

IN THE SUPREME COURT OF FLORIDA

VERNON RAY COOPER,

Petitioner,

v.

Case No. 71,139

RICHARD L. DUGGER, Secretary,
Department of Corrections,
State of Florida,

Respondent.

REPLY TO RESPONDENT'S OPPOSITION TO
THE PETITION FOR A WRIT OF HABEAS CORPUS

Petitioner, Vernon Ray Cooper, through undersigned counsel, respectfully replies as follows to Respondent Richard L. Dugger's Response to Petition for Writ of Habeas Corpus:

I. Contrary to the Respondent's Argument, the Proffered Mitigating Evidence Was Relevant to Sentencing

A. Contrary to the Respondent's argument, this Court's decision in Cooper I does not resolve the issues presented by this habeas petition

In arguing that the non-statutory mitigating evidence proffered by the defense at sentencing was properly excluded by the trial judge, the State relies heavily on this Court's treatment of the issue in Cooper v. State, 336 So.2d 1133 (Fla. 1976) [hereafter referred to as "Cooper I"]. See Response at 5-6, 8, 11. But the Respondent vacillates radically in his description of the nature and scope of the holding in Cooper I. The Respondent first suggests that Cooper I resolved the constitutional issue, that "this Court . . . in Cooper I . . . found no Lockett v. Ohio error." See Response at 6. See also id. at 5 ("this Court . . . made clear . . . there was no violation of Lockett v. Ohio"). Thereafter, the Respondent adopts a diametrically opposed interpretation of Cooper I, quoting this Court's statement in Songer v. State, 365 So.2d 700 (Fla. 1978) that Cooper I was concerned solely with the issue of whether the proffered evidence was relevant to the statutory mitigating

circumstances and did not reach the constitutional issue. See Response at 9-10. On the latter theory, Respondent argues that petitioner failed to raise the constitutional claim in Cooper I and should be viewed as having committed a procedural default. See Response at 18.

The Respondent urges this Court to adhere to its interpretation of Cooper I in Songer v. State, supra. See Response at 10. But if this Court does so, the Court must conclude, as it did in Songer, that Cooper I decided only the issue of whether petitioner's evidence was relevant to the statutory mitigating circumstances. See Cooper v. State, 437 So.2d 1070, 1071 (Fla. 1983) [hereafter "Cooper II"] (reiterating the Songer analysis of Cooper I and stating that "[i]n his initial appeal from his conviction and sentence, Cooper raised the question of whether certain evidence he had proffered was probative and relevant to the statutory mitigating factors, and we answered this question in the negative"). Accordingly, the Cooper I language evaluating the probative value of petitioner's evidence, which was quoted by Respondent, would have to be read as speaking solely to the question whether that evidence was probative of statutory mitigating circumstances.

Petitioner readily concedes that the mitigating evidence excluded in this case was not relevant to any statutory mitigating circumstance. The non-statutory nature of the evidence is precisely what led the trial judge to exclude it. Under Hitchcock v. Dugger, 107 S.Ct. 1821 (1987), that exclusion was unconstitutional if the evidence went to show non-statutory mitigation. And, by definition, that was simply not an issue which this Court could have decided in Cooper I under the view of Cooper I adopted in Songer v. State.

Even if one viewed Cooper I as reaching and rejecting a constitutional challenge to the exclusion of the non-statutory mitigating evidence, petitioner respectfully suggests that Cooper

I should not foreclose the merits of his present habeas petition. Cooper I's analysis of the right to present mitigating evidence and the relevancy of such evidence predated every single U.S. Supreme Court decision establishing the parameters of a capital defendant's right to present non-statutory evidence in mitigation. It predated the U.S. Supreme Court's first announcement in Lockett v. Ohio, 438 U.S. 586 (1978), and Bell v. Ohio, 438 U.S. 637 (1978), that mitigating evidence cannot be restricted to a statutory roster of circumstances. It predated Eddings v. Oklahoma, 455 U.S. 104 (1982), and Skipper v. South Carolina, 106 S.Ct. 1669 (1986). Most important of all, it predated Hitchcock v. Dugger, supra. As this Court stated in Downs v. Dugger, No. 71,100 (Fla. September 9, 1987), Hitchcock effected "a substantial change in the law" of Florida with respect to the introduction and consideration of non-statutory mitigating circumstances. Downs, supra, slip opinion at 2.

