IN THE SUPREME COURT OF FLORIDA

WILLIAM MELVIN WHITE,

Applicant/Petitioner,

vs.

STATE OF FLORIDA, RICHARD L. DUGGER, Secretary, Florida Department of Corrections,

Respondents.

_____/

CASE NO. 71184

(Former Appeal No. 55,875)

RESPONSE TO APPLICATION FOR RELIEF PURSUANT TO HITCHCOCK V. DUGGER

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IN THE SUPREME COURT OF FLORIDA

WILLIAM MELVIN WHITE,

Petitioner,

vs. CASE NO. 71,184

STATE OF FLORIDA, et al.,

Respondent.

_____/

RESPONSE TO APPLICATION FOR RELIEF PURSUANT TO HITCHCOCK V. DUGGER

Respondents, by and through the undersigned assistant attorney general, respectfully request this honorable court to deny the application for relief pursuant to Hitchcock v. Dugger, 107 S.Ct. 1821 (1987), and as grounds therefor state:

JURISDICTION

William Melvin White presents the issue of the alleged restricted consideration of mitigating circumstances disapproved by Hitchcock v. Dugger, 107 S.Ct. 1821 (1987). This court has recently entertained this issue by way of original action. Riley v. Wainwright, ___So.2d___, 12 F.L.W. 457 (Fla. Sept. 3, 1987); Downs v. Dugger, ___So.2d___, 12 F.L.W. 473 (Fla. Sept. 9, 1987). The intervening decision in Hitchcock, however, does not always require examination of such issue and may not constitute a per se fundamental change in Florida law. See, Agan v. Dugger, 508 So.2d 11, 12 (Fla. 1987); Delap v. Dugger, No. 71,194 (Fla. Oct. 8, 1987); Alvord v. Dugger, No. 71,192 (Fla. Sept. 28, 1987).

COURSE OF PRIOR PROCEEDINGS

As this court found on direct appeal, White was a member of a Kentucky chapter of the Outlaws, a motorcycle gang, but was visiting the Orlando chapter. A group of the Outlaws, accompanied by some girl friends, visited an Orlando nightclub where they met Gracie Mae Crawford. Gracie Mae accompanied some of the Outlaws back to their Orlando clubhouse. White retired to a bedroom with his girl friend. Sometime thereafter White was told by Richard DiMarino that Crawford liked blacks and that they

had to teach her a lesson. White dressed and went into the kitchen area where he joined DiMarino and Guy Ennis Smith in severely beating Crawford. Whether DiMarino or White led the assault is unclear, but one witness testified of White's hitting Crawford with his fist and knocking her to the floor. After the beating, DiMarino and White placed Crawford in the middle of the front seat of White's girl friend's car. White started driving but along the way stopped the car and DiMarino drove the car to the end of a deserted road. (The victim, White and DiMarino had done a lot of drinking that evening, but White's girl friend testified that he knew what he was doing.) After they stopped the car, DiMarino and White pulled Crawford from the car, passed her over a barbed wire fence, and laid her on the ground. White then straddled her, took out his knife, stabbed her fourteen times and slit her throat. He handed the knife to DiMarino who also cut her throat. Crawford died as a result of the wounds inflicted upon her.

While leaving the area White and DiMarino ran out of gas at the Seaworld parking lot and were later identified by Seaworld security guards who had given them gas. Because they had been seen, White and DiMarino went back and picked up the body and discarded it at a different place. The body was discovered that afternoon. White v. State, 415 So.2d 719 (Fla. 1982).

On July 11, 1978, White was indicted for first degree murder (R 1376). Trial by jury was held on November 27 to November 30, 1978 (R 1582). The penalty phase was held on December 20, 1978 (R 801-835). No additional evidence was presented, but arguments were heard. The jury returned an advisory recommendation of a sentence of death by a 12-0 vote and the trial court immediately imposed a sentence of death (R 827, 832, 1629). The trial court found as aggravating factors that: (1) the murder was committed during the commission of a kidnapping; (2) the murder was committed to disrupt or hinder the enforcement of laws; and (3) the murder was especially heinous, wicked and cruel. Although no testimony was presented of any mitigating circumstances, statutory or nonstatutory, the trial judge found the statutory

mitigating circumstance of no previous felony convictions (R 1645-1650).

