IN THE SUPREME COURT OF FLORIDA

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JOHNNY COPELAND,

Petitioner,

v. CASE NO. 69,428

RICHARD L. DUGGER,

Respondent.

- - - - - - - - - - - - - - - -x

JOHNNY COPELAND,

Appellant,

v. CASE NO. 69,482

STATE OF FLORIDA,

Appellee.

- - - - - - - - - - - - - - - -x

ANSWER BRIEF FOR PETITIONER-APPELLANT

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ANSWER BRIEF FOR PETITIONER-A[illegible]E

Summary of the Argument

This case presents a relatively narrow question: whether, in view of the substantial nonstatutory mitigating evidence actually presented to the jury at the penalty phase of petitioner's trial, the State can establish beyond a reasonable doubt that the Hitchcock error here was harmless. The State concedes that the jury was improperly instructed

that it could only consider the seven mitigating circumstances specifically enumerated in the Florida statute, in contravention of the United States Supreme Court's decision in Hitchcock v. Dugger, 107 S.Ct. 1821 (1987). The State also concedes that nonstatutory mitigating evidence was presented to the jury.

The State seeks to obscure the overwhelming evidence of harm to petitioner by arguing that the petitioner has the burden of proving that he was harmed by the erroneous instruction -- a standard never applied by this or any other Court. Under the rule adopted by this Court and required by the Constitution, the State must show, beyond a reasonable doubt, that the erroneous instruction had no effect upon the jury's decision.

The State cannot make that showing here. Under this Court's post-Hitchcock jurisprudence, it is settled that where the record demonstrates -- as it does here -- that there was substantial nonstatutory mitigating evidence presented, but that the jury and judge did not consider it, an appellate court cannot conclude beyond a reasonable doubt that the failure to instruct the jury properly had no effect upon the outcome at sentencing. And, under those circumstances, this Court has repeatedly held that a new sentencing proceeding -- to comport with the requirements of Hitchcock and Lockett -- must be conducted.

That conclusion is strengthened here by the fact that, despite being limited by an erroneous instruction, two members of the jury in this capital case were sufficiently moved to vote against imposition of the death penalty. Surely, then, it cannot be said beyond a reasonable doubt that, had the jury been permitted to consider all relevant nonstatutory mitigating evidence, the vote could not have gone the other way.

Statement of the Case and the Facts

On May 24, 1979, petitioner-appellant Johnny Copeland was convicted, in the Circuit Court of Wakulla County (Cooksey, J.), of felony murder for his participation in the events leading to the murder of Sheila Porter by Frank Smith. Copeland was sentenced to death on September 10, 1979, after the jury recommended the death sentence by a vote of 10 to 2. The conviction and sentence were affirmed by this Court on September 13, 1984. Copeland v. State, 457 So. 2d 1012 (Fla. 1984).

These proceedings began on October 14, 1986, when, under a death warrant, Copeland filed before the trial court a motion for collateral relief pursuant to R. Crim. Pro. 3.850 and a petition for a writ of habeas corpus. The trial court denied the motion and petition the next day. Copeland then appealed that denial to this Court. On

October 16, 1986, this Court granted a stay of execution, but on April 9, 1987, denied Copeland the relief he sought. Copeland v. Wainwright, 505 So. 2d 425 (Fla. 1987).

Copeland petitioned the United States Supreme Court for a writ of certiorari on July 8, 1987, based on the sole ground that his death sentence was invalid under Hitchcock v. Dugger, 107 S.Ct. 1821 (1987). In its response to Copeland's petition for certiorari, the State urged the U.S. Supreme Court to grant the petition and to deny Copeland's claim of Hitchcock error, just as it does here, on the ground that the error was harmless. The U.S. Supreme Court instead rejected the State's claim of harmless error when it vacated this Court's opinion and remanded to this Court for reconsideration in light of Hitchcock. Copeland v. Dugger, 108 S.Ct. 55 (1987).

The State moved for supplemental briefing on the issue of harmless error on July 29, 1988, and on August 22, 1988, the motion was granted.1/

1/ The State has failed to establish its right even to raise this "harmless error" claim. In the first place, the State does not demonstrate why, as a matter of law, the U.S. Supreme Court's remand is not dispositive of the issue. Surely, if the U.S. Supreme Court had agreed with the State's contention that the Hitchcock error was harmless, it would not have taken the action that it did.

(Continued)

ARGUMENT

I.

PETITIONER'S DEATH SENTENCE MUST BE VACATED BECAUSE THE STATE CANNOT CARRY ITS HEAVY BURDEN OF SHOWING THAT THE HITCHCOCK ERROR WAS HARMLESS

In Hitchcock v. Dusser, 107 S.Ct. 1821 (1987), the United States Supreme Court ordered that Hitchcock's death sentence be vacated and a new sentencing proceeding be conducted, because

> We think it could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of Skipper v. South Carolina, 476 U.S. ____, 106 S.Ct. 1669 (1986), Eddings v. Oklahoma, 455 U.S. 104 (1982), and Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion).

(Continued)

Moreover, the State has failed to demonstrate that it has not, as a matter of Florida law, waived its claim of harmless error. The State never made this claim in any earlier proceeding before this Court, although it had every opportunity to do so, particularly when petitioner urged in his R. Crim. Pro. 3.850 motion that the instruction to his jury was erroneous. Moreover, states were routinely making "harmless error" claims in the face of Lockett violations well before Hitchcock was decided. **See**, e.g., Skipper v. South Carolina, 106 S.Ct. 1669 (1986).