B. Contrary to the Respondent's argument, the proffered mitigating evidence of employment history was relevant, and its exclusion violated petitioner's constitutional right to present mitigating evidence of his character

Respondent's challenge to the relevancy of petitioner's evidence of prior employment is based solely upon Cooper I. See Response at 8 ("[t]he problem with the current contention is that i[t] was previously rejected in Cooper I"); see also id. at 5-6 (quoting Cooper I on the employment issue). We have just shown why Cooper I does not control the issue. And on the merits, there can be no serious doubt that evidence of prior employment is highly relevant to character and therefore to the capital sentencing determination. See, e.g., Tyler v. Kemp, 755 F.2d 741, 745 (11th Cir. 1985), rehearing denied, 765 F.2d 154 (11th Cir. 1985), cert. denied, 106 S.Ct. 582 (1985) (concluding that trial counsel's ineffectiveness in failing to present evidence in mitigation was prejudicial because "[t]here was significant mitigating evidence that could have been submitted" under Lockett

v. Ohio, 438 U.S. 586 (1978), including Tyler's "good work record"). The relevancy of a defendant's work record is demonstrated by the fact that such evidence has traditionally been included in presentence reports for consideration at sentencing (see, e.g., Williams v. New York, 337 U.S. 241, 250 n.15 (1949)), and the Florida legislature has expressly listed employment history as one of the factors that a presentence report must include. See Fla. Stat. Ann. § 921.131(1)(c) (1985) ("Such report shall include: . . . [t]he offender's employment background, . . . his present employment status, and his occupational capabilities").

The Respondent declares that the petitioner "overlooks the fact that during the trial phase evidence was introduced which indicated the petitioner was seeking employment at the time this murder occurred." Response at 7. In fact, the Petition addresses this very point at pages 11-12. As explained there, the employment evidence which emerged at the guilt phase was necessarily brief and incomplete because it was not relevant to the question of guilt or innocence. At trial, the petitioner simply mentioned that "[t]he last thing I was doing was glass construction work", "[c]utting the glass and putting it in the holes in buildings." T. XIII, at 100. By contrast, the sentencing evidence would have presented a complete picture of petitioner's employment history (see T. XIV, at 24) including a job at Memorial Hospital in Mobile (see T. XIV, at 130; see also id. at 77) to demonstrate that petitioner's good performance on the job gave him a "chance of rehabilitation, . . . [a] chance of . . . gaining a responsible position in the society, even twenty-five years in the future." See T. XIV, at 24. Moreover, even to the limited extent that the jury and the judge did hear about the petitioner's employment during the guilt phase, the jury "was instructed not to consider . . . [this] evidence of nonstatutory mitigating circumstances" at sentencing, Hitchcock v. Dugger,

supra, 107 S. Ct. at 1824, and the judge similarly restricted his consideration of evidence in mitigation to "statutory mitigating circumstances," R. 190.

C. Contrary to the Respondent's argument, the proffered evidence of domination by the co-perpetrator was relevant, and its exclusion violated petitioner's constitutional right to present mitigating evidence of his character and the circumstances of the offense

The Petition describes the exclusion of petitioner's evidence regarding the violent nature of his co-perpetrator, Steve Ellis, and Ellis' dominant role in their relationship. As trial counsel explained, this evidence would have illuminated the relationship between Ellis and petitioner, demonstrating a pattern and practice pursuant to which the more passive petitioner was dominated and controlled by the more violent Ellis. T. XIV, at 70-71, 79, 81.

Such evidence falls into two Hitchcock categories, showing both the "circumstances of the offense" (by indicating which of the two men would have played the dominant role in planning, directing, and carrying out the crimes), and petitioner's "character" (by showing that he was easily led by Ellis). See, e.g., Troedel v. Wainwright, __ F. Supp. __ (S.D. Fla. September 23, 1986), affirmed, 828 F.2d 670 (11th Cir. 1987) (opinion of the District Court attached as Appendix) (concluding that the ineffectiveness of trial counsel in failing to investigate a codefendant's violent nature and present evidence of various prior incidents of violent conduct prejudiced Troedel at his capital sentencing hearing).

