IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

FREDDIE LEE HALL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

APPLICATION FOR STAY OF EXECUTION AND SUMMARY INITIAL BRIEF FOR APPELLANT, AND, IF NECESSARY, MOTION FOR STAY OF EXECUTION PENDING FILING AND DISPOSITION OF PETITION FOR WRIT OF CERTIORARI IN THE UNITED STATES SUPREME COURT

ON APPEAL FROM THE CIRCUIT COURT
FOR THE FIFTH JUDICIAL CIRCUIT,
IN AND FOR SUMTER COUNTY, FLORIDA

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PRELIMINARY STATEMENT

This is an appeal from a Circuit Court's denial of a capital post-conviction litigant's motion for Fla. R. Crim. P. 3.850 relief. The Circuit Court found all facts presented below in Mr. Hall's favor, see, e.g., State v. Hall, No. 78-52-CF (Circuit Court Order denying post-conviction relief, p. 4 [nonstatutory mitigating circumstances proffered in Rule 3.850 action established "by a preponderance of evidence."]), and therefore the facts underlying Mr. Hall's Hitchcock v. Dugger claim are not at issue in this appeal. Rather, the issues here involve the Circuit Court's rulings of harmless error and its views of the procedural posture of Mr. Hall's case. Those matters are taken up at the outset in the instant brief.

The Record on Appeal regarding Mr. Hall's original trial and capital sentencing proceedings shall be cited herein as "R. ___." Since a Rule 3.850 Record on Appeal has not yet been made available to counsel, citation to the Rule 3.850 record shall note the document referenced and the appropriate page number. The appendix to Mr. Hall's Rule 3.850 motion shall be cited as "App. ___." All other references will be self-explanatory or will be otherwise explained.

Given the time constraints resulting from the presently outstanding death warrant, counsel for Mr. Hall has been unable to prepare a table of cases or summary of argument.

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I. INTRODUCTION: THE CIRCUIT COURT'S FACTUAL FINDINGS

Freddie Lee Hall, throughout his life, has been fundamentally addled by brain damage, alcohol and drug abuse, intellectual impairments, and mental illness. These conditions affected his behavior during and explained his involvement in the offense for which he has been sentenced to die. These were the reasons for his involvement in the crime. These were the factors which were at the heart of an understanding of who Freddie Hall was.

The trial court and the jurors charged with deciding whether Freddie Hall should live or die, however, learned none of this during the course of the pre-Lockett and pre-Songer proceedings resulting in his sentence of death. Florida's capital sentencing statute, its official interpretation, and the trial court's specific rulings barred counsel from developing and presenting any of this. At the time the trial court did not hesitate in expressing its views:

> It is the court's ruling that the case cited by the defendant, 428 U.S. 242, Proffitt vs. State of Florida, does not, does not stand, the proposition that evidence can be admitted or presented to the jury in the second stage of the trial, that is not specifically authorized by statute. That applies to both the state and the defense. They are limited to those items that are specifically specified or set forth in the statute.

The trial court's construction was based upon this Court's authoritative pronouncements. See, e.g., Cooper v. State, 336 So. 2d 1133, 1139 (Fla. 1976)("The sole issue in a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have no place in that proceeding any more than purely speculative matters calculated to influence a sentence through emotional appeal.")

That construction, however, specifically enforced by the trial court in this case, rendered Mr. Hall's capital sentencing determination fundamentally unreliable and unfair, and denied him the individualized penalty decision which the eighth amendment requires. Today, Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), demonstrates that that construction of the Florida capital sentencing statute was fundamentally wrong. But it was that construction that tied Mr. Hall's trial counsels' hands and limited their efforts with regard to the kind and quality of evidence that they developed and offered. Mr. Hall's trial attorneys were strapped by the statute and by the trial court's rulings, and consequently the only opportunity Mr. Hall had for a meaningful capital sentencing determination was skewed ab initio. As counsel explain:

> My name is Horace D. Robuck, Jr. and Morton D. Aulls, and I am an attorney in Florida's Fifth Judicial Circuit. In 1977, I served as trial attorney for Freddie Lee Hall

when he faced charges of first-degree murder, kidnapping and robbery. My co-counsel was Mr. Morton Drew Aulls or Horace D. Robuck.

At the time I represented Mr. Hall, I was aware that the State was going to actively seek the death penalty. I knew that if Mr. Hall was convicted that there would be a penalty phase at which the jury would consider aggravating and mitigating circumstances. The law at the time limited the relevant and admissible mitigating circumstances to those specifically listed in Fla. Stat. sec. 921.141 (before it was amended to allow consideration of any other mitigating circumstance). Mr. Aulls and I were aware of that limitation, labored under that limitation and prepared Mr. Hall's case, as best we could, in conformity with that limitation and the restrictive understanding of the statute then in effect. This understanding was shared by all participants at Freddie Lee Hall's trial -- defense counsel, the court, and the State.

It was your affiant's belief at the time, a belief shared by the trial court, that any evidence outside the scope of the statutorily enumerated mitigating circumstances was irrelevant and immaterial, and would not have been admitted.

Your affiant's understanding regarding the inadmissibility of nonstatutory mitigating evidence was in fact confirmed by the rulings of the Honorable Judge Booth. Although the Florida Supreme Court's opinions at the time clearly stated that mitigating evidence was restricted to that listed in Florida's capital sentencing statute, codefendant Mack Ruffin's counsel attempted to convince Judge Booth that he should allow consideration of nonstatutory mitigating evidence during a capital trial involving this defendant and codefendant Mack Ruffin which occurred approximately one month before this trial. You affiant joined that request. Judge Booth denied the request, ruling:

> It is the court's ruling that the case cited by the defendant, 428 U.S. 242, Proffitt v. Wainwright, does not, does not stand, [for] the proposition that evidence can be admitted or presented to the jury in the second stage of the trial, that is not specifically authorized by statute. That applies to both the state and the defense. They are limited to those items that are specifically specified or set forth in the statute. The [proffered evidence] . . . does not fall within the statutory provisions for mitigating circumstances.

That motion was renewed in this trial, and the request was again denied, as we expected and as Judge Booth had earlier made clear it would be. At the time we all understood that because of Judge Booth's interpretation of the statute, an interpretation in accord with the then-prevailing law and standards of practice, he would not have allowed the introduction and consideration of nonstatutory mitigation, and the jury would not have been instructed in that regard.

As a consequence of the then-prevailing law, the standard of practice with regard to nonstatutory mitigation then prevalent in the Fifth Judicial Circuit, and Judge Booth's ruling in the prior trial (a ruling which we all expected Judge Booth to follow and which he did in fact follow in this trial), your affiant did not attempt to investigate, develop, or present nonstatutory mitigating circumstances at the penalty phase of the capital trial discussed herein. Given the statutory restriction, and Judge Booth's earlier ruling, it would have been a waste of your affiant's time and resources to attempt to investigate and present the available nonstatutory mitigating evidence. Consequently, because of these restrictions, your affiant did not, and indeed was

officially precluded from attempting to investigate or develop psychological or psychiatric nonstatutory mitigation or seek out other evidence of a nonstatutory nature. Your affiant verily understood that this restrictive construction of the statute was the interpretation afforded by the Honorable Judge Booth, who was the Circuit Court Judge presiding at the trial. The brevity of the defense's presentation at the penalty phase of Freddie Hall's trial was a direct consequence of the fact that at the time of trial your affiant and his co-counsel understood that mitigation was limited to that provided in the statute, and that your affiant and his co-counsel operated under the restrictions then in effect. The nonstatutory mitigation which made its way into the record came in through Mr. Hall's testimony, because he chose to take the stand. As could be expected, no instruction was given to the jury pursuant to which it could consider this evidence, and Judge Booth certainly did not consider its nonstatutory mitigating effects, as his rulings and sentencing order made clear. In any event, your affiant would have investigated, developed, and offered any and all conceivable mitigating evidence had such been admissible. The statute and its interpretation at the time, however, tied your affiant's hands.

Mr. Hall's capital trial and sentencing proceedings took place at a time when Florida criminal defense attorneys, prosecutors, and judges generally understood that the mitigating evidence which could be introduced at a capital sentencing proceeding was restricted to the statutory list. Cooper v. State, 336 So. 2d 1133 (Fla. 1976), was controlling precedent at the relevant time. In Cooper, the Florida Supreme Court instructed that Florida capital sentencers, whether judge or jury, were limited strictly to the consideration of only those mitigating factors enumerated in Fla. Sta. sec. 921.141.

Your affiant did not pursue or develop nonstatutory mitigation because to do so would have been fruitless; such nonstatutory mitigating circumstances were inadmissible under the statute and Judge Booth's clear interpretation of the statute.

Due to these restrictions, my co-counsel and I did not pursue nonstatutory mitigation through the assistance of a psychiatrist or psychologist during the penalty phase. Subsequent to Mr. Hall's trial the law changed as to the relevancy of nonstatutory mitigating circumstances, and the admissibility of nonstatutory mental health mitigating evidence. If the trial were today, or if the law then had allowed for consideration of nonstatutory mitigating evidence such as was recently addressed in Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), I certainly would have obtained a mental health expert's help in developing the mitigating circumstances present in Mr. Hall's case, including those nonstatutory mitigating circumstances which I could not pursue in 1978.

Although Freddie Hall's competency to stand trial at the time was evaluated by an expert, neither I nor my co-counsel Mr. Aulls made inquiries of the expert, Dr. George Barnard, with regard to nonstatutory mitigating mental health evidence. If such evidence would have been admissible, we would certainly have requested that the expert provide an opinion with regard to nonstatutory mental health mitigation. We did not make the request solely because of the preclusive effects of the statute. It was because of the statutory preclusion discussed herein that we never investigated, developed, or offered nonstatutory mental health (psychological/psychiatric) mitigating evidence, or even inquired regarding nonstatutory mental health mitigation of the expert who examined Mr. Hall's competency at the time. A mental health professional would have provided great assistance in developing

nonstatutory mitigating circumstances regarding Freddie Hall, and such evidence would have been presented if the trial were held today, when the statute is no longer understood as preclusive.

If the proceedings were today, we certainly would have presented nonstatutory mitigating circumstances such as the conditions under which Freddie Lee Hall was raised, his environment, his records such as school records, military records, inmate records, medical records, etc., information from presentence investigations, the psychiatric examinations, and any other information whatsoever bearing on his mental status, character or upbringing.

Because we were aware that the law in effect at the time did not permit the introduction and use of such mitigation, and because of Judge Booth's construction of the statute, we did not pursue such evidence.

Due to the constraints imposed by the statute and courts discussed in this affidavit, your affiant and his co-counsel did not contact Mr. Hall's former attorney from his 1968 offense and discuss available mitigation with him, nor investigate, develop, or offer mental health and other background nonstatutory mitigation arising from the prior conviction and Mr. Hall's circumstances at that and other times in his life. Similarly, incarceration, school, military, and other records regarding Mr. Hall were not sought out, considered, or offered because information arising from such records would not have fit into the statute's restrictive list and the narrow interpretation given to the statute by Florida's courts and the courts of the Fifth Judicial Circuit. Neither was such information provided to Dr. Barnard. As stated, the expert was never asked to provide his opinions regarding nonstatutory mitigation because the statute and Judge Booth's rulings tied your affiant's hands.

(App. 2)(Affidavit of Mr. Hall's former trial counsel, Mr. Horace D. Robuck, Jr., and Mr. Morton D. Aulls)(emphasis added).

The mitigating truths regarding Freddie Lee Hall's "character and background" and the "circumstances of the offense," Lockett v. Ohio, 438 U.S. 586 (1978), were nonstatutory in nature. Nothing about Freddie Hall and his involvement in the offense "fit" the stringent statutory list, although a wealth of mitigation was amply available. Counsel were foreclosed from developing and offering an overwhelming case for life because of the statute and the trial court's construction.

In ruling on Mr. Hall's Rule 3.850 motion, the Circuit Court found all facts presented in support of Mr. Hall's Hitchcock claim in Mr. Hall's favor: that counsel were in fact precluded and that,

> . . . the affidavits, reports, statements, and other contents of the two volume Appendix attached to Defendant's 1988 Motion as a proffer of evidence has been examined in detail and it reasonably establishes, that is by a preponderance of evidence, the now required non-statutory mitigating circumstances . . .

State v. Hall, No. 78-52-CF (Circuit Court Order denying Rule 3.850 relief), p. 4 (emphasis added)(hereinafter "Circuit Court

Order").[1] The Circuit Court found Hitchcock/Lockett error. However, it denied relief by ruling that the wealth of nonstatutory mitigating evidence established by Mr. Hall below would not have outweighed the three aggravating circumstances established by the State: 1) prior conviction; 2) concurrent felony; 3) heinous, atrocious, or cruel. See Circuit Court's Order, p. 4. The lower court ruled that the error was harmless because the three aggravating circumstances presented by the State, in the lower court's view, "outweighed" the wealth of nonstatutory mitigating evidence established below.[2] The

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[1]Before the trial court, the State did not contest any of the facts proffered by Mr. Hall.

[2]The nonstatutory mitigating evidence is discussed in the body of this brief. See Claim I, infra. The evidence was established below on the basis of expert diagnoses and testing -- including the expert account of Dr. George Barnard, the expert appointed at the time of Mr. Hall's trial who was never asked to provide an opinion with regard to nonstatutory mitigation because of the preclusion on counsel (see Apps. 2 and 17) -- Mr. Hall's records, and the sworn accounts of family and other individuals who had had contact with Mr. Hall throughout his life. This evidence falls into approximately twenty-two classically recognized categories of nonstatutory mitigation: 1) The fact that Mr. Hall is brain damaged and suffers from a serious history of head injury; 2) The effects of Mr. Hall's brain damage on his behavior at the time of the offense; 3) Mr. Hall's long term history of substance abuse (drug and alcohol) and its effects on his level of psychological functioning and behavior throughout his life; 4) The effects of his history of drug and alcohol abuse, and his consumption of alcohol and drugs on his behavior at the time of the offense; 5) Mr. Hall's intellectual

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evidence is discussed in the body of this brief. That discussion is intended to demonstrate that the lower court erred -- under no

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deficiencies and his markedly low level of intellectual functioning; 6) The effects of his intellectual impairments on his behavior at the time of the offense; 7) Mr. Hall's low level of achievement throughout his life, resulting from his psychological, intellectual, and emotional impairments; 8) His educational difficulties and the fact that no help was provided to this intellectually impaired child; 9) A history of severe child abuse (abuse which can only be characterized as torture); 10) The fact that Mr. Hall is mentally ill and has been mentally ill and psychotic throughout his life, psychological deficiencies which compound the problems arising from his brain damage, intellectual impairments, and substance abuse; 11) Mr. Hall's unstable upbringing, resulting from being raised first by parents who were constantly at war with each other, and then in a one-parent family by an abusive, alcoholic mother in a home with no role models; 12) The poverty faced by Mr. Hall as a child and throughout his life, and its attendant effects; 13) The racism prevalent in the environment in which Mr. Hall was raised and lived, and its attendant effects on his behavior; 14) Mr. Hall's chronic speech impediment and its effects on his level of functioning; 15) The fact that Mr. Hall's sister was murdered and her killer went essentially unpunished, and its effects on Mr. Hall's psychologically impaired view of his environment; 16) Mr. Hall's history of suicide attempts; 17) The fact that Mr. Hall was incarcerated while still a youth, and the effects of that incarceration on his level of functioning and later lack of achievement; 18) Mr. Hall's efforts at employment; 19) The fact that notwithstanding his various psychological, behavioral, and intellectual impairments, Mr. Hall was not a behavioral problem in school, and followed rules, thus reflecting a potential towards rehabilitation; 20) The fact that Mr. Hall's various deficits left him vulnerable to being led by his co-defendant, even if that "domination" did not rise to the level required by the statute; 21) Mr. Hall's expressions of remorse; 22) Mr. Hall's illiteracy. These twenty-two categories have been

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construction can it be concluded, as a matter of law, that the preclusion on counsels' presentation of the plethora of nonstatutory mitigating evidence proven below was harmless.[3]

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outlined by counsel as a general description of the types of areas of traditionally recognized mitigation existing in this case, mitigation which has now been established before the lower court. The categories, however, are a general summary: the substantial nonstatutory mitigation in this case, and the expert, lay, and documentary evidence establishing it, compellingly speaks for itself and is presented in Claim I, infra.

[3]In its opinion on Mr. Hall's habeas corpus petition, this Court also found that Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), was violated during the course of the pre-Lockett v. Ohio proceedings resulting in Mr. Hall's sentence of death. However, the Court also found that the sentencing jury's and court's failure to consider the six nonstatutory mitigating circumstances which made their way into the record during the course of those proceedings did not violate the eighth amendment since, "[w]hen balanced against the [three] aggravating factors [found, the] nonstatutory mitigating evidence is very weak." Hall v. Dugger, 13 F.L.W. 320 (Fla., May 12, 1988). But see id. at 321 (Kogan, Shaw, and Barkett, JJ., dissenting)("Certainly if this case, with six nonstatutory mitigating circumstances and only three aggravating circumstances, is not a case of prejudicial Hitchcock error, then there is no longer any situation that can constitute Hitchcock error.").

During the course of the habeas corpus proceedings before this Court, Mr. Hall's former counsel explained that beyond the preclusive jury instructions and constrained judicial review issues, a Rule 3.850 motion had been filed which presented the third,non-record aspect of Mr. Hall's Hitchcock v. Dugger claim: the fact that Mr. Hall's trial counsel were constrained by the then-existing statute and the Circuit Court's specific rulings, and that as a result a wealth of nonstatutory mitigating evidence was never investigated, developed, or presented, and therefore

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That, however, was the lower court's legal conclusion in this case. The lower court erred, and those errors are discussed in the following section of this brief. What is clear, and what should be noted at the outset, is the fact that the Rule 3.850 trial court erred in denying Rule 3.850 relief in a case involving three (3) aggravating circumstances which related primarily to the offense, see Mikenas v. Dugger, 519 So. 2d 601, 602 (Fla. 1988), and a wealth of nonstatutory mitigation (falling into twenty-two general categories) relating to both the background of the offender and circumstances of the offense which was never heard or considered because of the preclusion on counsel.

The then-prevalent official preclusion on capital defense counsel had its effects:

> I, HOWARD H. BABB, JR., being duly sworn or affirmed, do hereby depose and say:
>
> My name is Howard H. Babb, Jr., and I am the Public Defender for Florida's Fifth Judicial Circuit. In 1978 I was an Assistant State Attorney in the Fifth Judicial Circuit.

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never made its way into the record. See Recording of Oral Argument, Hall v. Dugger, Case No. 71,284, 13 F.L.W. 320 (Fla., May 12, 1988). This is as it should be: Rule 3.850 was the proper means by which to present the non-record facts attendant to Mr. Hall's Hitchcock claim, i.e., the facts attendant to the preclusion on counsel.

> At the time Freddie Lee Hall went to trial reasonable defense counsel, the courts of the Fifth Judicial Circuit, and prosecutors all understood that the law at the time limited the relevant, admissible mitigating circumstances to those specifically listed in Fla. Stat. sec. 921.141 (before it was amended to allow consideration of any other mitigating circumstance). We were all aware of that limitation. Defense counsel operating in the area during this period of time, because of the limitations on the admissibility and consideration of nonstatutory mitigating evidence imposed by the statute, the local courts, and the Florida Supreme Court, operated under the statute's constraints and did not investigate, develop, or present nonstatutory mitigating evidence for the jury's and judge's consideration. Harvard v. State, 769 F.2d 1488 (11th Cir. 1985), Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985), and Hitchcock v. Dugger, 107 . Ct. 1821 (1987), are reported decisions reflecting the prevalent preclusive interpretation provided to Florida's capital sentencing statute at the time.
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> Judge Booth and other circuit court judges were applying this standard in the Fifth Judicial Circuit and local attorneys were preparing their cases with the understanding that they would be precluded from offering nonstatutory mitigating evidence. Because they were aware that the law in effect at the time did not permit the introduction and use of nonstatutory mitigation, defense attorneys, operating under the preclusion, did not pursue such evidence.

(App. 5). That counsels' efforts were constrained is a fact beyond dispute in Mr. Hall's case. That a substantial nonstatutory case for life was available is similarly indisputable: Freddie Hall's records, and the account of all who

knew him bear out a tragic history of child abuse, poverty, and mental illness; the account of mental health experts establishes a compelling nonstatutory case for life. Brain-damaged, alcohol- and drug-addled, emotionally-disturbed, and mentally-deficient Freddie Hall has carried his mental illnesses with him throughout his life. These factors did not "fit" within the statute, although these were the factors explaining his involvement in the offense. Even the expert who evaluated Mr. Hall's "competency" and "sanity", Dr. George Barnard, an expert who, because Mr. Hall's attorneys' hands were tied, was <u>never</u> asked a single question regarding nonstatutory mental health mitigation, would have been able to provide compelling information in this regard:

> I am a board certified forensic psychiatrist, professor, chief of the Consultation Service, and chief of the Forensic Division of the Department of Psychiatry of the University of Florida. I have conducted well over 4000 forensic evaluations in my career, have been qualified as an expert by numerous courts, including numerous Florida Circuit Courts, and have testified in many judicial proceedings.
>
> I had occasion to interview and evaluate Freddie Lee Hall on April 22, 1978, in relation to his trial for first first degree murder. Specifically I was asked to evaluate Mr. Hall's competency to stand trial and his legal sanity at the time of the offense.
>
> I was never asked to evaluate Mr. Hall's mental state and background with regard to mental health evidence which may have been considered as nonstatutory mitigation of

sentence at any time prior to or at Mr. Hall's trial.

Had I been asked to formulate and provide an opinion in this regard, there certainly existed important mental health nonstatutory mitigating evidence of which I was aware at the time and regarding which I would have been more than willing to testify. My original report in fact made reference to some of the nonstatutory mitigating evidence of which I was aware and with regard to which I could have provided expert testimony. In that report I noted:

> On the day of the alleged crimes he [Mr. Hall] had almost a pint of Apricot Brandy, with Ruffin drinking part of a cup. Hall also took two pills from Ruffin that day, but did not know the kind of pills they were.
>
> . . .
>
> He was born July 21, 1945, in Wildwood, Florida. His mother is seventy-two years of age, and his father died in 1963 at age seventy-two. His parents were separated when he was a boy, but he did not know how old he was at that time. He was sixth in a sibling group of six. He had one sister who was murdered by a man she had some children by. He was raised by his mother and got along well, and never ran away from home.
>
> He quit school in the eleventh grade at age sixteen or seventeen. He had failed the first grade because he was slow. He did learn to read and write, and had no special education classes. he was suspended once for playing cards. He got along with the teachers and students.
>
> . . .

> He has been unconscious several times while boxing or playing football. The longest period of unconsciousness was not more than a few seconds. He denied fits, convulsions, or seizures. He has had the venereal disease, Clap, numerous times, and was always treated. He has thought of suicide but has made no attempts. He never been a patient in a state mental hospital and has had no psychiatric treatment other than seeing a psychiatrist several times while in prison. He did not receive any medications at that time. As a child and again in 1967, he had the experience of being unable to move for several seconds, and in 1967 he saw a vision with three men when there was nobody there. he has had no other experiences like this.

As stated, Freddie Hall's history of head trauma and head injury, which I noted at the time of my original report, may be relevant to findings of brain damage as discussed below.

In my original report I noted that "There are mild deficits in his recent memory but his remote memory appears intact." It has been recognized in the profession that brain damaged individuals will evidence deficits in recent memory, as opposed to remote memory. Such indicia, along with other indicia that I noted in my original report, indicate that Mr. Hall may have been brain damaged. A hypothesis of brain damage is supported by his history of closed head injuries. As I noted above and in my original report "he has been unconscious several times while boxing or playing football".

It has been recognized in the profession that repeated trauma to the head can cause permanent damage. Individuals with such damage may suffer from difficulty with impulse control, emotional lability, mild paranoia, and slowness of thought.