The State does not -- and cannot -- dispute that evidence of nonstatutory mitigating circumstances was presented to Copeland's jury, as it was in Hitchcock. (See Resp. Br. at 2-3, 8-10) The record that was before Copeland's jury includes evidence 1) that Copeland was mentally retarded; 2) that Copeland was mentally disturbed before, during and after the crime; 3) that Copeland did not personally commit the murder; 4) that Copeland was dominated by his co-defendant, who actually killed the victim; 4) that Copeland did not intend that the victim be killed; 5) that Copeland tried to stop his co-defendant from committing the murder; 6) that Copeland was deeply remorseful over the crime, so much so that his remorse triggered a psychotic episode that lasted for months; 8) that Copeland surrendered peacefully and voluntarily; 9) that Copeland cooperated with the police and led police to the body; 10) that Copeland had responded positively to incarceration and was improving; 11) that Copeland had a good employment record; and 12) that Copeland demonstrated an excellent chance for rehabilitation.

The State also concedes -- as it must -- that the trial judge instructed the jury that it could only consider those mitigating circumstances specifically enumerated in the F.S. 921.141(6) and that this instruction, substantially identical to that given in Hitchcock, was erroneous. (See Resp. Br. at 5, 7, 10)

The State's opposition to granting Copeland a new sentencing proceeding uninfected by constitutional error is predicated exclusively on the contention that the Hitchcock error in Copeland's trial was harmless. As we now demonstrate, in light of the substantial quality and quantity of nonstatutory mitigating evidence actually before Copeland's jury -- and the fact that two jurors voted against imposition of the death penalty even on the basis of the preclusive jury instruction they were given -- the State has not met its heavy burden of establishing that the error was harmless.

A. The State Carries The Burden Of Showing That The Concededly Erroneous Instruction Given To Copeland's Jury Had **No** Effect On The Jury's Sentencing Decision

This Court has held that before an error of constitutional magnitude may be deemed harmless, there must be no reasonable possibility that the error contributed to any extent to the verdict or sentence. The State shoulders the heavy burden of so proving. State v. DiGuilio, 491 So. 2d 1129, 1138 (Fla. 1986). And, in the capital context, this Court has stated, emphatically, that "unless it is clear beyond a reasonable doubt that the erroneous exclusion of evidence did not affect the jury's recommendation of death, the defendant is entitled to a new jury recommendation on

resentencing." Valle v. State, 502 So. 2d 1225, 1226 (Fla. 1987).

These decisions did not come in a vacuum. They are consistent with the applicable federal constitutional standard repeatedly enunciated by the U.S. Supreme Court. Thus, in Chapman v. California, 386 U.S. 18, 24 (1967), the Supreme Court held that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that the error was harmless beyond a reasonable doubt." Accordingly, if there is a reasonable possibility that the error complained of might have contributed to the outcome, the burden of proof falls squarely upon the State -- as the beneficiary of the error -- to prove beyond a reasonable doubt that it did not contribute to the verdict. Id.; accord, State v. DiGuilio, supra, at 1138.

In the context of assessing a claim that it was harmless error to exclude mitigating evidence at the penalty phase in a capital case, the U.S. Supreme Court has held that such error may be found harmless only if the reviewing court can "confidently conclude that the excluded evidence" would have "had **no** effect upon the jury's deliberations." Skipper v. South Carolina, 106 S.Ct. 1669, 1673 (1986) (emphasis added). And in Hitchcock itself, the Supreme Court reiterated the "no effect" test -- pointing out that the State had not even argued, much less demonstrated, that the error there

"had **no** effect on the jury or the sentencing **judge."** 107 S.Ct. at 1824 (emphasis added).

Both the **"no** effect" test and the "beyond a reasonable doubt" standard have been adopted and consistently applied by this Court in its post-Hitchcock decisions. **See,** e.g., Cooper v. Dugger, 525 So. 2d 900, 903 (Fla. 1988) ("the state has not demonstrated that the error in this case was harmless beyond a reasonable doubt or had no effect on the jury or judge") and cases cited infra, at 26.

Here, the State does not even attempt to shoulder its burden of establishing that the trial court's erroneous instruction to the jury to consider only statutory mitigating evidence was harmless. Instead, the State resolutely ignores the issue by repeatedly asserting -- without citation of authority -- that it is Copeland who carries the burden of establishing that a proper instruction to the jury would have resulted in the imposition of a life sentence.[2/] **(See** Resp.

2/ The State concedes that the judge's instruction was erroneous, but asserts that the error was harmless because "Copeland cannot show" that the jurors **"interpreted"** the instruction to mean they could not consider all mitigating evidence. Resp. Br. at 7-8. That argument ignores the explicit holding of Hitchcock that once it is established that the faulty instruction was given to the jury, and once it is established that the judge refused to consider evidence of nonstatutory mitigating circumstances, there is created an irre-
(Continued)

Br. at 7-8) Remarkably, the State also ignores the actual record at trial and substitutes references to evidence not before the jury. The reason for this tactic is clear: the evidence of mitigating circumstances actually presented to the jury was powerful. A review of that evidence makes clear that one cannot conclude -- beyond a reasonable doubt -- that it would have had **no** effect on the jury's decision.

(Continued)
buttable presumption of Lockett error. **See** 107 S.Ct. at 1824; see also Zeigler v. Dugger, 524 So.2d 419, 420 (Fla. 1988) (it may be presumed that judge's perception coincided with manner in which jury was instructed).

