IN THE SUPREME COURT OF FLORIDA

DAVID ROSS DeLAP, Petitioner, vs. RICHARD L. DUGGER, Secretary, Department of Corrections, State of Florida, Respondent.	)	CASE NO. 71,194

RESPONSE IN OPPOSITION TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW Respondent, RICHARD L. DUGGER, by and through undersigned counsel, and files this response, in opposition to the pending Petition for Writ of Habeas Corpus, and states as follows:

I

PRELIMINARY STATEMENT

This Response, and the accompanying Response in opposition to Petitioner's Application for Stay of Execution, is being filed September 30, 1987, in response to Petitioner's pleadings filed with this Court, and served on Respondent on September 25, 1987. Oral agument is set for Tuesday, October 6, 1987, at 2:00 p.m. Petitioner is under his second death warrant, signed by Governor Martinez on August 4, 1987, and set to expire at noon on Wednesday, October 21, 1987. Petitioner's execution has been set for Thursday, October 15, 1987, at 1:00 p.m.

The symbols "ea" will mean "emphasis added", and "RA" will refer to Respondent's Appendix, attached to this response and incorporated herein. "R" will refer to the Record, on Petitioner's direct appeal Case Number 56,235.

II

PROCEDURAL HISTORY

Petitioner is presently in the custody of Respondent, Richard L. Dugger, Secretary, Florida Department of Corrections,

pursuant to a valid judgment and sentence, entered by the Circuit Court of the Ninth Judicial Circuit in and for Orange County, Florida. Petitioner was originally convicted, and sentenced to death, in Okeechobee County, in 1976. (R 1871). However, his conviction and sentence were reversed by this Court, because of the State's inability to provide an adequate transcript for appellate review. Delap v. State, 350 So.2d 462 (Fla. 1977). After remand, venue was changed to Orange County, where Petitioner was convicted of first-degree murder on October 13, 1978. (R 2191). On February 16, 1979, Petitioner was sentenced to death, for the murder of Paula Etheridge. (R 2420-2421). On June 12, 1979, the trial court made specific written findings of fact, basing its imposition of the death penalty, or evidence supporting six aggravating circumstances, and one non-statutory mitigating factor, under §921.141, Florida Statutes. (R 2460-2461). A recitation of said findings, is contained in this Court's opinion, on direct appeal. Delap v. State, 440 So.2d 1242, 1254-1255 (Fla. 1983).

Petitioner appealed his conviction and sentence to this Court, raising the following twelve (12) issues:

> 1) THE COURT ERRED IN FORCING ROBERT COPPOCK, EMPLOYEE OF THE PUBLIC DEFENDER AND INVESTIGATOR FOR APPELLANT'S CASE TO TESTIFY TO CONFIDENTIAL COMMUNICATIONS MADE BY APPELLANT IN VIOLATION OF THE ATTORNEY-CLIENT PRIVILEGE AND APPELLANT'S RIGHTS TO COUNSEL AND GUARANTEES AGAINST SELF-INCRIMINATION UNDER THE STATE AND FEDERAL CONSTITUTIONS.
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> 2) THE COURT ERRED IN REFUSING TO ALLOW APPELLANT'S POLYGRAPH EVIDENCE ON THE MOTION TO SUPPRESS CONFESSIONS THEREBY DENYING APPELLANT'S RIGHTS TO PRESENT EVIDENCE AND TO FULL AND FAIR HEARING.
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> 3) THE COURT BELOW IN DENYING APPELLANT'S MOTION TO SUPPRESS CONFESSIONS BECAUSE UNDER THE TOTALITY OF THE CIRCUMSTANCES IT WAS INVOLUNTARILY MADE AND THE FRUIT OF THE LAWLESS GENERAL AND EXPLORATORY SEARCH OF APPELLANT'S HOME IN VIOLATION OF HIS RIGHTS UNDER THE STATE AND FEDERAL CONSTITUTIONS.
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> 4) THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S OBJECTIONS TO DR. SCHOFIELD'S OPINION TESTIMONY BECAUSE IT WAS NOT BASED ON REASONABLE MEDICAL CERTAINTY.

5) THE TRIAL COURT ERRED IN ADMITTING INTO EVIDENCE, OVER APPELLANT'S OBJECTIONS, THREE PHOTOGRAPHS DEPICTING THE DECOMPOSED HEAD AND NECK OF THE DECEASED.

6) THE TRIAL COURT ABUSED ITS DISCRETION IN EXEMPTING LEM BRUMLEY FROM THE RULE OF SEQUESTRATION OF WITNESSES WITH RESULTING PREJUDICE TO APPELLANT THAT DENIED HIS RIGHTS TO A FAIR TRIAL.

7) THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY ON THE MAXIMUM AND MINIMUM SENTENCES WHICH MAY BE IMPOSED FOR THE OFFENSE FOR WHICH THE APPELLANT WAS ON TRIAL.

8) THE COURT ERRED IN REFUSING TO PROVIDE WRITTEN JURY INSTRUCTIONS FOR THE JURY.

9) THE COURT ERRED IN FAILING TO GIVE APPELLANT'S WRITTEN REQUESTED JURY INSTRUCTION DURING THE PENALTY PHASE THAT MITIGATING CIRCUMSTANCES OTHER THAN THE STATUTORY ONES COULD BE CONSIDERED.

10) THE TRIAL COURT ERRED IN ALLOWING THE STATE TO INTRODUCE EVIDENCE CONCERNING PRIOR ACCUSATIONS AND ARRESTS AGAINST APPELLANT IN AGGRAVATION.

11) THE COURT ERRED IN ALLOWING THE STATE TO RELITIGATE WHETHER THE OFFENSE WAS FOR PECUNIARY GAIN AND WAS COMMITTED DURING THE COURSE OF AN ENUMERATED FELONY AT THE PENALTY PHASE IN VIOLATION OF APPELLANT'S FIFTH AMENDMENT PROTECTION AGAINST DOUBLE JEOPARDY.

12) THE COURT ERRED IN IMPOSING THE SENTENCE OF DEATH UPON APPELLANT WHICH IMPOSITION, IF SUSTAINED AND CARRIED OUT, WILL UNCONSTITUTIONALLY DEPRIVE THE APPELLANT OF HIS LIFE.

