IN THE SUPREME COURT OF FLORIDA

FREDDIE LEE HALL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 77,563

BRIEF OF THE APPELLEE

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. LANDRY
Assistant Attorney General
2002 North Lois Avenue, Suite 700
Westwood Center
Tampa, Florida 33607
(813) 873-4739

OF COUNSEL FOR APPELLEE

*served 1 day late

TABLE OF CONTENTS

PAGE NO.

TABLE OF CITATIONS

PRELIMINARY STATEMENT

The instant appeal is the eighth occasion a state appellate court or federal court has reviewed Hall's claims after his conviction of the Carol Hurst murder.[1] A brief review of this odyssey is not inappropriate.

After this Honorable Court initially affirmed appellant's judgment and sentence (Hall I) in 1981, the defendant sought post-conviction relief when the governor signed a death warrant; his attack on the effectiveness of his trial counsel failed, in bath state and federal court, when collateral counsel for tactical reasons refused to present evidence on the claim (Hall 11, 111, IV), a deliberate bypass faund after an evidentiary hearing in federal court (Hall V). Appellant sought habeas corpus in this Court, relying on Hitchcock v. Dugger, 481 U.S. 393, 95 L.Ed.2d 347 (1987) and this Court held any error was harmless (Hall VI). Undaunted, the defendant sought 3.850 relief and this Court -- without requiring an evidentiary hearing -- ordered a new sentencing proceeding. Citing Tedder v. State, 322 So.2d 908 (Fla. 1975) and the hypothesis of a life recommendation the Court noted that if there were such a recommendation "the

---

[1] For earlier chapters in the Hall saga, see Hall v. State, 403 So.2d 1321 (Fla. 1981) (Hall I); Hall v. State, 420 So.2d 872 (Fla. 1982) (Hall II); Hall v. Wainwright, 565 F.Supp. 1222 (M.D. Fla. 1983) (Hall III); Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1984) (Hall IV); Hall v. Wainwright, 805 F.2d 945 (11th Cir. 1986)(Hall V); Hall v. Dugger, 531 So.2d 76 (Fla. 1988) (Hall VI); Hall v. State, 541 So.2d 1125 (Fla. *1989)* (Hall VII).

trial judge could not overrule" and impose a death sentence. 541 So.2d at 1128 (Hall VII)

Now, thirteen years after the homicide and receipt of an 8-4 jury death recommendation, appellant returns to this Court.

STATEMENT OF THE FACTS

At the resentencing proceeding the state called the victim's mother Barbara Brunson who described the last time she saw Carol Hurst (R 1258 - 1262), Vivian Mills who described seeing appellant Hall at the Shop and Go store where Deputy Coburn was shot (R 1265 - 1271) and Jerry Lee Brannen, a customer at the Shop and Go who observed two black men approach the deputy, (R 1273 - 77)

Sheriff's dispatcher Nancy Garrett heard a radio transmission from deputy Coburn calling for a computer check on an auto tag number. (R 1284 - 85) Her search revealed the vehicle was a 1975 Plymouth registered to Benjamin and Carol Hurst. Coburn said he was behind the Shop and Go at 301 and 50, then he reported on the radio he'd been shot. (R 1286)

The prior testimony of Deputy Leonard Mills, now deceased, was read to the jury. (R 1293 - 1323) He discovered Coburn after the latter was shot. Another gun other than Coburn's .357 Magnum (R 1295) was found at the scene. (R 1299 - 1300)

Deputy Jones received a call about a shooting and that a suspect vehicle was heading into his county. (R 1307) A vehicle came by, Jones verified the tag and gave chase. (R 1307 - 08) The passenger in that vehicle fired a .357 at him. (R 1308) The chase ended in a grove; the suspects jumped from the car and got into the trees. The colt python remained on the floor board of the Plymouth. (R 1310 - 11) The two suspects were both black; the smaller one on the passenger side fired the gun at him and

the larger one was driving the Plymouth. (R 1313 - 14) The passenger was Mack Ruffin, the driver Freddie Lee Hall. (R 1314) Law enforcement officer Robert White participated in the manhunt for the two suspects and captured Hall; Hall was lying flat on the ground to avoid detection. (R 1321) Former detective Bishop investigated the Coburn homicide; Deputy Mills furnished the Smith and Wesson revolver found at the scene under Coburn's body. (R 1342 - 43)

Arthur Cody, a crime scene technician, identified photos including that of a .357 Magnum found in the front seat of the Plymouth. (R 1353 - 1356) Additionally, a bag with lady's undergarments was found in the vehicle.

Cody was called away to another scene in Peterson Park about four miles from the orange grove where they found a motor vehicle owned by Mack Ruffin and bags of groceries. (R 1366 - 1367)

Officer Boyd Caudell travelled with Hall to a heavily wooded are where the body of Karol Hurst was found. She had been shot in the head. (R 1371 - 73) James Roop described the scene of the Hurst homicide. (R 1379 - 1385) A check was found at the scene. (R 1397)

Pathologist Dr. William Schutze performed an autopsy on Carol Hurst; he described abrasions on the body and a bullet wound to the head. Death was probably not immediate. The victim could have possibly survived the initial trauma but with this type of injury a person dies from the brain swelling. (R 1408 - 1415) Vaginal swabs revealed the presence of numerous sperm;

there was intercourse a short time prior to her death. (R **1416)** Karol Hurst was pregnant.

Charles Myers, an expert in forensic ballistics and firearms identification (R **1427)** and appellant stipulated that state Exhibit **39** was fired by exhibit for Identification WW. (R 1431 - 32)

Roger Morrison, an expert in forensic serology, determined there were semen stains on the woman's panties. Group B and group H blood group factors were found. (R **1440)** There **was** no indication of an A blood type in the semen stains. (R **1442)** Mr. Hall is type B and secretes the B and H antigens; Mr. Ruffin was a type *O* and secretes the H antigen. Semen stains on the panties had B and H antigens. Hall could have left the semen stains on the underwear. Ruffin could have left some of it but not all of it. **(R 1440 - 1444)**

Former state attorney Gordon Oldham testified that he had prosecuted Hall three times; first in **1968** for rape and appellant was convicted of assault with intent to commit rape on Thelma Fseelove. (R **1474)** (That victim was now deceased). (R **1476)** Appellant attacked her, and successfully tried to gouge her eyes out. That judgment and sentence was introduced. (R **1477)** The second prosecution was for the homicide of Deputy Lonnie Coburn. (R 1479) The judgment of second degree murder was introduced. **(R 1480)** The **third** prosecution **was** for the murder of Carol Hurst and for her kidnapping, sexual battery and robbery. (R **2483)** Hall testified in that case. (R 1485)

The state next introduced the testimony Hall had given in his prior trial at the penalty phase wherein appellant denied the 1986 rape and claimed he was railroaded. (R 1494) With respect to the Hurst crime, he claimed he didn't want anyone to get killed. (R 1495) 'Hall admitted having stolen the .38 used in the Hurst murder from his mother. (R 1501) He admitted stealing the car (R 1502) to use in the armed robbery. (R 1503) Mrs. Hurst said she was seven months pregnant. (R 1504) Hall claimed Ruffin raped here. (R 1505) The victim begged for her life and said she wanted to have her baby after she was beaten. She tried to write out a check for $20,000 to spare her life. (R 1506) They went to rob the convenience store but left when there were too many customers and had a confrontation with the deputy. (R 1509) Hall knew he was carrying a gun and discovery of that would send him back to prison. He claimed Ruffin shot the deputy when he (Hall) struggled with Coburn. (R 1510)

Probation supervisor Fred Dietz supervised Hall in the middle 1970's. (R 1517) Hall was on parole on February 21, 1978. (R 1518)

The state rested. (R 1519)

Defense witness Richard Hagin, appellant's trial lawyer in 1967, testified that he thought Hall's thought processes were slow. (R 1535) He said there were strong racial overtones to the case. (R 1536) He opined that Hall was not guilty of that charge. (R 1544) On cross-examination Hagin acknowledged that the jury had found Hall guilty of assault with intent to commit rape, (R 1549)

Hanna Foster, assistant superintendent of school records, testified that Hall's school records contained notations of his slowness. (R 1553 - 1557)

Attorney H.D. Robuck who represented appellant in the trials for the Hurst and' Coburn homicides (R 1566) testified that experts examined Hall to determine his competency. (R 1568) The witness could not recall that Hall told Dr. Carrera he got out of military service by acting crazy. (R 1570)

