IN THE SUPREME COURT OF FLORIDA

GARY ELDON ALVORD,

Appellant,

v. **CASE NO. 86,837**

STATE OF FLORIDA,

Appellee.
_____/

ON APPEAL FROM THE CIRCUIT COURT
IN AND FOR HILLSBOROUGH COUNTY
STATE OF FLORIDA

BRIEF OF APPELLEE

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STATEMENT OF CASE AND FACTS

a) Procedural History

On April 9, 1974, a jury convicted Gary Eldon Alvord of three counts of first degree murder. The jury recommended the death penalty, and the trial court imposed that sentence. This Court affirmed both the conviction and the death sentence in Alvord v. State, 322 So. 2d 533 (Fla. 1975), cert. denied, 428 U.S. 923 (1976). Alvord's first motion for postconviction relief was filed on October 6, 1978. The motion was denied by the trial court and affirmed by this Court on appeal. Alvord v. State, 396 So. 2d 184 (Fla. 1981).

Alvord then sought relief in federal court by way of Petition for Writ of Habeas Corpus. Relief was ultimately denied by the Eleventh Circuit in Alvord v. Wainwright, 725 F.2d 1282 (11th Cir.), cert. denied, 469 U.S. 956 (1984). On November 20, 1984, Alvord petitioned this Court for a Writ of Extraordinary Relief and requested a judicial determination of his competency to be executed separate from the existing procedure under §*922.071, Florida Statutes (1983)*. That petition was denied in Alvord v. State, 459 So. 2d 316 (Fla. 1984). Subsequent to the United States Supreme Court's decision in Hitchcock v. Dugger, 481 U.S. 393 (1987), Alvord filed a petition for writ of habeas corpus in this Court

seeking (1) a stay of a mental examination directed by the Governor to determine his competency to be executed and (2) a new sentencing proceeding because neither the trial judge nor the jury considered nonstatutory mitigating circumstances during the sentencing phase. Alvord then filed an amended habeas corpus petition adding a challenge to the omission of Alvord's confession. The petition for writ of habeas corpus was denied. Alvord v. Dugger, 541 So. 2d 598 (Fla. 1989). This Court specifically found the Hitchcock error to be harmless. A motion for rehearing was denied on May 11, 1989. Alvord then filed his second motion for post conviction relief on June 30, 1989. (PCR10-25)[1] This motion was denied without prejudice for failure to contain a notice of hearing. (PCR10) An Amended motion was filed on August 1, 1989. (PCR 28-37) A hearing was held on the motion on January 24, 1992. (PCR4)[2] On March 9, 1992, the state filed a response to the motion, wherein the state urged that Alvord's Hitchcock claim was procedurally barred.

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[1]The record on appeal from the judgment and sentence will be designated (DR___) and the post-conviction record will be designated as (PCR___).

[2]Transcripts of the hearings were not included in the appellate record in the instant case. Contemporaneous with the instant brief, the state is filing a Motion to Compel, urging this Court to compel Alvord to supplement the record with transcripts of the hearings held in circuit court on the Motion to Vacate.

(PCR4, 44-59) The trial court granted Alvord's request for the opportunity to present evidence in support of his Hitchcock claim on November 6, 1992. (PCR95-96)

After requesting numerous continuances, Alvord then filed his Second Amendment to Second Motion for Post-Conviction Relief, adding a Espinosa v. Florida, 112 S.Ct. 2926, 120 L. Ed. 2d 854 (1992) claim. (PCR104-22). Alvord then filed another request to continue his evidentiary hearing. (PCR124-25) The state filed a second response on September 24, 1993, asserting a procedural bar as to the Espinosa claim. (PCR126-34) Alvord then filed another request to continue his evidentiary hearing. (PCR135-37) On June 24, 1994, a year and a half after the trial court granted the request for an evidentiary hearing, the state filed a Motion For Rehearing on Issue of Defendant's Entitlement to Evidentiary Hearing. After hearing oral argument on the issue, the circuit granted the state's motion and denied the motion for post-conviction relief based on the procedural bars.

b) Facts

The facts of the instant case were set forth as follows by this Court in Alvord v. State, 322 So. 2d 533 (Fla. 1975).

