NO. 77-138

IN THE SUPREME COURT OF FLORIDA

CHESTER LEVON MAXWELL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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ARGUMENT

Appellee concedes that there was constitutional error under Hitchcock v. Dugger, 481 U.S. 393 (1987), but contends that the error was harmless.[1] Appellee bears the burden of proving beyond a reasonable doubt that the error did not affect the outcome of Chester Maxwell's sentencing proceeding. Chapman v. California, 386 U.S. 18 (1967). Appellee attempts to shift this burden to Mr. Maxwell by arguing that "appellant has failed to establish that any error in the jury instructions would have resulted in a life sentence." Answer Brief of Appellee at 17; see id. at 7. This attempt to shift the burden is clearly wrong.[2]

Appellee cannot satisfy its burden of proving beyond a reasonable doubt that the admitted violation of Chester Maxwell's rights under the Eighth and Fourteenth Amendments to the United States Constitution, and Article I, § § 9 and 17 of the Florida Constitution, was harmless. Appellee contends that the error is harmless because Judge Coker would have imposed death even if a

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[1] "Appellee concedes that this issue is again properly before this Court for the limited purpose of determining whether the Hitchcock violation was harmless error." Answer Brief of Appellee at 1.

[2] Appellee also attempts to shift the burden by referring to this Court's prior consideration of mitigating evidence in the context of Mr. Maxwell's ineffective assistance of counsel claim. Answer Brief of Appellee at 8. The standards for determining ineffective assistance of counsel are completely different than they are for Hitchcock harmless error. So are the burdens of proof. In an ineffective assistance of counsel claim, the petitioner has the burden of proving that but for counsel's failure to present mitigating evidence, there is a reasonable probability that the outcome would have been different. Strickland v. Washington, 466 U.S. 668 (1984). Under a Hitchcock analysis, the State has the burden of proving that the error was harmless beyond a reasonable doubt. Hitchcock v. Dugger, 481 U.S. 393 (1987).

properly instructed jury had recommended life.[3] That, again, is simply the wrong standard, as this Court made clear in Hall v. Wainwright, 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. The proper standard is whether a jury recommending life imprisonment would have a reasonable basis for that recommendation. If so, the trial judge could not override the jury's recommendation and sentence Hall to death. Tedder v. State, 322 So. 2d 908 (Fla. 1975).

Thus, appellee must prove that had a properly instructed jury recommended life, an override of the jury recommendation would have passed muster under Tedder. It is clear that appellee cannot do so. See Brief of Appellant, at 24-25. Given the substantial nonstatutory mitigation introduced by Mr. Maxwell, it requires a "remarkable exercise in speculation," Hall, 541 So. 2d at 1128, to argue that the Hitchcock error was harmless, or that the evidence was insufficient to support a jury recommendation of life.

Appellee also attempts to minimize some of the nonstatutory mitigating evidence presented to the jury by impugning or questioning Mr. Maxwell's motives. While most of the state's assertions in this regard do not merit a response, some of them do.

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[3] This argument apparently ignores the facts that in sentencing Mr. Maxwell, Judge Coker found five aggravating factors, three of which were later struck by this Court, and that Judge Coker limited his consideration of the mitigating evidence to statutory mitigation. See infra. It is extreme conjecture to say that a judge would have sentenced Chester Maxwell to death if he had considered only the two valid aggravating factors and also had considered the nonstatutory mitigation "as a mitigating factor," Lockett v. Ohio, 438 U.S. 586, 604 (1978), and the jury had recommended life.