Upon addressing each issue, this Court affirmed the convictions and sentence. Delap v. State, 440 So.2d 1242 (Fla. 1983). In specifically reviewing Petitioner's death sentence, this Court invalidated the aggravating circumstance of pecuniary gain, but approved the remaining five aggravating circumstances. Delap, 440 So. 2d, supra, at 1254-1257. The Court further determined that the trial court had found a non-statutory mitigating factor, as the result of investigating Florida death row, to examine Petitioner's conduct, while there. Delap, 440 So.2d at 1257. This Court unanimously concluded that "the facts supporting the sentence of death are clear and convincing and are established beyond a reasonable doubt." Id.

The United States Supreme Court denied certiorari review of this Court's decision. Delap v. Florida, ___U.S.___, 104 S.Ct.

3559, 82 L.Ed.2d 860 (1984).

On December 19, 1985, Petitioner filed a motion for post-conviction relief, pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure in the Orange County Circuit Court. This motion sought the vacation of his conviction and sentence of death, based on the following points:

(1) Ineffective assistance of counsel;

(2) Violation of right to cross-examination of adverse witnesses;

(3) Violation of Petitioner's due process rights, arising from the State's alleged suppression of impeachment evidence, relating to the credibility of a state witness.

The trial court denied Petitioner's motion for post-conviction relief, and Petitioner appealed to this Court, arguing the following points:

> The Defendant's Motion for Post-Conviction Relief was Legally Sufficient to State a Case for Relief Based upon Denial of Effective Assistance of Counsel and the Right to Effective Cross-Examination of Adverse Witnesses.
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> The Defendant's Motion for Post-Conviction Relief was Legally Sufficient to State a Case for Relief Based Upon the Prosecution's Withholding of Material Impeachment Evidence.
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> The Errors and Omissions of Defendant's Trial Counsel and the Prosecution's Withholding of Evidence Documented in the Motion for Post-Conviction Relief, Considered Either Singly or Collectively, were so Presumptively Prejudicial to Defendant that His Conviction and Sentence of Death must be Vacated and this Cause Remanded for a New Trial.

This Court denied all relief, and affirmed the trial court's denial of post-conviction relief, on March 26, 1987. Delap v. State, 505 So.2d 1321 (Fla. 1987). Mandate was issued on June 25, 1987.

On August 4, 1987, the Governor of Florida signed Petitioner's first death warrant. Said warrant is in effect, for the period beginning at noon, October 14, 1987, and ending at noon, October 21, 1987. Petitioner's execution is presently set for 7:00 a.m. on Thursday, October 15, 1987.

III

FACTS

Respondent relies on the facts contained in this Court's prior opinions in this cause, Delap v. State, 440 So.2d 1242 (Fla. 1983); Delap v. State, 505 So.2d 1321 (Fla. 1987), and further states the following relevant facts, bearing on Petitioner's legal claim herein:

At the outset of Petitioner's sentencing hearing, held on October 14, 1978, (R 1052), defense counsel sought to present evidence to the trial court, relating to factual findings conducted in other capital trials in Florida, where defendants had received life sentences. (R 1055-1056). The trial court ultimately permitted Petitioner to present such evidence, before the court imposed the death sentence. (R 1310, 1321). The trial court further indicated that it would entertain "whatever you have assembled. You can bring people from all over the United States again." (R 1058). In its preliminary charge to the jury, the trial judge informed them that the State and defense could present evidence, relative to a sentence of life and death, and that such evidence, coupled with evidence at trial, could be considered in sentencing. (R 1059).

The State presented testimonial and documentary evidence, pertaining to Petitioner's prior violent felony convictions of unarmed robbery and assault with intent to rape. (R 1060-1075).

Defense counsel presented Dr. Michael Gilbert, a psychiatrist, at the sentencing phase. (R 1103-1157). Dr. Gilbert testified he had performed an EEG on Petitioner in December, 1975, and based on such test, diagnosed Petitioner as having a personality disorder, involving an "emotionally unstable personality, with sociopathic features." (R 1111-1112) (e.a.). Dr. Gilbert also diagnosed Petitioner as having minimal brain damage, evidenced in part by alleged susceptibility to drugs and alcohol. (R 1113-1114). Said doctor testified that sociopathic personalities, involved people "who had difficulty" conforming to the laws and rules of society. (R 1113). Dr. Gilbert conceded that the EEG test did not show the cause of Petitioner's alleged abnormalities. (R 1122).

He further acknowledged that Petitioner knew the killing of Paula Etheridge was wrong, when he committed it. (R 1134). Dr. Gilbert further testified that he held a "very guarded prognosis" for Petitioner's future recovery and treatment, and that Petitioner "could be helped," over a long period of time, but did not specify how, and to what degree. (R 1137).

Under cross-examination, Dr. Gilbert conceded that Petitioner did not necessarily commit the murder, due to brain damage, and that minimally brain-damaged people would not necessarily commit violent acts. (R 1138, 1139). He acknowledged that Petitioner had not said anything to him, about taking drugs or "angel dust," in 1975, and did not do so until January, 1978. (R 1150-1152). He further admitted that, because Petitioner did not have "gross" brain damage, he conducted no further tests, beyond the EEG. (R 1153). Dr. Gilbert further acknowledged his role as a defense witness, in the "TV intoxication" defense case of Ronald Zamora. (R 1153).

The State's first rebuttal witness, Jo Randolf, a fellow student to Petitioner, testified that on the date of the crime, June 30, 1975, she talked with Petitioner before class, and that Petitioner did not appear upset at that time, or later that night. (R 1161-1162).

Dr. Aportela testified that he conducted an evaluation of Petitioner in December, 1975, and based his evaluation and diagnosis on various reports and medical records, dating back to Walter Reed Army Hospital records, in 1969. (R 1166-1167). Dr. Aportela further based his evaluation, on Dr. Gilbert's EEG results. (R 1167). Dr. Aportela concluded that Petitioner was not under the influence of an extreme mental or emotional disturbance; was not under extreme stress, and did not have impaired mental capacities, at the time of the crime. (R 1168, 1171). The doctor further concluded that Petitioner did not have brain disease, or psychosis, but was an "anti-social personality ." (R 1171, 1174, 1176). Such a personality was explained, as a person who displayed "frequent" and "chronic anti-social behavior," as lacking the ability to postpone pleasure and gratification, and as

possessing low tolerance for frustration. (R 1171-1177, 1185, 1186). Aportela stated that such a personality could control his behavior, if he chose to, but chose not to. (R 1172, 1185, 1186). An "anti-social" personality could get angry, "to the point of violence," if he did not get gratification. (R 1173). Dr. Aportela expressly concluded that there was a "poor prognosis" for this type of individual, due to the individual's lack of recognition or awareness that he had such a problem. (R 1174). The State's witness further added that an EEG abnormality was not reasonably indicative of brain damage. (R 1176). Dr. Aportela concluded that all prior reports, including the Army records, were consistent with and confirmed his diagnosis, and that Petitioner was "frustrated" and "impulsive", at the time of the crime. (R 1183, 1184).

