IN THE SUPREME COURT OF FLORIDA

ALVIN BERNARD FORD, or CONNIE FORD, acting as next friend on behalf of ALVIN FORD,	:	
Petitioner,	:	CASE NO. 70,793
vs.	:	
RICHARD L. DUGGER, Secretary, Department of Corrections, State of Florida,	:	
Respondent.	:	

REPLY TO RESPONDENT'S RESPONSE TO
PETITION FOR WRIT OF HABEAS CORPUS

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Mr. Ford files this reply, pursuant to Fla. Rules of Appellate Procedure, Rule 9.100 (i), to address the misleading argument and misstatement of fact by the respondent in his Response to Petition for Writ of Habeas Corpus.

There are two sets of legal standards to be considered in this case, and two separable issues. The two sets of legal standards are those developed by this Court, and those developed by the United States Supreme Court. While the United States Supreme Court may be the final arbiter of what constitutes a violation of federal constitutional law, this Court also evaluates whether a federal constitutional violation occurred, and may determine what procedures are available and appropriate under state law to redress such a violation. This Court has thus developed its own jurisprudence on the issues presented by Mr. Ford.

The two separable issues are: first, whether the instructions to the jury at the sentencing hearing unconstitutionally limited its consideration of mitigating evidence and second, whether the trial judge unconstitutionally restricted his own consideration of mitigating circumstances to those listed in the statute. The United States Supreme Court has made clear that if the judge limited his consideration to statutory mitigating factors, Lockett has been violated. It has never addressed the issue of whether there is a violation when only the jury was so limited, in a system where the jury verdict is advisory. Under this Court's jurisprudence defining the role of the jury in Florida, however, it is clear that Lockett error, which restricts the jury's consideration of mitigating circumstances in making its sentencing recommendation, necessitates the empaneling of a new jury on resentencing. See, e.g., Valle v. State, 502 So.2d 1225 (Fla. 1987) (on remand from the United States Supreme Court in light of Skipper v. South

Carolina, ___ U.S. ___, 106 S. Ct. 1943, 90 L. Ed. 2d 353 (1986), this Court ordered resentencing before new jury despite Supreme Court's order remanding only to the "sentencer"); Floyd v. State, 497 So.2d 1211 (Fla. 1986) (even though a judge believed there were no mitigating circumstances, his failure to instruct on them "denied [defendant] his right to an advisory opinion"); Lucas v. State, 490 So.2d 943 (Fla. 1986); Robinson v. State, 487 So.2d 1040 (Fla. 1986); Toole v. State, 479 So.2d 731 (Fla. 1985); Simmons v. State, 419 So.2d 316 (Fla. 1982); Perry v. State, 395 So.2d 170 (Fla. 1980).

Rather than addressing this Court's current standards for evaluating the issues and redressing violations of Lockett v. Ohio, 438 U.S. 586 (1978) -- standards under which Mr. Ford is clearly entitled to a new sentencing hearing before a properly instructed jury -- respondent relies on the pre-Hitchcock decision of the United States Court of Appeals for the Eleventh Circuit affirming the denial of Mr. Ford's petition for a writ of federal habeas corpus. That reliance is totally misplaced, first, because the decision was clearly overruled by Hitchcock, and second, because the standard used by the Eleventh Circuit is different than that to be applied by this Court in assessing Mr. Ford's claim.

In Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983) (en banc), the Eleventh Circuit was not evaluating the merits of Mr. Ford's claim. Instead, it was trying to determine whether there was "cause" and "prejudice" in counsel's failure to object to the jury instructions or the judge's limited consideration of mitigating circumstances. Such an evaluation places a very high burden on the habeas petitioner. He has to prove that an erroneous instruction created "actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." Id. at 812 (emphasis deleted). The Eleventh Circuit first looked at the wording of the instruction to determine whether, in its view, the instruction would necessarily have limited the jury's consideration of mitigating

evidence. Three of the four reasons it gave for deciding that the instruction did not have a limiting effect have been negated by the decision in Hitchcock.[1] The fourth, the trial judge's throwaway phrase at the end of his order[2], cannot seriously be deemed an expression of the judge's consideration of non-statutory factors. This Court has repeatedly held that such statements by a trial judge after he explicitly specified that he was evaluating only the statutory factors, then listing and discussing each factor, cannot be taken as an indication that non-statutory factors were considered. See, e.g., McCrae v. State, ___ So.2d ___, 12 F.L.W. 310, 312 (June 18, 1987) (trial court's reference to non-statutory matters in aggravation, after listing of statutory factors, deemed "surplusage"); Goode v. Wainwright, 410 So.2d 506, 508-09 (Fla. 1982) (judge's remarks after making specific findings relating to the aggravating and mitigating factors, which revealed consideration of future dangerousness, not deemed to be improper consideration of non-statutory aggravating factors). What the judge truly believed can