For example, appellant asserts that "whatever work appellant does for his father is not done out of the goodness of his heart. Appellant lived with his father rent free and was given money by his father when asked." Answer Brief of Appellee at 9. It was for the jury to decide if Chester was helpful around the house, not the State to infer bad motives.[4]

Similarly, regarding Chester Maxwell's cooperation with the police when arrested, the State contends that he was simply "smart enough not to resist arrest." Answer Brief of Appellee at 10. Again, this was for the jury to decide, not the State. Moreover, some of the appellee's contentions are simply incorrect. Chester Maxwell did not lie to the police about his identity. As was established at trial, Chester has gone by his mother's name (Sims) and his father's name (Maxwell) at various times in his life. R. 1183. In fact, the name on Chester's birth certificate is Chester Sims, the name he gave to the police. See Appendix. Nor did he lie to police about ownership of the luggage, as appellee contends. Answer Brief of Appellee at 9-10. The record clearly establishes that the luggage in question belonged to Dale Griffin, not Mr. Maxwell. R. 18-19 (hearing on motion to suppress physical evidence, wherein Griffin affirmatively testifies that the luggage belonged to him, not Chester); R. 754.

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[4] The fact is, Chester Maxwell helped other people, not just his father, with yard work and other chores, with no expectation of compensation. He did it out of generosity. See, e.g., R. 1399, 1404.

More fundamentally, appellee's argument seeks to invade the province of the jury. At issue here is the effect of precluding the jury from considering nonstatutory mitigating evidence, including all of the mitigating evidence presented by Mr. Maxwell. In determining whether this preclusion was harmless, how appellee construes and characterizes the mitigating evidence is not significant. What is at issue is whether a properly instructed jury could have considered this evidence as mitigating. It is clear that a properly instructed jury could have done so, but that Mr. Maxwell's jury was precluded from doing so.

For purposes of Hitchcock harmless error and Tedder analysis, the question is "whether a jury recommending life would have a reasonable basis for that recommendation." Hall, supra, at 1128. In answering that question, this Court has consistently looked only to whether the mitigation in question was sufficiently proven that a reasonable jury could rely on it. The fact that, for example, a trial judge finds that the defendant failed to prove mitigation, does not mean that the jury could not rely on the same mitigation as a basis for recommending life. See, e.g., Cheshire v. State, 568 So. 2d 908 (Fla. 1990) (trial judge found no mitigating circumstances; jury could have relied on evidence of drinking and emotional distress); Harmon v. State, 527 So. 2d 182 (Fla. 1988) (jury could have relied on doubt as to role of defendant and his accomplice and disparate sentences).

In addition to the substantial mitigating evidence presented by Mr. Maxwell, a properly instructed jury's life recommendation

would also have been reasonable because of the relative weakness, both in weight and quantity, of the aggravation in Mr. Maxwell's case. See Hallman v. State, 560 So. 2d 223 (Fla. 1990) (jury's life recommendation reasonable in part because they may have felt some of the aggravating factors entitled to little weight). Given the trial court's preclusive instruction, the jury was deprived of the opportunity to weigh the mitigating evidence against the weak aggravation, and consequently recommended death. Had the jury not been so precluded, it cannot be concluded beyond a reasonable doubt that they would not have recommended life, and such a recommendation would clearly have been reasonable.

In fact, this Court has repeatedly found that Hitchcock error was not harmless in cases far more egregious and aggravated than Mr. Maxwell's. See, e.g., McCrae v. State, 510 So. 2d 874 (Fla. 1987) (Hitchcock relief granted to petitioner who raped and brutally beat to death a 67-year old woman, despite finding an aggravation that McCrae had a prior conviction for assault with intent to commit murder; the crime was committed while engaged in the commission of a rape; and it was especially heinous, atrocious and cruel); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987) (granting Hitchcock relief to a triggerman in a contract killing which was committed for pecuniary gain); Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987) (Hitchcock relief granted in case in which defendant had brutally tortured and beat his female victim to death); Morgan v. State, 515 So. 975 (Fla. 1987) (granting Hitchcock relief where the murder was committed while the defendant was under sentence of