At the beginning of voir dire the judge told the jurors about the second part of the trial where the jury would be called upon to hear aggravating or mitigating circumstances (R 10). Their consideration was not limited to statutorily enumerated mitigating factors. The judge explained that in the event a verdict of guilty was rendered, "as soon as practicable, evidence is presented to the same jury as to **any matter relevant to the sentence, including aggravating or mitigating circumstances.**" (R 11). The prosecutor then informed the jury that there would certain guidelines in the second phase: ". . .There is a statute listing aggravating circumstances and **some mitigating circumstances** and you would follow those in the second phase in making your recommendation to the court." (R 16-17). No indication was given that the statute was inclusive of all mitigating circumstances. While ascertaining whether the prospective jurors could base their sentencing decision on the law and the evidence, the prosecutor later stated that "the law . . . covers aggravating circumstances that you could consider and mitigating circumstances which you could consider." (R 28).

At the penalty phase the judge told the jurors that "this is the part in which we will talk about the aggravating and mitigating circumstances." (R 803). The state relied on the evidence adduced at the guilt phase and summed up the same for the jury. The prosecutor told the jury:

> And again, you are going to be given jury instructions outlining in detail exactly what the aggravating circumstances are that you're to consider. And they will outline in detail those mitigating circumstances that you're to consider. So you'll be told by the judge what they are. You'll have a written copy of them to take back with you and read verbatim as to what he will tell you.
>
> * * *
>
> I have prepared for the purpose of our discussion here an outline of the aggravating and mitigating circumstances. And I would like to go through these with you one at a time to show you what we're talking about and

> what applies and what doesn't.
>
> I don't know if you can see this or not, but, anyway, you'll have these instructions with you. What we've done is prepared just an outline. And don't go by this verbatim, but go by the instructions. But this is an outline to essentially what they are, with the aggravating circumstances in this column and the mitigating circumstances in this column.

(R 805-806).

The prosecutor indicated that he would be going over the mitigating circumstances to demonstrate why they were applicable or inapplicable (R 805). He indicated, however, that he would be covering them from the **"prosecution's standpoint"** and that **"I expect that counsel will also want to cover those for the defense."** (R 805). The outline, thus, encompassed only those mitigating factors that the prosecutor could reasonably expect the defense to rely on. The prosecutor then discussed the applicability of the statutory aggravating and mitigating factors and indicated that the only mitigating circumstance that might be applicable would be the lack of a significant history of criminal activity since there was no evidence of prior criminal activity (R 806-815).

The defense presented no testimony of <u>any</u> mitigating circumstances, statutory or nonstatutory, and no limitations were put upon the defense by the trial judge. Nothing in the record reflects even a desire on the part of defense counsel to present testimony as to nonstatutory mitigating circumstances.

In rebuttal of the state's argument, the defense argued that DiMarino was the only witness to testify that petitioner murdered the victim and that in order for the jury to agree with the prosecutor they must believe DiMarino who only faced a minimum of fifteen years imprisonment, although, if his statement was true, he was equally guilty, yet the prosecutor sought the death penalty only for petitioner (R 817). Counsel then argued against the applicability of the aggravating factors that the murder was committed during a kidnapping; to avoid a lawful arrest; and the murder was heinous, atrocious and cruel (R 817-819).

In mitigation the defense argued that a person who had just

consumed a quart of whiskey could not have the necessary mental capacity to formulate ideas and future thoughts and that there was evidence that petitioner acted under the domination of DiMarino, recounting that DiMarino allegedly said "you kill her and then you can't testify against me." (R 819). Counsel then concluded his argument, imploring the jury: "When you go back, look at that list in the jury room. Weigh the mitigating factors. Weigh the aggravating factors. And I ask you to come back with the other alternative, not the death penalty, but the life sentence." (R 820). There is no indication in the record that the reference to the statutory list was made because counsel perceived a limitation on the jury's consideration of mitigating circumstances.

