No. 77-138

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IN THE SUPREME COURT
OF FLORIDA

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CHESTER LEVON MAXWELL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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ON APPEAL FROM THE CIRCUIT COURT OF
THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

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# BRIEF OF APPELLANT

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## PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's summary denial of Mr. Maxwell's motion for post-conviction relief brought pursuant to Florida Rule of Criminal Procedure 3.850. The sole claim raised in that motion, and in this appeal, is that Mr. Maxwell was sentenced to death in violation of his eighth and fourteenth amendment rights, as set forth in Hitchcock v. Dugger and its progeny. Although this claim would properly have been decided after an evidentiary hearing, the court below ruled without any hearing whatsoever.

References to the Rule 3.850 record on appeal will be cited as "P.C. R.__"; the record on direct appeal will be cited as "R.__"; and references to the transcript of a limited hearing on Mr. Maxwell's prior Rule 3.850 motion are cited as "P.C. Tr.__." In addition, as a convenience to the Court, Mr. Maxwell has reproduced and filed on this appeal a record appendix, which includes items which are relevant to the Court's consideration of this appeal. Fla. R. App. P. 9.220. These will be cited as "App.__."

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## STATEMENT OF THE CASE

### A. Introduction

On November 9, 1987, shortly after the United States Supreme Court's decision in Hitchcock v. Dugger, 481 U.S. 393 (1987), Mr. Maxwell filed in this Court a petition for a writ of habeas corpus setting forth his Hitchcock claim. The State filed a response, and Mr. Maxwell filed a reply brief. On June 21, 1989, this Court remanded Mr. Maxwell's habeas petition to the circuit court, with directions that the court treat the petition as a Rule 3.850 motion.

On November 14, 1990, Judge Thomas M. Coker, Jr., the circuit judge below, summarily denied Mr. Maxwell's Rule 3.850 motion without a hearing, finding that no Hitchcock error had occurred. P.C. R. 42.

Timely notice of appeal and directions to the clerk were filed. This action is now properly before this Court, pursuant to Art. V, § 3(b)(1), Fla. Const.

### B. Statement of Facts

At the penalty phase proceeding before the jury, Chester Maxwell presented "substantial mitigation." P.C. Tr. 98 (oral argument by State on prior 3.850 motion). The mitigation was entirely nonstatutory in nature. It included uncontroverted evidence that Mr. Maxwell was abandoned by his mother when he was very young; that he came from a broken home and an unstable home environment; that he was raised by his invalid grandmother, who

was unable to care for him properly; that he came from an impoverished background; that he was generous, kind and considerate towards friends and family; that he was especially loving towards children; that he was never known to be violent or cause trouble; that he had the potential for rehabilitation; and that he continues to have much to offer society. (R. 1396-1408). In addition, evidence presented during the guilt-innocence phase of the trial showed, among other mitigating factors, that he was devoted to his family (R. 1184-85, 1189, 1217) and cooperative with the police (R. 822, 855-56, 864, 872, 875).

The trial court instructed the sentencing jury to limit their consideration of mitigating factors to those enumerated in Fla Stat. § 921.141. (R. 1425). In addition to this instruction, the court repeatedly informed the jurors during voir dire that they were to consider a limited number of mitigating circumstances on which he would instruct them (R. 232-33, 426-27), told them prior to penalty phase that they would be instructed on the mitigating factors that they could consider (R. 1380), and told them that it was their duty to follow the law which he provided to them in reaching their sentencing verdict. (R. 1422, 1427). Furthermore, the prosecutor argued to the jury that they were to reach their sentencing verdict solely on the basis of the statutory aggravating and mitigating factors, and argued that none of the statutory mitigating factors were present. (R. 1410-12).

Following the trial court's instructions, the jury recommended that Mr. Maxwell be sentenced to death. The margin by which the jury recommended death is not known, as the jury was not polled.

In his sentencing order, Judge Coker found five aggravating circumstances applicable. App. 1. Three of these aggravating circumstances were subsequently struck by this Court, sua sponte, on direct appeal. Maxwell v. State, 443 So. 2d 967, 971 (Fla. 1983).

As to factors in mitigation, Judge Coker found none of the statutory mitigators applicable. After considering and rejecting each statutory mitigating factor, he concluded that there were no mitigating circumstances, without mentioning the nonstatutory mitigating evidence presented by Mr. Maxwell. App. 1. Judge Coker then sentenced Chester Maxwell to death in the electric chair. Id.

On June 21, 1989, this Court remanded Mr. Maxwell's Hitchcock claim to Judge Coker for consideration as a motion pursuant to Rule 3.850. On November 14, 1990, without benefit of hearing, updated briefs,[1] argument or notice to Mr. Maxwell or

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[1] The only briefs before Judge Coker were the briefs filed by Mr. Maxwell and the State three years earlier when Mr. Maxwell petitioned this Court for a writ of habeas corpus based on his Hitchcock claim.

his counsel, and after ex parte contact with the State, [2] P.C. R. 40-42, Judge Coker denied the motion.

The order first noted that Judge Coker considered Mr. Maxwell's claim to be procedurally barred, despite this Court's unambiguous precedents to the contrary.[3] However, because this Court's remand order required that the claim be considered on the merits, the order reached the merits but concluded that no Hitchcock violation occurred because Mr. Maxwell was allowed to present nonstatutory mitigating evidence at his trial. P.C. R. 42.[4] The order did not even discuss whether the sentencing instructions to the jury violated Hitchcock.

C. Procedural History

On October 15, 1980, a Grand Jury of the Seventeenth Judicial Circuit for Broward County issued an indictment of

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[2] Page 40 of the Record on Appeal is a copy of this Court's order transferring the habeas petition to the circuit court. On this order are the handwritten notes of Judge Coker saying, "Zacks. See me. T.C." "Zacks" is Assistant State Attorney Paul Zacks. "T.C." is Judge Thomas Coker. Additional handwritten notes appear to say, "11/6/90 -- P. Zacks to do order." Mr. Maxwell's attorney was never contacted by the court prior to the issuance of Judge Coker's order.

[3] See Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987), cert. denied, 485 U.S. 960 (1988); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987).

[4] This conclusion is inconsistent with this Court's precedents holding that "mere presentation" does not meet constitutional requirements if the judge believes, or the jury is led to believe, that nonstatutory mitigation cannot be considered. Downs v. Dugger, 514 So. 2d at 1071; Waterhouse v. State, 522 So. 2d 341, 344 (Fla.), cert. denied, 488 U.S. 869 (1988).

Mr. Maxwell and Dale Leonard Griffin, Jr., charging both with one count of first degree murder and three counts of armed robbery; they stood mute at arraignment, and pleas of not guilty were entered.

A motion to sever the trials of the two co-defendants was denied, and the trial was held April 13-22, 1981. On April 22, the jury found both men guilty on all counts. The penalty phase took place the following morning, at which time the prosecutor requested the death penalty only for Mr. Maxwell. The jury accordingly recommended life for Mr. Griffin and the death sentence for Mr. Maxwell. The jury was not polled as to how many of them concurred in recommending a sentence of death for Mr. Maxwell.

On May 12, 1981, Judge Coker imposed the death penalty on Mr. Maxwell, and three life sentences on the robbery counts. Mr. Griffin was sentenced, on May 11, to four life terms.