Appellant's sister Deanna Rigsby testified that she now has six brothers and three sisters. (R 1573) Raosevelt Johnson was a former playmate of appellant and described their growing up. (R 1575 - 1586) Appellant's brothers James Hall (R 1590 - 1603) and Eugene Elliott (R 1625 - 1631) described the beatings and abuse they suffered from their mother, as did Hall's niece Faye Paige. (R 1616 - 1624)

Former deputy sheriff Arthur Freeman testified that in 1978 Ruffin told him he shot Carol Hurst. (R 1605) Hall had told him that if he wanted to run with him he had to prove himself as a man. (R 1610) Ruffin also said Hall killed Deputy Coburn. (R 1611) The court then ruled that the prosecutor would have to call Freeman on rebuttal, rather than use cross-examination to explore the entirety of Ruffin's statement. (R 1612 - 13)

The court explained its ruling regarding additional family member testimony, repetitious testimony of the same events would be cumulative but the court would hear something new. (R 1641)

The court informed the jury that it was concerned that some of the testimony was repetitious and that a stipulation was entered to save time, to-wit: that four witnesses Robert Ellis, Henry Ellis, Ethel Mae Miller and Willie C. Hall would have testified to the same factual circumstances that other family witnesses had testified to. (R 1653)

Appellant's sister Kattie Mae Glenn testified that her mother explained that she inflicted beatings on the children to keep the white man from killing them. (R 1655) Appellant's niece Glory Gene Lotts testified that her grandmother would discipline appellant by placing him in a smokehouse. (R 1659)

Attorney Bernard Daley experienced in parole work testified that appellant's chances for parole were slim if he received a life sentence (R 1665) but he acknowledged Hall would at some point become eligible for parole and he could not guarantee there would be no parole. (R 1666)

The videotaped deposition of Dr. Dorothy Lewis was played to the jury. (R 1703)

Dr. Barbara Bard, a professor in special education (who testified for CCR in the Kenneth Hardwick federal habeas proceeding) (R 1708) evaluated appellant Hall in September of 1986 and opined that his profile was consistent with that of a mentally **retarded** adult. (R 1718) On voir dire the witness admitted reaching her opinion prior to listening to the 1978 tape involving Hall. (R 1729) The tape of appellant's confession was played to the jury. (R 1733) She made no attempt to review

Hall's prison records and she spent only two hours and fifteen minutes with appellant. (R 1739)

Dr. Jethro Toomer, a psychologist, opined Hall had brain damage (R 1748) and found no signs of malingering. (R **1757)** He opined that Hall was under the influence of extreme mental of emotional disturbance and that his ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. (R 1772 - 73) He did not meet Hall until 1988, ten years after the crime. (R 1779) He was asked to evaluate Hall by his attorney for his benefit. (R **1788)**

The witness added that he would not believe Hall if the latter told him he faked like he was crazy when he was in the military. (R 1795)

Dr. Kathleen **Heide,** a criminologist, interviewed appellant in September of 1990. (R 1832) She opined that appellant was simple minded (R 1835), and impulsive. (R 1847) **She** opined that his capacity to conform to the requirements of law **was** substantially impaired. (R 1849) Appellant told the witness a version of the facts consistent with what he told the police -- he denied killing Mrs. Hurst, denied having anything to do with her rape. One material difference with his story to the police was that he told Heide he never even ***touched*** **Deputy** Coburn. **(R 1855)** The witness was neither a psychiatrist nor a psychologist. (R 1856) The witness was familiar with the deposition of Arthur Freeman wherein Ruffin admitted that he and Hall **picked** up the

victim in the parking lot and that Hall told him if he wanted to run with him he'd have to prove himself like a man. Ruffin Hit her on the head -- Freddie told him to prove himself -- Ruffin's gun snapped three times, Hall said he had a gun and Ruffin killed her with it. **(R 1861)** Ruffin told Freeman he shot the girl because Hall encouraged him to prove his worth as a man. (R 1869)

Arthur Freeman was recalled. He gave a deposition in August of 1978, one month after Ruffin's July trial in which Ruffin said that after he and Hall picked up the girl in the parking lot Freddie told him if he wanted to be with him and run with him he'd have ta prove himself to be a man. Ruffin pulled the trigger on the .32; it snapped three times, so he got Hall's gun from him and killed her, (R **1874 - 75)**

State rebuttal witness Arthur Freeman testified that in Ruffin's statement to him he said Hall shot Deputy Coburn. (R **1898)** Ruffin also said he was afraid after they raped Wurst. (R **1901)**

The court allowed the defense to put into evidence Ruffin's judgments and sentences in the case. **(R 1942)**

State rebuttal witness psychiatrist Dr. Frank Carrera III evaluated appellant Hall in April of 1978 to determine his competence to stand trial and sanity at the time of the offense. (R 1945 - **1946)** **Hall** gave a personal history and mentioned that he put on like he was crazy when rejected by the military. (R 1952) He denied a history of pathological hallucinations. (R

1954) He denied suicide attempts. (R 1955) There was no evidence of thought disorder or loose associations. (R 1960) He indicated no delusions. (R 1961) The witness opined that at the time of Hall's 1978 trial he understood the difference between right and wrong and at the time of his offense understood the consequences of his behavior. (R 1966) He was not under the influence of extreme mental or emotional disturbance at the time of the offense and his ability to appreciate the criminality of his conduct or to conform to the requirements of law was not substantially impaired. (R 1968)

The jury recommended a sentence of death by a vote of eight to four. (R 474) The trial court agreed with the recommendation. (R 635 - 698)

The trial court issued a comprehensive thirty-two page sentencing order, detailing the findings of fact in support of the conclusion that death was the appropriate sanction (R 635-661). In summary, the trial court found the following aggravating circumstances:

(1) The defendant was convicted previously of a felony involving the use or threat of violence to the person. F.S. 921.141(5)(b) (including the 1968 assault upon Thelma Freelove, the 1978 murder of deputy Coburn, and the 1978 conviction of shooting into the vehicle occupied by deputy Janes).

(2) The capital felony was committed by a person under sentence of imprisonment (5)(a).

(3) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of a kidnapping or sexual battery. (5)(d)

(4) The capital felony was committed for pecuniary gain. (5)(f). (one of the motives for the murder was to obtain a vehicle to be used to frustrate identification and as a step in the furtherance of the sought-after financial gain expected to be derived from the robbery of a convenience store in Hernando County).

(5) The capital felony was especially heinous, atrocious, or cruel. (5)(h).

(6) The capital felony was a homicide committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification. (5)(i).

(7) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest. (5)(e).

The court noted that appellant attempted to present evidence to establish statutory mitigating circumstances (6)(b),(d), (f), and (g) and multiple nonstatutory mitigating circumstances (R 642-645). The court conducted an analysis of the mitigating circumstances and concluded with respect to statutory mitigating factors (b) and (f) that the testimony of Dr. Carrera, a psychiatrist who examined the defendant shortly after the crime in issue was entitled to much greater weight than that of the defense experts (R 648). Moreover, the court explained in support of its rejection of the defense expert testimony that the

description they offered of the defendant could not explain the planning end execution required for the kidnapping-robbery-murder of Hurst and the getaway which occurred after the fatal confrontation with Deputy Coburn until their capture hours later. In other words the 'views expressed by the defense experts was at odds with the other evidence in the case (R 649-650).

As to statutory factor (6)(d), the court concluded from the totality of the evidence that Hall was a knowing, willing, and active participant in the series of events leading up to and following Hurst's death. The defendant cannot benefit from the fact that only one bullet was fired where the evidence supports the proposition that Hall prevailed upon his codefendant to fire the bullet. Appellant's age of thirty-three was not mitigating, even taking into account the alleged mental deficits (R 651-52).

The court then listed some twenty-five asserted nonstatutory mitigating factors and noted the unquantifiability of some of these factors and the effect of these facts was impossible to ascertain (R 652-658). The court observed the paucity of evidence establishing any logical nexus between the defendant's past and present problems and the atrocity of his conduct on February 21,1978 (R 659). The court concluded that death was the appropriate sanction.

Appellant now appeals.

SUMMARY OF THE ARGUMENT

I. Appellant's contentions that the jury recommendation and sentence of death are invalid because based on improper aggravating circumstances, consideration of which is barred by res judicata, law of the case and fundamental fairness is without merit. Appellant raised a double jeopardy argument below which properly was denied on authority of Poland v. Arizona, 476 U.S. 147, 90 L.Ed.2d 123 (1986); his remaining arguments were not preserved for appellate review and even if they were, the lower court did not err in considering all available present statutory aggravating factors.

11. The lower court did not err in finding the aggravating factor of witness elimination as the evidence supports the finding,. Even if the lower court erred, it would be harmless in light of the multiple, overwhelming aggravating factors present.