In addition to these head injuries, Mr. Hall has a history of drug and alcohol abuse. In my report I also stated:

> He began the use of alcohol at age twenty-eight. He estimated that he drank daily if it was available, and guessed he may have a quart of beer plus a couple of ounces of whiskey when he could get it. He denied shakes, dt's, blackouts, or treatment for alcohol abuse. He began the use of drugs at age twenty-eight. He has used pot, black beauties, and speed. He has never been strung out on drugs and denied the use of Heroin or Cocaine.

Factors such as Mr. Hall's history of alcohol and substance abuse, and his excessive use of alcohol and use of pills at the time of the crimes would also have been relevant with regard to nonstatutory mitigation. Such substances impair judgment and control, affect one's emotions and thought processes, and affect one's behavior. Such substance abuse was noted in my original report as is quoted above.

Based upon the information which was known to me at the time, I could have testified to nonstatutory mitigating factors. Even my report, which was not prepared to answer questions regarding mitigation, stated that Mr. Hall suffered from deficits in memory, was partially oriented for time, had poor judgment, could only abstract two out of five proverbs, had been unconscious several times, has had suicidal thoughts, saw a psychiatrist in prison, and had a history of hallucinating, in addition to the matters discussed above.

> At the time of the original trial, I would have been willing to discuss such nonstatutory mitigating circumstances had I been asked to do so. Had I been asked questions in that regard, psychological and neurological testing would have been appropriate.
>
> Since the time of my initial evaluation, I have reviewed additional materials regarding Mr. Hall which have been recently provided to me. These materials include statements from Mr. Hall's attorney in his 1968 trial, records from the Department of Corrections, school records, mental health reports, information regarding a history of hallucinations, and bizarre behavior resulting from the abuse of alcohol, testing results, statements by Mr. Hall, official court transcripts, presentence reports, and other information. Had I been provided with such information at the time of my original evaluation of Mr. Hall, my opinions and ultimate conclusions with regard to evidence of a nonstatutory mitigating nature (discussed above) would have been further bolstered. In addition the materials I have reviewed reflect a childhood of material impoverishment and physical abuse. These materials also reflect that Mr. Hall's level of intellectual functioning is lower thatn the clinical assessment noted in my original report.
>
> In summary, the matters discussed above and referred to in my original report would have been relevant to non-statutory mitigation relating to the defendant's mental health. I would have been willing to provide my views and expert testimoy in this regard had I been asked to do so at the time of my original evaluation.

(App. 17)(Affidavit of Dr. George Barnard).

Dr. Barnard was never asked and never called to testify because his account also would not "fit" within the statute. Of

course, the accounts of the eminently-qualified mental health professionals who were asked to answer the question of whether or not nonstatutory mental health mitigation existed in Mr. Hall's case present evidence establishing an overwhelming case for life. (Their accounts are described in Claim I, infra.) And a great deal more was available (Id.). However, no one was asked these nonstatutory questions at the time of Freddie Hall's trial. None of the compelling, overwhelming nonstatutory mitigation discussed in this brief reached the Court and jury: the trial court's rulings and the statute tied counsels' hands and, as post-Hitchcock precedent makes clear, foreclosed meaningful, individualized, and reliable capital sentencing.

By his request for Rule 3.850 relief, Mr. Hall sought an opportunity to be heard before his execution forever forecloses meaningful capital sentencing. The lower court found all of the facts in Mr. Hall's favor, but nevertheless denied relief. The lower court erred in failing to correct clear eighth amendment error. A stay of execution, and Rule 3.850 relief, are more than proper in this case. See Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); McCrae v. State, 510 So. 2d 874 (Fla. 1987).

Mr. Hall's Hitchcock claim is based upon a significant change in the law. See Downs v. Dugger, supra, 514 So. 2d 1069

("We now find that a substantial change in law has occurred that requires us to reconsider [a Hitchcock issue]"; merits relief granted); Thompson v. Dugger, supra, 515 So. 2d 173 (Hitchcock is a "change in law" cognizable in post-conviction proceedings); McCrae v. State, supra, 515 So. 2d 874 (same; Rule 3.850 proceeding); Morgan v. State, 515 So. 2d 975 (Fla. 1987)(same); Cooper v. Dugger, 526 So. 2d 900 (Fla. 1988)(Lockett/Hitchcock claims subject to no procedural bar because Hitchcock represents a substantial change in law).

Mr. Hall was tried in June, 1978, before Lockett and Songer, at a time when Florida judges and lawyers could not but have labored under the view that the introduction of evidence in mitigation of a capital sentence was restricted to a narrow statutory list. See Songer v. Wainwright, 769 F.2d 1488, 1494 (11th Cir. 1985)(en banc) (Hall, Kravitch, Johnson and Anderson, JJ., concurring) ("Of course, neither the State trial judge's nor Songer's counsel's [preclusive] construction of the statute was unfounded. Quite the contrary, theirs was the most reasonable interpretation of Florida law at the time.") See also Harvard v. State, 486 So. 2d 537 (Fla. 1986)(recognizing preclusive interpretation); Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987)(same); Hargrave v. Dugger, 832 So. 2d 1529 (11th Cir. 1987)(en banc)(same). Mr. Hall's trial counsel operated under that "reasonable" but unconstitutionally restrictive

interpretation; as a consequence, Mr. Hall was denied an individualized and reliable capital sentencing determination. Cf. Hitchcock v. Dugger, supra. Relief is now proper.

II. THE LOWER COURT ERRED

The lower court's factual findings regarding Mr. Hall's Hitchcock claim were sound: Mr. Hall proved before the Circuit Court that his trial counsel were precluded and that a wealth of nonstatutory mitigating evidence existed at the time of trial but was not sought out, investigated, developed, or presented because of the preclusion on counsel. The lower court's ultimate disposition, however, was in error.

Specifically, the trial court found, first, that Mr. Hall's jury would not have voted for life had they heard the nonstatutory mitigation now established. Circuit Court Order, p. 3. Mr. Hall's jury, however, voted for death by the absolute slimmest of margins: 7-5. One vote would have made the difference. Under no construction can it be said that the wealth of nonstatutory mitigation never heard in this case would not have affected at least one juror. Even if this three aggravating primarily offense-related circumstance case involved a unanimous jury vote, there is no principled way that it can be found, as a matter of law, that the substantial nonstatutory mitigating evidence proven below would not have made a difference. Of

course, the constitutional standard is even more stringent: the State bears the burden of establishing that the Lockett/Hitchcock error "would have had no effect upon the [sentencer's] deliberations," Skipper v. South Carolina, 106 S. Ct. 1669, 1673 (1986)(emphasis added); Cooper v. Dugger, 526 So. 2d 900, 903 (Fla. 1988); the State must prove that the jury's failure to consider nonstatutory mitigating evidence was harmless beyond a reasonable doubt. See Riley v. Wainwright, 517 So. 2d 656, 659 (Fla. 1987), citing Valle v. State, 502 So. 2d 1225 (Fla. 1987). The State failed to even discuss Mr. Hall's proffered nonstatutory mitigating evidence below, much less so to prove harmlessness. The Hitchcock errors at issue in Mr. Hall's case were by no means "harmless", and much less so "harmless beyond a reasonable doubt." A man should not be dispatched to his execution when he so clearly has demonstrated that his capital sentence is so fundamentally unreliable, and so constitutionally infirm. To say that the powerful mitigating evidence proven below and discussed in Claim I, infra, would not have made a difference to even one juror (and one juror is all that was needed to alter the result in this case) is to engage in speculation of the most impermissible sort. The constraints on counsel "[a]ffected" this jury's sentencing decision. Skipper; Cooper. This much cannot be disputed.

Second, the lower court found:

> That (a) if the now required non-statutory mitigating instruction had been given and if (b) the evidence as proffered by defendant in his 1988 Motion had been submitted to the jury during the 1978 penalty proceeding; and should their advisory sentence been a recommendation of life imprisonment, such recommendation would not have been accepted by the undersigned sentencer, Edding v. Oklahoma, 455 U.S. 104 (1982); Hall v. Wainwright, 733 F.2d at 775 . . .

Circuit Court Order, p. 4 (emphasis in original). The error in this ruling is obvious: had this 7-5 jury voted for life, the plethora of nonstatutory mitigation now established would have been much, much more than a reasonable basis for the jury's life recommendation, and that recommendation therefore could not have been lawfully overturned. See, e.g., Tedder v. State, 322 So. 2d 908 (Fla. 1975); Ferry v. State, 507 So. 2d 1373, 1376-77 (Fla. 1987); Wasko v. State, 505 So. 2d 1314 (Fla. 1987); Brookings v. State, 495 So. 2d 135 (Fla. 1986); Hawkins v. State, 436 So. 2d 44, 47 (Fla. 1983); Burch v. State, 522 So. 2d 810 (Fla. 1988). See also Riley v. Wainwright, supra, 517 So. 2d at 659 (preclusion on jury's consideration of nonstatutory mitigating evidence renders penalty phase determination fundamentally unfair); Messer v. Florida, 834 F.2d 890, 895 (11th Cir. 1987) ("[T]he jury recommendation is an integral part of the Florida death sentencing scheme, and when a jury recommendation upon which the judge must rely is infected with a Lockett violation,

'then the entire sentencing process necessarily is tainted by that procedure.' [Riley, 517 So. 2d] at 659.").

Finally, the lower court made a blanket finding that the wealth of nonstatutory mitigation proven below by Mr. Hall would have been "outweigh[ed]" by the three "aggravating circumstances found." Circuit Court Order, p. 4. This blanket finding suffers from the same errors already discussed above. In fact, the lower court's error here is even more obvious: not once does the lower court cite the "beyond a reasonable doubt," Riley, supra, or "no effect," Skipper, supra; Cooper, supra, standards. A post-conviction court, faced with clear Hitchcock eighth amendment error, cannot "cure" the error by simply providing general speculations as to what a jury might have done. Such after-the-fact guesswork abrogates any rationality which may be ascribed to eighth amendment harmless error analysis, and eviscerates the meaning of the Hitchcock opinion itself.

In sum, the lower court erred in its application of the relevant eighth amendment law. Here, as in Mikenas v. Dugger, 519 So. 2d 601, 602 (Fla. 1988):

> All of the aggravating circumstances were directly related to the murder itself except one . . . [W]e cannot say beyond a reasonable doubt that had the jury [considered] nonstatutory mitigating evidence . . . it would not have recommended life rather than death.

This Court has consistently granted relief in Hitchcock cases presenting but one or two mitigating circumstances and numerous aggravating circumstances. See Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Combs v. State, 525 So. 2d 853 (Fla. 1988); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Foster v. State, 518 So. 2d 901 (Fla. 1987); McCrae v. State, 510 So. 2d 874 (Fla. 1987); Morgan v. State, 515 So. 2d 975 (Fla. 1987); Waterhouse v. State, 522 So. 2d 341 (Fla. 1988). Mr. Hall's jury's 7-5 vote, the dearth of aggravation, the wealth of nonstatutory mitigation now proven, and the compelling nature of the type and quality of nonstatutory mitigation Mr. Hall established before the lower court (see Claim I, infra) all establish that relief is as appropriate, and in fact is far more appropriate in Mr. Hall's case, than in any of the cases cited above. Even in co-defendant Mack Ruffin's case, a case presenting far less compelling mitigation than Mr. Hall's, the federal appeals court granted relief. See Ruffin v. Dugger, 848 F.2d 1512 (11th Cir. 1988). Precedent, logic, and the constitutional mandate that any sentence of death be deemed fundamentally fair and reliable all make it clear that relief is warranted in Mr. Hall's case, and that the lower court erred in

its ultimate conclusions of law. The Hitchcock/Lockett errors were not harmless. Reflief is proper.[4]

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[4]Before the lower court, the State presented no harmless error argument but primarily argued that Mr. Hall's claim should be barred because, according to the State, the federal courts somehow ruled that Mr. Hall's Hitchcock claim was "procedurally barred" in decisions rendered long before a petition for a writ of certiorari was even filed in Hitchcock v. Dugger (See Motion to Dismiss, p. 4, citing Hall v. Wainwright, 565 F.Supp. 1222 (M.D.Fla. 1983), and Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1984)). The lower court declined to make such a finding with regard to Mr. Hall's Hitchcock claim. Nor could any such finding be made: absolutely no procedural bar exists which can be applied against Mr. Hall's or any Florida capital litigant's Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), claim. The fact that no procedural bar exists is made evident by every post-Hitchcock pronouncement of the Florida Supreme Court. See Waterhouse v. State, 522 So. 2d 341 (Fla. 1988)(no procedural bar applicable to Hitchcock claim even though defendant, unlike Mr. Hall, was sentenced after Lockett and Songer); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987)("We now find that a substantial change in law has occurred that requires us to reconsider [a Hitchcock issue];" merits relief granted); Cooper v. Dugger, 526 So. 2d 900, 901 (Fla. 1988)("As a thresh[h]old matter, we reject the state's argument that petitioner's claim is procedurally barred. There is no procedural bar to Lockett/Hitchcock claims in light of the substantial change in the law that has occurred with respect to the introduction and consideration of nonstatutory mitigating evidence in capital sentencing hearings."); Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987)(granting relief and rejecting State's procedural default contentions because Hitchcock is a "change in law" mandating merits review in post-conviction proceedings); Morgan v. State, 515 So. 2d 975 (Fla. 1987)(same); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987)(same); McCrae v. State, 510 So. 2d 874 (Fla. 1987)(same); Mikenas v. Dugger, 519 So. 2d 601 (Fla. 1988)(merits relief granted and no procedural bar applied to Hitchcock claim because Hitchcock "represented a sufficient change in the law to defeat the application of procedural default."); Combs v. State, 525 So. 2d 853 (Fla. 1988)(same); Foster v. State, 518 So. 2d 901 (Fla. 1988)(same); Zeigler v. Dugger, 524 So. 2d 419 (Fla. 1988)("Even though

(footnote continued on following page)

The State argued below that because the Florida Supreme Court denied relief on Mr. Hall's state court petition for a writ of habeas corpus, the trial court should also decline to grant

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(footnote continued from previous page)

Zeigler unsuccessfully sought to raise this issue in prior proceedings, . . . he is not barred from raising the claim at this time since the United States Supreme Court's ruling in Hitchcock represented a sufficient change in the law so as to defeat the application of procedural default . . ."). The Florida Supreme Court has in fact reviewed the merits of every post-conviction litigant's Hitchcock claim, whether the claim had been raised in earlier proceedings or not. See McCrae v. State, 510 So. 2d 874, 880 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Waterhouse v. State, 522 So. 2d 341 (Fla. 1988); Combs v. State, 525 So. 2d 853 (Fla. 1988); Cooper v. Dugger, 526 So. 2d 900 (Fla. 1988); Zeigler v. Dugger, 524 So. 2d 419 (Fla. 1988).

The federal courts, in light of this consistent Florida Supreme Court line of precedent, have also acknowledged that Hitchcock/Lockett claims are no longer subject to any procedural bar in Florida and therefore that consideration of the merits of post-conviction litigants' Hitchcock claims is more than proper. See, e.g., Messer v. Florida, 834 F.2d 890 (11th Cir. 1987); Stone v. Dugger, 837 F.2d 477 (11th Cir. 1988); Armstrong v. Dugger, 833 F.2d 1430 (11th Cir. 1987); see also Hargrave v. Dugger, 832 F.2d 1528 (11th Cir. 1987)(en banc); cf. Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987). The merits of Mr. Hall's co-defendant's (Mack Ruffin) Hitchcock claim have been considered by the Eleventh Circuit and relief has been granted. See Ruffin v. Dugger, 848 F.2d 1512 (11th Cir. 1988).

In light of all this, it is hard to fathom why the State asserted a procedural bar against Mr. Hall's claim before the lower court. But that is the argument upon which the State primarily relied. Cf. Thompson v. Dugger, supra (granting relief without conducting harmless error analysis where State argued only procedural default); Waterhouse v. State, supra (same).

relief. The lower court, alternatively, ruled in the State's favor in this regard:

> That the Florida Supreme Court's denial of the habeas corpus relief in Hall v. Dugger, 13 F.L.W. 320 (Fla. Case No. 71,204, May 12, 1988) constitutes the law of the case and is res judicata.

Circuit Court Order, p. 3. Of course, this ruling is clearly in error. As stated earlier, and as shown in Claim I, infra, Hitchcock claims have three components: 1) a limitation on the jury's consideration through a court's jury instructions; 2) a limitation on the court's own review; and 3) a limitation on counsel resulting from the statute, its judicial interpretation, and, as in Mr. Hall's case, from the court's rulings. See, e.g., Hargrave v. Dugger, 832 F.2d 1528 (11th Cir. 1987)(en banc); Thompson v. Dugger, supra (trial court, as in Mr. Hall's case, declined to provide counsel's proffered instruction on nonstatutory mitigating evidence and declined to permit counsel to argue such evidence); McCrae v. State, supra (preclusion on counsel established at evidentiary hearing); see also Songer v. Wainwright, 769 F.2d 1488, 1494 (11th Cir. 1985)(en banc)(Clark, Kravitch, Johnson, and Anderson concurring). (The Songer opinion is discussed at lenth in Claim I, infra). As Mr. Hall's counsel explained to the Florida Supreme Court during the litigation of the habeas corpus petition, this most important aspect of Mr. Hall's claim -- the preclusion on counsel -- was presented

pursuant to Rule 3.850. It was presented pursuant to Rule 3.850 because this aspect of the claim was non-record in nature, requiring the full and fair airing of non-record evidentiary facts before a Rule 3.850 trial court. This aspect of Mr. Hall's claim was properly brought in a Rule 3.850 action, and the Florida Supreme Court neither ruled on nor rejected this evidentiary claim in the habeas corpus proceeding. See Hall, supra, 13 F.L.W. 320.

To the contrary, the Florida Supreme Court's habeas corpus Hall opinion demonstrates why the preclusion on counsel was harmful and prejudicial to Mr. Hall, and why Mr. Hall's claim must now be properly adjudicated. It was, in fact, because of the statutory and judicial preclusion on counsels' efforts at the penalty phase that only nonstatutory mitigating evidence which the Florida Supreme Court considered "weak", Hall, 13 F.L.W. 320, reached the sentencing jury. But for the preclusion on counsel (App. 2), a wealth of overwhelming nonstatutory mitigation would have been provided to the jury and the court. The lower court found these facts in Mr. Hall's favor, and this brief discusses the preclusion on counsel and the substantial nonstatutory mitigating evidence which would have been presented had counsel

not been precluded. It demonstrates that a stay of execution, and Rule 3.850 relief, are more than proper in this case.[5]

III. ARGUMENT

CLAIM I

MR. HALL WAS DENIED A MEANINGFUL, RELIABLE, AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION BECAUSE THE OPERATION OF STATE LAW AND THE COURT'S RULINGS RESTRICTED HIS TRIAL COUNSELS' EFFORTS TO DEVELOP AND PRESENT NONSTATUTORY MITIGATING EVIDENCE IN VIOLATION OF HITCHCOCK V. DUGGER AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

This case should trouble. As stated in the Introduction to this brief, and as supported by detailed affidavits (see, e.g., Apps. 2, 5, and 17) and by the case law, Mr. Hall's lawyers' efforts were strapped by the statute, and consequently this brain damaged, drug and alcohol riddled, and mentally ill individual's only opportunity for a meaningful capital sentencing determination was skewed ab initio. The fundamental truths regarding this pathetic individual's impairments, the mental and emotional deficits which have addled him throughout his life, and the effects of these illnesses on his behavior prior to and at the time of the offense never reached the trial court or the

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[5]The Circuit Court's rulings with regard to the other claims asserted in Mr. Hall's Rule 3.850 motion are discussed in the body of this brief.

jurors charged with deciding whether he should live or die. These truths never reached the Court because this mentally ill capital defendant's lawyers' hands were tied. No death sentence imposed under these circumstances can be allowed to stand, as Hitchcock v. Dugger makes abundantly clear. This claim must now be properly resolved, before an execution forever forecloses Mr. Hall's right to a meaningful and individualized capital sentencing determination. A stay of execution and post-conviction relief are more than proper. See Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987).

The Florida Supreme Court denied relief on the jury instruction and limited judicial consideration aspects of Mr. Hall's Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), claim based on its view that the mitigating evidence which had made its way into the record was "weak". Hall v. Dugger, 13 F.L.W. 320 (Fla., May 12, 1988). The Supreme Court, however, did not in that proceeding consider the third, non-record, and most important aspect of Mr. Hall's Hitchcock claim -- the fact that counsel were absolutely precluded from investigating, developing, and offering an overwhelming nonstatutory case for life. The preclusion on counsel explains why the nonstatutory mitigation in the record was described as "weak". What never made its way into the record because the statute, its official interpretation,

and the trial court's rulings tied counsels' hands is far from "weak"; to the contrary, the nonstatutory mitigation which counsel were precluded from presenting (discussed below) is simply overwhelming.

Throughout his life Freddie Lee Hall has been addled by brain damage and substance abuse. He has always been intellectually deficient, emotionally disturbed, and mentally ill. These conditions affected his conduct at the time of the offense and were the evidence explaining his involvement in the crime. His records made his illness clear. The fact that compelling nonstatutory mental health mitigation was available in Mr. Hall's case was recognized by the mental health expert who examined his sanity and competency at the time of the trial (App. 17 [Affidavit of Dr. George Barnard]). All who knew Mr. Hall would have described a history of child abuse, poverty, and mental illness -- factors explaining who this impaired individual was and why he came to find himself charged with a capital offense. School records, incarceration records, and military records all spoke to his mental illnesses and impairments.

None of these compelling truths, however, "fit" within Florida's pre-Lockett stringent list of statutory mitigating circumstances. The expert who examined Mr. Hall's sanity and competency was never asked to present his views (see App. 17), for his views did not "fit" within the statute. Had he been, a

wealth of nonstatutory mental health mitigation would have been heard by the jury charged with deciding whether Mr. Hall should live or die, as is made clear by that expert's own views (App. 17) and by the consistent reports of the eminently qualified experts who were asked to evaluate Mr. Hall with regard to the issue of whether any mental health nonstatutory mitigating evidence was available in his case (See Apps. 11, 12, 13, 14, 15, 16). At the time of Mr. Hall's trial the question was never posed -- the statute and the court's rulings tied his lawyers' hands.

Neither was Mr. Hall's history investigated or presented, nor were records sought out, nor were the views of his former attorney, family, and others who knew him (see Apps. 6, 7, 8, 9, 10) offered. None of this compelling evidence would have been "relevant" to the narrow statutory list.

The lower court, after "examin[ing]" the evidence "in detail," Circuit Court Order, p. 4, found all the facts proffered in Mr. Hall's favor. Id. However, the lower court denied relief by ruling that the error was "harmless", a ruling which is clearly contrary to law. See Sections I and II, infra. This most important aspect of Mr. Hall's, or any capital litigant's, Hitchcock claim -- the fact that counsel were constrained in their efforts -- should now be properly adjudicated by this

Court. It is this issue which Mr. Hall initially presents on this appeal.

Mr. Hall's capital trial and sentencing proceedings took place in June, 1978, before the issuance of the United States Supreme Court's opinion in Lockett v. Ohio, 438 U.S. 586 (1978), before the issuance of the Florida Supreme Court's opinion in Songer v. State, 365 So. 2d 696 (Fla. 1978), and precisely during the period of time when Florida's preclusive capital sentencing statute and its official interpretation had its most restrictive effects. See Hargrave v. Dugger, 823 F.2d 1528 (11th Cir. 1988)(en banc); see also Harvard v. State, 486 So. 2d 540 (Fla. 1986).