Mr. Maxwell's convictions and sentences were affirmed on direct appeal on December 15, 1983. Maxwell v. State, 443 So. 2d 967 (Fla. 1983). Rehearing was denied on February 7, 1984. Id. A petition for a writ of certiorari in the United States Supreme Court was never filed. Accordingly, under the provisions of Fla. R. Cr. P. 3.850 applicable to pre-1985 convictions, Mr. Maxwell's motion to vacate was not required to be filed until January 1, 1987.

On October 9, 1984, Governor Graham signed a death warrant, and Mr. Maxwell's execution was scheduled for November 7, 1984.

On October 30, 1984, after contacting over 100 law firms in an attempt to find counsel for Mr. Maxwell, the Florida Clearinghouse on Criminal Justice was able to retain Steven Malone, then a private attorney, to represent Chester Maxwell. See Appendix to prior 3.850 motion, Affidavits of Steven Malone and Gail Rowland. On November 5, 1984, Mr. Malone filed in the circuit court an application for a stay of execution, a motion for an evidentiary hearing on the need for a stay, and a motion to vacate conviction and sentence pursuant to Rule 3.850. The motions were denied the same day, after a limited hearing before Judge Coker.

This Court granted a stay of execution on November 6, 1984 and subsequently affirmed the denial of the Rule 3.850 motion and denied Mr. Maxwell's petition for a writ of habeas corpus on May 15, 1986. Maxwell v. State, 490 So. 2d 927 (Fla. 1986). Rehearing was denied on July 21, 1986. Id. Mr. Maxwell's present attorney, Andrew A. Ostrow, assumed representation and filed a petition for a writ of certiorari, which was denied by the United States Supreme Court on November 17, 1986. Maxwell v. Florida, 479 U.S. 972 (1986).

On March 11, 1987, Governor Martinez signed a second death warrant for Mr. Maxwell, setting the execution for May 7, 1987. On May 5, 1987, Mr. Maxwell filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, an application for a stay of execution, and a supporting memorandum in the United States

District Court for the Southern District of Florida. A stay was granted that same day.

Mr. Maxwell thereafter requested that the federal district court allow him to present his Hitchcock claim to the Florida state courts and that the district court hold the federal proceedings in abeyance pending exhaustion of that claim. The motion was granted on October 23, 1987.

On November 6, 1987, Mr. Maxwell filed in this Court a petition for a writ of habeas corpus alleging a Hitchcock violation. On June 21, 1989, this Court remanded the habeas petition to the circuit court for consideration as a Rule 3.850 motion.

On November 14, 1990, Judge Coker summarily denied the motion, without a hearing, and this appeal followed.

Mr. Maxwell has filed no post-conviction pleadings other than those set forth above.

## ARGUMENT

I. MR. MAXWELL WAS SENTENCED TO DEATH IN CLEAR VIOLATION OF HITCHCOCK V. DUGGER IN THAT THE JURY WAS INSTRUCTED TO CONSIDER ONLY STATUTORY MITIGATING FACTORS AND WAS THEREBY PRECLUDED FROM CONSIDERING SUBSTANTIAL NONSTATUTORY MITIGATING EVIDENCE.

Chester Maxwell was sentenced to death in violation of his eighth and fourteenth amendment rights. In a classic case of Hitchcock error, the jury was instructed not to consider, and the trial judge refused to consider, nonstatutory mitigating evidence. Substantial nonstatutory mitigation was presented at trial. The State has conceded it, and this Court has acknowledged it. The margin by which the jury recommended death is not known, as the jury was never polled. On direct appeal, this Court struck down, sua sponte, three of the five aggravating factors found by the trial court. Given the substantial nonstatutory mitigation and the weak aggravation in this case, the Hitchcock error was not harmless and Chester Maxwell is entitled to a new sentencing hearing.

### A. THE EIGHTH AMENDMENT ERROR BEFORE THE SENTENCING JURY

In Hitchcock v. Dugger, 481 U.S. 393 (1987), the United States Supreme Court made clear that under the eighth amendment, the sentencing jury may not be instructed so as to preclude it from considering, as a mitigating factor, any aspect of a defendant's character or record that the defendant proffers as a basis for a sentence less than death. Id. at 394 (citing Skipper v. South Carolina, 476 U.S. 1 (1986); Eddings v. Oklahoma, 455

U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978)). Justice Scalia, writing for a unanimous Court in Hitchcock, concluded that since the jury was instructed to consider only the enumerated mitigating factors listed in Fla. Stat. § 921.141(6) (1979), "it could not be clearer that [Hitchcock's] advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of" Skipper, Eddings or Lockett. Id. at 398-99.

The sentencing instructions that ran afoul of the eighth amendment in Hitchcock were as follows:

> [You will be instructed] on the factors in aggravation and mitigation that you may consider under our law.
>
> * * *
>
> [T]he mitigating circumstances which you may consider shall be the following: [listing the statutory mitigating circumstances].

Id. at 398.

The sentencing instructions given to Mr. Maxwell's jury were as follows:

> At the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors in aggravation and mitigation that you may consider.
>
> * * *
>
> The mitigating circumstances which you may consider, if established by the evidence, are these . . . . [listing the statutory mitigating circumstances].

R. 1380, 1424. This instruction is essentially identical to the offending Hitchcock instruction and is the same instruction condemned by this Court in O'Callaghan v. State, 542 So. 2d 1324 (Fla. 1989); Thomas v. State, 546 So. 2d 716 (Fla. 1989); and Riley v. Wainwright, 517 So. 2d 656, 659 (Fla. 1987), to name just a few.[5]

The restriction placed upon the jury's consideration of evidence in mitigation was not limited to the instructions given at the conclusion of the sentencing phase. During voir dire, the jury was unequivocally instructed that, in recommending a sentence, they could consider only the enumerated mitigating factors set out in Fla. Stat. § 921.141(6) (1979):

> ... I will instruct you on the law insofar as what you are to consider in arriving at your [sentencing] recommendation. ... I am going to be explaining to you that there are nine aggravating circumstances. This is what the law provides. You are to take into account nine aggravating circumstances, which will be fully explained to you. And if you find that there is sufficient aggravation to lead you to the conclusion that you should recommend the death penalty, I am going to follow that with seven areas of mitigation [i.e., the statutory mitigating factors], and they will be fully explained to you; in other words, reasons why you should impose the death penalty, reasons why you should not, and you are to compare the aggravating and mitigating circumstances.

R. 232-233 (emphasis added).[6]

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[5] The text of the instructions in O'Callaghan and Thomas is set forth in App. 2 and 3.

[6] The order below incorrectly concludes that these same statements demonstrate that the jury was properly instructed. P.C. R. 42. In fact, they clearly limit the jury to the

Later during voir dire Judge Coker stated:

> I will then read to you seven mitigating circumstances; that is to say, seven circumstances which militate against the death penalty.
>
> After you all have considered the nine aggravating circumstances and the seven mitigating circumstances, then you will be making a recommendation to me, either death in the electric chair or life imprisonment.

R. 426 (emphasis added).

Just before the penalty phase began, the trial court further instructed the jury:

> At the conclusion of taking evidence and argument of counsel, you will be instructed on the factors in aggravation and mitigation that you may consider.

R. 1380 (emphasis added). In its sentencing instructions, the trial court impressed upon the jury that "it is your duty to follow the law which will now be given you by the Court...." R. 1422 (emphasis added). "The sentence which you recommend to the Court must be based upon the facts as you find them from the evidence and the law as given you by the Court." R. 1426 (emphasis added). The law given to the jury by the court unquestionably limited their consideration to statutory mitigation only.