The Respondent seizes upon certain comments of the judge to suggest that the exclusions of the evidence about Ellis' violent nature and domination of petitioner were based solely upon its competency. See Response at 8-9. But a careful reading of the transcript reveals that these remarks and the judge's rulings excluding the evidence all stem from his view that non-statutory mitigating circumstances could not be presented. When petitioner

first attempted to question a witness about Ellis' violent nature, the judge sustained the State's objection, ruling that evidence concerning Ellis was irrelevant to "the question of mitigating circumstances" (id. at 53), which the court had previously defined as "those which are actually enumerated in the statutes or those that might be more or less a side issue of those matters." Id. at 23. When defense counsel then attempted to fit the Ellis evidence into categories of statutory mitigating circumstances, see T. XIV, at 53, 64, 70-71, the judge again rejected it, ruling that it did not make out the statutory mitigating factors. See id. at 54, 64, 80-81. The judge explained that the proffered evidence was irrelevant to the statutory mitigating circumstance that "[t]he defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor" (Fla. Stat. Ann. § 921.141(5)(d) (1975)) because "it was contemplated that he [petitioner] too was involved in the commission." T. XIV, at 54. Adopting a narrow view of the statutory mitigating circumstance of duress (Fla. Stat. Ann. § 921.141(5)(f) (1975)), the judge ruled that only evidence of duress at the time of the crime could be admitted, see T. XIV, at 64, 80-81, thereby excluding the proffered evidence of a long-term relationship of duress and domination. But, as the decision in Troedel v. Wainright, supra, demonstrates, the proffered evidence of Ellis' violent personality, while perhaps not relevant to these two statutory mitigating circumstances, was relevant and proper non-statutory mitigating evidence. So was evidence of a long-term relationship of domination that predated the crime and influenced petitioner's actions on the day of the crime.

Contrary to the Respondent's argument, the testimony offered to prove Ellis' violent personality and dominant relationship to petitioner was competent evidence. Ellen Saiger testified in a proffer outside the presence of the jury that she had known Steve

Ellis for two years and had known him well for approximately a year (T. XIV, at 68), that Ellis had retaliated against his employer for firing him by shooting at the employer's automobile (id. at 68-69), that Ellis kept weapons on the shelves in his home, and that petitioner appeared to be afraid of Ellis (id. at 70), "go[ing] places to keep away from Steve, where Steve couldn't find him . . . [and] . . . refus[ing] to answer the phone one day just because he didn't want to have any contact with Steve." Id. Marilyn Smith, who also testified in a proffer outside the presence of the jury, recounted that she had had extensive contact with Ellis (T. XIV, at 74); she corroborated Saiger's account of the incident in which Ellis shot at his former employer's automobile (T. XIV, at 76), adding that "he said, in front of my husband and myself, that he would kill [the employer] if he got the opportunity." Id. at 74. Smith would have testified that Ellis "beat [his son] pretty bad" (id.); she said that "one minute he was just as normal as we are, and the next minute he would act like a crazy person." Id. at 75. She corroborated Saiger's account of Ellis' possession of weapons, noting that he carried a weapon in his car (id. at 76-77), and she also corroborated Saiger's testimony that petitioner attempted to avoid Ellis (id. at 77).

The Respondent argues that petitioner testified in a later hearing on a Rule 3.850 Motion and "never suggested th[at] he was dominated by Ellis." Response at 7 n.2. But it is obvious why he did not: the hearing was directed solely to the issue of ineffectiveness of counsel, and the State objected whenever the petitioner's testimony strayed from that narrow issue. See, e.g., Transcript of Hearing, at 347. When the Respondent emphasizes petitioner's testimony that he went to pick up Ellis in his car (see Response at 7 n.2), arguing that this refutes the evidence of domination, the Respondent replicates the error made by the trial court in restricting evidence of duress and

domination to events which happened on the day of the crime. Plainly, a long-term relationship of duress and domination would influence petitioner to acquiesce in whatever Ellis told him to do, even if that included a directive to pick Ellis up at a certain time and place. It was precisely such a dominating relationship and Ellis' violent personality that petitioner attempted to show at the sentencing hearing, but the judge excluded the evidence pursuant to his narrow view of statutory mitigating circumstances.

