IN THE SUPREME COURT OF FLORIDA

VERNON RAY COOPER,

Petitioner,

v. Case No. 71,139

RICHARD L. DUGGER, Secretary,
DEPARTMENT OF CORRECTIONS,
STATE OF FLORIDA,

Respondent.
_____/



RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

Comes now the Respondent, Richard L. Dugger, by and through his undersigned counsel, to file this response to the show cause order of this Court issued September 18, 1987. Respondent contends the petition for writ of habeas corpus should be denied and in support thereof asserts the following:

## I. INTRODUCTION

Petitioner returns to this Court for a third attempt at having his death penalty set aside. See Cooper v. State, 336 So.2d 1133 (Fla. 1976) and Cooper v. State, 437 So.2d 1070 (Fla. 1983). Cooper has recently petitioned for writ of federal habeas corpus, see Cooper v. Wainwright, 807 F.2d 881 (11th Cir. 1986) cert.denied 107 S.Ct. 2183 (1987). His federal case was remanded for further preceedings in the Federal District Court. By an order dated September 24, 1987, the United States District Court agreed with the request of the parties to hold this case in abeyance pending this Court's resolution of the instant petition.[1]

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[1] A copy of the order of the District Court is attached as Exhibit A.

## II. JURISDICTION

This Court has jurisdiction. See Down v. Dugger, No. 71,100 (Fla. September 9, 1987).

## III. FACTS

The facts of the case as found by the trial judge, which were upheld by this Court in Cooper v. State, 336 So.2d 1133 (Fla. 1976), (with the exception of the finding that the homicide was especially heinous and atrocious and cruel) are as follows:

> 1. On January 19, 1974, at approximately 7:15 p.m., the defendant, armed with a blue metal pistol with wooden stock, together with his accomplice, Stephen Ellis, armed with a nichol colored pistol, robbed a Winn Dixie Store in Escambia County, Florida. Cash was taken from the office and checks out of the cash registers.
>
> 2. After the alert to the robbery, sheriff's deputys covered various areas of possible escape routes. Deputy Charles Wilkerson, victim of the murder, stationed himself at Pine Forest Road at Interstate 10, approximately three miles from the scene of the robbery. About fifteen minutes after the robbery, a cruiser car with blue lights flashing, later identified as driven by the victim, was observed by witnesses pulling over a car thought to be a black camero. The only illumination on the dark night came from the lights of the two vehicles. Two shots were heard. The camero "took off" travelling west on Interstate 10. No witnesses identified the occupants of the camero. One testified he saw a man appearing to be five-ten or five-eleven, slim built with "bushey hair" run from the driver's side of the cruiser toward the driver's side of the camero, but was unable to state the person entered the driver's side of the camero. From personal observation by the presiding judge the described physical features are reasonably accurate of the defendant. The defendant is of slim build and an appropriate stated height, with medium long hair. His accomplice was described as heavily built. Another witness approaching the car from the opposite directions across the medium

strip, saw a man in a "a trot" leave the driver's side of the deputy's cruiser, enter the passenger's side of the camero which "took off".

3. In the space of a minute or two following the shots, Deputy Wilkerson was found on the driver's side of his cruiser, lying in the front seat on his back with his feet out of the car, his pistol in the holster with the strap on it, his flashlight between his legs. The defendant, by stipulation of his attorney in open court, in the presence of the jury, admitted partipation in the robbery. Likewise he, in his testimony, admitted the robbery, ownership of the black camero, occupying the passenger's seat, being stopped by Officer Wilkerson, who approached the passenger's side of the camero, requesting that the occupants wait a minute. The Deputy went to his cruiser where he was followed and shot two times. Cooper attempted to place the entire blame for the killing upon his deceased accomplice, Ellis, together with his lack of knowledge Ellis had a pistol when he left the camera or his intention to kill.

