IN THE SUPREME COURT OF FLORIDA

JOHN O'CALLAGHAN, Petitioner, v. RICHARD L. DUGGER, Secretary, Florida Dept. of Corrections, Respondent.	)	CASE NO. 71,949

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW Respondent, RICHARD L. DUGGER, by and through undersigned counsel, and pursuant to this Court's February 26, 1988 Order herein, and files this Response, to show cause why the pending petition for a writ of habeas corpus should not be granted.

I.

PRELIMINARY STATEMENT

This Response is being filed in opposition to Petitioner's petition for a writ of habeas corpus, filed on or about February 12, 1988, seeking relief based on a Hitchcock[1] claim. This Court issued an order to Respondent, to show cause why the pending petition should not be granted, on February 26, 1988, and directed that such Response be filed on or before April 3, 1988 (with one extension granted to Respondent), with a reply from Petitioner, one week later. In addition to the filing of this Response, Respondent respectfully seeks oral argument in this cause, by separate motion.

The syllables "e.a." will mean emphasis added; "RA" will refer to Respondent's Appendix, attached and incorporated herein. "R" will refer to the Record, already before this Court, on Petitioner's direct appeal. O'Callaghan v. State, Case No. 60,704; and "RR" will refer to the Record, pending before this Court, on Petitioner's

[1] Hitchcock v. Dugger, ___U.S.___, 107 S.Ct 1821, 95 L.Ed.2d 347 (1987).

appeal of the denial of Rule 3.850 relief by the Circuit Court, Broward County. O'Callaghan v. State, Case No. 70,112.

II.

PROCEDURAL HISTORY

Petitioner is presently in Respondent's custody, under a valid judgment of conviction, and sentence entered by the Circuit Court, Broward County, Florida. Petitioner was convicted of the first-degree murder of Gerald Vick, committed on August 20, 1980, on April 8, 1981. (R, 1135, 1201, 1290). Petitioner was sentenced to death by Judge Thomas Coker, Broward County, Florida, on May 12, 1981 (R, 1187-1190, 1306-1308), following an advisory recommendation of a death sentence, on April 9, 1981. (R, 1170, 1298). In his factual findings, concerning his imposition of the death penalty, Judge Coker found the presence of four aggravating circumstances (defendant had committed prior violent felonies[2]; the murder of the victim occurred during the course of a felony[3]; the murder was committed in a heinous, atrocious and cruel manner; and the murder was committed in a cold, calculated and premeditated way, without any moral or legal justification), and no mitigating circumstances. (R, 1187-1188, 1306-1307).

Petitioner appealed his conviction and sentence to this court, raising the following four (4) issues (as restated):

> (1) The trial court abused its discretion, in denying a trial severance motion, by Petitioner;
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> (2) The State's indictment, and statement of particulars, did not adequately apprise Petition of the details and/or nature of the crime charged, and did not provide adequate basis for the giving of a felony-murder instruction to the jury;
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> (3) That prosecutorial comments, made during trial, deprived Petitioner of a fair trial, and that their admission was an abuse of discretion by the trial court; and,
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> (4) That the trial court erred in concluding that "felony-murder," and "heinous, atrocious and cruel" ("hac"), applied as appropriate aggravating circumstances, to the facts of Petitioner's case, so as to support a death sentence.

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[2] These felony convictions were specifically identified by the State, at sentencing, as robbery with violence; carnal knowledge of a female; and carnal knowledge of a female child. (R, 1151).

[3] Kidnapping, as urged by the State. (R, 1152).

Upon addressing each of these issues, this Court affirmed Petitioner's conviction and sentence. O'Callaghan v. State, 429 So. 2d 691 (Fla. 1983). In specific review of Petitioner's death sentence, this Court rejected Petitioner's challenge to the aforementioned two aggravating circumstances, and independently noted and approved the trial court's reliance on prior violent felonies, and "cold calculated and premeditated" ("ccp") manner of committing the murder. O'Callaghan, 429 So.2d, at 696-697. This Court specifically observed that the victim was taken from a public area in a bar, to the kitchen, where he was brutally beaten, transported while unconscious to a remote area and shot to death, in a manner that made the murder "unquestionably an execution killing." Id. This Court observed the absence of mitigating circumstances, and that the aggravating factors present, justified imposition of the death penalty, following a jury recommendation of death. O'Callaghan, 429 So.2d, at 697. Furthermore, this Court specifically concluded that the jury had received a complete opportunity to evaluate the roles and culpability of everyone involved in the circumstances of Vick's murder:

> The jury in this case heard the testimony of all those involved in Vick's death and knew that [Vicki] Lapointe was not charged and that [Anthony] Cox had received immunity. The jury had a full opportunity to evaluate the evidence presented and allocate each participant's responsibility for this crime. In our opinion, under the evidence presented, the jury could reasonably determine that the co-defendant Tucker, was guilty only of second-degree murder, while the Appellant, O'Callaghan, was guilty of first-degree murder and deserved the death penalty.

