IN THE SUPREME COURT OF FLORIDA

NO. 73,609

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IAN LIGHTBOURNE,

Petitioner,

v.

RICHARD L. DUGGER, Secretary,
Department of Corrections, State of Florida,

Respondent.

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# PETITIONER'S REPLY IN SUPPORT OF PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF HABEAS CORPUS, REQUEST FOR STAY OF EXECUTION, AND APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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## PRELIMINARY STATEMENT

Counsel for Mr. Lightbourne returned to their office (located in Tallahassee, Florida) after conducting a hearing in Mr. Lightbourne's case before the circuit court in Ocala, Florida, on January 30, 1989. The State's responses to the instant habeas corpus petition and to Mr. Lightbourne's Rule 3.850 motion were provided on that date while counsel were in Ocala. After returning to Tallahassee, counsel immediately began working on this reply and an anticipatory Rule 3.850 appeal brief. Given the constraints imposed by this litigation and that of another pressing action involving a condemned Florida capital prisoner, Clark v. Dugger, __ F.2d ___ (11th Cir. Jan. 27, 1989),[1] counsel have gone without sleep for three days. Shortcomings that may be perceived in this reply are a result of these factors. Undersigned counsel respectfully apologize to the Court for any shortcomings in this pleading.

## CLAIM I

THE SENTENCING COURT'S REFUSAL TO ALLOW MR. LIGHTBOURNE TO PRESENT MITIGATING EVIDENCE VIOLATED HITCHCOCK V. DUGGER AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The State misrepresents the record. Mr. Fox, Mr. Lightbourne's trial counsel, initially asked that the jury receive "the factual portion of the PSI" (R. 1495). When the trial court responded, "Oh, you want the good part but not the confidential part?," Mr. Fox replied, "That's my first request." Id. The court denied this request "on the basis that it's hearsay and -- hearsay, and not subject to Cross Examination or amounts -- and is established facts." Id. Mr. Fox then inquired

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1. Both Mr. Lightbourne's and Mr. Clark's cases involve 20-day death warrants and the same execution date.

whether the ruling would be the same if he requested that the entire report go to the jury. Mr. Fox stated "that will be my next request, based on the Court's previous ruling that the factual portion is hearsay" (R. 1496). The Court replied "the whole thing is hearsay. I have to be consistently correct." Id. Thus trial counsel attempted to have an excised PSI go to the jury -- the PSI minus the victim impact information. Counsel, desperate to get some mitigation to the jury, then offered the entire PSI. The fact that the PSI contained improper information under Booth v. Maryland, 107 S. Ct. 2529 (1987), is irrelevant. Counsel wanted the jury to have the evidence. Counsel was precluded from presenting the PSI to the jury either with or without the victim impact information.

The State argues that despite the trial court's ruling that the evidence was inadmissible hearsay, the court could have ruled within its discretion to preclude the presentation of nonstatutory mitigation. For this proposition, the State erroneously relies on Stewart v. State, 420 So. 2d 862 (Fla. 1982). However, there the question was whether the evidentiary phase of the penalty phase should be reopened to permit testimony. At the time Stewart argued that the testimony should be allowed in order "to show that [a witness that had already testified] had lied." 420 So. 2d at 865. The Florida Supreme Court noted that on appeal Stewart changed his justification for attempting to present additional testimony. The Court noted that an objection had not been registered to the trial court's ruling. Apparently, the reference was made to highlight the failure to proffer the testimony such that the appellate court could find some basis in the record for Mr. Stewart's claim that the witness was to be called to testify to Mr. Stewart's remorse. The facts of Mr. Lightbourne's case are quite different indeed.

In connection with this, section 90.104(1)(b) of the Evidence Code is particularly pertinent:

> (1) A court may predicate error, set aside or reverse a judgment, or grant a new trial on the basis of admitted or excluded evidence when a substantial right of the party is adversely affected and:
>
> . . . .
>
> (b) When the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer of proof or was apparent from the context within which the questions were asked.

Here section 90.104(1)(b) was clearly applicable and this issue was clearly preserved for appeal. There exists no legitimate reason for appellate counsel's omission.

Moreover, here the trial court specifically ruled only that the evidence was inadmissible "hearsay": the trial judge did not prohibit the evidence because it would require additional testimony. Stewart is certainly distinguishable on that basis. In addition, Stewart did not involve the presentation of mitigating evidence, evidence which under Lockett v. Ohio, 438 U.S. 586 (1978), Mr. Lightbourne had an absolute constitutional right to present.

