IN THE SUPREME COURT OF FLORIDA

JAMES E. HITCHCOCK,
Petitioner,

v. **Case No. SC04-1286**

JAMES V. CROSBY, JR.
ETC, *ET AL.*
____________________________________/

RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

RESPONSE TO INTRODUCTION

The "Introduction" set out on page 1 of the petition is argumentative and is denied.

RESPONSE TO PROCEDURAL HISTORY

The Respondents rely on the following statement of the facts and procedural history, which is taken verbatim from this Court's decision in Hitchcock's last proceeding:

> Hitchcock was convicted of first-degree murder for the death of his brother's thirteen-year-old stepdaughter. This Court's decision on direct appeal summarized the facts of the crime as follows:
>
> > Unemployed, ill, and with no place to live, Hitchcock moved in with his brother Richard and Richard's family two to three weeks before the murder. On the evening of the murder, appellant watched television with Richard and his family until around 11:00 p.m. He then left the house and went into Winter Garden where he spent several hours drinking beer and smoking marijuana with friends.
> >
> > According to a statement Hitchcock made

> after his arrest, he returned around 2:30 a.m. and entered the house through a dining room window. He went into the victim's bedroom and had sexual intercourse with her. Afterwards, she said that she was hurt and was going to tell her mother. When she started to yell because he would not let her leave the bedroom, Hitchcock choked her and carried her outside. The girl still refused to be quiet so appellant choked and beat her until she was quiet and pushed her body into some bushes. He then returned to the house, showered, and went to bed.
>
> At trial Hitchcock repudiated his prior statement. He testified that the victim let him into the house and consented to having intercourse. Following this activity, his brother Richard entered the bedroom, dragged the girl outside, and began choking her. She was dead by the time appellant got Richard away from her. When Richard told him that he hadn't meant to kill her, Hitchcock told him to go back inside and that he, the appellant, would cover up for his brother. According to Hitchcock, he gave his prior statement only because he was trying to protect Richard.

Hitchcock v. State, 413 So. 2d 741, 743 (Fla. 1982). The jury convicted Hitchcock of first-degree murder and recommended a death sentence, which the trial court imposed. This Court affirmed the conviction and sentence; however, postconviction proceedings resulted in a lengthy procedural history and three resentencing proceedings. [FN1] Hitchcock's last sentence of death was affirmed by this Court in 2000. *See Hitchcock v. State,* 755 So. 2d 638 (Fla. 2000). On November 30, 2001, he filed a second amended rule 3.850 motion for postconviction relief, which is now pending in the circuit court.

> FN1. On direct appeal, this Court affirmed Hitchcock's conviction and first sentence. See id. This Court also affirmed the denial

of Hitchcock's motion for postconviction relief. *See Hitchcock v. State*, 432 So. 2d 42 (Fla. 1983). In later federal habeas corpus proceedings, however, the United States Supreme Court granted certiorari and vacated Hitchcock's death sentence because the jury was instructed not to, and the sentencing judge refused to, consider evidence of nonstatutory mitigating circumstances. *See Hitchcock v. Dugger,* 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987). Upon resentencing, Hitchcock was again sentenced to the death penalty, and this Court affirmed the sentence. *See Hitchcock v. State*, 578 So. 2d 685 (Fla. 1990). But the United States Supreme Court again granted certiorari and remanded to this Court for reconsideration in light of *Espinosa v. Florida*, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992). *See Hitchcock v. Florida,* 505 U.S. 1215, 112 S.Ct. 3020, 120 L.Ed.2d 892 (1992). On remand, this Court vacated Hitchcock's death sentence and directed the trial court to conduct a new penalty proceeding. *Hitchcock v. State*, 614 So. 2d 483 (Fla. 1993). In Hitchcock's second resentencing, Hitchcock was again sentenced to the death penalty. But, on appeal, this Court remanded for a third sentencing proceeding because evidence portraying Hitchcock as a pedophile was erroneously made a feature of his second sentencing proceeding. *Hitchcock v. State*, 673 So. 2d 859 (Fla. 1996). Upon his third resentencing, Hitchcock was sentenced to the death penalty for the fourth time, and this Court affirmed the sentence. *Hitchcock v. State,* 755 So. 2d 638 (Fla. 2000), *cert. denied,* 531 U.S. 1040, 121 S.Ct. 633, 148 L.Ed.2d 541 (2000).