Cooper v. State, 336 So. 2d 1133 (Fla. 1976), was then the law. Under Cooper's official, preclusive interpretation, reasonable judges were constrained in their view of mitigation and defense attorneys were restricted in their efforts to investigate, develop, and present nonstatutory mitigation. Cf. Cooper v. Dugger, 526 So. 2d 900 (Fla. 1988). Relying on the then-prevalent official construction, the trial court imposed its restrictive views of the statute on Mr. Hall's trial counsel. The trial court erred in that regard then, see Hitchcock, supra; Hargrave, supra, and erred in failing to correct that error

now.[6] The statute's official interpretation and the trial court's views had an effect on counsel -- as a result of the stringent statutory construction, counsels' efforts were impaired and an overwhelming case for life was never presented to the jury.

Mr. Hall's trial counsel, Horace Robuck and Morton Aulls, were reasonable and professional criminal defense attorneys. Their account of the circumstances involved in their penalty phase efforts makes clear that the statute and the trial court's rulings precluded any chance Mr. Hall may have had to receive an individualized and reliable capital sentencing determination.

Counsels' affidavit (App. 2) explained:

> My name is Horace D. Robuck, Jr. and Morton D. Aulls, and I am an attorney in Florida's Fifth Judicial Circuit. In 1977, I served as trial attorney for Freddie Lee Hall when he faced charges of first-degree murder,

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[6]Other capital defendants sentenced to death by the Honorable John W. Booth have been granted relief precisely because of the preclusive statutory interpretation which was employed. See Songer, supra; Ruffin, supra (Mr. Hall's co-defendant). In this case the trial court's restrictive view had an even more far reaching preclusive effect: the trial judge's rulings directly imposed the court's preclusive views on Mr. Hall's counsels' efforts, thus resulting in trial counsels' failure to investigate, develop, or present nonstatutory mitigation. The on-the-record mitigation in this case, see Hall, supra, 13 F.L.W. 320, fortuitously made its way into the record primarily because Mr. Hall, against counsels' advice, asserted his right to testify. Counsel considered themselves and were in fact absolutely constrained, as this brief and the evidence presented below demonstrate.

kidnapping and robbery. My co-counsel was Mr. Morton Drew Aulls or Horace D. Robuck.

At the time I represented Mr. Hall, I was aware that the State was going to actively seek the death penalty. I knew that if Mr. Hall was convicted that there would be a penalty phase at which the jury would consider aggravating and mitigating circumstances. The law at the time limited the relevant and admissible mitigating circumstances to those specifically listed in Fla. Stat. sec. 921.141 (before it was amended to allow consideration of any other mitigating circumstance). Mr. Aulls and I were aware of that limitation, labored under that limitation and prepared Mr. Hall's case, as best we could, in conformity with that limitation and the restrictive understanding of the statute then in effect. This understanding was shared by all participants at Freddie Lee Hall's trial -- defense counsel, the court, and the State.

It was your affiant's belief at the time, a belief shared by the trial court, that any evidence outside the scope of the statutorily enumerated mitigating circumstances was irrelevant and immaterial, and would not have been admitted.

Your affiant's understanding regarding the inadmissibility of nonstatutory mitigating evidence was in fact confirmed by the rulings of the Honorable Judge Booth. Although the Florida Supreme Court's opinions at the time clearly stated that mitigating evidence was restricted to that listed in Florida's capital sentencing statute, codefendant Mack Ruffin's counsel attempted to convince Judge Booth that he should allow consideration of nonstatutory mitigating evidence during a capital trial involving this defendant and codefendant Mack Ruffin which occurred approximately one month before this trial. You affiant joined that request. Judge Booth denied the request, ruling:

> It is the court's ruling that the case cited by the defendant, 428 U.S. 242, Proffitt v. Wainwright, does not, does not stand, [for] the proposition that evidence can be admitted or presented to the jury in the second stage of the trial, that is not specifically authorized by statute. That applies to both the state and the defense. They are limited to those items that are specifically specified or set forth in the statute. The [proffered evidence] . . . does not fall within the statutory provisions for mitigating circumstances.

That motion was renewed in this trial, and the request was again denied, as we expected and as Judge Booth had earlier made clear it would be. At the time we all understood that because of Judge Booth's interpretation of the statute, an interpretation in accord with the then-prevailing law and standards of practice, he would not have allowed the introduction and consideration of nonstatutory mitigation, and the jury would not have been instructed in that regard.

As a consequence of the then-prevailing law, the standard of practice with regard to nonstatutory mitigation then prevalent in the Fifth Judicial Circuit, and Judge Booth's ruling in the prior trial (a ruling which we all expected Judge Booth to follow and which he did in fact follow in this trial), your affiant did not attempt to investigate, develop, or present nonstatutory mitigating circumstances at the penalty phase of the capital trial discussed herein. Given the statutory restriction, and Judge Booth's earlier ruling, it would have been a waste of your affiant's time and resources to attempt to investigate and present the available nonstatutory mitigating evidence. Consequently, because of these restrictions, your affiant did not, and indeed was officially precluded from attempting to investigate or develop psychological or

psychiatric nonstatutory mitigation or seek out other evidence of a nonstatutory nature. Your affiant verily understood that this restrictive construction of the statute was the interpretation afforded by the Honorable Judge Booth, who was the Circuit Court Judge presiding at the trial. The brevity of the defense's presentation at the penalty phase of Freddie Hall's trial was a direct consequence of the fact that at the time of trial your affiant and his co-counsel understood that mitigation was limited to that provided in the statute, and that your affiant and his co-counsel operated under the restrictions then in effect. The nonstatutory mitigation which made its way into the record came in through Mr. Hall's testimony, because he chose to take the stand. As could be expected, no instruction was given to the jury pursuant to which it could consider this evidence, and Judge Booth certainly did not consider its nonstatutory mitigating effects, as his rulings and sentencing order made clear. In any event, your affiant would have investigated, developed, and offered any and all conceivable mitigating evidence had such been admissible. The statute and its interpretation at the time, however, tied your affiant's hands.

Mr. Hall's capital trial and sentencing proceedings took place at a time when Florida criminal defense attorneys, prosecutors, and judges generally understood that the mitigating evidence which could be introduced at a capital sentencing proceeding was restricted to the statutory list. Cooper v. State, 336 So. 2d 1133 (Fla. 1976), was controlling precedent at the relevant time. In Cooper, the Florida Supreme Court instructed that Florida capital sentencers, whether judge or jury, were limited strictly to the consideration of only those mitigating factors enumerated in Fla. Sta. sec. 921.141.

Your affiant did not pursue or develop nonstatutory mitigation because to do so

would have been fruitless; such nonstatutory mitigating circumstances were inadmissible under the statute and Judge Booth's clear interpretation of the statute.

Due to these restrictions, my co-counsel and I did not pursue nonstatutory mitigation through the assistance of a psychiatrist or psychologist during the penalty phase. Subsequent to Mr. Hall's trial the law changed as to the relevancy of nonstatutory mitigating circumstances, and the admissibility of nonstatutory mental health mitigating evidence. If the trial were today, or if the law then had allowed for consideration of nonstatutory mitigating evidence such as was recently addressed in Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), I certainly would have obtained a mental health expert's help in developing the mitigating circumstances present in Mr. Hall's case, including those nonstatutory mitigating circumstances which I could not pursue in 1978.

Although Freddie Hall's competency to stand trial at the time was evaluated by an expert, neither I nor my co-counsel Mr. Aulls made inquiries of the expert, Dr. George Barnard, with regard to nonstatutory mitigating mental health evidence. If such evidence would have been admissible, we would certainly have requested that the expert provide an opinion with regard to nonstatutory mental health mitigation. We did not make the request solely because of the preclusive effects of the statute. It was because of the statutory preclusion discussed herein that we never investigated, developed, or offered nonstatutory mental health (psychological/psychiatric) mitigating evidence, or even inquired regarding nonstatutory mental health mitigation of the expert who examined Mr. Hall's competency at the time. A mental health professional would have provided great assistance in de[v]eloping nonstatutory mitigating circumstances regarding Freddie Hall, and

such evidence would have been presented if the trial were held today, when the statute is no longer understood as preclusive.

If the proceedings were today, we certainly would have presented nonstatutory mitigating circumstances such as the conditions under which Freddie Lee Hall was raised, his environment, his records such as school records, military records, inmate records, medical records, etc., information from presentence investigations, the psychiatric examinations, and any other information whatsoever bearing on his mental status, character or upbringing.

Because we were aware that the law in effect at the time did not permit the introduction and use of such mitigation, and because of Judge Booth's construction of the statute, we did not pursue such evidence.

Due to the constraints imposed by the statute and courts discussed in this affidavit, your affiant and his co-counsel did not contact Mr. Hall's former attorney from his 1968 offense and discuss available mitigation with him, nor investigate, develop, or offer mental health and other background nonstatutory mitigation arising from the prior conviction and Mr. Hall's circumstances at that and other times in his life. Similarly, incarceration, school, military, and other records regarding Mr. Hall were not sought out, considered, or offered because information arising from such records would not have fit into the statute's restrictive list and the narrow interpretation given to the statute by Florida's courts and the courts of the Fifth Judicial Circuit. Neither was such information provided to Dr. Barnard. As stated, the expert was never asked to provide his opinions regarding nonstatutory mitigation because the statute and Judge Booth's rulings tied your affiant's hands.

Of course, beyond the effects of the statute's constricted

official interpretation, Mr. Robuck and Mr. Aulls had to prepare Mr. Hall's penalty phase defense, "as best [they] could" (App. 2), within the confines of the trial court's rulings. As counsels' affidavit explains, and as the record bears out, in a trial involving Mr. Hall and codefendant Mack Ruffin which took place approximately one month before the trial at issue in this brief, counsel for co-defendant Ruffin attempted to persuade the Court that nonstatutory mitigation should be considered. The effort was joined by Mr. Aulls and Mr. Robuck. The Court's exchange with counsel in that regard made it clear that no nonstatutory mitigating evidence would be entertained and that such evidence was not deemed relevant:

> MR. SHAW [COUNSEL FOR MR. RUFFIN]: Your Honor, the defense position is that the defense is not limited to the specific mitigating factors as set out in the statute. The wording between aggravating circumstances and mitigating circumstances is different. The state is bound by the aggravating factors one, two, three four, cannot vary from it. U.S. Supreme Court case of Roberts vs. Louisana, 428 U.S. 325, recognizes the need for meaningful consideration of mitigating factors to fit the individual offender when they struck down the mandatory death penalty schemes. There are other cases, Profitt vs. Florida, 428 U.S. 242, has emphasized the difference in the language involved in the Florida Statute relating to the mitigating as related to aggravating. It is the defendants position that we are not limited to one, two, three recitation of the mitigating factors, whereas the state is.
>
> THE COURT: Then, you concede then,

that this is not one of the mitigating circumstances set out by the statute, is that correct?

MR. SHAW: It is not one of the ones listed in the statute, we concede that.

THE COURT: That is what I'm asking.

MR. KOVACH [CO-COUNSEL FOR MR. RUFFIN]: It is our position that the law allows us to go beyond what the...

THE COURT: What law is it that you are relying on that says that you can go further than what the statute says?

MR. SHAW: The case I just cited, Proffitt vs. Florida, your Honor, it says the statutory language differs from that of aggravating circumstances and does not limit to mitigating circumstances, Florida Statute 921.141 (6). --shall be the following, as contrasted to shall be limited to. As provided in subsection five. The reading of the language...the reading of the statute, in statutory language, the language used is that the state is limited to those set forth factors, in mitigating there are certain factors set forth but you can go beyond this.

MR. OLDHAM [STATE ATTORNEY]: I don't think it means that, your Honor. To introduce something like this. If this can be introduced, then I can rebut it by witnesses. And will.

THE COURT: Let me see your case, Mr. Shaw.

(The court reads)

THE COURT: It is just headnotes here, I would like to read the case.

MR. KOVACH: Could I go to the library and get it your Honor?

THE COURT: Take the defendants out.

WHEREUPON, the defendants were removed from the court room.

THE COURT: Court will be in recess for fifteen minutes.

WHEREUPON, court was in session following recess; defendants present in court room; Attorneys present; Mr. Oldham, Mr. Brown, Mr. Robuck, Mr. Aulls, Mr. Kovach, Mr. Shaw:

MR. KOVACH: For the record, your Honor, we would submit to the court a copy of Charles William Proffitt vs. State of Florida, 428 U.S. 242.

MR. OLDHAM: Your Honor, I would like to make one point. What part of this case is it that you are relying on, Mr. Shaw, that says that the defense is not limited to the statutory mitigating circumstances?

MR. SHAW: Your Honor, that starts on page 920, the last sentence, right before it starts to run over on the other page. It says

> Evidence may be presented on any matter, the judge deems relevant to sentencing and must include matters relating to certain legislatively specified aggravating and mitigating circumstances...

I read that to mean that the state has aggravating factors they must be allowed to present evidence on it, the defense has mitigating factors they must be allowed, and the term 'and' includes other evidence which the judge deems relevant to sentencing.

MR. OLDHAM: What they are saying there, your Honor, is at the time of sentencing, when his Honor ask the defendants

or their counsel if they have anything to say prior to sentencing, they can say basically what they want. That comes at a later stage after the recommendation.

MR. SHAW: I don't read it that way. The aggravating and mitigating come at this stage. It wouldn't make any sense to come at any other stage. That is the case and we would rely on that portion of the case.

MR. ROBUCK [COUNSEL FOR MR. HALL]: Your Honor, the defendant Hall would like to object to this whole proceeding based on the grounds it is unconstitutional. The United States Supreme Court set forth certain guidelines one of which was that these proceedings be adopted by rule. The Florida Supreme Court has never adopted these proceedings by rule, the Legislature has adopted them by statute, which is contrary to the United States Supreme Court, and based on that, your Honor, we would wish that these proceedings be abandoned at this time.

MR. KOVACH: We join in that objection, that move your Honor. We previously made this objection based upon Profession Yetter's article in the most recent Florida Bar Journal.

MR. OLDHAM: Your Honor, to that, we would say it has been adopted by Rule 3.780.

THE COURT: It is the court's ruling that the case cited by the defendant, 428 U.S. 242, Proffitt vs. State of Florida, does not, does not stand, the proposition that evidence can be admitted or presented to the jury in the second stage of the trial, that is not specifically authorized by statute. That applies to both the state and the defense. They are limited to those items that are specifically specified or set forth in the statute. The news item which has been marked for identification as Defendants

> exhibit for identication A does not fall within the statutory provisions for mitigating circumstancee.

State v. Hall and Ruffin, Cir. Ct., Hernando County, Case No. 78-39-CF-A-31 (Transcript of Proceedings, pp. 1468-71 [emphasis added])(John W. Booth, J.).

The record reflects, as the lower court found, that Mr. Robuck's and Mr. Aulls' recollection of the proceedings (App. 2) is absolutely correct: the Court, the State, and the defense all operated under the then-prevalent restrictive view of the statute. It is altogether understandable that in the time between the prior trial and this one counsel sought out no nonstatutory mitigation: the evidence would not have been admitted, as the record in this case (R. 697-98), and the court's adherence to its rulings in the Hernando County case when counsel renewed all previous motions in this case bear out.

Like Mr. Robuck and Mr. Aulls, and like the trial court, judges and lawyers in Florida at the time could not but have labored under that preclusive view of the statute. See Songer v. Wainwright, 769 F.2d 1488, 1494 (11th Cir. 1985)(Clark, Kravitch, Johnson, and Anderson, concurring) ("Of course, neither the state trial judge's nor Songer's counsel's construction of the statute was unfounded. Quite the contrary, theirs was the most reasonable interpretation of Florida law at the time." [emphasis added]). See also, Harvard v. State, 486 So. 2d 540 (Fla. 1986).

Mr. Hall was tried before Lockett v. Ohio, 438 U.S. 586 (1978) and before Songer v. State, 365 So. 2d 696 (Fla. 1978), at the time when the statute's preclusive interpretation had its most far reaching effects. Cf. Hitchcock v. Dugger, supra, 107 S. Ct. at 1823 (noting that Florida judges conducting sentencing proceedings during the relevant time period "believed that Florida law precluded consideration of nonstatutory mitigating circumstances"). The constraints imposed by that interpretation were discussed by the Florida Supreme Court in Harvard, supra, and by the Eleventh Circuit in Songer v. Wainwright, 769 F.2d at 1489 (emphasis supplied):

> The fact that the Florida Supreme Court has now held that neither the wording of the Florida Statute nor its prior decisions precluded the introduction of nonstatutory mitigating evidence, Songer v. State, 463 So. 2d 229 (Fla. 1985), relying on Songer v. State, 365 So. 2d 696, (Fla. 1978), is not controlling in the instant matter. That court has recognized that the law could have been so "misconstrued." See Perry v. State, 395 So. 2d 170, 174 (Fla. 1981); Jacobs v. State, 396 So. 2d 713, 718 (Fla. 1981).

As the Florida Supreme Court noted in Harvard v. State, 486 So. 2d 540 (Fla. 1986), "at the time appellant was sentenced, our death penalty statute could have been reasonably understood to preclude the introduction of nonstatutory mitigating evidence." Id. at 540.

It was, in fact, that construction of the statute which, as Mr. Robuck and Mr. Aulls now explain, rendered Mr. Hall's capital

sentencing proceedings constitutionally inadequate and deprived Mr. Hall of what the eighth amendment mandates -- an individualized and reliable capital sentencing determination. Mr. Hall's counsels' efforts were restricted by the operation of state law; the State's case for death was therefore never subjected to "meaningful adversarial testing." See United States v. Cronic, 466 U.S. 648, 659 (1984).

As a result of that preclusive construction, a wealth of mitigating evidence never got to the jury. The preclusion on counsel resulted in their failure to investigate, develop, and present powerful non-statutory mitigating evidence which was then available (see infra). In fact, nonstatutory mitigation was available in abundance, as reflected in this brief, in and Mr. Hall's Rule 3.850 motion and its appendices. Here, as in Songer v. Wainwright,

> [t]hese omissions were not the product of a tactical choice by Songer's counsel, . . . Rather, the omissions were a result of the perception of Florida law shared by Songer's counsel and the trial judge.

769 F.2d at 1491 (footnote omitted). In United States v. Cronic, 466 U.S. 648 (1984), the Supreme Court held that

> [t]he right to the effective assistance of counsel is . . . the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing . . . . But if the process loses its character as a confrontation between

> adversaries, the constitutional guarantee is violated.

Id. at 656-7 (emphasis added)(footnote omitted). Mr. Hall's is such a case.

Mr. Hall's penalty trial lost its character as a confrontation between adversaries because his attorneys operated in a system which precluded their presentation of nonstatutory mitigation, and because they practiced before a judge who tied their hands.[7] As Judge Clark explained in Songer, in conformity with the Florida Supreme Court's recent pronouncements, the majority opinion (granting only resentencing before a judge) did not go far enough because it,

> ignore[d] the reality of the state of mind of the prosecutor, the defense counsel, the trial judge and the jury with respect to the meaning of the Florida death penalty statute at the time of Songer's capital sentencing proceeding in 1974. The effect of their combined perception resulted not only, as the majority acknowledges, in the trial judge's failure to consider nonstatutory mitigating evidence, but also in counsel's failure to develop or present nonstatutory mitigating evidence and instructions that prevented the jury from considering such evidence.

769 F.2d at 1490 (Clark, Kravitch, Johnson and Anderson,

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[7]The irony of the situation, in fact, is that the more knowledgeable and professional a defense attorney was prior to Lockett, the more such an attorney would believe himself precluded. When counsel knew nonstatutory mitigation could not be presented, and would not be considered, counsel of course would have and did put their limited resources to other use (See Affidavit of Mr. Robuck and Mr. Aulls [App. 2]).

JJ., concurring)(emphasis added).[8] Mr. Hall is no less entitled to relief, as Hitchcock and this Court's recent rulings make undeniably clear.

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[8]Of course, the right to counsel is violated when the State "interferes . . . with the ability of counsel to make independent decisions about how to conduct the defense." Strickland v. Washington, 466 U.S. 668, 687 (1984); see also United States v. Cronic, supra; cf. Brown v. Allen, 344 U.S. 443, 486 (1953)(state interference with criminal defendant's efforts to vindicate federal constitutional rights), relied on in Murray v. Carrier, 477 U.S. 478, 106 S. Ct. 2639, 2646 (1986). Thus, a defendant is deprived of the right to counsel by a court order barring attorney-client consultation during an overnight trial recess, Geders v. United States, 425 U.S. 80 (1976); by court-ordered representation of multiple defendants, Holloway v. Arkansas, 435 U.S. 474 (1979); by a court's refusal to allow summation at a bench trial, Herring v. New York, 422 U.S. 853 (1975); by a state statute requiring a criminal defendant who wishes to testify on his own behalf to do so prior to the presentation of other defense testimony, Brooks v. Tennessee, 406 U.S. 605 (1972); or by a state statute restricting a criminal defendant's right to testify on his own behalf. Ferguson v. Georgia, 365 U.S. 570 (1961).

A fortiori, a criminal defendant's right to counsel, Cronic, supra, is violated where, as here, a state statute, Brooks, supra; Ferguson, supra, the official judicial interpretation given that statute by the State's highest court, see Cooper v. State, supra, and the constraints imposed by the trial judge, Geders, supra, tie counsels' hands and "interfere" with counsels' "decisions about how to conduct the defense." Strickland v. Washington, 466 U.S. at 687. Mr. Hall's counsels' hands were tied. They were forced to operate before a trial judge applying the most preclusive statutory construction attendant to the system condemned in Hitchcock; the statute then in effect and the trial judge's rulings were the "objective factor external to the defense [which] impeded counsel's efforts . . ." Amadeo v. Zant, ___ U.S. ___ (No. 87-5277, May 31, 1988), slip op. at 6, citing Murray v. Carrier, 477 U.S. 478, 488 (1986). Mr. Hall's resulting sentence of death was neither individualized nor reliable and was thus obtained in violation of Hitchcock and the eighth and fourteenth amendments.

A. THE OFFICIAL CONSTRAINTS

Cooper v. State, 336 So. 2d 1133 (Fla. 1976) was the law at the time Mr. Hall was sentenced to death. There, the Florida Supreme Court had spoken:

> We held in State v. Dixon [283 So.2d 1 (Fla. 1973)] that the rules of evidence are to be relaxed in the sentencing hearing, but that evidence bearing no relevance to the issues was to be excluded. The sole issue in a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have no place in that proceeding any more than purely speculative matters calculated to influence a sentence through emotional appeal. Such evidence threatens the proceeding with the undisciplined discretion condemned in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).
>
> . . . .
>
> As to proffered testimony concerning Cooper's prior employment, it is argued that this evidence would tend to show that Cooper was not beyond rehabilitation. Obviously, an ability to perform gainful work is generally a prerequisite to the reformation of a criminal life, but an equally valid fact of life is that employment is not a guarantee that one will be law-abiding. Cooper has shown that by his conduct here. In any event, the Legislature chose to list the mitigating circumstances which it judged to be reliable for determining the appropriateness of a death penalty for "the most aggravated and unmitigated of serious crimes," and we are not free to expand the list.
>
> . . . .

> The legislative intent to avoid condemned arbitrariness pervades the statute. Section 921.141(2) requires the jury to render its advisory sentence "upon the following matters: (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (6); (b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist...." (emphasis added). This limitation is repeated in Section 921.141(3), governing the trial court's decision on the penalty. Both sections 921.141(6) and 921.141(7) begin with words of mandatory limitation. This may appear to be narrowly harsh, but under Furman undisciplined discretion is abhorrent whether operating for or against the death penalty.