Dr. Haber additionally testified, as a rebuttal witness for the State. Haber maintained that Petitioner was not under extreme mental or emotional disturbance, duress or substantial mental impairment, and did not have organic brain damage. (R 1198, 1206, 1207). He characterized Petitioner as "narcissistic", and that what Petitioner wanted, was more important to him than following the rules of society. (R 1213, 1214). Dr. Haber concluded that Petitioner could not tolerate frustration, would react to it with hostility, and that Petitioner could have stopped the murder of Paula Etheridge, if he had chosen to. (R 1199, 1206). In Dr. Haber's prognosis, he doubted that Petitioner could be treated or helped at all, "without an awful lot of time." (R 1214).

At the charge conference, the prosecutor stated that Petitioner was not limited to statutory mitigating circumstances, but that he was so limited, to statutory aggravating circumstances. (R 1221-1222). The State expressly conveyed this to the jury, in his closing argument, and informed them they were not limited to statutory mitigation that the court would designate, but were so limited to statutory aggravation. (R 1239). The State referred to Petitioner's remorse, but did not limit, or convey to the jury that it could not consider same. (R 1236-1238).

Defense counsel, in closing argument, noted that the jury had to examine the testimony, presented during trial and sentencing, to determine whether aggravating circumstances outweighed the mitigating circumstances. (R 1247). At the conclusion of arguments, the trial judge again informed the jury, to base their advisory sentence on evidence heard at the trial and sentencing. (R 1256).

The jury deliberated for approximately one hour, forty-five minutes (1:45), before returning its majority recommendation for death. (R 1267).

At the sentencing hearing, held before the trial court, after ordering a presentence investigation (R 1270), on February 16, 1979, the trial judge indicated he had considered the appendix presented by defense counsel, which included a list of capital cases, like that of Petitioner, since the reinstitution of the death penalty in Florida, since 1976. (R 1310, 1321). Defense counsel argued, inter alia, that under a life sentence, Petitioner could be cured, and might be capable of functioning in society, at the conclusion of his minimum mandatory sentence. (R 1327). Defense counsel further reiterated that Petitioner had shown remorse. (R 1329-1332). Defendant himself testified to his remorse, and his desire for psychiatric help. (R 1332-1333). Defense counsel further argued that it was "wrong", to prove society's civilized nature, to murder the murderers. (R 1335). The trial judge did not in any way limit or prevent any such testimony or argument.

In his imposition of sentence, the trial court orally stated that both he, and the three doctors who testified at sentencing, argued that "Petitioner's problem is frustration" , and that Petitioner, in full knowledge of what he was doing, took out his frustrations on an innocent victim. (R 1336-1337). In his written findings of fact, the trial judge found, inter alia, that Petitioner had been convicted of a prior violent felony (unarmed robbery, assault with intent to rape); was "under sentence of imprisonment" by being on parole for these offenses, at the time of the Etheridge murder; that the murder was committed during the course of a kidnapping, robbery or rape; that the murder was "especially

cruel"; and that Petitioner created a great risk of harm or death to many persons, by driving on the road, while simultaneously holding the victim, while her body was banging against the passenger door. (R 2460-2461). In mitigation, the trial judge found Petitioner's behavior on death row, and at his trial, to be "acceptable," and that "perhaps there was some remorse" by Petitioner. (R 2460).

Any and all other relevant facts, will be referred to in the argument portion of this Response, infra.

PETITIONER'S LEGAL CLAIMS

Petitioner has maintained that he was denied his Eighth and Fourteenth Amendment rights to a fair and reliable capital sentencing proceeding, by the trial court's erroneous instruction to the jury, allegedly limiting them, in consideration of mitigation of the death penalty, to solely statutory factors.

IV

REASONS FOR DENYING WRIT

Petitioner has maintained that the alleged failure by the trial court and/or the parties, to accurately inform the jurors, at sentencing, of the lack of limitations on their consideration of mitigating factors, violated his rights to a fair and reliable capital sentencing proceeding. Petitioner relies on the decision in Hitchcock v. Dugger, ___U.S.___, 107 S.Ct 1821, 95 L.Ed.2d 347 (1987), as recently interpreted by this Court, in support of his request for habeas relief of a new capital sentencing proceeding. It is further alleged by Petitioner that, in view of this Court's ruling in Downs v. Dugger, 12 F.L.W. 473 (Fla., September 9, 1987), and Riley v. Wainwright, 12 F.L.W. 457, 458 (Fla., September 3, 1987), that the Hitchcock decision constitutes a "substantial change in the law" that benefits defendants who raised and lost a Hitchcock claim on direct appeal, and that Petitioner should obtain the benefit of a retroactive application of Hitchcock, supra. Based on the actual nature of the Hitchcock opinion, the subsequent analysis of its effect and consequences by the Federal courts, and certain past decisions of this Court, and the facts in the Record herein, Petitioner's claim must be rejected.

On the basis of Downs, supra, and Riley, supra, Petitioner initially submits that the Hitchcock decision permits retroactive re-examination and re-evaluation of his death sentence, despite the rejection of Petitioner's position on direct appeal, in September, 1983. Delap v. State, 440 So.2d, supra, at 1254. Notwithstanding those decisions, and with all due respect to this Court's sentiments therein, this Court's analysis of the retroactivity of subsequent legal rulings on post-conviction relief, to a fina judgment and sentence, in Witt v. State, 387 So.2d 922 (Fla. 1980), cert. denied, 449 U.S. 1067 (1980), mandates rejection of Petitioner's claim.