On December 29, 2001, Hitchcock also filed a motion for postconviction DNA testing pursuant to Florida Rule of Criminal Procedure 3.853.

Hitchcock v. State, 866 So. 2d 23, 24-5 (Fla. 2004). This Court affirmed the denial of Hitchcock's *Florida Rule of Criminal Procedure* 3.853 motion. *Id.,* at 28. The appeal from the denial of Hitchcock's postconviction relief motion is pending before this Court. This response is filed contemporaneously with the State's *Answer Brief* in that appeal.

RESPONSE TO GROUNDS FOR HABEAS CORPUS

The Respondents agree that this is Hitchcock's first petition for habeas corpus relief. However, none of the claims contained in the petition are meritorious.

THE INDIVIDUAL CLAIMS

I. THE SUFFICIENCY OF THE INDICTMENT CLAIM.

On pages 5-22 of the petition, Hitchcock argues that the indictment for premeditated murder was insufficient to charge the alternative theory of murder during the course of an enumerated felony. Despite the histrionics of Hitchcock's brief, Florida law has been to the contrary for at least 45 years:

> The Florida Supreme Court has held that a charge of premeditated murder is sufficient to support a conviction for felony murder. *Bush v. State*, 461 So. 2d 936 (Fla. 1984), *cert. denied*, 475 U.S. 1031, 106 S.Ct. 1237, 89 L.Ed.2d 345 (1986); *Knight v. State*, 338 So. 2d 201 (Fla. 1976). [FN3] In *Knight* the court, quoting from *Barton v. State,* 193 So. 2d 618 (Fla. 2d DCA 1966), *cert. denied*, 201 So. 2d 459 (Fla. 1967), reasoned that when a defendant is charged with premeditated murder the state may proceed on a

premeditated murder theory or a theory of felony murder. In *Bush*, 461 So. 2d at 940, the supreme court reiterated the *Knight* holding and rejected the defendant's argument that *Knight* was inapplicable because the defendant did not actually commit the murder. The court held that the defendant was not prejudiced by not knowing the specific theory upon which the state would proceed.

FN3. *See also Armstrong v. State*, 642 So. 2d 730 (Fla. 1994); *Lovette v. State*, 636 So. 2d 1304 (Fla. 1994); *Young v. State*, 579 So. 2d 721 (Fla. 1991), *cert. denied*, 502 U.S. 1105, 112 S.Ct. 1198, 117 L.Ed.2d 438 (1992); *O'Callaghan v. State,* 429 So. 2d 691 (Fla. 1983); *Adams v. State*, 412 So. 2d 850 (Fla.), *cert. denied*, 459 U.S. 882, 103 S.Ct. 182, 74 L.Ed.2d 148 (1982); *Barton v. State*, 193 So. 2d 618 (Fla. 2d DCA 1966), *cert. denied*, 201 So. 2d 459 (Fla. 1967).

. . .

The holding in *Knight*, that an indictment charging premeditated murder is sufficient under the statute to charge first degree murder, regardless of whether the murder was committed in the perpetration of any of the named felonies in the statute, is based on the theory that the perpetration or attempt to perpetrate any of the said felonies, stands in lieu of and is the legal equivalent of premeditation. *Killen v. State*, 92 So. 2d 825 (Fla. 1957).

State v. Ingleton, 653 So. 2d 443 (Fla. 5th DCA 1995). *See also, Chamberlain v. State,* 29 Fla. L. Weekly S305, 309-10 (Fla. June 17, 2004); *Anderson v. State*, 841 So. 2d 390, 404 (Fla. 2003); *Gudinas v. State*, 693 So. 2d 953, 964 (Fla. 1997). The decisions of this Court, which are not acknowledged by Hitchcock, are squarely contrary to his position, and stand for

the proposition that Hitchcock's substantive claim has no merit.