336 So. 2d at 1139 and n.7 (emphasis supplied).

As discussed, the Florida Supreme Court has now recognized that Cooper was interpreted as limiting consideration of mitigating factors. See Harvard v. State, supra; Perry v. State, 395 So. 2d 170, 174 (Fla. 1981)(trial judge, citing Cooper, "followed the law as he believed it was being interpreted at the time of trial" and precluded evidence of non-statutory factors); see also Jacobs v. State, 396 So. 2d 713, 718 (Fla. 1981)(judge "held the mistaken belief that he could not consider nonstatutory mitigating circumstances" where sentence was imposed in August, 1976, just after Cooper); cf. Lucas v. State, 490 So. 2d 943 (1986); McCrae v. State, 510 So. 2d 874 (Fla. 1987); Morgan v. State, 515 So. 2d 975 (Fla. 1987); Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987). In Cooper v. Dugger, 526 So. 2d 900 (Fla. 1988), the Florida Supreme Court recognized post-Hitchcock that

it had erred in its prior disposition of Mr. Cooper's case. Mr. Hall now respectfully urges that the Court recognize, post-Hitchcock, the errors attendant to its prior disposition of Mr. Hall's case.

The Florida Supreme Court has recognized that Cooper affected attorneys' presentation of evidence at the sentencing phase of capital trials, and that an attorney's failure, during the post-Cooper/pre-Songer period, to develop and present available mitigating evidence was a direct result of the then-prevailing preclusive understanding of capital sentencing law. Thus, in Harvard v. State, supra, 486 So. 2d 540, the Court, in denying a claim of ineffective assistance of counsel at sentencing, "concluded[d], as did the trial judge, that the conduct of Harvard's counsel, given the state of the law on the date the case was tried, reflect's reasonable professional judgment." Id. at 540. This was so because "at the time appellant was sentenced, our death penalty statute could have been reasonably understood to preclude the introduction of non-statutory mitigating evidence." Id. at 539; see also Muhammad v. State, 426 So. 2d 533, 538 (Fla. 1982)(counsel not ineffective because of restrictive view of statute and counsel would not be "expected to predict the decision in Lockett v. Ohio").

Mr. Hall's case goes much further than any of those -- the trial court's specific rulings had made it clear that

nonstatutory mitigating evidence would not be admitted or considered, and counsel of necessity conducted themselves accordingly (see App. 2). As a result, Mr. Hall was denied an individualized and reliable capital sentencing determination (as the evidence discussed below makes abundantly clear).

The case law, the record, and the account of former counsel were far more than sufficient to make clear Mr. Hall's entitlement to relief. Mr. Hall's case, however, presented a great deal more: the account of attorneys knowledgeable with local practice at the time in the Fifth Judicial Circuit also reflected the constraints imposed on counsel by the narrow statutory interpretation then in effect. Howard Babb, now Public Defender for the Fifth Judicial Circuit and then an Assistant State Attorney explained:

> My name is Howard H. Babb, Jr., and I am the Public Defender for Florida's Fifth Judicial Circuit. In 1978 I was an Assistant State Attorney in the Fifth Judicial Circuit.
>
> At the time Freddie Lee Hall went to trial reasonable defense counsel, the courts of the Fifth Judicial Circuit, and prosecutors all understood that the law at the time limited the relevant, admissible mitigating circumstances to those specifically listed in Fla. Stat. sec. 921.141 (before it was amended to allow consideration of any other mitigating circumstance). We were all aware of that limitation. Defense counsel operating in the area during this period of time, because of the limitations on the admissibility and consideration of nonstatutory mitigating

> evidence imposed by the statute, the local courts, and the Florida Supreme Court, operated under the statute's constraints and did not investigate, develop, or present nonstatutory mitigating evidence for the jury's and judge's consideration. Harvard v. State, 769 F.2d 1488 (11th Cir. 1985)[sic], Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985), and Hitchcock v. Dugger, 107 [S]. Ct. 1821 (1987), are reported decisions reflecting the prevalent preclusive interpretation provided to Florida's capital sentencing statute at the time.
>
> Judge Booth and other circuit court judges were applying this standard in the Fifth Judicial Circuit and local attorneys were preparing their cases with the understanding that they would be precluded from offering nonstatutory mitigating evidence. Because they were aware that the law in effect at the time did not permit the introduction and use of nonstatutory mitigation, defense attorneys, operating under the preclusion, did not pursue such evidence.

(App. 5).

These restrictions had their effects, and they affected Mr. Aulls' and Mr. Robuck's presentation in this case. In Songer v. Wainwright, as in Mr. Hall's case the counsel's failures to present nonstatutory mitigation,

> . . . were not the product of a tactical choice by Songer's counsel, ... Rather, the omissions were a result of the perception of Florida law shared by Songer's counsel and the trial judge. . .
>
> . . .
>
> In addition to the trial judge's statements regarding what he believed the law to be regarding mitigating evidence at the time, as

well as the instructions he gave and the verdict forms he utilized, we have Songer's counsel's testimony. He testified at a state post-conviction evidentiary hearing that he had not offered character or other mitigating evidence because he believed at the time that only evidence relevant to the statutory mitigating circumstances was admissible. He stated:

> The only recollection that I have is that the statute was new at that time, ...going over the statutory grounds with him for aggravating circumstances and mitigating circumstances, and what would be available to us under the statutory language and what would be against us under the statutory language.... [I examined] all the factors we had available to us. . .

. . .

[The Court's footnote at the end of the above quote explained that counsel also subsequently provided an affidavit in which he stated:]

> 8. That at the time of the defendant's sentencing hearing, Florida Statute 921.141 was relatively new. Your affiant in construing said statute reasonably believed that it precluded the consideration of any evidence except the statutorily enumerated mitigating circumstances.
>
> 9. Further, it was your affiant's belief that any evidence outside the scope of the statutorily enumerated circumstances was irrelevant, immaterial and patently inadmissible. . .

. . .

[The Court's discussion further explained:]

> Of course, neither the state trial judge's nor Songer's counsel's construction of the

Florida statute was unfounded. Quite the contrary, theirs was the most reasonable interpretation of Florida law at the time. The new Florida death penalty statute was passed and became effective in December of 1972, shortly after the Supreme Court's decision in Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). The wording of the statute itself is logically interpreted consistently with their view; at least, the statute is very ambiguous. The Florida Supreme Court's subsequent rulings verified their conclusions. The Florida Supreme Court first construed the statute in State v. Dixon, 283 So.2d 1 (Fla. 1973). That court in describing the statute stated:

> The Legislature has, ...provided a system whereby the possible aggravating and mitigating circumstances are defined, but where the weighing process is left to the carefully scrutinized judgment of jurors and judges.

283 So. 2d at 7. Later in the opinion the court reasoned:

> The most important safeguard presented in Fla.Stat. Section 921.141, F.S.A., is the propounding of aggravating and mitigating circumstances which must be determinative of the sentence imposed.

283 So. 2d at 8.

Finally, before discussing each mitigating circumstance enumerated in the statute, the court said:

> When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in Fla.Stat. Section 921.141 (7), F.S.A. All evidence of mitigating circumstances may be considered by the judge or jury.

283 So. 2d at 9.

> The reasonableness of the trial judge's and Songer's counsel's view of the statute was further born out in Cooper v. State, 336 So.2d 1133 (Fla. 1976). The Florida Supreme Court in Cooper stated:
>
> > The sole issue in a sentencing hearing under Section 921.141...is to examine in each case the itemized aggravating and mitigating circumstances. Evidence concerning other matters have [sic] no place in that proceeding.... The Legislature chose to list the mitigating circumstances which it judged to be reliable..., and we are not free to expand the list.

336 So. 2d at 1139.

> Thus, the majority's conclusion that there was no error in the jury sentencing phase of Songer's trial is not supported by the record in this case. However, the error was not due to the fault of either the trial judge or Songer's counsel. Florida law, as reasonably and logically construed by both, operated to preclude non-statutory mitigating evidence.

Songer v. Wainwright, supra, 769 F.2d at 1490-95 (Clark, Kravitch, Johnson, and Anderson, concurring). That analysis was confirmed by the United States Supreme Court in Hitchcock v. Dugger, 107 S. Ct. 1821 (1987).

Mr. Hall was tried in June, 1978, and in June, 1978, it was Cooper that guided Judge Booth and Mr. Hall's trial attorneys, as it did other Florida capital attorneys (see App. 5) and judges, see Harvard, supra, at the time.

Of course, we now know that that restrictive interpretation

was constitutionally wrong. The United States Supreme Court has spoken. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). But the fact remains that the status and operation of Florida law at the time Mr. Hall was sentenced to death precluded his attorneys from developing and presenting a wealth of nonstatutory mitigating evidence and by operation of state law, Geders, supra; Brooks, supra, interfered with his attorneys' efforts to secure the constitutionally mandated individualized and reliable capital sentencing determination to which Mr. Hall was entitled. United States v. Cronic, 466 U.S. 648 (1984). Relief is now proper.

B. THE OVERWHELMING NON-STATUTORY MITIGATION THAT WAS NEVER DEVELOPED OR OFFERED DUE TO THE PRECLUSION ON COUNSEL

As stated, the Circuit Court found that Mr. Hall proved the facts proffered. The Circuit Court nevertheless denied relief.

The lower court erred in its ultimate legal conclusion, for as reflected in this brief and in Mr. Hall's Rule 3.850 motion and its appendices, what would have been presented had counsel not been precluded would have made a real difference. Under no construction can it be said that the preclusion on counsels' efforts to develop and present non-statutory mitigating evidence had "no effect upon the [sentencers'] deliberations." See Skipper v. South Carolina, 106 S. Ct. 1669, 1673 (1986). Here, it by no means is "clear beyond a reasonable doubt" that Mr.

Hall's sentencing jury, or any jury, would not have been affected by the substantial nonstatutory mitigation established below -- mitigation which would have been presented had counsel not been constrained. Mr. Hall's jury, after all, voted for death by the slimmest of margins, 7-5.

Freddie Lee Hall is brain damaged, addled by a history of alcohol and drug abuse, intellectually impaired, and mentally ill. These conditions have plagued him throughout his life. These conditions plagued him at the time of the offense -- in fact, immediately before the offense, this brain damaged individual had consumed large quantities of alcohol and had taken pills. Because none of this was sufficient to meet the stringent, technical requirements of statutory mitigation, none of this compelling nonstatutory mitigating evidence was presented to the jury charged with deciding whether Freddie Lee Hall should live or die.

Dr. George Barnard was the expert appointed to determine Mr. Hall's sanity and competency at the time of trial. Dr. Barnard concluded that Mr. Hall was sane and competent. Dr. Barnard provided no information at the time which "fit" within the statutory list and, because of the statute and the trial court's rulings, counsels' inquiry naturally ended there. No one asked Dr. Barnard to evaluate what nonstatutory mental health mitigating evidence may have been available in this case. Had he

or any qualified expert been asked, had the Court and the law not tied counsels' hands, a wealth of significant nonstatutory mental health mitigation relating to both Mr. Hall's background and his condition at the time of the offense would have been more than available.

Although he was never asked the question, and therefore never evaluated Mr. Hall with regard to nonstatutory mitigation, Dr. Barnard's affidavit relates that such evidence was available at the time of Mr. Hall's trial:

> I am a board certified forensic psychiatrist, professor, chief of the Consultation Service, and chief of the Forensic Division of the Department of Psychiatry of the University of Florida. I have conducted well over 4000 forensic evaluations in my career, have been qualified as an expert by numerous courts, including numerous Florida Circuit Courts, and have testified in many judicial proceedings.
>
> I had occasion to interview and evaluate Freddie Lee Hall on April 22, 1978, in relation to his trial for first first degree murder. Specifically I was asked to evaluate Mr. Hall's competency to stand trial and his legal sanity at the time of the offense.
>
> I was never asked to evaluate Mr. Hall's mental state and background with regard to mental health evidence which may have been considered as nonstatutory mitigation of sentence at any time prior to or at Mr. Hall's trial.
>
> Had I been asked to formulate and provide an opinion in this regard, there certainly existed important mental health nonstatutory mitigating evidence of which I was aware at the time and regarding which I

would have been more than willing to testify. My original report in fact made reference to some of the nonstatutory mitigating evidence of which I was aware and with regard to which I could have provided expert testimony. In that report I noted:

> On the day of the alleged crimes he [Mr. Hall] had almost a pint of Apricot Brandy, with Ruffin drinking part of a cup. Hall also took two pills from Ruffin that day, but did not know the kind of pills they were.
>
> . . .
>
> He was born July 21, 1945, in Wildwood, Florida. His mother is seventy-two years of age, and his father died in 1963 at age seventy-two. His parents were separated when he was a boy, but he did not know how old he was at that time. He was sixth in a sibling group of six. He had one sister who was murdered by a man she had some children by. He was raised by his mother and got along well, and never ran away from home.
>
> He quit school in the eleventh grade at age sixteen or seventeen. He had failed the first grade because he was slow. He did learn to read and write, and had no special education classes. He was suspended once for playing cards. He got along with the teachers and students.
>
> . . .
>
> He has been unconscious several times while boxing or playing football. The longest period of unconsciousness was not more than a few seconds. He denied fits, convulsions, or seizures. He has had the venereal disease, Clap, numerous times, and was always treated. He has thought of suicide but has made

no attempts. He never been a patient in a state mental hospital and has had no psychiatric treatment other than seeing a psychiatrist several times while in prison. He did not receive any medications at that time. As a child and again in 1967, he had the experience of being unable to move for several seconds, and in 1967 he saw a vision with three men when there was nobody there. he has had no other experiences like this.

As stated, Freddie Hall's history of head trauma and head injury, which I noted at the time of my original report, may be relevant to findings of brain damage as discussed below.

In my original report I noted that "There are mild deficits in his recent memory but his remote memory appears intact." It has been recognized in the profession that brain damaged individuals will evidence deficits in recent memory, as opposed to remote memory. Such indicia, along with other indicia that I noted in my origingal report, indicate that Mr. Hall may have been brain damaged. A hypothesis of brain damage is supported by his history of closed head injuries. As I noted above and in my original report "he has been unconscious several times while boxing or playing football".

It has been recognized in the profession that repeated trauma to the head can cause permanent damage. Individuals with such damage may suffer from difficulty with impulse control, emotional lability, mild paranoia, and slowness of thought.

In addition to these head injuries, Mr. Hall has a history of drug and alcohol abuse. In my report I also stated:

> He began the use of alcohol at age twenty-eight. He estimated that he

drank daily if it was available, and guessed he may have a quart of beer plus a couple of ounces of whiskey when he could get it. He denied shakes, dt's, blackouts, or treatment for alcohol abuse. He began the use of drugs at age twenty-eight. He has used pot, black beauties, and speed. He has never been strung out on drugs and denied the use of Heroin or Cocaine.

Factors such as Mr. Hall's history of alcohol and substance abuse, and his excessive use of alcohol and use of pills at the time of the crimes would also have been relevant with regard to nonstatutory mitigation. Such substances impair judgment and control, affect one's emotions and thought processes, and affect one's behavior. Such substance abuse was noted in my original report as is quoted above.

Based upon the information which was known to me at the time, I could have testified to nonstatutory mitigating factors. Even my report, which was not prepared to answer questions regarding mitigation, stated that Mr. Hall suffered from deficits in memory, was partially oriented for time, had poor judgment, could only abstract two out of five proverbs, had been unconscious several times, has had suicidal thoughts, saw a psychiatrist in prison, and had a history of hallucinating, in addition to the matters discussed above.

At the time of the original trial, I would have been willing to discuss such nonstatutory mitigating circumstances had I been asked to do so. Had I been asked questions in that regard, psychological and

neurological testing would have been appropriate.[9]

Since the time of my initial evaluation, I have reviewed additional materials regarding Mr. Hall which have been recently provided to me. These materials include statements from Mr. Hall's attorney in his 1968 trial, records from the Department of Corrections, school records, mental health reports, information regarding a history of hallucinations, and bizarre behavior resulting from the abuse of alcohol, testing results, statements by Mr. Hall, official court transcripts, presentence reports, and other information. Had I been provided with such information at the time of my original evaluation of Mr. Hall, my opinions and ultimate conclusions with regard to evidence of a nonstatutory mitigating nature (discussed above) would have been further bolstered. In addition the materials I have reviewed reflect a childhood of material impoverishment and physical abuse. These materials also reflect that Mr. Hall's level of intellectual functioning is lower that the clinical assessment noted in my original report.

In summary, the matters discussed above and referred to in my original report would have been relevant to non-statutory mitigation relating to the defendant's mental health. I would have been willing to provide my views and expert testimoy in this regard had I been asked to do so at the time of my original evaluation.

(App. 17)(Affidavit of Dr. George Barnard)(emphasis supplied).

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[9]As discussed below, such testing has now been conducted, and the results clearly establish Mr. Hall's brain damage and mental illness.

Of course, Dr. Barnard was never asked to evaluate Mr. Hall with regard to nonstatutory mental health mitigation. Even so, he was able to discern in his "competency" and "sanity" evaluation that significant nonstatutory mental health mitigation existed in this case.

Mental health professionals who have been asked the questions which Mr. Hall's trial counsel were precluded from asking at the time of Mr. Hall's trial compellingly fill in the missing pieces. Dr. Jethro Toomer, an eminently qualified psychologist, professor, and Diplomate of the American Board of Professional Psychology, was asked by post-conviction counsel to answer the question which trial counsel could not pose and which Dr. Barnard was not asked -- he was asked to evaluate Mr. Hall and provide his views regarding what, if any, nonstatutory mental health mitigation may have been available in Mr. Hall's case. Background records (school, incarceration, etc.) regarding Mr. Hall, which Mr. Hall's trial counsel never obtained because they did not relate to the statute (see App. 2), were provided to Dr. Toomer. Dr. Toomer's conclusions, based on his examination, the records, and testing,[10] presented in his report (App. 11), are

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[10]In this regard, it is noteworthy that Dr. Barnard's affidavit (App. 17) explains that had he been asked about nonstatutory mental health mitigation, psychological testing would have been appropriate.

significant and compelling:

Interview Data

Freddie Lee Hall is a 43 year old single black man presently on Death Row at the Florida State Prison where he is awaiting execution for the murder. He was cooperative during the interview and responsive to requests for information. At the same time, it was extremely difficult to understand him as his speech was impaired and pronunciation of a number of words faulty. He attempted to make himself understood although not all ideas reached their intended goals without loosening of association. Many ideas were presented but not developed in a logical coherent fashion. Throughout the interview he described hallucinations, both auditory and visual. These hallucinations often keep Mr. Hall awake at night. The subject appears to be well oriented for time, place and person. He has little insight into the motives for his behavior. His judgment remains immature, juvenile and his ability to reason abstractly and discriminatively is severely impaired. While his thought processes ramble, the subject consistently describes hallucinations and visits by "spirits" which apparently are used by Mr. Hall as a coping mechanism. He described being able to walk as well as lay on water and when placing himself in a quiet posture, having the ability to raise the dead. He sees himself as eventually becoming a prophet or a "savior". There are certain paraniod themes recurrent in his descriptions. His ability to control events remain a constant hallucinatory theme. The subject describes these hallucinations beginning early in his life and indicated that his mother helped to interpret these hallucinations and to find meaning in them.

Background:

The subject was born in Wildwood, Florida on July 21, 1945, and a few days

later moved with his family to Webster, Florida. At the time of his arrest he resided with his mother. Presently both mother and father are deceased. According to the subject there were seventeen children comprising the family constellation, fathered by two different men. The subject was raised in a violent environment where he was severely physically abused on a regular basis. Compounding the abuse were conditions of extreme poverty. He described a continuation of this violent trend represented by the shooting death of a brother who was shot in 1957 and a sister who was shot to death in 1975. The subject's school history was charecterized by frustration and a lack of success. Elementary school records reflect poor grades and but no disciplinary problems. Counselors described him as being mentally retarded and having a mental age well below his chronological age. At age twenty-three, the Department of Correction's screening documents indicate that the subject's reading ability was at grade 2.6 and that grade placement was approximately 3.8. This same document dated February 11, 1969, described the subject as follows:

> "He seems to be very inadequate and seems to lack the ability to adequately cope with the complex factors of his environment. He seems also to lack the ability to reason through to logical conclusions, and problems of day to day living, thus having a tendency to act out rather than to come to logical conclusions."

Records further indicate that the subject was denied access to military service and was classified 4F, a category designating poor mental and intellectual functioning.

Substance abuse has also formed a part of the subject's history. This substance abuse involved alcohol, narcotics and other substances. Although the subject denies

alcohol being related to his hallucinations, others report that alcohol does indeed alter his behavior. For example, the statement given by Ann Gamble, who was with the subject prior to his arrest describes his memory loss, impulsive and aggressive behavior, and memory deficits manifested while under the influence of alcohol.

Test Results:

The results of the Revised Beta Examination indicate that the subject's level of intellectual functioning is in the range described as mentally deficient with a Beta I.Q. of less than 60. This score is reflective of very severe deficits in mental functioning.

Prior testing also reflects a low I.Q., (I.Q. of 80), but not as low as the current results. These inconsistent results may be explained by a number of factors. For example, the particular ability to respond to items tested by Revised Beta Examination is an area of weakness for Mr. Hall. The Revised Beta Examination relies heavily on visual motor functioning and visual spatial ability, which appears to be problems for Mr. Hall. These problems were also reflected in his responses to the Bender-Gestalt Designs examination which tests visual-spatial and motor skills. Responses on the Bender-Gestalt Designs further reveal the presence of reaction characterized by mood variability, poor impulse control and a tendency toward upheavel or panic around a traumatic, disruptive or identity threatening situation. Low ego strength, poor planning ability, scattered thought processes, learning disturbance and visual-motor difficulty are reflected in protocol responses. Protocol results also indicate the presence of organicity and acutely low intellectual functioning. Further testing would reveal the extent and nature of this organic disturbance, and would no doubt be congruent with earlier reports of brain

damage.

Omissions and general poverty of responses to the pictures presented as part of the Thematic Apperception Test, are indicative of a repressed state, poor reality testing, and impoverished affect. Responses to questions selected from the verbal reasoning section of the Wechsler Adult Intelligence Scale were largely concretistic and inadequate. In addition when asked, "What do we mean when we say that a stitch in time saves nine?", he replies you save money to buy something. To the question, "What do we mean when we say that people who live in glass houses should not throw stones?" he admits having heard this but states that he did not know what it means, and added that a stone will break glass. This tends to be a concrete answer, missing the abstract point and obviously presenting difficulty in this area so that the projection of consequences and the ability to deal with abstract material is impaired. This is consistent with his impaired mental functioning.

The Carlson Psychological Survey (CPS) is a psychometric instrument intended primarily for individuals convicted and incarcerated for crimes. It recognizes the unique situation of these individuals as well as the atypical reasons for referrals. Mr. Hall's CPS profile is as follows:

FACTOR	PERCENTILE
Chemical Abuse	80
Thought Disturbance	95
Anti-social Tendencies	60
Self Depreciation	30

Such individuals have poor social adjustment and demonstrate difficulty in relating to others. Characteristics of impulsivity, intolerance, aggression, and irrational behavior are often evident. Depression is also present along with feelings of inferiority, and inappropriate affect. An unstable family life, physical

abuse and poor relationships with parental figures are often characteristics of these individuals.

Summary:

Mr. Hall's deficits are longstanding in nature and contributed to the offense for which he has received the death sentence. Mr. Hall's mental and emotional illness, substance abuse, organic brain disturbance and the other deficits discussed in the report explain his involvement in the offense. These illnesses and deficits relate to the question of mitigation of sentence. From the perspective of Mr. Hall's mental health they answer important questions regarding his involvement in the crime.

Mr. Hall was administered a variety of psychological tests to assess his intellectual and personality functioning. The results are consistent with his history and reports of behavior manifested throughout his life. He functions in the mentally deficient range of intelligence, shows signs of mental illness, as well as organic brain dysfunction (it should be noted that the subject has experienced several incidents of head trauma throughout his life which may represent contributing factors to his brain damage and behavior, (e.g., a car accident in 1963, a boxing blow in 1967 and in 1975, a blow to the head by an iron pipe. Prior evaluation also note numerous instances of head trauma.) These deficits have manifested themselves over an extended period of time, however, no intervention was made to remediate these difficulties.