This Court's analysis in Witt, supra, specifically

distinguished the nature and degree of a "change in law" that would mandate post-conviction re-examination and "abridgement of the finality of judgments," of claims that either should have been or were raised on direct appeal. Witt, 387 So.2d, supra, at 924, 929. Those law changes, characterized as "jurisprudential upheavals," of such substantial magnitude that a right is newly created or altered, to confer a previously non-existing benefit to a defendant, are considered cognizable under Witt. Witt, at 929.[1] However, those "changes" which are classified as "evolutionary refinements" in the law, which merely extend rights previously known and existing to different or emerging factual circumstances, are not given effect, when raised on collateral review:

> To allow [such law changes] that impact would ... destroy the stability of the law, render punishments uncertain and therefore ineffectual, and burden the judicial machinery of our state, fiscally and intellectually beyond any tolerable limit.

Witt, at 929-930. With all due respect to this Court's recent rulings, the Hitchcock decision must be considered an example of this latter Witt category, and rejected as a present basis for relief as a "change in law."

It should first be significantly noted that the Hitchcock decision involved the application of the already-existing requirement of fairness, reliability and the "individualizing" of capital sentencing, in terms of full consideration of relevant mitigating evidence, to a jury instruction, and express references by a trial court judge to a limited classification of mitigating circumstances.

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[1] The Witt decision noted that Gideon v. Wainwright, 372 U.S. 385 (1963)(State must provide assistance of counsel to indigent defendants), was the type of case that represented such an "upheaval." Witt, at 929. It must be remembered that Lockett pre-dated Petitioner's sentencing hearing, unlike Riley, and that the decision relied on by Petitioner, for purposes of retroactivity, is Hitchcock, not Lockett.

Hitchcock, 95 L.Ed.2d, at 350-353. This is clearly evident from the Supreme Court's discussion of the issue, as having its genesis in the decisions in Lockett v. Ohio, supra; Eddings v. Oklahoma, 455 U.S. 104 (1982), and Skipper v. South Carolina, 476 U.S.___, 106 S.Ct 1669, 90 L.Ed.2d 1 (1982), and from its initial recitation of the issues to be resolved in Hitchcock. Hitchcock, at 350, 353. More significantly, the characterization of the Hitchcock claim, as an extension of the requirements of Lockett, Eddings and Skipper, is further evidenced by this Court's recitation and tracing of the Hitchcock claim, in cases like Riley and Downs, and that Lockett and Eddings had issued prior to Petitioner's sentencing and direct appeal, respectively. Downs, at 473; Riley, at 458. Thus, the inevitable conclusion to be drawn, from the discussion and analysis of the issue in Hitchcock and subsequent Florida cases, is that Hitchcock was an "evolutionary refinement" of Lockett.

Furthermore, the Hitchcock decision was expressly limited to its facts, and the Court therein did not hold, as a matter of law, that the type of jury instruction given therein, in and of itself, would invalidate every capital sentencing proceeding, in which it appeared. Hitchcock, at 352, 353; Elledge v. Dugger, 1 F.L.W. Fed. 1074, 1077 (11th Cir., July 20, 1987)("Hitchcock did not create a per se rule of reversal when the trial judge gives a particular jury instruction [footnote omitted]. Instead, the Court focused on the specific facts of the sentencing proceeding and emphasized that both the judge and jury believed themselves to be limited to statutory mitigating factors.") The Hitchcock decision further made it clear that the claim involved was susceptible to harmless error analysis. Hitchcock, at 353. Moreover, the Elledge decision leaves no doubt that distinguishing factual circumstances could yield a diametrically opposite result, e.g., Elledge, at

1077, 1078; Card v. State, 12 F.L.W. 475 (Fla., September 15, 1987). These circumstances do not amount to a "jurisprudential upheaval" under Witt, such that Petitioner's Hitchcock claim should now be heard by this Court.

The "evolutionary" nature of Hitchcock, has been expressly recognized as such, by this Court, in decisions prior to the recent Riley-Downs line of cases. In at least three prior decisions, this Court has refused to re-examine a death sentence, based on Hitchcock, and has specifically rejected the notion that Hitchcock, or any Florida counterpart cases[2] was such a fundamental change in law, as to be applied retroactively in post-conviction proceedings, where the claim was rejected and/or not raised on direct appeal. Agan v. Dugger, 508 So.2d 11, 12 (Fla. 1987); Copeland v. Wainwright, 505 So.2d 425, 427 (Fla. 1987); Aldridge v. State, 503 So.2d 1257, 1260 (Fla. 1987); Martin v. Wainwright, 497 So.2d 872, 874, n. 3 (Fla. 1986); and State v. Ziegler, 494 So.2d 957, 958 (Fla. 1986). Petitioner cannot reconcile his present claim of a Witt change in the law, with these prior decisions, or fulfill his burden of demonstrating how Riley and Downs are sufficiently distinct, to have created jurisprudential upheavals, where Harvard and Lucas, supra, clearly did not, on the Hitchcock issue. Id. Petitioner's attempts to relitigate the validity of his sentence on this issue, based on some evolutionary refinement and disguised in a habeas petition, should be rejected, as other such attempts have been rejected by this Court. Williams v. Wainwright, 503 So.2d 890, 891 (Fla. 1987); Witt v. State, 387 So.2d, supra, at 931 (England, J, concurring opinion).

As will be discussed in more detail, infra, Petitioner is not entitled to relief, merely on the basis of

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[2] Harvard v. State, 486 So.2d 537 (Fla. 1986); Lucas v. State, 490 So.2d 943 (Fla. 1986), relied on by Petitioner. Petition for Habeas Corpus, at 12, 14.

the instruction on the mitigating circumstances, in and of itself. Elledge v. Dugger, 1 F.L.W. Fed. 1074, 1077 (11th Cir., July 20, 1987). Factual aspects of the Record demonstrate that the jury was not limited in its consideration of mitigation. The trial court both preliminarily advised the jury, and at the end of the presenting of evidence at sentencing, that State and defense could present evidence at sentencing, and that the jury could consider all evidence presented at the trial and sentencing phase (R, 1059, 1256). Defense counsel's evidentiary presentation, at sentencing, consisted of statutory factors,[3] of extreme mental or emotional disturbance, substantial impairment, and duress,[4] (R, 1103-1136, 1210-1213); and non-statutory factors, such as Petitioner's expressions of remorse, and amenability to future psychiatric treatment. (R, 1137, 1155-1157).[5] The State's rebuttal witnesses, specifically addressed these non-statutory factors. (R, 1174, 1214). Moreover, the prosecutor clearly advised the jury, as he had previously advised the trial judge (R, 1221-1222), that it was not limited to statutory mitigating circumstances. (R, 1239):

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[3] §921.141(6)(b); (e); (f), Fla. Stat. (1977).