The jury was then instructed by the judge that it was their duty to follow the law as given by the court and to render an advisory sentence based upon their determination as to whether sufficient aggravating circumstances existed to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist (R 820). The jury was further instructed that their verdict should be based upon the evidence which they heard while trying the guilt or innocence of the defendant and the evidence that had been received (R 821). The judge then listed the aggravating circumstances for the jury's consideration (R 821-823). In regard to the consideration of mitigating circumstances, the jury was instructed: "The mitigating circumstances which you may consider, if established by the evidence, are these." The court then listed the statutorily enumerated mitigating circumstances (R 823). **No objection was interposed by defense counsel to the instruction** (R 823-827).

The prosecutor during argument alluded to the fact that the jurors would be provided with a written copy of the jury instructions. The record does not reflect, however, that they were so provided with a copy. Counsel were shown what was sent into the jury room but the items were not identified for the court reporter (R 926). The instructions merely indicate that

they were filed in open court on the date of the penalty hearing (R 1622).

In sentencing petitioner, the judge orally stated:

> ...This Court, after weighing the aggravating and mitigating circumstances, finds that sufficient aggravating circumstances exist as enumerated in Florida Statute 921.141(5) to require imposition of the death penalty, and that there are insufficient mitigating circumstances as enumerated in subsection (6) to outweigh the aggravating circumstances.

(R 831). The court then inquired as to whether anyone wished to offer any testimony or make any statement before pronouncement of sentence. Defense counsel declined the offer and the defendant responded "No, I ain't got nothing to say on the record." (R 832).

In his written finding of fact in support of the death sentence the judge stated: "In determining whether the Defendant should be sentenced to death or life imprisonment; the Court is mandated by Section 921.141(5) Florida Statutes (1977), to apply the facts to certain enumerated aggravating circumstances and **such mitigating circumstances as one applicable in this case.**" (R 1648). The sentencing order reflects the recital of statutorily enumerated mitigating circumstances with only circumstance (a) being found applicable; that the defendant was not previously convicted of any felonies (R 1649). The sentencing order later recites, however:

> The sentence to be imposed is not to be determined simply by subtracting the number of mitigating circumstances from the number of aggravating circumstances. The sentence to be pronounced must be based on the **totality of the evidence**, as applied to the enumerated "aggravating" circumstances and **such "mitigating" circumstances are applicable.** The "aggravating" circumstances have been proven beyond and to the exclusion of every reasonable doubt. One "mitigating" circumstance is present, however, it is not sufficient to outweigh the "aggravating" circumstances (R 1650). (emphasis supplied).

As the records of this court will reflect, on direct appeal petitioner attacked his sentence on the basis that the statutory mitigating factors of age and domination by a co-defendant were

not found and that there was a disparity in petitioner's and DiMarino's sentences. See, Initial Brief of Appellant, pgs. 41-50. In a per curiam opinion filed April 1, 1982, this court affirmed petitioner's conviction of first degree murder and sentence of death. In a motion for rehearing petitioner raised the issue for the first time that the jury's consideration of mitigating factors was limited to those expressly set out in the statute and that the judge's consideration was limited, as well. Mitigating factors that should have been considered were the disparate sentence received by DiMarino, doubt about guilt or at least whether petitioner was the one who actually committed the killing and drug and alcohol use. Motion for Rehearing, pgs. 7-8. An order of July 8, 1982 indicates that the opinion filed April 1, 1982 was revised on page three and in view of this the motion for rehearing was denied. This court subsequently held:

> ...The jury unanimously recommended the imposition of the death sentence. The trial judge found three aggravating factors and recited his reasons therefor. No testimony was presented of any mitigating circumstances, statutory or nonstatutory, but the trial judge found the mitigating circumstance of no previous felony convictions. We are satisfied that the trial judge weighed the aggravating circumstances against this and any other mitigating circumstances in pronouncing sentence.

White v. State, 415 So.2d 719, 721 (Fla. 1982).