4. Two deputy sheriffs, in separate vehicles, travelling west on Interstate 10, overtook and stopped the camero after crossing the Alabama line. Deputy Bates took the rear of the camero, leveled his revolver at Ellis, who approached his from the driver's side of the camero. Defendant was on the passenger's side of the camero. The shotgun was fired in the camero while Bates was "patting" down Ellis which blast momentarily diverted Bates attention from Ellis. Ellis came up with a pistol from his coat and leveled at Bates. Bates shot and killed Ellis. Ellis's pistol, a chrome 38 Smith and Wesson was later recovered from the hood of Deputy Bates automobile. There followed a second shotgun blast from the camero occupied by Cooper which may have shattered the window glass of Bate's car. The deputies fired many rounds into the camero which started moving, travelling about a mile and one half before it ran into an embankment. Cooper fled. After a search of several hours by four to five hundred people, Cooper was discovered lying face down in a shallow drainage ditch, with a sawed-off shotgun underneath him. Two fired shells were in the twelve guage gun. Later processing of the camero revealed a hole in the floor of the passenger's

side, apparently the first shot from the sawed off shotgun. The blue pistol carried by the defendant at the robbery was missing. Two bags of money were recovered from the camera.

5. The pathologist performing the autopsy testified the cause of death of Deputy Wilkerson was two bullet wounds in the forehead, one above the right eyebrown and the second a little higher. One was fired at such close range that the powder burns were apparent. Death was practically instanteous. Two bullets were removed from the head of Deputy Wilkerson at the autopsy.

6. A firearm's examiner at the Department of Law Enforcement of the State of Florida, examined the pistol which Ellis pulled on Deputy Bates, test fired it, and compared the bullets with the two removed from the head of Deputy Wilkerson. He unequivocally was of the opinion the bullets causing the death of Deputy Wilkerson were not fired from Ellis' nickel or chrome colored pistol. The blue colored pistol described by the assistant manager of the robbed store worn by Cooper at the robbery was admitted by Cooper to be in his possession. No trace of the blue 38 Smith and Wesson pistol was found. Cooper claimed after the shooting as they were on Interstate 10, Ellis handed him the blue pistol with instructions to get rid of it, and he threw it out the car window.

The facts support these aggravating circumstances:

1. The defendant was previously convicted of two felonies involving the abuse or threat of violence to persons; namely, armed robbery.

2. The murder was committed while the defendant was in the perpetration of a robbery and in flight after committing a robbery.

3. The murder was committed for the purpose of avoiding or preventing the lawful arrest of the defendant.

4. The capitol felony was especially heinous atrocious and cruel.

Finally, no statutory mitigating circumstances are presented by the evidence to be weighed against the aggravating circumstances. The

> evidence is conclusive of defendant's guilt under the felony/murder statute. Likewise, the positive evidence, combined with the circumstantial evidence, establishes a premeditated designed to kill Deputy Wilkerson, and that the fatal shots were fired by Cooper.

The finding that the crime was particularly heinous atrocious and cruel was set aside by this Court in Cooper I, supra.

## IV. REASONS WHY THE PETITION SHOULD BE DENIED

### A. THE PROFFERED EVIDENCE WAS NOT RELEVANT TO SENTENCING

Simply stated, Cooper's is not a "Hitchcock" case.

In Cooper I, this Court unanimously held that the type of proffered testimony Cooper now seeks to relitigate was correctly excluded because it was not relevant. Although this Court did speak to a perceived strict limitation on statutory aggravating and mitigating circumstances, it made clear that regarding the proffered evidence, there was no violation of Lockett v. Ohio:

> Testimony regarding Ellis's temperament and Cooper's attempts to avoid Ellis on a few occasions reflected events and opinions too removed in the planning of the robbery and commission of the murder for there to be any rational basis on which the jury could conclude that Cooper acted under Ellis domination. Similarly, those facts could have no probative bearing on whether Cooper or Ellis fired the fatal shots.
>
> As to proffered testimony concerning Coopers prior employment, it is argued that this evidence would tend to show that Cooper was not beyond rehabilitation. Obviously an ability to perform gainful work is generally a prerequisite to the reformation of a criminal life, but an equally valid fact of life is that employment is not

> a guarantee that one will be law abiding. Cooper has shown that by his conduct here.

Id. 1139.

Further, this Court noted that the trial judge did permit "great latitude in the admission of evidence, some questionably probative or relevant, regarding Coopers character and his general reputation for veracity and non-volience." Id.

As Justice Barkett noted in her opinion in the direct appeal case of Floyd v. State, 497 So.2d 211, 215:

> As we said in Coooper v. State, 336 So.2d 1133, 1140 (Fla. 1976) cert-.denied, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977), a trial judge should not be permitted in any way to inject his preliminary views of a proper sentence into the jury's deliberations.

