IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

FREDDIE LEE HALL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

_____/

REPLY BRIEF OF APPELLANT IN SUPPORT OF APPELLANT'S APPEAL FROM THE CIRCUIT COURT'S ORDER DENYING FLA.R.CRIM.P. 3.850 RELIEF, AND IN SUPPORT OF APPLICATION FOR STAY OF EXECUTION, AND, IF NECESSARY, MOTION FOR STAY OF EXECUTION PENDING THE 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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REPLY 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.

Almost all of the matters asserted by the State Appellee's Brief were discussed in Mr. Hall's initial brief. In fact, the State's cursory analysis with respect to Mr. Hall's Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), claim presents absolutely nothing to overcome Mr. Hall's entitlement to relief. The State's arguments are nevertheless addressed, again, herein.[1]

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[1]It should be noted at the outset that the State's assertion that Mr. Hall's petition was dismissed below as an "abuse of procedure" (State's Brief, p. 5) does not apply to Mr. Hall's Hitchcock claim. The trial court made no such finding with regard to this claim, and the State's brief itself, in discussing the Hitchcock claim (see State's Brief, pp. 5-6) makes clear that no such finding was made. The State in fact argues no such issue with regard to Mr. Hall's Hitchcock claim. No such finding applies to this claim: as this Court's pronouncements make evident, Hitchcock v. Dugger represents a significant change in law which mandates post-conviction merits review irrespective of a pre-Hitchcock procedural default ruling from either a state or federal court. See Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987).

First, the State argues simplistically that Mr. Hall's claim should be rejected on the basis of this Court's denial of habeas corpus relief on Mr. Hall's Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), challenge to the preclusive jury instructions concerning and to the restrained judicial consideration regarding the nonstatutory mitigating evidence which was in the record. State's Brief at 5-6, citing Hall v. Dugger, 13 F.L.W. 320 (Fla. 1988). This facile argument is devoid of merit; its lack of merit has in fact already been demonstrated by the discussion of the trial court's erroneous "law of the case" ruling presented in Mr. Hall's initial brief. See id., pp. 20-29.. As counsel for Mr. Hall explained during the habeas corpus action before this Court, the jury instruction and constrained judicial review aspects of the Hitchcock v. Dugger claim were being presented, as they should, in the state habeas corpus action, while the preclusion-on-counsel aspect of Mr. Hall's claim was being presented by motion pursuant to Rule 3.850. This is as it should be: Rule 3.850 is the proper means by which to present non-record facts, and this aspect of Mr. Hall's Hitchcock claim is based on non-record facts. Mr. Hall is not to blame for the fact that Florida's post-conviction rules are cumbersome. Cf. State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987)(directing Rule 3.850 evidentiary hearing on non-record facts in successive post-conviction action where post-conviction counsel had taken good

faith steps to comply with state rules governing collateral proceedings). He has litigated his case in accordance with the rules. In any event, this Court's finding that relief was inappropriate on the state habeas action because it considered the nonstaturoty mitigating evidence in the record "weak" by no means bars relief on Mr. Hall's Rule 3.850 claim. It is in fact precisely because of the preclusion on counsel that only evidence which the Court considered "weak" was adduced. But for that unconstitutinal preclusion, powerful and compelling nonstatutory mitigating evidence would have been presented.

This is a proper Rule 3.850 claim, a claim premised upon non-record facts, for only a Rule 3.850 trial court can conduct evidentiary proceedings and initially pass on those non-record facts. See Cooper v. Wainwright, 807 F.2d 881, 889 (11th Cir. 1986)(evidentiary hearings generally required in cases raising Lockett claims); see also McCrae v. State, 510 So. 2d 874, 880 and n.3 (Fla. 1987)(basing post-conviction grant of relief pursuant to Hitchcock on non-record facts established during Rule 3.850 trial court proceedings).

The State fails to recognize that Hitchcock/Lockett claims have three components: a preclusion on the jury; a preclusion on the court; and a preclusion on counsel. See, e.g., Hargrave v. Dugger, 832 F.2d 1529 (11th Cir. 1987)(en banc); cf. Songer v. Wainwright, 769 F.2d 1488, 1494 (11th Cir. 1985)(en banc) (Clark,

Kravitch, Johnson and Anderson, JJ., concurring); Harvard v. State, 486 So. 2d 537 (Fla. 1986). This third, and in Mr. Hall's case most significant, aspect of a petitioner's Hitchcock/Lockett claim is properly brought in a Rule 3.850 action, for such claims are generally -- and specifically here -- founded upon non-record facts.

Mr. Hall presented his claim to the proper forum -- the Rule 3.850 trial court. As Mr. Hall's initial brief explained, id. at 1-29, the trial court found all relevant facts in Mr. Hall's favor: that counsel were in fact constrained by the then-existing law and the trial court's restrictive rulings, 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's Order denying Rule 3.850 relief), p. 4 (emphasis added).