Mr. Hall suffers from an extreme mental and emotional disturbances, severe impairment of cognitive functioning, and organic brain damage. History and the results of this evaluation reflect behavior symptomatic of serious mental deficits. His history is characterized by poor school achievement, poor socialization and a poor environment

incapable of providing sufficient nurturing. He is unable to reason abstractly, and discriminatively or to project consequences and his level of mental functioning is characterized by being easily influenced. Additionally, Mr. Hall's use of alcohol and drugs, [] clearly had an impact on his behavior and subsequent confrontations with the criminal justice system.

While the aforementioned information relates to mitigating factors, both statutory and non-statutory, it also speaks to other important issues such as sanity or insanity at the time of the offense, the subject's intent and premeditation or lack thereof, and competency to stand trial. The subject's intellectual deficits, lack of education, poverty stricken background, history of severe child abuse, emotional deficiencies, mental illness and organic brain damage, all combine to impact the mental health issues related to his level of culpability as well as his mental state at the time of the offense and at trial.

The subject's impaired level of intellectual functioning with it's attendant poor reality testing, inability to reason abstractly and discriminatively, would affect at all levels his participation in the offense and the criminal justice system. Mr. Hall's brain damage, substance abuse and the other facts descriptive of his impairment discussed in this report clearly related to and affected his level of culpability for this offense.

Overall, the subject's history, the numerous records I have reviewed regarding Mr. Hall, and the results of this evaluation and others provide clear evidence of mitigating factors relating to the subject's mental health. This information provides substantial data critical in evaluating Mr. Hall in regard to statutory and non-statutory mitigating circumstances.

(App. 11 [Report of Dr. Toomer])(emphasis supplied).

As stated, had he been asked the relevant questions, Dr. Barnard would have recommended psychological testing. Such testing leaves absolutely no doubt about Mr. Hall's mental illness and brain damage. Neuropsychological testing demonstrates his organic impairments:

> The profile of scores obtained on the Halstead-Reitan battery are characteristic of patients with serious brain impairment. All of the four most sensitive indicators of impairment on the Halstead-Reitan batter substantiate a diagnosis of brain impairment. Although his scores on Categories and Trails B are only in the mildly impaired range, both the Impairment Index (1.0) and the Location score on the Tactile Performance Test (TPT) are indicative of servere impairment. In fact, he was able to place only about half of the TPT blocks with either the left or the right hand in under 10 minutes, he required nearly 7 minutes to complete the puzzle with both hands and he successfully remembered only one of the 10 shapes.
>
> Mr. Hall's difficulties in processing and remembering shapes appear on the Aphasia Screening test in his inability to spell and poor figure reproduction. This, together with the extremely poor TPT performance, would suggest disturbances in the right hemisphere. However, his weakness in speech sound processing on the Speech Perception Test, the Aphasia Screen and in his communication with the clinician would suggest a possible focal disturbance in the left posterior temporal-parietal region. Further evidence of left hemispheric disturbance was obtained on the Grip Strength test in which the non-dominant (left) hand performed as well as the dominant (right) and in the Sensory Perception Examination in which he evidenced poor Finger-Tip Number

perception with the right hand. Results from the psychoeducational test battery will be most helpful in further refining the neuropsychological diagnosis.

(App. 13 [Dr. Richardson]). Psychoeducational testing likewise reflects his impairments:

TESTS ADMINISTERED

1. Woodcock-Johnson Psycho-Educational Inventory
2. Test of Written Language (TOWL) Hammill & Larsen Story sub-test.
3. Language Screening
4. Speech Screening - Goldman - Fristoe Test of Articulation
5. S.U.P.E.R. - Learning Disabilities Screen

BEHAVIOR DURING TESTING

Mr. Hall was cooperative and civil. He attempted all test materials. When they became difficult, he seemed to shrug, accepting calmly that he could no longer continue the individual sub-test. He had difficulty scanning.

SCHOOL HISTORY

Mr. Hall claimed to have completed the eleventh grade. He was retained in first grade "because I couldn't read". He said he was "sick a lot" and missed "a lot of school". He appeared to have no idea what was wrong or what illness or condition caused him to be absent. Mr. Hall received no special help in school, and to the best of his recollection, was never enrolled in special education of any kind. His favorite subject was gym, especially track and basketball.

RESULTS OF TESTING

1. Woodcock-Johnson Psycho-educational Battery (see attached)

The only score which even approaches an adult level is one which has nothing to do with formal schooling, the Spatial Relations subtest. The skill calls to select from a group of shapes, those that can be used to construct a sample figure. Mr. Hall's skills on this exercise are those of a child in the middle of the sixth grade.

All other subtests ranged from a grade level score of 0 to one of 4.7. Those which represent the ability to read and understand what has been read are representative of an almost total illiteracy. Though he knows the letters, he can neither read words nor can he interpret what the few words he reads mean. His math abilities are so low as to be below the first grade level. He did not get a single example correct on a test instrument which began with material on a pre-kindergarten level.

2. Speech and Language Screening

Mr. Hall's speech is often unintelligible. He lost the pattern of both /p-t/ and /p-t-k/ in the diedechokinetic movements exploration though tongue movements were adequate in later parts of the procedure. An articulation test showed extreme dentalization of all tongue sounds, heavily accented (Southern) vowel pronunciation and intonation but no major errors. Nevertheless, Mr. Hall's speech is muffled and often unintelligible. When asked if anyone ever had any difficulty understanding him he said, "I be talking and sometimes I don't understand myself."

On the Prather Mini-Screening Test of Adolescent Language, Mr. Hall failed item three. He could not explain what did not make sense and why it did not make sense in the following sentence. "The sun was shining so brightly last week on Tuesday that I had to wear my glasses in the movie theater."

3. S.U.P.E.R. Screening Survey for Learning Deficits

The only sub-test administered was the Visual Motor Integration Probe. Here Mr. Hall was asked to reproduce four geometric figures when presented with a sample printed on the page. He could reproduce only the first and simplest in a satisfactory manner. The others were all incorrect though he apparently made a concerted effort to copy them.

4. Test of Written Language - story Sub-test

Mr. Hall could not write a coherent story about a set of three pictures which depicted the break-up of a planet, space travel to a new planet, and settlement on the new planet. He wrote one sentence and a fragment. He clearly did not understand that the pictures told a story, and after he was told that there was a story, he could not grasp its meaning.

SUMMARY AND CONCLUSIONS

Mr. Hall is an illiterate adult. His mathematical abilities are virtually non-existent. He is probably incapable of even the most basic living skills which incorporate math and reading such as understanding and paying a bill, writing a check, or keeping a checking account. Certainly, he would get very little from a daily newspaper. His speech is often incomprehensible and his use and understanding of language is no better than a nine year olds. His skills are so rudimentary that the assessment of whether or not he has a specific learning disability is difficult to make. Certainly, in the area of visual perception there is reason to suspect a considerable deficit.

(App. 15 [Dr. Bard]). Neurological testing further demonstrates

his organic brain impairment (App. 13 [Dr. Pincus]), and a neurometric evaluation (EEG) confirms the obvious -- that Mr. Hall is brain damaged:

NEUROMETRIC EVALUATION

Pt. Name: Freddie Hall #B207
dob: 7/21/45 dot: 9/15/86

Examinations performed: 19 channel eyes closed EEG
a) resting
b) following hyperventilation

All EEG records were subjected to visual inspection and quantitative computer analysis.

EEG FINDINGS:

The quantitative evaluation of this patients EEG revealed significant slow wave excess in the central regions (more on right than left), and excess of alpha in the fronto-temporal regions. Signficant excess of power was found in the right central and right fronto-temporal regions. Extreme significant incoherence in the central and parieto-occipital regions and power asymmetry in the central, parieto-occipital and fronto-temporal regions was seen.

Following hyperventilation slow activity decreased in the centrals, right temporal and left parieto-occipital regions and increased in all other regions. Power increased in right central and bilateral parieto-occipital regions only.

Visual inspection of the EEG record revealed possible sharp waves in the parietal region. Sharp waves were slightly more diffuse following hyperventilation.

SUMMARY

> This is a moderately abnormal neurometric exam.

(App. 14 [Dr. Prichep]).

These reports were conducted in conjunction with the evaluation of Dr. Dorthy Lewis, an eminently qualified psychiatrist and professor of psychiatry at the New York University School of Medicine. Dr. Lewis' report explained:

> Psychiatric Evaluation of Freddie Lee Hall:
>
> The following evaluation is based on a single psychiatric interview with Mr. Hall lasting 2 1/2 hours, on the results of neuropsychological testing, performed by Dr. Richardson, the results of intelligence and projective testing, performed by Marilyn Feldman, and the results of educational testing performed by Dr. Bard, and the results of a neurological examination by Dr. Jonathan Pincus. Freddie Lee Hall is a 41-year old black man, who was evaluated on Death Row in Florida on September 10, 1986, where he was awaiting execution for the murder of a pregnant woman and of a police officer.
>
> Medical History: Mr. Hall was the only informant for his medical history and, therefore, the history is incomplete. Mr. Hall did not know anything about his birth or developmental history. He did say that he had been seriously ill as a young child. he said that he was taken out of school and stayed out "a long time". When asked what was wrong, he said he had "pus in your skin". He said that he was treated by a Dr. Cherry, with frequent injections. When asked whether he had had any serious accidents or injuries, Mr. Hall recalled, "I fell out of a tree before I started school. I laid down there for a while". Whether or not he was

unconscious remains unknown. Mr. Hall also recalled a car accident when he was approximately 17 years of age, at which time the car he was in hit a pole and his head hit the windshield. He also had a head injury at approximately age 28 when he was hit on the top of his head with a heavy object. He also has had several head injuries in the course of boxing. As he put it, "There are scars all over my head". Some of them I was able to palpate during these examinations. Thus, Mr. Hall has suffered a multipicity of significant head injuries, any one of which, or all of which, may account for the picture of brain damage that emerges from his evaluation.

Family History: Both of Mr. Hall's parents are dead. According to Mr. Hall, his mother had seventeen children fathered by two different men. He seems to have been raised in a rather violent household in which his step-parents fought with each other and even threatened to kill each other. Mr. Hall recalls one incident when his father pulled a shotgun on his mother and the children had to intervene to save her. Two of Mr. Hall's siblings have died violent deaths. A brother was shot to death in 1957, and a sister was shot to death, in 1975. Apparently, Mr. Hall was physically abused, not only by his mother, who beat him with switches and raised welts all over his body, but also, by his older brothers and sisters. Although, there is no history of psychiatric treatment in this family, there is reason to believe that Mr. Hall's mother may have been seriously psychiatrically disturbed. According to Mr. Hall, his mother would make him help her cast voodoo-like spells on various neighbors, friends, or family members. She also interpreted some of the visual hallucinations that he experiences as simply visitations from the dead and saw nothing peculiar in them. Mr. Hall seems to think that his mother's behavior went beyond what were ordinary beliefs or practices in his town.

Past Psychiatric History: It would seem that Mr. Hall suffered from significant psychopathology, starting very early in life. To quote Mr. Hall, "My mother used to tell me I was bugged, crazy". From earliest childhood, Mr. Hall recalls having experienced what he terms visions. At such times, figures would appear before him, and at times he would try to reach out and touch them and his hand would go through them. He also first began to experience auditory hallucinations before school age. He described tham as a "A great big voice came into my head. I tried to holler. I tried to move. I couldn't". These kinds of experiences recurred throughout childhood and adulthood. Describing one of these events, which he said occurred in 1967, he said, "That big force came on my head. Then I seen three men and a dog. They was coming straight toward me. Then they detoured. The voice left. It got off me. I went home". When I asked what the voice had said, or what it sounded like, he said, "I didn't understand it, just a human voice with real power". When I asked whether these episodes occurred after he had been drinking or taking drugs, he said that these occurred when he had not had any alcohol and had not had any drugs. Among the more vivid hallucinations that Mr. Hall recalls was an hallucination of his dead brother, which he experienced when Mr. Hall was thirteen years of age. He said, "As I was running, I seen my dead brother sitting on the porch. I went to the next house. I crawled back on my knees. I went and stood by a water shed". At another time, he recalls both seeing his dead grandmother, and having her speak to him. He said, "My gradmother came. She said, 'I'm your aunt'. I said, 'you're my grandmother.' She said, 'No, I'm your aunt'." It would seem that Mr. Hall still experiences episodes of visual and auditory hallucinations. When asked about whether his ears played tricks on his, he said, "like somebody in the next room. They say something bad about me. I can hear it". It would seem that many of the fights that

Mr. Hall got into during childhood and throughout his life have occurred in response ot paranoid misperceptions, or misinterpretations. He said that he got into fights at school because of "people trying to think for me, trying to tell me what to do". Apparently, he even perceived the teachers' requests as attempts to control him. Thus, it would seem that Mr. Hall has been significantly psychotic from early childhood up until the present. He indicated to me that he had been beaten up by officers during his time on Death Row. He said that this was because he had a blanket and sheets over his bars to keep warm, and he got into a fight with them when they told him to tak down this blanket and the sheet. Mr. Hall is also convinced that "This broad, Ann, she set me up to be killed. She called my sister and said she had a car wreck. She wanted me to come there for a dude to kill me". When permitted to talk at greater length, Mr. Hall can relate multiple incidents when he believes that he has been set up to be killed by other people.

Mental Status: At the time of my interview with Mr. Hall, it was extremely hard to understand him at times. His speech was impaired, and he was unable to pronounce many words. In addition to this, however, his thought processes were rambling, and at times did not seem to follow ordinary logic. This combination made it extremely hard to understand him. At times, Mr. Hall was quite paranoid, and, at other times, his thoughts were idiosyncratic. The following is a sample of his thought processes. He said, "You always have someone who dislikes you. It's a mean world, a jealous world, an evil world, but Jesus came..."

Mr. Hall's short term memory was impaired. He could at times, remember five digits forward, and at other times only recall four digits forward. He could only recall three digits backward, not four. He was able to subtract serial sevens

accurately, working very slowly. There was no sense of relatedness during our interview. he described times in his past when he has been extremely depressed and has been suicidal. He also described other times in his past when he gambled, stayed up all day and all night and on into the next day. He said, at those times, "I believed that I was a god. Playing cards, I was a master". However, neither this sadness, nor this manic-like feeling showed itself during our interview. He was more distant, and, if anything, inappropriate. Throughout the interview, however, the theme of his believing that people set him up and that he had to be on his guard was recurrent, suggesting a continuous paranoid orientation. He was, in summary, rambling, often inappropriate, and idiosyncratic in many of his responses.

Psychological Test Results: Mr. Hall achieved a Verbal I.Q. score on the Wechsler Adult Intelligent Scale of 77, a Performance of 85, and a Full Scale I.Q. of 80. His performance on the Bender-Gestalt was poor and he was able to recall only one of the designs after completion. Of greatest interest, was his response on the Rorschach Test. He had an extremely poor form level, a finding indicative of poor reality testing or psychosis. For example, on Card IX he saw cow hearts, and when asked more about it he described how a liver had also been cut up. Neuropsychological test results on the Halstead-Reitan battery of tests was indicative of brain damage. He was completely unable to do the Tactual Perception Test. Indeed, the examiner had to stop testing after 10 minutes with the left hand, and after 9 minutes with the right hand, because he had only been able to insert four or five blacks in the correct spaces. This and his performance on several of the other tests of the Halstead-Reitan is clearly indicative of brain damage.

Learning Disabilities Testing: According to

> Dr. Bard, Mr. Hall's functioning is, by and large, at the first grade level. For example, his Reading Comprehension was at the 1.5 grade level, his Concept Formation was 1.0 level and his Analysis and Synthesis score was at the 1.0 level. Highest score in Spacial Relations was at the 6.3 grade level. Thus, Mr. Hall is severely learning disabled. A more detailed report is available from Dr. Bard.
>
> Neurological Evaluation: According to Dr. Pincus, Mr. Hall shows a significant discrepancy between right and left performance on Finger Tap, suggesting a right hemisphere abnormality, although, he said that Mr. Hall is slow on both sides. he suspected mild retardation and brain damage. He said that Mr. Hall's enlarged head circumference may be related to his brain damage, and he recommended a CT scan to rule out hydrocephalus. He also recommended an EEG be performed.
>
> Conclusion: To summarize, Mr. Hall is a chronically psychotic brain damaged individual, with severe learning disabilities. His functioning is compromised further by use of alcohol or drugs. It is likely that the chronic severe abuse suffered at the hands of his mother and also his older siblings, and his exposure to extreme family violence in a household in which the parents tried to kill each other, also contributed significantly to his violent behavior. Although we were unable, in the time allowed, to discuss the events of the crime for which he has been sentenced, it is extremely likely that Mr. Hall's paranoid ideation, psychotic misperception, and impulsivity secondary to brain damage, coupled with his history of extreme abuse, contributed significantly to the crime for which he is now sentenced.

(App. 12 [Report of Dr. Lewis]).

Marilyn Feldman's evaluation, referred to in Dr. Lewis'

report and prepared in conjunction with that report, explained:

PSYCHOLOGICAL EVALUATION

Name: Freddie Hall

Tests Administered: Wechsler Adult Intelligence Scale - Revised (WAIS-R), Bender-Gestalt, House-Tree-Person Drawings, and Rorschach.

Date of Examination: 9/10/86

Examiner: Marilyn Feldman, M.A.

Test Behavior

Mr. Hall is a 41 year old, single, black man who was tested while in prison on Death Row in Starke, Florida. He was friendly and cooperative. His speech was often difficult to understand and he displayed a tic-like movement of his forehead and eyebrows. He was open but quite limited in his capacity for meaningful interaction. His comments were sometimes simple and childlike and only tengentially related to test stimuli.

Intellectual Functioning

Mr. Hall's reproductions of the designs on the Bender-Gestalt were done poorly and are suggestive of organic impairment. Struggling to draw the figures correctly, he crossed out and redid initial attempts at 5 of the 9 designs. There were rotations and difficulties with overlapping and angulation, and the dots in one figure deteriorated into dashes. His planning and organization was quite poor, with 3 designs going off the page. His performance on the memory portion of the test was extremely impaired; he could reproduce only the last one of the 9 designs.

On the WAIS-R, Mr. Hall achieved a verbal IQ score of 77, performance IQ score of 85, and a full-scale IQ score of 80, placing him in the borderline/low average

range of intellectual functioning. Scaled subtest scores are as follow:

Verbal		Performance	
Information	6	Picture Completion	5
Digit Span	6	Picture Arrangement	7
Vocabulary	4	Block Design	7
Arithmetic	6	Object Assembly	9
Comprehension	6	Digit Symbol	6
Similarities	6		

Mr. Hall's performance on the WAIS-R was remarkable for the amount of idiosyncratic material elicited in even so structured a task. For example, on the vocabulary subtest, Mr. Hall's answers were bizarre and autistically motivated. He defined conceal as "secret information book of lies for god... hole in a safe." Consume was defined as "Not sure I'm telling the truth." On the Picture Completion subtest, his answers were characteristic of those given by people with a schizophrenic disorder. He could not differentiate between essential and nonessential details, and often gave very irrelevant answers. For example, to a picture of a man with a missing finger, he responded that a lady was missing. When pushed to identify something else he correctly responded a finger. He had no ability to make discriminations between correct and irrelevant answers, and greatly losing distance from the stimulus, let his own inner preoccupations rule his perceptions.

Another quality of his performance which is often indicative of a schizophrenic disorder was his difficulty in shifting set. Thus, in addition to his inability to shift from his own preoccupations to a more detailed examination of the pictures, there were perseverations in his answers. To a picture of a boat missing an oarlock he said, "No man, no sun." To the next card of a lady and dog walking on a beach with lady's tracks missing, he said, "No sun, a man."

Psychosocial Functioning

Mr. Hall is a man with a very shaky sense of himself and the world about him. He experiences considerable anxiety and inner tension. He is dependent and helpless, and feels lowly and contemptuous in a depriving world that has offered little nurturance.

There is great disorganization of his inner experience, with inadequate integrating controls. Thus, intellectual functions and reality-orientation become subservient to primitive emotions and impulses.

Mr. Hall's performance on the Rorschach gave numerous indicators of schizophrenic thought processes. His performance was quite variable and there was the presence of a contaminated response, minus for level, predicate logic and bizarre, gruesome content, all illustrating his capacity for extreme breaks with reality. Though he can sometimes maintain adequate contact with reality and demonstrate the capacity for empathic relatedness to others (a good prognostic indicator), this is unstable, and emotional stimulation can be quite disorganizing to him. His thinking becomes loose and perceptual boundaries fluid.

The bizarre quality and logic of his perceptions is illustrated by his response to one card where he saw "four or five cow hearts. Someone done split it open. Being I made these cowhearts, liver is green and split it open, it may look something like this. Me don't know."

Summary

Mr. Hall is a man with limited intelligence, possible organic damage, and extreme impairment in personality integration. He is capable of psychotic disorganization and there are extreme gaps in his reality-testing that suggest a

> schizophrenic disorder. Perceptual boundaries are fluid and disorganized and there is no self-stability nor sense of the world as a stable or nurturing place. He feels helpless and dependent, with a very negative self-image.

(App. 16).

These reports and evaluations confirm that a compelling nonstatutory case for life was more than available at the time of Mr. Hall's trial. Each of these independent evaluations conforms to the information that Dr. Barnard noticed, but was never asked to evaluate, assess, or discuss. The fact that Mr. Hall is brain damaged, impaired, and mentally ill also conform to what recognized authorities in the field have noted:

> [W]ith repeated concussions, permanent damage is likely to occur. This chronic condition is referred to as traumatic encephalopathy or sometimes as dementia pugilistica, or punch-drunk syndrome, because of its frequent occurrence in boxers. The syndrome is clearly evident in many aging boxers and includes dysarthric speech, slowness of thought, emotional liability, mild paranoia, and difficulty with impulse control.
>
> . . .
>
> Most closed-head injuries produce deficits that implicate both hemispheres. Motor and sensory deficits tend to be less pronounced than with vascular disorders. (However, traumatic vascular injuries such as epidural, subdural, subarachnoid, and intracerebral hemorrhages are frequent concomitants of both open-and closed-head injuries.) Injuries to the frontal lobes are common, with a resultant loss of inhibition and behavioral control and with impaired ability in simultaneous processing and in processing

> complex stimuli. Memory skills are frequently impaired.

Berg, Franzen, and Wedding, Screening for Brain Impairment (1987), pp. 20-21, 23 (emphasis in original). See also Hartlage, Asken, and Hornsby, Essentials of Neuropsychological Assessment, p. 24 ("[C]losed-head injuries may result in memory loss, slowed thinking processes, decreased ability to make decisions, and inability to perform complex mental operations.")

Of course, organic brain damage, and head trauma, and their and its effects on behavior, certainly mitigate -- but did not "fit" in the pre-Lockett sentencing scheme.

Mr. Hall's history of alcohol and drug abuse, and his consumption of intoxicating substances immediately prior to the offense also mitigates. "[U]p to 50% of polydrug abusers exhibit neuropsychological impairment, even after a period of abstinence. The deficits do not appear to be related in a simple cause-and-effect fashion to consumption history, but rather reflect the culmination of demographic, lifestyle, medical, and developmental variables, which, in combination, result in impairments in cognitive capacity for some individuals." Essentials of Neuropsychological Assessment, p. 154. This too did not "fit" within the pre-Lockett statutory construction.

A history of mental illness (psychosis, suicidal tendencies, delusions, hallucinations) and impaired functioning also mitigates. Thus too, however, did not "fit" in the pre-Lockett

construction.

Records reflecting a history of mental illness, the prescription of significant amounts of antipsychotic medication, and the other factors reflected in Mr. Hall's pre-1978 incarceration records also mitigate. This also did not "fit" within the statute.

Impaired intellectual functioning, and its effects on behavior, also mitigates. This as well did not "fit" the statute.

The effects of Mr. Hall's incarceration while still a youth on his later behavior (see also infra) also mitigated, see Burch v. State, 522 So. 2d 810 (Fla. 1988), but this also did not "fit" the statute.

