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IN THE SUPREME COURT OF FLORIDA SID J. WHITE

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Deputy Clerk

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WILLIAM THOMAS ZEIGLER, JR., :

Petitioner, :

-against- :

RICHARD L. DUGGER, Secretary, :

Department of Corrections, State :

of Florida, :

Respondent. :

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Case No. 71,463

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PETITIONER'S REPLY TO RESPONSE TO  
PETITION FOR WRIT OF HABEAS CORPUS

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ORAL ARGUMENT REQUESTED

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## PRELIMINARY STATEMENT

Petitioner, William Thomas Zeigler, Jr., respectfully submits his reply to respondent's Response to Petition for Writ of Habeas Corpus. Respondent's argument that Mr. Zeigler's claims are procedurally defaulted is without merit, as this Court's recent decisions make clear. Respondent's contention that any error committed at his sentencing was harmless is equally erroneous, because respondent is, in effect, answering the question that Hitchcock v. Dugger said was for the trier of fact to decide. Mr. Zeigler wanted to introduce considerable relevant mitigating evidence at his sentencing hearing. Judge Paul, the same judge who sentenced Mr. Hitchcock, precluded the introduction of most of that evidence. More importantly, he refused to consider any evidence of non-statutory mitigating factors. Consideration of all relevant mitigating evidence is precisely what is mandated by Hitchcock, Lockett, Eddings, and Skipper. Moreover, given the jury's recommendation of life, it appears that the mitigating evidence that was presented was, indeed, quite material to Mr. Zeigler's sentencing. Accordingly, Mr. Zeigler's Petition for Writ of Habeas Corpus should be granted.

## ARGUMENT

### I.

PETITIONER'S CLAIMS ARE NOT PROCEDURALLY  
DEFAULTED BECAUSE THIS COURT HAS HELD THAT  
HITCHCOCK IS A FUNDAMENTAL CHANGE OF LAW

This Court has made it abundantly clear that it considers the United States Supreme Court's decision in Hitchcock v. Dugger, 107 S.Ct. 1821 (1981) to be a "substantial change in the law" sufficient to defeat procedural default. Thompson v. Dugger, Nos. 70,739 and 70,781, slip op. at 3 (Fla. Sept. 9, 1987); Downs v. Dugger, No. 71,100,

slip op. at 2 (Fla. Sept. 9, 1987); Riley v. Wainwright, No. 69,563, slip op. at 6 (Fla. Sept. 3, 1987); Delap v. Dugger, 513 So.2d 659, 660 (Fla. 1987); see also Hargrave v. Dugger, No. 84-5102, slip. op. at 3 (11th Cir. Nov. 13, 1987) (available on LEXIS). Similarly, in Hargrave, the United States Court of Appeals for the Eleventh Circuit (en banc) carefully analyzed Lockett v. Ohio, 438 U.S. 586 (1978), its predecessors and its progeny, and concluded that a Lockett claim had been unavailable, for all practical purposes, to persons tried and sentenced before 1978. The Eleventh Circuit then found that "Hitchcock has breathed new vitality into claims based on the exclusion of non-statutory mitigating factors. . . ." Id. at 7.

Accordingly, Mr. Zeigler is entitled to raise his Hitchcock claim and obtain relief in either the state or federal courts. He has chosen to come to this Court first out of respect to the state court system, to allow this Court to determine this issue in accordance with its precedents. For respondent to urge this Court to deny relief because Mr. Zeigler's claim has "again risen like Phoenix from the ashes" (Response, p. 4) is ironic, since it was respondent who suggested to the federal District Court that Mr. Zeigler should bring his Hitchcock claim to this Court again. Appendix, Exhibit 1, p. 3.\*

The cases cited by respondent in support of its argument that Mr. Zeigler's claims are procedurally barred were decided before Hitchcock and are therefore inapposite.

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\* Respondent suggests that this Court should follow "the law of the case" in Mr. Zeigler's case in spite of the Hitchcock decision. Response, p. 6. That argument is contrary to the recent decisions of this Court that have given effect to the change of law in Hitchcock in cases in which this Court had previously denied a Hitchcock claim. See Riley v. Wainwright, No. 69,563, slip op. (Fla. Sept. 3, 1987); Foster v. Dugger, Nos. 70,184 and 70,597, slip op. (Fla. Dec. 3, 1987).