O'Callaghan, 429 So.2d, at 697. (e.a.). Petitioner did not seek certiorari review of this decision with the U.S. Supreme Court.

Petitioner's first death warrant was signed in April 1984, by then-Governor Graham, with Petitioner's execution set for May 31, 1984. On May 23, 1984, Petitioner filed a post-conviction motion, in the Circuit Court, Broward County, Florida, pursuant to Rule 3.850, Fla.R.Crim.P. Petitioner sought to vacate his conviction and sentence, based on the following grounds (as restated):

(1) The State's alleged destruction and/or suppression of evidence, specifically, a T-shirt worn by the victim when he was murdered, denied Petitioner due process, in violation of Brady v. Maryland, 373 U.S. 83 (1963);

(2) Alleged improper prosecutorial comments, during closing argument;

(3) The denial by the trial court, of a jury request, during deliberations, of a copy of the autopsy report, and a re-reading of the testimony of expert witnesses;

(4) The instructions to the jury, during sentencing, telling them their recommendation was "advisory," violated Petitioner's rights under state decisional law of Tedder v. State, 322 So.2d 908 (Fla. 1975), and Richardson v. State, 437 So.2d 1091 (Fla. 1983);

(5) Petitioner was allegedly denied adequate notice of the charges against him, in that the indictment did not specifically charge him with kidnapping or felony-murder;

(6) The evidence of Petitioner's guilt of first-degree murder was insufficient;

(7) The absence of sufficient evidence to support application of the aggravating circumstance of "heinous, atrocious and cruel";

(8) The denial of Petitioner's motion for individual and sequestered voir dire;

(9) Ineffective assistance of counsel, at defendant's trial and sentencing;

(10) Arbitrary application of the death penalty, based on "race of the victim"; and

(11) The unreliability of Petitioner's conviction and sentence, based on an "eleventh hour" affidavit by Tucker, Petitioner's co-defendant, that Tucker shot the victim.

After a hearing, the Circuit Court, Broward County, denied Petitioner's post-conviction motion, and application for stay of execution, on May 24, 1984. After initially granting a stay of execution, on or about May 25, 1984, this Court affirmed the denial of Rule 3.850 relief, except for limited aspects of Petitioner's ineffective assistance claim, on which this Court required an evidentiary hearing, and remanded for such a purpose.[4] O'Callaghan v. State,

[4] An evidentiary hearing was held by the Broward Circuit Court on January 9-10, 1985. (RR, 1-501). The Circuit Court denied relief on January 20, 1987. (RR, 745-749). Petitioner then requested that this Court grant him leave to present other evidence, in support of his post-conviction claim, based on defense counsel's bar disciplinary

461 So.2d 1354, 1355-1356 (Fla. 1984).

At the same time that he appealed the trial court's 1984 denial of post-conviction relief, Petitioner filed his first habeas corpus action, alleging ineffective assistance of appellate counsel. O'Callaghan v. Wainwright, Case No. 65,355. It its same opinion upholding the denial of post-conviction relief, except for the aforementioned limited remand, this Court concluded that Petitioner's original habeas petition was without any merit. O'Callaghan v. Wainwright, 461 So.2d, supra, at 1356. No certiorari review of this decision was sought with the U.S. Supreme Court.

At the same time as his original Rule 3.850 appeal and first habeas petition, Petitioner sought a writ of error coram nobis, based on the alleged "new evidence" of Tucker's alleged recantation, and admission of the shooting. This Court denied such relief, on December 13, 1984, when it denied the aforementioned other relief to Petitioner. O'Callaghan, 461 So.2d, supra, at 1356.

No Federal habeas corpus relief, has thus far been sought by Petitioner.

III.

FACTS

Respondent relies on the facts contained in this Court's prior opinion in this case, on direct appeal, O'Callaghan v. State, 429 So.2d 691, 691-694, 697 (Fla. 1983), and further states the following pertinent facts, to Petitioner's Hitchcock claim:

During voir dire, the State prosecutor told a particular potential juror (and other prospective jurors present), that the jury would hear evidence and arguments, as to what the proper penalty should be, at sentencing. (R, 118). This statement did not in any way refer to a limit or restriction, on the character of such evidence. Furthermore, defense counsel, William Seidel, in questioning prospective juror

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proceedings, which was granted on September 15, 1987. Thereafter, the Circuit Court again denied relief, on November 20, 1987, from which Petitioner now appeals. Said appeal of the trial court's denial of post-conviction relief, is now pending before this Court. O'Callaghan v. State, Case No. 70,112.