Clearly, this Court was aware in Cooper I of this type of limitation, but found no Lockett v. Ohio error given the nature of the profferred testimony. The petitioner makes much of the reasons why the trial court suppressed the proffered evidence, but fails to recognize that a trial court may be right, albeit, for the wrong reasons. See Vandergrif v. Vandergrif, 456 So.2d 464, 466 (Fla. 1984) (Noting the well established rule that trial court decisions are presumptively valid and should be affirmed, if correct, regardless of whether the reasons advanced are erroneous).

A review of the trial record will support this Court's earlier conclusion in Cooper I. For example, as to the proposed testimony regarding Ellis's supposed domination of petitioner, the trial judge properly ruled it inadmissible, not because the evidence that a person is dominated or coerced is not relevant, but because the witness was not competent to give such

testimony. (TR. XVI 65-66).[2] As the trial court so aptly stated during the trial, "the fact that somebody may come in and express an opinion as to his domination is not the facts and it should not go before the jury." This ruling by the trial court was confirmed when, (at page 65 of the record) the witness indicated:

> Q: Could you attest to Mr. Ellis's reputation in the community?
>
> A: His reputation was, as far as I could tell, I wasn't around him very much. He would come by my house once in awhile and talk to me. He come by one time and helped me build a porch, and he didn't charge me anything for it. Otherwise, as far as I could tell he was a very nice fellow. (TR Vol. XIV p. 65-66).

The Court's ruling was similar when it came to Ms. Saiger. (TR. Volume XVI 70-71). The court noted that the evidence was inadmissible because the witness had no personel knowledge that the petitioner was dominated by Ellis.

Petitioner also claims that evidence regarding his employment history was excluded during the sentencing phase. This contention overlooks the fact that during the trial phase evidence was introduced which indicated the petitioner was seeking employment at the time this murder occurred.

In the sentencing phase, the defense proffered that he was "attemping to maintain and seek gainful employment". (TR Vol. XIV p. 32) The purpose, as outlined by defense counsel, was to establish for the jury the possibility that Cooper was able to

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[2] This Court should also note that after Cooper filled his motion for post conviction relief the trial court conducted an evidentiary hearing at which Cooper testified. Cooper v. State, 437 So.2d 1070, 1071 (Fla. 1983). During the evidentiary hearing Cooper voluntarily took the witness stand to testify, but never suggested the he was dominated by Ellis. Indeed, he went to pick up Ellis in his car, a fact that refutes the testimony that he attempted to avoid Ellis on the day of the crime. (Exhibit B Volume 2, Transcript of Motion to Vacate Death Penalty, Case Number 74-185 State v. Cooper, Volume II pages 356-360.)

rehabilitate himself and therefore might be a candidate for something other than the death penalty. (TR Vol. XIV p. 62).

The problem with the current contention is that is was previously rejected in Cooper I. This Court declared that Cooper had shown by his conduct that there was no indication that the attempt to gain employment had any positive impact upon him. Id. 1139.[3]

Interestingly enough, petitioner's father testified, on proffer, that he never saw Ellis threaten anyone and had no knowledge of Ellis's reputation (TR 1465-66). Ms. Saiger also admitted that she never saw Ellis threaten anyone in her presence. (TR 1468).

In response to trial counsel's argument that Ms. Saiger should be allowed to testify that Cooper's participation was minor and only accomplished under duress or domination by Ellis, the Court noted:

> "What domination, what duress, what has the witness testified as duress? She testified that he has avoided Mr. Cooper had avoided Mr. Ellis, but she does not know why." (TR Volume XIV p. 71).

The record refutes any notion that the witness was qualified to give testimony regarding the date in question or the time involved. This Court need look only to the state attorney's objection (TR Volume XIV p. 64), and the trial court's ruling on the point:

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[3] Respondent vigorously objects to the assertion that the trial court would not even hear a profer of the evidence of employment history outside the presence of the jury. See Petition p. 6. To the contrary, the record indicates that the trial judge specifically and repeatedly indicated that he would entertain profers on this matter as well as other matters regarding mitigation. (TR Volume XIV page 61, 64).

> There is no testimony that he was acting under domination, from this witness, at all that he was ever dominated by him by this witness I mean Steve Ellis." (TR Vol. XIV p. 71).