[4] It is apparent that defense counsel sought to elicit evidence of Petitioner's alleged brain damage and/or personality disorders, to demonstrate statutory mitigation of "extreme mental or emotional disturbance," impairment and/or duress, supra. Thus, any limitation that the allegedly offending instruction placed on the jury's consideration of mitigation, did not affect the jury's consideration of Petitioner's mental state; such "limits" were the result of defense counsel's reasonable strategy. See Jackson v. State, 438 So.2d 4, 7 (Fla. 1983)(McDonald, J, concurring in part, dissenting in part). Thus, with regard to this mental state evidence, counsel's choice to present these, as statutory mitigating considerations, prevents a finding of Hitchcock error. Id.

[5] Any claim that defense counsel's decision to heavily concentrate on statutory mitigation, because of a belief he was limited to such, is specifically rebutted by various inferences in the Record, demonstrating counsel held no such belief. (R, 1055-1056; 1155-1159; 1263-1266; 1310, 1321, 1327, 1331-1332, 1335).

> The Court will instruct you that you shall consider certain aggravating circumstances, and you are limited to it. If you feel that there are sufficient aggravating circumstances to where the death penalty should be recommended, the Court will instruct you that you should go on them and consider, and you may consider, but you are not limited to considering, certain mitigating circumstances which this Court will enumerate what the mitigating circumstances are.
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> * * * *
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> ... if the aggravating circumstances are such that they override whatever mitigating circumstances you might consider, then you should advise the death penalty.

(R, 1239-1240)(emphasis added)("e.a."); Card, 12 F.L.W., supra, at 476. The prosecutor further discussed, in his closing argument to the jury, the possible non-statutory mitigating value of Petitioner's mental state evidence:

> We do not deny the fact that he may have had some anxiety or an emotional disturbance of some kind, but not to the extreme that it would cause the act, and then the fact you would come in and say that he had some emotional feelings at that time, therefore, he should not have to face up to the penalty.

(R, 1244)(e.a.). In addition, the State trial judge did not limit, exclude or prevent evidence or arguments on mitigation, whether statutory or non-statutory, infra. Thus, given the evidence presented, the Court's instructions to consider evidence at sentencing, and the prosecutor's clear expression to the judge and jury that no limitations on such consideration existed, this Record does not demonstrate that the offending instruction affirmatively precluded the jury's consideration of non-statutory mitigating circumstances. Hitchcock; Card, supra.

Respondent is not unaware of this Court's stance, on the effect of "mere presentation" of evidence, of non-statutory mitigation. Downs; Riley. As just discussed, the circumstances on this Record, go well beyond "mere presentation." Additionally, the presentation of non-staturory mitigation is not insignificant as a factor in a Hitchcock analysis, since such presentation, without limitation, demonstrates that neither the court, State or defense counsel believed such evidence or argument to be limited. Compare, Elledge, supra; Card, supra, with Harvard v. State, 486 So.2d 537 (Fla. 1986)(trial court stated that he felt limited to statutory mitigation); Thompson v. Dugger, 12 F.L.W. 469, 470 (Fla., September 9, 1987)(trial court sustained State's objection to defense counsel's argument to jury, that it could consider non-statutory mitigation). Furthermore, in Darden v. Wainwright, 477 U.S.___, 106 S. Ct___, 91 L.Ed.2d 144, 160 (1986), the U.S. Supreme Court relied on a trial court judge's statement, permitting "presentation" of non-statutory evidence, as mandating rejection of a claim that such non-statutory evidence was not considered. It must not be overlooked that in Hitchcock, supra, and in decisions like Harvard, supra, and Lucas, supra, those decisions did not reject examination of "presentation" of non-statutory mitigation, as a factor in evaluating a Hitchcock claim. Hitchcock; Harvard; Lucas. In fact, this Court's recent opinions in Card, Downs and Riley demonstrate an evaluation, based in part on what the jury was otherwise informed, beyond the standard instruction, that it could consider in mitigation. Card, at 476; Downs, at 474; Riley, at 459.

Petitioner has characterized the prosecution and defense closing arguments, as additional evidence that the jury was limited in its consideration of mitigation. However, it is an inescapable conclusion that the State's ex-

press statements on consideration of aggravating and mitigating factors, (R, 1239), was not limiting under Hitchcock.[6] Furthermore, the State was not suggesting, as implied by Petitioner, that the jury could not consider evidence of Petitioner's remorse, but that such evidence should not be accepted, as rising to the level of a mitigating circumstance. (R, 1237-1238). This conclusion is substantiated by the prosecutor's advice to the jury to consider the evidence heard at sentencing (R, 1238), some of which clearly included references to remorse, as already detailed herein. Thus, as in Card, supra, this factor supports the conclusion that Petitioner's sentencing proceeding was not infected by Hitchcock error.

Petitioner's construction of defense counsel's closing argument, is similarly selective, taken way out of context, and does not support any conclusion that such argument limited the jury in any inappropriate manner. Defense counsel's admonition that the jury follow the instructions, Petitioner's Petition for habeas corpus, at 11, n. 4, was directed towards focusing the jury's attention on the aggravating circumstances to be spelled out by the court, and explaining the "change of hats" by defense counsel, in accepting the guilty verdict, in transition to the sentencing phase. (R, 1247-1248). Defense counsel further urged the jury that, in its evaluation of aggravating and mitigating circumstances, "... you have got to look at the testimony that was presented both during the trial and the second phase to make a determination here." (R, 1247). Thus, contrary to Petitioner's impression, defense counsel did not merely inform the jury to blindly rely on the

[6]Such Record reference demonstrates that the prosecutor was informing the jury that they were not limited to those "enumerated" mitigating circumstances the court would read, particularly in the light of the prosecutor's admonition, in the same paragraph, that aggravating circumstances were so limited. (R, 1239).

court's instructions, and consider nothing more than statutory mitigation.