Rule 3.850 was the proper way to present and "establish", Circuit Court Order, p. 4, the non-record facts attendant to the preclusion on counsel aspect of Mr. Hall's Hitchcock/Lockett

claim. The facts have now been proven,[2] and the evidence is detailed in Mr. Hall's initial brief -- evidence which, because Mr. Hall's trial attorneys' efforts were strapped by the statute and the sentencing court's preclusive rulings, never reached the jury charged with deciding whether Freddie Hall should live or die. The State has not and cannot contest the facts which Mr. Hall has proven below: the facts compellingly speak for themselves. See Appellant's Summary Initial Brief, pp. 1-106. The claim was properly brought under Rule 3.850, and should be determined at this juncture. See McCrae, supra. Cf. State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987).[3]

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[2]It is noteworthy that the State did not contest the facts supporting Mr. Hall's claim before the lower court and has contested neither the facts nor the Circuit Court's findings in Mr. Hall's favor before this Court.

[3]Of course, as this Court's and the Eleventh Circuit's settled precedents make clear, Mr. Hall's Hitchcock claim is subject to no procedural bar. See e.g., Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987)(no procedural bar any longer applicable Hitchcock v. Dugger/Lockett v. Ohio claims); Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987)(same); Zeigler v. Dugger, 524 So. 2d 419, 420 (Fla. 1980)(same); Cooper v. Dugger, 526 So. 2d 900, 901 and n.2 (Fla. 1988)(same); Combs v. State, 525 So. 2d 853, 855 (Fla. 1988)(same); see also Armstrong v. Dugger, 833 F.2d 1430 (11th Cir. 1987)(no adequate and independent state procedural bar applicable to Hitchcock\Lockett claims by Florida capital petitioners since such claims have been subject to no procedural bar in the Florida state courts after the issuance of Hitchcock); Stone v. Dugger, 837 F.2d 1477 (11th Cir. 1988); Messer v. Florida, 834 F.2d 890 (11th Cir. 1987).

The second (and only factual) argument asserted in the State's brief is: ". . . trial counsel requested an instruction that mitigating factors were not limited to the statute, so he (sic) was not operating on a false impression of the law." State's Brief, p. 6. The facts established below were that counsel would have presented compelling nonstatutory mitigating evidence had the sentencing court not precluded them. Of course, both in this trial and in the trial conducted approximately one month before this one involving Mr. Hall and codefendant Mack Ruffin, counsel requested instructions on nonstatutory mitigation. Counsel wanted to, and would have, presented a compelling nonstatutory case for life had the sentencing court not constrained their efforts. This, in fact, is the basis of the Rule 3.850 claim which Mr. Hall established below. The State conveniently fails to inform the court that the instruction requested was denied, as it was denied in the case involving Mr. Hall and codefendant Mack Ruffin tried in Hernando County prior to the instant trial. That, of course, is the point of Mr. Hall's claim. As reflected in the affidavits which Mr. Hall presented below (see e.g., App. 2), would have developed, investigated, and presented nonstatutory mitigating evidence. The trial court relying on its view of the law at the time would not let them do it. It was precisely because of rulings such as those -- because of the limiting statutory construction imposed

by the trial court -- that the overwhelming nonstatutory case for life discussed in Mr. Hall's initial brief never reached the jury.

The State's argument in this regard is of course not only far from sufficient to refute Mr. Hall's claim, but in fact demonstrates Mr. Hall's entitlement to relief: counsel did want to present and would have presented nonstatutory mitigating evidence (see affidavit of Mr. Robuck and Mr. Aulls, App. 2); the statute and the sentencing court's rulings, however, tied their hands.

Third, the State makes one passing reference to this Court's habeas corpus holding that the trial court's and jury's failure to consider the nonstatutory mitigating evidence which made its way into the record was "harmless". See State's Brief, p. 6. In that proceeding, this Court denied relief based upon its view that the nonstatutory mitigation in the record was "weak". Hall v. Dugger, 13 F.L.W. 320 (Fla. 1988). But see id. at 321(Kogan, Shaw, and Barkett, JJ., dissenting)("Here, the [harmless error] 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 significant mitigating evidence . . . did not contribute to the decision to impose the death sentence.")

What the State fails to mention, and what has now been proven below, is that it is precisely because of the preclusion

on counsel that only nonstatutory mitigating evidence which the majority of this Court deemed "weak" made its way into the record. But for the preclusion on counsel (see App. 2), an overwhelming case for life would have been presented. It has been presented now and established below. That evidence, falling into approximately twenty-two areas of acknowledged nonstatutory mitigation, see Appellant's Summary Initial Brief, pp. 9-12 n.2, is far from "weak" and far from harmless beyond a reasonable doubt.[4] Mr. Hall's initial brief, if nothing else, makes this abundantly clear. See id. at pp. 57-106.