Petitioner's attitude towards prior incarceration or "feelings" in regard thereto, based upon discussion with unnamed individuals in the community or otherwise, (TR Vol. XIV p.34) is totally irrelevant. Nothing in Lockett suggests that this is the type of evidence that a court has to admit in order to comport with the Eighth Amendment. The same is true of the proposed marital plans and relationships of Cooper. (TR Volume XIV p. 51) Since petitioner had been found guilty and would at minimum, receive a sentence of twenty-five years imprisonment without the possibility of parole, the evidence relative to his marital plans was immaterial in this context. Likewise, the evidence relative to his accomplice's propensity for violence was not a matter which was relevant to Cooper's character or background.

The question of whether or not this evidence should have been admitted in a sentencing phase was again addressed by this Court in its unanimous opinion on rehearing in the case of Songer v. State, 365 So.2d 700 (Fla. 1978). In the case which has constituted the "bright line" to Lockett claim analysis in Florida, this Court held:

> In Lockett, the Court held that Ohio's death penalty statute, which restricts the sentencing judges consideration to the statutory list of mitigating factors, violates the Eighth and Fourteenth Amendments of the United States Constitution. Appellant asserts that Florida statute similarly proscribes an exclusive list of mitigating circumstances, relying principally on language from our decision in Cooper v. State, 336 So.2d 1133 (Fla. 1976), to the effect that unlisted mitigating circumstances should not be considered in sentencing for a capital crime.
>
> In Cooper, this Court was concerned not with whether enumerated

> factors were being raised as mitigation, but with whether the evidence offered was probative. Chief Justice Burger, writing for the majority in Lockett, expressly stated that irrelevant evidence may be excluded from the sentencing process. 98 S.Ct. at 2965 n. 12. Cooper is not apropos to the problems addressed in Lockett. (Emphasis added).

If this Court meant what it said, it must adopt Respondent's position at this time.

Recent rulings support our view. For example Cooper's is a case similar of that of Clarence Edward Hill, reported in Hill v. State, 12 F.L.W. 480 (Fla. September 17, 1987).

In Hill, this Court concluded that there was no error due to the trial judge's exclusion of certain allegedly mitigating testimony concerning background and character:

> "The judge refused to permit appellant's mother to testify that she cared for appellant's cousins, as well as her own children. Similarly, the judge declined to allow defense counsel to question appellant's father regarding his own ill health and past job responsibilities. In our view, the excluded evidence focus substantially more on the witnesses character than on appellant's. There has been no showing that the trial judge abused his discretion in excluding the testimony and we find no violation of the United States Supreme Court's recent decision in Hitchcock v. Dugger, 107 S.Ct. 1821 (1987), or Eddings v. Oklahoma, 455 U.S. 104 (1982), or Lockett v. Ohio, 438 U.S. 586 (1978).

A similar conclusion was reached by this Court more recently in the case of Amos Lee King v. State, (Fla. No. 68,631, September 24, 1987). In that case, the Court noted that ". . . the only limitation on introducing mitigating evidence is that it be relevant to the problem at hand, i.e., that it go to determining the appropriate punishment. As the trial court did, we find the exclupatory evidence sought to be introduced irrelevant

to King's sentence. King has not demonstrated an abuse of discretion, and we will not disturb the trial court's ruling." Slip Opinion p. 7.

To summarize this first portion of our argument, Respondent stresses two things: (1) The lack of witness competency on proffered matters and the lack of relevancy to character, background and circumstance and (2) the binding language of Cooper I and Songer (on rehearing). Respondent asserts they control and mandate a finding that no relief is warranted because no Eighth Amendment violation occurred at trial.

B. COOPER'S EIGHTH AMENDMENT CLAIM IS PROCEDURALLY BARRED AND CANNOT BE EXCUSED BASED ON CAUSE AND ACTUAL PREJUDICE.

Assuming this Court declines to follow its prior holding in Cooper I, (see also Songer), it still should not grant relief to Cooper because Cooper had the opportunity to raise the claim and is therefore barred at this late date from attempting what is in essence a second direct appeal.

In Strazzulla v. Hendrick, 177 So.2d 1 (Fla. 1965), Justice Roberts, writing for a unananimous court held:

> We think it should be made clear, however, that an appellate court should reconsider a point of law previously decided on a former appeal only as a matter of grace, and not as a matter of right; and that an exception to the general rule binding the parties to "the law of the case" at the retrial and at all subsequent proceedings should not be made except in unusual circumstances and for the most cogent reasons - and always, of course, only where "manifest injustice" will result from a strict and rigid adherence to the rule. Id, at 2.

With this standard in mind, Respondent refers this Court to those cases from the United States Supreme Court and Federal Circuit Court of Appeals which should control in this matter.