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[1] The three reasons are: 1) the fact that the word "only" did not appear before the listing of mitigating circumstances; 2) the fact that the jury was not limited to only two factors in mitigation, as in Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981); and 3) the assumption that the evidence which could be introduced was not limited and that "the jury arguments encompassed all evidence introduced in the case."

The Eleventh Circuit's reading of the language has been shown to be in error by the Supreme Court in Hitchcock, thus eliminating the first two reasons.

Arguably, the so-called non-statutory evidence introduced in this case by Mr. Ford's mother and a psychiatrist who examined him was presented under the rubric of the statutory mitigating circumstances relating to diminished capacity. Fla. Stat. 921.141 (b) & (f). In any case, the argument by defense counsel, which is attached to this reply as Appendix A, can hardly be called an argument which encompassed any of the evidence introduced in mitigation. (See infra pp. 5-6). Most importantly, as the Court in Hitchcock made clear, it is irrelevant whether non-statutory mitigating evidence was introduced if the sentencer was precluded from or refused to consider it. In both Lockett and Eddings, evidence of non-statutory mitigating circumstances was also introduced, but was not considered (in the first case by force of the language of the statute, and in the latter by virtue of the trial judge's refusal to do so).

[2] The trial court, after listing the aggravating and mitigating circumstances, stated that there were no mitigating circumstances "statutory or otherwise" which outweighed the aggravating circumstances he found. It should be noted that three of the aggravating circumstances found by the trial judge were overturned by this Court on appeal.

be derived from his statements during the charge conference and the instructions he actually gave to the jury (both set forth in the Petition at p. 6) which show a limitation of the factors to be considered. See Lucas v. State, 490 So.2d at 946. Accord Rogers v. Richmond, 365 U.S. 534, 541-42 (1961); Adams v. Wainwright, 764 F.2d 1356, 1364 (11th Cir. 1985). Moreover, even if this Court does believe the trial judge's findings are ambiguous, any doubt about whether the judge considered non-statutory factors must be resolved in favor of Mr. Ford. "Woodson and Lockett require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial judge". Eddings v. Oklahoma, 455 U.S. 104, 119 (1972) (O'Connor, J., concurring).

As an alternative ground to its four reasons for failing to find prejudice in the language of the instruction, the Eleventh Circuit determined that the failure to consider the non-statutory mitigating evidence present in Mr. Ford's case "would not create a substantial likelihood that there was actual and substantial disadvantage to [Mr. Ford]." Again, the court was applying the stiff standard utilized in federal habeas cases to determine whether to excuse a procedural default. The standard used by this Court in evaluating the need for a redress of a Lockett violation, however -- even in the post-conviction context -- is quite different. As that standard was set forth in Valle v. State, 502 So.2d 1225, 1226 (Fla. 1987), "[U]nless 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." (Emphasis supplied). Unlike the Eleventh Circuit, this Court does not take the position that it can determine what a trial judge would have done if it had considered the excluded evidence. "Whether nonstatutory factors actually presented in the guilt phase or the newly asserted nonstatutory mitigating factors would have influenced the trial judge is a determination which, under these circumstances, should be made by the trial judge

rather than by this Court on the face of a cold record." Harvard v. State, 486 So.2d 537, 539 (Fla. 1986).

The respondent attempts to distinguish Hitchcock, and in doing so distorts both the opinion in Hitchcock and the facts of Mr. Ford's case. While it is true that the Court in Hitchcock chose to decide the case on the facts presented, it did so after making quite clear that a more drastic alternative was possible: a holding that the Florida sentencing statute -- as interpreted by this Court before Lockett -- was unconstitutional. The Court began the analysis portion of its opinion by reviewing the provisions of the Florida sentencing statute in effect at the time of Mr. Hitchcock's -- and Mr. Ford's -- trial (noting, parenthetically, that the statute has since been amended). The Court quoted specifically those provisions which, on their face, limited the jury's and judge's consideration of mitigating circumstances to those listed in the statute.[3] Hitchcock v. Dugger, 95 L.Ed.2d 347, 351-52 (1987). It then quoted the language of this Court's decision in Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976), in which this Court ruled that "[t]he sole issue is a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have [sic] no place in that proceeding...." It is only following this description of Florida law that the Court indicated that, rather than determine whether the restrictions imposed were required by Florida law, it would reverse based on the fact that the restrictions were clearly imposed in Mr. Hitchcock's case.