Once Petitioner's mischaracterizations of the parties' closing arguments are eliminated, his argument is reduced to mere reliance on the instruction alone, and its "reinforcement," when sent back to the jury in writing. As already argued, the Elledge decision, and the language of Hitchcock itself, completely dispels the notion that a defective instruction, like the one in Hitchcock, mandates a new sentencing hearing. Elledge, 1 F.L.W. Fed., supra, at 1077, 1078; Hitchcock, 95 L.Ed.2d, at 350-353. This Court's recent decisions have not invalidated a death sentence, on a Hitchcock claim, solely based on the instruction itself. Morgan v. State, 12 F.L.W. 433, 434 (Fla., August 27, 1987)(instruction, plus silent order on non-statutory mitigation considered); Thompson v. Dugger, 12 F.L.W. 469, 469-470 (Fla., September 9, 1987)(limits by State in closing argument, to statutory mitigation; exclusion of defense argument that mitigation not limited, in addition to instruction); Downs, supra, at 474 (instruction, plus prosecutor's argument limiting mitigation, and trial court's comment and provision of copy of instructions); Riley, supra, at 459 (instructions, plus trial judge's and prosecutor's comments, and trial court's express limits in sentencing order). Thus, even under this Court's analysis, in cases where habeas relief was granted, there were additional factors relied upon, on a case-by-case basis, which lead to a conclusion of Hitchcock error. Id.[7] Those additional factors, when examined herein, as in Card, warrant denial of the relief Petitioner requests.

By focusing exclusively on the jury's considera-

[7]Similarly, in Card, supra, this Court did not merely rely on the absence of a limiting instruction, per se and alone, to reject a Hitchcock claim, but further examined and discussed the comments and statements by State and defense. Card, supra, at 476.

tion of mitigation, Petitioner has wholly ignored the effect and impact of the trial court's consideration of mitigating circumstances. Notwithstanding the jury's understanding of the scope of mitigation to be considered, the role of jury and judge in Florida capital sentencing, casting the judge as the ultimate "sentencer" and the jury as advisory, Pope v. Wainwright, 496 So.2d 796, 805 (Fla. 1986), mandates that the focus of a Hitchcock inquiry be on the judge's consideration of mitigation:

> The trial judge, alone, makes the ultimate decision as to sentencing in capital cases [citation omitted]. When the trial judge has the proper view of the law --- as is evident from the Record --- and imposes sentence based not only on statutory, but also on non-statutory factors, the resulting sentence meets the constitutional parameters outlined in Lockett [citation omitted].

Elledge, supra, at 1078 (e.a.); see also Jones v. Wainwright, Case No.: PCA 82-0697 (RV, Supplemental Report and Recommendation, Magistrate Susan Novotny (ND Fla., June 2, 1987), at ppg. 8-9. (Respondent's Appendix, attached hereto). In analogous circumstances, involving claims by capital defendants that a jury instruction at sentencing mislead them as to their proper role and considerations in deciding upon a sentence, this Court has unhesitatingly approved and focused upon the role of the trial court as capital sentencer. Copeland v. Wainwright, 505 So.2d 425, 427 (Fla. 1987); Aldridge v. Wainwright, 503 So.2d 1257, 1259 (Fla. 1987); State v. Sireci, 502 So.2d 1221, 1223-1224 (Fla. 1987); Pope, supra. The Federal courts have repeatedly approved the Florida capital sentencing scheme, which makes the trial court the actual sentencer, and have additionally directed their attention, to the actions of the trial court, regarding appropriate consideration of mitigation. Spaziano v. Florida, 468 U.S. 447 (1984); Profitt v. Wainwright, 428

U.S. 242 (1976); Darden v. Wainwright, 91 L.Ed.2d, at 160; Elledge. The analysis in Elledge, and the analysis by this Court in Pope and its progeny, on a jury instruction issue, indistinguishable in effect and scope from the Hitchcock issue, should apply herein. This position does not render the capital sentencing jury superfluous; rather, it places the focus of whether any error occurred, affecting a death sentence, on the actual sentencer, under a statutory scheme, upheld against Constitutional attack, which recognizes the jury's role as advisory. Elledge; Hitchcock; Pope, supra. Under such an appropriate analysis, it is apparent, as conceded by Petitioner, Petition for Habeas Corpus, at 8, that the trial court did not limit its consideration to purely statutory mitigating circumstances. (R, 2460); Delap, 440 So.2d, at 1252, 1254-1255. The trial judge's written sentencing order, as well as, inter alia, the trial court's comments, inviting the presentation of anything in mitigation (R, 1058), and the trial court's admission of non-statutory evidence and argument (as already documented), clearly demonstrates that the trial court "ha[d] the proper view of the law." Elledge, at 1078; Jones v. Wainwright, supra, at 8.

Assuming arguendo the existence of Hitchcock error, this Court must address the question of whether such error was harmless. Hitchcock, at 353; Elledge, at 1078; Downs, at 474; Riley, at 459. In responding to this question, Petitioner has sought to re-visit and re-argue the validity of certain aggravating circumstances, that were already addressed by this Court, on direct appeal. Petition, at 12, 13; 13, n. 13. As a threshold matter, this Court should reject Petitioner's blatant attempt to use the vehicle of habeas corpus, as a second direct appeal. Steinhorst v. Wainwright, 477 So.2d 537, 539 (Fla. 1985); Harris v. Wainwright, 473 So.2d 1246, 1247 (Fla. 1985); McCrae v.

Wainwright, 439 So.2d 868, 870 (Fla. 1983). There is nothing in the Hitchcock opinion, which permits such re-examination of the validity of aggravating circumstances, that were affirmed by this Court, on direct appeal. Delap, 440 So.2d, at 1254-1257. A harmless error analysis involves measuring the effect of mitigating evidence not considered by the jury, on the actual sentence imposed, in light of those aggravating and mitigating circumstances then in existence.

It cannot be overlooked, or overemphasized, that the scope and nature of the aggravating circumstances, presented and found to exist by this Court, Delap, supra, at 1254-1257, was very strong. This Court, upon invalidating one aggravating circumstance, concluded that there were five aggravating circumstances: [(1) That the crime was committed, while Petitioner was "under sentence of imprisonment," under parole for unarmed robbery and assault with intent to rape; (2) That the Petitioner had a prior violent felony conviction, for said crimes; (3) That the murder of Paula Etheridge was "especially cruel"; (4) That the murder was committed, in the course of the kidnapping, robbery or rape of Paula Etheridge; (5) That the murder was committed in a manner involving a "great risk of harm" to others, in that Petitioner was driving down a highway, holding the steering wheel in one hand, and the victim in the other, while the victim's body banged against the passenger door, creating great risk to several witnesses standing or driving in the area]. Id. Assuming arguendo this Court does not bar Petitioner's challenge to the felony murder and great risk of harm aggravating circumstances, there was substantial evidence in the Record, to support these,[8] as well as the other three aggravating factors. Id.