To the extent that Hitchcock pleads a claim of ineffectiveness on the part of appellate counsel, that claim has no merit, either. Because the law is squarely contrary to Hitchcock's position, appellate counsel cannot be faulted for not raising an issue that was not, and is not, legally meritorious. *Herring v. Dugger*, 528 So. 2d 1176, 1177 (Fla. 1988) (counsel not ineffective for not raising issue when controlling case law is contrary); *Suarez, supra*; *Gamble v. State/Crosby*, 877 So. 2d 706, 719 (Fla. 2004); *Reed v. State/Crosby*, 875 So. 2d 415, 440 (Fla. 2003); *Armstrong v. State/Crosby*, 862 So. 2d 705, 720 (Fla. 2003); *Owen v. Crosby*, 854 So. 2d 182, 191-92 (Fla. 2003).

To the extent that this claim includes a sub-claim that is based on *Apprendi v. New Jersey* and *Ring v. Arizona*, Florida law is well settled that those decisions have no impact on Florida's capital sentencing structure because death eligibility is determined at the guilt stage of a Florida capital trial. *See, Bottoson v. Moore*, 833 So. 2d 693 (Fla. 2002); *King v. Moore,* 831 So. 2d 143 (Fla. 2002); *Peterka v. State/Crosby,* 2004 WL 2201477 (Fla. Sept. 30, 2004); *Hernandez-Alberto v. State*, 29

Fla. L. Weekly S521, 525 (Fla. Sept. 23, 2004); *Pietri v. State*, 29 Fla. L. Weekly S440 (Fla. Aug. 26, 2004); *Dillbeck v. State*, 29 Fla. L. Weekly S437 (Fla. Aug. 26, 2004); *Sochor v. State*, 29 Fla. L. Weekly S363 (Fla. July 8, 2004); *Hutchinson v. State*, 29 Fla. L. Weekly S337 (Fla. July 8, 2004); *Kimbrough v. State*, 29 Fla. L. Weekly S323 (Fla. July 1, 2004); *Hamilton v. State*, 875 So. 2d 586 (Fla. 2004); *Henyard v. State*, 29 Fla. L. Weekly S271 (Fla. May 27, 2004); *Patton v. State*, 878 So. 2d 368 (Fla. 2004); *Gudinas v. State*, 879 So. 2d 616 (Fla. 2004); *Stewart v. Crosby*, 880 So. 2d 529 (Fla. 2004); *Douglas v. State*, 878 So. 2d 1246, 1263-64 (Fla. 2004); *Gamble v. State*, 877 So. 2d 706, 719 (Fla. 2004); *Howell v. State*, 877 So. 2d 697, 705 (Fla. 2004); *Power v. State*, 29 Fla. L. Weekly S207 (Fla. May 6, 2004); *Windom v. State*, 29 Fla. L. Weekly S191 (Fla. May 6, 2004); *Globe v. State*, 877 So. 2d 663, 674 (Fla. 2004); *Reed v. State*, 875 So. 2d 415, 438-39 (Fla. 2004); *Robinson v. State*, 865 So. 2d 1259, 1265-66 (Fla. 2004).

Moreover, the *Apprendi/Ring* claim is not appropriately litigated in a habeas corpus petition. On direct appeal, Hitchcock did not claim that Florida=s capital sentencing structure violated his Sixth Amendment right to a jury trial or his right to due process under the Fourteenth Amendment.

Hitchcock did not raise a direct appeal claim concerning the State=s alleged failure to include all of the elements of capital murder in the indictment. Hitchcock did not claim error in the State=s failure to submit these Aextra elements@to a jury and prove them beyond a reasonable doubt. Finally, Hitchcock did not argue, on direct appeal, that the penalty phase instructions impermissibly shifted the burden to the defendant to prove that mitigating circumstances outweigh the aggravating factors or that Florida=s murder in the course of an enumerated felony is an impermissible automatic aggravator.