The effects of these factors on Mr. Hall's involvement in the offense is, of course, significant nonstatutory mental health mitigation. This too never made its way to Mr. Hall's 7-5 jury -- counsels' hands were tied (App. 2).

Each of these factors, and those discussed infra, presented proper nonstatutory mitigation. See, e.g., Holsworth v. State, No. 67,973, slip op. at 9, 10 (Fla. Feb. 18, 1988)("history of drug and alcohol problems" properly considered by jury in mitigation); Ross v. State, 474 So. 2d 1170, 1174 (Fla. 1985)(jury override improper due in part to defendant's history of "drinking problems" and alcoholism, notwithstanding defendant's testimony that he was "cold sober" on night of

crime); Waterhouse v. Dugger, 522 So. 2d 341 (Fla. 1988)("Waterhouse proffered evidence that he suffered from alcoholism and was under the influence of alcohol [on] the night of the murder. . . . The jurors should have been allowed to consider these factors in mitigation"); Fead v. State, 512 So. 2d 176, 178 (Fla. 1987)(Florida Supreme Court has "held improper an override where, among other mitigating factors, there was some 'inconclusive evidence that [defendant] had taken drugs on the night of the murder,' along with 'stronger' evidence of a drug abuse problem"); Barbera v. State, 505 So. 2d 413, 414 (Fla. 1987)(intoxication and drug dependence may mitigate sentence); Amazon v. State, 487 So. 2d 8, 13 (Fla. 1987), cert. denied, 107 S. Ct. 314 (1987)("history of drug abuse" one factor rendering jury override improper); Roman v. State, 475 So. 2d 1228, 1235 (Fla. 1985), cert. denied, 475 U.S. 1090 (1986) (alcoholism and organic brain syndrome); Huddleston v. State, 475 So. 2d 204, 206 (Fla. 1985)(history of drug abuse among factors rendering jury override improper); Hargrave v. Dugger, 832 F.2d at 1534 (vacating death sentence because nonstatutory mitigating evidence, including evidence of a "history of drug abuse," was excluded from consideration by sentencer); Foster v. State, 518 So. 2d 901, 902 n.2 (Fla. 1988)("some" evidence of alcohol use); see also Burch v. State, supra, 522 So. 2d 810 (effects of incarceration while young on defendant's later behavior).

Mental illness, brain damage, substance abuse, and impaired intelligence all mitigate.[11] None of it, however, could have been squeezed into the narrow pre-Lockett statutory list. None of it therefore was ever investigated, developed, or presented by Mr. Hall's trial counsel: the Court and the statute tied their hands.

In addition to expert testimony, much more nonstatutory mitigation was available. Mr. Hall's childhood (discussed below) was marked by a continuous level of child abuse which can only be described as torture. Abject poverty infected Mr. Hall's family during his formative years. Mr. Hall's intellectual impairments resulted in significant learning disabilities affecting his schooling. His formative years were marked by the effects of poverty and racism on him and his family. Moreover, Mr. Hall was raised in a family without a role model, by parents constantly at war with each other and, after his father abandoned the family, by an abusive and alcoholic mother. His sister was murdered, and her killer was soon paroled. All this also affected Mr. Hall's behavior as an adult. All this also mitigated (See infra). All this was also never sought out or offered because counsels' hands were tied.

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[11]Mr. Hall's records, history, and the accounts of those who knew him, reflecting these deficiencies, are discussed below.

Evidence of Freddie Lee Hall's life-long history of psychological and emotional impairment, low intellectual functioning, and mental retardation was amply available at the time of his trial and capital sentencing proceeding. Virtually anyone who had had significant contact with Mr. Hall could have provided compelling testimony and evidence regarding his dysfunctional, damaged brain. Records documenting his longstanding serious mental deficiencies abounded, and could have (and would have, had not the then-prevalent interpretation of Florida's capital sentencing statute flatly precluded the presentation of nonstatutory mitigating evidence, see Apps. 2, 5) been collected, developed, and presented at Mr. Hall's sentencing proceeding.

Those who knew Mr. Hall best (and longest), his own family, could have provided starkly compelling evidence with regard to the existence and inception of his mental and emotional deficiencies:

> I have always been concerned about my younger brother because I believe he is mentally retarded. I always felt that Freddie Lee would have a hard life because of his limited ability. Freddie Lee's problems started at the beginning of his life, much of it due to being born to a poor, black family, whose resources did not allow Freddie to get the help he would someday need to survive in this world.
>
> As Freddie Lee was growing up, we noticed that his behavior was unlike other children his age. Freddie Lee was slow in

> doing everything. He could not talk for a long time and always had difficulty pronouncing his words. He frequently talked to himself even though he was among a room full of people. When he did talk, he went from one subject to another . . .

(App. 9)(Affidavit of James Hall). Similarly,

> My infant brother cried uncontrollably, probably hungry for more milk. Freddie Lee was mama's sixteenth child and she had too little milk by the time he came along. I tried to comfort him, without success. As if that was not enough, we soon realized that something was very wrong with Freddie Lee. It took him longer to learn to walk and he had great difficulty forming his words. When he did learn to talk, he stuttered so bad that it was difficult to understand him.

(App. 7)(Affidavit of Diane Mitchell Rigsby).

> Freddie Lee has experienced problems throughout his life, mostly because he is a slow learner. He walked and talked long after his other brothers and sisters. When he did talk, he stuttered so bad, we had a problem understanding him. The stuttering frustrated Freddie Lee and he would often stomp his foot when the words would not come out.

(App. 8)(Affidavit of Katie Mae Glenn).

Family members could also have provided insights into the circumstances of Mr. Hall's birth, his upbringing, and the social, cultural, and economic status of his family. This information would not only have been critical to an understanding of the bases and genesis of Mr. Hall's mental and emotional impairments, but would also have been independently mitigating. The economic deprivation, emotional degradation, and physical

abuse sufferred by Mr. Hall throughout his childhood would have been compelling (albeit nonstatutory) evidence in mitigation of death. For example, his sister could have related:

> Freddie Lee is one of 17 children born to our mother, Delia Ellis Hall. I am eight years older than Freddie and I remember his birth so well, because my mama almost died a few months before he was born. She had a severe case of what she thought was indigestion. Throughout the day, she took medicine for the indigestion, but nothing made it better. By that evening, my mama was almost unconscious. My brothers wrapped her in a blanket and carried her in their arms five miles to the home of her employer. Mr. Booker took her to a doctor in Wildwood who said if my mama had not gotten there when she did, she would have died. She returned home and continued to work in the fields as she had done throughout her pregnancy. It was nothing for my mother to work all day and have a baby that night. Several weeks later Freddie Lee was born. Freddie Lee was the first and only one of my mama's children born in a hospital. My mama always used a midwife and I assumed she went to the hospital because of the complications with her pregnancy.
>
> . . .
>
> Our family had a terrible homelife and while I know that Freddie Lee was born with a mental problem, living in our house made it worse. My parents physically fought almost daily, using guns, knives or whatever was handy. The fights would sometimes go on all night, especially if they had been drinking. Some of the children would cry, so afraid that my parents might kill each other. I often saw Freddie Lee sitting in a corner staring off into space as if he was in a trance.

The fighting stopped after my daddy, paralyzed by a stroke, went to live with his mother so that she could take care of him. But our troubled lives continued because of mama.

Mama beat us unmercifully when we misbehaved. I am sure that my sisters and brothers bear scars or other marks from our mama's whippings. Mama made us take our clothes off when she beat us, inflicting blows that made us bleed. She used plaited tree branches, a rope, which she tied in knots and soaked in water to make it stiff, an ironing cord and anything else that she could get her hands on. During the night, mama often tied our hands or legs to the bed posts with rope that she put through the rafters in the ceiling. The following morning we would be awakened when she hoisted us up in the air to beat us.

Mama frequently beat us before she went to work even though we had done nothing wrong. She said we would get it again and even worse if we misbehaved. Mama gave the neighbors permission to punish us whenever she was away from home. One neighbor beat us when she did not beat her own children for misbehaving, but Freddie Lee got the worst of it. Freddie Lee was very sensitive and was teased a great deal by other children when he stuttered or got confused. When he and the other kids would fuss and fight, this lady would punish him. She said that she beat him a lot, because she was trying to break him or change his bad behaviors. After she beat Freddie Lee, she would put him under a bed all day until my mother came home, a practice that went on for several years. Freddie Lee was terrified of the dark and being under that bed with the door closed really affected him. I can hear him now whimpering and pleading to get out. Freddie Lee remained afraid of the dark long after he became an adult.

When my mama wasn't beating us she was

> working us to death. Everyone in our house who could walk had to work in the fields. Mama made $5 sometimes $10 a week doing farmwork and ironing sheets. It was never enough. So, she kept us out of school during the seasons, when we picked peas, peppers, cotton and other crops. My mama was as stern about teaching us to work as she was about our behavior. If we failed to complete a row, she beat us right in the field.
>
> Our wages helped mama to keep a roof over our heads, but we still never had enough to eat. Many days and nights, we were hungry. We had food some of the time, but mama stored the food away for the famine. She was a superstitious woman, who believed that a famine would occur and food in short supply similar to the depression. She denied us access to food when we were desperately hungry. It was hard on Freddie Lee and the younger children whose mouths would have white rings around them caused by hunger. To see food and not be able to eat was so confusing to the little ones. I begged for food in order to feed them. If it had not been for the generosity of some of our neighbors, we would have starved.
>
> We always had compassion for Freddie Lee's problems and accepted his weird behavior. Freddie Lee could be sitting in a room full of people talking and carry on a conversation with himself. Even when he talked to somebody, he moved from one subject to the other, he never could keep his mind on one thing. I think that's why he preferred the company of children to adults. I had hoped to protect Freddie Lee from the outside world. Even though he was full grown, mentally he was a child.

(App. 7)(Affidavit of Diane Mitchell Rigsby).

Mr. Hall's brother, now a minister, could have provided equally compelling information:

When Freddie and my sisters and brothers came along, our mama was very tired. Sh gave birth to 17 children altogehter [sic], but Freddie Lee and I came along at the end of her childbearing years. Freddie Lee was the sixteenth and I was her fourteenth child. My mother had worked all of her life as a farmworker, toiling from dawn until night, while being exposed to the sun, rain, cold, heat and all kinds of chemicals used to fertilize crops. Mama has been known to work in the fields all day and give birth that night. For years, mama walked several miles to town twice a week to pick up shirts she ironed for 15 cents each. She had very little love and understanding left for her children.

My mother was a heavy drinker and by today's standards she would be considered an alcoholic. Both my parents drank and would often be away on weekends, leaving us under the supervision of my sister, Diana. Although my father left us after he suffered a stroke, my mother continued her irresponsible behavior and we suffered as a result.

All of the childrenin in our family had to work so hard when we were growing up, almost from the time that they started walking. My mother worked right alongside, making sure that we were always on the job, even if it meant keeping us out of school. I did not object to the work, but mama was unable to feed us many days when we were working. We would be so hungry. She took all of our earnings and never permitted us to keep or spend more than an occasional 15 cents a week, which was used for admission to a movie and a box of popcorn. We never dared spend any of the money we made in the fields because we knew the consequences. My mother was a brutal disciplinarian.

She beat us for no reason as often as she beat us for misbehaving. Freddie Lee suffered a little bit more than the other

children because he did not always understand how to behave, or he did not realize he was doing something wrong. One day he filled the bottom of his bucket with leaves and covered the leaves with strawberries. We thought what he did was funny. Mama considered it a disgrace for him to behave that way in front of white folk, who respected mama for the way she disciplined her children. I thought mama would kill Freddie Lee, she beat him so hard. That was a beating that no one would ever forget.

I felt sorry for Freddie Lee because he could not cope as well as the other children with the kind of life we led. Our homelife made us all nervous wrecks, but Freddie Lee seemed to be worse off than anyone else. He was scared of everything, especially the dark. He could not express himself as well as the others because of his speech impediment probably made worse by the turmoil in our house.

My parents fought violently and on a regular basis until my father left home around 1955. We were frightened all the time. I would hate it when the weekends came. I prayed that God would allow me to grow up and leave my house. Daddy lost part of his lip and tongue while fighting with mama. They used guns, knives, whatever weapons were available. Sometimes the children would all get in one bed, crying and whimpering. I wondered what would become of us when we left our home and often feared that we would not survive without some kind of serious injury.

After my father left, I believe we were worse off. Mama seemed to beat us more, if that was possible. Mama's boyfriends, who started coming around after daddy left, were sympathetic. One of her boyfriends tried to discourage mama from beating Freddie Lee.

But very few people could influence mama, whose superstitious nature led her to

be extreme in her behavior. She withheld food from us when we would be starving. Mama believed that a famine would come and there would be food shortages similar to the depression. Mama persisted in this belief, rationing food to us in order to set some aside for the famine. My sisters and brothers generally rejected her beliefs, except for Freddie Lee.

Freddie Lee has been seeing ghosts and spirits ever since he was a little boy and I know he received mama's encouragement in his beliefs. Mama was always talking about evil spirits -of one kind or another and the potions she made to keep them away. That was one of the reasons why people in the community and even members of his own family believed Freddie Lee was insane. He could really go on about what he had seen and what the vision did or said.

(App. 9)(Affidavit of James Hall).

Other siblings could have confirmed and elaborated:

Mama said she would rather beat us than have the white folks kill us. She said that is why she was raising us the hard way. What mama did to us then would be child abuse now. She made us strip, beating us until we bled. Mama had no sympathy for anybody and believed any adult who said that we did wrong. We got many whippings for things we did not do, especially Freddie Lee. She beat him more than anyone because people told on him all of the time. But no one was spared her violence. Mama tied us to the bedposts by our hands and feet. My mama tied my brother, Henry, to a tree and set a fire under him. One day after she made me strip, she beat me in front of her boyfriend, who could see that I was menstruating. I was so embarrased and ashamed. Her boyfriend told me if I ever wanted to run away he would give me the money. That is why we were so nervous. We were scared to death of what she might do to us and what she and daddy might do to each

other.

Mama and daddy fought with everything they could get--knives, guns, belts and their fists. I would be in a corner during their fights, which lasted all day and night and sometimes throughout the weekend. I never had fingernails when I was growing up, because I would chew them down to the quick when my folks were fighting. Freddie Lee would just sit and stare or run out the door. The only reason they did not kill themselves is because my older brothers and sisters would get between them and keep them apart. My daddy got sick and went to live with his mother. While the fights stopped, my mama continued to beat us and make us work in the fields.

We would leave in the dark and come home in the dark when we worked in the fields. Everybody went to the fields, including the babies, who were placed under a tree. Mama gave the little children a syrup bucket and as they got older a water bucket and then a foot tub. I wanted to go to school, but mama kept us out and told us to run from the truant officer if she came looking for us.

We all needed to be in school, but Freddie Lee needed it the most. It was impossible for him to catch up, but mama did not understand that. When we brought home bad grades, she beat us because she said we could do just as good as the other children could. But that was not true since no other children lived the way we did.

Mama believed that a famine was coming and she stored food away for when it happened. We had so little food and sometimes no food in our house except the food for mama was saving. Mama sent us to the fields all day to work without food and no matter how hungry we were we could not spend any of the money we earned. Sometimes I would be so hungry my lips turned white and my stomach cramped. But rather than spend

> the money and take a beating, I suffered in silence until I got home. After all of mama's children were grown, we found out that she saved a lot of the money that we made.
>
> Mama also spent our earnings on liquor. She was a heavy drinker, who made her own brew if she could not afford to buy it. Mama liked to socialize and she left us at home under Diana's supervision when she went to town with her friends. sometimes, we barely had enough to eat and Diana would go to the neighbors and beg them for food. I think we would have starved if it had not been for some of our neighbors.
>
> While some of the neighbors gave us food, others with mama's permission, beat us alsmost as bad as mama. One lady beat Freddie Lee all the time and after she finished made him get under a bed in the dark. I felt so sorry for Freddie Lee because he was scary and really afraid of the dark.
>
> Ever since Freddie Lee was a little boy, he told us he saw ghosts. He would bolt out the door when he did, scared out of his wits. He was superstitious just like mama who put things around the house to keep people from bothering her. Freddie Lee continued to have visions long after he became an adult.

(App. 8)(Affidavit of Katie Mae Glenn).

The family's observations and assessments of Freddie's behavior as a young boy are corroborated and supported by records and documents and the observations of professionals who dealt with him. His school records uniformly reflect failing or near-failing grades, and his teachers uniformly observed that he was mentally retarded and sorely in need of special help. (See App. 18 [School Records]). Others recognized Freddie's problems, and

his special needs:

> A minister came to our house many times and advised my mama many times that Freddie Lee needed help. But mama would not admit that her child was a long way from being okay. Of course, mama would not admit to her own problems.

(App. 9)(Affidavit of James Hall). Similarly,

> Freddie Lee needed help and everybody in town knew it by the time he was school age. A minister came to see my mama and told her that Freddie Lee would run into some problems when he got older if he did not get some help. But my mother ignored the minister's warnings as well as the warnings of other people.

(App. 7)(Affidavit of Diane Mitchell Rigsby).

Unfortunately, Freddie Lee Hall never received the help he so obviously and desperately needed, and was wholly unable to cope with the demands made upon his feeble intellect by the academic environment:

> Freddie Lee's school performance confirmed our suspicions that he was mentally retarded. He was never able to learn to read or write and eventually the teachers gave up on him and passed him from one grade to another. School was so frustrating for him that he frequently ran away when his teachers chastised him or when kids teased him. He ran away rather than sass his teachers.

(Id.). He ultimately dropped out of school after the tenth grade.

Despite the fact that he did attend at least ten grades of school, only being held back once (see App. 18 [School Records]),

Mr. Hall is illiterate, or at best only marginally literate (see App. 19 [FSP Medical Records]; App. 20 [DOC Records]). His high school principal recalled that Freddie was "not a good student academically and was mostly socially promoted so as to be able to play football, which he was quite good at." (See App. 20 [Presentence Investigation Report, 12/20/68, DOC Records]). His mother informed Department of Corrections officials, well before this trial, that Freddie never finished school because "he couldn't learn," and always did poorly because of his "head problem" (see App. 20 [Parental Questionnaire, DOC Records]). Despite his academic inabilities, Mr. Hall was never a disciplinary problem in school, and was an active participant in school sports programs (see Presentence Investigation Report, supra).

Mr. Hall's severe mental impairments worsened with age. After dropping out of school, he was drafted by the United States Army, but was ultimately rejected as intellectually unfit (see App. 20 [DOC Records]; App. 10 [Motion for New Trial, State v. Hall, Circuit Court of Sumter County, Florida, Case No. 1546]; App. 6 [Affidavit of T. Richard Hagin]). An attorney who represented Mr. Hall on a criminal charge during this time period recalled Mr. Hall's deteriorated mental state:

> During Mr. Hall's trial when the excitement, fear or shock of the same came upon the defendant, he was virtually

> incoherent and unable to communicate or express any thoughts or ideas whatsoever to his attorney. During the trial conferences, when the Defendant would be not more than twelve inches from his attorney, said attorney would be unable to understand anything that the Defendant was saying. Therefore, the Defendant was unable to testify in his own behalf or materially assist his attorney in his defense during the trial . . . the Defendant gave his attorney no assistance whatsoever during the trial. There is good reason to believe that the Defendant was insane at the time of the commission of the alleged crime and/or at the time of trial.

(App. 6)(Affidavit of T. Richard Hagin).

The records of Mr. Hall's prior incarceration are rife with compelling documentation of his mental illnesses, intellectual impairment, and deteriorating psychological status. Mental health professionals affiliated with Department of Corrections reported his IQ at various levels between 68 and 76 and his reading level at a maximum of grade 2.6. (See App. 20 [DOC Records]). His "dull intellect," "functioning at a below normal level," and "borderline retardation," were variously attributed to "cultural, social, economic, and intellectual deprivation" and the "adverse influences [imposed by] his family's cultural and economic situation." (Id.). All of this would have of course provided powerful, albeit nonstatutory, mitigating evidence. All of this would have substantiated significant nonstatutory mental health mitigation had it been provided to a mental health professional. Cf. Mason v. State, 489 So. 2d 734, 736-37 (Fla.

1986)(remanding for evidentiary hearing on question of professional validity of psychiatric evaluations where counsel failed to provide expert with background records regarding defendant's history of mental illness). None of it was developed and presented at Mr. Hall's sentencing proceeding, however, because the then-prevalent interpretation of Florida's capital sentencing statute simply precluded the introduction of such evidence, as it did not conform to the narrow statutory categories. (See Apps. 2, 5).

Mr. Hall's mental illness and brain damage, and its further exacerbation and continuing deterioration is confirmed by the records of his incarceration. Florida State Prison records report that Mr. Hall has continually been plagued by nightmares, visions, and hallucinations. (See App. 19 [FSP Medical Records]). Those records also indicate that Mr. Hall has been on a regimen of powerful anti-psychotic drugs, such as Mellaril and Haldol, powerful anti-depressant drugs, such as Sinequan and Pamerol, and various combinations thereof throughout his incarceration at Florida State Prison. (Id.)

Of course, all this is substantial, compelling nonstatutory mitigation which can by no means be characterized as "weak". Cf. Hall v. Dugger, supra, 13 F.L.W. 320. The lower court found the facts in Mr. Hall's favor, but ruled that the errors were harmless. However, because,

> [t]he harmless error rule allows the state to conduct an unfair proceeding without having to correct that unfairness[, it] is axiomatic that such a rule must be very carefully applied and applied only when the state has proven beyond a reasonable doubt that the error did not contribute to the . . . sentence. Here, the rule has not been properly applied, and the state has not fulfilled its burden to show there is no possibility that the failure to consider [the] significant mitigating evidence [found as factually "established" by the lower court] did not contribute to the decision to impose the death sentence.

Hall v. Dugger, supra, 13 F.L.W. at 321 (Kogan, Shaw, and Barkett, JJ., dissenting). That analysis certainly applies to the Circuit Court's refusal to grant here. The presence of the wealth of nonstatutory mitigating evidence which the circuit court found Mr. Hall had "established," simply cannot be squared with the circuit court's ultimate legal conclusion that the error here was "harmless." The lower court erred. Relief is proper.

C. MR. HALL'S ENTITLEMENT TO RELIEF

Of course, the standard Hitchcock harmless error analysis is inapplicable to this claim: it was as a result of the preclusion under which counsel were forced to operate that the mitigating evidence related herein was never provided to the sentencing judge and jury. This claim was based on non-record facts which were not before this Court during the adjudication of the habeas corpus action; the non-record facts have now been proven below,

and make Mr. Hall's entitlement to relief abundantly clear.

The penalty phase proceedings in this case, like those in Hitchcock v. Dugger, violated the eighth amendment. The same preclusive consideration was provided because the trial judge and counsel were absolutely constrained.

> The key aspect of the penalty trial is that the sentence be individualized, focusing on the characteristics of the individual. Gregg v. Georgia, 428 U.S. 153 (1976). Here the jurors were [not permitted to] mak[e] such an indivudualized determination.

Thomas v. Kemp, 796 F.2d 1322, 1325 (11th Cir. 1986). No one took note of anything concerning the character of the offender and circumstances of the offense, Gregg v. Georgia, which mitigated against death but which was not in the statute; the statute and the Court tied Mr. Robuck's and Mr. Aulls' hands. Ample [nonstatutory] mitigation, however, was available and should have been developed, presented, and considered. See Hitchcock, supra.

This jury voted for death by the slimmest of margins -- 7-5 -- yet it never heard the compelling evidence set forth herein. The preclusion on counsel skewed Mr. Hall's penalty proceeding at its inception: the compelling mitigation related herein was never even heard by the jury, much less so considered.

