IN THE SUPREME COURT OF FLORIDA

FREDDIE LEE HALL,

Petitioner,

v. CASE NO. 71,284

RICHARD L. DUGGER, Secretary,
Florida Department of Offender
Rehabilitation;
TOM BARTON, Superintendent of
Florida State Prison at Starke,
Florida; and
ROBERT A. BUTTERWORTH, Attorney General
of the State of Florida

Respondents.

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. LANDRY
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

OF COUNSEL FOR RESPONDENT

/tms

TABLE OF CONTENTS

PAGE NO.

TABLE OF CITATIONS

PAGE NO.

PRELIMINARY STATEMENT

FREDDIE LEE HALL will be referred to as the "Petitioner" in this brief. The STATE OF FLORIDA will be referred to as the "Respondent". The record on appeal will be referred to by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE FACTS

On June 27, 1978, the trial court, after adjudicating Hall guilty of first degree murder, imposed a sentence of death. Hall took a direct appeal from his judgment and sentence and in that appeal raised five issues.[1] On July 16, 1981, this Court unanimously affirmed the judgment and sentence. Hall v. State, 403 So.2d 1321 (Fla. 1981).

Thereafter, following the signing of a death warrant, Hall filed a Rule 3.850 motion to vacate raising for the first time,

---

[1] Those issues included:

> I. WHETHER THE COURT BELOW ERRED IN NOT GRANTING A MISTRIAL AN/OR NEW TRIAL FOR THE DEFENDANT WHEN THE STATE COMMITTED REVERSIBLE, FUNDAMENTAL ERROR DURING ITS CLOSING ARGUMENT BY IMPROPERLY COMMENTING UPON THE DEFENDANT'S FAILURE TO TESTIFY AND BY MAKING IMPROPPER APPEALS TO THE SYMPATHY OF THE JURY.
>
> II. WHETHER THE COURT BELOW ERRED IN NOT GRANTING A MISTRIAL AND/OR NEW TRIAL FOR THE DEFENDANT WHEN THE STATE IMPROPERLY ELICITED TESTIMONY DURING ITS CASE IN CHIEF RELATING TO THE DEFENDANT'S SILENCE FOLLOWING THE ADMINISTERING OF THE MIRANDA WARNINGS TO HIM.
>
> III. WHETHER THE JURY VERDICT OF GUILTY MUST BE SET ASIDE BECAUSE THE ONLY PROOF OF THE DEFENDANT'S GUILT WAS CIRCUMSTANTIAL, AND SAID CIRCUMSTANTIAL PROOF DID NOT EXCLUDE EVERY REASONABLE HYPOTHESIS OF INNOCENCE.
>
> IV. WHETHER THE COURT BELOW ERRED IN ALLOWING THE STATE TO INTRODUCE CERTAIN EVIDENCE OF THE DEFENDANT'S INVOLVEMENT IN OTHER CRIMES UNDER THE PRETENSE THAT SAID EVIDENCE WAS ADMISSIBLE UNDER THE WILLIAMS RULE.
>
> V. WHETHER THE COURT BELOW ERRED IN SENTENCING THE DEFENDANT TO DEATH IN THAT THE DEATH SENTENCE CONSTITUTED AN ABUSE OF THE COURT'S DISCRETION IN LIGHT OF THE STATUTORY MITIGATING CIRCUMSTANCES PRESENT, AND DUE TO THE IMPROPER REMARKS OF THE PROSECUTOR DURING HIS CLOSING STATEMENT.

among other issues, that the trial court had improperly limited consideration of the mitigating circumstances to those enumerated in the statute in violation of Lockett v. Ohio, 438 U.S. 506, 57 L.Ed.2d 973 (1978). The trial court denied relief observing that Hall's Lockett argument had been rejected in Straight v. Wainwright, 422 So.2d 827 (Fla. 1982) and that jury instruction issues could be raised only on direct appeal, not collaterally. On appeal from the denial of the 3.850 motion, this court affirmed. Hall v. State, 420 So.2d 872 (Fla. 1982):

> "The majority of issues raised in the motion to vacate were raised on appeal. Most of the remaining issues could have been raised there. They are, therefore, not matters which will support a collateral attack . . . "

(420 So.2d at 873)

Petitioner sought federal habeas corpus relief in the United States District Court. As to Hall's "Lockett" claim (Ground K in the petition), the district court decided that the procedural default doctrine of Wainwright v. Sykes, 433 U.S. 72, 53 L.Ed.2d 594 (1977) precluded habeas review. See Hall v. Wainwright, 565 F.Supp. 1222, at 1227 and 1232 - 1234. Hall appealed the denial of habeas relief and the Eleventh Circuit Court of Appeal agreed that Hall was procedurally barred. Hall v. Wainwright, 733 F.2d 766, 777 (11th Cir. 1984).