The State further ignores settled law when it argues that the error in this case was harmless in that "defense counsel understood Lockett and presented all desired nonstatutory mitigating evidence.!! Resp. Br. at 5. The "mere presentation!' standard was explicitly rejected by the United States Supreme Court in Hitchcock, and by this Court in Riley v. Wainwright, 517 So. 2d 656, 659-60 (Fla. 1987), each holding that the crucial issue is not whether the evidence was presented but whether the jury was permitted to consider it.

For the same reason, the State's reliance on language from this Court's opinion denying Copeland's motion for collateral relief under R. Crim. Pro. 3.850, at 505 **So**. 2d 425 (Fla. 1987), is misplaced. Resp. Br. at 1. This Court merely noted that **"the** record of the original trial shows that the defense was allowed to present evidence of mitigating factors not strictly related to any of the statutory list of mitigating circumstances,!! id. at 427, but did not conclude, as the State misleadingly suggests, that the jury or judge had considered the evidence.

B. Substantial Nonstatutory Mitigating Evidence Was Presented At Trial

1. Evidence of Copeland's Retardation

Because the trial court limited the jury to consideration of statutory mitigating factors -- and did not itself consider any nonstatutory mitigating evidence -- the sentence of death was imposed without consideration of the substantial unrebutted evidence of Copeland's mental retardation.

Dr. Patrick E. Cook (who had been appointed by the trial judge to evaluate Copeland's competency to stand trial) testified that Copeland's I.Q. at the time of trial was 62. (R 1946) Dr. Cook estimated that, "[i]n comparison to a hundred citizens of Wakulla County, [Copeland] would be in the bottom, say, five percent regarding his general intellectual ability, to be able to figure out problems, answer questions and so forth." (R 1935; see R 1946)

Copeland could not remember the name of the President of the United States. (R 1947) He did not know how many months there are in a year. (R 1948) He had "great difficulty remembering family information that most normal people would very easily know." (R 1947) According to Wakulla High School's custodian of school records, Copeland left school at the age of 15, but had only completed the sixth grade. (R 1968-69) The State offered no evidence to

rebut Copeland's mental retardation. Even the prosecutor at trial referred to Copeland as "pretty **stupid."** (R 1952; **see** R 2053-54)

Mental retardation is unquestionably an important mitigating factor that **"must** be **considered."** Brown v. State, 526 So.2d 903, 908 (Fla. 1988) (new sentencing hearing required where evidence of retardation was not considered); ~~see also~~ Burger v. Kemp, 107 S.Ct. 3114, 3123 n.7 (1987); Eddings v. Oklahoma, 455 U.S. 104, 107 (1982). At least one state, Georgia, now bars execution of the mentally handicapped no matter what the circumstances of the crime. Ga. Code Ann. § 27-1503 (1988).[3/] Yet Copeland's jury was required by the judge's instruction in effect to disregard all evidence of Copeland's mental retardation, because unless a

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3/ Thus, the Georgia Legislature has concluded that mental retardation is sufficiently mitigating to require no more than life imprisonment no matter what aggravating circumstances exist. Therefore, it cannot be argued that no reasonable jury could have given Copeland a life sentence if it had been allowed to consider his mental retardation.

The U.S. Supreme Court has granted certiorari in a case involving the question whether execution of the mentally retarded is cruel and unusual punishment in violation of the Eighth Amendment. Penry v. Lynaugh, 832 F.2d 915 (5th Cir. 1987), cert. granted, 108 S.Ct. 2896 (June 30, 1988). The American Bar Association also recognizes mental retardation as a significant mitigating factor in capital cases. ABA Standard for Criminal Justice § 9.3 (1980).

defendant's mental deficiencies are so severe that the defendant cannot "appreciate the criminality of his conduct or conform his conduct to the requirements of the law," F.S. 921.141(6)(b), mere mental retardation is not a statutory mitigating circumstance.

The State's effort in this Court to undermine this significant evidence is completely misplaced. The State asserts, for example, that Dr. Cook's conclusion that Copeland was mentally retarded is unreliable because he was able to "correctly give his name, age and date of birth," "live on his own" and "maintain personal hygiene." (Resp. Br. at 2, 9) The State also places great emphasis upon Copeland's work as a "skilled brickmason" to suggest that he is not mentally retarded. (Resp. Br. at 9)[4/]

Questions of the weight to be given such evidence, of the inferences to be drawn from it, and of the relative credibility of experts should be determined by a properly instructed jury, and not an appellate court. See Caldwell v. Mississippi, 472 U.S. 320, 330 (1985) (intangible mitigating

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4/ The premise of the State's argument is that the mentally handicapped cannot learn the simplest tasks of daily life or the basic vocational skills of manual labor. That premise, which is based on a primitive view of the mentally handicapped, is, at best, a disputable proposition.

factors cannot be gleaned from appellate record); accord, Bollenbach v. U.S., 326 U.S. 607, 614-15 (1946). "Harmless error is not a device for the appellate court to substitute itself for the trier of fact by simply weighing the evidence." State v. DiGiulio, supra at 1130. It is in summations to juries, not in briefs to appellate tribunals, that arguments over these issues are properly advanced. Here, such arguments do not establish that the uncontroverted Hitchcock error was harmless beyond a reasonable doubt.

