IN THE SUPREME COURT OF FLORIDA

JOHNNY COPELAND,

Petitioner,

v. CASE NO. 69,428

RICHARD L. DUGGER,

Respondent.

JOHNNY COPELAND,

Appellant,

v. CASE NO. 69,482

STATE OF FLORIDA,

Appellee.

BRIEF OF RESPONDENT/APPELLEE

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STATEMENT OF THE CASE AND FACTS

The State shall rely upon the factual determinations reached by this Honorable Court in Copeland **v.** State, **457** So.2d **1012** (Fla. 1984), and Copeland **v.** Wainwright, **505** So.2d **425, 427** (Fla. **1987).** In the latter case, in particular, this Court held:

> Thus, at the time of appellant's trial and sentencing, any confusion in the law had been resolved and the matter clarified. If defense counsel at trial had perceived any injury or prejudice in the instructions given to the jury concerning the consideration of mitigating circumstances, he could have raised the issue by appropriate motion, objection, or request for alternate instructions based on Lockett and Songer . . . Moreover, 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. The reason there was no objection to the court's instruction based on the statutory list only is probably because the defense did not feel the jury was restricted or perceived any prejudice.

The record shows that defense counsel filed a pretrial challenge to the constitutionality of Florida's death penalty, citing Lockett **v.** Ohio, **438** U.S. **586** (1978), but noted that this Court had already applied Lockett to Florida cases. **(R 166-167).** The State did not contest the issue and the trial court denied the motion.

As this Court noted, non-statutory mitigating evidence was offered and considered. Still, ten of the twelve jurors voted for death.

(A) Copeland's Mitigating Evidence

The issue at bar relates to the non-statutory mitigating evidence which Copeland and counsel saw fit to present to the advisory jury and the sentencing judge.

The penalty phase transcripts show that Copeland relied upon only one witness other than himself (although at (R **2196-2197)** the jury was told to consider all guilt phase evidence as well). Copeland's witness, Dr. Wray, examined Copeland nine **(9)** times between February and May of **1979. (R 2141).** Dr. Wray stated that Copeland was sane and competent "beyond a reasonable doubt" at the time of the trial and the crime itself. (R **2147-2148).** Wray felt that Copeland became psychotic after being arrested, but that the psychosis got better over time. (R **2141-2143).** Wray also said that Copeland claimed to be "dominated" by co-defendant Frank Smith (R **2143-2146),** but this domination was not verifiable. (R **2146).** Copeland's own testimony established his sanity and his competence. Copeland correctly gave his name, age and date of birth. (R **2149).** He denied guilt. **(R 2150).** He challenged the accuracy of testimony by Investigator Miller. **(R 2150-2154).**

On cross, Copeland listed all who were present for his statement. (R **2155).** He admitted robbing and kidnapping Sheila Porter. (R **2161).** He admitted being present when she was shot and the use of his gun to shoot her. (R **2161).** He displayed a precise memory and a strong desire to help himself.

The record on file shows that Copeland was aware of his rights and requested counsel at his first appearance. (R **10**). Judge Flack advised him of the charges and he understood them. (R **12**). Copeland was a brickmason (R 11), supported himself (and his girlfriend) with a $260/week salary (R **11**). Copeland paid car, rent and utility payments. (R **11**). In other words, he functioned normally.

Judge Cooksey appointed Doctor Semon and Dr. Cook to examine Copeland. Dr. Semon reported:

> My impression of Johnny Copeland throughout this interview was that he was working very hard to convince me he was psychotic. I don't buy it. He seemed to me to be acting as he thought a psychotic person would act. Also, when I shared with him that I thought he was "acting crazy" his bizarre behavior stopped immediately, he looked directly into my eyes and said "Don't you ever say that again". His tone of voice, his eye contact, the coherence of his sentence all suggested to me he knew I knew he was putting on an act. Additionally, psychotic people as floridly psychotic as he wanted me to believe he was, are generally in an active psychotic process and usually unable to care for for their most basic needs. Deputies reported to me he was intelligently conversing with them while driving to Tallahassee.

(R 401).

Dr. Semon found Copeland competent to stand trial and suspected he was competent during the crime.

Dr. Cook felt Copeland's low verbal IQ score of 69 reflected a lack of cooperation as well as low intelligence. (R **404**). He concluded that Copeland was competent for trial and during the offense. (R **404**). Further testing by Dr. Cook again found Copeland uncooperative and did not change his opinion. (R **427**).

Copeland's penalty phase jury argument stressed his low intelligence, state "twisting" of his story to "get what it wanted", residual doubt about guilt and alleged evidentiary deficiencies. (R 2188-2194).

(B) Sentencing

The trial judge found the following to be aggravating factors:

(1) Copeland had prior convictions for violent felonies.