Hall sought via a cross-petition for certiorari to have the Supreme Court review his claim that the trial court limited its own and the jury's consideration of evidence offered in mitigation to the circumstances enumerated in the capital sentencing statute, contrary to Lockett v. Ohio. The court denied his cross-petition on May 13, 1985. Hall v. Wainwright, 471 U.S. 1111, 85 L.Ed.2d 862.

Subsequently, the United States District Court, following a remand from the Eleventh Circuit Court of Appeals denied habeas relief to Hall and the Court of Appeals affirmed. Hall v. Wainwright, 805 F.2d 945 (11th Cir. 1986). Hall then sought, once again, via certiorari petition to have the Supreme Court decide whether Hitchcock v. Dugger, ___ U.S. ___, 95 L.Ed.2d 347 (1987)

required the Court to consider petitioner's Lockett claim. On October 13, 1987, the Supreme Court denied the petition for writ of certiorari. See attached copy of response to petition and order.

Petitioner now seeks to continue the litigation of the Lockett claim in this Court.[2]

---

[2] Petitioner mentions that the trial judge may have misunderstood the law in another trial involving another homicide. It is irrelevant what a judge or court may have previously thought the law required if not asked to rule upon an issue in a particular case. We note, for example, that some Justices of this Court expressed a view that the death penalty statute was unconstitutional prior to the decision in Proffitt v. Florida, 428 U.S. 242, 49 L.Ed.2d 913 (1976). See State v. Dixon, 283 So.2d 1, 23 - 27. Certainly, we do not assume that prior views continue if the court is given an opportunity to consider them again. See also Elledge v. Dugger, 823 F.2d 1439 at 1449 (court unpersuaded that trial judge misunderstood the law because of pronouncements made in earlier cases).

ARGUMENT

Petitioner must be denied relief since (1) there has been no violation of Hitchcock and Lockett ; (2) Hall's procedural default in failing to complain at trial or urge consideration of additional non-statutory mitigating factors plus the failure to argue Lockett on direct appeal precludes collateral litigation under Wainwright v. Sykes, supra, and its progeny; (3) any error in this regard must be deemed harmless. See DeLap v. State, So.2d ___, 12 F.L.W. 517.

In the first place, petitioner was not precluded from introducing for the judge and jury's consideration any relevant evidence of a mitigating factor. The record shows that at the penalty phase of the trial, Hall testified on his own behalf. (TR 660 - 684) The trial court did not limit that which could be presented in evidence, nor did the court proscribe what could be argued to the jury. In fact, trial counsel argued to the jury that the evidence was not clear whether Hall or his companion was the triggerman, (R 694) and that Hall had cooperated with law enforcement authorities by confessing and agreeing to take them to the scene of the body (a non-statutory mitigating factor). (R 695) The trial court's order imposing a sentence of death does not reflect any view that the trial court felt obligated to consider only the statutory-enumerated mitigating factors. The court's order states:

> "Based exclusively and only upon (1) the records and the evidence properly introduced and admitted during the trial and sentencing proceeding, and (2) the aggravating circumstances set forth in Paragraph A, B, and C above, same being sufficient inasmuch as there are no mitigating circumstances, the undersigned accepts and agrees with the Advisory Sentence recommending that the death sentence should be imposed on said Defendant Hall."

(R 351)

This is in sharp contrast to Hitchcock v. Dugger, U.S. ___, 95 L.Ed.2d 347 (1987) where the trial judge in his sentencing order demonstrated that he considered only statutory enumerated mitigating circumstances. In Hitchcock, the trial

counsel introduced evidence concerning the defendant's background and capacity for rehabilitation which the trial judge refused to consider.

Hitchcock, therefore, is but another application of Lockett v. Ohio, as can plainly be discerned from a reading of the last sentence of the Hitchcock decision.

> That court is instructed to remand to the District Court with instructions to enter an order granting the application for a writ of habeas corpus, unless the State within a reasonable period of time either resentences petitioner in a proceeding that comports with the requirements of Lockett or vacates the death sentence and imposes a lesser sentence consistent with law.

(text at 353)

Although this Court has recently concluded that Hitchcock requires resentencing merely if an arguably ambiguous jury instruction has been utilized, such an analysis is an unwarranted expansion of Hitchcock to the extent that any capital sentence is set aside without a showing that in the particular case the trial judge who imposed sentence actually refused to consider proffered non-statutory mitigating evidence. This Court should reconsider those cases.