Beyond this, however, in its zealousness to impose the death penalty here, the State has seriously misrepresented the trial record to this Court. For instance, the State relies heavily on a one-page letter by Dr. Hugh Semon to suggest that Copeland was **"faking"** psychosis. (Resp. Br. at 3, 9)[5] But Dr. Semon's letter was never offered in evidence and was never before the jury. Although the State could have called Dr. Semon to testify, either at the guilt or penalty phase, it did not. Now, having sidestepped the

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5/ The State fails to mention that Dr. Semon's diagnosis, which was based on a single one hour visit, is directly contradicted by the diagnoses of Dr. Robert Wray, who examined Copeland nine times over a four-month period (R 2141), and Dr. Cook, who examined Copeland two times for three hours. (R 1934-35) The State also fails to mention that Dr. Semon was angry at Copeland for missing two earlier appointments. (R 400)

rigors of cross-examination, the State asks this Court to weigh evidence that the jury never considered.[6/]

2. Evidence That Copeland Did Not Commit The Murder And Tried To Dissuade The Killer From Doing So

As this Court has established, Frank Smith, not Copeland, actually shot Sheila Porter to death. Copeland was convicted of felony murder because of his participation in the robbery and kidnapping that eventually led to the murder of Ms. Porter by Frank Smith, who was known as the **"Chief."** (R 1670) Copeland, 457 So. 2d at 1015, 1019. **See** Copeland v. Dugger, 505 So. 2d 425, 428 (Fla. 1987).

Indeed, there was considerable evidence presented at trial that Copeland strenuously objected to killing the victim and tried to dissuade Smith from shooting her. (R 1688, 1691, 2170-71, 2172, 2178) Copeland did not know at first that Smith intended to kill Ms. Porter. (R 2162) Copeland believed that **"the** thing was just to let the lady go." (R 2172) When Smith did not release Ms. Porter,

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6/ The State also relies on the transcript of Copeland's first appearance before Judge Flack, where Copeland was denied counsel, to demonstrate that he was an "intelligent defendant." (Resp. Br. at 9) Petitioner strongly disagrees with this mischaracterization of the transcript, but more to the point, this **"evidence,"** like Dr. Semon's letter, was never presented to the jury.

Copeland asked Smith "nine or ten times" to release Ms. Porter. (R 2172) When it finally became clear to Copeland that Smith intended to kill Ms. Porter, Copeland argued with Smith (R 1688; R 2170-71), even though he was afraid that Smith might kill him also, as Smith had threatened to do. (R 1683; 1692)

This Court has already decided (though petitioner disagrees) that Copeland's participation in the crimes at issue was substantial enough to avoid a per se invalidation of the death sentence under Enmund v. Florida, 458 U.S. 782 (1982). Copeland, 505 So. 2d at 428. But even if Copeland's degree of participation was not deemed sufficiently diminished to invalidate his death sentence automaticallv, it is nevertheless certainly important mitigating evidence in favor of a life sentence. As this Court has affirmed, evidence that an accomplice actually committed the murder is an important nonstatutory mitigating factor. Cooper v. Dugger, 526 So.2d 900, 903 (Fla. 1988) (rejecting a claim of harmless error under Hitchcock where such evidence was not considered); Downs v. Dugger, 514 So. 2d 1069, 1072 (Fla. 1987) (same). To conclude otherwise would be to obliterate any moral distinction between one who actually kills and one who does not.

Yet because the trial court did not find that Copeland's participation in the crime was "relatively minor"

-- the additional element required to prove a statutory mitigation circumstance, **F.S.** 921.141(6)(d) -- the jury was precluded from considering any evidence that Copeland was not the killer.

3. Evidence That Copeland Was Under The Domination Of The Man Who Actually Killed The Victim

At the sentencing phase, the jury was also prevented from considering the ample evidence that the mentally retarded Copeland was manipulated by the domineering **"Chief,"** Frank Smith. (R 1670) The trial court itself found that Smith was the "dominant **movant."** (R 515) According to Dr. Robert Wray (who, like Dr. Cook, was appointed by the court to evaluate Copeland's competence to stand trial), Copeland's personality was "passive **dependent."** (R 2146) Copeland took comfort in the fact that **"as** long as he was with the Chief nothing would go wrong." (R 1678) Dr. Wray testified that Copeland was "basically one who was led or particularly followed a man called Frank **[Smith]."** (R 2145) The trial conclusively established -- and this Court agreed -- that Smith, not Copeland, committed the murder. Copeland's statement to the police reveals that Smith engineered the crime (R 1674), Smith was in charge throughout, and that Smith threatened to kill Copeland if he tried to leave. (R 1683) When asked by the prosecutor, **"Can** you

state, then, as a reasonable medical certainty that [Copeland] was under substantial influence of another person at the time these crimes were committed?" Dr. Wray testified, "If the history he gave me is correct, I can say that." (R 2146) The State never offered any evidence to rebut this testimony.

Evidence tending to show that a defendant "was easily led . . . and likely played a follower's role in the commission of the crime" has been recognized by this Court as "relevant to whether [the defendant] was deserving of the death penalty." Cooper v. Dugger, 526 So. 2d 900, 903 (Fla. 1988) (Hitchcock error not harmless in view of nonstatutory mitigating evidence). Federal courts have agreed. See, e.g., Troedel v. Wainwright, 667 F.Supp. 1456 (S.D. Fla. 1986), affirmed, 828 F.2d 670 (11th Cir. 1987); Thompson v. Wainwright, 787 F.2d 1447, 1450 (11th Cir. 1986), cert. denied, 107 S.Ct. 1986 (1987). Once again, however, because the trial court did not find that this evidence rose to the level required to prove the statutory mitigating circumstance of "substantial domination," the jury instructions effectively eliminated this evidence from the awesome calculus of life and death the jury had to perform. F.S. 921.141(6)(e).

