IN THE SUPREME COURT OF FLORIDA

ALVIN BERNARD FORD, or CONNIE FORD, acting as next friend on behalf of ALVIN BERNARD FORD, Petitioner, v. RICHARD L. DUGGER, Secretary, Department of Corrections, State of Florida, Respondent.	CASE NO. 70,723

RESPONSE TO PETITION FOR HABEAS CORPUS

Comes now the Respondent, Richard L. Dugger, and responds to the Petition for Habeas Corpus filed by the Petitioner, Alvin Bernard Ford, and states:

I. JURISDICTION

The Petitioner seeks to invoke this Court's original habeas corpus jurisdiction to re-examine its prior determination that the Petitioner's claim the trial judge and jury's consideration of the evidence in mitigation was restricted to the statutory factors was procedurally barred. In Ford v. State, 407 So.2d 907 (Fla. 1981), this Court held the claim was a matter known at the conclusion of the trial which could have been raised on direct appeal; hence, Rule 3.850 was not an appropriate remedy.

The Respondent maintains the procedural bar ruling by this Court, in 1981, which was between the same parties represented by the same counsel as are presently before the court, is the law of the case and the matter is not open to re-litigation. Terry v. State,

467 So.2d 761, 765 (Fla. 4th DCA 1985); Cruz v. State, 437 So.2d 692, 698 (Fla. 1st DCA 1983) (on rehearing); Airvac, Inc. v. Ranger Insurance Company, 330 So.2d 467, 469 (Fla. 1976); Parrish v. State, 14 So.2d 171 (Fla. 1943). The Petitioner's citation to McCrae v. State, 12 FLW 310 (Fla. June 18, 1987), Lucas v. State, 490 So.2d 493 (Fla. 1986), and Harvard v. State, 486 So.2d 537 (Fla. 1986), cases which involve different facts, in different cases, between different parties, have no effect on the "law of the case" bar to the present petition.

Nevertheless, citing Kennedy v. Wainwright, 483 So.2d 424, 426 (Fla. 1986), the Petitioner alleges his claim should be re-examined. Kennedy states, "it is only in the case of error that prejudicially denies fundamental constitutional rights that this Court will revisit a matter previously settled by the affirmance of a conviction or sentence." The instant case does not present such an error, for after this Court ruled the issue was procedurally barred in Ford v. State, 407 So.2d 907 (Fla. 1981), it was eventually reviewed by the United States Court of Appeals for the Eleventh Circuit, sitting en banc. Ford v. Strickland, 696 F.2d 804 (11th Cir.) (en banc), cert. denied, 464 U.S. 865 (1983). The majority noted the state courts had found the issue barred, so it was reviewable federally only if Ford could come within the cause and prejudice exception to Wainwright v. Sykes, 433 U.S. 72 (1977). The court found Ford failed to establish prejudice because the jury instructions did not preclude consideration of non-statutory mitigating factors, Ford was unlimited in his presentation of evidence, and the sentencing order specifically reflected the trial judge's perception that he was not limited. Ford v. Strickland, 696 F.2d at 812-813.

Alternatively, the majority agreed with Judge Godbold's separate concurrence that the non-statutory mitigating evidence was unpersuasive when considered against the five valid aggravating factors, so even if it was not considered, the outcome was unaffected. Ford v. Strickland, 696 F.2d at 822.

In view of the thorough evaluation by the Eleventh Circuit and its conclusion that the Petitioner was not prejudiced, the instant case does not present one of those rare cases of fundamental error contemplated by Kennedy v. Wainwright, 483 So.2d 424 (Fla. 1986).

Likewise, Copeland v. Wainwright, 505 So.2d 425 (Fla. 1987), certainly did not hold, as the Petitioner infers, that capital cases tried before the decision in Songer v. State, 365 So.2d 696 (Fla. 1978), are exempt from the requirements of Fla. R. Crim. P. 3.390(d), which requires a timely objection to jury instructions.[1] On the contrary, as noted in Aldridge v. State, 503 So.2d 1257, 1260 (Fla. 1987), the decisions in Harvard and Lucas do not reflect a fundamental change in the law. See also, Martin v. Wainwright, 497 So.2d 872, 874 (Fla. 1986) [Lockett claim not fundamental error].

Therefore, the procedural bar was appropriately invoked in the 1981 3.850 litigation and affirmed by this Court on appeal. The Petitioner may not now re-open the issue. The present case is particularly an abuse of procedure because in 1984, the Petitioner filed an original habeas corpus petition in this Court. Ford v. Wainwright, 451 So.2d 471 (Fla. 1984). One of the issues therein concerned the propriety of a jury instruction

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[1]Moreover, although this trial occurred in 1974, the direct appeal was not decided until July 18, 1979, a year after Lockett v. Ohio, 438 U.S. 586 (1978). See, Ford v. State, 374 So.2d 496 (Fla. 1979).

given at the sentencing phase. Certainly at that time, Ford could have asserted any other purported deficiencies and called upon this Court to re-examine its 1981 decision in Ford v. State, 407 So.2d 907 (Fla. 1981). His failure to do so as well as the correctness of this Court's 1981 opinion, compel dismissal of the present petition on procedural grounds.

II. STATEMENT OF THE CASE AND FACTS

The Respondent accepts the Petitioner's statement as generally accurate, subject to the following additions:

A. Case Chronology

Petitioner filed a third Fla. R. Crim. P. 3.850 motion in December, 1986. It was dismissed on procedural grounds. The appeal of that dismissal is presently pending before this Court in Ford v. State, Case No. 70,467.

