IN THE SUPREME COURT OF FLORIDA

JOHNNY COPELAND,

Petitioner,

v. CASE NO. 69,428

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

Respondent.

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JOHNNY COPELAND,

Appellant,

v. CASE NO. 69,482

STATE OF FLORIDA,

Appellee.

REPLY BRIEF FOR RESPONDENT-APPELLEE

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STATEMENT OF THE CASE

The State stands by its factual representations and shall not respond to New York counsel's **ad hominem** attacks. The State submits the following corrections to Mr. Copeland's factual averments:

At page **(4),** Copeland incorrectly implies that the United States Supreme Court, at State request, undertook "harmless error" review. In truth, what happened was this: After the Circuit Court and this Court rejected Copeland's "**Hitchcock**" claim on purely procedural grounds (without requiring a "merits" response from the State), the State consented to certiorari review on the procedural default issue as well as "harmless error". While certiorari was pending, this Court changed the law of Florida by abandoning the procedural bar (upheld in **Straight** v. **Wainwright).** In reaction to **Riley** v. **Wainwright, 517** So.2d **656** (Fla. **1987),** the United States Supreme Court **summarily** granted certiorari and remanded the case! No records, transcripts or briefs on the merits were ever filed in Washington. There was, simply stated, no "harmless error" review and Copeland knows it.

At page (13), Copeland condescendingly reports that the State has a "primitive view" of the "mentally handicapped's" ability to "learn the simplest tasks" or "basic" vocational skills of manual labor. We submit that this effete ignorance of

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[1] **488** So.2d **530** (Fla. **1986).**

the skills required to become a brickmason reflects more upon Copeland's counsel than "primitive" State argument.

At page (14), the State is falsely accused of "serious misrepresentation" by Copeland because the State referred to record evaluations of Copeland by Dr. Semon. The State did **not** say the advisory jury saw Semon's letters. The **sentencer,** Judge Cooksey, did see them and, again, the report is part of the record. (R **400,** 401). (The letters are addressed directly to the sentencer, Judge Cooksey). As Copeland's counsel is well aware, the State "misrepresented" nothing.

Dr. Wray testified on direct that Copeland's "IQ" could be as high as "80", (R **1946)** and that his score was unnaturally low due to stress, uncooperativeness and incarceration. As a result, Wray had to "interpret" the "IQ" test because he did not receive a reliable hard score. (R **1945).** On **cross,** Dr. Wray said it "crossed his mind" Copeland was faking. (R **1949).** Copeland did not cooperate. (R **1949).** Wray still felt Copeland would not score in the "normal" range. (R **1950).**

To show how far off-base Wray's estimation was, Wray did not think Copeland could obtain a driver's license without "a lot of coaching". (R **1951).**

SUMMARY OF ARGUMENT

Mr. Copeland concedes that a cold record and pure speculation cannot provide a basis for relief.

The record at bar shows an incorrect instruction to the jury, but no evidence that the jury failed to consider any evidence presented to it.

On the other hand, the **actual sentencer, on the record,** acknowledged his duty under **Lockett.** Therefore, no matter what "non-binding" recommendation the jury rendered, the actual sentencer followed **Lockett** and thus insulated Copeland from any speculative error.

This "insulation", countered only by bald speculation about what a non-sentencer may have thought, satisfies the reasonable doubt test. Again, "reasonable" doubt is not tantamont to "speculative", "hypothetical" or "beyond a shadow" of a doubt. Given the curative effect of the sentencer's obedience to **Lockett** (not to mention this Court's independent review), the State has met the "reasonable doubt" test for harmless error.

ARGUMENT

THE PETITIONER'S DEATH SENTENCE SHOULD BE AFFIRMED DUE TO THE HARMLESSNESS OF ANY SO-CALLED "HITCHCOCK" ERROR

The Petitioner's answer brief demonstrates a profound misunderstanding of both Florida and constitutional law.

Under Florida law, the judge, not the advisory jury, is the only "sentencer". **Spaziano v. Florida, 468 U.S. 447 (1984).** The jury's role is advisory only, and even though its recommendation is entitled to "great weight" under **Tedder v. State, 322 So.2d 908** (Fla. 1975), its decision does not carry the weight of a statutory aggravating factor if the decision is for "death", as here.