This Court noted in 1985 that substantial mitigation was contained in the PSI. Lightbourne v. State, 471 So. 2d 27 (Fla. 1985). However, because of the trial court's ruling, this evidence never reached to the jury. This Court has recognized that Lockett requires "a sentencer 'not be precluded from considering . . . any aspect of a defendant's character or record and any of the circumstances of the offense.'" Riley v. Wainwright, 517 So. 2d 656, 657 (Fla. 1987). As a result, this Court in that case went on to hold:

> Clearly, our prior cases indicate that the standards imposed by Lockett bind both judge and jury under our law. We reject the state's argument that a new advisory jury upon resentencing is not constitutionally required under Florida's sentencing scheme. If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure.

517 So. 2d at 659. Here the jury was precluded from considering mitigation by the trial court's erroneous ruling. The ruling was wrong under Lockett and section 921.141 of the Florida Statutes. It was certainly deficient performance not to read the record, to see Mr. Fox's ardent attempts to introduce the PSI, and to pursue this issue on direct appeal. Had counsel raised this issue, Mr. Lightbourne's sentence of death would have been overturned and a new sentencing hearing ordered.

The State's fumbling efforts to explain why relief should not be granted on the basis of this claim, and the State's misstatements of the record,[2] are far, far from sufficient to rebut Mr. Lightbourne's entitlement to relief.

CLAIM II

THE SENTENCING COURT ERRED BY FAILING TO INDEPENDENTLY WEIGH AGGRAVATING AND MITIGATING CIRCUMSTANCES, CONTRARY TO MR. LIGHTBOURNE'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Respondent contends that there was no deficient performance in appellate counsel's failure to challenge the trial court's failure to independently weigh aggravating and mitigating circumstances. Respondent argues that this is so because of

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2. For example, the Respondent asserts that the pre-sentence investigation report contained the "conclusions of the appointed psychiatrist, Dr. Barnard, to the effect that no substantial or emotional defect seemed to exist." Response, pp. 7-8 (emphasis in original). The Respondent's misstatement of what the PSI reflects is grossly misleading. Contrary to the State's assertions, Dr. Barnard never said that there was "no substantial or emotional defect." He did say, according to the PSI, that Mr. Lightbourne was "oriented", had no loosening of associations of delusions, but had "Mild deficits in both recent and remote memory" (consistent with brain damage and substance abuse, see Summary Initial Brief on Rule 3.850 Appeal, Claim IV [accompanying this petition]), and that he was competent to stand trial. Nowhere in the PSI does Dr. Barnard discuss emotional disturbances or defects, and nowhere does he discuss mitigation. (The PSI author never asked; neither did trial counsel. Id.) Nowhere does he present aggravation. Nothing said by Dr. Barnard was harmful, contrary to the State's implication.

"this claim's utter lack of potential merit," but never explains why the claim is devoid of merit. Respondent asserts, contrary to settled case law, that there is no authority requiring that the sentencing judge prepare his own findings of fact.

In Nibert v. State, 508 So. 2d 1, 4 (Fla. 1987) (emphasis added), this Court stated:

> Although we strongly urge trial courts to prepare the written statements of the findings in support of the death penalty, the failure to do so does not constitute reversible error so long as the record reflects that the trial judge made the requisite findings at the sentencing hearing.

Thus under Nibert, and as Mr. Lightbourne's petition explained, the issue is whether the trial judge here independently weighed the aggravating and mitigating circumstances, and then made the requisite findings. See section 921.141(3), Florida Statutes.

In determining whether the requisite independent weighing occurred, the circumstances involved in the issuance of the findings must be considered. In Patterson v. State, 513 So. 2d 1247 (Fla. 1987), the sentencing judge without adequately articulating this finding (see Nibert, supra), ordered the State to "prepare an order of sentence." 513 So. 2d at 1262. There, as here, once the order was drafted the judge could have "reject[ed] the proposed findings." Response at 10. In Patterson, this Court concluded that the judge's decision to simply sign the proposed order was not the independent judgment required under section 921.141(3), supra. The judge did the same thing here. In Patterson, this Court stated, "It is our view that the judge must specifically identify and explain the applicable aggravating and mitigating circumstances." 513 So. 2d at 1263. Here, the judge never "specifically identif[ied] and explain[ed] the applicable aggravating and mitigating circumstances." He simply read, verbatim the proposed findings into the record, proposed findings handed to him by the State, and signed them. The judge thus failed to comply with section

921.141(3), supra, in sentencing Mr. Lightbourne to death. He simply signed what the State had already prepared.