> "In the early afternoon of June 18, 1973, the bodies of Georgia, Ann and Lynn were discovered in a home in Tampa, Florida. The

> home was owned by Ann, who was the daughter of Georgia. Lynn, eighteen years of age, was the daughter of Ann and lived at home with her mother.
>
> Each of the three women was found in a separate room in the house and each had been strangled with a piece of cord. A vaginal test on Lynn showed the presence of semen and there was a slight abrasion on the right side of her head. The front door of the house had been kicked open and the condition of the house tended to indicate the murderer burglarized the house either before or after the three women had been murdered. The time of death was tentatively established as occurring between 1:00 a.m., Saturday, June 16, 1973, and 1:30 p.m., Monday, June 18, 1973."
>
> Id. at 533.

Additionally, this Court noted that there was evidence that the eighteen year old victim Lynn had been raped prior to the murder. Her underwear were found in a room separate from her body, her pubic area was exposed and Alvord had fingernail scratches on his chest. Id. at 538.

This Court also noted that the verdict of guilt was supported by evidence that: 1) Alvord had possession of some of Ann's jewelry after the murder; 2) the police found a short piece of rope in a dresser drawer in the defendant's apartment which was the same type of rope used to strangle all three of the victims; 3) one of defendant's shirts had blood on it; 4) on the morning after the

murder that the defendant had over a hundred dollars; 5) one of the victim's purses used to store large quantities of money was found empty; and, 6) Alvord confessed to his girlfriend Zelma Hurley. Zelma Hurley testified that the defendant told her, "I had to rub out three people last night." He identified the victims as Ann, Lynn and Georgia. The defendant then told Zelma the details of the murder. Id. at 539 - 540.

SUMMARY OF THE ARGUMENT

It is the state's contention that Alvord's Hitchcock claim is procedurally barred as this Court has already squarely addressed this claim on the merits in Alvord v. State, 541 So. 2d 598 (Fla. 1989). Alvord contends, however, that despite the prior ruling on the merits of this claim, this Honorable Court should, nevertheless, revisit this claim because this Court's ruling was limited to nonstatutory mitigating facts developed on the face of the record. Alvord argues that since the Court did not address the restriction of nonstatutory mitigating circumstances not present on the face of the record, that he must be afforded the opportunity, by way of an evidentiary hearing, to present these non-record mitigating circumstances to further substantiate his Hitchcock claim.

The trial court did not err in summarily denying this claim as it has already been rejected on the merits by this Court. Further, even if this Court's previous ruling on the merits did not preclude the trial court from granting relief, Alvord has failed to present any substantial nonstatutory mitigating evidence that was not previously presented to and considered by this Court which would undermine this Court's finding that the Hitchcock error was harmless.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED IN DENYING ALVORD'S MOTION FOR POST-CONVICTION RELIEF WITHOUT AN EVIDENTIARY HEARING.

Now in his second motion for post conviction relief appellant, Gary Eldon Alvord, alleges that he was improperly restricted from presenting certain nonstatutory mitigating circumstances to the sentencing jury in violation of his Eighth Amendment rights under the United States Constitution and Hitchcock v. Dugger, 481 U.S. 393 (1987). Alvord further alleges that he was entitled to an evidentiary hearing to enable him to prove such available nonstatutory mitigating factors and, upon its conclusion, a new sentencing hearing in this cause.[3]

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[3]Alvord also states, without supporting facts, law or analysis, that the trial court erred in finding his Espinosa v. Florida, 112 S.Ct. 2926, 120 L. Ed. 2d 854 (1992), claim procedurally barred. Alvord's cursory reference to Espinosa is insufficient to put this issue before this Court. Rodriguez v. State, 502 So. 2d 18 (Fla. 1DCA 1987). Thus, this claim should be deemed abandoned. Johnson v. Singletary, 647 So. 2d 106, 109 (Fla. 1994). Moreover, the claim is procedurally barred as the claim was not raised at trial or on direct appeal. Doyle v. Singletary, 655 So. 2d 1120, 1121 (Fla. 1995); Chandler v. Dugger, 634 So. 2d 1066, 1069 (Fla.1994); Jackson v. Dugger, 633 So. 2d 1051, 1055 (Fla.1993); Beltran-Lopez v. State, 626 So. 2d 163, 164 (Fla.1993). Further, any error in the jury instruction was harmless. Dougan v. Singletary 644 So. 2d 484, 485 (Fla. 1994).

