance, was nevertheless "high" on alcohol and marijuana on the night of the offense. Tr. 663, 676.
- (5) Petitioner offered no resistance when arrested.
- (6) The evidence of petitioner's intent to cause the victim's death was weak and entirely circumstantial, and did not foreclose all doubt as to petitioner's guilt of first degree murder.

After receiving the instructions quoted above, the jury recommended imposition of a sentence of death. Tr. 701-702. The following day, Judge Booth imposed a death sentence after finding the existence of three statutory aggravating circumstances and no mitigating circumstances. Tr. 708-709.

During the sentencing proceeding which followed the jury's advisory verdict, Judge Booth did not restate his belief that mitigating circumstances were limited to those enumerated by statute. However, it is plain that he did adhere to that view at

¹The statutory mitigating circumstance that "the offense was committed by another person and the defendant's participation was relatively minor" clearly did not ensure that the jury would give independent consideration to petitioner's lesser role in the murder, since this circumstance applies only to defendants whose participation in the crime was "relatively minor." Once the jury found that petitioner's role in the kidnapping and robbery of the victim was "major," as petitioner himself conceded it to be in his testimony, the trial court's instructions effectively precluded consideration, as a mitigating circumstance, of the fact that he was not the triggerman.

the time that he sentenced petitioner to death. Just over a month before petitioner's trial, during the course of a prior sentencing proceeding involving petitioner and his accomplice, Judge Booth expressly asserted that Florida law limited both the state and the defense to the statutory aggravating and mitigating circumstances enumerated by statute.² Furthermore, Judge Booth has subsequently made clear in the course of post-conviction proceedings in another case that during the period prior to the United States Supreme Court's decision in Lockett, he construed Florida law prior as limiting the mitigating factors available to capital defendants to those enumerated by statute. Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985) (en banc), cert denied, ___ U.S. ___, 107 S.Ct. 1982 (1987). These circumstances, together with the instructions given to the jury, make clear that Judge Booth's consideration of mitigating circumstances was limited to those contained in the Florida statute, and that he neither considered nor weighed in his own sentencing determination any of the non-statutory mitigating evidence contained in the record.

Petitioner's appointed trial counsel did not raise on appeal the trial court's limitation on consideration on mitigating circumstances. However, on September 21, 1982, with petitioner's scheduled execution only fifteen days away, the trial court appointed new counsel to represent petitioner. Petitioner promptly filed a post-conviction motion in the trial court alleging, inter alia, that Judge Booth had unconstitutionally limited both the jury's and his own consideration of mitigating circumstances to

²The judge's ruling, which excluded a proffered item of nonstatutory mitigating evidence, was as follows:

It is the court's ruling that the case cited by the defendant, 428 U.S. 242, Proffitt v. Wainwright, does not, does not stand, [for] the proposition that evidence can be admitted or presented to the jury in the second stage of the trial, that is not specifically authorized by statute. That applies to both the state and the defense. They are limited to those items that are specifically specified or set forth in the statute. The [proffered evidence] . . . does not fall within the statutory provisions for mitigating circumstances.

Motion to Vacate, Set Aside or Correct Conviction and Sentence, App. A., Record at Vol. I, p. 94, Hall v. State, 420 So.2d 872 (Fla. 1982).

those specifically enumerated by statute, and that the pre-Lockett Florida law which governed petitioner's trial denied him an individualized determination of his sentence. Motion to Vacate, Set Aside or Correct Conviction and Sentence, State v. Hall, Case No. 78-52CP (5th Jud. Cir. Ct. (Fla.)) (Sept. 28, 1982), Claims K and L. Petitioner further alleged that his trial counsel were ineffective for failing to investigate and introduce nonstatutory mitigating evidence, and for failing to ensure that the instructions given to the jury did not preclude the jury's consideration of such nonstatutory mitigating evidence as was contained in the record. Id., Claim U (a, b, i). In addition, petitioner filed a petition for writ of habeas corpus in this Court alleging that his original attorneys had been ineffective for failing to raise on appeal, inter alia, "the improper limitation on mitigating circumstances by Judge Booth in his instructions and in his own consideration of mitigating circumstances," and "the sufficiency of the instructions regarding aggravating and mitigating circumstances." In support of this claim, petitioner made the following argument:

