IN THE SUPREME COURT OF FLORIDA

FREDDIE LEE HALL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 73029

APPEAL FROM THE CIRCUIT COURT
OF THE FIFTH JUDICIAL CIRCUIT
IN AND FOR SUMTER COUNTY

BRIEF OF APPELLEE

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PRELIMINARY STATEMENT

FREDDIE LEE HALL will be referred to as the "Appellant" in this brief and the STATE OF FLORIDA will be referred to as the "Appellee". The Record on Appeal will be referenced by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE FACTS

PROCEDURAL HISTORY

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

1/ Those issues included:

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

Thereafter, after the governor signed a death warrant on Hall, he filed a Rule 3.850 motion to vacate raising approximately two dozen issues. At the scheduled evidentiary hearing on the motion, Hall and his two collateral counsel declined to present evidence although they were given an opportunity to do so. The Florida Supreme Court affirmed the denial of relief. Hall v. State, 420 So.2d 872 (Fla. 1982).

Hall sought federal habeas corpus relief raising the same issues and on May 18, 1983, United States District Judge Black denied relief. Hall v. Wainwright, 565 F.Supp. 1222. On appeal, the Eleventh Circuit Court of Appeals affirmed in part, reversed in part and remanded for an evidentiary hearing concerning his absence from the courtroom at various stages and whether he had deliberately bypassed state remedies at the post-conviction proceeding. Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1984). The state's petition for certiorari was denied. Wainwright v. Hall, 471 U.S. 1107, 85 L.Ed.2d 858 (1985) as was Hall's petition. Hall v. Wainwright, 471 U.S. 1111, 85 L.Ed.2d 862 (1985).

U.S. District Judge Black denied relief after an evidentiary hearing and the Court of Appeals affirmed. Hall v. Wainwright, 805 F.2d 945 (11th Cir. 1986). The United States Supreme Court again denied review. Hall v. Dugger, ___ U.S. ___, 98 L.Ed.2d 206 (1987).

Undaunted, Hall subsequently sought habeas corpus relief in the Florida Supreme Court, claiming an error under Hitchcock v.

Dugger, 481 U.S. ___, 95 L.Ed.2d 347 (1987). The Florida Supreme Court denied the petition. Hall v. Dugger, ___ So.2d ___, 13 F.L.W. 320, rehearing denied July 20, 1988.

In a second Rule 3.850 motion to vacate, petitioner Hall brought three additional claims:

> (1) that his rights under Brady v. Maryland were violated by the prosecutor's alleged non-disclosure that hair evidence linking him to the rape of the victim was unreliable;
>
> (2) that Florida law precluded defense counsel from investigating and presenting non-statutory mitigating evidence and from having such evidence considered in mitigation.
>
> (3) that the death sentence violates the Eighth Amendment because imposed without consideration by judge and jury that defendant was brain damaged and psychotic.

Hall was given an opportunity to file additional pleadings and after having done so, the trial court summarily denied relief on September 9, 1988. Hall now appeals.

POINT ON APPEAL

WHETHER THE LOWER COURT ERRED IN SUMMARILY DENYING POST-CONVICTION RELIEF ON HALL'S SECOND, SUCCESSIVE MOTION.

ARGUMENT

The trial court correctly ruled that Hall's second successive motion for post-conviction relief should be denied as an abuse of procedure. Petitioner could have presented, and did not do so, such claims as these at the time of his first motion to vacate six years ago. Accordingly, this second petition was properly dismissed. See Witt v. State, 465 So.2d 510 (Fla. 1985); Christopher v. State, 489 So.2d 22 (1986); see also Delap v. State, 513 So.2d 1050 (Fla. 1987); Stewart v. State, 495 So.2d 164 (Fla. 1986).