It is the state's contention that Alvord's Hitchcock claim is procedurally barred as this Court has already squarely addressed this claim on the merits in Alvord v. State, 541 So. 2d 598 (Fla. 1989). With regard to the Hitchcock claim, this Court stated:

> In Hitchcock, the United States Supreme Court held that, absent harmless error, resentencing was required when the jury was instructed to consider only evidence of statutory mitigating circumstances and the judge failed to consider nonstatutory evidence. Hitchcock v. Dugger, 107 S.Ct. at 1824. At the outset, we note that the state concedes a Hitchcock violation because all participants -- the prosecutor, the defense counsel, and the trial judge -- explained to the jury that it should limit consideration to mitigating circumstances to those enumerated in the statutes.
>
> We recognize the Hitchcock error and must now determine whether the error was harmless. Hitchcock. [cites omitted] We have previously applied the harmless error analysis to Hitchcock violations, found harmless error, and denied new sentencing proceedings. [cites omitted] On the other hand, we have found that certain Hitchcock violations did not meet the harmless error test and directed a new sentencing proceeding. [cites omitted]
>
> In the instant case, the trial judge, in imposing the death sentence, found the following three statutory aggravating circumstances; (1) the murders were committed during the commission of a burglary; (2) the murders were especially heinous, atrocious, or cruel; and (3) Alvord's conduct created a serious risk of death to many persons. The trial judge also found two statutory

> mitigating circumstances. He concluded that, during the commission of the crime, Alvord was under the influence of extreme mental or emotional disturbance and his capacity to conform his conduct to the requirements of law was impaired.
>
> Alvord now asserts that he was denied the opportunity to present nonstatutory mitigating evidence concerning among other things; (1) is capacity for rehabilitation; (2) the history of mental illness within his family; and (3) his traumatic life experiences while involuntarily committed to mental institutional. The latter two concern Alvord's mental condition which, to a large extent, was presented to both the jury and the judge. We find the mitigating evidence clearly insufficient to change the sentencing decision, given the circumstances in this case. Based on the record, we conclude that the *Hitchcock error* was harmless.
>
> Id. at 598, 599.

This is clearly a ruling on the merits that bound the lower court. The law is well settled that where a claim has previously been raised and ruled upon, it is procedurally barred from subsequent review by the lower court. Davis v. State, 589 So. 2d 896 (Fla. 1991); Francis v. Barton, 581 So. 2d 583 (Fla.), cert. denied, 111 S.Ct. 2879 (1991); Clark v. State, 569 So. 2d 1263 (Fla. 1990); Atkins v. Dugger, 541 So. 2d 1165 (Fla. 1989); Eutzy v. State, 541 So. 2d 1143 (Fla. 1989). Accordingly, the trial court properly denied the motion. See, Fratello v. State, 496 So.

2d 903 (Fla. 4th DCA 1986) (res judicata bars appeal of an issue clearly considered and disposed of in prior habeas proceedings).

The prior ruling also bars review on appeal where the issue has previously been appealed and denied. In Henry v. State, 649 So. 2d 1361 (Fla. 1994), this Honorable Court declined to review a suppression issue that was raised in Henry's prior appeal and denied by a majority of this Court finding that "the 'law of the case' doctrine applies. Under this doctrine, all points of law which have been previously adjudicated by a majority of this Court may be reconsidered only where a subsequent hearing or trial develops material changes in the evidence, or where exceptional circumstances exist whereby reliance upon the previous decision would result in manifest injustice. Preston v. State, 444 So. 2d 939, 942 (Fla.1984); Green v. Massey, 384 So. 2d 24, 28 (Fla.1980); Steele v. Pendarvis Chevrolet, Inc., 220 So. 2d 372, 376 (Fla.1969); Ball v. Yates, 158 Fla. 521, 29 So. 2d 729, 738 (1946), cert. denied, 332 U.S. 774, 68 S.Ct. 66, 92 L.Ed. 359 (1947)." Id. at 1364. "It is only in the case of error that prejudicially denies fundamental constitutional rights that this Court will revisit a matter previously settled by the affirmance of

a conviction or sentence." Porter v. Dugger, 559 So. 2d 201,(Fla. 1990), *quoting*, Kennedy v. Wainwright, 483 So. 2d 424, 426 (Fla.), cert. denied, 479 U.S. 890, 107 S.Ct. 291, 93 L.Ed.2d 265 (1986).

Alvord contends, however, that despite the prior ruling on the merits of this claim, this Honorable Court should, nevertheless, revisit this claim because this Court's ruling was limited to nonstatutory mitigating facts developed on the face of the record. Alvord argues that since the Court did not address the restriction of nonstatutory mitigating circumstances not present on the face of the record, that he must be afforded the opportunity, by way of an evidentiary hearing, to present these non-record mitigating circumstances to further substantiate his Hitchcock claim. To support this proposition, Alvord relies on this Court's decision in Hall v. State, 541 So. 2d 1125 (Fla. 1989)(Hall VII). Hall is readily distinguishable from the instant case.