In Patterson, this Court did not require that an objection be registered when a judge fails to perform his statutory duty and independently weigh the aggravating and mitigating circumstances. No trial-level contemporaneous objection can be applied when the error complained of is error in the trial court's sentencing order, for errors in a sentencing order render the resulting death sentence unreliable. (The State argues that Nibert hints at a contemporaneous objection rule; however, there, this Court addressed the merits notwithstanding the fact that defense counsel had not objected to the State's preparing of the proposed order.)

Appellate counsel's failure to raise this issue was deficient performance. Section 921.141(3) was not complied with by the sentencing judge. "If appellate counsel had brought [this issue to this Court's] attention on appeal, a new [sentencing] would have been granted." Johnson v. Wainwright, 498 So. 2d 938, 939 (Fla. 1986). Thus a new sentencing should be ordered now.

CLAIM VI

ARGUMENT, INSTRUCTION AND COMMENT BY THE PROSECUTOR AND COURT THROUGHOUT THE COURSE OF THE PROCEEDINGS RESULTING IN IAN LIGHTBOURNE'S SENTENCE OF DEATH DIMINISHED HIS CAPITAL 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, IN VIOLATION OF MR. LIGHTBOURNE'S RIGHTS TO AN INDIVIDUALIZED AND RELIABLE CAPITAL SENTENCING DETERMINATION, AND IN VIOLATION OF CALDWELL V. MISSISSIPPI AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

The State argues that this Court has "specifically" held that a violation of Caldwell v. Mississippi, 472 U.S. 320 (1985) "cannot be raised in a petition for writ of habeas corpus." (State's Response, p. 18). For this proposition, the State cites

Jones v. Dugger, 533 So. 2d 290 (Fla. 1988), Tafero v. Dugger, 520 So. 2d 287 (Fla. 1988), and Phillips v. Dugger, 515 So. 2d 227 (Fla. 1987). Even a casual reading of these cases (and many others) shows that this Court has never held that a Caldwell violation cannot be raised in a petition for writ of habeas corpus. Rather, in accordance with its view of the claim, see Daugherty v. State, 533 So. 2d 287 (Fla. 1988), this Court has consistently held that it will not grant relief on the basis of Caldwell claims presented in habeas corpus actions because "[t]his Court has determined that Caldwell is inapplicable in Florida," Daugherty, supra, and that Caldwell does not involve a substantial change in law. Mr. Lightbourne respectfully urge that the Court reconsider that ruling. But if this Court is to deny relief on this claim, Mr. Lightbourne respectfully submits that it would be a gross miscarriage of justice to single him out as the only Florida capital litigant whose Caldwell claim will not be even heard in a habeas action. This Court is not mean-spirited, and the State's invitation that the Court be mean-spirited and render an unprecedented ruling with dire collateral consequences in the federal courts should be rejected. There is no precedent for the State's unfounded invitation. To the contrary, even the cases cited by the State demonstrate that this Court hears Caldwell claims presented in habeas corpus actions, and then denies them. Thus, in Jones v. Dugger, supra, cited by the State, this Court said,

> [Petitioner has presented an] assertion based on Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985), that the jury's responsibility in making its sentencing recommendation was impermissibly diminished. This argument is procedurally barred because there was no objection to the statements which are said to have offended the principles of Caldwell. Moreover, this argument should have been made on direct appeal because Caldwell did not represent a change in the law upon which to justify a collateral attack. Foster v. State, 518 So. 2d 901 (Fla. 1987), cert. denied, ___ U.S. ___, 108 S.Ct. 2914, 101 L.Ed.2d 945 (1988).

533 So. 2d at 292. Similarly, in Tafero v. Dugger, the Court explained,

> Tafero also claims that the trial court improperly diminished the jurors' sense of responsibility in sentencing in violation of Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). Caldwell is not a change in the law which will justify postconviction relief. Ford v. State, Foster v. State, 518 So.2d 901 (Fla. 1987). Tafero is, therefore, procedurally barred from raising this claim in this proceeding.