While at the time of Mr. Hall's trial Florida Law was at best, ambiguous regarding the presentation of non-statutory mitigating evidence, by the time of the filing of the brief for Mr. Hall in October, 1979, it was clear that, whatever state law may have been, such a limitation was unconstitutional under the federal constitution. Lockett v. Ohio, which so held, was decided in July, 1978, more than a year before the filing of the brief. Counsel's failure to raise the violation of Lockett in Mr. Hall's case is inexcusable and constitutes a violation of Mr. Hall's right to effective assistance of counsel.

Petition for Writ of Habeas Corpus, Hall v. Wainwright, at 2-4 (filed October 2, 1982).

The state responded to petitioner's Lockett claims by alleging that they were procedurally barred by the failure of his previous counsel to raise them on direct appeal, and the state trial court agreed that "[j]ury instruction issues can only be raised on appeal, not collaterally." As for petitioner's claim that counsel's failure to raise the Lockett claims on direct appeal constituted a denial of effective assistance of counsel, the state asserted that "[t]he instructions given to the jury at the sentencing

phase were appropriate. " Response to Petition for Writ of Habeas Corpus at 1, 3.

This Court dismissed petitioner's claim of ineffective assistance on appeal without discussion of any of his specific allegations. Hall v. State, 420 So.2d 872, 873 (1982). The state supreme court also rejected most of petitioner's remaining claims with the statement that "[w]e, like the trial court, find no merit to Hall's attacks on his conviction and sentence." The court added that most of the issues raised in the state collateral proceeding either were or could have been raised on direct appeal, and would therefore not support a collateral attack. Id.

IV. WHY THE WRIT SHOULD ISSUE

A. This case is squarely controlled by Hitchcock v. Dugger.

Since this Court last considered petitioner's Lockett challenge to his sentence of death, the United States Supreme Court has held that jury instructions materially identical to those given in petitioner's case violate the Eighth Amendment. Hitchcock v. Dugger, ___ U.S. ___, 107 S.Ct. 1821 (1987). A comparison of the instructions given in each case make clear their factual similarities:

HALL

At the conclusion of the taking of the evidence and after argument of the attorneys, you will be instructed on the factors in aggravation and mitigation that you may consider. Tr. 648-649.

The mitigating circumstances which you may consider, if established by the evidence, are these [listing statutory mitigating circumstances].

Tr. 698-699.

HITCHCOCK

[Trial judge advised jury that he would instruct them] on the factors in aggravation and mitigation that you may consider under our law.

The mitigating circumstances that you may consider shall be the following [listing the statutory mitigating circumstances].

107 S.Ct at 1824.

As in Riley v. Wainwright, No. 69,563 (Fla. September 3, 1987), it is quite plain that the trial court's treatment of nonstatutory mitigating circumstances in this case was "nearly identical" to that found to be unconstitutional by the Supreme Court in Hitchcock, and that resentencing is required.

B. The error is not procedurally barred, and cannot be disregarded as harmless.

The state of Florida as respondent has asserted in prior proceedings that petitioner's Lockett claim is barred by the failure of his trial counsel to object to the trial judge's limitation of mitigating factors at trial, or to raise the claim on direct appeal. This procedural defense is now foreclosed by Thompson v. Dugger, Nos. 70,739 & 70,781 (Fla. September 9, 1987). In Thompson, this Court squarely held that "the United States Supreme Court's consideration of Florida's capital sentencing statute in its Hitchcock opinion represents a sufficient change in the law . . . to defeat a claim of procedural default." Slip op. at 3. The identical situation is present here, and requires consideration of petitioner's Hitchcock claim on its merits without regard to the disposition of his claim in pre-Hitchcock proceedings in the state and federal courts. See Copeland v. Dugger, ___ U.S. ___ (Oct. 5, 1987) (per curiam).³