111. The lower court did not err in finding the aggravating factor of cold, calculated and premeditated with no pretense of moral or legal justification. The evidence supports it and the finding is consistent with this Court's precedents. There is no defense of moral justification available.

IV. The trial court did not err by applying the wrong legal standard in the weighing process. The court considered in minute detail all that was presented, engaged on a serious and meaningful weighing analysis and reached the appropriate result. The instant death sentence is not disproportionate given the overwhelming aggravated nature of the offense and his career.

V. The trial court did not err by applying the wrong legal standard in following the jury recommendation.

VI. The trial court did not err in refusing to permit an explanation of to the jury;-- the reason for the thirteen year old remand for resehtencing it would have unnecessarily confused them and not aided in their deliberative process.

VII. The lower court did not err in its ruling pertaining to the Ruffin-Coburn homicide since the judgment imposed was not relevant to the issue presented to the jury and would have been unnecessarily confusing.

VII. The trial court did not err in ruling that some of the testimony of siblings was unnecessarily cumulative and redundant.

IX. The statutory aggravating factor of "heinous, atrocious or cruel" is not unconstitutionally vague.

X. Florida Statute 921.141 is not unconstitutional, either facially or as applied.

XI. The trial court did not abuse its discretion in refusing to grant Hall an additional peremptory challenge, after already granting one additional challenge.

ARGUMENT

ISSUE I

WHETHER JURY RECOMMENDATION AND DEATH SENTENCE ARE INVALID BECAUSE BASED ON IMPROPER STATUTORY AGGRAVATING CIRCUMSTANCES; CONSIDERATION OF SUCH FACTORS IS BARRED BY RES JUDICATA, LAW OF THE CASE AND FUNDAMENTAL FAIRNESS.

Prior to trial appellant filed a motion to preclude evidence or consideration of aggravating factors not found in the original 1978 trial. (R 391 - 393) Appellant argued this motion at a hearing on December 5, 1990 (R 2196 - 2198; R 431 - 435) acknowledging the adverse decision of Poland v. Arizona[2] which the prosecutor relied on and the court denied the motion, (R 2200)

In Poland, the Supreme Court opined:

> [5a] We reject the fundamental premise of petitioners' argument, namely, that a capital sentencer's failure to find a particular aggravating circumstance alleged by the prosecution always constitutes an "acquittal" of that circumstance for double jeopardy purposes. Bullington indicates that the proper inquiry is whether the sentencer or reviewing court has "decided that the prosecution has not proved its case" *that the death penalty is appropriate.* We are not prepared
>
> [476 US 156]
>
> to extend Bullington Further and view the capital sentencing hearing as a set of minitrials on the existence of each aggravating circumstance. Such an approach would push the analogy on

---

[2] 476 U.S. 147, 90 L.Ed.2d 123 (1986).

> which Bullington is based past the breaking point.
>
> [6] Aggravating circumstances are not separate penalties or offenses, but are "standards to guide the making of [the] choice" between the alternative verdicts of death and life imprisonment.

(90 L.Ed.2d at 132)

Appellant complains that in his original 1978 trial, the court had found only three aggravating factors; prior conviction of another capital crime or felony involving the use or threat of violence to another person, the capital felony was committed while Hall was engaged in the commission of a kidnapping and robbery, and the murder was especially heinous, atrocious or cruel. Hall v. State, 403 So.2d 1321, 1325 (1981). He argues that any subsequent finding of additional aggravating factors is improper violates res judicata, law of the case and fundamental fairness principles. In the lower court appellant merely argued that double jeopardy under the state and federal constitutional precluded consideration of additional aggravating factors. (R 391 - 393, R 431 - 435, R 2196 - 98) Now, instead of urging double jeopardy, he changes the basis of his argument to res judicata and law of the case. He may not do so and his argument should be deemed procedurally barred.

See Steinhorst v. State, 412 So.2d 332 (Fla. 192); Occhicone v. State, 570 So.2d 902 (Fla. 1990); Farinas v. State, 569 So.2d 425 (Fla. 1990); Bertolotti v. State, 514 So.2d 1095 (Fla. 1987).

But even if the issue had been preserved, it is meritless. No sentencer -- neither jury nor judge -- has determined that death is the inappropriate sanction. At every opportunity to consider the matter, a jury and a judge have agreed that death is the proper penalty.' This Court's decision in Hall v. State, 541 So.2d 1125 (Fla. 1985), constitutes no impediment here. The issue presented in Hall was whether the trial court erred in summarily denying post-conviction when Hitchcock error had occurred; any language the court may have employed regarding the three statutory aggravating factors previously found would have had to have been dicta if meant to suggest what prospectively must be balanced in a future proceeding.

Additionally, this Court has already indicated that when a new sentencing proceeding is ordered, the state is clean for consideration anew of aggravating and mitigating circumstances. See King v. Dugger, 555 So.2d 355, 358 (Fla. 1990) (King's resentencing was a completely new proceeding, separate and distinct, from his first sentencing). Cf. Zeigler v. State, 580 So.2d 127 (Fla. 1991) (it would have been all right for trial judge to have found CCP aggravator without violating expost facto on a resentencing proceeding); Teffeteller v. State, 495 So.2d 744 (Fla. 1986) (resentencing should proceed de novo on all issues bearing on the proper sentence which the jury recommends be imposed. A prior sentence, vacated on appeal, is a nullity).

ISSUE II

WHETHER THE TRIAL COURT ERRED IN FINDING THE MURDER WAS COMMITTED FOR THE PURPOSE OF ELIMINATING WITNESS.

The trial court's order recites:

> "(7) The capital felony was committed for the purposes of avoiding or preventing lawful arrest.
>
> (a) The evidence clearly demonstrates the defendant discussed with his codefendant the benefits to be derived from witness elimination by the killing of Karol Lea Hurst: obviously she, once dead, could not call them to account for her abduction and rape.
>
> (b) The evidence clearly leaves no reasonable inference but that Karol Lea Hurst was abducted and transported some distance to a secluded area for the sole purpose of killing her, thereby eliminating the only witness to her abduction, rape and, equally significant the theft of, and subsequent criminal use of, her vehicle in the planned robbery of the convenience store.
>
> See Johnson v. State, 442 So.2d 185 (Fla. 1983); Cave v. State, 476 So.2d 180 (Fla. 1985); Swafford v. State, 533 So.2d 270 (Fla. 1988); Lopez v. State, 536 So.2d 226 (Fla. 1988)."

(R 642)

See also R 2048 - 2052.

In Cave, supra, this Court opined:

> "The evidence leaves no reasonable inference but that the victim was kidnapped from the store and transported some thirteen miles to a rural area in order to kill and thereby silence the sole witness to the robbery. The record also shows that she pleaded for her life, and was in such fear that her bladder involuntarily released. There is also evidence . . . that after being stabbed and

falling to the ground she was executed by a single shot to the back of the head.''

(476 So.2d at 188)

See also Swafford, supra (victim's body found in a wooded area by a dirt road six miles from the site of the kidnapping; she had been sexually battered and shot. This Court approved the finding of witness-elimination and homicide to avoid or prevent arrest and this Court rejected a defense argument that the aggravating factor was applicable even without direct evidence of the offender's thought processes where the factor can be shown by circumstantial evidence through inference from the facts shown. Id. at 276.[3]

Appellant makes no attempt to discuss these cases relied on by the trial judge (although he does mention Lopez). Appellant acknowledges case law wherein this aggravator is found following defendant's admission of his motive for killing but argues that such a factor cannot be found via a codefendant's statement. Hall ignores this Court's decision in Swafford, supra, and cases cited therein that circumstantial evidence -- even apart from an outright admission personally by the accused can suffice. See

---

[3] Both in text and footnote the court cited the following precedents: Routly v. State, 440 So.2d 1257; 1263 (Fla. 1983), Cave, supra; Burr v. State, 466 So.2d 1051 (Fla. 1985); Martin v. State, 420 So.2d 583 (Fla. 1982); Griffin v. State, 414 So.2d 1025 (Fla. 1982); Harich v. State, 437 So.2d 1082, 1086 (Fla. 1986).

also Gilliam v. State, 582 So.2d 610, 612 (Fla. 1991) (approving common sense inferences of the circumstances).