Furthermore, the prosecutor exacerbated the error by reinforcing the unconstitutional instructions during his argument. See Waterhouse v. State, 522 So. 2d 341 (Fla. 1988), cert. denied, 488 U.S. 869 (1988). The jury was told:

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enumerated statutory mitigating circumstances.

> In this case, in any capital case, there are certain what we call statutorily defined aggravating and mitigating circumstances, and what that means, ladies and gentlemen, the law says there are these aggravating circumstances and these mitigating circumstances, and that is what you are supposed to base your advisory sentence on, ladies and gentlemen.
>
> Well, with reference to Chester Maxwell, you will see that none of the mitigating seven circumstances exist, and I will read them to you and the court is going to read them to you.

R. 1410 (emphasis added). The prosecutor then listed the statutory mitigating factors, one by one, arguing that none of them applied to Chester Maxwell. R. 1410-1412.

Hence, it could not be clearer that Mr. Maxwell, like Mr. Hitchcock, was sentenced to death in violation of the eighth and fourteenth amendments, when his jury was instructed to consider only statutory mitigating factors.

B. THE TRIAL JUDGE'S REFUSAL TO CONSIDER NONSTATUTORY MITIGATING EVIDENCE

Judge Coker's sentencing order makes clear that not just the jury but the court itself also failed to consider nonstatutory mitigating evidence, in violation of Hitchcock. In his sentencing order, after listing the statutory aggravating factors and finding five of them applicable,[7] Judge Coker recited the

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[7] On direct appeal, this Court struck down, sua sponte, three of the five aggravating factors found by Judge Coker. Maxwell v. State, 443 So. 2d 967, 971 (Fla. 1983).

list of statutory mitigating factors, finding none of them applicable. He then concluded:

> In summary, the Court finds that of the nine aggravating circumstances, five were applicable to this case. As to the mitigating circumstances, none applied in this case.

App. 1. His order contains not the slightest mention of the substantial nonstatutory mitigating evidence presented by Mr. Maxwell. As far as Judge Coker was concerned, that evidence had nothing to do with whether Mr. Maxwell should be sentenced to life or death. See McCrae v. State, 510 So. 2d 874, 880 (Fla. 1987) (trial judge apparently gave no serious consideration to nonstatutory mitigation presented). Accordingly, the trial court's treatment of the nonstatutory mitigation here is indistinguishable from Hitchcock, where the Supreme Court found both jury and judge sentencing error.

As discussed above, Judge Coker instructed the jury to consider only statutory mitigating factors. The judge is presumed to follow the instructions he gives to the jury. Zeigler v. Dugger, 524 So. 2d 419, 420 (Fla. 1988) ("it may be presumed that the judge's perception of the law coincided with the manner in which the jury was instructed"); Johnson v. Dugger, 520 So. 2d 565, 566 (Fla. 1988) (it must be "presume[d] that the judge followed his own instructions to the jury on the consideration of nonstatutory mitigating evidence").

Moreover, where the trial court both instructs the jury in a preclusive manner and makes no mention of nonstatutory mitigating

circumstances in his sentencing order, there is no question that the judge failed to consider that evidence. Combs v. State, 525 So. 2d 853, 855 (Fla. 1988); Morgan v. State, 515 So. 2d 975, 976 (Fla. 1987), cert. denied, 486 U.S. 1036 (1988); Foster v. State, 518 So. 2d 901, 902 (Fla. 1987), cert. denied, 487 U.S. 1240 (1988).

The statement below, nine-and-a-half years after trial, that Judge Coker considered all mitigating evidence, statutory or non-statutory,[8] is belied by both his instructions at sentencing and his sentencing order. Moreover, it is inappropriate to consider what is effectively the testimony of the sentencing judge as to what he had in mind when he sentenced Mr. Maxwell to death. See Washington v. Strickland, 673 F.2d 879, 902-906 (11th Cir. 1982), rev'd on other grounds, 466 U.S. 668 (1984) (discussing at length the impropriety of delving into the mental processes of the sentencer and allowing after-the-fact testimony by sentencing judge as to the weight he accorded the aggravating and mitigating circumstances presented at trial; "[a] judge's statement of his mental processes is absolutely unreviewable") (emphasis added) (citing Fayerweather v. Ritch, 195 U.S. 276, 306-07 (1904)). See also Johnson v. Dugger, 520 So. 2d at 566 n.2: "The State has attached to its response an affidavit from the trial judge stating that he did consider the nonstatutory mitigating evidence proffered by Johnson. This affidavit is not properly before this Court on appeal and is not part of the record. Therefore we will

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[8] P.C. R. 42.

not consider it, and it forms no basis for our opinion." In Copeland v. Dugger, 565 So. 2d 1348 (Fla. 1990), the State argued that circuit court judges should have an opportunity to explain their sentencing thoughts prior to being reversed. This Court rejected that argument, finding that the State's argument "misconceives the entire nature of the appellate process. This Court itself was reversed for violating the Constitution in Hitchcock. No special master was appointed nor were we summoned to Washington to explain ourselves. Indeed, it would be improper for a judge to assume the role of an advocate arguing in a public forum for the correctness of some particular opinion already issued." Id. at 1350 (emphasis added).

Despite what he may say now, in 1981 Judge Coker was not considering nonstatutory mitigating evidence. He is the same judge who sentenced John O'Callaghan and Ed Clifford Thomas to death, whose sentences were vacated by this Court based on the identical instruction and sentencing order given in Mr. Maxwell's trial. O'Callaghan v. State, 542 So. 2d 1324, 1326 (Fla. 1989); Thomas v. State, 546 So. 2d 716, 717 (Fla. 1989).[9] Both of these men were sentenced around the same time as Chester Maxwell. In

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[9] In O'Callaghan and Thomas, this Court vacated the death sentence and remanded for resentencing on the ground that Judge Coker's instructions violated Hitchcock in that they failed to apprise the jury that they could consider nonstatutory mitigating evidence. O'Callaghan, 542 So. 2d at 1326; Thomas, 546 So. 2d at 717. See also Herzog v. State, 439 So. 2d 1372, 1381 (Fla. 1983), in which this Court vacated Judge Coker's override of the jury's life recommendation in part because there was no indication in the sentencing order that Judge Coker had considered nonstatutory mitigating circumstances.

fact, O'Callaghan was sentenced the very same day as Mr. Maxwell.[10] The same finding of Hitchcock error is compelled here.

Until as late as August 1981, Judge Coker continued to employ the same offending instruction as that used in O'Callaghan, Thomas and this case.[11] It was not until November, 1981, in Livingston v. State, that Judge Coker changed his instruction to apprise the jury to consider any mitigating evidence concerning the circumstances of the crime and the defendant's background and character.[12]

Even were this post hoc rationalization to be credited,[13] it

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[10] App. 2. Thomas was sentenced two months after Mr. Maxwell. App. 3. The sentencing jury was instructed in O'Callaghan on April 9, 1981, two weeks prior to Mr. Maxwell's jury. App. 2. Mr. Thomas' jury was instructed on June 25, 1981. App. 3.

[11] See sentencing instructions and sentencing order in Wilson v. State, attached hereto as App. 4.