D. Contrary to the Respondent's argument, the other proffered evidence of character was relevant

The Respondent asserts that the proffered mitigating evidence of petitioner's marital plans was irrelevant to the capital sentencing determination. See Response at 9. But the marital plans showed petitioner's ability to form a long-term relationship, his stability, and his reliability. In these respects, it was character evidence relevant to sentencing, just as information about a defendant's family circumstances has always been deemed relevant to the sentencing determination. See, e.g., Williams v. New York, supra, 337 U.S. at 249-50 & n. 14-15. Indeed, the Florida statute governing the preparation of pre-sentencing investigations requires that presentence reports contain a discussion of "[t]he social history of the offender, including his family relationships, marital status, interests, and related activities." Fla. Stat. Ann. § 921.231(1)(d) (1985).

The Respondent also challenges the relevancy of the proffered mitigating evidence of petitioner's feelings about his prior period of incarceration. See Response at 9. As trial counsel explained to the judge, this evidence was designed to demonstrate petitioner's "attempt to rehabilitate himself since he was released from jail." T. XIV, at 22. In Skipper v. South Carolina, 106 S.Ct. 1669 (1986), the Court made clear that a capital defendant's reactions to prior punishment are highly

relevant to the life-or-death decision. Evidence that petitioner responded to the prior period of incarceration by attempting to rehabilitate himself is "past conduct . . . indicative . . . that the defendant would not pose a danger if spared (but incarcerated) [and thus] must be considered potentially mitigating." Id. at 1671.

E. Contrary to Respondent's argument, the unconstitutionality of the judge's repeated exclusion of non-statutory mitigating evidence is not cured by the fact that the judge did allow some inconsequential non-statutory mitigating evidence to be presented

The Respondent argues that the trial judge admitted some non-statutory mitigating evidence regarding petitioner's reputation for veracity and non-violence. Response at 6. At the time of the sentencing hearing, which took place in 1974, the judge had little guidance to administering a new death sentencing statute, and he essentially created his own rules for the types of mitigating evidence he would and would not allow. While establishing a general rule that non-statutory mitigating evidence would be excluded (see, e.g., T. XIV, at 23), he made a very narrow exception for the traditional category of testimony attesting to good community reputation for the classic virtues. See T. XIV, at 27. This subject was discussed in footnote 2 of the Petition at pages 9-10, which demonstrates that the admission of such a restricted form of non-statutory mitigation cannot justify the constitutional violations committed by excluding other non-statutory mitigating evidence encompassed within the rules of Lockett v. Ohio, supra, and Hitchcock v. Dugger, supra. Moreover, the petitioner's presentation of even this narrow category of non-statutory mitigation was rendered fruitless by the judge's limiting instruction to the jury and his refusal to consider any non-statutory mitigating factors in his own sentencing determination. See Riley v. State, supra, slip opinion at 7 (explaining that Hitchcock rejects the "'mere presentation' standard").

F. Contrary to the Respondent's argument, the general caselaw on according deference to the trial court's evidentiary rulings has no application to the present case

The Respondent cites general caselaw calling for deference to the trial court's evidentiary rulings. See Response at 10; see also id. at 6. But a trial judge's ruling is owed no deference when the judge applied the wrong legal standard. See, e.g., Walter v. Walter, 464 So.2d 538, 539 (Fla. 1985); Howard v. Howard, 467 So.2d 768, 771 (1st Dist. 1985). That is precisely what happened here. The judge's rulings were based upon a restrictive view of mitigating circumstances that was not only incorrect but unconstitutional. And although Respondent would have this Court ignore "the reasons why the trial court suppressed the proffered evidence", see Response at 6, it is the judge's reasoning which demonstrates that he excluded the evidence on the basis of an unconstitutionally narrow concept of mitigating circumstances and further demonstrates that this narrow concept led him to exclude all non-statutory mitigating evidence from his own sentencing consideration. See, e.g., Harvard v. State, 486 So.2d 537, 539 (Fla. 1986), cert. denied, 107 S.Ct. 215 (1986) ("an appellant seeking post-conviction relief is entitled to a new sentencing hearing when it is apparent from the record that the sentencing judge believed that consideration was limited to the mitigating circumstances set out in the capital sentencing statute").

II. Contrary to Respondent's Procedural Default Claim, the Petitioner is Entitled to Relief Under this Court's Standards for Post-conviction Relief

The procedural default claim in Part II of the Response is an enigma. It purports to be based exclusively on federal habeas corpus doctrines, but the Respondent must be aware that he made this very argument on the same grounds in petitioner's federal habeas corpus proceeding and lost it three times: in Cooper v. Wainwright, 807 F.2d 881 (11th Cir. 1986), rehearing en banc

denied, Cooper v. Wainwright, 811 F.2d 612 (11th Cir. 1987),
certiorari denied, Dugger v. Cooper, 107 S.Ct. 2183 (1987).