(2) The crime occurred in connection with kidnapping and rape.

(3) The murder was committed to avoid arrest for robbery, kidnapping and rape.

(4) The murder was committed for pecuniary gain.

(5) The murder was heinous, atrocious and cruel.

Only one mitigating factor, Copeland's age (22), was found. This Court upheld these findings.

The "new" evidence offered pursuant to Copeland's collateral attack was not "excluded" from his penalty phase proceeding and is not relevant to the issue.

SUMMARY OF ARGUMENT

The "Hitchcock" error committed sub judice was harmless for a number of reasons.

First, the trial judge understood his duty under Lockett and performed it.

Second, defense counsel understood Lockett and presented all desired non-statutory mitigating evidence.

Third, five valid aggravating factors are present.

Fourth, the touted mitigating factors of residual doubt and low intelligence are either improper or of dubious validity.

A harmless error analysis looks to the evidence presented and its treatment by the sentencer. A harmless error inquiry is not a license to drag in newly procured evidence which played no part in the trial. From the trial record, there can be no doubt that any error was harmless.

ARGUMENT

ANY "HITCHCOCK" ERROR COMMITTED AT TRIAL WAS HARMLESS

Johnny Copeland was tried and convicted almost a full year after the decision in Lockett v. Ohio, 438 U.S. 586 (1978). The record shows that all parties to this action were fully aware of the requirements of Lockett and that, but for the giving of the so-called "Hitchcock Instruction", Lockett was fully satisfied.

This Honorable Court has correctly held that errors pursuant to Hitchcock v. Dugger, 481 U.S. ____, 95 L.Ed.2d 347 (1987), are subject to the harmless error analysis of Chapman v. California, 386 U.S. 18 (1967), and State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). In fact, "Hitchcock" errors have been deemed harmless in a number of death cases. Demps v. Dugger, 514 So.2d 1092 (1987); DeLap v. Dugger, 513 So.2d 659 (Fla. 1987); Booker v. Dugger, ____ So.2d ____, 13 F.L.W. 33 (Fla. 1988); White v. Dugger, ____ So.2d ____, 13 F.L.W. 59 (Fla. 1988); Ford v. State, ____ So.2d ____, 13 F.L.W. 150 (Fla. 1988); Tafero v. Dugger, ____ So.2d ____, 13 F.L.W. 161 (Fla. 1988).

"Hitchcock" error, of course, involves the giving of an imprecise jury instruction to an advisory jury whose decision, in any event, will not bind the court. Hitchcock itself does not reverse the holding in Lockett that Florida did (does) not restrict consideration of non-statutory mitigating evidence. Similarly, Hitchcock did not explicitly state that the improper jury instruction, in every case, prohibited juries from considering all the evidence to which they had been exposed. All Hitchcock says is that there was "confusion" that "could" have

led to Lockett error. In other words, Hitchcock error is a "red flag" which alerts us to examine the record for Lockett error by the sentencer.

An advisory recommendation of death does not bind the sentencer and, standing alone, will not justify the imposition of a death sentence. While entitled to "great weight", the jury's decision does not rise to the dignity or worth of a statutory aggravating factor. Thus, despite a jury suggestion of death, the sentencer is required to independently assess the statutory aggravating factors and weigh them against any mitigating evidence. If the jury suggests "death" but the aggravating factors are not present, "death" cannot be imposed.

Opponents of capital justice have tried to inflate Tedder v. State, 322 So.2d **908** (Fla. 1975), **to** the extent that a jury suggestion of death would be equal of dignity to a statutory aggravating factor. By doing so, they hope to defeat any claim of harmless Hitchcock error by indulging in the myth that (1) the jury was automatically restricted and (2) the judge was bound by the jury's decision.

As we have seen, neither contention has merit. Even Hitchcock did not assume "automatic Lockett error" by the advisory jury and, as we know, the sentencer was not bound by the decision anyway.

Mr. Copeland has provided us with the "red flag" of Hitchcock error but nothing more. He cannot show that the jury was unaffected by the evidence presented or the arguments it heard. He cannot show which of the two recognized

interpretations of the "Hitchcock" instruction the advisory jury adopted. Finally, even if the jury felt restricted, Copeland is ethically bound to confess that the trial judge and the lawyers had read Lockett, discussed it on the record and fully realized the duty to consider all non-statutory mitigating evidence. (Thus, as in Demps, supra, the sentencer negated any Hitchcock error by personally satisfying Lockett).

Copeland was sentenced to death following one of the most cruel and agonizing murders ever seen in this state. Copeland robbed and then kidnapped Sheila Porter, a girl of only **19**. Copeland and his gang subjected Sheila to the degradation of gang rape. Copeland then took the terrified girl out into the woods, in the dark, where he and/or his friends killed her. This Court has already recognized the vicious nature of this crime and the applicability of the five statutory aggravating factors listed above.