[12] See App. 5 (jury instructed to consider in mitigation "[a]ny other aspect of the defendant's character or record, and any other circumstance of the offense").

[13] In assessing the weight to be given to this statement, the Court should consider Judge Coker's evident partiality, as indicated by a letter he sent to the Pardon and Parole Board, regarding clemency. His letter stated that "Mr. Maxwell was found guilty of a senseless, and cold-blooded murder. He deserves nothing better than that which he visited upon the victim and the victim's family." App. 6. Whether a particular judge can rule in a neutral and detached manner becomes doubtful when there is "such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused." Ungar v. Sarafite, 376 U.S. 575, 588 (1964). Given this extrajudicial statement, as well as the Judge's ex parte communications with the prosecutor, see page 4 supra, this post hoc attempt to explain away the Hitchcock violation is entitled to no weight at all.

is nevertheless irrelevant. The precedents of this Court make plain that resentencing is required if Hitchcock error occurs either before the sentencing jury or the sentencing judge:

> [T]he standards imposed by Lockett bind both the judge and the jury under our law . . . If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure.

Riley v. Wainwright, 517 So. 2d 656, 659 (Fla. 1987) (emphasis added).[14] The Court emphasized, moreover:

> The jury must be instructed either by the applicable standard jury instructions or by specially formulated instructions, that their role is to make a recommendation based on the circumstances of the offense and the character and background of the defendant.

Id. at 658 (citing Floyd v. State, 497 So. 2d 1211, 1215 (Fla. 1986). It is also clear that Hitchcock error results when the sentencer is precluded from considering nonstatutory mitigation, regardless of whether the defendant was allowed to present nonstatutory mitigation:

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The reliability of Judge Coker's purported statement is particularly suspect given the fact that the order was apparently prepared by the Assistant State Attorney. See Argument III, infra.

[14] In so holding, the Court emphasized that "the jury's determination of the existence of any mitigating circumstances, statutory or non-statutory, as well as the weight to be given them are essential components of the sentencing process." Id. at 657-58. "[E]xclusion of any relevant mitigating mitigating evidence," moreover, "affects the sentence in such a way as to render the trial fundamentally unfair." Id. at 660 n.2 (citing Harvard v. State, 486 So. 2d 537 (Fla.), cert. denied, 479 U.S. 863 (1986)).

> Under Hitchcock, the mere opportunity to present nonstatutory mitigating evidence does not meet constitutional requirements if the judge believes, or the jury is led to believe, that some of that evidence may not be weighed during the formulation of an advisory opinion or during sentencing.

Downs v. Dugger, 514 So. 2d 1069, 1071 (Fla. 1987) (emphasis added).[15]

In Booker v. Dugger, 520 So. 2d 246, 248 (Fla.), cert. denied, 486 U.S. 1061 (1988), this Court was "compelled to conclude that a sentencing error occurred under the rationale of Hitchcock" despite the apparent awareness of the sentencing judge that nonstatutory mitigation was relevant to the sentence. See also Waterhouse v. State, 522 So. 2d at 349 ("[W]hat is important is what the jury was permitted to consider in making its recommendation to the court."); Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989) ("It is of no significance that the trial judge stated that he would have imposed the death penalty in any event."). Accord Jones v. Dugger, 867 F.2d 1277, 1280 (11th Cir. 1989) (trial court cannot, by specifically considering nonstatutory mitigating evidence, cleanse a jury recommendation which is tainted by Lockett error; error can be cured only by a sentencing proceeding before a new advisory jury); Magill v. Dugger, 824 F.2d 879, 893 (11th Cir. 1987) ("Whether or not the

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[15] The apparent holding of the court below that there was no error because Mr. Maxwell was allowed to present nonstatutory mitigation is thus clearly contrary to Downs, as well as Waterhouse v. State, 522 So. 2d at 344. See Hitchcock v. Dugger, 481 U.S. at 397 (finding constitutional error despite defendant's presentation of nonstatutory mitigation at penalty phase).

trial court believed it could consider nonstatutory mitigating circumstances, Magill's sentence must be vacated because the jury was led to believe its inquiry was so limited.") (emphasis added).

In Mr. Maxwell's case, both the judge and jury limited their consideration of mitigating factors to those delineated in the statute. Chester Maxwell was thus denied an individualized and reliable capital sentencing determination, in violation of the eighth and fourteenth amendments. For the reasons discussed below, this violation cannot be considered harmless, and Mr. Maxwell is entitled to be sentenced by a properly instructed jury.

## II. BECAUSE SUBSTANTIAL NONSTATUTORY MITIGATING EVIDENCE WAS PRESENTED AT TRIAL, THE HITCHCOCK ERROR CANNOT BE CONSIDERED HARMLESS BEYOND A REASONABLE DOUBT.

This Court has held that cases involving Hitchcock error are subject to a harmless error analysis -- that is, the State must prove that the Hitchcock error was harmless beyond a reasonable doubt. E.g., Way v. Dugger, 568 So. 2d 1263, 1266 (Fla. 1990); Mikenas v. Dugger, 519 So. 2d 601, 602 (Fla. 1988); Riley v. Wainwright, 517 So. 2d at 658, 660 (citing Valle v. State, 502 So. 2d 1225 (Fla. 1987)). See Hitchcock v. Dugger, 481 U.S. at 399 (absent a showing of harmless error, new sentencing hearing required).

The Hitchcock error in this case cannot be considered harmless beyond a reasonable doubt. Substantial nonstatutory

mitigating evidence was presented to Mr. Maxwell's jury, a point the State conceded in oral argument before the trial court on Mr. Maxwell's ineffective assistance of counsel claim:

> Mr. Harris did put on substantial mitigation. There's a line of cases that we've cited there that talks about counsel's decision as to what he should put on and what he should not is strictly a matter of trial strategy. I think that's particularly true in this case where substantial evidence was put on and argued to the jury strenously."

P.C. Tr. 98 (emphasis added).[16]

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[16] In its brief in opposition to Mr. Maxwell's habeas petition alleging Hitchcock error, the State acknowledged the abundance of nonstatutory mitigating evidence presented by defense counsel. It observed that defense counsel presented four character witnesses, all of whom testified in areas of non-statutory mitigation concerning Chester Maxwell's "kindness and generosity to others in his neighborhood, his potential for rehabilitation and possible future contributions to society, general condemnation of capital punishment as a deterrent, and pleas for mercy by counsel and family." P.C. R. 16, 28.

> Defense counsel's presentation of evidence consisted entirely of non-statutory mitigating factors, including Petitioner's assistance to neighbors with chores, his status as a "big brother" and good friend to other people in the neighborhood, his relationship with children, his "rough" childhood, in general terms, and his prospects for offering positive future contributions to society.

Id. at 22.

> [Additionally, t]he PSI report clearly contained non-statutory mitigating factors such as Petitioner's social history (A. 36-37); and the statements of Petitioner's father and grandfather, urging mercy, and stating that Petitioner was "a good worker [and] contributed to the household", "was very helpful around the house", and did not cause problems. (A. 39).

Id. at 23.

This Court, moreover, has expressly acknowledged that "defense counsel did present testimony of witnesses concerning the defendant's character and background. The testimony went beyond statutory mitigating factors to include also nonstatutory factors." Maxwell v. State, 490 So. 2d at 932.