Throughout Mr. Copeland's brief he refers only to the jury and to "constitutional error", rather than to the role played by the actual sentencer. As **Spaziano** makes crystal clear, "jury sentencing" is not required by the Constitution. Thus, in a system where the jury does not pass sentence, any error in argument or instruction to the jury (during the penalty phase) does not rise to the level of "constitutional error".

A careful reading of **Hitchcock** shows that the United States Supreme Court granted relief due to error by the judge, not the jury. The **judge** was required to consider all non-statutory mitigating evidence under **Lockett v. Ohio, 438 U.S. 586 (1978).** The judge's jury instruction "might" have misled the jury, but that possible "error" did not, standing alone, prompt relief. Rather, relief was granted because the judge's instruction served as evidence that **he,** as sentencer, was in violation of **Lockett.**

In demonstrating harmless error, the State can overcome **Hitchcock** by showing that the **sentencer** abided by **Lockett** no matter what the jury did. While Copeland criticizes the State for relying upon evidence received and evaluated by the sentencer, his position ignores the fact that the sentencer had more material to consider than the advisory jury.

Copeland, of course, has a strategic reason for distracting the inquiry into a simple review of what the jury saw or heard. By looking at the actual facts, we can see that the sentencer at bar was **aware** of **Lockett** and **followed Lockett.**

In a curious admission, Copeland states that appellate review should not be based upon pure speculation and a cold transcript. In **Sullivan** v. **State, 303** So.2d **632** (Fla. 1974), this Honorable Court held that a reversal of a valid judgment would not be granted solely on the basis of speculation. Thus, using **Sullivan** and Mr. Copeland's own admission that speculation would be improper, we submit that no relief should be granted when, as here:

(1) The record shows beyond a reasonable doubt that **Lockett** was obeyed **by the sentencer,** and

(2) We can only speculate as to the impact of a misleading jury instruction on a purely advisory jury.

Absent constitutional error by the sentencer, Copeland is not entitled to relief. Therefore, the State has met its burden.

In closing, however, the State offers one suggestion. As Mr. Copeland points out, the State has been given the burden of

proving "harmless error" beyond a reasonable doubt.[2] This standard is a trial court standard, not an appellate court standard. Appellate courts do not accept evidence or take live testimony. According to **Tibbs** v. **State,** 397 So.2d 1120 (Fla. 1981), cold records alone may not provide a basis for judging evidentiary "weight" even if they can satisfy "sufficiency".

The nature of any **Lockett** inquiry, whether based upon **Lockett** or **Hitchcock,** centers upon what evidence the **actual sentencer** considered. Only the sentencer can answer that question, and since the sentencer is a judge, we must assume that he or she would answer truthfully. It seems to the State that if the record itself does not provide "sufficient" evidence, then we who must carry the burden of proof - using a trial court standard - should have the fair opportunity to present either an affidavit (as we tried in **Johnson** v. **State,** but this Court rejected it), or some testimony from the judge.

Circuit Court judges should not be publicly accused and found guilty of violating the Constitutional rights of any litigant without receiving the (judicial, if nothing else) courtesy of a chance to defend themselves prior to reversal.

If this Court should find this record insufficient (but we suggest it is not), a special master should be appointed to determine whether **Lockett** was violated by the sentencer.

If **Lockett** was violated, Copeland can be resentenced and the entire appeals process can begin anew. If **Lockett** was not

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[2] "Reasonable", of course, does **not** mean "speculative", "hypothetica1" or "possib1e" doubt.

violated, we can serve the interests of justice and judicial economy by avoiding a whole new round *of* appeals.

CONCLUSION

The record establishes beyond a reasonable doubt that the sentencer abided by **Lockett** v. **Ohio, so** any **Hitchcock** error in instructing the jury was corrected, if the jury ever was misled. Of course, we can only speculate as to that point and reversal cannot be based upon speculation.

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 Mr. Richard A. Rosen, Esq., PAUL, WEISS, RIFKIND, WHARTON & GARRISON, 1285 Avenue of the Americas, New York, New York 10019; and to Mr. Marc E. Taps, Esq., 822 North Monroe Street, Tallahassee, Florida 32303, this 10th day of November, 1988.

MARK C. MENSER
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