In Hall v. Dugger, 531 So. 2d 76 (Fla. 1988)(Hall VI), this Court, upon review of Hall's petition for writ of habeas corpus raising a Hitchcock claim, held that Hall's sentencing jury was improperly instructed but, the error was harmless beyond a reasonable doubt. Subsequently, Hall raised this same claim in a motion for post conviction relief in the trial court. Upon review of the denial of the motion, this Court (Hall VII) held that its

prior ruling on the Hitchcock claim did not constitute a procedural bar. This Court held that this was true because the motion involved significant additional non-record facts which were not considered in the habeas proceeding and because Hitchcock was a significant change in the law. Id. at 1126. In Hall VII the defendant proffered substantial nonstatutory mitigating evidence which counsel had been precluded from presenting below. This evidence included substantial evidence that Hall had a long history of drug and alcohol abuse, child abuse amounting to torture, organic brain damage resulting from repeated head trauma suffered as a child and adolescent and a very low intellectual level. This Court found just as compelling as the mental evidence was the evidence of the child abuse suffered by Hall as a child. This Court noted:

> Affidavits from some of Hall's sixteen brothers and sisters paint a stark portrait of a childhood filled with abject poverty, constant violence, and unbearable brutality. Borne the sixteenth of seventeen children to a mother and father who fought ceaselessly with guns, knives, or whatever weapons were available, Hall's childhood was marked by an existence which could only be described as pitiful. Teachers and siblings alike immediately recognized him to be significantly mentally retarded. This retardation did not garner any sympathy from his mother, but rather, caused much scorn to befall him. Constantly beaten because he was "slow" or

because he made simple mistakes, Hall felt the wrath of his father, his mother and his neighbors, who had his mother's permission to beat Hall whenever they deemed it proper. Hall's mother would strap him to his bed at night, with a rope thrown over a rafter. In the morning she would awaken Hall by hoisting him up and whipping him with a belt, a rope, or cord.

Violence of this sort was a regular part of Hall's life as a child. Two of his siblings were murdered while Hall was young, while another brother was tied to a tree with a fire set underneath him.

Hall and his brothers and sisters were required by their mother to work in the fields from the time they could walk. During harvesting seasons, Hall would be kept out of school to work. When his school grades suffered as a result of this, he was further beaten severely.

Furthermore, there is substantial evidence that Hall's mother may have been insane, always believing that a famine was imminent requiring the rationing of their food supplies. As a result, Hall and his brothers and sisters worked fourteen hours a day in the fields to come home to empty dinner plates. In addition to this delusion, there is evidence that Hall's mother was extremely superstitious, believing encouraging Hall when he reported to her that he saw spirits and ghosts, hallucinations that have continued to plague Hall throughout his life. These observations and assessments of Hall's family background are corroborated by documents and observations of professionals who dealt with him.

Id. at 1127 - 1128.

The holding in Hall was limited, however, to such extraordinary circumstances. In Clark v. Dugger, 559 So. 2d 192 (Fla. 1990), Clark asserted the Hitchcock claim in his petition for writ of habeas corpus to this Court. In rejecting that claim, this Court noted that the claim was procedurally barred because both this Court and the federal courts had considered Clark's sentencing in light of Hitchcock. This Court further noted that its decision in Hall VII was not such a change in the law as to require retroactive application and preclude imposition of the procedural bar. Clark at 194.

Further, it must be remembered that at the time Hall presented his Hitchcock claim to the Court Hitchcock had just been decided. Conversely, the decision in Alvord addressing the Hitchcock claim was two years after the rendering of Hitchcock. Thus, there was plenty of time for the law to develop and for counsel to ascertain that an evidentiary hearing was needed in order to develop non-record facts if such were necessary. Nevertheless, Alvord's counsel represented to this Court on pg. 2, paragraph #4 of his Petition for Extraordinary Relief, For Writ of Habeas Corpus; and Request For Stay of Mental Examination, that an evidentiary hearing was not needed as the error was apparent on the face of the record.

Clearly, if counsel had felt that an evidentiary hearing was warranted he should have requested such relief from this Court as this Court has not hesitated to remand for an evidentiary hearing where it was represented that additional nonrecord facts needed to be presented. Meeks v. Dugger, 576 So. 2d 713 (Fla. 1991). Alvord's current request for an evidentiary hearing is merely an attempt to get a "second bite at the apple". The state urges this Honorable Court to find that Alvord's affirmative assertion that an evidentiary hearing was unnecessary, precludes a subsequent claim that such a hearing is needed.