In addressing constitutional challenges to Florida=s capital sentencing statute directly, this Court has repeatedly ruled that constitutional challenges to Florida=s capital sentencing statute must be raised on direct appeal. *Finney v. State* , 831 So. 2d 651, 657 (Fla. 2002) (ruling that because Finney could have raised a claim that Florida's capital sentencing statute was unconstitutional on direct appeal, this claim was procedurally barred on postconviction motion); *Floyd v. State* , 808 So. 2d 175 (Fla. 2002) (claim that Florida's death penalty statute is unconstitutional is procedurally barred in appeal of the post conviction motion proceedings because it should have been raised on direct appeal); *Arbelaez v. State* ,

775 So. 2d 909, 919 (Fla. 2000) (challenges to the constitutionality of Florida's death penalty scheme should be raised on direct appeal).

This Court has also consistently ruled that a petition for writ of habeas corpus cannot be used as a second or substitute appeal. *McCrae v. Wainwright*, 439 So. 2d 868, 870 (Fla. 1983). *See also Baker v. State*, 29 Fla. L. Weekly S 105 (Fla. Mar. 11, 2004); *Swafford v. State* , 828 So. 2d 966 (Fla. 2002) (observing that habeas proceedings cannot be used for second appeals); *Brooks v. McGlothlin* 819 So. 2d 133 (Fla. 2002) (ruling, in dismissing the petition, that a petition for writ of habeas corpus cannot be used as a second or substitute appeal). Hitchcock now seeks to use these habeas proceedings to raise claims that could have been, and should have been, raised on direct appeal.

Hitchcock has not offered any excuse, much less a legally sufficient one, for his failure to raise this claim on direct appeal. The fact that *Ring* had not yet been decided at the time Hitchcock pursued his direct appeal does not preclude this Court from finding a procedural bar. This Court has applied procedural bar to dispose of claims based on *Apprendi v. New Jersey* , 530 U.S. 466 (2000), even in cases tried before *Apprendi* was decided. *Barnes v. State*, 794 So. 2d 590, 591 (Fla. 2001);

McGregor v. State, 789 So. 2d 976, 977 (Fla. 2001).

The issue addressed in *Ring* is by no means new or novel. This claim, or a variation of it, has been known since before the United States Supreme Court issued its decision in *Proffitt v. Florida* , 428 U.S. 252 (1976), in which it held that jury sentencing is not constitutionally required. In fact, the very existence of earlier decisions addressing judge versus jury sentencing demonstrates that the issue is not novel; it has been raised and addressed repeatedly. *See e.g. Hildwin v. State* , 531 So. 2d 124, 129 (Fla. 1988) (rejecting as without merit petitioner's claim that "the death penalty was unconstitutionally imposed because the jury did not consider the elements that statutorily define the crimes for which the death penalty may be imposed"); *Spaziano v. State* , 433 So. 2d 508, 511 (Fla. 1983) (concluding that a judge's consideration of evidence that was not before the jury in deciding to sentence convicted murderer to death over jury's recommendation of life in prison was not improper); *See also Barclay v. Florida* , 463 U.S. 939 (1983) (upholding Florida = s capital sentencing structure). The basis for any Sixth Amendment challenge to Florida's capital sentencing procedures has always been available to Hitchcock.

In *Turner v. Crosby*, 339 F.3d 1247, 1281-1282 (11th Cir.

2003), the Eleventh Circuit ruled that Turner's *Ring* claim was procedurally barred. In doing so, the Court rejected any notion that claims, like the one raised by Hitchcock here, could not have been raised before the Supreme Court handed down the decision in *Ring.* The Court held that Turner could not excuse his failure to raise the issue in Florida's courts because Turner's *Ring* claim was not so new and novel that its legal basis was not reasonably available to counsel. Because Hitchcock failed to raise his Sixth Amendment challenges on direct appeal, the claim is procedurally barred for habeas purposes.