Powers, about his belief in the death penalty, asked him whether there should be a death penalty imposed, "no matter what mitigating or aggravating or other circumstances there are." (R, 173-174)(e.a.). Seidel further inquired of Powers, whether even in the event that a premeditated murder occurred, there might be "other circumstances that would require life imprisonment" (R, 174)(e.a.). These questions, did not restrict consideration of mitigation, to statutory circumstances only.

At sentencing, the State presented documentary evidence of three prior violent felonies committed by Petitioner, as relevant to the "prior violent felony" aggravating circumstance, §921.141(5)(b), Fla. Stat. (R, 1140, 1141, 1144). Defense counsel stipulated to the existence of these prior violent felonies (R, 1141), which included robbery with violence, carnal knowledge of a female; and carnal knowledge of a female child. (R, 1151). The State further concluded its closing argument, by deferring to the jurors' "experiences in life," in recommending sentence. (R, 1156).

Defense counsel presented testimony that was elicited from Leslie Knuck, a barmaid at the Finish Line Bar where the events of the murder occurred, at the parole revocation hearing of Beau Tucker, O'Callaghan's co-defendant. (R, 1141). The Court clearly allowed this testimony, to be read to the jury, by defense counsel. (R, 1141, 1142, 1145-1149, 1244, 1301). In said testimony, Knuck stated that she had observed Tucker enter the bar, and aim a gun, "very close", at the head of the eventual victim, Gerald Vick. (R, 1145-1149). In his argument, defense counsel maintained that the evidence of kidnapping and "torture" of the victim, demonstrated Tucker's involvement in the crimes, and that there was no evidence that O'Callaghan had ever touched Vick. (R, 1157-1159). Seidel also maintained that O'Callaghan was "emotionally disturbed," by what happened to be the victim, in the bar's kitchen. (R, 1160, 1161). Counsel clearly informed the jury that it could consider the Leslie Knuck testimony, presented at Tucker's parole revocation hearing. (R, 1157).

The Court initially instructed the jury, at sentencing,

that the State and defense would present evidence, as to the appropriate sentence, and that such evidence could be considered, along with the evidence heard at trial, in recommending a sentence. (R, 1143, 1163, 1293). The Court further did not in any way limit defense counsel's presentation of the Knuck testimony, (R, 1141, 1142, 1145-1149, 1244, 1301), and sent the written record of her testimony at the Tucker parole revocation hearing, back to the jury, when it deliberated its sentencing recommendation. (R, 1168, 1169). Furthermore, at the May 12, 1981 sentencing hearing, the Court noted Seidel's closing argument, at sentencing before the jury (R, 1185, 1306). The trial judge further explicitly stated he had considered a presentence investigation on O'Callaghan, and Seidel's recommendation of sentence, as maintained by Seidel in a written post-trial memorandum. (R, 1185-1186). Said "Defense Recommendation as to a sentence," (R, 1303-1304), included arguments, inter alia, of Tucker's motives against the victim, based on Vick's shooting of a gun into Tucker's house; Tucker's role as a bodyguard for James Long, who believed Vick had cheated Long in a card game; Tucker's use of a gun to strike Vick, and his participation in beating Vick; Cox's testimony that, after the beating, there was no sign of life from Vick, and that such testimony was credible, in view of Cox's immunity from prosecution; and the length of deliberations by the jury, at the guilt phase. (R, 1303, 1304). The State relied, in part, on the recommendations of the PSI on sentence, at the May 12, 1981 sentencing proceedings before Judge Coker. (R, 1186).

Judge Coker's written sentencing order did not indicate any limitation or restriction of mitigation, and did not specifically discuss any non-statutory mitigating factors. (R, 1306-1309). The written order also referred to Seidel's argument for life, and the State's deferrence to the jury, on penalty. (R, 1306).

All other relevant facts will be referred to in Section IV of this Response ("Reasons for Denying Writ"), infra.

IV.