4. Evidence of Copeland's Remorse And Post-Crime Psychosis

The jury was also prevented from considering Copeland's remorse over the crime and the psychosis that was triggered by that remorse. Dr. Wray testified that Copeland had been "definitely psychotic" and "suffering from a serious mental illness" prior to trial. (R 2142) Dr. Wray believed that the psychosis arose from the "shock, guilt and fear" of the crime. (R 2148) Copeland even tried to commit suicide while awaiting trial. (R 1710) According to Dr. Wray (who examined Copeland nine times between February and May of 1979, and initially declared Copeland incompetent to stand trial), before the trial Copeland was "so psychotic he could not render really a history of his side of what happened [at the time of the crime]." (R 2143)

The trial court found that this psychosis did not exonerate Copeland from guilt because Copeland was not insane at the time of the crime. But even if this mental illness arose after the crime, it is plainly evidence in mitigation of a death sentence. Copeland's "shock, guilt and fear" arising from Smith's killing of Ms. Porter was so severe that he lost his mind. A reasonable jury could certainly interpret this as evidence that Copeland was no cold-blooded, calculating killer, but rather a frightened and nervous participant in a robbery where, as Copeland is reported to

have said, "everything got out of hand." (R 1769) Yet again, the jury was instructed not to consider this evidence, because mental illness that arises after the crime, no matter how extreme and no matter if it is caused by remorse over the crime, is not a statutory mitigating circumstance.

Indeed, Copeland expressed remorse over the crime both in his interviews with Dr. Wray (R 2148), and in his penalty phase testimony to the jury. (R 2152) This Court has found remorse to be a nonstatutory mitigating factor in cases in which it has rejected claims of harmless error under Hitchcock. Mikenas v. Dugger, 519 So. 2d 601, 602 (Fla. 1988); **see** Foster v. State, 518 So. 2d 901, 901 n.2 (Fla. 1987), cert. denied, 108 S.Ct. 2914 (1988). Yet Copeland's jury was not told to evaluate the sincerity of his remorse -- instead, they were instructed, in effect, to disregard it because remorse is not a statutory mitigating factor. **See** **F.S. 921.141(6).**

5. Evidence Of Copeland's Peaceable Surrender And Cooperation With The Authorities

The jury was also prevented from considering Copeland's peaceful surrender and cooperation with the authorities. At trial, the arresting officer testified to Copeland's cooperation. Indeed, it was Copeland who led police to the area where the body was found. (R 1695)

Further, he offered no resistance when arrested. Instead, according to the arresting officer, he pointed to the officer's gun and said, **"You** don't need that **. . .** I ain't gonna be no trouble." (R 1664) **As** the U.S. Supreme Court recognized in Hitchcock, voluntary surrender is important nonstatutory mitigating evidence. 107 S.Ct. at 1824. But the jury was instructed not to consider this important evidence, because cooperation with the police and peaceful surrender are not statutory mitigating circumstances. **See F.S.** 921.141(6).

6. Evidence of Copeland's Rehabilitation

Finally, the jury had to disregard evidence of Copeland's good work record, improvement during incarceration and ability to rehabilitate. Copeland's stepfather and others testified to Copeland's good work record and willingness to work hard. (R 1639; 2159) The State never challenged this evidence -- indeed, it now inexplicably tries to recharacterize it as aggravating evidence. (Resp. Br. at 9) Dr. Wray's trial testimony also established that Copeland was improving as a result of his incarceration. (R 2143)

"Unquestionably, a defendant's potential for rehabilitation is a significant factor in **mitigation."** Cooper v. Dugger, 526 So. 2d 900, 902 (Fla. 1988). This Court has specifically recognized that employment history is

relevant to a defendant's potential for rehabilitation and productivity within prison, and has refused to find harmless error in cases where this evidence was not considered. Id. at 902; Riley v. Wainwright, 517 So. 2d 656, 659 n.1 (Fla. 1987); Fead v. State, 512 So. 2d 176 (Fla. 1987); McCampbell v. State, 421 So. 2d 1072 (Fla. 1982). Indeed, in Skipper v. South Carolina, 106 S.Ct. 1669 (1986), the U.S. Supreme Court ordered a new sentencing hearing where the **only** mitigating evidence that the jury was not allowed to consider was evidence of positive adjustment to prison life, stating that the jury "must consider" this evidence. 106 S.Ct. at 1673. Yet Copeland's jury was forbidden to consider this evidence of Copeland's possibility for reform, because possibility of reform and improvement during incarceration are not statutory mitigating circumstances. **See** F.S. 921.141(6).

7. Cumulative Effect

None of the above nonstatutory circumstances can fairly be considered in isolation. They work in confluence to form a picture of Copeland that the jury was told to disregard, because that picture did not conform to any of the statutory mitigating circumstances to which the jury's consideration was exclusively limited. Had the jury been allowed to consider all the evidence, including the impression that Copeland himself made upon the jurors when he took

the stand, it could reasonably have believed that Copeland was not a cold-hearted killer, but a mentally retarded, emotionally disturbed and easily led young **man**[7] who was truly remorseful and willing to try to rehabilitate himself. The jury, had it been free to weigh the evidence as it saw fit, could very well have concluded that life in prison was punishment enough for Copeland's participation in the crime.

Given the quantity and quality of the evidence that was kept from the jury, it is simply impossible to know beyond a reasonable doubt that the precluded evidence would have had no effect on the jury's **decision.**[8] This is

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7/ Copeland's youth **was** established as a statutory mitigating factor. (R 516)

8/ The State devotes a substantial portion of its brief arguing that the evidence submitted by Copeland in support of his Rule 3.850 motion is unreliable and should not be considered by this Court. To be sure, Copeland introduced substantial evidence in his post-conviction proceedings that corroborates many of the nonstatutory mitigating factors that were demonstrated at trial. This evidence includes the affidavit of Copeland's mother, Annie Lee Williams, as well as the affidavits of Dr. Dorothy Otnow Lewis and Dr. Harry Krop. These affidavits confirm Copeland's mental debilitations, sexual and physical abuse in childhood, and a history of brain damage. As argued in our earlier submissions to this Court, this evidence is properly before this Court and should be considered.