Moreover, respondent's allegation that procedural default was never raised in any of the post-Hitchcock cases (Response, p.6) is flatly untrue. See Thompson v. Dugger, Nos. 70,739 & 70,781, slip op. at 3 (Fla. Sept. 9, 1987); Demps v. Dugger, No. 71,363, slip op. at 2 (Fla. Oct. 30, 1987). Respondent's continued insistence (Response, p.6) that Hitchcock was not a substantial change of law is frivolous.\*

## II.

### JUDGE PAUL DID NOT CONSIDER THE MITIGATING EVIDENCE THAT WAS PRESENTED

Respondent claims that Mr. Zeigler cannot show prejudice from the failure of his appellate counsel to argue the restriction and lack of consideration of non-statutory mitigating evidence because there is no "record" evidence that Judge Paul limited or failed to consider mitigating evidence. Response at 8. That argument is directly contrary to the Supreme Court's decision in Hitchcock. As in Hitchcock, there is ample evidence in the record that Judge Paul did not consider any mitigating evidence. He gave the same jury instructions that were given in Hitchcock and referred in his sentencing order to only the "enumerated" statutory mitigating circumstances. Appendix, Exhibit 6, p. 2817; Exhibit 7. There is nothing in the record of this case to indicate that Judge Paul acted differently at Mr. Zeigler's trial than he did at Mr. Hitchcock's trial: to the contrary, it is even

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\* Respondent claims (Response, p.6) that, because it has not been given the opportunity to challenge petitioner's former counsel's affidavits at an evidentiary hearing, there is no "record" evidence of his allegations that the defense was limited in its presentation of mitigating evidence at trial. This argument is disingenuous and begs the question, since the only time that a court granted an evidentiary hearing on the Hitchcock issue, respondent was successful in securing reversal of the decision to grant the hearing. Zeigler v. State, 494 So. 2d 957 (Fla. 1986).

more clear that he did not consider non-statutory mitigating evidence because at the rule 3.850 evidentiary hearing, he stated that he considered only the circumstances that he listed, and he listed only the statutory circumstances. Appendix, Exhibit 8. He ignored and did not even mention the non-statutory mitigating evidence.

Respondent erroneously argues that there is no "substantial basis for determining that the trial judge refused to consider the non-statutory mitigating evidence actually presented." Response, p. 15. One of the most significant aspects of the Hitchcock decision is that the mere presentation of non-statutory mitigating evidence is no longer sufficient to meet the requirements of individualized sentencing set forth in Lockett. 107 S.Ct. at 1824. As this Court stated unequivocally in Downs v. Dugger,

"[W]e thus can think of no clearer rejection of the 'mere presentation' standard reflected in prior opinions of this Court, and conclude that this standard can no longer be considered controlling law. Under Hitchcock, the mere opportunity to present non-statutory mitigating evidence does not meet constitutional requirements if the judge believes, or the jury is led to believe, that some of the evidence may not be weighed during the formulation of an advisory opinion or during sentencing."

Slip op. at 3. See also Riley v. Wainwright, No. 69,536, slip. op. at 7 ("The United States Supreme Court clearly rejected this 'mere presentation' standard. . . ."); Foster v. Dugger, Nos. 70,184 and 70,597, slip. op. at 2-3 (Fla. Dec. 3, 1987); McCrae v. State, 510 So. 2d 874, 880 (Fla. 1987); Magill v. Dugger, 824 F.2d 879, 893 (11th Cir. 1987). These cases show that the presentation of non-statutory mitigating evidence is meaningless if the judge fails to consider it. As the Supreme Court stated in Eddings v. Oklahoma, 455 U.S. 104, 114-115 (1982), "[t]he sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But

they may not give it no weight by excluding such evidence from their consideration."