REASONS FOR DENYING WRIT

Petitioner has maintained that he was denied his rights to a fair and reliable sentencing determination, in violation of his Eighth and Fourteenth rights, and of the decision in Hitchcock v. Dugger, ___U.S.___, 107 S.Ct 1821, 95 L.Ed.2d 347 (1987), by jury instructions at sentencing, and trial and prosecutorial comments at voir dire, allegedly restricting consideration of mitigating factors, solely to statutory ones. Based on the actual nature of the Record of Petitioner's sentencing proceedings, before jury and judge, and this Court's harmless error analysis in evaluating Hitchcock claims, this Court should deny Petitioner's requested habeas relief.[5]

Petitioner's entire argument is based on the premise that the presence of an instruction in a capital sentencing Record, similar or identical to the one in Hitchcock, necessitates a new sentencing proceeding. As this and other courts have noted, the mere presence of such an instruction, does not per se invalidate a capital defendant's sentencing proceeding. White v. Dugger, 13 F.L.W. 59 (Fla., January

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[5] While Respondent is clearly mindful of this Court's recent rejection of the application of procedural default to Hitchcock claims, not raised at trial, or on direct appeal, Respondent nevertheless feels compelled to maintain this position, in light of Hargrave v. Dugger, 832 F.2d 1528 (11th Cir. 1987)(en banc). Since Respondent's claim was not presented at trial or on appeal, his claim would appear to be barred, under Hargrave, supra, since not raised therein, or in his 1984 first habeas action.

In Hargrave, supra, the entire Eleventh Circuit concluded that the decision in Lockett v. Ohio, 438 U.S. 586 (1978), was so "novel," that its benefits should be applied to capital defendants who had pre-Lockett capital sentencing proceedings. Hargrave, 832 F.2d, at 1531-1533. This conclusion was based on the absence of any governing state or Federal precedent, at the time of Hargrave's 1975 state direct appeal that could have reasonably led counsel to raise, as a claim, "the articulation of a constitutional principle [in Lockett] that had not been previously recognized by the [US] Supreme Court." Hargrave, 832 F.2d, at 1531. However, the Hargrave court recognized Hitchcock, supra, as involving "a Lockett claim similar to Hargrave's," which has breathed new vitality into claims based on the exclusion of non-statutory mitigating factors." Hargrave, 832 F.2d, at 1533. It appears that these statements amount to an express conclusion by the Eleventh Circuit that Hitchcock did not create a novel claim, not previously articulated in any form by state or Federal courts, that would be cognizable under Witt v. State, 387 So.2d 922, 924, 929 (Fla. 1980), cert. denied, 449 U.S. 1067 (1980); see also, Reed v. Ross, 468 U.S. 1, 16, 17 (1984). The Hargrave decision logically dictates that the "tools" for a Hitchcock claim, in light of the advent of Hitchcock, and Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956 (1979), were available to O'Callaghan, at the time of his 1981 trial, and 1982-1983 appeal. Smith v. Murray, 106 S.Ct 2661, 2667 (1986). Under these circumstances, Petitioner cannot establish "cause," to avoid procedural bar, and the lack of merit to his position affords him no relief, under the "prejudice" component of procedural default analysis.

28, 1988); Delap v. Dugger, 513 So.2d 659, 662; 662, n. 5 (Fla. 1987); Hargrave, supra. A "totality of circumstances" approach, and comparison of the entire sentencing record with that of Hitchcock, is determinative of whether the judge or jury was limited in its consideration of mitigation. Id.

The Record shows that the jury and trial court were not limited, in their consideration of mitigation, to purely statutory factors. The court initially instructed the jury, at sentencing, that it could consider evidence, heard at both trial and sentencing, in considering O'Callaghan's appropriate penalty. (R, 1143). There was trial evidence presented, based on the theory that Tucker shot Gerald Vick, and/or that the victim was already dead when shot. Additionally, the court freely permitted defense counsel's presentation and argument, without limitation and with the State's stipulation, of non-statutory mitigating evidence at sentencing, detailing Tucker's pointing of a gun at the victim's head, at the scene of the bar, on the day of the murder. (R, 1141, 1142, 1145-1149, 1157-1159, 1244, 1301). Moreover, the court referred to having considered further non-statutory mitigation, at sentencing, (R, 1185-1186), in the form of a post-sentencing memorandum by defense counsel, recommending a life sentence, based on, inter alia, Tucker's motive and culpability, as the actual killer of Vick; Vick's possible death, as a result of Tucker's pre-shooting beating of Vick in the bar kitchen; and the length of the jury's deliberations. (R, 1303-1304). The Court additionally referred to, and, along with the State, relied on, consideration of a pre-sentence investigation report (R, 1185, 1186), which contained considerable references to non-statutory mitigating information.[6] In light of these circumstances, the comments and/or instructions by Judge Coker, and the state prosecutor, and/or the court's "neutral" sentencing order,

[6] This PSI report included, inter alia, Petitioner's family status, his report of past alcohol problems, his status as a father of two children, and conclusions as to the existence of any mental or emotional problems; and defense counsel's recommendation as to sentence. (RA, Exhibit C, 4-7).