However, this Court need not reach this issue now. Copeland does not need to rely on that evidence here, because the evidence that **was** presented to the jury at

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particularly so where, as here, the jury's recommendation is less than unanimous. This Court has stressed that where an erroneous Hitchcock instruction has been given, and several jurors nonetheless vote against imposition of the death penalty, that is a circumstance creating special doubt as to what the outcome would have been under a proper instruction. See, e.g., Mikenas v. Dugger, 519 So. 2d 601 (Fla. 1987); Morgan v. State, 515 So. 2d 975 (Fla. 1987).9/

II.

IN LIGHT OF THIS COURT'S POST-HITCHCOCK JURISPRUDENCE, THE STATE CANNOT DEMONSTRATE BEYOND A REASONABLE DOUBT THAT THE ERRONEOUS INSTRUCTION TO COPELAND'S JURY HAD NO EFFECT UPON THE SENTENCING DECISION

In the eighteen months since the United States Supreme Court decided Hitchcock, this Court has ruled in more

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trial is more than sufficient to defeat any claim of "harmless error." Indeed, the only party now relying on evidence that was not before the jury is the State.

9/ In Copeland's case there is even more reason to question the outcome because the jury was repeatedly led to believe, by the judge and prosecutor, that the responsibility for determining the defendant's sentence rested solely with the judge. (R 1342, 1357-58, 1360-62, 1372, 1417, 1436-37, 1442, 1512, 2120, 2135, 2181-82) Such "minimizing" of the jury's role is constitutionally impermissible, and, in this case, provides a compelling additional reason to require a new sentencing hearing. See Caldwell v. Mississippi, 472 U.S. 320 (1985).

than twenty cases in which a Hitchcock claim of error has been raised, and "has consistently declined to uphold death sentences where the proceedings violate the teachings of Lockett." Waterhouse v. State, 522 So. 2d 341, 344 (Fla.), cert. denied, 57 U.S.L.W. 3235 (1988). Although recognizing that a harmless error analysis may be appropriate where a Hitchcock error has occurred,[10/] in no instance has this Court found a Hitchcock error harmless when confronted with a combination of factors and circumstances such as presented by petitioner here.

10/ Petitioner respectfully disagrees with this Court's conclusion that a Hitchcock error can ever be deemed harmless, and intends to raise the issue, should it become necessary, in the United States Supreme Court or on federal habeas corpus. Notably, in the ten years since Lockett was decided, no court has held any Lockett error harmless prior to this Court's several recent decisions holding erroneous Hitchcock instructions harmless. One reason is that "the [capital] jury is called upon to make a highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves," Turner v. Murray, 106 S.Ct. 1683, 1687 (1986), cited in Robinson v. State, 520 So.2d 1, 7 (Fla. 1988). The recent decisions of this Court applying harmless error analysis to post-Hitchcock cases seem to give less weight to the importance of the jury's special role in Florida's sentencing scheme than petitioner believes the Constitution requires.

a

A. Where It is Clear That the Jury Was Misinstructed, and the Judge Did Not Consider Nonstatutory Mitigating Circumstances, This Court Has Found Reversible Error

In considering Hitchcock claims, this Court has repeatedly held that where "it is apparent that the judge believed that he was limited to consideration of the mitigating circumstances set out in the statute and instructed the jury accordingly," that is sufficient to require a new sentencing hearing. Riley v. Wainwright, 517 So. 2d 656, 659 (Fla. 1987). Accord, McCrae v. State, 510 So. 2d 874, 880 (Fla. 1987); Foster v. State, 518 So. 2d 901, 902 (Fla. 1987); Downs v. Dugger, 514 So. 2d 1069, 1071-72 (Fla. 1987); Mikenas v. Dugger, 519 So. 2d 601, 602 (Fla. 1988); Combs v. State, 525 So.2d 853 (Fla. 1988); Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Waterhouse v. State, 522 So. 2d 341 (Fla. 1988); Cooper v. Dugger, 526 So. 2d 900 (Fla. 1988).

In every one of the above-cited cases, this Court ordered a new sentencing proceeding. The circumstances in each case were virtually identical to what this Court faces here: there was nonstatutory mitigating evidence presented, there was an instruction from the judge that precluded the jury from considering the nonstatutory evidence, and there were indications that the judge did not consider the nonstatutory evidence. Most recently, in Zeigler v. Dugger, 524

So. 2d 419, 421 (Fla. 1988), this Court reaffirmed that when those circumstances are present, a Hitchcock error cannot be held harmless:

> Thus, there was every indication that at the time of sentencing the trial judge believed that nonstatutory mitisatins evidence was not a proper consideration. There was enoush nonstatutory mitigating evidence introduced at the penalty phase proceeding that we are unable to say whether the judge's decision might have been different had he realized that nonstatutory mitigating circumstances were pertinent. On the record of this case, we cannot say that the principle of harmless error applies. (emphasis added)

Because all of the indicia of reversible error recognized by this Court in Zeigler, Riley, Cooper and the other cases are indisputably present here, Copeland is entitled to a new sentencing proceeding -- one that comports with the requirements of Hitchcock and Lockett.