Hall admitted -- via his prior sentencing testimony introduced sub judice -- thht Hall knew he was carrying a gun and discovery of that' fact by Deputy Coburn in the subsequent confrontation at the convenience store would send him back to prison. (R 1510) The victim had attempted to spare her life by pleading for her unborn baby **and** by writing out a check for $20,000. (R 1506) While appellant alludes to the testimony of Arthur Freeman -- introduced by appellant Hall -- concerning Ruffin's admission -- that he shot the victim Mrs. Hurst that he killed her because he didn't want her to talk (R 1605 - 16060), he fails to mention that Hall had told Ruffin that if he wanted to run with him he had to prove himself a man (R 1610) and that when witness Freeman was recalled he repeated Hall's urging to Ruffin about proving himself and that Ruffin got Hall's gun for the execution when his own misfired (R 1874 - 75); and appellant fails to mention that there was testimony presented below through Drs. Shutze and Morrison -- and found by the trial court (R 640) -- that Hall sexually assaulted Mrs. Hurst (R 1440 - 1444), his protestations to the contrary not withstanding.

In summary, appellant's claim is meritless.

Finally, even if this Honorable Court were to conclude that the court below erred in finding this aggravating factor (which we do not concede), the removal of such a factor does not change the result in light of the numerous remaining valid aggravators

and the absence of meaningful mitigating factors. See Green v. State, 583 So.2d 647, 653 (Fla. 199.2) fn. 11; Holton v. State, 573 So.2d 284 (Fla. 1990); Hill v. State, 515 So.2d 176 (Fla. 1987); Rogers v. State, 511 So.2d 526 (Fla. 1987); Bassett v. State, 449 So.2d 863 (Fla. 1984); Brown v. State, 381 So.2d 690 (Fla. *1990).*

ISSUE III

WHETHER THE TRIAL JUDGE ERRED IN FINDING THAT THE MURDER WAS COLD, CALCULATED AND PREMEDITATED, WITH NO PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

The trial court made the following finding:

> "(6) The capital felony was a homicide and was committed, in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.
>
> (a) The evidence demonstrates the defendant abducted Karol Lea Hurst from a public location in Lake County, Florida, and took her to a hidden, isolated location in Sumter County, Florida. Once at the murder site, the defendant raped Karol Lea Hurst, then took her some 60 feet further into a wooded, secluded area, clearly evidencing a fully developed premeditation to kill.
>
> (b) The evidence clearly demonstrates that there in the deep, hidden woods, Karol Lea Hurst alternately bargained for and begged for her life; once offering the defendant a blank check; then pleading that her life and the life of her unborn child be spared. Such bargains and pleas could fail to dissuade only an already fixed, unmovable, premeditated intent.
>
> (c) The evidence clearly demonstrates that then Karol Lea Hurst was murdered: the initial effort consisting of raining down strong blows on the back of her neck with a pistol barrel or butt; and then, with Karol Lea Hurst in a huddled, defensive position, she was shot execution-style, in the back of the head at close range. See, Stano v. State, 460 So.2d 890 (Fla. 1984); Parker v. State, 476 So.2d 134 (Fla. 1985); Harvey v. State, 529 So.2d 1083 (Fla. 1988); Knight v. State, 512 So.2d 922 (Fla. 1987).
>
> Under the totality of the circumstance in this cause, it is this Court's conclusion, beyond and to the exclusion of every reasonable doubt, that the capital felony was

> a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justificatian."
>
> (R 641)

Hall now urges that the trial court's finding is insufficiently supported.[4] Appellee respectfully submits that the instant homicide meets the criteria established by this Court's precedents and is comparable to the following cases:

See Robinson v. State, 574 So.2d 108 (Fla. 1991) (CCP found where victim abducted at gunpoint, transported to remote, desolate cemetery, sexually abused by two defendants and then shot twice); Asay v. State, 580 So.2d 610 (Fla. 1991) (CCP upheld where victim discovered by chance while defendants looked for prostitutes); Henry v. State, 586 So.2d 1033 (Fla. 1991) (CCP found when defendant during robbery lured victim into a restroom, persuaded her to be allowed to be tied then lit her on fire); Valle v. State, 581 So.2d 40 (Fla. 1991) (execution-style shooting of police officer meets CCP standard); Wickham v. State, ___ So.2d ___, 16 F.L.W. S777 (Fla. 1991) (while the murder of Fleming may have begun as a caprice, it clearly escalated and prearranged effort to commit the crime); Dougan v. State, ___

---

[4] IN a footnote at page 38 of his brief, Hall urges that application of CCP is expost facto. Appellee disagrees. See Combs v. State, 403 So.2d 418 (Fla. 1981); Stano v. Dugger, 524 So.2d 1018 (Fla. 1988); Sireci v. State, 587 So.2d 450 (Fla. 1991); Dougan v. State, 17 F.L.W. 10 (Fla, 1991); Zeigler v. State, 580 So.2d 127 (Fla. 1991).

So. 2d ___, 17 F.L.W. S10 (Fla. 1991) (planning and execution of kidnapping-murder demonstrated CCP)

Appellant complains that the finding of this aggravator is inappropriate because he claims the evidence fails to support a conclusion that Hall formed the intent to eliminate a witness, that he intended Mrs. Hurst be shot or that he encouraged his accomplice (Ruffin) to do the evil deed. Appellant focuses on that portion of Ruffin's confession to Deputy Freeman in which he admitted -- after trial being the triggerman and he urges that Hall's self-serving statements in 1978 that he did not intend the killing must be believed. But Hall's self-serving declarations can be ignored where inconsistent with the evidence. For example, Hall did not admit to participating in the rape of Mrs. Hurst -- he said Ruffin did it (R 1505) whereas the medical testimony of Dr. Schutze and forensic serologist Roger Morrison showed that Ruffin could not have left all the semen discovered on the body. (R 1440 - 1444) In Hall's prior testimony he admitted having stolen the .38 used in the Hurst murder from his mother and stealing the car. (R 1501 - 1503) And Hall fails to mention the totality of Ruffin's confession to Freeman that Hall had urged Ruffin to kill the victim "if he wanted to run with him he had to prove himself as a man". (R 1610) Indeed, when Ruffin's gun misfired and snapped three times Ruffin took Hall's gun to complete the execution. (R 1874 - 75) Hall even admitted struggling with Deputy Coburn knowing that if the deputy discovered him in possession of a gun, he would return to prison.

(R 1509 - 1510) Obviously, elimination of witness Hurst had to be a motive to avoid imprisonment. Note Freeman's testimony that he recalled telling defense attorney Robuck in deposition in August of 1978 Ruffin told him that after he and Hall had picked up the victim in the parking lot Hall said if Ruffin wanted to run with him he had to prove himself like a man.

Finally, as the state has previously urged in Issue 11, supra, even if this aggravator were to be excluded, the overwhelming remaining factors in aggravation -- most of which are unchallenged -- render any error harmless and require affirmance.

Appellant next turns his attention to the pretense of moral or legal justificatian prong of CCP and suggests (apparently seriously) that Hall's alleged mental retardation constitutes a "pretense of moral ok legal justification". Appellee is unaware of one precedent by this Court which suggests that retardation constitutes a justification for the first degree murder of a seven months pregnant woman after she has been raped and beaten. Frankly, appellee believes the contention to be an insult to those mentally retarded citizens of the state who choose to lead a law-abiding life rather than engage in the uncivilized conduct of Mr. Hall. Appellee would submit that the proper interpretation of cases like Banda v. State, 536 So.2d 221 (Fla. 1988) is that the crime is at least a colorable claim of self-defense; no such contention can be urged here that Mrs. Kurst presented an unreasonable, unprovoked assault upon Hall. Indeed,

this Court has rejected the "pretense" defense where there has been no threatening act by the victim. Williams v. State, 511 So.2d 289 (Fla. 1987). If Banda is as expansive as Hall urges, the instant case would be the appropriate vehicle to overrule Banda.

Lastly, even if appellant's pretense had some weight, the trial court carefully explained in its order if the view of defense experts were fully believed, he would be "practically a vegetable" and "his behavior at the time of the crime . . . would belie the fact of his severe psychosis and mental retardation." (R 649) And, "Here, the defendant shows more deliberation and planning than that which might be attributed to a typically retarded defendant. See, e.g., Kight v. State, 512 So.2d 922 (Fla.)." (R 662)

Appellant's claim is without merit.

ISSUE IV

WHETHER THE TRIAL JUDGE ERRED REVERSIBLY BY ALLEGEDLY USING WRONG LEGAL STANDARD IN FINDING, REJECTING AND/OR IN WEIGHING MITIGATION: THE SUBSTANTIAL MITIGATION THAT EXISTS IN THIS CASE WITHOUT CONTRADICTION RENDERS THE DEATH SENTENCE DISPROPORTIONATE BECAUSE THIS CASE ALLEGEDLY IS NOT THE MOST AGGRAVATED AND LEAST MITIGATED OF MOST SERIOUS OFFENSES.