The mitigation testimony to which this Court and the State referred revealed the following:

Penalty Phase Mitigation

1. Loretta Pembleton, a close friend of Chester Maxwell, testified that he was like an older brother to her. They grew up together and went to school together. R. 1396, 1397. As to his character, she testified that "[h]e's always been good. I have never known him to cause any problems. He has always been great. He taught me to cope with problems that I never knew how to cope with. He taught me to deal with the community." R. 1397 (emphasis added).

   The community of which Miss Pembleton spoke was the that of Collier City, an impoverished, black ghetto, in which, she testified, it was "very hard to live." R. 1397 (emphasis added). Chester Maxwell taught her how to cope in that community:

   > I used to have a lot of problems dealing with the people there, and I sometimes used to sit down and talk to Chester and tell him my problems, and he would always give me his opinion as to how I should handle the situation, and it always came out that I was always on top. He always showed me the right way out. ... I think he has a lot to offer society.
   >
   > R. 1397 (emphasis added).

2. Mrs. Willie B. Johnson, a friend and neighbor of Chester Maxwell, testified that he often played with her six children and that she thought of him as one of her own children. R. 1399. Mrs. Johnson told the jury of Chester's kindness and generosity towards her family, how he would clean up her yard and help her

children around the house, and how good he was with the children. R. 1399. Mrs. Johnson also stated that Chester has a lot to offer society and that "he should have a chance to be rehabilitated." R. 1400 (emphasis added).

3. Mrs. Frances Lenora Mincey, who had known Chester Maxwell and his family for 15 years (R. 1403), testified that he "was a wonderful boy; very, very nice" and that he got along well with her five children. R. 1404. He would help her and her children around the house, cleaning the yard, painting, or whatever needed to be done. Id. She testified that Chester never caused any trouble at all in the neighborhood: "Never; no arguments, no fights, none whatsoever." Id.

   Mrs. Mincey explained that Chester had a difficult childhood, having been abandoned by his mother and raised by his invalid grandmother, who was unable to care for Chester properly. R. 1403-1404. She explained how he was again uprooted when his grandmother became bedridden and he was sent to live with his father and stepmother. Id. But despite all that, she testified, he was a very good, considerate boy and had a lot of good to offer. R. 1404. As she explained to the jury.

4. Joseph Maxwell, Chester's father, was the final person to testify for him. He testified how his son would always help him out, laying sod, hoeing, painting or cleaning, "or try to do anything around the apartment that would, you know, would help me." R. 1407. (Chester Maxwell himself testified at the guilt-innocence phase that he felt it was his duty to help his father: "I feel I should help my father, you know, take care of his business, and like I'm his oldest son, and like I'm the only one to help him out with the apartments." R. 1047, 1185-1186.)

   When asked about Chester's mother, Mr. Maxwell told of how Chester was abandoned by his mother, explaining that he had a mother "for a while" but then "something happened" and he then went to live with his grandmother. R. 1406.[17] After living with his grandmother

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[17] As this Court learned when it considered Mr. Maxwell's previous 3.850 appeal, Chester Maxwell's mother was an alcoholic who was never at home, who would dump Chester with relatives and not return for days at a time, who failed to feed and clothe him

> for about seven or eight years, Chester was then sent to live with his father. Id.
>
> Mr. Maxwell testified that his son was an avid drummer, who loved to play percussion instruments and the bongo drums. R. 1406. See also R. 1186. Mr. Maxwell explained how the children in the neighborhood all looked up to Chester and would always come to visit him. Chester served as a big brother to these children. "They wanted to talk with him. They wanted to be with him, and they would always be grateful of him." R. 1407 (emphasis added).
>
> Finally, Mr. Maxwell testified that his son had a "great deal to offer society" and when asked if there was anything else he would like to tell the jury, he said, "No more than I would like to ask the court for mercy, the jury for mercy. He is a good boy ...." Id.

This testimony was uncontroverted and established, at a minimum, that Chester Maxwell was abandoned by his mother; that he was shipped from one relative to another; that he came from a broken home; that he had an unstable home environment; that he was raised by his invalid grandmother, who was unable to care for him properly; that he came from an impoverished background; that he had a difficult childhood; that he lived in a tough, black ghetto; that despite all this, he had many good qualities that were deeply appreciated by those who knew him best; that he was generous, kind and considerate towards friends and family; that he was never known by his neighbors to be violent or to cause trouble; that he was loving towards children and that they loved him back; that he had the potential for rehabilitation; and that he continues to have much to offer society.

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and who abandoned him before he was even old enough to remember her. See Appendix to prior 3.850 motion, Affidavits of Idella Sims and Lee Anna Thompkins.

This is powerful, substantial mitigating evidence sufficient to support a jury recommendation of life. Chester Maxwell had the constitutional right to a jury that was able to consider this evidence in deciding whether he should live or die.

This Court has previously held that such evidence is mitigating and can provide the basis for a life recommendation. See, e.g., Hegwood v. State, 575 So. 2d 170, 173 (Fla. 1991), ("generally good and obedient child who had an unfortunate and impoverished childhood"); Songer v. State, 544 So. 2d 1010, 1011-1012 (Fla. 1989) (manifested a desire to help others; emotionally impoverished upbringing); Livingston v. State, 565 So. 2d 1288, 1292 (Fla. 1988) (neglected by mother); Lamb v. State, 532 So. 2d 1051, 1054 (Fla. 1988) (family and friends feel rehabilitation potential exists; "friendly, helpful, and good with animals and children" before offense); Harmon v. State, 527 So. 2d 182, 189 (Fla. 1988) (defendant was a good son and could contribute to society); Holsworth v. State, 522 So. 2d 348, 354 (Fla. 1988) (positive character traits; came from broken home; capacity for rehabilitation; known to family and friends as quiet, nonviolent person); Brown v. State, 526 So. 2d 903, 908 (Fla.), cert. denied, 488 U.S. 944 (1988) (impoverished background; subject to rehabilitation); Robinson v. State, 520 So. 2d 1, 2-3 (Fla. 1988) ("emotionally deprived because he had never known his mother"); Perry v. State, 522 So. 2d 817, 821 (Fla. 1988) (substantial nonstatutory mitigation presented, including testimony that

defendant was "kind, good to his family and helpful around the home" and never showed signs of violence).

5. Age/Potential Sentence. Also at penalty phase, Mr. Maxwell's trial attorney argued as a mitigating factor that Mr. Maxwell was only 26 years old and, if given a life sentence, would not even be eligible for parole until he was 51 years old. R. 1418. The jury should have been able to consider this fact in mitigation of a death sentence. See Jones v. State, 569 So. 2d 1234, 1239-40 (Fla. 1990).

Guilt-Innocence Phase Mitigation

Not only was significant nonstatutory evidence introduced at penalty phase, but additional nonstatutory mitigation was introduced through testimony at the guilt-innocence phase, which the jury should have been able to consider:[18]

6. Devotion to family: Chester Maxwell testified that he often visited his uncle (R. 1189), that he felt it was his duty to help his father in the upkeep of the apartments (R. 1184-1185), and that he had given his brother almost all of the

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[18] R. 1422 ("Your [sentencing] verdict should be based on the evidence you heard at guilt-innocence and in these proceedings."). See Downs v. Dugger, 514 So. 2d at 1072 (relying on evidence presented by the State at guilt-innocence phase to find Hitchcock error harmful); Harvard v. State, 486 So. 2d at 539 (nonstatutory mitigation may arise not only from evidence presented at penalty phase but from evidence presented and observations made in guilt-innocence phase). Indeed, if a capital defendant's case can be "aggravated" on the basis of evidence heard at guilt-innocence, certainly a capital case can also be "mitigated" on that basis. Moreover, it is from the guilt-innocence phase that any mitigation relating to the "circumstances of the offense" will normally arise.

clothes he owned. R. 1217. Evidence of close family ties and of generosity to friends and family can mitigate against a death sentence. See Perry, 522 So. 2d at 821.