As this Court has recently reiterated, any death sentence imposed in violation of Lockett and Hitchcock must be deemed the product of a "fundamentally unfair" trial. Riley v. Wainwright, No. 69,563

³Petitioner would add that this Court's procedural holding in Thompson is consonant with the views of the United States Supreme Court, recently expounded in Smith v. Murray, 478 U.S. ___, 106 S.Ct. 2661, 2668 (1986), concerning the "fundamental miscarriage of justice" exception to the procedural default rule of Wainwright v. Sykes, 433 U.S. 72 (1977). In the context of a capital sentencing determination, the Court in Smith focused on whether the defaulted constitutional claim concerned an error which "precluded the development of true facts [or] resulted in the admission of false ones." 106 S.Ct. at 2668. The Hitchcock violation in this case is such an error. The systematic exclusion from the sentencer's consideration of all nonstatutory mitigating circumstances revealed by the evidence, in a case in which almost all of the evidence in mitigation was nonstatutory, is precisely the kind of error which "served to pervert the jury's deliberations concerning the ultimate question of whether in fact petitioner" deserved to be sentenced to death. Smith v. Murray, supra. Unable to consider the fact that petitioner was not the triggerman, his efforts to aid the victim, his cooperation with the police following his arrest, or the weakness of the state's wholly circumstantial case of first-degree murder, petitioner's jury was left with almost no evidentiary basis upon which to consider recommending life rather than death. The effect of the Lockett violation in this case was to undermine the reliability of the jury's sentencing decision, and thus the constitutionality, under the Eighth Amendment, of the death sentence ultimately imposed. Hitchcock v. Dugger, supra; Sumner v. Shuman, ___ U.S. ___, 107 S.Ct. 2716 (1987).

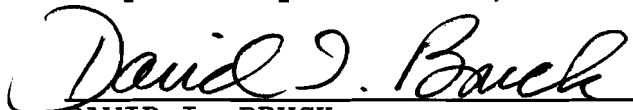
(Fla. September 3, 1987), Slip op. at 7, n. 2. Because the state has no valid interest in carrying out such a death sentence, petitioner's sentence must be vacated and redetermined after consideration by a properly-instructed jury.

No serious claim can be made that the Hitchcock errors committed here were harmless. It is true that the trial judge found three statutory aggravating circumstances and no statutory mitigating circumstances. But far from establishing harmlessness, this fact actually underscores the prejudicial impact of the Hitchcock violation. This was a case in which virtually all of the mitigating factors--the weakness of the state's evidence of petitioner's intent to kill, his cooperation with authorities, the fact that petitioner was not the triggerman--were wholly or primarily non-statutory. A reviewing court simply cannot conclude, with the degree of certainty required in such matters, Chapman v. California, 386 U.S. 18 (1967), that the effective exclusion of virtually all of petitioner's case in mitigation "had no effect upon the jury's deliberations." Skipper v. South Carolina, 476 U.S. ___, 106 S.Ct. 1669, 1673 (1986). Hitchcock plainly requires that petitioner's death sentence be vacated, and that he be afforded an opportunity to present to the sentencing jury and judge--and to have them consider--all relevant evidence tending to show why his life should be spared.

V. CONCLUSION

For the foregoing reasons, petitioner respectfully requests that his sentence of death be vacated and that he be granted a new sentencing hearing before an advisory jury empaneled for such purpose.

Respectfully submitted,



DAVID I. BRUCK
Attorney at Law

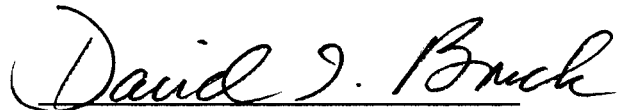
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ATTORNEY FOR THE PETITIONER.

October 13, 1987

CERTIFICATE OF SERVICE

I hereby certify that I have this date served the within Petitioner for Writ of Habeas Corpus upon counsel for the respondent by depositing one (1) copy of the same in the United States Mail, postage prepaid, and addressed to Mr. Robert J. Landry, Esq., Assistant Attorney General, 1313 Tampa Street, Suite 804, Tampa, Florida 33602.



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