Finally, it is hard to fathom the purpose of the State's reference to the fact that it has been ruled that Mr. Hall waived his opportunity to present an "ineffective assistance of counsel" claim. State's Brief, p. 6. Mr. Hall is not presenting an ineffective assistance of counsel claim here. To the contrary, Mr. Hall's claim is premised on the fact that counsel would have

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[4]Of course, it is the State's burden to establish that the error had "no effect" or that it was "harmless beyond a reasonable doubt." See Cooper v. Dugger, 526 So. 2d 900, 903 (Fla. 1988). The State has not only failed to contest, before this Court or the lower court, the facts presented by Mr. Hall in support of his Hitchcock/Lockett claim, but the State has also failed to present any reason why the preclusion on counsel and its resulting effects can be characterized as "harmless", and much less so harmless beyond a reasonable doubt.

presented nonstatutory mitigating evidence had the court and the statute not precluded their efforts.

One last point should be noted. The State has said absolutely nothing to even suggest, and much less so to establish, that the trial court's preclusion on counsels' efforts to present nonstatutory mitigating evidence to Mr. Hall's jury was harmless under any standard. See State's Brief, pp. 5-6. The State shies from even mentioning the significant nonstatutory mitigating evidence established below. The State was able to prove but three aggravating circumstances, two of which related to the offense. Cf. Mikenas v. Dugger, 519 So. 2d 601, 602 (Fla. 1988)(Finding Hitchcock error harmful, in part, because "[a]ll of the aggravating circumstances were directly related to the murder itself except one . . ."). As discussed in Mr. Hall's initial brief, pp. 9-12 n.2, 57-106, compelling evidence falling into approximately twenty-two categories of nonstatutory mitigation was presented to the Rule 3.850 Circuit Court, evidence which would have been presented by trial counsel had the statute then in effect and the trial court's rulings not constrained their efforts. The Circuit Court found, as a matter of fact, that the evidence presented by Mr. Hall "establish[ed]" the nonstatutory mitigating circumstances proffered. Circuit Court Order, p. 4 (emphasis added).

Consequently, under no rational construction of any harmless error standard can the preclusion on counsel's efforts be characterized as "harmless error."[5] It simply cannot be logically said, under even the most stringent standard of review, that Mr. Hall's jury's failure to consider the substantial nonstatutory mitigation proven below was "harmless". The evidence, in fact, in its type and quality, speaks for itself much more compellingly than the twenty-two categories counsel has outlined as an aid to the Court. See Appellant's Summary Initial Brief, pp. 9-12 n.2.

We respectfully urge the Court to carefully review it, id. at pp. 57-106, for it establishes that in this case,

> [t]he state has not demonstrated that the error . . . was harmless beyond a reasonable doubt or had no effect on the jury . . .

Cooper v. Dugger, 526 So. 2d 900, 903 (Fla. 1988). This jury heard aggravation primarily related to the offense, see Mikenas,

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[5]Of course, Mr. Hall's jurors voted for life, that decision could not have been overridden, for the nonstatutory mitigation proven before the Rule 3.850 Circuit Court establishes much more than a "reasonable basis" for such a recommendation. See Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975); McCampbell v. State, 421 So. 2d 1072 (Fla. 1982); Wasko v. State, 505 So. 2d 1314 (Fla. 1987); Ferry v. State, 507 So. 2d 1373 (Fla. 1987); Brookings v. State, 495 So. 2d 135 (Fla. 1986); Cailler v. State, ___ So. 2d ___, No. 70,297 (Fla. April 7, 1988).

supra, but heard only what this Court viewed as "weak", Hall, supra, 13 F.L.W. 320, mitigating evidence about the offender and the offense. The reasons for this have been now proven below: counsels' hands were tied. That is the reason why only evidence which a majority of this Court deemed "weak" reached the jury.

Mr. Hall has proven his entitlement to Rule 3.850 relief. "[U]nder these circumstances, [Mr. Hall] is entitled to a new sentencing hearing." Cooper, supra, 526 So. 2d at 903, citing, Hitchcock v. Dugger.

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 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.

Mr. Hall would rely on his previous submissions with respect to this issue. Moreover, no procedural bar can be applied to this claim for it challenges the very carrying out of Mr. Hall's now-scheduled execution. It is therefore properly brought here. See, e.g., Ford v. Wainwright, 106 S. Ct. 2545 (1986).

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.

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), modifying 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 in Mr. Hall's trial court Consolidated Emergency Application for Stay, etc., and initial brief before this Court, violated his 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. 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. Mann and Adams control, and Mr. Hall is entitled to the same relief as Mr. Mann.