In a later motion to vacate judgment and sentence filed in the circuit court on October 13, 1983, petitioner complained that defense counsel was ineffective for failing to properly investigate and present mitigating evidence at sentencing of petitioner's intoxication and the basis for DiMarino's testimony because of his belief that there was nothing he could do to avoid the imposition of the death sentence. See, Motion to Vacate, pg. 21. Counsel was further condemned for not objecting to the limiting jury instructions precluding consideration of the nonstatutory mitigating circumstances of residual doubt about guilt and petitioner's intoxication. Motion to Vacate, pgs. 26-27. The motion to vacate judgment and sentence is before the circuit court pending resolution of the issues presented to this

court.

In the present petition it is argued that the disparate treatment of DiMarino, residual doubt about guilt, and petitioner's intoxication were not properly considered as nonstatutory mitigating factors by the jury and judge below.

ARGUMENT

The respondents would first submit that the issues presented in the application for relief are not properly before this court. Residual doubts about a defendant's guilt, as a matter of Florida law, cannot be considered in mitigation by either the judge or jury. Buford v. State, 403 So.2d 943, 953 (Fla. 1981); Burr v. State, 466 So.2d 1051, 1054 (Fla. 1985); King v. State, 12 F.L.W. 502 (Fla. Sept. 24, 1987). Defense counsel, in any event, was allowed to hammer on this theme in closing argument at sentencing (R 817-819). The jury was told that before they apply the aggravating circumstances and reject the mitigating circumstances, as argued by the prosecutor, they must first believe that everything DiMarino testified to was true (R 816). Counsel, thus, used residual doubt about guilt to attack the entire statutory sentencing matrix rather than present it as a weaker nonstatutory factor. See, Echols v. State, 484 So.2d 568, 577 (Fla. 1985)("One of the unfortunate side effects of admitting any and all nonstatutory mitigating evidence is that it encourages the introduction of evidence which, in the context of the case, carries very little weight.) This case cannot be considered one where the quantum of proof foreclosed doubts as to guilt. Cf. Melendez v. State, 498 So.2d 1258, 1262-1263 (Fla. 1986). (Barkett, J. concurring specially.) Thus even if this issue was cognizable, relief would be precluded.

On appeal, this court was fully aware of not only DiMarino's role in the murder and his mental state at the time thereof, but the lesser sentence that he received. This court held: ". . . In affirming the sentence we are fully aware that DiMarino escaped with a conviction of a third-degree murder. While this is fortunate for him, it does not require the reduction of White's sentence. White was the executioner, and his sentence is

warranted." White v. State, 415 So.2d 719, 721 (Fla. 1982). This court is an appropriate forum to make such determination. Cabana v. Bullock, ____U.S.___, 106 S.Ct. 689, 697-698 (1986). Thus, as in Agan v. Dugger, 508 So.2d 11 (Fla. 1987), the intervening decision in Hitchcock v. Dugger, ___U.S.___, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987) does not require this court to reexamine this issue as it presents no new issues of law as to this case. As in Agan, this court has disposed of this issue adverse to petitioner in his previous appeal to this court, specifically stating "We are satisfied that the trial judge weighed the aggravating circumstances against this and any other mitigating circumstances in pronouncing sentence." White v. State, 415 So.2d 719, 721 (Fla. 1982). Habeas corpus or original actions are not vehicles for obtaining additional appeals of issues which were raised on direct appeal. White v. Dugger, 12 F.L.W. 433 (Fla. August 20, 1987). See Aldridge v. State, 503 So.2d 1257 (Fla. 1987)(Opportunity to present Lockett/Eddings claim in earlier petition or motion for relief precludes raising the ground on a subsequent petition).