7. Poverty: The jury was shown pictures of the all-black, low-income neighborhood of Collier City and the meager home in which Chester Maxwell lived. R. 1068. From these pictures, it would have been apparent to the jury that Mr. Maxwell came from an impoverished background, a fact they were also entitled to consider in mitigation. See, e.g., Hegwood, 575 So. 2d at 173.

The jury also was also presented with nonstatutory mitigating evidence concerning Mr. Maxwell's record and the circumstances of the offense:

8. Cooperative with police: The jury heard testimony that when Mr. Maxwell was arrested, he did not resist the police in any way. Officer Cayea, a witness for the State, testified that Mr. Maxwell was "very cooperative" and gave the police no trouble at all. R. 875. In fact, Detective Hall testified that he transported Mr. Maxwell without handcuffs and that he was under no obligation to go with the police to the station. R. 822, 856. Additionally, Mr. Maxwell consented to a search of his luggage. R. 864, 872. When asked to accompany the officers to the police station, Mr. Maxwell readily complied. R. 855, 856. This cooperation was pointed out to the jury in closing arguments during the penalty phase. R. 1260. Such behavior is mitigating. See Perry, 522 So. 2d at 821.

9. Impulsive/reflexive shooting: This case did not involve any of the aggravating factors that relate to the intent of the defendant. It did not involve a conscious intent to inflict unnecessary pain and suffering on the victim. It was not a highly calculated, execution style or witness elimination murder. Rather, it was an unfortunate, spontaneous, reflexive shooting during the course of a robbery. As this Court observed, "[D]eath was instantaneous, following a single shot." 443 So. 2d at 971. The jury heard testimony that the victim died instantly. R. 579. There is every indication that the shooting was impulsive and reflexive.[19] See Mikenas v. State, 519 So. 2d 601, 602 (Fla. 1988) (one of the nonstatutory mitigating factors

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[19] At sentencing, the court noted that it had reviewed Mr. Maxwell's Presentence Investigation Report. According to that report, Mr. Gelber advised police that Klein "requested [the gunman] not to take the ring. At that point the subject either forcibly removed or was in the process of receiving the property from the victim as the gun according to the victim Gelber wavered slightly in the subject's right hand and discharged." Updated Presentence Investigation Report at 3. This description strongly suggests that the shooting was impulsive and accidental rather than deliberate and premeditated.

Although this Court has previously stated that there was sufficient evidence of premeditation, 443 So. 2d at 971, there is no indication whether the jury -- the sole factfinder on this issue -- believed it was premeditated. It is just as likely that the jury's first-degree murder verdict was premised on the felony-murder rule, since the jury was instructed on both premeditated and felony murder, and both were argued to the jury. R. 565, 1325. See Asay v. State, No. 73,432, Slip op. at 6 (Fla. May 16, 1991) (whether a premeditated design to kill was formed prior to a killing is a question of fact for the jury); Penn v. State, No. 74,123, Slip op. at 5 (Fla. Jan. 15, 1991) (whether or not evidence shows premeditated design to commit murder is a question of fact for jury) (citing Preston v. State, 444 So. 2d 939 (Fla. 1984)).

presented was that the killing was "arguably the result of a reflex").

The jury also heard how Chester Maxwell tried to sell the gun to Willie Pearl Paul the night before the crime occurred. R. 791. This evidence hardly suggests a preconceived plan by Mr. Maxwell to commit a robbery the next day. To the contrary, he was trying to get rid of that gun. Cf. Mikenas, 519 So. 2d at 602 (nonstatutory mitigating circumstance that defendant did not have a gun until shortly before the robbery began).

Moreover, although this shooting was committed in daylight, in front of three eyewitnesses, no effort was made in this case, unlike in many other capital cases, to eliminate the three witnesses, although they might have been able to identify the two assailants. The jury was entitled to consider these facts in mitigation. See generally Hallman v. State, 560 So. 2d 223 (Fla. 1990) (jury entitled to consider weakness of aggravating factors in recommending sentence); Jones v. State, 569 So. 2d at 1239 (sentencer must be able to consider any relevant evidence that might cause it to decline to impose the death sentence) (citing McCleskey v. Kemp, 481 U.S. 279, 304 (1987)).

10. Weakness of identification. The jury clearly had some doubt about the identification of the perpetrators. The weakness in identification was the major theme of the defense. R. 1286. Defense counsel repeatedly emphasized to the jury that only one of three eyewitnesses, Mr. Gelber, identified Mr. Maxwell at the lineup, R. 1286; that Mr. Gelber needs eyeglasses to drive, R.

666, 1294; and that both Mr. Gelber and Dr. Prince testified that the gunman had straight, slicked-back hair with "goo" on it, whereas Chester Maxwell had very curly hair with no "goo", R. 682, 1292. Defense counsel also emphasized the discrepancies in the witnesses' descriptions of the assailants' height, weight, skin color, facial hair, and clothes. R. 1289-1293.

During guilt-innocence deliberations, the jury sent a note to the Court requesting the "booking record of both Defendants at the time of the arrest, dash, photos." R. 1362. Whether the question in the jury's mind related to determining who was the triggerman or to determining if these two men were the assailants, in either event, the jury clearly had some concern as to identification, and this doubt could have formed the basis for a recommendation of life instead of death. Although this Court has held that lingering doubt as to the defendant's guilt is not a proper factor to consider in mitigation, King v. State, 514 So. 2d 354 (Fla. 1987), cert. denied, 487 U.S. 1241 (1988), the Court recently acknowledged in Cooper v. State, No. 74,611 (Fla. May 9, 1991), that "[c]onflicting evidence on the identity of the actual killer can form the basis for a recommendation of life imprisonment." Slip op. at 4 (citing Hawkins v. State, 436 So. 2d 44 (Fla. 1983); Malloy v. State, 382 So. 2d 1190 (Fla. 1979)).

11. Equal culpability of co-defendant. The jury found Mr. Maxwell's co-defendant, Dale Griffin, guilty of first-degree murder. The prosecutor repeatedly stressed to the jury that while Griffin did not pull the trigger, he was equally culpable

of first-degree murder. R. 1268, 1269. Indeed, in every other respect, the evidence showed that Griffin was at least as culpable as Mr. Maxwell. They left town together. R. 758. They were both in possession of the jewelry. R. 808. They both had a weapon. R. 657-58. They both had worked at the Palm Aire Country Club. R. 939, 942.

One of the witnesses, Mr. Fox, testified that Griffin held a knife with a six-inch blade to his jugular vein. R. 574-75. This fact was reinforced by the prosecutor:

> "Mr. Fox ... tells you that ... Griffin ... stuck the knife in his neck." R. 1268. "When two people act in concert, the act of one is the act of the other .... Why did [Griffin] put that knife in Mr. Fox's neck? Why did he put this knife in Dr. Prince's back? Just to be there, something to do? It's ridiculous."