(1) **The Hitchcock v. Dugger issue -**

With respect to appellant's Hitchcock v. Dugger ___ U.S. ___, 95 L.Ed.2d 347 (1987) claim, the trial court correctly denied relief since this Honorable Court previously rejected the Hitchcock claim in his most recent habeas corpus petition. Hall v. Dugger, ___ So.2d ___, 13 F.L.W. 320 (Fla. 1988). Obviously, a trial court may not overrule the judgment of the Florida Supreme Court. The courts have also held that a petitioner may not seek extraordinary relief in one tribunal after denial of the same relief in a different court with concurrent jurisdiction. Jenkins v. Wainwright, 322 So.2d 477 (Fla. 1975); Florida Parole and Probation Commission v. Baker, 346 So.2d 640 (Fla. 2d DCA

1977).

Appellant attempts to circumvent this Court's ruling by subdividing his Hitchcock claim into subelements. But, issues previously litigated cannot be repetitively asserted. Darden v. State, 496 So.2d 136 (Fla. 1986); Clark v. State, 467 So.2d 699 (Fl;a. 1985); Straight v. State, 488 So.2d 530 (Fla. 1986); see also In re Shriner, 735 F.2d 1236, 1240 (11th Cir. 1984) (condemning tactic of reasserting previous claim in a different format).

Hall's last minute effort to avoid execution by urging that counsel felt precluded from presenting non-statutory mitigating evidence also must be rejected. First, as this Court well knows from the record in Case No. 71,284 (reported at 13 F.L.W. 320) trial counsel requested an instruction that mitigating factors were not limited to the statute, so he was not operating on a false impression of the law. Secondly, this Court has found the Hitchcock issue to be harmless error:

> ". . . we are convinced beyond a reasonable doubt that it would have been given little weight and that Hall's sentence would have been no different."

Finally, petitioner had the opportunity to have trial counsel testify in his 1982 3.850 motion to vacate but deliberately by-passed that opportunity for tactical reasons. Hall v. State, 420 So.2d 872, 874 (Fla. 1982); Hall v. Wainwright, 805 F.2d 945 (11th Cir. 1986), cert. denied, Hall v. Dugger, ___ U.S. ___, 98 L.Ed.2d 206 (1987).

(2) **The Brady v. Maryland issue -**

The trial court correctly denied relief. His complaint about the prosecutor's reference to a hair sample seems to be a repetitive assertion of claim 1(e) in his 1982 motion. In addition, to the extent that Hall seeks to contort a personnel evaluation of hair analysis expert Diana Bass into a Brady violation, suffice it to say that this Court rejected an identical argument in Preston v. State, ___ So.2d ___, 13 F.L.W. 341 (Fla. May 26, 1988).

(3) **The Brain Damage issue -**

Appellant had the opportunity to present his most current assertion in his previous motion for post-conviction relief six years ago. In fact, he did urge Hall's low IQ at the September 30, 1982 hearing (pp. 68, 72 of that hearing). The attempt now to relitigate a similar claim constitutes an abuse of the writ. Cf. Woodard v. Hutchins, 464 U.S. 377, 78 L.Ed.2d 541 (1984) (an abuse of writ found vacating a stay of execution where last minute claim of insanity made without adequate explanation why the claim was not raised earlier).

(4) **The Caldwell v. Mississippi claim -**

Appellant failed to preserve for subsequent review by appropriate objection in the lower court and he failed to assert the basis of his Caldwell claim on direct appeal. Therefore, he

has procedurally defaulted on the issue. See Wainwright v. Sykes, 433 U.S. 72, 53 L.Ed.2d 594 (1977); Murray v. Carrier, 477 U.S. 478, 91 L.Ed.2d 397 (1986); Smith v. Murray, 477 U.S. 527, 91 L.Ed.2d 434 (1986); Engle v. Isaac, 456 U.S. 107, 71 L.Ed.2d 783 (1982); United States v. Frady, 456 U.S. 152, 71 L.Ed.2d 816 (1982).