Judge Paul was very clearly of the view that his consideration of mitigating evidence was limited to the statutory circumstances, and just as in Hitchcock, he did not consider the mitigating evidence that was presented. Respondent concedes that the jury instructions given by Judge Paul listed only the statutory aggravating and mitigating factors, and that the jury instruction was equivalent to the one given in Hitchcock. Response, pp. 3-4, 10. Respondent also admits that Judge Paul did not mention any non-statutory mitigating evidence in its sentencing order. Response, p. 10. This Court, in Morgan v. State, No. 69,104, slip. op. at 2 (Fla. Aug. 27, 1987) found such an omission to be quite relevant in evaluating Morgan's Hitchcock claim:

"Nowhere in [the judge's] order is there any reference to any non-statutory mitigating evidence proffered by the appellant. The state argues that there is no evidence that the trial court refused to consider such non-statutory mitigating circumstances. We disagree with this view of the record. Our reading of the record leads to one conclusion. That is, that non-statutory mitigating factors were not taken into account by the trial court, as required by Lockett v. Ohio, 438 U.S. 586 (1978), and now Hitchcock."\*

Respondent argues that Mr. Zeigler's counsel's argument to the jury that it was "free to consider whatever mitigating circumstances you feel you should in arriving at your decision" cured any error that might have occurred during sentencing. Response, p. 10. This allegation is clearly legally insufficient under Hitchcock. Hitchcock's counsel said essentially the same thing to the jury, that it should "look at the overall picture . . . consider everything

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\* The cases cited by Respondent in opposition to this point, Thomas v. Wainwright, 495 So. 2d 172 (Fla. 1986) and Middleton v. State, 465 So. 2d 1218 (Fla. 1985), were decided before Hitchcock.

together . . . consider the whole picture, the whole ball of wax." 107 S.Ct. at 1824. The Supreme Court held that Judge Paul limited himself in sentencing Hitchcock to the statutory mitigating factors "despite the argument of petitioner's counsel that the court should take into account the testimony concerning petitioner's family background and his capacity for rehabilitation. . . ." Id. At Mr. Zeigler's trial, which took place six months before Mr. Hitchcock's trial, both Judge Paul's statements from the bench and his subsequent findings show that he did exactly the same thing -- disregarded counsel's presentation pertaining to mitigation -- because he thought he could not consider "whatever mitigating circumstances" were presented. (Petition, p.8.)\*

Respondent's attempts to distinguish Mr. Zeigler's case from the recent decisions in which this Court granted relief on Hitchcock claims are unavailing. As it did in McCrae, Morgan, Riley, Downs, Thompson, and Foster, this Court should grant Mr. Zeigler relief and remand for a new sentencing hearing.

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\* On page 11 of the Response, respondent suggests that in his sentencing order, Judge Paul indicated that "[a]ll evidence of mitigating circumstances may be considered by the judge or jury." The statement is taken out of context. Prior to the quote, the sentencing order reads "[i]n following the statute (Fla. Stat. 921.141), the trial judge is directed to weigh the statutory aggravating and mitigating circumstances, when determining the appropriate sentence to be imposed in light of all the facts adduced." Given this statement and the other statements of Judge Paul cited in the petition at pages 7-9, it is obvious that the language quoted by respondent referred to evidence of statutory mitigating circumstances that might be considered by the judge or jury.

### III.

#### THE CONSTITUTIONAL ERROR THAT OCCURRED AT PETITIONER'S SENTENCING WAS NOT HARMLESS

This Court has "implicitly recognized" that "exclusion of any relevant mitigating evidence affects the sentence in such a way as to render the trial fundamentally unfair." Riley, slip op. at 7. Respondent, however, argues that simply because Mr. Zeigler was convicted, it must follow that his character is so bad that any evidence of positive character traits would be meaningless and he should therefore be denied the opportunity to present any such evidence. That argument, in effect, seeks a directed verdict on sentencing when the jury returns a verdict of guilty. Respondent would apparently sentence to death everyone who is found guilty of murder with some statutory aggravating circumstances because, in his view, no amount of evidence of a person's good character or positive personality traits could possibly have any effect on the same twelve people who found that person guilty or on the sentencing judge. It is not, however, for respondent to decide what effect mitigating evidence might have. Respondent is attempting to answer the question that Hitchcock held was for the trier of fact to decide.

The Supreme Court held in Lockett that the sentencer must not be precluded from considering as a mitigating factor "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 438 U.S. at 604. This is so because the death penalty is "profoundly different from all other penalties," thereby increasing "[t]he need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual." Id. at 605. Respondent would deny Mr. Zeigler the respect that the Supreme Court has held is his due.