In Antone v. Strickland, 706 F.2d 1534 (11th Cir. 1983), the Court was faced with the following issue:

> During the penalty phase of Antone's trial, the state trial judge, without objection from either party, instructed the jury on aggravating factors, and then stated "the mitigating factors which you may consider are these . . . ." and listed the seven mitigating factors enumerated by Fla.Stat., Section 921.141 (1975) (footnote omitted). Petitioner now argues that this instruction impliedly limited the jury's consideration of mitigating circumstances in contravention of Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), relying on Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981) cert. denied 456 U.S. 949, 102 S.Ct. 2221, 72 L.Ed.2d 474 (1982), Petitioner contends that the

> jury was effectively precluded from consideration of the non-statutory mitigating factors. Id, at 536-537.

Antone, like Cooper, was a pre-Lockett case. Still, the Eleventh Circuit Court of Appeal rejected Antone's claim by utilizing procedural bar analysis:

> Antone did not object to the jury instructions at trial or on direct appeal. Florida Rules of Criminal Procedure, Rule 3.390(d) (1973), specifically provided that jury instructions must be objected to before the jury retires to consider its verdict. The State therefore argues that Antone is in procedural default and that federal court consideration of the jury instruction in a habeas corpus proceeding is barred by Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). In Sykes, the United States Supreme Court held that a state prisoner must demonstrate "cause and prejudice in order to advance in a federal habeas corpus proceeding, a claim barred from consideration by valid state procedural rule. Id, at 537.

The Court went on to determine that Antone had not established cause for his default for two reasons. First, Antone's counsel had anticipated the ruling in Lockett and had filed a motion to dismiss the indictment prior to trial. See footnote 4. However, the majority went on to note that pursuant to Engle v. Isaac, 456 U.S. at 130, "futility of presenting an objection to state courts can not alone constitute cause for failure to object at trial." Thus, Antone was found to have been unable to establish cause by the Court. Two members of the Court went on to discuss whether or not Antone could show the second prong, that is actual prejudice. Citing to Henderson v. Kibbe, 431 U.S. 145, 97 S.Ct. 1730, 52 L.Ed.2d 203 (1977) (footnote omitted), and Davis v. McAllister, 631 F.2d 1256, 1260 (5th Cir. 1980) cert. denied, 452 U.S. 907, 101 S.Ct. 3035, 69 L.Ed.2d 409 (1981), the Court majority concluded "Antone has not established that the jury perceived that in deciding whether to recommend

death it was denied consideration of any non-statutory mitigating factors". Id, at 537-538.

Antone sought a writ of certiorari from the United States Supreme Court. The petition was denied. Antone v. Dugger, 464 U.S. 1003, 78 L.Ed.2d 699, 104 S.Ct. 511. Antone sought another round of collateral litigation in which he then unsuccessfully argued in this Court and in the federal courts for relief pursuant to Lockett v. Ohio. When Antone reached the United States Supreme Court, Antone v. Dugger, 465 U.S .200, 104 S.Ct. 962, 79 L.Ed.2d 147 (1984), seven members of that court rejected Antone's appeals in summary fashion. However, short opinions were delivered by the majority and by Justice Stevens (concurring). In these opinions, the court noted that Antone's second habeas corpus petition contained "several claims that had proportedly not been raised in his first federal habeas petition", 79 L.Ed.2d 151. Among these claims was an allegation that "the statute, under which applicant was sentenced, unconstitutionally excluded non-statutory mitigating factors from consideration, see Lockett v. Ohio, supra. These claims twice previously have been considered, as noted above, by the Florida Supreme Court." Id, at 151-152. After discussing why Antone had abused the writ, the majority concluded:

> Upon consideration of the extensive papers filed with the court, we find that none of the challenges warrants for the review. Indeed, the grounds relied upon by applicant all appear to be meritless." Id, at 153.

Soon after this opinion was rendered, Antone was executed.