520 So. 2d at 289. And in Phillips v. Dugger, this Court held:

> In this petition Phillips now raises a challenge to the sentencing proceeding based on Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct 2633, 86 L.Ed.2d 231 (1985). As grounds for his writ of habeas corpus Phillips maintains that comments from the prosecutor and the judge to the effect that the jury's role in the sentencing proceeding was advisory and that the trial judge would make the final determination of sentence diminished the jury's sense of responsibility for its actions. Thus, petitioner argues, he was denied a fair and individualized sentencing proceeding, which is guaranteed by the eighth amendment to the United States Constitution.
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> Phillips's trial counsel did not object to these comments at the time they were made, and his direct appeal did not argue that the jury was in any way adversely influenced by them. The failure to raise this issue at trial and on direct appeal means the claim is procedurally barred. Caldwell, which was based in part on prior Florida case law, was not a sufficiently significant change in the law upon which to base a collateral attack. Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980).

515 So. 2d at 227-8.

Each of these cases involved a petition for writ of habeas corpus, and in none of them did this Court refuse to address the Caldwell claim based on the vehicle by which it was brought to the Court's attention. Rather, this Court has consistently applied a bar based on the belief that Caldwell does not apply in Florida, and is not a substantial change in law.

This Court explained at length in Combs v. State, 525 So. 2d 853 (Fla. 1988) its understanding of why Caldwell does not

apply in Florida: "In Caldwell, the United States Supreme Court was considering the application of the Mississippi death penalty procedure which is dissimilar to that utilized by Florida." Id. at 856.

More recently, this Court reiterated its holding in Combs: "This Court has determined that Caldwell is inapplicable in Florida. Combs v. State [supra]." Daugherty v. State, 533 So. 2d 287 (Fla. 1988). See also, Henderson v. Dugger, 522 So. 2d 835 (Fla. 1988). That is why this Court denies Caldwell claims, whether brought by habeas corpus petition or under Rule 3.850.

This Court has also held that Caldwell does not represent a change in law of the type upon which relief should be granted in post-conviction actions, whether those actions involve a Rule 3.850 motion, or a habeas corpus petition. See Jones v. Dugger, supra; Tafero v. Dugger, supra; Phillips v. Dugger, supra; see also Demps v. State, 515 So. 2d 196 (Fla. 1987); Cave v. State, 529 So. 2d 293 (Fla. 1988); Foster v. State, 518 So. 2d 901 (Fla. 1987). Where this Court has recognized a sufficient change in law to overcome procedural bars (for example, claims predicated upon Hitchcock v. Dugger, 107 S. Ct. 1821 (1987),) a petition for habeas corpus relief has been recognized as a proper vehicle for review of such claims.

Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987) involved a petition for writ of habeas corpus. In granting the petition, this Court held:

> We now find that a substantial change in the law has occurred that requires us to reconsider issues first raised on direct appeal and then in Downs' prior collateral challenges.

Id. at 1070.

In addressing another such petition for writ of habeas corpus, this Court held:

> As a threshhold 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. Downs v. Dugger, 514 So.2d 1069 (Fla. 1987); Thompson v. Dugger, 515 So.2d 173 (Fla. 1987).

Cooper v. Dugger, 526 So. 2d 900, 901 (Fla. 1988); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987) (same).

This Court addressed a similar issue in Mr. Mikenas' petition for writ of habeas corpus, finding that:

> Mikenas is not barred from raising this claim since Hitchcock represented a sufficient change in the law to defeat the application of procedural default. Thompson v. Dugger, 12 F.L.W. 469 (Fla. Sept. 9, 1987).

Mikenas v. State, 519 So. 2d 601 (1988). Thus, where this Court has recognized that a case involves a substantial change in the law, it has not hesitated to review and grant relief pursuant to a petition for writ of habeas corpus.

The State nevertheless argues that Mr. Lightbourne's Caldwell issue should have been brought in his Rule 3.850 motion rather than his petition for writ of habeas corpus. The State, however, can muster no authority for this proposition. While Caldwell claims may also be cognizable in Rule 3.850 proceedings, this Court hears them on habeas corpus petitions as well. It denies them pursuant to the same analysis, whether they are brought in a habeas application or a Rule 3.850 motion. In fact, no case involving a Caldwell claim has held that habeas corpus is an improper vehicle for review of the claim and that Rule 3.850 is. The State has not cited such a case, because there is not one to cite. The claim is rejected in the same way no matter what vehicle the petitioner may choose.