do not indicate that jury or judge was actually limited, in consideration of sentence, by exclusion of non-statutory mitigating factors. Booker v. Dugger, 13 F.L.W. 33 (Fla., January 14, 1988)(trial court considered post-trial memo, referring to Lockett decision, and stated such consideration at sentencing); Demps v. Dugger, 514 So.2d 1092, 1093 (Fla. 1983)(court permitted introduction of non-statutory mitigating evidence); Delap, 513 So.2d, supra, at 662 (court's order referred to consideration and inclusion of non-statutory mitigating factors, in sentencing determination); Johnson v. Dugger, 13 F.L.W. 167 (Fla., February 24, 1988)(no indication in Record, that court failed to consider non-statutory mitigation, and "neutral" sentencing order). This Record must be viewed in sharp factual contrast, to Hitchcock and other Florida decisions, where trial courts expressly, by sentencing order or otherwise, affirmatively limited consideration of non-statutory mitigation. Hitchcock, supra (trial court sentencing findings referred to consideration of mitigation, as statutorily enumerated); Foster v. Dugger, 12 F.L.W. 598 (Fla., December 3, 1987)(same); Thompson v. Dugger, 515 So.2d 173 (Fla. 1987)(trial court sustained State objections, to defendant's argument of non-statutory mitigation to jury); Riley v. Wainwright, 517 So.2d 656 (Fla. 1987)(limit in sentencing order); Hargrave, 832 F.2d, at 1534-1535 (comments by State and judge rejecting PSI, as containing "irrelevant" information, beyond statutory mitigating considerations). This Record contains circumstances well beyond "mere presentation," and shows no Hitchcock error, in totality.

Assuming arguendo that this Court finds the Record circumstances to be Hitchcock error, such error was clearly harmless. Petitioner's present reliance, on certain non-statutory mitigating factors, would clearly have had no impact on O'Callaghan's sentencing outcome, before judge or jury, based on the totality of circumstances to be considered by this Court.

It cannot be overemphasized or overstated that the trial court in imposing the death penalty on O'Callaghan, found the existence of considerable, substantial and strong aggravating factors, which have

been previously approved by this Court. (R, 1187-1188, 1306-1307); Maxwell v. State, 429 So.2d 691, 696, 697 (Fla. 1983). Specifically, the trial court found (and this Court approved, Id.), that Petitioner had committed a prior violent felony, supported by the State's introduction of certified copies, at sentencing, of prior convictions, of robbery with a firearm; carnal knowledge of a female; and carnal knowledge of a female child (R, 1151); that the murder by O'Callaghan, of Gerald Vick, was committed during the course of a felony (kidnapping, according to the State (R, 1152)); that the murder was heinous, atrocious and cruel; and that the murder was committed in cold, calculated and premeditated manner, without any moral or legal justification. (R, 1187-1188, 1306-1307). In approving all of these aggravating circumstances, this Court specifically observed the evidence in support, reflecting the taking of the victim, from a public area in the Finish Line Bar, to the bar's kitchen, where Vick was brutally beaten, transported while unconscious to a remote area, and shot to death, in a way that this Court further characterized as "unquestionably an execution killing." O'Callaghan v. State, 429 So.2d, at 696-697. The evidence clearly supported these findings, and demonstrated further attendant circumstances, including, inter alia, O'Callaghan's forcing of the Finish Line Bar owner, Allan Wheatley, to show him where the victim lived, because Petitioner was "going to get" Vick (R, 535-536; 555, 562); O'Callaghan's possession of a gun, when Wheatley finally showed him Vick's residence, and Petitioner's drawing and checking of the weapon, while searching for Vick at the house (R, 537-538); O'Callaghan's pointing of a gun at Vick, underneath a table in the bar, before Vick was taken back into the kitchen (R, 612, 734-735); O'Callaghan's presence in the kitchen, armed with a gun, while Vick was beaten (R, 632-633, 636, 734-735, 781); Petitioner's retrieval of a gun from Wheatley, through Cox, at Petitioner's direction and insistence, before transport of Vick from the bar, to the desolate area where Vick was killed (R, 731-732); Petitioner's demand for, and receipt of keys to the van, in which he helped place Vick's body, to be transported to the murder scene, and admoni-

tions to others not to interfere, and to keep quiet (R, 543, 577, 593, 613); O'Callaghan's instructions, to have the large amount of blood in the kitchen, cleaned up, and his subsequent disposal of "clean up" items in a dumpster (R, 615-619, 633); Petitioner's placing of the body in the van, and driving of the van, to a deserted area, while armed with a gun, and giving orders (R, 737-739, 765, 782, 783, 796, 811-814); O'Callaghan's shooting of Vick, in the back of the head and chest, causing his death (R, 698, 699, 724, 737-739, 766-767, 782-785, 811-814); and Petitioner's subsequent disposal of Vick, the murder weapon, and Vick's car. (R, 410-423, 427-428, 547, 676-683, 695, 740, 741, 760, 786, 788). It is the strength of this evidence, and attendant circumstances, surrounding these valid aggravating circumstances, against which Petitioner's mitigation must be measured, for harmless error purposes. Booker, supra; Tafero, supra; Demps, supra; Delap, supra.