The Supreme Court's description of the sentencing proceeding in Mr. Hitchcock's case first notes that non-statutory mitigating evidence was introduced and argued to the jury, and defense

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[3] 921.141(2): the jury must determine "(b) [w]hether sufficient mitigating circumstances exist as enumerated in [§921.141(6)], which outweigh the aggravating circumstances found to exist." 921.141(3): the judge must make findings "(b) [t]hat there are insufficient mitigating circumstances, as enumerated in [§921.141(6), to outweigh the aggravating circumstances."

counsel specifically urged the jury to "look at the overall picture." The introduction of and argument concerning non-statutory mitigating evidence thus is clearly not sufficient to defeat Mr. Ford's claim.[4] While the Court then noted the prosecutor's argument to the jury in Mr. Hitchcock's case, indicating that they were to consider the mitigating circumstances by number, an erroneous prosecutor's argument is certainly not a pre-requisite to a finding of a Lockett violation, as respondent suggests. It has never been mentioned in any of this Court's or the United States Supreme Court's Lockett opinions. The argument of the prosecutor in Mr. Ford's case would be one factor to consider if he specifically informed the jury either that it could or could not consider non-statutory mitigating factors, but having done neither it is simply irrelevant.

The Court then recites the instructions given to Mr. Hitchcock's jury by the trial judge. That language is virtually identical to the instructions given in Mr. Ford's case. (Those instructions are set forth in the Petition at p. 6). Finally, the Court reviews the sentencing order in Mr. Hitchcock's case. Mr. Hitchcock's judge explained that his sentencing decision was based upon his weighing of the mitigating circumstances "enumerated in Florida Statute 921.141 (6)." Mr. Ford's judge explained similarly that he was weighing the elements of mitigation "set forth in Florida Statutes." It cannot seriously be argued that there is any difference between Mr. Ford's case and Mr. Hitchcock's case sufficient to defeat Mr. Ford's claim.

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[4] In reality, Mr. Ford's counsel never argued for consideration of non-statutory mitigating evidence, as respondent claims. His entire argument, consisting of two pages of transcript, is attached as Appendix A. That argument was merely a response to the state's invocation of the "eye for an eye" justification for a death sentence, and an attempt to correct any misimpression that may have been created concerning parole eligibility for Mr. Ford based on evidence of parole eligibility for Mr. Ford's accomplice, who was convicted of a lesser charge. He never attempted to marshall the facts presented during the testimony of Mr. Ford's mother or the psychiatrist to justify a life sentence. His only reference to any of the non-statutory mitigating evidence of Mr. Ford's background or character was this: "Based on what the Doctor said, what is your thinking in ... regard [to the sentence to be imposed]?" (T.T. 1344).

Finally, respondent fails to address the fact that in Mr. Ford's case, unlike Mr. Hitchcock's case, there is direct evidence that the jury believed itself to be limited in its consideration of mitigating evidence. Mr. Ford's jury specifically asked the judge to repeat "what they [the judge and counsel] consider the mitigating circumstances." In response, the judge read the statutory list, alone, and in no way suggested there was leeway to consider anything else.

Accordingly, both Mr. Ford's trial judge and jury were limited in their consideration of mitigating factors to those listed in the sentencing statute. As a result, Mr. Ford's death sentence must be vacated.

WHEREFORE, Mr. Ford requests that this Court grant the writ he seeks.

Respectfully submitted,

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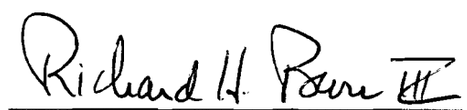
By 
ATTORNEYS FOR PETITIONER

CERTIFICATE OF SERVICE

I, Richard H. Burr III, hereby certify that a copy hereof has been furnished by mail to Joy B. Shearer, Assistant Attorney General, Department of Legal Affairs, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401, this 5th day of August, 1987.

Richard H. Burr III
Of Counsel