Appellant complains about the trial court's determination that some of the asserted factors in mitigation were unquantifiable (R 653 - 654) and contends that it contravenes Campbell v. State, 571 So.2d 415 (Fla. 1990). The lower court's order is not improper.

As Campbell outlines, the trial court expressly evaluated in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether in the case of nonstatutory factors, it is truly of a mitigating nature. Id. at 519. In the factors alluded to at R 652 - 654 relating to appellant Hall's mental/emotional problems the trial court was articulating the first prong of the Campbell protocol -- that there was factual evidence supportive of the assertion. Campbell then provides:

> "The court then must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight." (text at 420)

The trial court's explication that the mitigating value of a factor is unquantifiable is not assertion that it is being "dismissed as having no weight," nor is it an assertion that legally such factors may no$ be considered as possible mitigating circumstances; rather the court is articulating a weighing description, i.e., given the necessary speculative nature of attributing all of human conduct to factors that have been present throughout an individual's life, the best that can be said, in the instant case, is that they did not impact on, or help to explain Hall's conduct during this Hurst-Coburn crime spree. Although appellant seeks to deny it, Hall's real complaint is with the weight that the trial court gave to his assertions of mitigation.

With respect to Hall's complaint that the trial court gave insufficient weight to the testimony of defense mental health experts and otherwise failed to conduct an appropriate analysis or weighing process, this Court has consistently declined to engage in second-guessing of trial judges when they consider the matters presented to them and disagree with the weight that the defense would attribute to them. See Nixon v. State, 572 So.2d 1336 (Fla. 1990) (clear that trial court considered and rejected all mitigating evidence offered); Robinson v. State, 574 So.2d 108 (Fla. 1991) (no error in failing to find additional mitigating factors; trial court's comprehensive order discussed all mitigating presented and reflected it Considered and weighed it); Gunsby v. State, 574 So.2d 1085 (Fla. 1991) (trial judge

considered conflicting testimony of mental health professionals and as an appellate court we have no authority to reweigh that evidence); Engle v. Dugger, 576 So.2d 696 (Fla. 1991) (mental health experts often reach different conclusions); Sanchez-Velasco v. State 570 So.2d 908 (Fla. 1990) (failure to find extreme mental or emotional distress and inability to appreciate the criminality of conduct not error; judge could appropriately reject it since the evidence was not without equivocation and reservation); Zeigler v. State, 580 So.2d 127 (Fla. 1991) (judge explained why he was giving little or no weight to the mitigating evidence); Sochor v. State, 580 So.2d 595 (Fla. 1991) (OK for trial judge to reject mitigating factors; although several doctors testified as to defendant's mental instability, one testified he had not been truthful and another that he had selective amnesia and deciding about the family history as mitigation is within the trial court's discretion); Jones v. State, 580 So.2d 143 (Fla. 1991) (while a poor home environment in some cases may be mitigating, sentencing is an individualized process and the trial court may find it insufficient); Ponticelli v. State, So.2d , 16 F.L.W. S669 (Fla. 1991) (rejecting defense argument that court failed to consider unrebutted mitigating evidence; trial court found doctor's testimony "speculation" and there was competent, substantial evidence to support rejection of the mitigating evidence); Sireci v. State, 587 So.2d 450 (Fla. 1991) (involving the same Lewis-Pincus death row study team, this Court said that the decision as to whether a

particular mitigating circumstance is established lies with the trial judge; reversal is not warranted simply because an appellant draws a different conclusion; since it is the trial court's duty to resolve conflicts in the evidence, that determination should be final if supported by competent, substantial evidence); Pettit v. State, So.2d ___, 17, F.L.W. S41 (Fla. Case No. 75,565, January 9, 1992).[5]

Hall relies on Nibert v. State, 574 So.2d 1059 (Fla. 1991) where the state had presented no evidence to challenge any of the mitigating evidence and this Court found it erroneous for "the trial court's refusal to consider" the evidence of abuse. Here, the trial court did not refuse to consider it; it did consider it but found it unpersuasive in terms of its weight. As noted in Ponticelli v. State, So.2d ___, 16 F.L.W. S669, 672 (Fla. 1991):

> Finally, we reject Ponticelli's claim that the trial court erred in failing to consider valid unrebutted mitigating evidence. In rejecting the mitigating factor that the defendant was under the influence of extreme mental or emotional disturbance at the time of the murders, the court found Dr. Mills' testimony in support of this factor "mere speculation." Ponticelli had not discussed

---

[5] What the trial court's order reflects is not substantially different from what this Court has said in Rogers v. State, 511 So.2d 526, 535 (Fla. 1987) ("We thus find that the **record** factually does not support a conclusion that Rogers' childhood traumas **produced** any effect upon him relevant to his character, record or the circumstances of the offense so as to afford some basis for reducing a sentence of death") [emphasis supplied].

> his mental processes or any of the details of the offense with Dr. Mills, and the only evidence to support Dr. Mills' opinion was Ponticelli's use of cocaine and the description of his hyperactivity on the evening of the murders, although there was no evidence of drug use on the evening of the murders.
>
> The trial court also rejected as a mitigating circumstance the fact that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. In rejecting this factors, the court again considered the fact that there was no evidence that Ponticelli was using cocaine at the time of the murders to support Dr. Mills' opinion that this factor applied. The court considered expert testimony given during the competency hearing. It also considered testimony concerning Ponticelli's actions on the night of the murder evincing that his capacity to appreciate the criminality of hip conduct was not impaired. Our review of the record reveals that there is competent substantial evidence to support the trial court's rejection of these mitigating circumstances.

The trial court was entirely correct in deciding that in this particular case the torture and abuse were not persuasive mitigation since other siblings and family members were similarly abused without resorting to a life-career in crime (Cf. Sochor, supra, C.J. Jones, supra), and with respect to the mental mitigators, the trial court could disbelieve some of their speculation in light of the fact that his alleged difficulty in coping was inconsistent with the facts of the case. After noting the speculative attempt years after the crime to opine about Hall's mental status (R 646 - 47), the trial judge found that the defense experts' views were contrary to that of Dr. Carrera who

examined appellant eight weeks after the murder and who testified that appellant was ~~not~~ ~~under~~ the influence of extreme mental or emotional disturbance nor was his capacity to appreciate the criminality of his conduct to the requirements of law substantially impaired. (R 648) The court cancluded:

> "Nevertheless, their [The defense experts] testimony all suffers from the same defect in that they cannot positively predict that the defendant was suffering from the various mental anomalies of which they testify at the time of the crime itself, even though they all testify that they feel confined that the defendant so suffered at the time of the crime. These defense witnesses' assurances though are contradicted by the testimony of Dr. Carrera, a Court-appointed psychiatrist who examined the defendant shortly after the crime at issue. Dr. Carrera found no indication of any psychosis an the part of the defendant. This Court concludes that Dr. Carrera's testimony, based on an examination only a month or so after the crimes for which the defendant was convicted, is entitled to much greater weight than that of the defense experts.
>
> Moreover, the Court suspects that the defense experts are guilty of same professional overkill. If the testimony of the defense experts is believed and taken to its logical conclusion, the defendant is practically a vegetable. However, his behavior at the time of the crimes for which he stands convicted, as well as some of the statements that he made previously (such as his previous testimony at trial), would belie the fact of his severe psychosis and mental retardation. Nothing of which the experts testified could explain how a psychotic, mentally-retarded, brain-damaged, learning-disabled, speech-impaired person could formulate a plan whereby a car was stolen and a convenience store was robbed. Bear in mind the facts of this case conclusively showed that Freddie Lee Hall was the one that kidnapped Karol Lea Hurst from the Pantry Pride grocery store.

Freddie Lee Hall alone was the one that drove Karol Lee Hurst, in broad daylight, through the city of Leesburg to a spot in the woods some eighteen miles distant. There is no evidence as to whether or not Freddie Lee Hall possessed a driver's license, but he was certainly driving a car in broad daylight through city traffic with a kidnapped victim inside. Moreover, after the killing of Deputy Coburn at the convenience store in Ridge Manor, Hernando County, Florida, the evidence is uncontraverted that it was Freddie Lee Hall who was driving the getaway car during a high-speed chase while Mack Ruffin, Jr. was firing at the pursuing deputy. Freddie Lee Hall was able to drive the car in such a manner as to elude the deputy after approximately a five-mile chase and to get the car into an orange grove where he and his codefendant made their escape on foot. On foot they made their way some six to seven miles distance, eluding a massive manhunt, until they were captured in the early morning hours of the following day. Nothing in the evidence can explain how Freddie Lee Hall could live a more or less normal life, obtain employment, and substantially remain outside of violation of the law during the five (5) years that he was on parole after his first rape conviction. Nothing in the evidence can explain the statements that the defendant made when he testified in his own behalf during his first trial. Those statements appear to the Court to be an attempt to place blame on others for his involvement in the crime, but his statements are no different than those made by the "normal" defendant in almost any criminal trial conducted. In other words, the clinical characterization of the defendant presented by the testimony of the defense experts does not seem to comport with the other evidence of the defendant's background and behavior that are clear from other aspects of the evidence in this case. Thus, this Court believes that the evidence of the experts, for whatever reason or reasons, is exaggerated to some extent.