Petitioner has initially suggested that the relative culpability of O'Callaghan and Tucker, along with the disparate and/or lenient treatment of O'Callaghan, from Tucker and other participants in the beating and murder of Gerald Vick, would have possibly altered the sentencing outcome, if properly considered by jury and judge. In making this argument, Petitioner concedes that there was evidence presented, at sentencing, of the difference in roles played by O'Callaghan and Tucker. Petition, at 17-19. In fact, this was the major thrust of defense counsel's sentencing presentation of evidence, argument, and post-sentencing memorandum. (R, 1145-1149; 1157-1160; 1303, 1304). Furthermore, this Court expressly found that the jury had been given full and complete opportunity, to evaluate the degree of participation by O'Callaghan, Tucker, Cox and Lapointe:

> The jury in this case heard the testimony of all those involved in Vick's death and knew that [Vicki] Lapointe was not charged and that [Anthony] Cox received immunity. The jury had a full opportunity to evaluate the evidence presented and allocate each participant's responsibility for this crime. In our opinion, under the evidence presented, the jury could reasonably determine that the co-defendant Tucker was guilty only of second-degree murder, while the [Pe-

titioner], O'Callaghan was guilty of first-degree murder, and deserved the death penalty.

O'Callaghan, 429 So.2d, at 697 (e.a.). The evidence presented, clearly and definitely demonstrated O'Callaghan to be the principal actor and actual killer of Vick, and to have controlled, directed and/or ordered the events leading to Vick's murder, and the concealment of the crime. Any reliance on the relative roles of those involved, would have only served to emphasize O'Callaghan's active and primary culpability for the crime, with its brutal attendant circumstances. Furthermore, it is ludicrous to suggest that the same jury and judge, who must be considered to have at least rejected the "disparate treatment" / "relative culpability" comparisons, between Petitioner and others, on a statutory mitigating level, would have nevertheless concluded that such evidence rose to the level of non-statutory mitigation. Booker, 13 F.L.W., supra, at 34. In light of the justified basis, on the Record, for the disparate treatment of O'Callaghan, from the others involved, it is completely unreasonable to suggest that such a factor would have favorably benefitted Petitioner, on a non-statutory mitigating level. White v. Dugger, 13 F.L.W. 59 (Fla., January 28, 1988); Tafero v. Dugger, 13 F.L.W. 161 (Fla., February 26, 1988); Demps v. Dugger, 514 So.2d 1092, 1093-1094 (Fla. 1987).

Petitioner has further argued, in reliance on his parents' deposition testimony and affidavit (Petition, Exhibit C, D), that evidence of family history, including vision problems and learning disabilities, if considered, could have altered the outcome of his sentencing proceedings.[7] There is absolutely no evidence of any learning disabilities in Petitioner, in either of his parents' statements. Furthermore, there was no evidence that any eyesight problems hampered

[7] It must initially be observed, that Judge Coker, in his Order denying post-conviction relief (RR, 745-749), on January 20, 1987, O'Callaghan v. State, Case No. 70,112, Fla.Sup.Court, concluded that Petitioner clearly informed defense counsel, that he did not want either of his parents involved in the proceedings, in any way. (RR, 747). Thus, evidence of family history would not realistically have come from Petitioner's parents. This is further confirmed by Petitioner's similar desire not to provide the names of, or involve family or friends on his behalf, in the PSI investigation. (RA, Exhibit C, at 5, 7).

O'Callaghan in committing the murder of Vick, compelled him to commit it, or in any way prevented him from directing and controlling all of the events of the murder, in its planning, execution and/or concealment. Petitioner's father's characterization of O'Callaghan as the "perfect kid" and "well-balanced," (Petition, Exhibit C, 11-13), brought up in an environment free of physical abuse, and embodied with the values of respect for human life, (Exhibit C, at 12, 13; Exhibit D, at 5), would have re-emphasized the negative aspects of Petitioner's involvement in the crime, and his commission of prior violent felonies. His parents' reference to frequent arrests as a teenager, (Exhibit C, at 15); his imprisonment for armed robbery, (Exhibit C, at 16); and his placement in a boys' reform school, (Exhibit D, at 4), could not seriously have improved prospects for a life recommendation or sentence, if presented and considered. This evidence would have re-emphasized other evidence of Petitioner's criminal history, (RA, Exhibit B, at 9-11; Exhibit C, at 3-4), and would almost certainly have even more deleteriously affected Petitioner's advisory and actual sentence, including a wholly contradictory characterization or strategy of mitigation (admission of the act, with "unfortunate" family history and background, as justification or excuse), from that at trial (denial of involvement).