In terms of the judge's consideration of nonstatutory mitigating circumstances, it should not be overlooked that a Hitchcock situation is not presented here. In the sentencing order the trial judge did not refer to "insufficient mitigating circumstances as enumerated in Florida Statute 921.141(6) to outweigh the aggravating circumstances." Instead, the judge wrote: "In determining whether the Defendant should be sentenced to death or life imprisonment; the Court is mandated by Section 921.141(5) Florida Statutes (1977), to apply the facts to certain enumerated aggravating circumstances and such mitigating circumstances as one applicable in this case." (R 1648). The sentencing order further recites: "The sentence to be pronounced must be based on the totality of the evidence, as applied to the enumerated 'aggravating' circumstances and 'such mitigating circumstances are applicable'." (R 1650). Despite his reference to enumerated mitigating circumstances in the oral pronouncement of sentence, the written findings do not indicate that

consideration of mitigating circumstances was statutorily proscribed, but rather were circumscribed only by the quantity and quality of mitigating evidence actually presented. Thus, reversible error is not present where the final word of the ultimate sentencer does not reflect restricted consideration of mitigating circumstances. Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987).

Even if it could not be fairly said that this court's previous opinion embraced and decided the issue presented herein, the issue is still not properly before this court. The state would submit that matters alleged in the motion to vacate judgment and sentence preclude the granting of relief by this court. In said motion the alleged failure to present such nonstatutory mitigating evidence or argue it more fully was attributed to a failure to investigate on the part of counsel, not attributable alone to any perceived limitation by counsel on the presentation of mitigating circumstances. Such an issue should not be resolved in the guise of a Hitchcock claim. Logic dictates that an ineffective assistance of counsel claim should first be presented to the circuit court so that the cause for a procedural default may first be ascertained. Murray v. Carrier, ___U.S.___, ___ 106 S.Ct. 2639, 2644-2646 (1986). Consideration of what evidence was reasonably available and the reason for its nonproduction should be litigated below in the context of an ineffective assistance of counsel claim. See, Jackson v. State, 438 So.2d 4, 6 (Fla. 1983)(McDonald, J., dissenting in part, concurring in part.)

It should also be remembered that counsel presented no testimony in mitigation and his argument was directed at the applicability of the statutory aggravating and mitigating circumstances. The record being devoid of any reason therefor, it certainly cannot be said that the jury or judge limited their consideration to only statutorily enumerated mitigating circumstances when that was all that was presented to them. Thus, this court's holding that "we are satisfied that the trial judge weighed the aggravating circumstances against this and any

other mitigating circumstances in pronouncing sentence" could, alternatively, reasonably be construed as an implicit finding of default.

Defense counsel made no objection to the judge's instruction to the jury or his findings of fact in support of a sentence of death as he was required to do under Florida law and the issue was waived for purposes of appeal. Fla. R. Crim. P. 3.390(d); State v. Smith, 240 So.2d 807 (Fla. 1970); Wainwright v. Sykes, 433 U.S. 72 (1977). The issue was then doubly defaulted upon by failure to raise the issue on direct appeal. Under Florida law, an argument cannot be raised for the first time in a petition for rehearing. See, Delmonico v. State, 155 So.2d 368 (Fla. 1963); Reid v. Johnson, 106 So.2d 624 (Fla. 3d DCA 1958); Leslie Bros. v. Roope, 108 Fla. 289, 148 So. 212 (1933); Price Wise Buying Group v. Nuzum, 343 So.2d 115, 117 (Fla. 1st DCA 1977). In the present case, although the court entered a revised opinion to include the finding of a statutory mitigating factor and to reflect consideration by the trial judge of mitigating factors, the fact remains, that the petition for rehearing was denied. Petitioner has, thus, committed procedural default and foreclosed his right to review of his jury instruction claim. See, Hargrave v. Dugger, 804 F.2d 1182, opinion vacated, 809 F.2d 1486 (11th Cir. 1987), review pending en banc.

There exists no obstacle to the application of a procedural bar in this case. The result reached in Hitchcock v. Dugger, 107 S.Ct. 1821 (1987) was obtained in a situation wherein no procedural bar was ever discussed by any state or federal court. See, Hitchcock v. State, 413 So.2d 741 (Fla. 1982); Hitchcock v. State, 432 So.2d 42 (Fla. 1983); Hitchcock v. Wainwright, 745 F.2d 1332 (11th Cir. 1984); Hitchcock v. Wainwright, 770 F.2d 1514 (11th Cir. 1985); Hitchcock v. Dugger, 107 S.Ct. 1821 (1987). Hitchcock v. Dugger, 107 S.Ct. 1821 (1987) merely held that in instances where the state has not argued procedural default a capital defendant may seek relief from his death sentence by demonstrating that the jury and judge ignored the requirements of Lockett v. Ohio, 438 U.S. 586 (1978).