B. Facts Material to the Present Lockett Claim

Respondent disputes the Petitioner's assertions that the jury considered only statutory mitigating circumstances. At the commencement of the sentencing hearing, the jury was instructed that counsel were going to "have an opportunity to call witnesses to present testimony relating to aggravating and mitigating circumstances in this cause" (T 1311). Defense counsel called two lay witnesses, Petitioner's mother and a friend of his, who testified as to his general background and character (T 1313-1322). He also called Dr. David Taubel who presented a psychiatric profile of Ford (T 1323-1340).

The prosecutor said nothing in his closing argument to indicate that the jury's consideration of mitigating evidence was limited (T 1340-1343). Defense

counsel argued non-statutory factors (T 1343-1345). In addition to discussing the evidence that had been presented, he argued that killing Ford would not bring back the victim's life and that if given a life sentence, Ford would have to serve at least twenty-five years.

The trial judge, in his sentencing order, discussed the inapplicability of the enumerated statutory mitigating factors. [The order is set out in its entirety in Ford v. State, 374 So.2d 496, 500 - 202, n. 1 (Fla. 1979)]. He then concluded: "There are no mitigating circumstances existing--either statutory or otherwise--which outweighs any aggravating circumstances, to justify a sentence of life imprisonment rather than a sentence of death." (Quoted at Ford v. State, 374 So.2d at 501, emphasis added.) Thus, the trial judge considered all the mitigating evidence presented, but found it did not rise to the level of a mitigating circumstance.

III. ARGUMENT

The Respondent's jurisdictional argument set forth in §I of the response is dispositive and this Court need go no further. However, assuming arguendo the court reaches the merits, the Respondent maintains there was no erroneous limitation on the evidence in mitigation at Ford's sentencing proceeding.

First, the Respondent relies on the en banc Eleventh Circuit opinion in Ford v. Strickland, 696 F.2d 804, 811-813 (11th Cir. 1983). The majority of seven judges of that court agreed that Ford had failed to show the jury perceived that it was denied the use of any non-statutory mitigating factors in making its recommendation. The majority also held the trial judge's sentencing order quoted above reflected his perception that there was no restriction against the use of any

non-statutory mitigating evidence offered by Ford.

Just as the Respondent has relied on this Court's previous procedural bar determination as the law of the case which bars the present petition (see §I, supra), the Respondent relies on the Eleventh Circuit opinion as the law of the case to compel rejection of the Petitioner's Lockett claim on its merits. The United States Supreme Court's decision in Hitchcock v. Dugger, 481 U.S. ____, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), does not require reconsideration.

In analyzing Hitchcock, it is important to note the decision was narrowly applied to its facts and the circumstances of the instant case are distinguishable. The Supreme Court did not hold the type of instruction given in the Petitioner's case, in and of itself, would invalidate a sentencing proceeding. Hitchcock, 95 L.Ed.2d at 352, 353. Although noting that other Florida cases had reached similar conclusions as to the confusion in Florida law on consideration of non-statutory circumstances, the court specifically declined to categorize all such Florida cases which used the instructions as fundamentally flawed. Hitchcock, 95 L.Ed.2d at 352. Rather, the court chose instead to focus on ". . . our examination of the sentencing proceedings actually conducted in [Hitchcock's] case . . .", Id., further supporting the conclusion that the Hitchcock decision was expressly limited to its facts.

The reversal in Hitchcock was based on the instructions given, the prosecutor's remarks limiting the jury to the statutory factors, and the judge's order referring solely to the enumerated statutory factors. By contrast, here the jury was informed it would hear evidence relevant to the mitigating circumstances (T 1311),

it then heard non-statutory mitigating evidence and argument (T 1313-1340; 1343-1345), and the prosecutor made no attempts to restrict the jurors' consideration of the evidence. The trial judge's sentencing order specifically referred to non-statutory factors (. . . there are no mitigating circumstances existing--either statutory or otherwise-- . . .). Thus, this case is factually distinguishable from Hitchcock, for it is apparent on the present record that non-statutory mitigating evidence was presented and considered.

Moreover, in Hitchcock the court expressly noted that the State in that case had not argued the error was harmless. Hitchcock, 95 L.Ed.2d at 353. In the instant case, there were five substantial aggravating factors upheld by this Court on direct appeal, Ford v. State, 374 So.2d 496, 503 (Fla. 1979), as "compel[ling] the inescapable conclusion that the proper sentence is the death penalty." The overwhelming nature of the aggravating circumstances persuaded two separately concurring Eleventh Circuit Judges, Godbold and Clark, and the majority of the court accepted as an alternative ground, that any error in limiting the mitigating factors in this case was harmless. Ford v. Strickland, 696 F.2d 804, 821-822, Godbold, J.; concurring, 813, majority (11th Cir. 1983) (en banc). Therefore, harmless error remains a viable argument under Hitchcock and in the present case, an harmless error determination is an appropriate alternative ground for denying the petition.

IV. CONCLUSION

Based on the foregoing reasons, the Respondent respectfully requests that the Petition for Habeas Corpus be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Response to Petition for Habeas Corpus has been mailed to Craig S. Barnard, Chief Assistant Public Defender, 301 North Olive Avenue, 9th Floor, West Palm Beach, FL 33401; Richard H. Burr, III, Esquire, 99 Hudson Street, 16th Floor, New York, NY 10013; and to Laurin A. Wollan, Jr., Esquire, 1515 Hickory Avenue, Tallahassee, FL 32303, this 15th day of July, 1987.

Of Counsel