A similar pattern arose in the case of Ronald Straight. Less than a month after this Court's independant view of the record compelled it to remand a capital case for resentencing, Harvard v. State, 486 So.2d 537 (Fla. 1986), Ronald Straight

litigated the last round of federal collateral review prior to his execution. On May 20, 1986, the United States Supreme Court rejected Straight's application for stay of execution. Straight v. Wainwright, 90 L.Ed.2d 683 (1986). As noted by Justice Marshsall in his dissent from the denial of a stay of execution, Straight argued that the failure of the trial court to consider non-statutory mitigating factors violated Lockett v. Ohio. Id, at 686. Justice Marhsall cited to the Harvard opinion as well as Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985) in support of his views. However, five members of the high court disagreed. Writing for the majority, Justice Powell outlined Straight's previous litigation history and came to the conclusion that Straight's case presented no basis for relief. In the majority's view, the Eleventh Circuit's decision not to allow Straight to litigate the Lockett claim due to procedural default was correct. The Court also held that Straight's attempt at a second successive petition was an abuse of the writ.

Justice Brennan, with whom Justice Marshall and Justice Blackman joined, dissented from this ruling. They held:

> This issue is similar to one presented in Darden v. Wainwright, No. 85-5319, a case that has been argued but not yet decided by the court, and other petitions that are before the court that have not yet been acted upon."

Despite this protest, Straight was executed.

When the Darden case came before the United States Supreme Court, the result was significant. Less than two weeks after the Supreme Court accepted Hitchcock v. Dugger for review, the Court issued its opinion in Darden v. Wainwright, 477 U.S. _____, 91 L.Ed.2d 144 (1986). The Court rejected Darden's claim that trial counsel's interpretation of Florida's statutory list of mitigating factors as an exclusive list rendered his counsel constitutionally ineffective. 91 L.Ed.2d at 160. Of special

significance is the fact that the United States Supreme Court recognized and approved of the mere presentation standard:

> We express no view about the reasonableness of that interpretation of Florida law, because in this case, the trial court specifically informed Petitioner and his counsel just prior to the sentencing phase of trial that they could "go into any other factors that might really be pertinent to full consideration of your case and the analysis of you and your family situation, your causes or anything else that might be pertinent to what is the appropriate sentence." (R 877). At that point, even if counsel previously believed the list to be exclusive, they knew they were free to offer non-statutory mitigating evidence, and chose not to do so. (emphasis added)

Surprisingly enough, none of the dissenters in the Darden case took specific objection to that adoption of a mere presentation standard. Thus, in the two cases that were decided contemporaneous with the acceptance of the Hitchcock case, the Supreme Court specifically adopted a mere presentation standard analysis with approval and reaffirmed the notion that Lockett claims were not subject to exception from procedural bar analysis.

The Court's most recent Eighth Amendment case is Booth v. Maryland, _____ U.S. _____, 107 S.Ct. 2529, 41 Cr.L.R. 3282 (1987). In that case, the Supreme Court held that the Eighth Amendment prohibits a capital sentencing jury from considering victim impact evidence. The Respondent suggests that Booth is no different from Hitchcock v. Dugger in that it merely extends the Eighth Amendment analysis to the facts of the particular situation.

Significantly, the Fifth Circuit Court of Appeals has refused to allow a procedural default on a Booth v. Maryland claim to be excused. Thompson v. Lynaugh, 821 F.2d 1080 (5th Cir. 1987). In the Thompson case, the state court had held that there was a waiver due to lack of objection at trial. Id, at

1082. Recognizing the procedural default, the Fifth Circuit went on with an analysis of whether the bar could be excused. The court concluded:

> Absent a showing of cause, we must also conclude that Thompson cannot excuse his procedural default. See Murray v. Carrier, _____ U.S. _____, 106 S.Ct. 2639, 2650, 91 L.Ed.2d 937 (1986), Smith v. Murray, _____ U.S. _____, 106 S.Ct. 2661, 2665-66, 91 L.Ed.2d 434 (1986), Engle v. Isaac, 456 U.S. 107, 129, 102 S.Ct. 558, 1572-73, 71 L.Ed.2d 783 (1982). The Supreme Court's decision in Booth does not create a sufficiently novel issue to excuse a procedural default, for it merely reiterates what the Supreme Court has previously held "the Eighth Amendment requires that sentencing in a capital murder case must focus on the individualized character of the defendant and the particular circumstances of the crime. See Booth U.S. at _____, 107 S.Ct. at _____, 41 Cr.L.R. at 1383; Zant v. Stevens, 462 U.S. 862, 878-79, 103 S.Ct. 2733, 2743-44, 77 L.Ed.2d 235 (1983); Eddings v. Oklahoma, 455 U.S. 104, 112, 102 S.Ct. 869, 875, 71 L.Ed.2d 1 (1982). Moreover, any claim of futility of objection under state law would not constitute good cause to excuse a procedural default. See Engle v. Isaac, 456 U.S. at 180, 102 S.Ct. at 1573.