B. There Is No Clear Indication That The Judge Understood His Duty To Consider Nonstatutory Mitigating Circumstances

One circumstance in which this Court has been willing to excuse a Hitchcock error as harmless is where it is apparent from the record that the trial judge understood that he could consider -- and he actually did consider -- nonstatutory mitigating factors. Thus, in Delap v. Dugger, 513 So. 2d 659, 662 (Fla. 1987), this Court noted that "it is obvious that the judge knew that nonstatutory mitigating

factors could be considered because he did so . . ."[11] And in Card v. Dugger, 512 So. 2d 829 (Fla. 1987), this Court likewise concluded that "there can be no doubt that both the trial judge and the jury were well aware that nonstatutory mitigating circumstances could be considered, and there is nothing to suggest they were not **considered."** Accord, Johnson v. Dugger, 520 So. 2d 565 (Fla. 1988) (nothing in record to indicate judge failed to consider nonstatutory mitigating evidence); White v. Dugger, 523 So. 2d 140 (Fla.), cert. denied, 57 U.S.L.W. 3235 (1988) (plain that jury and judge considered potential mitigating evidence); Agan v. Dugger, 508 So. 2d 11 (Fla. 1987) (clear from record that trial judge considered both statutory and nonstatutory mitigating factors); Booker v. Dugger, 520 So.2d 246 (1988)

11/ The finding of harmless error in Delap seems to have rested in part on this Court's conclusion that "the judge never explicitly told the jury it could not consider" nonstatutory mitigating evidence. 513 So. 2d at 662. That conclusion is wholly irreconcilable with the United States Supreme Court's holding in Hitchcock that **"the** jury was instructed not to consider" nonstatutory mitigating evidence. 107 S.Ct. at 1824. Delap's jury was given the identical instruction to that given in Hitchcock and Copeland. See also Mills v. Maryland, 108 S.Ct. 1860, 1870 (1988) (death sentence cannot stand where "there is a substantial probability that reasonable jurors . . . well may have thought they were precluded" from considering all mitigating evidence).

(judge understood relevance of nonstatutory evidence at time of sentencing).

The State suggests that this case is like those above -- i.e., that even though the jury was erroneously instructed to consider only statutory mitigating evidence, that error is rendered harmless because Copeland's **"trial** judge understood his duty under Lockett and performed **it."** (Resp. Br. at 5)

The State is wrong on the facts. The record contains no evidence that the judge understood that he could consider nonstatutory mitigating evidence. Instead, there is clear and compelling record evidence that he did not. Neither his Instruction to the Jury (R. 2196-2203), his **"Findings** of the Court Re: Death Sentence" (R. 512-516), nor his Sentencing Order (R. 510-511) make any mention of non-statutory mitigating circumstances. Rather, his Instruction, identical to the instruction invalidated in Hitchcock, said, **"[t]he** mitigating circumstances which you may consider, if established by the evidence, are these . . . ." He then read off the seven statutory circumstances. (R. 2199) His **"Findings** of the Court" specifically state that he applied **"the** mitigating circumstances enumerated in F.S. 921.141(6) (a) (b) (c) (d) (e) and (f)," again the identical language used by the trial judge in Hitchcock. His **"Findings"** then address and discuss only the enumerated statutory mitigating

circumstances, by number. Even though substantial nonstatutory evidence had been presented to the judge, he makes no mention of any of it anywhere. Not a single word uttered or written by the judge -- from the voir dire to the final sentencing -- suggests that he understood he could consider nonstatutory evidence.

Under Florida law, "a judge who fails to consider or is precluded from considering nonstatutory mitigating circumstances commits reversible error." Riley v. Wainwright, 517 So. 2d 656, 657 (1987).

But even if the judge had understood that he could consider nonstatutory mitigating evidence, that understanding would not have cured the error promulgated by his improper jury instruction. To so rule would be to vitiate what this Court has referred to as "the extreme importance of the jury's recommendation." Copeland v. Wainwright, 505 So. 2d 425, 427 (1987). This Court has resolved this issue in Riley, supra, where, after a complete review of its own cases, it concluded the following:

> [I]mproper, incomplete or confusing instructions relative to the consideration of both statutory and nonstatutory mitigating evidence does violence to the sentencing scheme and the jury's fundamental role in that scheme . . . . If the advisory function were to be limited initially because the jury could only consider those mitigating and aggravating circumstances which the trial judge decided to be appropriate in a particular case, the statutory scheme would be distorted.
>
> . . .

> Clearly, our prior cases indicate that the standards imposed by Lockett bind both judge and jury under our law. . . . If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencins process necessarily is tainted by that procedure.

517 So. 2d at 658-59, citing Cooper v. State, 336 So. 2d 1133, 1140 (Fla. 1976) (emphasis added).

Any other conclusion would have the effect of reading out of Florida law the well-settled principles that 1) a defendant, under Florida law, has the right to an advisory opinion from a jury, Floyd v. State, 497 So. 2d 1211 (Fla. 1986); and 2) that the jury's advisory opinion is entitled to "great weight" and "cannot be overturned by the sentencing judge unless the facts suggesting a different sentence are so clear and convincing that no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975).12/

12/ The State labels the notion that the judge must give great weight to the jury's advisory opinion a **"myth"** that petitioner is "indulging **in"** to defeat a claim of harmless error. Resp. Br. at 7. If **so**, it is a **"myth"** to which this Court has long subscribed. **See,** e.g., Tedder, 322 So. 2d at 910; Riley v. Wainwright, 517 So. 2d 656, 659 (Fla. 1987); Ferry v. State, 507 So. 2d 1373, 1376-77 (Fla. 1987); Wasko v. State, 505 So. 2d 1314 (Fla. 1987); Brookings v. State, 495 So. 2d 135 (Fla. 1986); Richardson v. State, 437 So.2d 1091 1095 (Fla. 1983).