Petitioner has additionally relied on evidence of alleged drug dependency, "mental disorders,"[8] and/or other non-statutory mitigation that would have allegedly resulted in a life advisory or actual sentence, if properly considered by the jury. As is evident from the Record of Petitioner's Rule 3.850 proceedings, such evidence would have not only failed to aid O'Callaghan's chances for obtaining a life sentence, but would have strengthened the jury and Court's resolve, to impose the death penalty.

The testimony of Dr. Krop, Dr. Zager and Dr. Perlswig essentially portrayed Petitioner as a substance abuser, and a sociopath. (RR, 266, 296-297, 334, 342-343, 356, 364-365, 387). First

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[8] Again, it must be noted that defense counsel's decision not to present such evidence, was motivated by the fact that both defense counsel "saw no evidence" of any mental condition or disorder, in Petitioner. (RR, 748).

of all, it is absolutely ridiculous to suggest that such non-statutory "mitigation" would have favorably swayed the jury. This is especially true, in light of O'Callaghan's testimony, and evidence at sentencing, and statement in the PSI report, which did not in any way indicate that any drug or alcohol consumption, on the day of the crime, resulted in, influenced or directed O'Callaghan's conception, execution and direction of the Vick murder. Demps, 514 So.2d, at 1093; (RA, Exhibit C, at 5, 6). The compelling fact that none of the doctors sought to verify such drug use, or even compare O'Callaghan's statement about drug use, with his trial testimony,(R,950-981), even though each considered Petitioner's truthfulness to be important to his diagnosis, would have further diminished any drug use evidence. (RR,281, 289-291, 293, 346-348, 352, 353, 381-383). Petitioner's credibility would have been subjected to even further doubt by each doctor's testimony that Petitioner had reported physical abuse by his father (RR,267, 274, 284, 286, 349, 350, 383-386), when in fact, Petitioner's father completely contradicted his son's story of abuse. (Petition, Exhibit C, at 11-13). Thus, as the Circuit Court noted, the doctors' diagnoses of various psychological or mental disorders, were substantially undermined by the inaccuracies and contradictory statements Petitioner reported, and which were uncorroborated. (RR, 748). Furthermore, such testimony would reasonably have resulted in the admission of testimony by the State, from the 1981 admission summary, done by the Department of Corrections at the outset of Petitioner's incarceration for the Vick murder.[9] Said summary contains further damaging rebuttal to Petitioner's representations of drug problems, abuse at home, and an "unstable" childhood,[10] as does the

[9] Said admission summary was submitted by the State, at O'Callaghan's Rule 3.850 hearing, as State's Exhibit 1, and is attached herein, (RA, Exhibit B).

[10] In a June, 1981 psychological screening report, a psychologist, Dave Hutto, reported that O'Callaghan "exhibited no symptoms of psychosis or mental problems," "denied any drug addiction." (RA, Exhibit B, at 6). A classification summary, dated July 29, 1981, further revealed Petitioner's statements, at a point in time in very close proximity to the murder and trial, that his father was "a stable figure in the home," and that Petitioner and his father had a "satisfactory relationship." (RA, Exhibit B, at 9). The PSI report further noted that Petitioner was not delusional, could tell right from wrong, and did not exhibit or report any serious illnesses, accident, or mental or emotional problems. (RA, Exhibit C, at 6).

PSI, done in May, 1981.

Perhaps more significantly, the testimony of the doctors, and the 1981 admission summary, (RA, Exhibit B), would have revealed extremely harmful information to the judge and jury. Said jury would have been asked to consider, in the name of non-statutory mitigation, inter alia, (1) his parents' revelations about his reform school incarceration, and his arrests as a juvenile, (Exhibit C, at 15-17; Exhibit D, at 4); (2) his father's surprise at Petitioner's expressed desire not to involve his parents, at his trial or sentencing, and surprise at the knowledge that Petitioner had an alias (Exhibit C, at 11, 16, 17); (3) his doctor's conclusions that Petitioner was of average intelligence and had no brain damage (RR, 275, 343), (4) Dr. Perlswig's admission that Petitioner's assertions to him, of drug and alcohol use on the day of the crime, differed from his trial and PSI version, and further acknowledgement by Petitioner, to Perswig, that Petitioner had told different stories on this subject (RR, 382, 383); (5) reports by Perlswig of Petitioner's expulsion from parochial and public school, because of behavior problems (RR, 372; RA, Exhibit C, at 5); (6) Petitioner's version of the crime, as told to the doctors, which was contradicted by all other witnesses at trial (RR, 338-339, 369, 370, 376), and (7) Petitioner's extensive criminal record, as specified in the 1981 admission summary and PSI, including juvenile and other crimes, beyond those relied on at sentencing as prior violent felonies (RA, Exhibit B, at 9-11; Exhibit C, at 3-4).[11] There can be little question that consideration by the jury, of the totality of the evidence Petitioner has selectively ignored, would not have been affected at all, to Petitioner's benefit. Demps, 514 So.2d, at 1093 (PSI rebutted much of defendant's claimed non-statutory mitigation); Ford v. Dugger, 13 F.L.W. 150,