Finally, to the extent that Hitchcock argues that he should have been entitled to separate verdicts as to premeditated murder and murder during the course of a felony, Florida law is long-settled that such separate verdicts are not required. *Cummings-El v. State,* 863 So. 2d 246, 250 (Fla. 2003); *San Martin v. State*, 717 So. 2d 462, 469 (Fla. 1998). The *Ring* claim is not a basis for relief.

II. THE "ABSENCE FROM BENCH CONFERENCES" CLAIM.

On pages 23-28 of the petition, Hitchcock argues that appellate counsel was ineffective for not raising a claim related to Hitchcock's purported "absence" from bench conferences conducted during the **guilt** stage of his capital

trial. This claim was raised, **for the first time**, in Hitchcock's most recent postconviction proceeding, and the trial court denied relief. Hitchcock's conviction became final on October 18, 1982, when the United States Supreme Court denied certiorari review. *Hitchcock v. Florida*, 459 U.S. 960 (1982). Florida law is well-settled that January 1, 1987, was the deadline for seeking postconviction relief from **convictions** which became final prior to January 1, 1985. *Sireci v. State*, 773 So. 2d 34, 44 (Fla. 2000); *Downs v.* State, 740 So. 2d 506, 513 (Fla. 1999); *Zeigler v. State*, 632 So. 2d 48, 50 (Fla. 1993). Hitchcock raised **no** guilt stage claims in his first state postconviction motion, and did not receive **sentence** stage relief until April of 1987. This claim is untimely, and, moreover, is not properly raised in a habeas proceeding, anyway. *See Scott v. Dugger*, 605 So. 2d 465 (Fla. 1992); *White v. Dugger*, 511 So. 2d 554 (Fla. 1987); *Kight v. Dugger,* 574 So. 2d 1066 (Fla. 1990).

Alternatively and secondarily, while Hitchcock does not acknowledge it, this issue is not available to him, anyway. This Court has made it clear that *Coney* (which deals with the defendant's right to be "present" during jury selection) is not retroactively applicable to final judgments:

> The record reflects that Boyett was present in the courtroom, but not at the bench, when peremptory

challenges were exercised. Boyett argues that our decision in *Coney v. State*, 653 So. 2d 1009 (Fla. 1995), *cert. denied*, 516 U.S. 921, 116 S.Ct. 315, 133 L.Ed.2d 218 (1995), should apply to him insofar as it requires that a defendant be present at the actual site where jury challenges are exercised. Although in that case we explicitly stated that our ruling was to be prospective only, Boyett argues that he should be entitled to the same relief because his case was not final when the opinion issued, or, in the alternative, that the rule announced in Coney was actually not new, and thus should dictate the same result in his case. We reject both of these arguments.

In *Coney*, we interpreted the definition of "presence" as used in *Florida Rule of Criminal Procedure* 3.180. We expanded our analysis from *Francis v. State*, 413 So. 2d 1175 (Fla. 1982), which concerned both a defendant whose right to be present had been unlawfully waived by defense counsel, and a jury selection process which took place in a different room than the one where the defendant was located. In Coney, we held for the first time that a defendant has a right under rule 3.180 to be physically present at the immediate 310 site where challenges are exercised. See Coney, 653 So. 2d at 1013. Thus, we find Boyett's argument on this issue to be without merit. [footnote omitted]

Boyett's second *Coney* argument--that the rule of that case should apply because Boyett's case was non-final when the decision issued -- is also without merit. In *Coney*, we expressly held that "our ruling today clarifying this issue is prospective only." *Coney*, 653 So. 2d at 1013. Unless we explicitly state otherwise, a rule of law which is to be given prospective application does not apply to those cases which have been tried before the rule is announced. *See Armstrong v. State*, 642 So. 2d 730, at 737-38 (Fla. 1994), *cert. denied*, 514 U.S. 1085, 115 S.Ct. 1799, 131 L.Ed.2d 726 (1995). Because Boyett had already been tried when *Coney* issued, *Coney* does not apply.