Quite apart from the fact that Hitchcock has not been violated, the claim should not even be reviewed now because of Hall's previous procedural defaults under Wainwright v. Sykes, 433 U.S. 72, 53 L.Ed.2d 594 (1977) and its progeny.

In the instant case, there was no objection in the trial court to the instuctions given, (R 695 - 701) nor did the trial court limit the presentation of mitigating evidence to those enumerated in the statute; trial counsel was permitted to present whatever he wanted. (TR 659 - 685) Hall did not urge any "Lockett" claim on direct appeal, although Lockett had been decided and could have been cited. In affirming the denial of 3.850 relief previously, this Court obviously applied its enforcement of procedural default policy by observing that issues which could have been raised on appeal are not matters to support a collateral attack. 420 So.2d at 873. Not only did this Court

find and enforce the procedural default policy, but also the federal courts agreed that the claims were defaulted.

United States District Judge Susan Black specifically ruled that Hall's Lockett issue had been procedurally defaulted and thus, the claim was not subject to federal habeas review. Hall v. Wainwright, 565 F.Supp. 1222, 1227, 1231 - 1233. The Court of Appeals for the Eleventh Circuit agreed. Hall v. Wainwright, 733 F.2d 766, 777 (11th Cir. 1984) Hall describes in his petition that trial counsel and appellate counsel did not urge the Lockett claim at trial or on appeal and seems to urge that they were ineffective as cause to excuse the default. If that is his assertion, we must give the court a more complete chronology of the ineffective counsel claim.

With respect to a claim that trial counsel rendered ineffective assistance, every court which has considered the issue has concluded that Hall and his collateral counsel deliberately and tactically refused to present evidence at the appropriate opportunity to support the claim. The trial court found Hall had made a deliberate bypass, this Court agreed. (420 SO.2d 872); United States District Judge Susan Black found a deliberate bypass of the claim (565 F.Sup. 1222, 1241) and after an evidentiary hearing on the issue, the Eleventh Circuit Court of Appeals agreed that Hall had deliberately bypassed state procedures. (805 F.2d 945) Not counting the most recent denial of certiorari by the United States Supreme Court, twelve judges have unanimously concluded that Hall chose not to present evidence on the ineffective counsel claim. It is ludicrous for petitioner now to attempt to resurrect his abandoned claim.

Petitioner's attempt not to litigate a claim of ineffective appellate counsel is equally unavailing. Hall did contend in the federal district court that appellate counsel had been ineffective, but he abandoned any such claim by failing to raise the issue on appeal in the Eleventh Circuit. See Willford v. Estelle, 672 F.2d 552 (5th Cir. 1982); Porter v. Wainwright, 805 F.2d 930, 942, n. 14 (11th Cir. 1986).

The courts have already litigated the claim that Hall's Lockett claim is not open to collateral attack; it need not be revisited.

Respondent recognizes that in a recent line of cases this Court has seemed to adopt a view that a collateral review of a conviction should be treated as the substantial equivalent of direct appeal, that procedural bars need not be considered and that Hitchcock constitutes a major change in law.

The notion that collateral attack may be available to review merely errors which could be litigated on direct appeal must be rejected for the reasons expressed by the Supreme Court in Engle v. Isaac, 456 U.S. 107, 71 L.Ed.2d 783 and United States v. Frady, 456 U.S. 152, 71 L.Ed.2d 816.

As stated in Frady:

> " . . . we have long and consistently affirmed that a collateral challenge may not do service for an appeal . . . [citations omitted] . . .
>
> This citation indicates that the Court of Appeals erred in reviewing Frady's §2255 motion under the same standard as would be used on direct appeal, as though collateral attack and direct review were interchangeable.
>
> (71 L.Ed.2d at 828)

In rejecting Frady's claim that the habeas court should apply a plain error standard of review to colateral attack on an erroneous jury instruction, the Court declared:

> "In sum, the lower court's use of the plain error standard to review Frady's §2255 motion was contrary to long-established law from which we find no reason to depart. We reaffirm the well-settled principle that to obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal.
>
> (71 L.Ed.2d at 829)

To the extent any of this Court's recent cases assume that the procedrual default doctrine is inapplicable or that collateral attacks are permissible because Hitchcock constitutes a new and fundamental change of law, they are wrong. Hitchcock is nothing more than an application of prior established decisions. Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982). In Hitchcock, as in previous cases, the trial

judge, the sentencer, had refused to consider proffered mitigating evidence; under Lockett and Eddings, reversal was required. That this is so is confirmed by the last sentence in the Hitchcock opinion which required the state to resentence petitioner in a proceeding "that comports with the requirements of Lockett." 95 L.Ed.2d 347. If Hitchcock had been deemed a fundamental change of law since Lockett, the Court would not have mandated compliance with Lockett.