(R 648 - 650)

Hall continues his assault by criticizing Dr. Carrera's opinion; appellee will not belabor the point. The jury in returning its death recommendation and the judge in crediting the state's **expert** over those of the **defense** could permissibly do so, not only on the ordinary basis that fact-finders may accept or reject conflicting testimony of experts (especially in an area know to all to be fraught with disagreement) but also on the basis that appellant gave contrary stories to various experts at different times when it seemed convenient for him (he told Dr. Carrera he was not abused - R 1959; and that he faked being crazy in the military - R 1952) whereas he was motivated while on death row years later to tell Dr. Lewis' group either something different or not it report at all.

Appellant criticizes the trial court's ruling at R 658 that the fact that the codefendant Ruffin received a life sentence is not deemed mitigating under the particular facts of the instant case. The trial court was eminently correct in light of Ruffin's admission to Freeman regarding Hall's urging to prove himself a man. The court further explained why it was reporting this factor at R **662 - 664.**

Finally, even if it were true that the court had failed to find and weigh available mitigating evidence in the record, affirmance would still be required as in Wickham v. State, ___ So.**2d** ___, **16** F.L.W. S777 (Fla. 1991) where this Court determined that in light of the very strong case for aggravation, weighing of the mitigating proffered could not reasonably have resulted in

a lesser sentence. (Appellee does not concede the trial court erred in his weighing analysis).

Proportionality --

Finally, Hall urges that a sentence of death is not proportionate in the instant case (citing Penn v. State, 574 So.2d 1079, Nibert, supra, Farinas v. State, $69 So.2d 425, Livingston v. State, 565 So.2d 1288, and Fitzpatrick v. State, 527 So.2d 809).

With respect to proportionality, none of the cases cited by appellant are comparable to the instant case. Penn, supra, involved two aggravating factors -- one of which was improper -- and a trial court finding of two mitigating factors -- along with heavy drug use and his wife's telling him that his mother stood in the way of their reconciliation. Nibert involved substantial mitigation and apparently a single aggravating factor of HAC. Farinas involved only two valid aggravating factors -- one improper aggravator -- present mitigating factors including an obsession with the victim and a killing during a heated domestic confrontation.

Livingston involved two valid aggravators, two mitigating and one improper aggravating. Fitzpatrick involved a jury life recommendation, unanimity among mental health experts as to the presence of mental mitigating factors and his actions were those of an "emotionally disturbed man-child not those of a cold-blooded heartless killer." 527 So.2d at 812. In contrast the instant case involves a jury death recommendation, seven

aggravating factors,[6] a paucity of mitigating and the facts show an unprovoked murder of a kidnapped rape victim who plead for her life as Hall urged his companion Ruffin to prove himself a man. The death penalty is proportionate.

Appellant is not entitled to a reduction to life imprisonment merely upon his claim that it is disproportionate or otherwise improper to impose death because of the alleged presence of some mental or emotional difficulties. Cruse v. State, So.2d ___, 16 F.L.W. S701 (Fla. 1991).

[6] In the instant case, the trial court faund the presence of aggravating factors 921.141(5)(a), (b), (d), (e), (f), (h), (i) (R 639 - 642), only two of which are substantively challenged by Hall.

ISSUE V

WHETHER THE TRIAL JUDGE ERRED BY APPLYING WRONG LEGAL STANDARD WHEN FOLLOWING THE JURY SENTENCING RECOMMENDATION.

In a pretrial motion and memorandum of law, the defense extolled the importance of the jury sentencing recommendation by urging that judicial override be precluded. (R 78 - 100) In requested jury instruction number 20, the defense wanted the jury told:

> "Your decision regarding punishment is extremely important and 1 cannot overstate this fact. I am required to give tremendous weight to your verdict . . . ."

The defense filed a motion to prohibit the state from commenting that the jury's role is merely advisory. (R 150) The defense filed a motion and memorandum to preclude comments and instructions that the jury recommendation was only advisory. (R 254 - 260)[7]

Having sought throughout to emphasize the importance of the jury's role in making a recommendatian -- now after receipt of an eight to four death recommendation (R 474) -- appellant criticizes the trial court for allegedly taking the jury's recommendation too seriously.[8]

---

[7] His motion cited McCampbell v. State, 421 So.2d 1072, 1075 (Fla. 1982). (R 254)

[8] It is not entirely clear to appellee why a jury recommendation of life should carry inordinate weight when compared to a death recommendation when in either case no one can discern the basis of the recommendation. Cf. Dolinsky v. State, ___ So.2d ___, 16 F.L.W. S145 (Fla. 1991) (J. Ehrlich, dissenting).

In the instant case, after conducting a thorough evaluation and weighing of the aggravating factors, the statutory mitigating factors and the nonstatutory mitigating factors, the trial judge added a section discussing the jury's recommendation. (R 664 - 665) In pertinent part the order reads:

> "After all the evidence that the jury was given by the defense in the way of mitigation and extenuation during this six-day resentencing proceeding, and after vigorous argument by counsel and approximately 1-1/2 hours of deliberation, the jury returned an "Advisory or Recommended" Verdict for death by a vote of eight to four. This two-thirds majority opinion for death comes to this Court ostensibly with some presumption of correctness and is entitled by law to and must be given great weight by this Court in determining what sentence to impose in this case. Mann v. Dugger, 844 F.2d **1446;** McCampbell v. State, 421 So.2d 1072 (Fla. 1982).
>
> It is only under rare circumstances that this Court could impose a sentence other than what is recommended by the jury, although, the Court obviously has the right in appropriate circumstances, to exercise its prerogative of judicial override.

This Court has acknowledged that the jury's recommendation is entitled to great weight. Stone v. State, 378 So.2d **765** (Fla. **1979).** (Swan's jury recommended mercy while Stone's recommended death and the jury recommendation is entitled to great weight); Middleton v. State, 426 So.2d 548, 553 (Fla. 1982) (the jury recommended death and the judge found not mitigating circumstances. With the case in this posture, we conclude that the trial court's sentence is appropriate) Penn v. State, 574 So.2d 1079, 1085 (Fla. 1991) (J. Grimes, concurring in past and

dissenting in part) (the jury unanimously recommended the sentence of death. This recommendation was entitled to great weight . . . the trial judge was in the best position to evaluate the propriety of the recommendation because he heard the evidence); Hayes v. state, 581 So.2d 121, 127 (Fla. 1991) (Weighing all those factors in light of the jury's recommendation of death, the [trial] court concluded that death was appropriate).

Appellant apparently complains about the trial court's statement in the order regarding "rare circumstances" for an override. The trial court certainly was statistically correct that overrides -- either way -- are rare and was also eminently correct in declaring that "in appropriate circumstance" the court had the right to exercise it prerogative of overriding. The real question presented is whether the trial judge perceived himself to be bound by the jury's recommendation -- and of course he did not. No serious contention can be made that the trial court did not thoroughly and completely review and consider all that was presented on behalf of the defendant in support of the view that life was a more appropriate sentence; the order discusses the numerous aggravating factors found (R 639 - 642), the statutory mitigating factors. (R 643 - 45). And the judge did not list and then ignore them; he analyzed why they were inappropriate for nineteen pages. (R 646 - 664) In short, the court considered all and could not find a basis to disagree with the jury's recommendation.

ISSUE VI

WHETHER THE TRIAL JUDGE ERRED REVERSIBLY IN REFUSING TO EXPLAIN TO THE JURY AND/OR IN REFUSING TO PERMIT HALL TO PRESENT EVIDENCE TO EXPLAIN WHY A NEW PENALTY PHASE WAS NECESSARY THIRTEEN YEARS AFTER HALL WAS INITIALLY CONVICTED OF THE MURDER OR KAROL HURST.