We recognize that in *Coney* we applied the new definition of "presence" to the defendant in that

> case: the state conceded that the defendant's absence from the immediate site where challenges were held was error, and we found that the error was nonetheless harmless. *Coney*, 653 So. 2d at 1013. It was incorrect for us to accept the state's concession of error. Because the definition of "presence" had not yet been clarified, there was no error in failing to ensure Coney was at the immediate site. Although the result in *Coney* would have been the same whether we found no error or harmless error, we recede from *Coney* to the extent that we held the new definition of "presence" applicable to Coney himself.

Boyett v. State, 688 So. 2d 308 (Fla. 1996). There is no basis for relief, and there is no basis for a claim of ineffectiveness of counsel, either. To the extent that Hitchcock complains about the "absence" of transcripts of certain parts of his trial, that claim is not a basis for relief, either. *Armstrong v. State,* 862 So. 2d 705, 720 (Fla. 2003); *Schwab v. State/Moore,* 814 So. 2d 402, 410-11 (Fla. 2002); *Darling v. State,* 808 So. 2d 145, 163 (Fla. 2002); *Torres-Arboleda,* 636 So. 2d 1321, 1323-24 (Fla. 1994).

III. THE "DURING THE COURSE OF AN ENUMERATED FELONY" CLAIM.

On pages 28-33 of the petition, Hitchcock argues that appellate counsel was ineffective for not arguing that the "murder during an enumerated felony" aggravating circumstance did not apply because the sexual battery was complete before Hitchcock killed his victim. In the contemporaneously-filed appeal from the denial of Rule 3.851 relief, Hitchcock argues

that trial counsel were ineffective for not raising this argument at trial. Florida law is well-settled that appellate counsel cannot be ineffective for "failing" to raise an issue that was not preserved at trial. *Suarez v. Dugger*, 527 So. 2d 190, 193 (Fla. 1988); *Hamilton v. State,* 875 So. 2d 586 (Fla. 2004); *Cummings-El v. State*, 863 So. 2d 246 (Fla. 2003); *Rivera v. State*, 859 Do. 2d 495 (Fla. 2003); *Owen v. Crosby*, 854 So. 2d 182 (Fla. 2003); *Wright v. State*, 857 So. 2d 861 (Fla. 2003). This claim is procedurally barred for habeas purposes because it was not preserved below.

Alternatively and secondarily, this claim has no legal basis. Hitchcock's claim is that "[t]here was no evidence that the homicide occurred at the time the actual penetration was taking place." *Initial Brief*, at 88. There is no such requirement in Florida law. In fact, given that the murder during an enumerated felony aggravator is applicable to an **attempted** sexual battery, and given that a **conviction** for sexual battery is not a condition precedent to the application of this aggravator, Hitchcock's argument is frivolous. *Dailey v. State*, 659 So. 2d 246 (Fla. 1995) (attempted sexual battery); *Bogle v. State*, 655 So. 2d 1103 (Fla. 1995) (conviction for sexual battery not prerequisite). *See also, e.g., Gudinas v. State*, 693

So. 2d 953, 965-66 (Fla. 1997); *Robinson v. State,* 574 So. 2d 108, 111-12 (Fla. 1991). Under well-settled Florida law, appellate counsel cannot be ineffective for not raising issues that have no merit. *Herring v. Dugger*, 528 So. 2d 1176, 1177 (Fla. 1988) (counsel not ineffective for not raising issue when controlling case law is contrary); *Suarez, supra*; *Gamble v. State/Crosby*, 877 So. 2d 706, 719 (Fla. 2004); *Reed v. State/Crosby*, 875 So. 2d 415, 440 (Fla. 2003); *Armstrong v. State/Crosby*, 862 So. 2d 705, 720 (Fla. 2003); *Owen v. Crosby*, 854 So. 2d 182, 191-92 (Fla. 2003).