This case presents three aggravating circumstances, two of which related strictly to the offense. It presents over twenty

classically recognized areas of nonstatutory mitigating evidence. It presents a wealth of expert, lay, and documentary support for each of those mitigating factors. Under no view can it be said that these errors had "no effect" on the ultimate penalty, Skipper; Cooper, that the errors were "harmless beyond a reasonable doubt," Riley; Mikenas, or "harmless" under any standard. The State made no effort to prove harmlessness below. Mr. Hall, on the other hand, has gone well beyond what law required him to establish: he has proven the harm. He has proven his entitlement to relief.

CLAIM II

THE EXECUTION OF MR. HALL'S SENTENCE OF DEATH WOULD VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE IT WAS IMPOSED WITHOUT ANY CONSIDERATION BY THE SENTENCING JURY AND JUDGE OF THIS FACT THAT MR. HALL IS, AND WAS AT THE TIME OF THE OFFENSE, CHRONICALLY BRAIN DAMAGED AND INTELLECTUALLY IMPAIRED, AND BECAUSE MR. HALL WAS AND IS BRAIN DAMAGED AND INTELLECTUALLY IMPAIRED.

As the evidence presented with his Rule 3.850 motion and related pleadings conclusively demonstrates, Mr. Hall's brain is damaged. The problems arising from his life-long organicity are compounded by his severely impaired level of intellectual functioning. He has functioned throughout his life, and currently functions at a level far below even that which could normally be expected of someone with a similar organic brain

condition, or his level of intellectual achievement.

As discussed at length in the preceding section, the preclusion of the sentencers' consideration, in mitigating, of Mr. Hall's mental condition independently violates the eighth and fourteenth amendments in that it created the unacceptable risk that Mr. Hall may have been sentenced to death despite factors calling for a sentence of life imprisonment. His execution -- i.e., the execution of a brain damaged and intellectually impaired criminal defendant -- itself also would independently violates the eighth amendment proscription against cruel and unusual punishment. Cf. Ford v. Wainwright, 106 S. Ct. 2545 (1986); Woods v. State, No. 71,523 (Fla. Sup. Ct. July 14, 1988) slip op. at 9-10 (Barkett, Kogan, Shaw, JJ., dissenting).

A similar issue is currently pending certiorari review in the United States Supreme Court. See Penry v. Lynaugh, 832 F.2d 915 (5th Cir. 1988), cert. granted, 56 U.S.L.W. 3894 (June 28, 1988). Mr. Hall's execution should be stayed pending resolution of Penry. This Court should exercise its authority to further the ends of justice, and enter an order prohibiting the execution of this impaired petitioner.

CLAIM III

ARGUMENT, INSTRUCTION, AND COMMENT BY THE COURT AND PROSECUTOR THROUGHOUT THE COURSE OF THE PROCEEDINGS RESULTING IN FREDDIE LEE HALL'S SENTENCE OF DEATH DIMINISHED HIS CAPITAL SENTENCING JURY'S SENSE OF RESPONSIBILITY FOR THE AWESOME CAPITAL SENTENCING TASK THAT THE LAW WOULD CALL ON THEM TO PERFORM, AND MISLED AND MISINFORMED THEM AS TO THEIR PROPER ROLE AT THE PENALTY PHASE, IN VIOLATION OF MR. HALL'S RIGHTS TO AN INDIVIDUALIZED AND RELIABLE CAPITAL SENTENCING DETERMINATION, CALDWELL V. MISSISSIPPI, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

A. INTRODUCTION

On March 7, 1988, the United States Supreme Court granted certiorari in Dugger v. Adams, 56 U.S.L.W. 3601, previous history in Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1987), modified on rehearing, Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986). Adams will have a direct effect on the viability of Mr. Hall's sentence of death: if the Supreme Court affirms the Eleventh Circuit's grant of relief in Adams, Mr. Hall's death sentence must be vacated; the prosecutorial arguments and judicial comments discussed below violated Mr. Hall's rights to a reliable and individualized capital sentencing determination in the same way as those condemned by the Adams panel.

On April 21, 1988, the Eleventh Circuit, en banc, issued its opinion in Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988). Relief was granted to a capital habeas corpus petitioner

presenting a Caldwell v. Mississippi claim involving prosecutorial and judicial comments and instructions which diminished the jury's sense of responsibility and violated the eighth amendment in the identical way in which the comments and instructions discussed below violated Mr. Hall's eighth amendment rights. Freddie Lee Hall is entitled to relief under Mann and Adams, for there is little discernible difference between these cases.

Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633 (1985), did not exist at the time of Mr. Hall's trial, direct appeal, or prior state court post-conviction proceedings. Nor were any precedents then available applying Caldwell's standards to Florida's trifurcated capital sentencing scheme. The first such case was Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified on rehearing sub nom., Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1987).

This proceeding is the first opportunity Mr. Hall has had to present his Caldwell v. Mississippi claim, for the Caldwell opinion was rendered after the trial court dismissed Mr. Hall's prior post-conviction action and after the Florida Supreme Court affirmed that dismissal. The State, however, asserted that Mr. Hall's failure to object at trial, assert the claim on direct appeal, or present it in his initial state court post-conviction or federal habeas corpus proceedings precludes him from now

raising the claim in the instant proceedings (See State's Reply to Defendant's Rule 3.850 motion, p. 4). The State did not, however, indicate how Mr. Hall could have raised the instant eighth amendment claim in those pre-1985 (i.e., pre-Caldwell) proceedings. The State does not because it cannot -- Mr. Hall could not have raised this claim in earlier proceedings: the "tools" with which to raise it simply did not exist at the time. See Reed v. Ross, 483 U.S. 1 (1984); Adams, supra.

Caldwell represents a "substantial change" in eighth amendment law, far more substantial in fact than Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). This is so because where Hitchcock changed the standard of review which the Florida Supreme Court had been applying to a class of constitutional claims, see Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987) (Hitchcock rejected "mere presentation" standard of review applied to Lockett v. Ohio issues); Down v. Dugger, 514 So. 2d 1069 (Fla. 1987)(same), the Caldwell decision established a class of constitutional claims which did not previously exist:

> None of the [pre-Caldwell eighth amendment] cases indicated that prosecutorial comments or statements by a trial judge to the jury, other than those that limited the mitigating factors that could be considered, implicated the eighth amendment prohibition against cruel and unusual punishment.

Adams v. Dugger, 816 F.2d at 1499. Thus, Caldwell's holding that the eighth amendment is violated by the "fear [of] substantial

unreliability as well as bias in favor of death sentences" resulting from "state-induced suggestions that the sentencing jury may shift its sense of responsibility . . .," 105 S. Ct. at 2640, clearly represented a substantial change in the law. As such, Caldwell falls squarely within the standards enunciated in Witt v. State, 387 So. 2d 922 (Fla. 1980), and Downs v. Dugger. In this regard, it is significant that every judge of the Eleventh Circuit who has passed on a Caldwell claim has recognized the novelty of the constitutional doctrine which Caldwell established, see, e.g., Adams v. Wainwright, supra, 804 F.2d at 1526; see also Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988)(en banc).

Caldwell involves the essential eighth amendment requirements to the validity of any death sentence: that such a sentence be individualized (i.e., not based on factors having nothing to do with the character of the offender or circumstances of the offense), and that such a sentence be reliable. Id., 105 S. Ct. at 2645-46. The opinion established, for the first time, that comments which diminish a capital jury's sense of responsibility render the resulting death sentence unreliable and therefore constitutionally invalid. Caldwell is a substantial change in law because it established the eighth amendment principle.

Caldwell also substantially changed the standard of review,

cf. Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987), pursuant to which such issues must be analyzed: under Caldwell, the State must show that comments such as those provided to Mr. Hall's sentencing jury had "no effect" on their verdict. Id. at 2646. No opinion had so held before Caldwell was announced. Cf. Thompson, supra (Hitchcock changed standard of review); Downs v. Dugger, supra (same).

The instant Rule 3.850 proceedings represent the first opportunity Mr. Hall has had to present his Caldwell v. Mississippi claim. The legal bases of the claim were simply not available until Caldwell was decided, see Adams v. Dugger, supra; Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988)(en banc), long after Mr. Hall's trial, direct appeal, and initial state court post-conviction proceedings. There is thus no procedural bar to its litigation in the instant proceedings. See Reed v. Ross, supra.

Moreover, Caldwell error renders a capital sentencing proceeding constitutionally unreliable. This too demonstrates that the State's procedural default argument must fail: a capital defendant cannot be deemed to waive his right to a reliable capital sentencing determination, as the United States Supreme Court has recognized. See Smith v. Murray, 106 S. Ct. 2661, 2668 (1986)(no procedural default applicable to claim which involves error "pervert[ing] the jury's deliberations on the

ultimate question of whether [the defendant should be sentenced to die].").

Mr. Hall's Caldwell claim is thus before this Court on the merits. The State contended below that the merits do not entitle Mr. Hall to relief, as "[t]he giving of . . . standard jury instructions which constitute a correct statement of the law does not constitute a violation of Caldwell." (State's Reply, p. 7).

The State's facile analysis of the merits of Mr. Hall's Caldwell claim conveniently ignored a plethora of judicial and prosecutorial comments which went far beyond that portion of the standard instructions quoted in the State's pleading (See infra). The State was correct in its assertion that the standard instructions, standing alone, are insufficient to constitute a violation of Caldwell. See Harich, 844 F.2d at 1475. Here, however, there was much, much more. This is thus plainly not a case where, as in Harich, the jury was merely instructed that their role was advisory. Harich, 844 F.2d at 1475. Rather, this is a case where the "overall effect of the court's [and prosecutor's] actions was to diminish the jury's sense of responsibility with regard to its sentencing role." Mann, 844 F.2d 1446 (11th Cir. 1988); see also Adams, supra. Mann controls, and Mr. Hall is entitled to relief thereunder.

The claim should now be heard and relief should now be granted. At a minimum, Mr. Hall urges that the Court withhold

decision pending the United States Supreme Court's resolution in Adams. As in the case of other similarly-situated litigants presenting a Caldwell claim after the grant of certiorari in Adams, a stay of execution is proper. As this Court has noted:

> [Petitioner] takes the position that because "this very issue is now pending before the United States Supreme Court in Adams v. Dugger, ... the trial court should issue a stay of execution and preserve its jurisdiction to address this claim after the issuance of Adams." If this were the first time [Petitioner] presented this Caldwell claim to the trial court, such a stay may be warranted. However, because this claim was previously reject[ed] by the trial court, we decline to issue a stay to reconsider the issue.

Darden v. Dugger, 13 FLW 196, 197 (Fla. March 18, 1988)(footnotes omitted)(emphasis supplied). This is the first time Mr. Hall has our could have presented his Caldwell claim to any court. A stay of execution, at a minimum, is proper.

B. MR. HALL'S ENTITLEMENT TO RELIEF

In Mann v. Dugger, a case involving prosecutorial and judicial comments very similar to those heard by Mr. Hall's jury, the en banc Eleventh Circuit granted relief. There is little discernible difference between Mann and Mr. Hall's case. Compare Mann v. Dugger, 844 F.2d at 1455-56 (11th Cir. April 21, 1988), slip op. at 20 ("As you have been told, the final decisions to what punishment shall be imposed is the responsibility of the

judge. However, it is your duty to follow the law which will now be given to you . . . and render . . . an advisory opinion . . .") (jury instructions), with Hall, R. 33 ("Now, this advisory sentence can either be followed by the Court or rejected by the Court. In other words, the final determination as to whether to impose the life sentence or the death sentence is left up to the Court, alone.") There is no difference.

In Mann, the en banc Eleventh Circuit held that "the Florida [sentencing] jury plays an important role in the Florida sentencing scheme," and thus:

> Because the jury's recommendation is significant. . . the concerns voiced in Caldwell are triggered when a Florida sentencing jury is misled into believing that its role is unimportant. Under such circumstances, a real danger exists that a resulting death sentence will be based at least in part on the determination of a decisionmaker that had been misled as to the nature of its responsibility. Such a sentence, because it results from a formula involving a factor that is tainted by an impermissible bias in favor of death, necessarily violates the eighth amendment requirement of reliability in capital sentencing. See Adams v. Wainwright, 804 F.2d 1526, 1532 (11th Cir. 1986), modified 816 F.2d 1493 (11th Cir. 1987), cert. granted, 56 U.S.L.W. 3608 (U.S. March 7, 1988).

Id. There is very little principled factual or legal distinction between Mr. Hall's case and Mann. Under Mann, Mr. Hall is entitled to relief.

Throughout the proceedings resulting in Mr. Hall's capital conviction and sentence of death, the court and prosecutor made statements about the difference between the jurors' responsibility at the guilt-innocence phase of the trial and their non-responsibility at the sentencing phase. As to guilt or innocence, the jury was told they were the only ones who would determine the facts: as to sentencing, however, the responsibility was not on their "shoulders," but rested solely with the judge.

Mann makes clear that proceedings such as those resulting in Mr. Hall's sentence of death violate Caldwell and the eighth amendment. In Mann, the prosecutor sought to lessen the jurors' sense of responsibility during voir dire and repeated his effort to minimize their sense of responsibility during his closing argument. The comments were then "sanctioned," cf. Caldwell, supra, by the trial court's instructions that "the final decision as to what punishment shall be imposed is the responsibility of the judge." Mann, supra. The comments, argument, and judicial instructions provided to Mr. Hall's jury were as egregious as those in Mann and Adams, and went far beyond those condemned in Caldwell. Pertinent examples are reproduced immediately below.

i. Voir Dire

Here the prosecutor explained, as the prosecutor in Mann explained and admonished, that the jurors' role at the penalty

phase would be essentially insignificant:

> The Judge has already informed you he will impose the sentence, but you will be required to give an advisory opinion, or recommendation, concerning the sentence, should you find the accused guilty of the premeditated murder. . . ."

(R. 40). In Mr. Hall's case, as in Mann, the effort to minimize the jury's sense of responsibility was persistent: the prosecutor made sure that the jurors understood themselves to have little responsibility for deciding whether Mr. Hall would live or die:

> [PROSECUTOR]: His Honor has already instructed you that you will not be required to sentence in this case . . . .

(R. 52).

> [PROSECUTOR]: Do you understand, well, let me ask you this, do you understand the procedure that you do not actually sentence?
>
> [JUROR #3]: That's right.

(R. 54).

These comments set the minimizing tone when the jurors were first introduced to the proceedings at voir dire. The court's preliminary voir dire instructions, as in Mann and as in Caldwell, only sanctioned the prosecutor's efforts:

> Now, in the event the jury finds the defendant guilty of murder in the first degree, then it will, in a separate proceedings, render an advisory sentence to the Court, recommending that the death sentence be imposed on the defendant or that

> he be sentenced to life imprisonment....
>
> Now, this advisory sentence can either be followed by the Court or rejected by the Court. In other words, the final determination as to whether to impose the life sentence or the death sentence is left up to the Court, alone.

(R. 33)(emphasis supplied).

> Now, I want to read this question to you and ask that you listen to it carefully. If you are selected as a juror to serve on this case, and the evidence presented in this courtroom and the law as instructed by the Court justifies the return of a verdict of first degree murder, would you find the defendant guilty of such crime, even though it could result in the Court imposing the death sentence?

(R. 34)(emphasis supplied).

The trial judge repeated this identical instruction during the voire dire a total of seven times (R. 108, 144, 165, 186, 196, 209).

ii. Penalty

The trial court set the anti-Caldwell stage for what was to follow in its preliminary instructions at the commencement of the sentencing phase:

> [THE COURT]: Ladies and gentlemen of the jury, you have found the defendant guilty of murder in the first degree. The punishment for this crime is either death or life imprisonment. The final decision as to what punishment shall be imposed rests solely with the Judge of the trial court. However, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed on the

> defendant.

(R. 648)(emphasis supplied). The prosecutor then rehashed the same theme in his summation:

> As His Honor told you, it is within the final discretion of the court, and you are sort of like an advisory body now.

(R. 689).

iii. Jury Instructions

At the guilt-innocence phase, the jury was instructed to disregard the consequences of their verdict. Cf. Mann, supra. Then, at sentencing, they were time and again instructed that their role was "merely" advisory and "only" a recommendation, and could be accepted or rejected as the sentencing judge saw fit. As the judge instructed:

> [THE COURT]: Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the defendant for the crime of first degree murder. And as you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge. However, it is your duty to follow the law which will now be given to you by the Court, and render to the Court an advisory sentence....

(R. 695)(emphasis supplied). Cf. Mann, supra ("As you have been told, the final decisions to what punishment shall be imposed is the responsibility of the judge. However, it is your duty to follow the law which will now be given to you...and render...an advisory opinion..."). The prosecutor's statements were as

egregious in Mr. Hall's case as those at issue were in Mann -- and the sentencing instructions, Mann, supra; Caldwell, supra, were the same, if not worse.

C. RELIEF SHOULD NOW BE GRANTED

In a capital case, jurors are placed "in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice . . . Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role." Caldwell v. Mississippi, 105 s. Ct. 2633, 2641-42 (1985)(emphasis supplied). When we understand these factors, we can appreciate why comments and instructions such as those provided to Mr. Hall's jurors, and condemned in Mann, served to diminish their sense of responsibility, and why the State cannot show that the comments at issue had "no effect" on the deliberations. Caldwell, 105 S. Ct. at 2645-46.

The comments here at issue were not isolated, but were made by judge and prosecutor at critical stages of the proceedings. They were heard throughout, and they formed a common theme: the judge had the final and sole responsibility, while the "critical" role of the jury, Adams v. Wainwright, 764 F.2d 1356, 1365 (11th Cir. 1985), was substantially minimized.

The gravamen of Mr. Hall's claim is based on the fact that the prosecutor's and the judge's comments allowed the jury to attach less significance to their sentencing verdict, and misled the jury, therefore enhancing the risk of an unreliable death sentence. Mann v. Dugger; Caldwell v. Mississippi. There can be little doubt that the egregiousness of the jury-minimizing comments here at issue and the judge's instructions surpassed what was condemned in Caldwell.

Under Caldwell the central question is whether the prosecutor's comments minimized the jury's sense of responsibility. If so, then the reviewing court must determine whether the trial judge sufficiently corrected the prosecutor's misrepresentation. Applying these questions to Mann, the en banc Court of Appeals found that the prosecutor did mislead or at least confuse the jury and that the trial court did not correct the misapprehension. Applying these same questions to Mr. Hall's trial, the jury was similarly misled by the prosecutor, and the situation was not remedied by the trial court.

The constitutional vice condemned by the Caldwell Court is not only the substantial unreliability comments such as the ones at issue in Mr. Hall's case inject into the capital sentencing proceeding, but also the danger of bias in favor of the death penalty. A jury which is unconvinced that death is the appropriate punishment might nevertheless vote to impose death as

an expression of its "extreme disapproval of the defendant's acts" if it holds the mistaken belief that its deliberate error will be corrected by the 'ultimate' sentencer, and is thus more likely to impose death regardless of the presence of circumstances calling for a lesser sentence. See Caldwell, 105 S. Ct. at 2641. Moreover, a jury "confronted with the truly awesome responsibility of decreeing death for a fellow human," McGautha v. California, 402 U.S. 183, 208 (1971), might find a diminution of its role and responsibility for sentencing attractive. Caldwell, 105 S. Ct. at 2641-42.

In Caldwell, 105 S. Ct. 2633, the Court held "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death lies elsewhere," id., 105 S. Ct. 2639, and that therefore prosecutorial arguments which tended to diminish the role and responsibility of a capital sentencing jury violated the eighth amendment. Because the "view of its role in the capital sentencing procedure" imparted to the jury by the improper and misleading argument was "fundamentally incompatible with the eighth amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case,'" the Court vacated Caldwell's death sentence. Caldwell, 105 S. Ct. at 2645, quoting Woodson v. North Carolina,

428 U.S. 280, 305 (1976). The same vice is apparent in Mr. Hall's case, and Mr. Hall is entitled to the same relief.

CLAIM IV

THE FLORIDA SUPREME COURT HAS INTERPRETED "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" IN AN UNCONSTITUTIONALLY OVERBROAD MANNER AND APPLIED THIS AGGRAVATING CIRCUMSTANCE UNCONSTITUTIONALLY AND OVERBROADLY TO THIS CASE, IN VIOLATION OF MAYNARD V. CARTWRIGHT, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

Since the time of Mr. Hall's trial, direct appeal, and initial post-conviction proceedings, the United States Supreme Court decided Maynard v. Cartwright, 108 S. Ct. 1853 (1988). Under the Cartwright decision, Mr. Hall is undeniably entitled to post-conviction relief. Pre-Cartwright, on direct appeal, this Court affirmed a finding on the "heinous, atrocious, and cruel" aggravating circumstance in Mr. Hall's case. Now, post-Cartwright, that resolution should be revisited, for the United States Supreme Court's pronouncement makes clear that the analysis then employed was fundamentally at odds with what the eighth amendment requires.

The instruction given at the penalty proceedings of Mr. Hall's trial, the language of the trial court's sentencing order, and the language of the Florida Supreme Court's opinion on direct appeal are identical to the language condemned as vague by both the Tenth Circuit and the United States Supreme Court in

Cartwright.

In Proffitt v. Florida, 428 U.S. 242, the United States Supreme Court approved the Florida Supreme Court's construction of the "heinous, atrocious, or cruel" aggravating circumstance, holding:

> [The Florida Supreme Court] has recognized that while it is arguable "that all killings are atrocious, . . . [s]till, we believe that the Legislature intended something 'especially' heinous, atrocious or cruel when it authorized the death penalty for first degree murder." Tedder v. State, 322 So. 2d, at 910. As a consequence, the court has indicated that the eighth statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So. 2d, at 9. See also Alford v. State, 307 So. 2d 433, 445 (1975); Halliwell v. State, [323 So. 2d 557], at 561 [Fla. 1975]. We cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases.

Proffitt, 428 U.S. at 255-56 (footnote omitted).

The construction approved in Proffitt was not utilized at any stage of the proceedings in Mr. Hall's case. The jury was simply instructed that they could consider as one of the aggravating circumstances whether "the crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel." (R. 697). Providing the jury with little guidance concerning its meaning, the court defined this circumstance as follows:

> "Heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others.

(R. 697).

The trial court's sentencing order found that the state proved this aggravating circumstance, and itself concluded that the crime was "especially heinous and atrocious" because, inter alia, the victim "was, at the time, 21 years of age, 7 months pregnant, and married less than one year." (Findings of Fact, R. 350). As to this circumstance, the court's order sets forth in eight paragraphs, a "summary" of the trial testimony. Most of this testimony has no relationship to the homicide itself, but rather related to the identity and status of the victim, the theft of her automobile, and the identification of the murder weapon. (See R. 350-51). Nothing within the order or summary spelled out which facts the court regarded as "conscienceless or pitiless [and] . . . unnecessarily tortuous to the victim," thereby justifying this aggravating circumstance. Proffitt at 255-56. The Florida Supreme Court on direct appeal referred only to the fact that the trial court "properly" found three aggravating factors, one being that "the murder was especially heinous, atrocious, or cruel." Hall v. State, 403 So. 2d 1321, 1325 (Fla. 1981). The explanatory or limiting language approved by Proffitt simply does not appear anywhere in the record of

these proceedings.

The same scenario occurred in Maynard v. Cartwright, 108 S.Ct. 1853 (1988): the jury found the murder to be "especially heinous, atrocious, or cruel," and the state Supreme Court affirmed, reciting facts which supported the application of the circumstance. Id. The United States Supreme Court affirmed the Tenth Circuit's grant of relief, explaining that this procedure did not comply with the fundamental eighth amendment priniciple mandating a limitation of capital sentencers' discretion. The Supreme Court's eighth amendment analysis fully applies to Mr. Hall's case; the identical factual circumstances upon which relief was mandated in Cartwright are present here. The result here should be the same as in Cartwright:

> Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238 (1972).
>
> Furman held that Georgia's then-standardless capital punishment statute was being applied in an arbitrary and capricious manner; there was not principled means provided to distinguish those that received the penalty from those that did not. E.g., id., at 310 (Stewart, J., concurring); id., at 311 (White, J., concurring). Since Furman, our cases have insisted that the channeling and limiting of the sentencer's

discretion in imposing the death penalty is a fundamental consitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action. Gregg v. Georgia, 428 U.S. 153, 189, 206-207 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); id., at 220-222 (White, J., concurring in judgment); Spaziano v. Florida, 468 U.S. 447, 462 (1984); Lowenfield v. Phelps, 484 U.S. ___, ___ (1988).