Prior to trial, the defense filed a motion in limine with respect to the history of the case to prohibit the jury from hearing that Hall had been on death row since 1978. (R 265 - 266; R 2176 - 2178) The trial court deferred ruling. Thereafter, appellant requested an instruction be given to the jury venire. (R 429 - 430) The defense announced that it may want that issue presented later to the jury but initially no mention should be made of it; the state did not oppose the motion in principle. (R 2194 - 2195) On December 10, 1990, the court advised the jury that Hall had previously been found guilty of murder in the first degree of victim Carol Hurst on February 21, 1978, and that the Florida Supreme Court had ordered a resentencing proceeding. (R 726) The trial court agreed with the prosecutor during voir dire that the jury should not be infused with facts regarding the length of time and the reasons for remand by the appellate court. (R 840 - 842)

Only half-facetiously do we suggest that had the jury been totally informed of Hall's six prior unsuccessful appellate and post-conviction ventures and his last (seventh and successful) visit wherein this Honorable Court ordered a new sentencing proceeding, it is not unlikely that the jury would have returned

a recommendation that not only Mr. Hall should be subject to the ultimate sanction but also should the judiciary.

In all seriousness appellee cannot fathom why it should be appropriate for the jury to be informed -- whether exactly or inexactly -- of the appellate reasons given supporting the conclusion that a resentencing is necessary; and much mischief can come of it should the jurors conclude in their own mind that the reasons advanced by the appellate court are unpersuasive.

Appellee further takes issue with the correctness of the instruction proposed by the defense at R **429**. **It** is not correct to say that in the prior proceeding "the jury was not permitted to hear certain other evidence which may be presented in this proceeding." It is not correct because the original trial counsel did not attempt to offer such evidence only to be refused by the trial court; it is more correct to say that other mitigating evidence was not advanced perhaps due to the alleged misapprehension of the law by counsel and the court. It is not a distinction without difference because much of what was introduced in the new penalty phase -- including the testimony of mental health experts such a5 Dr. Lewis -- was not available in the 1978 trial but discovered in **1986**.

The trial court's instruction to the jury that the Florida Supreme Court has ordered resentencing was true, correct and concise and needed no amplification. (R 726)

Appellant cites Hitchcock v. State, 578 So.2d 685 (Fla. **1990)** for the proposition that the defense failure to submit a

proposed writing instruction was fatal, an infirmity not present sub judice. But it appears this Court's rejection of the jury instruction was not predicated -- at least entirely -- on the failure to submit a written instruction:

> [19] The court granted Hitchcock's motion to preclude mention of his prior death sentence, but refused to give the jury Hitchcock's proposed instruction on why resentencing was necessary. Hitchcock now claims that the jurors' and potential jurors' knowledge of his previous sentence from pretrial publicity was unlawfully prejudicial and that the court's refusing his proposed instruction compounded that prejudice. We disagree.
>
> [20] Although a vacated death sentence should not play a significant role on resentencing, mention of a prior sentence does not mandate reversal. ***Teffeteller*** *v. State*, **495 So.2d 744** (Fla. **1986.** Here, as stated previously, the court conducted individual voir dire to week out prospective jurors who had been unduly influenced by pretrial publicity and instructed the jury correctly with the standard instructions. The instant jury was not told the previous jury's recommendation, and Hitchcock has not demonstrated undue prejudice. We find no abuse of discretion in the court's refusal to give the proposed instruction.
>
> **(578 So.2d at 692)**

See also Sireci v. State, ___ So.2d ___, 16 F.L.W. **S623** (Fla. **1991).**

No reversible error appears.

ISSUE VII

WHETHER THE TRIAL JUDGE ERRED IN RULING THAT, IF HALL INTRODUCED THE JUDGMENT SHOWING THAT RUFFIN WAS CONVICTED OF FIRST DEGREE MURDER FOR THE MURDER OF DEPUTY COBURN, THE COURT WOULD INSTRUCT THE JURY THAT THE JUDGMENT SHOULD HAVE BEEN FOR SECOND-DEGREE MURDER RATHER THAN FIRST DEGREE.

After the defense had finished calling its witnesses, it requested introduction of the judgments and sentences of Mack Ruffin (appellant's codefendant) for the first degree murders of Deputy Lonnie Coburn and Carol Hurst. **(R** 1885) The prosecutor called the court's attention to the fact that while the court had previously ruled that it would allow the jury to be informed of Ruffin's life sentence for the Hurst murder there was no ruling regarding the **Coburn case.** (R **1885 -** 86) The prosecutor expressed a concern that it was misleading to inform the jury part of the circumstances of the appellate history without explaining all of it, (R 1887 - 1888) The state contended that Ruffin's conviction for the Coburn killing was irrelevant. **(R 1888 - 1890)** The court thought the jury would be unduly confused. **(R 1891)**

Subsequently, when the court declared that it would be unfair to the state and mislead and confuse the jury without an explanation of the appellate history, the defense decided not to put on the evidence, (R 1917 - 1922) Over the state's objection the court permitted the judgments and sentences of Ruffin for the Hurst crimes. (R 1922 **- 23; R 1942)**

Appellant has mistakenly characterized the issue as the trial court having ruled that it would instruct the jury that Ruffin's conviction should have been for second degree, rather than first degree murder, of Coburn. The court's treatment was rather -- if the defense introduced the conviction -- the prosecution could explain the legal circumstances surrounding it (R 1891); the court also suggested simply telling the jury that Ruffin's and Hall's prior convictions had simply gone to two different appellate courts which yielded different results. (R 1911 - 1912) Prior to the trial court's fashioning an explanation for the jury, the defense chose not to introduce the evidence. (R 1918)

Appellant contends that the trial court erred reversibly in ruling that if appellant desired to introduce the Ruffin judgment on the Coburn killing the state would be permitted to offer an explanation. Hall cites not precedential authority for his argument. In response, appellee submits that the prosecutor was eminently correct below in contending that Ruffin's judgment for the Coburn homicide, as distinguished from the Hurst murder, was not relevant. (R 1888, 1890) Certainly, the jury could be told -- and was -- the result that codefendant Ruffin had obtained in the Hurst prosecution so that they may consider the relevant culpability and punishment of the two for the murder being considered by the jury. But what bearing does it have for the jury in making a recommendation of life or death for Freddie Lee Hall for the murder of Carol Hurst to be inundated with

information about what degree of homicide Mack Ruffin was convicted of in the Coburn case?

Additionally, the trial court was correct in suggesting that unnecessary confusion would result. The fact is that Hall and Ruffin were bath originally tried and convicted of first degree murder of Deputy Coburn. Hall received a death sentence and appealed and the judgment was reduced from first to second degree murder. Hall v. State, 403 So.2d 1319 (Fla. 1981). The two defendants had been tried jointly and Ruffin received a life sentence for the first degree murder of Coburn (see Hall v. State, 403 So.2d 1321, 1323 fn. 1) and Ruffin's first degree murder-life imprisonment conviction was affirmed per curiam by the Fifth District Court of Appeal. Ruffin v. State, 390 So.2d 841 (5th DCA 1980)[9]

Appellee respectfully submits that not only is Ruffin's judgment in the Coburn matter irrelevant to a proper consideration of the appropriate penalty for Hall in the Hurst crime, but also it would unnecessarily confuse the jury into attempting to understand how different results on the same facts can be achieved by two different state appellate courts. The

---

[9] The undersigned counsel represented the state in both the Ruffin and Hall appeals and can, as an officer of the Court, assert that sufficiency of the evidence was raised in the Ruffin appeal. This Court can take judicial notice of that fact by reviewing the briefs filed in the Fifth District Court of Appeal pursuant to F.S. 90.202.

search for rationality is not advanced merely by providing irrelevant and confusing data to the jury.

ISSUE VIII

WHETHER THE TRIAL JUDGE ERRED IN EXCLUDING, AS CUMULATIVE, SOME OF APPELLANT'S SIBLINGS TESTIMONY.

Appellant introduced below the testimony of sister Deanna Rigsby, former childhood playmate Roosevelt Johnson, brothers James Hall and Eugene Elliott who all described the beatings and abuse Hall suffered from Hall's mother, as did his niece Faye Paige. (R 1573 - 1631) When the state objected the trial court agreed that the testimony was becoming repetitive, redundant and cumulative. (R **1633)** The caurt noted that if there were additional testimony not covered by the earlier witnesses it would listen. (R 1634 - **1641)**

After some discussion the parties stipulated to the following submission to the jury.