As this Court stated recently, "evidence of contributions to family, community or society reflects on character and provides evidence of positive character traits to be weighed in mitigation." Rogers v. State, 511 So. 2d 526, 535 (Fla. 1987). The evidence proffered by Mr. Zeigler in the affidavits contained in the Appendix, Exhibit 4 is precisely the type of evidence mentioned in Rogers. The affidavits show that Mr. Zeigler was a kind, generous and compassionate person who was always ready to help others, even at personal cost to himself. He worked very hard in his family's furniture store, and sought to be fair and honest in his business dealings. He took an active role in and was a credit to his community, playing a leading part in implementing a downtown beautification project. Appendix, Exhibit 4. Even if Mr. Zeigler committed the crimes for which he was convicted, which he vehemently denies to this day, the evidence contained in the affidavits clearly show that he deserves to live. He is not an "animal", as respondent offensively contends; he is a human being, with all of the accompanying "diverse frailties of humankind" and the possibility of rehabilitation. Woodson v. North Carolina, 428 U.S. 280, 304 (1974). Lockett and its progeny clearly hold that he should, at the very least, be allowed the opportunity

to present these facts by way of his mitigating evidence to the sentencer.\*

This Court recently held, in Morgan v. State, that the fact that the judge did not take into account any evidence of non-statutory mitigating circumstances "may not be considered harmless [error] in light of the close nature of the jury recommendation vote. . . . Under such, and other circumstances, the failure to consider non-statutory mitigating factors cannot be termed harmless error." Morgan, therefore, stands for the proposition that Hitchcock error cannot be harmless when the jury's vote for death is close; Mr. Zeigler's case is a fortiori one of the "other circumstances" that this Court alluded to in Morgan, since the jury voted for life after hearing only some of the mitigating evidence. In contrast, Judge Paul, who refused to consider any non-statutory mitigating evidence, imposed death. See Magill, 824 F.2d at 893 (" . . . it is precisely because such evidence was persuasive that the [judge's] failure to consider the evidence was prejudicial.")

Moreover, given the high standard set forth in Tedder v. State, 322 So.2d 908 (Fla. 1974) for a judge to override a jury's recommendation of life, it cannot be said, beyond a reasonable doubt, that a trial judge who took into account all of the potential mitigating evidence would have

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\* The two cases cited by respondent in support of its harmless error argument, Delap v. Dugger, 513 So. 2d 659 (Fla. 1987), and Demps v. Dugger, No. 71, 363, slip op. (Fla. Oct. 30, 1987), are completely distinguishable. In Delap, the harmless error was based on the fact that non-statutory mitigating evidence was presented to and clearly considered by the trial judge. In Demps, a pre-sentence investigation report countered much of the non-statutory mitigating evidence that was presented, and the trial judge stated that the defense was not limited to the statutory mitigating factors. In contrast, Judge Paul did not consider any non-statutory mitigating evidence that was presented, stated that he did not do so, and there is no pre-sentence investigation report that counters the mitigating evidence available in this case. Delap and Demps, therefore, are not controlling.

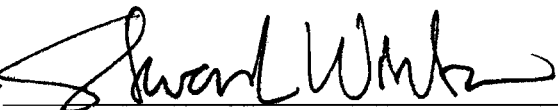
imposed a sentence of death. Indeed, on this record, the jury's recommendation of life, rather than death sentences strongly suggests that the trial judge's sentencing was the product of his refusal to consider the mitigating evidence which had been presented. Certainly there is no basis for concluding that Judge Paul, if he had considered all the evidence which Mr. Zeigler tried to offer, would still have sentenced him to death.

CONCLUSION

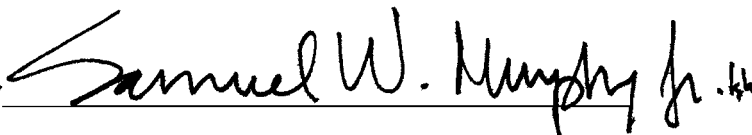
For the above reasons, Mr. Zeigler's sentences of death should be vacated, and a new sentencing hearing be held.

Dated: New York, New York  
December 19, 1987

Respectfully submitted,

By  <sup>1st</sup>

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CERTIFICATE OF SERVICE

I, GRETCHEN HOAG, ESQ., hereby certify that a true and correct copy of the foregoing Reply to Response to Petition for Writ of Habeas Corpus was sent December 19, 1987, by United States mail, first class, postage prepaid, to:

Sean Daly, Esq.  
Assistant Attorney General  
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125 North Ridgewood  
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A handwritten signature in cursive script, appearing to read "Gretchen Hoag", written in black ink.