[11] There are references to Petitioner's admission of a 1967 B & E conviction and incarceration; a 1969 escape from prison, while serving time for the armed robbery conviction; a 1980 arrest for carrying a concealed weapon, subsequent to the murder; and juvenile incarceration at a reform school, twice, once for misuse and theft of a taxi; and other convictions for accessory to breaking and entering, 1968; possession of controlled substances, in 1970 and 1973, and DUI in 1976. (RA, Exhibit B, at 9-11; RA, Exhibit C, at 3-4).

151 (Fla., February 18, 1988)(lack of persuasiveness of non-statutory mitigation); Booker, supra (same); Tafero, supra (same); Delap, supra (same).

Petitioner's reliance on other non-statutory mitigation, such as the existence of physical abuse, alcohol abuse by his family, the lack of stability of his childhood, his eye problems, and/or a passive nature, is simply rebutted by the facts, and contradicted by other non-statutory information he relies on. As already discussed, Petitioner's parents completely contradicted the existence of any physical abuse, or any instability in his upbringing; in fact, Petitioner stayed with his parents, until he left home for his prison term, for armed robbery. (Exhibit C, at 16). Similarly, there was no indication that Petitioner was raised amongst alcoholics, other than Petitioner's suspect self-serving statements. Finally, the strict nature of his parochial school upbringing, would only have served to emphasize that he was expelled from such school, because of behavioral problems, and would not have influenced the jury or judge, to sentence him to life.

Petitioner has finally urged that his potential for rehabilitation, should have been considered by his sentencing jury and judge. This is unquestionably such weak mitigation, as to be completely non-existent. Such a proffer, would have definitely heightened the nature and existence of Petitioner's three prior violent felonies, relied on as an aggravating factor, and would have further emphasized the arrests and other convictions, including significantly, one for escape from prison, contained in O'Callaghan's prison admission summary. (RA, Exhibit B, at 9-11; RA, Exhibit C, at 3-4). Petitioner's continued, escalating participation in criminal activity, leading up to the Vick murder, would have destroyed any valid reliance on rehabilitative potential; any positive adjustment to prison life, would have been greatly offset, by Petitioner's escape from prison, while there for armed robbery, another violent crime against a person.

There is no doubt that, assuming arguendo Petitioner's

suggested mitigation would have been found to validly exist by jury or sentencing judge, such circumstances are incredibly weak, when reassured against the overwhelming evidence of aggravation, to support Petitioner's death sentence. Ford; Tafero; White; Booker; Demps; Delap. Petitioner's suggestion, that such mitigation would have caused the jury and judge to "almost certainly" impose life, is conclusory, self-serving, and finds no support in the Record. The Record of Petitioner's post-conviction proceedings, although analyzed from a Sixth Amendment context, provides substantial proof of the relatively weak and self-contradictory nature of Petitioner's mitigation, and its total lack of impact, on balance, against the four valid aggravating factors present. When combined with Petitioner's own expressed preference for the death penalty, over life in prison (RA, Exhibit C, at 4-5),[12] there is also no question that the jury could not have reasonably recommended life, based on such non-statutory mitigation, and that an override death sentence would have been appropriate. Ford; Demps; Booker. On this Record, there is no Hitchcock error, requiring a reversal of Petitioner's death sentence.

V.

CONCLUSION

Based on the foregoing arguments, authorities and circumstances, Respondent respectfully requests that this Court DENY the petition for habeas corpus relief, and any other relief requested.

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[12] Petitioner stated, in the PSI report, which was considered by the court, in sentencing:

> "I would just as soon get the death penalty because sweeping floors in some prison is not my idea of how to spend my life. [Judge] Coker would be doing me a favor if I lose my appeal and gives me the death penalty ... If I lost my appeal, they can go ahead and pull the switch."

(RA, Exhibit C, at 4-5).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response in opposition to Petition for Writ of Habeas Corpus has been mailed to JONATHAN LANG, ESQUIRE, Yeager & Lang, 888 Seventh Avenue, New York, NY 10106, on this 1st day of April, 1988.

Richard G. Bartmon
Of Counsel