Accord, Hargrave v. Dugger, 804 F.2d 1182, opinion vacated, 809 F.2d 1486 (11th Cir. 1987), review pending en banc.

In Hargrave, for which undersigned counsel is counsel of record, one issue is whether Lockett v. Ohio merely extended earlier decisions of the Supreme Court or whether it established new law so as to excuse procedural default by establishing cause. In Hargrave, the panel of the Eleventh Circuit had unanimously held that the subsequent release of Lockett after Hargrave's 1974 trial did not furnish "cause" for trial counsel's failure to object at trial. The panel cited Reed v. Ross, 468 U.S. 1 (1984), and Antone, supra, 706 F.2d 1534 in support of its position. This case was argued before the en banc court in June of this year and an opinion should be forthcoming.

Respondent asserts that these cases show that the federal courts do not perceive that new Eighth Amendment cases from the Supreme Court constitute novel issues so as to excuse cause for a default. In this case, Cooper is squarely in default. He did not object to the proposed jury instructions at trial and he did not raise these issues on appeal. As such, he is not entitled to relief at this time. See United States v. Frady, 456 U.S. 152, 71 L.Ed.2d 816, 102 S.Ct. 1584 (1982) decided the same term as Engle v. Isaac, supra where the Court reversed a lower court for applying the standard of review available on direct appeal to non objected to trial errors - the so-called "plain error" test instead of applying the standard of review announced in Wainwright v. Sykes, 433 U.S. 72, 53 L.Ed.2d 594, 97 S.Ct. 2497 (1977) to be used when the alleged error is first presented in a collateral attack. In Frady as here, the trial counsel did not object to a jury instruction. Frady, 456 at 167.

Even assuming Cooper could establish cause, he could not establish actual prejudice. Indeed, he has not attempted to do so. The best Cooper can show is at the time he robbed the store and killed the police officer in this case, he may or may not have had a job or been seeking a job. Respondent knows of no such case from this court or any federal court which even remotely suggests that this meager allegedly "mitigating" evidence, if introduced, would probably have changed the outcome in this case. Cooper was involved in the murder of a law enforcement officer who was trying to stop Cooper and his accomplice from completing their escape from an armed robbery. To even suggest that a jury in this state would find his attempt to find a job or his desire to get married outweighed the severity of his crime or justified a lighter sentence, is to ignore a long line of Florida case history. Compare Suarez v. State, 481 So.2d 1201 (Fla. 1986); Raulerson v. State,

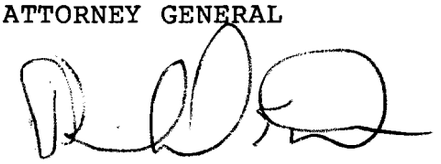
358 So.2d 826 (Fla. 1978); Fitzpatrick v. State, 437 So.2d 1073 (Fla. 1983). Kennedy v. State, 455 So.2d 37 (Fla. 1984). This overwhelming public sentiment in favor of treating "cop killers" with great severity has recently been incorporated into Section 921.141(5), Florida Statutes as a statutory aggravating factor. See Chapter 87-368, Laws of Florida effective October 1, 1987.

## CONCLUSION

Based upon the foregoing legal authority Respondent urges this Court to summarily deny the petition for writ of habeas corpus in that the Petitioner fails to state factual basis upon which relief could be granted or in the alternative upon a finding that the claim although factually legitimate is procedurally barred and not excused by either cause or actual prejudice.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

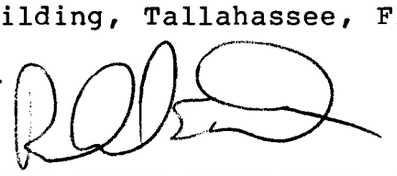


RICHARD E. DORAN
ASSISTANT ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FLORIDA 32399-1050
(904) 488-0290

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by United States Mail to Judith J. Dougherty, Attorney at Law, 906 Thomasville Road, Tallahassee, Florida 32303 and Randy Hertz, New York University School of Law, 7115 Broadway, 4th Floor, New York, New York 10003 and to Ray Marky, Assitant State Attorney, Lewis State Bank Building, Tallahassee, Florida 32301, this 5th day of October, 1987.



RICHARD E. DORAN
Assistant Attorney General