IV. THE "*CALDWELL*" CLAIM.

On pages 33-40 of the petition, Hitchcock argues that his jury was instructed in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985). The claim contained in the petition is a variant of the claim contained in the contemporaneously filed appeal from the denial of Hitchcock's Rule 3.851 motion. The collateral proceeding trial court denied relief on procedural bar grounds, finding that the *Caldwell* claim could have been, but was not, raised on direct appeal.[1] This Court has repeatedly held that Florida's standard jury instructions fully advise the

[1]In footnote 7 on page 33 of the petition, Hitchcock asserts that the *Caldwell* claim was preserved at trial, but nevertheless argues that trial counsel were ineffective. The alternative arguments are internally inconsistent.

jury of the importance of its role and do not violate *Caldwell*. *Thomas v. State*, 838 So. 2d 535 (Fla. 2003) (rejecting ineffectiveness claim); *Floyd v. State*, 850 So. 2d 383 (Fla. 2002); *Burns v. State*, 699 So. 2d 646, 654 (Fla. 1997); *Archer* v. State, 673 So. 2d 17, 21 (Fla. 1996); *Sochor v. State*, 619 So. 2d 285, 291-92 (Fla. 1993); *Combs v. State*, 525 So. 2d 853 (Fla. 1988); *Grossman v. State*, 525 So. 2d 833 (Fla. 1988), *cert. denied*, 489 U.S. 1071 (1989). Under well-settled Florida law, appellate counsel cannot be ineffective for not raising issues that have no merit. *Herring v. Dugger*, 528 So. 2d 1176, 1177 (Fla. 1988) (counsel not ineffective for not raising issue when controlling case law is contrary); *Suarez, supra; Gamble, supra; Reed, supra; Armstrong, supra; Owen, supra*.

In a remarkably misleading bit of advocacy, Hitchcock argues that *Mann v. Dugger*, 844 F.2d 1466 (11th Cir. 1988), compels relief. In fact, *Mann* no longer states the law from the Eleventh Circuit on the *Caldwell* issue. That Court has specifically held:

> Since the district court released its opinion, we have issued our decision in *Davis v. Singletary*, 119 F.3d 1471 (11th Cir. 1997). In *Davis*, at 1481- 82, we held that our decisions in *Mann v. Dugger*, 844 F.2d 1446 (11th Cir. 1988), and *Harich v. Dugger*, 844 F.2d 1464 (11th Cir. 1988) (*en banc*), had to be read in light of the Supreme Court's subsequent decisions in *Romano v. Oklahoma*, 512 U.S. 1, 114 S.Ct. 2004, 129 L.Ed.2d 1 (1994), and *Dugger v. Adams*, 489 U.S. 401, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989). Doing that, we concluded

> that there can be no *Caldwell* violation unless the jury is affirmatively misled regarding its role in the sentencing process. *See* 119 F.3d at 1482. Moreover, we held in *Davis* that in deciding a *Caldwell* claim questionable remarks and comments must be considered in the context of the entire trial. *See id.* Having done so in this case, we conclude that the district court was correct when it decided that there was no *Caldwell* violation.

Provenzano v. Singletary, 148 F.3d 132 (11th Cir. 1998). The United States Supreme Court has left no doubt that the reach of *Caldwell* is not as broad as Hitchcock would have this Court believe. That Court has clearly held that in order "to establish a *Caldwell* violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Romano v. Oklahoma*, 512 U.S. 1, 9 (1994) (*quoting Dugger v. Adams*, 489 U.S. 401, 407, (1989)). "The infirmity identified in *Caldwell* is simply absent" when "the jury was not affirmatively misled regarding its role in the sentencing process." *Romano*, 512 U.S. at 9. As was the case in *Davis*,

> . . . the references to and descriptions of the jury's sentencing verdict in this case as an advisory one, as a recommendation to the judge, and of the judge as the final sentencing authority are not error under *Caldwell*. **Those references and descriptions are not error, because they accurately characterize the jury's and judge's sentencing roles under Florida law**.

Davis v. Singletary, 119 F.3d 1471 (11th Cir. 1997). Hitchcock’s

Caldwell claim has no legal basis, and the ineffectiveness of counsel claim fails.