imprisonment, there was a prior felony conviction, and the ten stab wounds to the victim supported a finding of heinous, atrocious and cruel); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987) (Hitchcock relief granted to defendant who, for the purpose of robbing his employer, entered the business and shot three persons, killing two, with aggravating factors of murder to avoid lawful arrest for pecuniary gain, and in the course of a robbery. See Riley v. State, 366 So. 2d 19 (Fla. 1978)); Foster v. State, 518 So. 2d 901 (Fla. 1987) (Hitchcock relief granted in case where an elderly gentleman was robbed by a defendant who cut the victim's throat, beat him, dragged him into the woods and cut his spine, all supporting a finding of heinous, atrocious and cruel); Waterhouse v. State, 522 So. 2d 341 (Fla. 1988) (Hitchcock relief granted to defendant who had a second degree murder conviction and was on parole, and where the killing was heinous, atrocious and cruel and committed during a brutal sexual battery); Ziegler v. Dugger, 524 So. 2d 419 (Fla. 1988) (Hitchcock relief granted where Zeigler had knowingly created a risk of death to others by virtue of an overall scheme of a planned mass homicide, was found guilty of four murders, and had aggravating factors of murder for pecuniary gain, to escape detection and avoid lawful arrest, and where two of the murders were heinous, atrocious and cruel); Combs v. State, 525 So.2d 853 (Fla. 1988) (granting Hitchcock relief in a drug related execution that was heinous, cold, calculated and premeditated); O'Callaghan v. State, 542 So. 2d 1324 (Fla. 1989) (Hitchcock relief granted where the aggravating factors were that the murder was

committed during the course of a kidnapping, heinous, atrocious and cruel, cold, calculated and premeditated, in a prior conviction of robbery); and Thomas v. State, 546 So.2d 716 (Fla. 1989) (Hitchcock relief granted to defendant with aggravating factors of a prior capital felony; murder was committed to avoid lawful arrest; heinous, atrocious and cruel; and cold, calculated and premeditated).

In the instant case, it is clear both that there was substantial nonstatutory mitigation that would have formed a reasonable basis for a jury recommendation of life for Chester Maxwell, and that the aggravation was far weaker than in numerous cases in which this Court has granted Hitchcock relief. Under this Court's precedents, it is equally clear that the preclusion of the jury from considering the nonstatutory mitigating evidence presented by Mr. Maxwell was not harmless.

With respect to the Hitchcock error before the sentencing judge, appellee makes numerous citations to statements by Judge Coker in the record. Answer Brief of Appellee at 12-13. Appellee contends that these statements indicate that Judge Coker considered all of the evidence presented by Mr. Maxwell. Nowhere in the trial record, however, is there any instruction by Judge Coker to the jury to consider any mitigating evidence other than statutory mitigation. Nor is there any indication by Judge Coker that he considered "as a mitigating factor," Lockett v. Ohio, 438 U.S. 586, 604 (1978), any of the nonstatutory mitigating evidence presented by Mr. Maxwell. The fact that Judge Coker read the PSI or listened

to the nonstatutory mitigating evidence presented by Mr. Maxwell does not establish that he considered that evidence as mitigation. As argued by Mr. Maxwell in the Brief of Appellant, at 12-19, Judge Coker's instructions to the jury, his sentencing order, and the remainder of the record establish that he limited his consideration of mitigating factors to those set forth in the statute.[5]

Conclusion

For the foregoing reasons, Mr. Maxwell's death sentence should be vacated and the matter remanded for a new sentencing hearing which comports with the Eighth and Fourteenth Amendments.

Respectfully,

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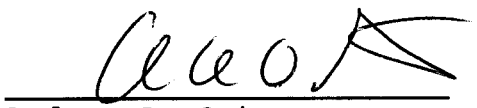
[5] Appellee contends that Card v. Dugger, 512 So. 2d 829 (Fla. 1988), supports its position that Judge Coker's failure to address the nonstatutory mitigation in his sentencing order is irrelevant to the issue whether he considered such mitigation. Answer Brief of Appellee at 14. Card is clearly distinguishable, in that there was no Hitchcock error in the jury instructions in Card. Id. at 830. Appellee has no response to the cases cited by Mr. Maxwell in his initial brief, establishing that where the judge both improperly instructs the jury and fails to discuss the nonstatutory evidence in his sentencing order, Hitchcock error is presumed. Brief of Appellant at 13-14.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of September,1991, a copy of the foregoing Reply Brief of Appellant was furnished by United States Mail to CELIA TERENZIO, ESQ., Office of Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach, FL 33401.



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