Pursuant to Wainwright v. Sykes, 433 U.S. 72 (1977), procedural bars may be lifted by a showing of cause for and actual prejudice from such default. As in Antone v. Strickland, 706 F.2d 1534 (11th Cir. 1983) the petitioner cannot demonstrate cause for the procedural defaults because trial was held on Nevember 27, 1978, after the July 3, 1978 decision in Lockett, and a sentencing memorandum filed on December 18, 1978 by defense counsel reflects that counsel was aware that "the mitigating circumstances are not limited to those enumerated in the statute." (R 1814). As in Antone, actual prejudice cannot be demonstrated because counsel sought to present no nonstatutory mitigating circumstances and the court considered all mitigating circumstances presented.

Antone subsequently sought a writ of certiorari from the United States Supreme Court which was denied. Antone v. Dugger, 464 U.S. 1003, 104 S.Ct. 511, 78 L.Ed.2d 699 (1983). He then undertook another round of collateral litigation in which he unsuccessfully argued in this court and in the federal courts for relief pursuant to Lockett v. Ohio. When he reached the United States Supreme Court, see, Antone v. Dugger, 465 U.S. 200, 104 S.Ct. 962, 79 L.Ed.2d 147 (1984), seven members of that Court rejected his appeal in summary fashion. 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 purportedly not been raised in his first federal habeas petition. Among these claims was an allegation that the statute, under which he was sentenced, unconstitutionally excluded nonstatutory mitigating factors from consideration, see Lockett v. Ohio, supra. "These claims twice previously have been considered, as noted above, by the Florida Supreme Court." 104 S.Ct. of 963-964. 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 relief upon by applicant all appear to be meritless." Id, at 965.

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 independent 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, ___U.S.___, 106 S.Ct. 2004 (1986). Straight argued that the failure of the trial court to consider nonstatutory mitigating factors violated Lockett v. Ohio. 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. Straight was executed. Additionally, the United States Supreme Court recently denied certiorari in the case of Freddie Lee Hall, wherein Hall had sought to present this issue anew, after having been found to be procedurally defaulted. See, Hall v. Dugger, USSC Case No. 87-5048, slip order, (October 15, 1987)(See Appendix for copy of order and state's Brief in Opposition).

The court's most recent Eight Amendment case is Booth v. Maryland, ___U.S.___, 107 S.Ct. 2529 (1987) in which it held that the Eighth Amendment prohibits a capital sentencing jury from considering victim impact evidence. 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 a 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, 1572-1573, 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 1373; Zant v. Stevens, 462 U.S. 862, 878-879, 103 S.Ct. 2733, 2743-2744, 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.

One issue in Hargrave 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. These cases demonstrate that 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, White is squarely in default. He did not object to the jury instructions at trial and did not properly or timely 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, 456 U.S. 130, 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 (1977) to be used when the alleged error is first presented in a collateral attack. In Frady as here, trial counsel did not object to a jury instruction. Frady, 456 at 167.

Even if this court finds that the present case does not fit within the ambit of Agan v. Dugger, 508 So.2d 11, 12 (Fla. 1987), Hitchcock does not constitute a change in the law and respondents respectfully suggest that the analysis in Thompson v. Dugger, 12 F.L.W. 469 (Fla. Sept. 9, 1987) should be receded from. Petitioner in the present case was able to perceive such issue presentencing and post-Lockett on the basis of such precedents as Proffitt v. Florida, 428 U.S. 242 (1976), McGautha v. California, 402 U.S. 183, 91 S.Ct. 1454 (1971) and Commonwealth of Pennsylvania v. Ashe, 302 U.S. 51, 58 S.Ct. 59 (1937). These cases make clear the fact that a sentencer must consider all relevant evidence pertaining to the offense and the character and propensities of the offender, and that Hitchcock merely represents the latest application of such long-recognized principle of law.