The Florida Supreme Court has held that the failure to raise Caldwell claims on direct appeal result in a default precluding collateral consideration. See Aldridge v. State, 503 So.2d 1257 (Fla. 1987); Copeland v. Wainwright, 505 So.2d 425 (Fla. 1987); Phillips v. Dugger, 515 So.2d 227 (Fla. 1987); Foster v. State, 518 So.2d 901 (Fla. 1988).

Additionally, appellant failed to urge the claim on his first state motion to vacate proceeding and this second petition constitutes a successive petition and an abuse of the writ. Witt v. State, 465 So.2d 510 (Fla. 1985); Christopher v. State, 489 So.2d 22 (Fla. 1986).

Even if this issue were subject to collateral review now, appellant Hall should not prevail. The jury's responsibility was not denigrated as in Caldwell v. Mississippi, 472 U.S. 320, 86 L.Ed.2d 251 (1985).

Finally, on the merits of his Caldwell claim, this Court has consistently rejected Hall's argument. See Combs v. State, 525 So.2d 853 (Fla. 1988); Grossman v. State, 525 So.2d 833 (Fla. 1988).

The jury was given a correct explanation and statement of

Florida law (Tr 695-700) and it is not a violation of Caldwell to provide a correct statement of the law. See Harich v. Dugger, 844 F.2d at 1472-1475 (11th Cir. 1988).

(5) **The Maynard v. Cartwright issue -**

Appellant Hall failed to raise this issue on direct appeal and consequently the procedural default doctrine precludes collateral review. Wainwright v. Sykes, 433 U.S. 72, 53 L.Ed.2d 594 (1977); Murray v. Carrier, 477 U.S. 478, 91 L.Ed.2d 397 (1986); Smith v. Murray, 477 U.S. 527, 91 L.Ed.2d 434 (1986).

Additionally, six years ago in Hall's first Rule 3.850 motion to vacate and in his first federal habeas corpus petition, he urged the same contention that the aggravating factor of heinous, atrocious or cruel was unconstitutionally vague (Ground Q). The state and federal courts ruled that procedural default precluded collateral review. Hall v. State, 420 So.2d 872 (Fla. 1982); Hall v. Wainwright, 565 F.Supp. 1222, 1227, 1235 (U.S.D.C. M.D. Fla. 1983); Hall v. Wainwright, 733 F.2d 766, 777 (11th Cir. 1984). Appellant is thus presenting a second successive petition on the same issue and constitutes an abuse of the writ. See, Witt v. Wainwright, 755 F.2d 1396 (11th Cir. 1985).

Hall's reliance on Maynard v. Cartwright, ___ U.S. ___, 100 L.Ed.2d 372 (1988) is unavailing. Maynard is not a novel change in law; rather, as the United States Supreme Court observed: ". . . Godfrey controls this case" (100 L.Ed.2d at 382). Godfrey v. Georgia, 446 U.S. 420, 64 L.Ed.2d 398 was decided in 1980, well

prior to Hall's last round of collateral attack. Thus, there has been no new change of law requiring reconsideration of appellant's successive presentation of this claim.[2]

2/ Moreover, that Oklahoma courts had failed adequately to define its statutory terms heinous, atrocious or cruel does not support an assertion that Florida has failed to do so. The United States Supreme Court has approved Florida's scheme on this. Proffitt v. Florida, 428 U.S. 242, 49 L.Ed.2d 913 (1976). Indeed, the Maynard court contrasted Godfrey with Proffitt. See also Dobbert v. Strickland, 532 F.Supp. 545, 557 (1987) rejecting an attack on this statutory aggravating factor.

CONCLUSION

Based upon the foregoing reasons, arguments and citations of authority, the judgment and sentence of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by overnight Express Mail to Office of the Capital Collateral Representative, 1533 S. Monroe Street, Tallahassee, Florida 32301, this 12th day of September, 1988.

OF COUNSEL FOR APPELLEE