Copeland attempted to overcome these five aggravating factors with evidence of low intelligence and residual doubt about guilt. After a thorough Lockett analysis, the trial judge rejected these factors. After Lockett review by this Court, you agreed.

Residual doubt about guilt is not a recognized mitigating factor, statutory or non-statutory. White v. Dugger, ____ So.2d ____, **13** F.L.W. **59** (Fla. 1988); King v State, **514** So.2d 354 (Fla. 1987). Here, as in White, there can be no doubt regarding Copeland's guilt. Copeland committed the robbery, Copeland kidnapped Sheila personally, Copeland raped her, and Copeland was

present when she was killed, with Copeland's gun. All this case lacks is a confession.

Copeland's alleged low intelligence cannot overcome the aggravating factors at bar. Low intelligence, or even evidence of organic brain damage, does not establish insanity or mental incompetence. **James** v. **State, 489** So.2d **737** (Fla. **1986).** The record at bar calls into question just exactly how unintelligent Copeland was.

Copeland's "IQ" scores fell in the **59-69** range. Copeland, however, was uncooperative and uninterested in performing well according to Drs. Semon, Wray and Cook. Indeed, his "retarded" scores were belied by any number of other factors:

(1) Copeland was a skilled brickmason. This kind of work is not for the "retarded".

(2) Copeland lived on his own, supported himself and his girlfriend, paid his bills, drove a car and lived, by all accounts, a normal existence.

(3) Copeland's first appearance transcript shows an intelligent defendant who understood the charges against him and requested counsel.

(4) Copeland openly attempted to fake "psychosis" and, when challenged, threatened the doctor not to ever mention it again. Copeland's acting was poor and uncorroborated by his other traits such as interest in his case and maintenance of personal hygeine.

(5) Copeland's memory for detail, as emphasized by his own testimony during the penalty phase, belied

retardation. Copeland eloquently and precisely argued his case, analyzed and criticized the testimony used against him.

There is, of course, a recognized presumption that Copeland portrayed his "symptoms" falsely in order to provoke the desired diagnosis. Mims v. United States, 375 F.2d 135 (5th Cir. 1967); United States v. Mota, 598 F.2d 995 (5th Cir. 1979); United States v. Makris, 535 F.2d 899 (5th Cir. 1976).

Copeland, of course, seeks to overcome the penalty phase record with "new evidence" in the form of recent evaluations by notorious anti-death penalty advocates Harry Krop and Dorothy Lewis. This Court's own records show that the ubiquitous Dr. Krop is a common provider of eleventh hour "incompetence" affidavits. Dr. Lewis, we note, recently testified that Theodore Bundy was mentally incompetent and saw her assessment flatly rejected by the federal courts. Bundy v. Dugger, ____ F.2d ____, 2 F.L.W. Fed. C 1013 (11th Cir. 1988).

We need not be overly concerned with the credibility of these defense experts, however, since their theories are irrelevant.

When analyzing the impact of Hitchcock error, the impact must be assessed on the basis of the record, not affidavits procured years after the trial. Those affidavits were not offered to the jury at the penalty phase, so they would not have been considered whether Hitchcock error was committed or not. Thus, it is inappropriate for Copeland to attempt to obfuscate these proceedings with post hoc affidavits by chronic defense

witnesses. In fact, in Booker V. State, 413 So.2d 756 (Fla. 1982), this Court held that collateral relief will not be granted every time a defendant dredges up a new doctor who is willing to disagree with his predecessors.

Copeland cannot win on the record and he knows it. Thus, Copeland seeks to abuse the "Hitchcock" issue by converting it into a device for the presentation of newly obtained "evidence". We note that this is not "newly discovered" evidence, (unavailable during trial) and that no such claim has been raised. We also note that defense counsel was fully aware of Lockett (as was the court) and did not feel "restricted", nor was he prevented, from offering this evidence.

Copeland's claim boils down to this: Copeland wants to retry the penalty phase because he has two defense experts who will testify on his behalf. Period. Drs. Krop and Lewis and their dubious theories are, again, irrelevant to the issue of whether all evidence that was presented at trial was considered by the sentencer and are irrelevant to any Chapman analysis as well.

CONCLUSION

There can be no reasonable doubt that Copeland was properly sentenced to death notwithstanding the **Hitchcock** instruction and that a different instruction would not have altered the result. The five aggravating factors applied herein are sound and intact. The "mitigating evidence" is dubious and weak, if even properly before us. The "new evidence" is irrelevant. Copeland's sentence should be affirmed.

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 7th day of October, **1988**.

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