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 or federal 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). The State asserts 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, p. 4). The State does not, however, indicate how Mr. Hall could have raised the instant eighth amendment claim in those earlier 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 of those prior proceedings, e.g., 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); Downs 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, supra. 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 applies to the Florida capital sentencing scheme. Mann v. Dugger, supra. 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 basis of the claim was 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. This claim is before the court on the merits, and the merits require relief. Mr. Hall is entitled to, at a minimum, a stay of execution pending the United States Supreme Court's ultimate decision in Adams.

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.

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 v. State, supra; Tafero v. State, 459 So. 2d 1034 (Fla. 1984); Downs, supra. The claim is before this Court on the merits, and the merits require relief.

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.

The State now argues in this Court, for the very first time in these proceedings, that this claim is procedurally barred. The procedural defenses the State now brings are brought too late; the State's withholding of its procedural contentions from the lower court precludes its effort to now raise those contentions for the first time on this appeal. See Cave v. State, No. 72,637

___ So. 2d ___ (Fla. July 1, 1988), slip op. at 9-10(where litigant fails to present claim to rule 3.850 trial court, claim cannot be urged for first time on appeal). The State waived any procedural arguments by keeping them hidden below. Id. The State's efforts to now belatedly level such arguments should be foreclosed. Cf. Boykins v. Wainwright, 737 F.2d 1539, 1545 (11th Cir. 1984); LaRoche v. Wainwright, 599 F.2d 722, 724 (5th Cir. 1979); Washington v. Watkins, 655 F.2d 1346, 1368 (5th Cir. 1981).[6]

The State alternatively asserts (also for the first time in these proceedings) a bizarre harmless error contention, arguing that "[a]ny error would be harmless anyway since a majority of the jury recommended death." (State's Supplemental Brief, p. 3). Of course, had not a majority recommended death, neither this claim (nor any other claim challenging the constitutionality of a death sentence) would have been presented: there would be no death sentence and Mr. Hall would not be one week away from an execution.

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[6]In any event, Mr. Hall's claim is based on substantial changes in the law, Caldwell, supra; Mills, supra, and there is therefore no procedural basis upon which review of the claim can be declined.

We cannot tell, because the trial court never specifically inquired regarding the actual vote, what the "majority" which the State asserts renders the constitutional error addressed herein harmless was. Cf. Harich v. State, 437 So. 2d 1082 (Fla. 1983)(similar erroneous jury instruction harmless where jury had also been instructed that a 6-6 vote was a valid life recommendation and ultimately returned with a 9-3 recommendation of death). Mr. Hall's jury had substantial difficulty reaching a verdict, and did so only by an obviously narrow margins. The risk of "a possibility that a single juror" could understand the instructions given to require a majority vote for either life or death and "consequently require the jury to impose the death penalty," Mills v. Maryland, 108 S. Ct. 1860, 1870 (1988), is simply too great to allow Mr. Hall's sentence of death to withstand eighth amendment scrutiny. It thus cannot be said here that the error was harmless beyond a reasonable doubt. Given the nonstatutory mitigating evidence which was present on the record, and the obviously slim margin by which the jury recommended death, the State cannot show (and has not shown) "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Satterwhite v. Texas, 108 S. Ct. 1792, 1798 (1988), quoting Chapman v. California, 386 U.S. 18, 24 (1967).

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.

As with the previous claim, the State now asserts, for the first time in these proceedings, that this claim is procedurally barred. Again, the State waived any procedural defenses by withholding them below and asserting them for the first time on appeal. See Cave, supra; Boykins, supra; LaRoche, supra; Washington, supra.

As argued in Mr. Hall's initial brief, any procedural bar which the State now asserts is in any event inapplicable to the instant claim. Mills v. Maryland, supra, and Caldwell v. Mississippi, supra, now govern the resolution of this claim. Under Mills, 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 1864 (footnotes omitted).

Mills and Caldwell represent changes in law, and consideration of this claim on the merits is now appropriate. See Witt v. State, 387 So. 2d 922 (Fla. 1980); cf. Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987). The merits demand relief.

CONCLUSION

Mr. Hall has established his entitlement to Rule 3.850 relief. The Circuit Court found all facts in Mr. Hall's favor, but nevertheless denied relief. The Circuit Court erred. Mr. Hall urges that this Court reverse the lower court's ruling,

enter a stay of execution, and grant him the Rule 3.850 relief to which he has established his entitlement.

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 U.S. MAIL/HAND DELIVERY, to to Robert J. Landry, Assistant Attorney General, Park Trammel Building, 1313 Tampa Street, 8th Floor, Tampa, Florida 33602, this 14th day of ~~August~~ September, 1988.

Billy H Nolas
Attorney