It is obviously the state's contention that, because this court reached the matter of the sentencer's consideration of evidence going toward nonstatutory mitigating circumstances on direct appeal, reconsideration of this claim on habeas corpus is improper. This case must be considered to be squarely controlled by Agan v. Dugger, 508 So.2d 11 (Fla. 1987), wherein similar relief was denied. The only three areas of nonstatutory mitigating evidence cited by petitioner relate to: (1) alleged residual doubt as to guilt; (2) the complicity of petitioner's co-defendant, Richard DiMarino and (3) petitioner's use and consumption of alcohol. All three matters were presented to the jury during petitioner's trial, and there is nothing to indicate

that such jury did not fully consider them again for sentencing purposes as well. Further, in the sentencing order in this case, the judge expressly noted that the sentence to be pronounced had to be based upon the totality of the evidence and, on appeal, this court found that it was satisfied that the trial judge had weighed the aggravating circumstances against the one mitigating circumstance found "and any other mitigating circumstance." White, 415 So.2d at 721. Given the fact that petitioner's consumption of alcohol was expressly considered by the judge in determining the application of that mitigating circumstance set forth in section 921.141(6)(b) Florida Statutes (1977), it simply strains credulity for petitioner to now re-attack the sentencing court's failure to find mitigation in this regard; in his sentencing order, the judge expressly found, from the testimony presented, that although petitioner had been drinking, "he knew what he was doing" at the time he murdered the victim (R 1649). Further, in its opinion, this court expressly addressed the appropriateness of the instant death sentence when contrasted with the sentence received by Richard DiMarino. White at 722.

Accordingly, the question now becomes what more does petitioner expect from this court. The evidence which he asserts was not considered, was in fact considered both at sentencing and on appeal. To the extent necessary, or to the extent that petitioner can make a showing that it was not, respondents would contend that harmless error applies. In its recent decision in Delap v. Dugger, supra, this court expressly found that such analysis could be applied to a claim of error premised upon Hitchcock v. Dugger. Respondents respectfully contend that the instant evidence of nonstatutory mitigation, if in fact it was not considered below, would conclusively have had no effect upon the reliability of the death sentence imposed in this case. Again, respondents cannot help expressing puzzlement at petitioner's contention that the evidence was not considered. All of the matters now asserted in mitigation were argued by defense counsel to the jury as a basis for acquitting petitioner during his trial (R 716-747); the closing argument of

petitioner's counsel at the sentencing phase consisted solely of arguments that death was not appropriate due to the fact that: (1) the state's prime witness, Richard DiMarino, who had only received a fifteen year term, was unworthy of belief (R 817) and (2) petitioner was too intoxicated to have fully contemplated the offense (R 819). The death sentence in this case is premised upon a unanimous advisory verdict of death returned by the jury and the sentencing judge's finding of three unassailable aggravating circumstances. Although one statutory mitigating circumstance was found, respondents suggest that the instant evidence could have had no effect upon the weighing process. As noted, the judge expressly found petitioner's consumption of alcohol to have been insufficient to have had any effect upon his conduct at the time of the offense. As noted, this court has previously found the instant sentence appropriate, in light of that imposed upon DiMarino. As noted even earlier, this court has consistently held that residual doubt as to guilt is not a factor to be considered in mitigation. The death sentence in this case was validly imposed, and the instant petition for writ of habeas corpus should be denied.

CONCLUSION

WHEREFORE, for the aforementioned reasons, respondent moves this honorable court to deny the instant petition for writ of habeas corpus in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Response to Application for Writ of Habeas Corpus, has been furnished by mail, to Craig S. Barnard, Esq., counsel for petitioner, 301 North Olive Avenue, West Palm Beach, Florida 33401, this 16th day of October, 1987.

Margene A. Roper

Richard B. Martell
Of Counsel