Even if Hall stood for the proposition that a defendant can have his Hitchcock claim revisited in circuit court, it is clearly limited to those instances where the defendant can produce *substantial* non-record mitigating evidence. Under any circumstances the defendant has the burden to establish that an evidentiary hearing is warranted. A motion for post conviction relief can be denied without an evidentiary hearing when the motion and the record conclusively demonstrates that the movant is entitled to no relief. See Agan v. State, 503 So. 2d 1254 (Fla. 1987); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984).

In contrast to Hall, Alvord has not presented substantial nonstatutory mitigating evidence that was withheld from the jury or that was not previously considered by this Court when it rejected Alvord's prior Hitchcock claim. Much of the evidence that Alvord is now claiming should have been presented to the jury was in fact presented to the jury.

Alvord claims that the jury was precluded from hearing about his years as a teenager in a mental institution, his drug and alcohol abuse, his family history, including his mother's mental condition and rejection by his parents, his capacity for rehabilitation and the fact that he wore secondhand clothes. With the exception of Alvord's wardrobe of secondhand clothes, the bulk of this information was presented to the jury below and considered by this Court in its review of the Hitchcock claim. During the penalty phase of Alvord's initial trial Dr. Robey testified as follows:

> Well, you know, without going into enormous detail, he began to have difficulty getting along with other kids, petty misdemeanors, breaking things, stuff of this sort. **One time he was sent to the Methodist Children's Village in Michigan and he was admitted to a juvenile home upon several occasions. And, in 1960 when he was thirteen he was finally admitted to a mental hospital**, Northfield State Hospital, which serves the Detroit area and was there from May 12, of 1960 until

February 16 of 19 6 3 . So, from the ages of thirteen to sixteen he had run away from the hospital several times, had made threatening phone calls, had committed other minor, but pesty, angry sorts of acts. And finally, on February . . . 16, 1963, the Superintendent requested his transfer to the Iona State Hospital because of his frequent escapes because there was concern that he might be dangerous.

Question: What do these escapes mean? Is that sort of a walkaways or --

Answer: They are for the most part walkaways. **He would go home and find that his parents or, at least, his father -- his mother would also be in a mental hospital, different mental hospitals during this period -- would, you know, not want him there. He would be brought back to the hospital.**

Question: **Was his mother in mental hospitals?**

Answer: Yes, **his mother was, while I believe she got, first began to show real overt signs of psychosis or mental illness when Gary was, oh, about twelve. And I am not sure because its hard to pin together, but I have a suspicion that this began to bring out some of the problems that finally got him into a hospital. And she was in and out of mental hospitals for, oh, three or four years or longer. I am not really sure how long. I don't have her whole history. But she would go from sometimes very loving and close to suddenly just totally rejecting and unpredictably so. And in another case she would sometimes not come home or sometimes she would.** He was finally sent up to Iona. (DR 1180 - 1191)

The doctor further testified that while in the hospital Alvord was recovering and was finally released when he got a job. During this period of time, Alvord got married. He was married almost a year and was not in any difficulty with the law until he was charged with the rape of an eleven year old girl in October of 1967. The doctor also noted that Alvord had one child from this marriage who was approximately six years old at the time of the trial. The doctor then went on to thoroughly describe Alvord's mental condition and the treatment that he had been through. Dr. Robey also testified that with the proper care and treatment Alvord was an excellent candidate for rehabilitation. Further, the defendant himself testified at trial that at the time of the murder he had been drinking heavily and smoking marijuana. (DR957 - 958)

Based on a review of the record, it is clear that any nonstatutory mitigating evidence that Alvord is now suggesting should have been and was not presented to the jury, is merely cumulative to what was presented and considered by this Court in its decision in Alvord v. Dugger, 541 So. 2d 598 (Fla. 1989).

Further, even if this Court's previous ruling on the merits did not preclude the trial court from granting relief, Alvord has failed to present any substantial nonstatutory mitigating evidence that was not presented to and considered by this Court which would

undermine this Court's finding that the Hitchcock error was harmless. Accordingly, the trial court did not err in summarily denying this claim.

CONCLUSION

Based on the foregoing argument and citations to authority, appellee urges this Honorable Court affirm the trial court's denial of Alvord's Motion for Post Conviction relief.

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. Regular Mail to William Sheppard, Esq., SHEPPARD AND WHITE, 215 Washington Street, Jacksonville, Florida 32202, this 24 day of June, 1996.

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