[8]Petitioner's challenge to the felony-murder finding, consists of the same argument raised and rejected on direct appeal. Delap, at 1255-1256. Neither the trial court's statements on felony-murder, at the first trial, nor the

Petitioner has maintained that substantial evidence of non-statutory mitigation was not considered by the jury, due to the erroneous instruction given, and should have been. Petition, at 12. This does not even remotely approach true harmless error analysis on this issue, which looks to the actual effect on the jury's recommendation, and judge's sentence. Hitchcock, at 353; Downs; Riley. It is clear that the jury would not have found such non-statutory evidence to rise to the level of mitigating factors, such that it would have lead them to outweigh the existing aggravating circumstances, and return a life recommendation.

Petitioner contends that, amongst the most substantial non-statutory mitigating factors the jury could

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fact that felony-murder may not have been submitted as an express theory of prosecution at the guilt phase, prevented the reliance on evidence, or finding, that the victim was killed, during the commission of another felony. Poland v. Arizona, 476 U.S.___, 106 S.Ct 1749, 90 L.Ed.2d 123, 131-132 (1986); Bullington v. Missouri, 451 U.S. 430, 445 (1981). Petitioner has never been "acquitted," by a judge or jury, of "whatever was necessary to impose a death sentence." Id. Furthermore, there is clear evidence supporting such an aggravating circumstance, including, inter alia, Petitioner's confession that he was mad, looked for someone to take his anger out on, and, finding Ms. Etheridge alone in the laundromat, kidnapped her at knifepoint, struggled with her in the car, to keep her in the car, and was bitten by her, during the struggles, preceding her death. (R, 792-797). Other facts, supporting the finding of murder during a rape and/or robbery, appear in the Record as well. (R, 438, 446, 792-797); Delap, at 1257.

As to the "great risk of harm" factor, Petitioner contends that this aggravating circumstance "would never be upheld today by this Court." Petition, at 13, n. 13. Initially, this wholly speculative and improper nature of this suggestion is clearly an improper attempt to relitigate the validity of this factor. Steinhorst, supra. In finding this factor to exist, this Court examined several other cases, on direct appeal, comparing favorably the circumstances supporting the "great risk of harm" factor therein, with the facts herein. Delap, at 1256-1257. Petitioner's present authorities are easily distinguishable, involving highly speculative findings, or findings involving facts preceding or unconnected to the capital issue. Lusk v. State, $$¢ So.2d 1038, 1042 (Fla. 1984); Barclay v. State, 470 So.2d 691, 694-695 (Fla. 1985); Dougan v. State, 470 So.2d 695, 702 (Fla. 1985); Trawick v. State, 473 So.2d 1235, 1240 (Fla. 1985). The facts in this case go well beyond speculation, and demonstrate a "likelihood" and/or "high probability" of great risk of death or harm to others. Delap, supra. Kampff v. State, 371 So.2d 1007 (Fla. 1979). The evidence demonstrated that Petitioner's car "swerved into the yard" of two eyewitnesses(R, 470-471), and was observed "swerving all over the road" by at least four witnesses, two of whom were in a car, going in the same direction as Petitioner, and specifically saw him "come up fast", and thought he would strike them, or hit someone else. (R, 470-474; 476-481; 485, 487, 492, 508). There was further testimony that Petitioner hit a bridge, so as to deliberately keep the passenger car door closed, to prevent Ms. Etheridge from escaping. (R, 487, 492).

have considered, were his alleged mental and emotional problems. It is highly significant that both the jury and trial judge, by recommending and imposing death, rejected all such evidence presented, as not constituting statutory mitigation of "extreme mental or emotional disturbance," §921.141(6)(b), supra, acting "under extreme duress," §921.141(6)(e), supra, or acting under "substantially impaired" mental capacity, §921.141(6)(f), supra. (R, 1267, 2460-2461). Petitioner thus is left with the position that the jury, having rejected the mental mitigation presented on a statutory basis, nevertheless would have been affected by the same evidence, on a non-statutory basis, such that their recommendation would have been life. An examination of the Record demonstrates the fallacy of such an argument, and the presence of harmless error, beyond a reasonable doubt.

There was testimony, at sentencing from three doctors, relating to mental mitigation. Dr. Gilbert's diagnosis of a personality disorder, nevertheless included a conclusion that Petitioner's personality had "sociopathic features." (R, 1112). When asked to explain these features, Dr. Gilbert described a sociopathic personality, as including individuals who "had difficulty" conforming to the rules and laws of society. (R, 1113). Dr. Gilbert further conceded that Petitioner's brain damage was "minimal," and that Petitioner's crime was not necessarily caused or affected by such damage. (R, 1113-1114, 1138-1139; 1153). The doctor further conceded that Petitioner knew the murder was wrong, when he committed it. (R, 1134, 1135). It was additionally revealed that Petitioner had never informed Dr. Gilbert, when first examined by him, about ingestion of drugs or "angel dust."[9] (R, 1150-1152). In his testimony as to Petitioner's

[9] Furthermore, contrary to Petitioner's implication, Petition, at 13, any evidence of Petitioner's "unique vulnerability to alcohol," allegedly caused by brain damage, would have been completely unavailing, in a case where there was no evidence

prognosis for recovery or improvement, Dr. Gilbert indicated that such a prognosis was "very guarded," and that while Petitioner "could be helped," he had "a very difficult condition," that would not be cured in a "short period of time."[10] (R, 1137). This defense witness further admitted that because of the minimal nature of such alleged brain damage, no further tests were run, beyond an EEG. (R, 1153). Given the fact that this was the most favorable testimony on Petitioner's behalf at sentencing, there can be little doubt that Dr. Gilbert's own apprehensive and conditional testimony, on the existence of "minimal" brain damage, would not have affected the jury's recommendation. Downs; Riley.

This conclusion becomes even more apparent, when the testimony of the State's rebuttal witnesses is examined. Both Dr. Aportela and Dr. Haber concluded that Petitioner did not suffer from brain disease, or any form of psychosis, but was an individual who exhibited frequent and chronic anti-social behavior. (R, 1171-1172; 1199, 1206, 1207, 1213). Dr. Haber labelled Petitioner as "narcissistic," and both witnesses stated that Petitioner's reaction to frustration was to engage in hostility. (R, 1172-1173, 1213, 1214). Both psychiatrists gave highly significant testimony, that Petitioner could control his behavior, but did not, by choice, and could have stopped himself from the murder, if he had wanted to. (R, 1172, 1173, 1185, 1186, 1199, 1206, 1207). Further, on the subject of remorse, and possibilities

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of drug or alcohol use by Petitioner at the time of the crime.