To the extent that Hitchcock relies on *Apprendi v. New Jersey* and *Ring v. Arizona* to save this meritless claim, those cases are of no help to him. This Court has specifically rejected that claim:

> . . . Robinson claims that Florida's standard jury instructions in capital cases do not comply with *Caldwell*, in light of the *Ring* opinion, because *Ring* requires the jury to play a vital role in sentencing and the jury instructions currently diminish that role. *Caldwell* and *Ring* involve independent concerns. *Ring's* focus is on jury findings that render a defendant eligible for the death penalty, while *Caldwell's* focus as applied in this state is on the jury's role in the decision to recommend a sentence for death-eligible defendants. Therefore, *Ring* does not require that we reconsider the *Caldwell* issue raised in this case.

Robinson v. State, 865 So. 2d 1259 (Fla. 2004). Hitchcock's claim has no legal basis, and the petition should be denied.

V. THE "*RING V. ARIZONA*" CLAIM.

On pages 41-43 of the petition, Hitchcock argues that his death sentence violates *Apprendi v. New Jersey*, and *Ring v. Arizona.* This claim is also contained in the contemporaneously-filed appeal from the denial of Hitchcock's Rule 3.851 motion. Given that this claim was properly raised and decided in the Rule 3.851 proceeding, the *Apprendi/Ring* claim is not properly

raised in a petition for writ of habeas corpus. *Scott v. Dugger*, 605 So. 2d 465 (Fla. 1992).[2] See pages 6-10, above.

To the extent that Hitchcock asserts that this claim is raised to "preserve it for federal review," the United States Supreme Court has clearly held that *Ring v. Arizona* is not retroactively available to cases, such as this one, which were final before *Ring* was decided. *Schriro v. Summerlin*, 124 S.Ct. 2519 (2004).

Alternatively and secondarily, without waiving the defenses pleaded above, the *Apprendi/Ring* claim is without merit, as this Court has repeatedly held. *See, Bottoson, supra; Peterka, supra; Hernandez-Alberto*, *supra*; *Pietri, supra; Dillbeck, supra; Sochor, supra; Hutchinson, supra; Kimbrough, supra*; *Hamilton, supra; Henyard, supra; Patton, supra; Gudinas, supra; Stewart, supra; Douglas, supra; Gamble, supra; Howell*, *supra*; *Powers supra; Windom*, *supra*; *Globe, supra; Reed, supra; Robinson, supra.*

VI. THE COMPETENCY FOR EXECUTION CLAIM.

On pages 43-44 of the petition, Hitchcock asserts that he

[2]To the extent that Hitchcock has utilized the habeas petition to argue the merits of the claims raised on appeal from the denial of his Rule 3.851 motion, such is improper. The petition has been used to try to obtain a second bite at the appellate apple. See Claim I, *supra*.

may be "incompetent" at the time of his execution. Hitchcock correctly acknowledges that this claim is not timely, and states that it is contained in the petition merely to preserve the issue. This claim is untimely, and should be dismissed. *Gamble v. State/Crosby*, 877 So. 2d 706, 720 (Fla. 2004); *Porter v. State/Crosby*, 840 So. 2d 981, 986 (Fla. 2003); *Guzman v. State*, 868 So. 2d 498, 511 (Fla. 2003); *Hunter v. State/Moore*, 817 So. 2d 786, 798-99 (Fla. 2002); *Brown v. Moore*, 800 So. 2d 223, 224 (Fla. 2001); *Mann v. Moore*, 794 So. 2d 595, 602 (Fla. 2001); *Hall v. Moore*, 792 So. 2d 447, 450 (Fla. 2001); *Thompson v. State/Singletary*, 759 So. 2d 650, 668 (Fla. 2000); *Provenzano v. State*, 751 So. 2d 37, 40 (Fla. 1999).

CONCLUSION

WHEREFORE, based upon the foregoing arguments and authorities, the Respondents respectfully request that all requested relief be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above has been furnished by U.S. Mail to **Eric Pinkard, Esquire, David Gemmer, Esquire, and James L. Driscoll, Esquire**, CCRC-Middle, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, this ___ day of October, 2004.

____
Of Counsel

CERTIFICATE OF COMPLIANCE

This brief is typed in Courier New 12 point.

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