Godfrey v. Georgia, 446 U.S. 420 (1980), which is very relevant here, applied this central tenet of Eighth Amendment law. The aggravating circumstance at issue there permitted a person to be sentenced to death if the offense "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." Id., at 422. The jury had been instructed in the words of the statute, but its verdict recited only that the murder was "outrageously or wantonly vile, horrible or inhuman." The Supreme Court of Georgia, in affirming the death sentence, held only that the language used by the jury was "not objectionable" and that the evidence supported the finding of the presence of the aggravating circumstance, thus failing to rule whether, on the facts, the offense involved torture or an aggravated battery to the victim. Id., at 426-427. Although the Georgia Supreme Court in other cases had spoken in terms of the presence or absence of these factors, it did not do so in the decision under review, and the trial court held that such an application of the aggravating circumstance was unconstitutional, saying:

> "In the case before us, the Georgia Supreme Court has affirmed a sentence of death based upon no more than a finding that the offense was 'outrageously or wantonly vile, horrible and inhuman.' There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious

> infliction of the death sentence. A person of ordinary sensibility could fairly characterizee almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' Such a view may, in fact, have been one to which the members of the jury in this case subscribed. If so, their preconceptions were not dispelled by the trial judge's sentencing instructions. These gave the jury no guidance concerning the meaning of any of [the aggravating circumstance's] terms. In fact, the jury's interpretation of [that circumstance] can only be the subject of sheer speculation." Id., at 428-429 (footnote omitted).

The affirmance of the death sentence by the Georgia Supreme Court was held to be insufficient to cure the jury's unchanneled discretion because that court failed to apply its previously recognized limiting construction of the aggravating circumstance. Id., at 429, 432. The trial court concluded that, as a result of the vague construction applied, there was "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Id., at 433. Compare Proffitt v. Florida, 428 U.S. 242, 254-256 (1976). It plainly rejected the submission that a particular set of facts surrounding a murder, however, shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty.

We think the Court of Appeals was quite right in holding that Godfrey controls this case. First, the language of the Oklahoma aggravating circumstance at issue--"especially heinous, atrocious, or cruel"--gave no more guidance than the "outrageously or wantonly vile, horrible or inhuman" language that the jury returned in its verdict in Godfrey. . . .

> Second, the conclusion of the Oklahoma court that the events recited by it "adequately supported the jury's finding" was indistinguishable from the action of the Georgia court in Godfrey, which failed to cure the unfettered discretion of the jury and to satisfy the commands of the Eighth Amendment. The Oklahoma court relied on the facts that Cartwright had a motive of getting even with the victims, that he lay in wait for them, that the murder victim heard the blast that wounded his wife, that he again brutally attacked the surviving wife, that he attempted to conceal his deeds, and that he attempted to steal the victims' belongings. 695 P.2d, at 554. Its conclusion that on these facts the jury's verdict that the murder was especially heinous, atrocious, or cruel was supportable did not cure the constitutional infirmity of the aggravating circumstance.

Cartwright, supra, 105 S. Ct. at 1858-59.

In Mr. Hall's case, as in Cartwright, what was relied upon by the jury, trial court, and Florida Supreme Court did not guide or channel sentencing discretion. Likewise, no "limiting construction" was ever applied to the "heinous, atrocious, or cruel" aggravating circumstance. Finally, the Florida Supreme Court did not cure the unlimited discretion exercised by the jury and trial court. Its recitation of facts failed to set out any evidence that "set the crime apart from the norm of capital felonies" Dixon v. State, 283 So. 2d 1, 9 (Fla. 1973), thereby narrowing the class of death-sentenced persons. Pursuant to Cartwright, Mr. Hall is entitled to relief.

Notwithstanding the fact that Cartwright, decided just weeks

ago, established that this Court's affirmance of the "heinous, atrocious, or cruel" ruling on direct appeal was eighth amendment error, the State argued below that Mr. Hall's claim should be procedurally barred. The State was in error.

Maynard v. Cartwright, 108 S. Ct. 1853 (1988), changed the standard of review applied to claims of this type (and changed the standard of review which the Florida Supreme Court had been applying to this class of constitutional claims). It is thus as "substantial" a change in law as Hitchcock v. Dugger, and thus falls squarely within the standards enunciated in Witt v. State, 387 So. 2d 922 (Fla. 1980). Cf. Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987)(Hitchcock is a change in law because it rejected "mere presentation" standard of review applied to Lockett v. Ohio issues); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987)(same). This claim is thus appropriately brought in the instant proceedings. See Witt, supra; Tafero v. State, 459 So. 2d 1034 (Fla. 1984); Downs, supra.

The State also argued with respect to the merits of the claim that the fact "that the Oklahoma courts had failed to adequately define its statutory terms heinous, atrocious or cruel does not support an assertion that Florida has failed to do so," noting that the United States Supreme Court expressly approved "Florida's scheme" in Proffitt v. Florida, 428 U.S. 242 (1976)(see State's Response, p. 7 n.4). What the State ignored,

however, is that nowhere in the instructions given at the penalty phase of Mr. Hall's trial (see R. 697), in the trial court's sentencing order (see R. 350), or in the Florida Supreme Court's opinion affirming Mr. Hall's conviction and sentence on direct appeal, see Hall v. State, 403 So. 2d 1321, 1325 (Fla. 1983)(trial court "properly" found that "the murder was heinous, atrocious or cruel"), does the limiting language approved by Proffitt appear. The Cartwright opinions of the Tenth Circuit and United States Supreme Court discussed the fact that the Oklahoma appellate court's construction of "heinous, atrocious, and cruel" was based on the construction given that factor by the Florida Supreme court. The state high courts' construction in Oklahoma and Florida violated the eighth amendment. Cartwright's holding speaks for itself.

In Mr. Hall's case, as in Cartwright, what was relied upon by the jury, trial court, and Florida Supreme Court did not guide or channel sentencing discretion. Likewise, no "limiting construction" was ever applied to the "heinous, atrocious, or cruel" aggravating circumstance. Finally, the Florida Supreme Court did not cure the unlimited discretion exercised by the jury and trial court. Its recitation of facts failed to set out any evidence that "set the crime apart from the norm of capital felonies," Dixon v. State, 283 So. 2d at 9, thereby narrowing the class of death-sentenced persons, Zant v. Stephens, 103 S. Ct.

2733, 2742-43 (1983).

Pursuant to Cartwright, Mr. Hall is entitled to relief. Cartwright was not available to Mr. Hall at the time of his trial, direct appeal or initial post-conviction proceedings. Like Hitchcock, Cartwright represents a substantial change in law announced by the United States Supreme Court. Relief is proper.

CLAIM V

THE ERRONEOUS INSTRUCTIONS THAT A VERDICT OF LIFE IMPRISONMENT REQUIRED A MAJORITY VOTE MATERIALLY MISLED MR. HALL'S JURY AS TO ITS TRUE FUNCTION AND ROLE AT THE PENALTY PHASE, CREATED THE CONSTITUTIONALLY UNACCEPTABLE RISK THAT DEATH WAS IMPOSED DESPITE FACTORS CALLING FOR LIFE IMPRISONMENT, AND VIOLATED MR. HALL'S RIGHTS UNDER MILLS V. MARYLAND, CALDWELL V. MISSISSIPPI, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Hall's sentencing jury was consistently misled and misinformed with regard to the vote required for a valid recommendation of life imprisonment. Although they were correctly instructed that a majority of their number was required to recommend a sentence of death, this same majority instruction was erroneously applied to a life recommendation as well -- as instructed, Mr. Hall's jury could not return a recommendation of life imprisonment unless a majority of their number so voted, an illegal restriction of their function under the law. See Rose v. State, 425 So. 2d 521 (Fla. 1982); Harich v. State, 437 So. 2d

1082 (Fla. 1983).

The instructions given to Mr. Hall's sentencing jury were crystal clear:

> The law requires that seven or more members of the jury agree upon any recommendation advising either the death penalty or life imprisonment.

(R. 700)(emphasis added). Unfortunately, these instructions were also flatly wrong -- the law in Florida is and has been that a capital sentencing jury vote of six-to-six is a recommendation of life. See Rose, supra, 425 So. 2d at 523; see also Harich, supra; Patten v. State, 467 So. 2d 975 (Fla. 1985). Thus, a majority is not required to return a verdict of life. Mr. Hall's sentencing jury was nevertheless informed that

> the sole issue which is submitted to you at this time . . . is whether a majority of your number recommend that the defendant be sentenced to death or to life imprisonment.

(R. 700)(emphasis added) (see also R. 699: "In these proceedings it is not necessary that the verdict of the jury be unanimous, but a verdict may be rendered upon the finding of a majority of the jury."). Moreover, the verdict form which the jury took back with them repeated and reaffirmed this erroneous statement of the law:

> A majority of the jury advise and recommend to the court that it impose a sentence of live [sic] imprisonment upon the defendant, Freddie Lee Hall.

(R. 700)(emphasis added). At no point was the jury correctly

instructed with regard to the number of votes required for a valid recommendation of life.

The final sentencing instructions were not the first occasion where Mr. Hall's jury was misinformed in this regard. The State informed the entire venire at voir dire that the jury's sentencing recommendation must be by majority, whether for life or death (R. 55). Again, in its closing argument at the sentencing phase, the State (mis)informed the jury that a recommendation of life must be made by a majority of their number (R. 689). No one ever correctly apprised Mr. Hall's jury that a life recommendation need not be made by a majority.

Mr. Hall's jury was erroneously instructed as matter of state law. See Rose, supra; Harich, supra. Unlike Mr. Harich's jury, at no point during the sentencing instructions did Mr. Hall's jury hear a correct statement of the law; i.e., that a six-six vote was a recommendation of life imprisonment. The error was thus even more egregious here. Mr. Hall may well have been sentenced to die because his jury was misinformed and misled. Such a procedure violates the eighth and fourteenth amendments, for it creates the substantial risk that the death sentence was imposed in spite of factors calling for a less severe punishment. Wrongly telling the jury that it had to reach a majority verdict "interject[ed] irrelevant considerations into the factfinding process, diverting the jury's attention from the

central issue" of whether life or death is the appropriate punishment. Beck v. Alabama, 447 U.S. 625, 642 (1980). The erroneous instruction encouraged Mr. Hall's jury to reach a death verdict for an impermissible reason -- its incorrect belief that a majority verdict was required. The erroneous instruction thus "introduce[d] a level of uncertainty and unreliability into the [sentencing] process that cannot be tolerated in a capital case." Id. at 643. The instruction created the clear danger that jurors may have changed their votes to death in order for a majority verdict to be reached -- not because of equivocation as to the appropriate penalty, but because of a belief that a majority vote had to be reached. The instruction, like an improper "Allen charge," falsely pressured the jurors to reach a verdict. A verdict on life or death should not be the product of such unreliability.

Because the erroneous instructions at issue here were the type of jury misinformation condemned by Caldwell v. Mississippi, 106 S. Ct. 2633 (1985), as they "create[d] a misleading picture of the jury's role," id. at 2646, the State must show that the erroneous instruction had no effect on the sentencing decision. Id. This the State cannot do, and Mr. Hall is thus entitled to resentencing.

In determining whether an instruction misled the jury, a court must determine how a reasonable juror would have understood

the instruction. Mills v. Maryland, 108 S. Ct. 1860 (1988), citing Francis v. Franklin, 471 U.S. 307 (1985). In the capital sentencing context, the Constitution requires resentencing unless a reviewing court can rule out the possibility that the jury's verdict rested on an improper ground:

> With respect to findings of guilt on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict. See, e.g., Yates v. United States, 354 U.S. 298, 312 (1957); Stromberg v. California, 283 U.S. 359, 367-368 (1931). In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds. See, e.g., Lockett v. Ohio, 438 U.S., at 605 ("[T]he risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments"); Andres v. United States, 333 U.S. 740, 752 (1948) ("That reasonable men might derive a meaning from the instructions given other than the proper meaning of [section] 567 is probable. In death cases doubts such as those presented here should be resolved in favor of the accused"); accord, Zant v. Stephens, 462 U.S. 862, 884-885 (1983). Unless we can rule out the substantial possibility that the jury may have rested its verdict on the "improper" ground, we must remand for resentencing.

Mills, supra, 108 S. Ct. at 1866-67 (footnotes omitted).

The special danger of an improper understanding of jury instructions in a capital sentencing proceeding is that such an

improper understanding could result in a failure to consider factors calling for a life sentence:

> Although jury discretion must be guided appropriately by objective standards, see Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (plurality opinion), it would certainly be the height of arbitrariness to allow or require the imposition of the death penalty [when the jury's weighing process is distorted by an improper instruction]. It is beyond dispute that in a capital case "'the sentencer [may] 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.'" Eddings v. Oklahoma, 455 U.S. 104, 110 (1982), quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) (emphasis in original). See Skipper v. South Carolina, 476 U.S. 1, 4 (1986). The corollary that "the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence'" is equally "well established." Ibid. (emphasis added), quoting Eddings, 455 U.S., at 114.

Mills, supra, 108 S. Ct. at 1865 (footnotes omitted). Cf. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987).

In Mr. Hall's case, a more than "substantial possibility" exists that the jury understood its instructions to require a majority verdict for life. A reasonable juror could not but have understood the instructions to require a majority verdict.

Mitigating evidence was presented and argued to Mr. Hall's jury. The jury was then told that it had to reach a majority verdict for life or death. A "substantial possibility" exists

that the jury relied on its incorrect instructions and was effectively precluded from considering the factors before it calling for a life sentence. Mills, supra. Caldwell and Mills represent significant changes in the law and were not available to Mr. Hall at the time of trial, direct appeal, or initial state-court post-conviction proceedings. This claim is thus cognizable in the instant proceeding, see Witt v. State, 387 So. 2d 922 (Fla. 1980), and relief should be granted.

CLAIM VI

THE TRIAL COURT'S INSTRUCTIONS TO THE JURY AT THE PENALTY PHASE OF MR. HALL'S CAPITAL TRIAL UNCONSTITUTIONALLY SHIFTED THE BURDEN OF PROOF WITH REGARD TO THE ISSUE OF PUNISHMENT, THEREBY DEPRIVING MR. HALL OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION, AND HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The sentencing court instructed the jurors at the penalty phase of Mr. Hall's capital trial that they were to consider whether the mitigating circumstances listed in the statute outweighed the aggravating circumstances found when deciding whether to vote for life or death. In Arango v. State, 411 So. 2d 172, 174 (Fla. 1982), the Florida Supreme Court made clear that such an instruction was error, holding that a capital sentencing jury must be told that a sentence of death is appropriate only "if the state showed the aggravating

circumstances outweighed the mitigating circumstances." This allocation of burdens is in compliance with due process requirements. Id.; Mullaney v. Wilbur, 421 U.S. 684 (1975). The standard upon which Mr. Hall's jury was instructed was error, unconstitutionally shifting the burden on the issue of whether he should live or die to Mr. Hall.

Mr. Hall's sentencing jury was instructed that it should first "determin[e] whether sufficient aggravating circumstances exist to justify the imposition of the death penalty," and then, after having already made a determination that death was the appropriate sentence, determine whether sufficient aggravating circumstances exist to outweigh any aggravating circumstances." (R. 695; see also R. 697). Thus, according to the court's instructions, once the state proved the existence of aggravation, death was presumed appropriate, unless the defense proved the existence of mitigation, and that the mitigation "outweighed" the aggravation already proven by the State. This is a classic example of unconstitutional burden shifting: under the instructions actually given Mr. Hall's sentencing jury, the state's only burden was to prove the existence of aggravating circumstances, at which point the jury would then determine whether the mitigating factors presented by the defendant outweighed those aggravating factors (See R. 648, 695, 697); i.e., at which point the ultimate burden on the issue of

punishment was unconstitutionally shifted to Mr. Hall.

In Arango v. State, 411 So. 2d 172, 174 (Fla. 1982), the Florida Supreme Court found that an instruction which apprised the sentencing jury that mitigating circumstances must outweigh aggravating circumstances, standing alone, violated the "principles of law enunciated in Mullaney [v. Wilbur, 421 U.S. 684 (1975)] and Dixon," Id. However, because Mr. Arango's jury had also been instructed that a death sentence "could only be given if the state showed the aggravating circumstances outweighed the mitigating circumstances," the instructions as a whole were not erroneous." Id. Here, by contrast, no such "curative" instruction was given. At no point during the sentencing instructions was Mr. Hall's jury informed that the State had the burden of proving that aggravating circumstances outweighed mitigating circumstances and thus that death was the appropriate. It therefore cannot be said here that the instructions "as a whole" were not erroneous. Cf. Arango, supra.

The focus of a jury instruction claim is the manner in which a reasonable juror could have interpreted the challenged instructions. See Francis v. Franklin, 471 U.S. 307 (1985); Sandstrom v. Montana, 442 U.S. 510 (1979). Mr. Hall's jury was effectively instructed that death was presumed appropriate once aggravating circumstances were established, unless Mr. Hall proved that the mitigating circumstances outweighed the

aggravating circumstances. A reasonable juror could well have understood that mitigating circumstances were factors calling for a life sentence, that aggravating and mitigating circumstances had differing burdens of proof, and that life was a possible penalty while at the same time understanding, based on the instructions, that Mr. Hall had the ultimate burden to prove that life was appropriate.

Affirming indisputable principles regarding the heightened reliability required in capital sentencing proceedings, the Eleventh Circuit has found a presumption such as the one employed here to violate the eighth amendment:

> Presumptions in the context of criminal proceedings have traditionally been viewed as constitutionally suspect. Sandstrom v. Montana, 442 U.S. 510 (1979); Francis v. Franklin, 471 U.S. 307 (1985). When such a presumption is employed in sentencing instructions given in a capital case, the risk of infecting the jury's determination is magnified. An instruction that death is presumed to be the appropriate sentence tilts the scales by which the jury is to balance aggravating and mitigating circumstances in favor of the state.
>
> It is now clear that the state cannot restrict the mitigating evidence to be considered by the sentencing authority. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). . . . Rather than follow Florida's scheme of balancing aggravating and mitigating circumstances as described in Proffitt [v. Florida, 428 U.S. 242, 258 (1976)], the trial judge instructed the jury in such a manner as virtually to assure a sentence of death. A

> mandatory death penalty is constitutionally impermissible. Woodson v. North Carolina, 428 U.S. 280 (1976); see also State v. Watson, 423 So. 2d 1130 (La. 1982) (instructions which informed jury that they must return recommendation of death upon finding aggravating circumstances held unconstitutional). Similarly, the instruction given is so skewed in favor of death that it fails to channel the jury's sentencing discretion appropriately. Cf. Gregg v. Georgia, 428 U.S. 153, 189 (1976) (sentencing authority's discretion must "be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action").

Jackson v. Dugger, No. 86-5630, slip op. at 10-11 (11th Cir. Feb. 1, 1988).

The Eleventh Circuit's concerns about such a presumption echo the concerns emphasized by the United States Supreme Court in its recent decision in Mills v. Maryland, 108 S. Ct. 1860 (June 6, 1988). There, the Court focused on the special danger that an improper understanding of jury instructions in a capital sentencing proceeding could result in a failure to consider factors calling for a life sentence:

> Although jury discretion must be guided appropriately by objective standards, see Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (plurality opinion), it would certainly be the height of arbitrariness to allow or require the imposition of the death penalty [when the jury's weighing process is distorted by an improper instruction]. It is beyond dispute that in a capital case "'the sentencer [may] 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.'" Eddings v. Oklahoma, 455 U.S. 104, 110 (1982), quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) (emphasis in original). See Skipper v. South Carolina, 476 U.S. 1, 4 (1986). The corollary that "the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence'" is equally "well established." Ibid. (emphasis added), quoting Eddings, 455 U.S., at 114.

Mills, supra, 108 S. Ct. at 1865 (footnotes omitted). Cf. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987).

The Mills Court concluded that, in the capital sentencing context, the Constitution requires resentencing unless a reviewing court can rule out the possibility that the jury's verdict rested on an improper ground:

> With respect to findings of guilt on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict. See, e.g., Yates v. United States, 354 U.S. 298, 312 (1957); Stromberg v. California, 283 U.S. 359, 367-368 (1931). In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds. See, e.g., Lockett v. Ohio, 438 U.S., at 605 ("[T]he risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments"); Andres v. United States, 333 U.S. 740, 752 (1948) ("That reasonable men might derive a meaning from the instructions given other than the proper meaning of

> [section] 567 is probable. In death cases doubts such as those presented here should be resolved in favor of the accused"); accord, Zant v. Stephens, 462 U.S. 862, 884-885 (1983). Unless we can rule out the substantial possibility that the jury may have rested its verdict on the "improper" ground, we must remand for resentencing.

Mills, supra, 108 S. Ct. at 1866-67 (footnotes omitted). This constitutionally mandated standard must now be applied to Mr. Hall's case.

The effects feared by the Jackson and Mills courts are precisely the effects resulting from the burden-shifting instruction given in Mr. Hall's case. In being instructed that mitigating circumstances must outweigh aggravating circumstances before the jury could recommend life, the jury was effectively told that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances outweighed the aggravating circumstances. Cf. Mills, supra. Thus, the jury was precluded from considering mitigating evidence and from evaluating the "totality of the circumstances," Dixon v. State, 283 So. 2d 1, 10 (1973), in considering the appropriate penalty. There is a "substantial possibility" that this understanding of the jury instructions resulted in a death recommendation despite factors calling for life. Mills, supra.

Mills establishes a new constitutional standard by which jury instruction claims such as the instant are to be resolved, a

standard which was obviously not available to Mr. Hall at the time of his trial, direct appeal, and initial post-conviction proceedings. Mills thus represents a substantial change in law, and this claim is now cognizable in the instant proceedings.

These errors violated Mills and Caldwell because Mr. Hall's jurors were misinformed as to their proper deliberations at sentencing. Mills and Caldwell represent significant changes in law, making Mr. Hall's claim cognizable in this proceeding, and making Mr. Hall's request for relief more than appropriate.

CLAIM VII

MR. HALL'S RIGHTS UNDER BRADY V. MARYLAND WERE VIOLATED BY THE PROSECUTION'S NON-DISCLOSURE PRIOR TO TRIAL OF THE FACT THAT HAIR EVIDENCE ALLEGEDLY LINKING THE DEFENDANT TO THE RAPE OF THE VICTIM WAS UNRELIABLE AND INADMISSIBLE.

The time constraints imposed by the pendency of a death warrant and the resulting expedited briefing schedule make it impossible for Mr. Hall to professionally and adequately brief this claim. Mr. Hall therefore respectfully refers the Court to his Rule 3.850 pleadings and other submissions in this regard.

IV. CONCLUSION

Mr. Hall has presented compelling claims establishing a violation of the most fundamental of constitutional rights. The lower court found the facts in Mr. Hall's favor but nevertheless denied relief. The lower court erred, and this Court should now correct that error.

A stay of execution should issue, and Rule 3.850 relief should be granted.

Respectfully submitted,

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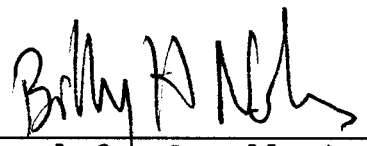
By: 

Counsel for Appellant,
Freddie Lee Hall

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 to Robert J. Landry, Assistant Attorney General, Department of Legal Affairs, Park Trammel Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602, this 12th day of September, 1988.

Attorney