R. 1269.

It was Griffin's bag that contained the gun, the knife and his fingerprints. R. 565, 754, 806, 886, 967-970, 1012. It was Griffin who paid for the bus tickets to get out of town. R. 1221. It was Griffin who asked his sister to take them to the bus station. R. 753. And, according to Fox and Prince, it was Griffin who had to pull Chester together after the shooting. Griffin went to Chester and said, "Let's get out of here." R. 577. The jury could have inferred that Chester Maxwell was in an emotional state, that Griffin was more composed and in that sense the dominant actor. Another indication that Chester Maxwell did not plan this crime was that as late as the night before the offense, he was trying to get rid of the gun. R. 791.

Yet Griffin was given a life sentence, and Chester Maxwell was given death.[20] This jury sentenced Mr. Maxwell to death because that is what the prosecutor told them to do. Mr. Maxwell has previously argued that he was severely prejudiced in being tried together with Griffin at both the guilt-innocence and penalty phases.[21] In being singled out by the prosecutor as the only one deserving of death, the entire sentencing process was skewed inexorably in favor of death for Chester Maxwell, thereby denying him his right to an individualized, fair and reliable sentencing proceeding under the eighth and fourteenth amendments. See Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

13. Presentence Investigation Report. Judge Coker noted at sentencing that he had reviewed Mr. Maxwell's Presentence Investigation Report ("PSI"). Yet there is no indication that Judge Coker gave any effect to the nonstatutory mitigating circumstances presented in the PSI, which the State itself has

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[20] Griffin was eligible for a death sentence based on the aggravating circumstances of felony/murder and prior violent felony, the prior felony being the contemporaneous armed robberies of Klein, Fox and Prince. See Wasko v. State, 505 So. 2d 1314, 1317 (Fla. 1987) (contemporaneous convictions prior to sentencing qualify as prior violent felonies for purposes of aggravation, where they involve multiple victims in a single incident or separate incidents combined in a single trial) (citing Johnson v. State, 438 So. 2d 774 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984); King v. State, 390 So. 2d 315 (Fla. 1980), cert. denied, 450 U.S. 989 (1981); and Lucas v. State, 376 So. 2d 1149 (Fla. 1979)).

[21] See 490 So. 2d at 933.

conceded were present.[22] See Foster v. State, 518 So. 2d at 902 (clear that judge did not consider nonstatutory mitigation because there was nonstatutory mitigation that court could have considered); Morgan v. State, 515 So. 2d at 976 (no reference anywhere in sentencing order to nonstatutory mitigation; abundantly clear that judge did not consider it); Herzog v. State, 439 So. 2d 1372 (Fla. 1983) (no indication that sentencing judge considered nonstatutory mitigation, despite presence of such mitigation).

In addition to shedding light on the substantial nonstatutory mitigation introduced at trial, the PSI also indicated that Chester Maxwell had no juvenile record; that in 1975, he cooperated with the police in helping to clear at least five cases in the Broward County area, see Perry v. State, 522 So. 2d at 821; that he never knew his natural mother and was an illegitimate child with no true family, see Robinson v. State, 520 So. 2d at 2-3; that he was neglected by his father, who had little concern for Chester's well-being and failed to provide proper guidance and discipline, see Burch v. State, 522 So. 2d 810, 816 (Fla. 1988) (lack of parental guidance); that Chester repeated fourth and sixth grade and his grades were below average, see Herring v. State, 446 So. 2d 1049, 1057 (Fla.), cert. denied, 469 U.S. 989 (1984) (poor school performance, failed grades); that he had a close relationship with his grandmother and grandfather; that he is a member of the Baptist

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[22] P.C. R. 23.

faith, see Harmon v. State, 527 So. 2d at 189; and that he worked in the construction business with his grandfather, who described Chester as a good worker, see Smalley v. State, 546 So. 2d 720, 723 (Fla. 1989). The PSI's description of the offense also suggests that the shooting was accidental.[23]

In sum, substantial nonstatutory mitigation was presented to judge and jury in this case. Only two valid aggravating factors were present -- felony/murder and prior violent felony. The existence of substantial nonstatutory mitigation, combined with the weakness of these two aggravators, makes it certain that a jury recommendation of life would have been upheld. See Hallman v. State, 560 So. 2d at 227.

"Long ago [this Court] stressed that the death penalty was to be reserved for the least mitigated and most aggravated of murders." Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989) (citing State v. Dixon, 283 So. 2d 1 (Fla. 1983), cert. denied, 416 U.S. 943 (1974)). This is not one of those cases. Indeed, this case is similar to Mikenas v. State, in which the defendant shot and killed a police officer during a convenience-store robbery. This Court held the Hitchcock error not to be harmless:

> Even though the weight of the nonstatutory mitigating evidence was limited by the absence of character evidence, by the same token the aggravating circumstances cannot be characterized as overwhelming. All of the aggravating circumstances were directly related to the murder itself except one which referred to the fact that Mikenas was on parole when he committed the crime.

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[23] See note 19 supra.

> Considering the circumstances under which this crime was committed, we cannot say beyond a reasonable doubt that had the jury known that nonstatutory mitigating evidence could be considered, it would not have recommended life rather than death. Even though the second trial judge apparently knew that nonstatutory mitigating evidence could be considered, we are also unable to conclude beyond a reasonable doubt that an override would have been authorized even if the judge had decided not to follow a life recommendation.

519 So. 2d at 602. See also Copeland v. Dugger, 565 So. 2d 1348, 1349 (Fla. 1990) (jury's inability to consider the potential body of mitigating evidence regarding prospects for rehabilitation, mental retardation and remorse was not harmless error); O'Callaghan v. State, 542 So. 2d 1324 (Fla. 1989) (jury's inability to consider as a nonstatutory mitigating factor the disparate sentences given to other participants in the beating and shooting death of victim was not harmless error); Riley v. Wainwright, 517 So. 2d 656, 659 (Fla. 1987) (evidence relative to family background, character, and capacity for rehabilitation constituted significant nonstatutory mitigation; error not harmless). Accord Jones v. Dugger, 867 F.2d 1277, 1280 (11th Cir. 1989) (jury's inability to consider testimony of defendant's sister regarding his positive personality traits and good behavior in prison was not harmless).

As discussed above, the margin by which the jury voted for death is not known. No poll of the jury was ever taken. This Court cannot presume that the jury voted for death by a wide

margin. After all, this same jury voted to spare the life of the co-defendant, Dale Griffin.

This is not a case, moreover, in which the only constitutional error committed was in preventing the jury from considering substantial nonstatutory mitigating evidence. Rather, this is a case in which there was contamination of the process at every juncture: The jury was instructed that whether they recommended life or death, the verdict had to be by majority vote (R. 1428); Mr. Maxwell was prejudicially paraded before the jury in the custody of bailiffs and deputy sheriffs and at certain times during the trial appeared before the jury in leg irons and handcuffs (R. 367-68; App. 7); the courtroom was packed with bailiffs and deputies due to Griffin's outburst and verbal assaults on the Judge (R. 101-105, 367-68; App. 7); the jury was instructed that the real responsibility for sentencing the defendant to death rested not with them but with the court;[24] and, as discussed above, it was inherently prejudicial to try Mr.