## OTHER CLAIMS

Time constraints make it impossible for counsel to adequately reply with regard to the other claims presented in

this action. With regard to those claims, however, counsel notes the following.

The State repeatedly asserts throughout its response that many of Mr. Lightbourne's claims "cannot be raised in the petition for writ of habeas corpus," and that habeas corpus is an improper "vehicle" in which to raise claims based on new law. See, e.g., State's Response, p. 18. The State is wrong and misapprehends the critical distinction between a claim which is "cognizable" and a claim which "was or should have been" raised on direct appeal.

A claim which is "cognizable" is a claim which is properly before the court. A claim can be "cognizable" and yet be dismissed as procedurally barred because it was or should have been raised on direct appeal. See, e.g., Jones v. Dugger, supra (finding claim cognizable, i.e., ruling on it, but deeming it barred). One example from this Court's precedents illustrates the point. In Downs v. Dugger, 514 So. 2d 1069 (Fla. 1988), a habeas corpus action, this Court granted sentencing relief on the basis of Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), despite the fact that the claim had been previously raised and rejected on direct appeal, in a Rule 3.850 proceeding, and in a habeas corpus proceeding. There, as in Mikenas and Cooper, supra, Hitchcock was found to be new law, and the claim was thus heard in the petitioner's habeas action.

Despite clear pronouncements from this Court, the State refuses to recognize that claims based on new law are "cognizable" (i.e. properly before the court) in habeas corpus proceedings. Rather, the State chooses to characterize this Court's rejection of claims similar to those raised in Mr. Lightbourne's petition as rejections based on a lack of cognizability. What the State does not recognize is that, while the court may not agree that the claims are based on new law or that the new law is not applicable to the claims, the claims are

properly before the court. The court's rejection of such claims is based upon its view of the law asserted as a basis for the claim, not upon its view of the propriety of presenting the claim to the court in the particular proceeding.

Thus, the claims in Mr. Lightbourne's petition which the State asserts are not appropriate for habeas corpus have not been rejected by this Court because they were brought in a habeas corpus action, but because of this Court's view of the state of the law asserted as a basis for the claims. A few examples demonstrate the mischaracterizations in the State's response. The State asserts that this Court has held that a claim alleging the improper doubling of aggravating circumstances is not "cognizable" in habeas corpus (Response at 14). However, the case upon which the State relies, Suarez v. Dugger, 527 So. 2d 190 (Fla. 1988), held only that the improper doubling claim in that case was or should have been raised on direct appeal. Id. at 192. Similarly, the State asserts that Mr. Lightbourne's claims based on Maynard v. Cartwright, 108 S. Ct. 1853 (1988) (Claims IV and V), should not be raised in habeas corpus proceedings. Once again, the case upon which the State relies, Henderson v. Dugger, 522 So. 2d 835 (Fla. 1988), merely says that such a claim should have been raised on direct appeal. Id. at 836, n.*. Another case upon which the State relies for this proposition, Jones v. Dugger, 533 So. 2d 290 (Fla. 1988), held, "Maynard is inapplicable to this case," id. at 293, a clear merits ruling. Regarding Mr. Lightbourne's claims based upon Mills v. Maryland, 108 S. Ct. 1860 (1988) (Claims III, VII, VIII and IX), the State again baldly asserts that these claims "cannot be presented on habeas corpus" (Response at 21) without citing any authority to support its proposition that claims based on new law may not be presented in habeas corpus proceedings. See Preston v. State, 531 So. 2d 154, 159 (Fla. 1988)("The rationale of Mills . . . is inopposite to this issue.").

While the Court has determined in other cases that claims such as some of those raised in the petition were procedurally barred (i.e., should have been presented on direct appeal) or that the new law asserted as a basis of the claims was not "new" or was not applicable to the claim, the claims Mr. Lightbourne raises nevertheless have always been deemed "cognizable in habeas corpus proceedings." Contrary to the State's assertions, Mr. Lightbourne's petition properly placed the claims before this Court and should always be heard.

## CONCLUSION

For all of the reasons presented in Mr. Lightbourne's petition and this reply, we respectfully urge that the Court issue its Writ of Habeas Corpus.

Respectfully submitted,

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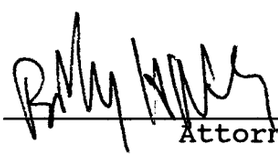
By: 
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