> "Ladies and gentlemen, you are advised that Robert Ellis, Henry Ellis, Ethel Mae Miller and Willie C. Hall would have testified to the same factual circumstances that other family witnesses have testified to." (R **1653)**

The **defense** interposed a continuing objection to the court's ruling prohibiting cumulative testimony; the prosecutor announced his understanding that the court had not prohibited putting the witness on -- only cumulative, repetitious testimony. (R 1653 - **54)**

Appellant then introduced the testimony of live witnesses Katie Glenn (appellant's sister) and Hall's niece Glory Lotts. (R **1654 - 1661)**

In his closing argument to the jury the prosecutor acknowledged the testimony of appellant's family and friends concerning his abusive childhood. (R 2032 - 2033) In the prosecutor's argument to the jury discussing the testimony of the experts he pointed 'out that they had examined Hall eight years after the crime (R 2038) and that they were selective in believing some things Hall said and disbelieved others. (R 2039)

This Court has previously recognized that a trial court does not err reversibly in failing to allow cumulative, repetitive testimony in a penalty phase proceedings. See e.g., Garcia v. State, 492 So.2d 360, 367 (Fla. 1986); Espinosa v. State, ___ So.2d ___, 16 F.L.W. S753, 755 (Fla. 1991). Muehleman v. Stag, 503 So.2d 310, 316 (Fla. 1987).

See also Glock v. Dugger, 537 So.2d 99, 102 (Fla. 1989) (counsel not deemed ineffective for failure to submit cumulative testimony); Puiatti v. Dugger, ___ So.2d ___, 16 F.L.W. S649 (Fla. 1991); Woods v. State, 531 So.2d 79, 82 (Fla. 1988) (more is not necessarily better); Francois v. Wainwright, 763 F.2d 1188 (11th Cir. 1985); Stewart v. Dugger, 877 F.2d 851, 856 (11th Cir. 1989) (additional character witnesses would have been cumulative); Kennedy v. Dugger, 933 F.2d 905 (11th Cir. 1991).

Appellant alludes to the testimony of Dr. Dorothy Otnow Lewis.[10] In 1986 Hall's attorney contacted her to do an

[10] Dr. Lewis is no stranger to the courts in capital litigation. See Sireci v. State, 587 So.2d 450, 16 F.L.W. S623 (Fla. 1991); Elledge v. Graham, 432 So.2d 35 (Fla. 1983); Martin v. State, 515 So.2d 189, 193 (Fla. 1987) (J. Barkett, dissenting). *See* also

evaluation of him. (SR 6) As this Court well knows appellant Hall was on death row at that time - between his first and second death warrants. See also SR 51, SR 60, SR 77.

Appellant complains that even though the trial court's "error' may be subject to harmless error analysis, it was not harmless sub judice because the prosecutor discredited Dr. Lewis' testimony by cross examining her on questions focusing on her absence of personal knowledge of defendant's history. Appellee does not accept Hall's initial premise that refusal to allow cumulative testimony to be error to begin with. Secondly, any juror knows -- without being told by a prosecutor -- that a mental health expert who examines any defendant following commission of a crime for trial purposes does not have personal knowledge of the defendant's life prior to the time of examination and will rely either on the defendant or the reports of others about the defendant's history. If there were error, appellee fails to see how there can be deemed any prejudice to appellant when the court instructed the jury that Robert Ellis, Henry Ellis, Ethel Mae Miller and Willie Hall would have testified to the same circumstances that other family members testified to. (R 1653)

Bundy v. Dugger, 850 F.2d 1402 (11th Cir. 1988) where the courts found her testimony unpersuasive.

ISSUE IX

WHETHER THE STATUTORY AGGRAVATING FACTOR OF ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL IS UNCONSTITUTIONALLY VAGUE.

Appellant contends that the lower court erred in failing to rule that the statutory aggravating factor of "HAC" was unconstitutionally vague. This Court has consistently rejected this argument and upheld this factor against vagueness challenges. See e.g., Smalley v. State, 546 So.2d 720 (Fla. 1989); Bedford v. State, 16 F.L.W. S665, fn. 4 (1991); Sochor v. State, 580 So.2d 595 (Fla. 1991); Robinson v. State, 574 So.2d 108, 113, n. 6 (Fla. 1991); Ponticelli v. State, 16 F.L.W. 5669, n. 4 (Fla. 1991).

Appellant's reliance on Shell v. Mississippi, 498 U.S. ___, 112 L.Ed.2d 1 (1990) is misplaced as Florida is a judge-sentencing state, not a jury sentencing state. *See* Walton v. Arizona, 497 U.S. ___, 111 L.Ed.2d 511 (1991).

ISSUE X

WHETHER FLORIDA STATUTE 921.141 IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

Appellant filed a pretrial motion to declare *F.S.* 921.141 unconstitutional. **(R 197 - 253)** The trial court denied the motion (R **325)** after hearing arguments on August **16, 1990. (R 2130 - 2190)** This Court has consistently rejected the contention that the statute is either facially invalid or unconstitutional as applied.

See Bedford v. State, **16** F.L.W. S665, fn. **3,** 4 (Fla. **1991);** Van Poyck **v.** State, 564 So.2d 1066 (Fla. 1990); Ponticelli v. State, 16 F.L.W. S669 fn. 4 (Fla. 1991); Cruse v. State, 16 F.L.W. **S701,** fn. **7** (Fla. **1991);** Sireci v. State, ___ So.**2d** ___, 16 F.L.W. S623 (Fla. **1991)** (rejecting argument that *F.S. 921.141* is unconstitutional and that the Court violates the separation of powers doctrine in defining *F.S.* 921.141); Henry v. State, 586 So.2d **1033,** fn. 11 **(Fla.** 1991); Young v. State, 579 So.2d 721 (Fla. 1991); Sochor v. State, 580 **So.2d** 595 **(Fla. 1991);** Gunsby **v.** State, 574 So.2d 1085 (Fla. **1991);** Robinson v. State, 574 **So.2d 108** (Fla. **1991);** Bruno v. State, 574 So.2d 76 (Fla. 1991); Hitchcock v. State, 578 So.2d 685, **fn.** 2 **(Fla. 1990).**

ISSUE XI

WHETHER THE TRIAL JUDGE ABUSED HIS DISCRETION IN REFUSING TO GRANT HALL AN ADDITIONAL PEREMPTORY CHALLENGE TO STRIKE A JUROR WHO HAD BEEN EXPOSED TO PREJUDICIAL PUBLICITY AND JUROR MISBEHAVIOR

Appellant next contends that he should have been given additional peremptory challenge to strike juror Cavanaugh.

The record shows that each side had ten peremptory challenges. (R 846) Appellant utilized his allotted challenges. (R 849 - 850, 956 - 959, 1197 - 1199) When appellant asked for additianal peremptory challenges, the trial judge attempted to be accommodating and gave an additional challenge, because juror "Roguski was at least arguable as to cause". (R 1200) Appellant utilized his eleventh peremptory and excused juror Huntington. (R 1200) Appellant requested a twelfth challenge to remove Cavanaugh and it was denied. (R 1201 - 1202) The court pointed out the process could go on ad infinitum with no finality in jury selection. (R 1203)

The record also reflects that juror Cavanaugh had seen a newspaper headline but didn't read it and did not hear what jurors were saying in the hallway.

Hall has demonstrated no abuse of discretion in the lower court's treatment of the parties in jury selection and unless the court is prepared to abolish the procedural rule providing a finite number of peremptory challenges (which would result in the impossible requirement that no jury be seated unless totally desirable to both prosecution and defense), this Court must

affirm. Unlike the cases cited by appellant, Hall was not wrongfully forced to exhaust peremptory challenges, he was given an additional peremptory; he simply was denied the opportunity for unlimited peremptory exqusals.

Appellant is hot aided by decisions such as Trotter v. State, 576 So.2d 691 (Fla. 1990) or Floyd v. State, 569 So.2d 1225 (Fla. 1990) since the predicate act for consideration of relief is the trial court's wrongful failure to excuse a juror for cause who should have been. Since that did not occur sub judice (even if juror Roguski is deemed a cause excusal the trial court awarded an additional peremptory), appellant may not prevail. There has been no abuse of discretion. Cf. Puiatti v. State, 16 F.L.W. S649 (Fla. 1991).

CONCLUSION

The views of Justices *McDonald, Overton and Grimes in 1989 (Hall VII) that the additional proffered circumstances of appellant's wasted life would not change the result has been vindicated. The sentence of death should be affirmed.

Respectfully submitted

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ROBERT J. LANDRY
Assistant Attorney General
Florida Bar ID No. 0134101
2002 North Lois Ave., Su. 700
Westwood Center
Tampa, Florida 33607
(813) 873-4730

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Larry B. Henderson, Assistant Public Defender, 112-A Orange Avenue, Daytona Beach, Florida 32114, this 31st day of January, 1992.

OF COUNSEL FOR APPELLEE.