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[24] At voir dire, the Court stated: "I just want to make it perfectly clear, as I did in here, juries do not send anyone to the electric chair nor to the penitentiary. Juries do not do that. Juries make recommendations." R. 265 (emphasis added). The prosecutor emphasized at voir dire, "You understand that Judge Coker is the only one to have any sentencing power?" R. 450 (emphasis added). The effect of these statements was directly evident when one juror, when asked at voir dire if she could impose the death penalty, responded, "I am not the one that grants it." R. 515. This woman sat on the jury. No effort was made to correct her misstatement. And at sentencing, the jury was instructed that "[t]he final decision as to what punishment shall be imposed rests solely with the Judge of this court." R. 1379. At the penalty phase, the prosecutor told the jury that "it's only an advisory sentence, ... it's not binding on the court and it's only a recommendation." R. 1409.

Maxwell and Mr. Griffin together and then ask the jury to impose death only on Mr. Maxwell.

Chester Maxwell's jury did exactly what it was told to do: to sentence him to death. In being instructed to consider only statutory mitigating factors, in a case in which the only mitigation presented was nonstatutory in nature, the jury was told to sentence Chester Maxwell to death. And in being instructed on all the statutory aggravating factors, whether they validly applied here or not, the jury was told to sentence Chester Maxwell to death.

Based on the totality of the circumstances, this Court cannot properly conclude that the failure of both judge and jury to consider the substantial nonstatutory mitigating evidence in this case had no effect on the ultimate sentence imposed on Chester Maxwell. The error was not harmless.

## III. THE TRIAL JUDGE'S SIGNING OF AN ORDER PREPARED BY THE STATE ATTORNEY, WITHOUT BENEFIT OF HEARING, BRIEFS, ARGUMENT OR NOTICE TO MR. MAXWELL, AND AFTER EX PARTE CONTACT WITH THE STATE, REQUIRES THAT THIS PROCEEDING BE REMANDED TO AN IMPARTIAL FACTFINDER FOR A FULL AND FAIR CONSIDERATION OF MR. MAXWELL'S 3.850 MOTION.

Rule 3.850 proceedings are governed by due process principles. Holland v. State, 503 So. 2d 1250 (Fla. 1987). Rudimentary due process requires that a defendant be afforded an independent determination by a tribunal based on the applicable law and the relevant, material facts.

Mr. Maxwell's fundamental due process and eighth amendment rights were violated in this case when the court below, without

benefit of hearing, updated briefs,[25] argument or notice to Mr. Maxwell, and after ex parte contact with an Assistant State Attorney, signed an order apparently prepared by the Assistant State Attorney denying Mr. Maxwell's 3.850 motion.

On the face of the order remanding Mr. Maxwell's habeas petition for consideration as a Rule 3.850 motion, Judge Coker wrote: "Zacks -- See me. T.C." "Zacks" is Assistant State Attorney Paul Zacks. Also on the order, Judge Coker wrote, "11/6/90 -- P. Zacks to do order. T.C." P.C. R. 40. Eight days later, Judge Coker signed the order denying Mr. Maxwell's 3.850 motion. P.C. R. 42. At no time was Mr. Maxwell ever given an opportunity to see, comment upon, or object to the State's order. Nor was there any hearing or argument prior to the entry of this order.

Judge Coker's notations on the remand order indicate that he and Assistant State Attorney Zacks engaged in ex parte communications regarding Mr. Maxwell's 3.850 motion and the disposition of that motion. Mr. Maxwell's attorney received no notice whatsoever of these communications.

Had he been given the opportunity, Mr. Maxwell would have objected to the State's order on the ground that it purports to make factual findings concerning the claim at issue, although no evidentiary hearing has been held on this claim. The order also makes numerous clearly inaccurate legal conclusions, as

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[25] The briefs before Judge Coker were three years old. See note 1 supra.

previously discussed. The order is nothing more than a one-sided document presenting a condensed version of the State's response to the original habeas petition.[26]

To state the obvious, courts are supposed to hear the evidence presented by both parties and make independent rulings. When findings are fed to a court through a one-sided presentation from one party, the resulting order, which is "written by the prevailing party to a bitter dispute," will not comport with what fair adjudication requires. Amstar Corp. v. Domino's Pizza, Inc., 615 F.2d 252, 258 (5th Cir.), cert. denied, 449 U.S. 899 (1980). Such a disposition is unfair, unjust and improper. In a capital case, such a disposition violates fundamental fairness and due process, as well as the eighth amendment. In the capital sentencing context, this Court has expressly forbidden circuit courts from relying on findings of fact prepared by the State. Patterson v. State, 513 So. 2d 1257 (Fla. 1987). The necessity

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[26] Compare State's brief in opposition at page 6 (R. 14): "[T]he trial court advised the jury that it might hear more evidence presented at the sentencing phase, `on any matter relevant to the sentence', (R. 125), and that the jury could consider such evidence, in making its advisory sentence. (R. 125, 232, 1379)" with Judge Coker's order at page 2 (R. 42): "The Court also advised the jury both at the jury selection and the sentencing stages that there could be additional evidence presented at sentencing `on any matter relevant to the sentence' that the jury could consider in arriving at its sentence recommendation (see pages 125, 132 [sic] and 1379 of the appellate record)." As is clear from the record, this statement completely misrepresents what the jury was told at voir dire. As discussed supra at note 6, these citations only serve to confirm the commission of Hitchcock error rather than to rebut it. Those portions of the record certainly do not "conclusively show" that Mr. Maxwell is "entitled to no relief." Fla. R. Cr. P. 3.850.

for independent weighing of Mr. Maxwell's claim is just as clear in the instant case.[27]

Moreover, it is clear that the procedure followed by the State and Judge Coker comports with neither this Court's mandate nor Rule 3.850. In remanding Mr. Maxwell's Hitchcock claim to the trial court for treatment as a Rule 3.850 motion, P.C. R. 40, this Court clearly contemplated that the trial court would either hold an evidentiary hearing to resolve disputed factual matters, see, e.g., Hall v. State, 541 So. 2d 1125, 1126, 1128 (Fla. 1989), or at a minimum decide whether an evidentiary hearing was required, after notice and an opportunity to be heard. See Rule 3.850. In the event that the court below decided that no evidentiary hearing was required, the court was required to review the record and the pleadings in a neutral and impartial fashion, and make an appropriate disposition of the motion. Id. The court below did none of these things. Instead, after ex parte contact with the State, it assigned to the State the task of preparing the order, purported to make factual findings without the benefit of an evidentiary hearing, and denied the motion apparently without review of the record and certainly without citing or attaching portions of the record establishing that Mr. Maxwell is entitled to no relief. The proceedings in the court below deprived Mr. Maxwell of his right to due process

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[27] As noted above, Judge Coker's impartiality is also called into question by his letter to the Pardon and Parole Board, stating that Mr. Maxwell "deserves nothing better than that which he visited upon the victim and the victim's family." See note 13 supra.

and this Court of the reasoned review it sought through its remand order.

For the foregoing reasons, this Court should either grant Mr. Maxwell relief under Hitchcock based on the record as it exists or remand this case for reassignment to another circuit judge for a full and fair adjudication of Mr. Maxwell's Rule 3.850 motion.

## CONCLUSION

For the foregoing reasons, Mr. Maxwell's death sentence should be vacated and the matter remanded for resentencing before a new advisory jury. Alternatively, the matter should be remanded and reassigned to a different circuit judge for a full and fair adjudication of Mr. Maxwell's 3.850 motion.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of May, 1991, a copy of the foregoing Brief of Appellant was sent by United States mail to:

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