Additionally, if Hitchcock were a massive change in law, why did the United States Supreme Court without comment, deny Hall's most recent petition for certiorari urging a Hitchcock violation?[3] The reason we submit is clear: Hitchcock is not a major change in law and was not intended to override prior decision which enforced the procedural default rulings of state courts. Similarly in Thompson v. Lynaugh, 821 F.2d 1080 (5th Cir. 1987) the petitioner sought habeas relief urging that the use of victim impact statements vioalted Booth v. Maryland, ____ U.S. ____, 96 L.Ed.2d 440 (1987). The state court found the claim procedurally barred by lack of objection at trial. The Fifth Circuit Court of Appeals agreed. The court reasoned that Booth was not a sufficiently novel issue to excuse the default, but merely a reiteration of the individualized character of the defendant. 821 F.2d at 1082. Hitchcock too is a reiteration of Lockett and does not excuse Hall's procedural default.

The idea that procedural defaults (the failure to object at trial or urge on direct appeal) need not be enforced fails to take into account the fact that Hitchcock did not involve any discussion or decision of procedural bar. And, as discussed earlier, Hitchcock only is an application of Lockett v. Ohio. Any attempt to extent Hitchcock beyond its facts is unwarranted. As in Eddings v. Oklahoma, 455 U.S. 104, the sentencing judge in Hitchcock refused to consider proffered non-statutory mitigating

---

[3] A copy of the state's response to the petition and the order denying certiorari is attached to this response.

factors. The Court's discussion with respect to jury instructions simply served as evidence to the Court's conclusion that the trial judge feld compelled to consider only statutorily enumerated mitigating factors. In this regard, the Eleventh Circuit Court of Appeals ' discussion of Hitchcock is correct in Elledge v. Dugger, 823 F.2d 1439, at 1448 - 1449.

> The differing factual setting presented here persuades us that **Hitchcock** is not dispositive of this case. Even assuming that the instruction to the jury was erroneous under **Hitchcock**, the sentencing jury in Florida's trifurcated capital scheme is merely advisory. The trial judge, alone, makes the ultimate decision as to sentencing in capital cases. **See, Proffitt v. Florida,** 428 U.S. 242, 252, 96 S.Ct. 2960, 2966, 45 L.Ed.2d 913 (1976). When the trial judge has the proper view of the law - as is evident from the record here - and imposes sentence based not only on statutory , but also on nonstatutory, factors, the resulting sentence meets the constitutional parameters outlined in **Lockett.**
>
> (text at 1449)

Finally, even if this court were to conclude that there has been a Hitchcock violation, it is clear that any such error must be harmless. This Court has previously found Hitchcock errors to be harmless. See, e.g. Delap v. State, ___ So.2d ___ (Fla. Oct. 8, 1987, Case No. 71,194, 12 F.L.W. 517.

As stated above, the defense was not precluded from offering non-statutory mitigating evidence and the trial court did not refuse to consider that which was offered. Petitioner urges, ten years after trial, that he was not the triggerman and did not intend death. But the trial court specifically alluded to Hall's version of the incident in its order imposing death:

> "Hall denied participation in the beating and killing of the victim Hurst . . . .He also testified that he could not go along with his co-defendant in the killing . . . " (R 351)

What petitioner urges the jury should have considered, trial counsel did urge them to consider.

The trial court found three valid statutory aggravating factors and no mitigating factors. (R 348 - 351) This Court agreed with those findings when it affirmed at 403 So.2d 1321. Indeed, in its opinion of affirmance, this Court rejected on appeal the

claim that Hall was high on alcohol and marijuana. 403 So.2d at 1325.[3] Having previously considered and rejected Hall's assertings of the existence of mitigating factors, it is frivolous now for petitioner to say that a different result should obtain a decade after his conviction.

If the trial court and this court agreed that death was the appropriate penalty previously, nothing has now been offered that should legitimately change that result. Error, if any, is harmless. Delap, supra.

---

[3] This Court declared that even if Hall had argued the use of alcohol and drugs as mitigating factors "the trial court could have reasonably found that this testimony did not establish those mitigating factors."

CONCLUSION

Based on the above stated facts, arguments and authorities, Respondent would ask that this Honorable Court deny the Petition for Writ of Habeas Corpus.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. LANDRY
Assistant Attorney General
1313 Tampa Street, Suite 804
Park Trammell Building
Tampa, Florida 33602
(813) 272-2670

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to David I. Bruck, BRUCK & BLUME, 1247 Sumter Street, Suite 202, Columbia, South Carolina, 29211, this 2nd day of November, 1987.

OF COUNSEL FOR RESPONDENT.