Indeed, in declaring Florida's trifurcated statutory (Continued)

C. This Is Not A Case In Which There Is Little Or No Nonstatutory Mitigating Evidence

In several post-Hitchcock cases, this Court has concluded beyond a reasonable doubt that an erroneous Hitchcock instruction did not affect the outcome at sentencing either because no nonstatutory mitigating evidence was presented or because the evidence that was presented was so meager or weak that it could not possibly have altered the jury's or judge's decision. Thus, in Ford v. State, 522 So. 2d 345, 346 (Fla. 1988), where Ford's only nonstatutory evidence was a slight dyslexia and an unsubstantiated possibility of long-term rehabilitation, this Court was "able to say, beyond a reasonable doubt, that even with the proper jury instruction on nonstatutory mitigation, the jury could not have reasonably made a recommendation for life imprisonment."

In Tafero v. Dugger, 520 So. 2d 287 (Fla. 1988), this Court found that Tafero's lawyer deliberately did not argue mitigating circumstances at all and that the evidence he could have presented, had he chosen to, was very weak.

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death penalty scheme constitutional in Dobbert v. Florida, 432 U.S. 282, 295 (1977), the Supreme Court found the Tedder **"myth"** to be a "crucial protection" and an indispensable safeguard in the statutory structure.

And in Clark v. State, No. 72,303 (Lexis 969) (Fla. Sept. 8, 1988), this Court determined that "there simply were no nonstatutory mitigating circumstances to consider."

Likewise, in Smith v. Dusser, No. 71,367 (Lexis 1124) (Fla., June 16, 1988) and Hall v. Dusser, 13 F.L.W. 320 (Fla., May 20, 1988), this Court reviewed the nonstatutory mitigating evidence that was presented and determined that it was very weak relative to the aggravating circumstances that were presented. In each case this Court was able to conclude beyond a reasonable doubt that the evidence, had it been considered, could not have altered the outcome at sentencing. In Smith's case, the only mitigating evidence presented was a videotape of his confession that contained vague references to his traumatic childhood and oblique expressions of regret. Moreover, Smith specifically asked the jury to sentence him to death, and the jury was unanimous in recommending death.[13]

13/ As to the revisiting and reweighing of aggravating and mitigating evidence engaged in by this Court in Smith, Hall and Delap, this Court has itself warned that such is not the proper role of the appellate court (State v. DiGuilio, supra, at 1139):

> Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The question is whether there is a reasonable possibility that the

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Though Hall presented a somewhat more substantial list of mitigating circumstances, his evidence was far less than what Copeland presented and was uncorroborated by doctors or other witnesses. This Court, in a 4-3 decision, determined that, in view of the significant aggravating circumstances, the outcome in Hall would not have differed given a proper instruction.[14/] The same cannot be concluded here, where both the quantum and quality of evidence exceeded that presented by Hall. Copeland presented substantial evidence of mental retardation, domination by another, psychosis, remorse, positive response to prison life, good

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error affected the verdict.

The Supreme Court's decision in Skipper v. South Carolina, 106 S.Ct. 1669 (1986), essentially defines the limits on an appellate court's speculative inquiry into the effect that evidence kept from a jury's consideration might have had, if considered. Skipper was a case in which a single nonstatutory mitigating circumstance -- Skipper's good behavior in jail -- was kept from the jury's consideration. Yet the Court found that the exclusion of that single bit of evidence -- evidence far less compelling than what Copeland marshalled at his trial -- "was sufficiently prejudicial to constitute reversible error." Id. at 1673.

14/ In weighing the aggravating evidence in Copeland's case, this Court should be guided by its own precedent in Mikenas v. Dugger, 519 So. 2d 601 (Fla. 1988), in which it noted that all but one of the aggravating circumstances established by the State "were directly related to the murder itself." The same is true in Copeland's case.

employment record, and capacity to be rehabilitated. Hall presented evidence of none of these.[15/]

Clearly Copeland's is not an instance like Tafero or Clark in which there was no nonstatutory mitigating evidence presented, nor is it a case like Ford or Smith where the evidence was so weak that this Court could confidently predict the outcome even if the evidence had been considered. On the contrary, this is a case where the mitigating evidence was both ample and compelling. Given that two jurors voted against imposing the death penalty even though they could consider virtually none of Copeland's substantial mitigating evidence, it is very likely that the outcome would have been different had all twelve jurors been permitted to consider all the evidence. Certainly the evidence was weighty enough that one cannot conclude beyond a reasonable doubt that it would have had "no effect" upon the judge and jury had they considered it.

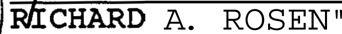
15/ We note, in any event, that this Court has, subsequent to its May 20, 1988 ruling in Hall, granted a motion for stay of execution, presumably in order to reconsider Hall's claim under Hitchcock. Hall v. Dugger, No. 73,029 (Fla. Sup. Ct., Sept. 14, 1988).

conclusion

For the foregoing reasons, petitioner respectfully requests that this Court remand to the trial court for a new sentencing proceeding to comport with the requirements of Hitchcock and Lockett or, in the alternative, vacate the sentence of death and impose a lesser sentence consistent with the law.

Dated: November 1, 1988

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 to Mark C. Menser, Assistant Attorney General, at the Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050, this 2nd day of November, 1988.

Jon D. Kaplon