[10] Contrary to Petitioner's representation, Dr. Gilbert testified to these conclusions without objection, and was only limited in giving his personal opinion, as to whether he felt "[rehabilitation] is worth a try." (R, 1137). Dr. Gilbert was clearly permitted to specifically testify, as to Petitioner's capacity for rehabilitation, (R, 1137), and subsequently testified, without limitation that Petitioner was amenable to treatment. (R, 1157).

for rehabilitation, Dr. Aportela concluded that Petitioner had a "poor prognosis," because such a personality did not either acknowledge their problem, or seek treatment for it. (R, 1174). Dr. Haber expressed doubts about any future prognosis, without an "awful lot of time." (R, 1214). Furthermore, Dr. Aportela reviewed numerous prior medical and other of Petitioner's records (including Dr. Gilbert's EEG results), dating back to an army hospital report in 1967, and concluded that all such prior reports and records, were consistent with, and confirmed his diagnosis. (R, 1167, 1176, 1177).

Thus, the evidence of Petitioner's mental or emotional problems, revealed substantial indications of an anti-social, hostile man, given to committing acts of violence when frustrated, which he could have controlled, against Paula Etheridge, but chose not to. Petitioner's own psychiatrist expressed considerable doubts, about a prognosis for Petitioner's eventual recovery and/or rehabilitation, from such alleged disorders. Evidence of any organic problem, was, at best, "minimal." At the time of the crime, Petitioner was a college student. In sum, there is no doubt that, on the face of this evidence, the jury's recommendation would not have been at all affected, to Petitioner's benefit. James v. State, 489 So.2d 737, 739 (Fla. 1986); James v. State, 453 So.2d 786, 792 (Fla. 1984)(no prejudice, failure to have non-statutory mitigation presented and considered by jury, in light of four aggravating circumstances); Stone v. State, 481 So.2d 478, 479 (Fla. 1985); Stone v. State, 378 So.2d 765, 772 (Fla. 1979)(same, in light of aggravating circumstances of heinous, atrocious and cruel, under sentence of imprisonment, prior violent felony); Middleton v. State, 465 So.2d 1218, 1222-1224 (Fla. 1987) (failure to present to jury, evidence of personality disorder, tough childhood, not prejudicial, when measured against aggra-

vating circumstances of prior violent felony, under sentence of imprisonment, pecuniary gain, and cold calculated and premeditated, particularly when defendant presented some of such mitigation to judge); see also Hill v. State, 12 F.L.W. 480, 481-482 (Fla., September 17, 1987)(consideration of improper aggravating circumstance harmless, in light of four other aggravating circumstances --- prior violent felony, great risk of harm, murder committed during course of robbery, avoiding arrest --- and one statutory mitigating factor).

Petitioner has further suggested other categories of non-statutory evidence presented, that the jury could have considered, if instructed to do so. While the trial court found Petitioner's possible remorse, and "acceptable" behavior at his second trial, and on death row, to be mitigating factors, this Court clearly and unanimously approved the weighing by the trial court of these factors, against the "clear and convincing" facts supporting the imposition of death, to impose a death sentence. Delap, supra, at 1257. Two of these aggravating circumstances referred to Petitioner's prior convictions, and parole status from those convictions at the time of the Etheridge homicide. It can hardly be seriously maintained that the sentencing jury would have been affected by Petitioner's "adequate" behavior, in the significantly regulated environments of the trial courtroom, and Florida's death row. Furthermore, Petitioner's "cooperation with authorities," in showing them the body of the victim, was clearly both considered by the trial court, in its finding of possible remorse, (R, 1338), and tempered by Petitioner's apprehension, some seven days after the murder, Delap, supra, at 1246, by Officer Brumley, whom he recognized, when apprehended, as a police officer with whom he had previously had a conversation. (R, 730). Petitioner's "status as a father of young children," Peti-

tion, at 13, is presented as "available" non-statutory evidence, would clearly have been considered against Petitioner, in that he relied on such status, and his child's phantom "accident," as an alibi, for the presence of blood on his shirt, when noticed by classmates, upon his return to campus, after the murder. (R, 463). This evidence would clearly not only have not benefitted Petitioner, in its effect on the jury recommendation and judge's ultimate sentence, but would have done more harm than good. When measured against the relative strength of five valid aggravating circumstances, any such exclusion of this evidence, from consideration by the jury, was clearly harmless beyond a reasonable doubt. Compare Riley, supra, at 459 (presence of two aggravating circumstances, one statutory mitigating circumstance, a factor in determining Hitchcock error not harmless).

Petitioner has characterized one juror's initial disagreement with the jury's majority recommendation of death, as an indication that the jury's vote, although not precisely shown in the Record, was 11-1 for death. Petition, at 13, n. 12. Assuming arguendo this conclusion to be accurate, the overwhelming strength of such a recommendation, as followed by the trial court, must be considered an important factor, in leading to the conclusion that any Hitchcock error was harmless. Morgan v. State, 12 F.L.W. 433, 434 (Fla., August 27, 1987)(no harmless Hitchcock error, where jury recommendation of death was by a 7-5 vote).

Thus, there is clearly no reason to remand for resentencing in this case, in view of an examination of the Record under existing Federal and state precedent, which reveals no Hitchcock error, requiring disturbance of Petitioner's present death sentence. This Court should reject Petitioner's often-stated suggestion, that the presence of the Hitchcock-type instruction, requires reversal of his death sentence, under Hitchcock. The absence of substantive merit herein, bars any habeas or stay relief.

V

CONCLUSION

Based on the foregoing arguments, authorities and circumstances, Respondent respectfully requests that this Court deny the Petition for Writ of Habeas Corpus, Application for Stay of Execution, and any other relief requested.

Resepctfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response in Opposition to Petition for Writ of Habeas Corpus has been furnished, by United States Mail, to GERRY S. GIBSON, ESQUIRE, Steel Hector and Davis, 4000 Southeast Financial Center, Miami, Florida 33131 and CRAIG BARNARD, ESQUIRE, Richard L. Jorandby, Public Defender, The Government Center, 301 North Olive Avenue, Ninth Floor, West Palm Beach, Florida 33401 this 30th day of September, 1987.

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