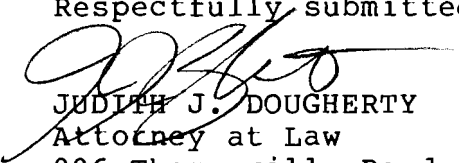
In any event, the Respondent's elaborate analysis of the federal habeas corpus doctrine of procedural default is entirely off the mark, because this Court has established its own doctrines for determining whether a claim can be raised in Florida post-conviction proceedings. Even assuming arguendo that the petitioner had failed to raise a Hitchcock claim on direct appeal, it could still be raised in post-conviction proceedings if "there has been a change in the law." Witt v. State, 465 So.2d 510, 512 (1985); see, e.g., State v. White, 470 So.2d 1377, 1378-79 (Fla. 1985). As this Court demonstrated in Downs v. Dugger, No. 71,100 (Fla. September 9, 1987), Thompson v. Dugger, Nos. 70,739 & 70,781 (Fla. September 9, 1987), and Riley v. Wainwright, No. 69,563 (Fla. September 3, 1987), Hitchcock effected a "substantial change in the law" (Downs, supra, slip opinion at 2) that permits the raising of Hitchcock claims not previously presented. Indeed, in the Thompson case, the State argued in the federal courts, just as in the present case, that Thompson had procedurally defaulted because "the issue was not presented on Thompson's direct appeal." Thompson v. Wainwright, 787 F.2d 1447, 1456 (11th Cir. 1980). The Eleventh Circuit did not reach the procedural default issue because it found the nonstatutory mitigating evidence in Thompson too insignificant to warrant relief. See id. at 1456-57. Yet, notwithstanding Thompson's failure to raise the Hitchcock claim on direct appeal, this Court permitted him to present it in Thompson v. Dugger, supra, and reversed and remanded for a new sentencing hearing. Thus, even assuming arguendo that the present petitioner had not adequately preserved his Hitchcock contentions prior to Hitchcock, the "substantial change in the law" effected by the Hitchcock decision (Downs, supra, slip opinion at 2) would allow him to present the issue in this collateral proceeding.

CONCLUSION

The transcript of petitioner's sentencing proceeding shows repeated attempts by defense counsel to introduce non-statutory mitigating evidence and repeated rulings by the trial judge excluding it upon the constitutionally erroneous theory that mitigating circumstances must be restricted to the statutory roster. These rulings -- together with a jury charge so similar to the one condemned in Hitchcock that not even the Respondent has attempted to distinguish the two -- allowed the prosecutor to address this case as one which indisputably presented no mitigating circumstances whatsoever: he argued to the jury that it should return a recommendation of death because "not a single mitigating factor has been discussed today or any other day throughout the trial." T. XIV, at 114-15; see also id. at 118. The sentencing judge took the same view, stating that he was imposing a death sentence because "no statutory mitigating circumstances are presented by the evidence to be weighed against the aggravating circumstances," R. 190 (emphasis added).

The exclusion of the non-statutory mitigating evidence, the limiting instruction to the jury, and the judge's refusal to consider non-statutory mitigating circumstances combined to deprive petitioner of his Eighth Amendment rights, and compel reversal under this Court's rulings in Downs v. Dugger, supra, Thompson v. Dugger, supra, and Riley v. Wainwright, supra.

Respectfully submitted,

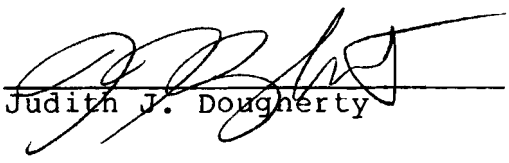

JUDITH J. DOUGHERTY
Attorney at Law
906 Thomasville Road
Tallahassee, Florida 32303
(904) 224-7464

RANDY HERTZ
New York University School
of Law
715 Broadway, Fourth Floor
New York, New York 10003
(212) 998-6430

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by U.S. Mail/~~hand delivery~~ to Mark C. Menser, Assistant Attorney General, The Capitol, Tallahassee, Florida 32301, this 14th day of October, 1987.


Judith J. Dougherty