IN THE SUPREME COURT OF FLORIDA

FREDDIE LEE HALL,
Defendant/Appellant,
v.
STATE OF FLORIDA,
Plaintiff/Appellee.

CASE NO. 77,563

APPEAL FROM THE CIRCUIT COURT
IN AND FOR SUMTER COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

STATEMENT OF THE CASE AND FACTS

In 1978, Hall was found guilty[1] of the first-degree murder of Karol Hurst and sentenced to death following a jury trial. The judgment and sentence were upheld on direct appeal. Hall v. State, 403 So.2d 1321 (Fla.1981). However, the death sentence was later vacated by the Supreme Court of Florida and the matter remanded for re-sentencing because the trial judge had improperly restricted the scope of mitigation that could be presented by Hall, in that Hall had been limited to presenting evidence of statutory mitigating factors only. Hall v. State, 541 So.2d 1125 (Fla.1989) This is the direct appeal of a sentence of death that was imposed in accordance with an eight-to-four sentencing recommendation following the new penalty phase.

[1] Mack Ruffin, Hall's co-defendant, was also found guilty of the first-degree murder of Mrs. Hurst; Ruffin was sentenced to life imprisonment.

Primarily through a statement Hall gave in 1978, the State established that, while high on beer, marijuana and brandy, Hall and Mack Ruffin ("Ruffin") decided to commit a robbery, and Hall abducted Kathy Hurst in order to use her car in the robbery. (R1502-08)[2] Hall drove to a wooded area where Ruffin raped her and, over Hall's protestations, beat her with a pistol and then shot her in the head. (R1505-07) Ruffin and Hall returned to Ruffin's car and relocated it for use after the robbery. (R1507) The two drove Hurst's car to a Shop-And-Go convenience store, but Ruffin and Hall abandoned the plan to rob that store because it was too crowded. (R1508)

As they left the store they were immediately confronted by Deputy Coburn, who had been dispatched there to investigate a suspicious vehicle report. (R1266-71;1294-95) The dispatcher ran a license check for Coburn around 7:20 p.m. and determined that the vehicle was registered to Karol and Benjamin Hurst from Mt. Dora. (R1283-85) A patron leaving the store saw the deputy pointing a shotgun at two black men in the store's back parking lot. (R1274-78) Deputy Coburn radioed that he was holding two suspicious black males behind the Shop-And-Go, and a minute or two later he radioed that he had been shot. (R1286-86)

Hall claimed that he grabbed the deputy because he was afraid that he would be sent back to prison if the deputy found that he was carrying a gun. (R1509) The deputy fired a shot

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(R) refers to the record on appeal, whereas (SR) refers to the supplemental record on appeal received by the undersigned on September 10, 1991.

during the ensuing struggle before Ruffin obtained Coburn's .357 magnum pistol and shot the deputy, killing him. (R1510)[3] Hall and Ruffin fled in Hurst's automobile, and Ruffin took Deputy Coburn's pistol and left behind the gun he had used to murder Mrs. Hurst. (R1298-1302)

Acting on a BOLO, a Pasco County deputy saw and began following Hurst's automobile. (R1307) The surveillance turned into a high speed chase during which Ruffin shot at the deputy. (R1307-13) The chase ended when Hurst's car was driven into an orange grove and abandoned. (R1309-13) During a search of the area, Hall was found hiding in a pasture and apprehended by a Florida Highway Patrolman. (R1321-25) Following his arrest, Hall led deputies to Hurst's body in Sumter County, and in that regard Hall was described as being "cooperative." (R1369-72) Ruffin was also apprehended and, when searched, deputies found in his possession a cigarette lighter bearing the inscription, "Ben Hurst." (R1375-76)

The Fifth Circuit Medical Examiner determined that Mrs. Hurst died from a bullet wound to the back of her head; that type injury would have rendered her unconscious immediately. (R1405-09;1414) The bullet taken from her sinus was consistent with

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[3]Ruffin was convicted of first-degree murder for killing Coburn and sentenced to life imprisonment. That conviction and sentence was affirmed by the Fifth District Court of Appeal. See Ruffin v. State, 390 So.2d 841 (Fla. 5th DCA 1980). Hall was also convicted of first-degree murder and sentenced to death for Coburn's murder, but that conviction was reduced to a conviction for second-degree murder by this Court because the evidence failed to show that Coburn's death was premeditated. See Hall v. State, 403 So.2d 1319 (Fla. 1981).

having been fired from the pistol recovered from beneath Deputy Coburn's body. (R1413;1423-32) Prior to her death, Mrs. Hurst received injuries consistent with her having been struck with a gun barrel, and a bruise to her right breast was consistent with a bite mark. (R1412-13;1410-12)

Mrs. Hurst was pregnant at the time of her death. (R1416) Sperm found during a vaginal examination indicated the occurrence of sexual intercourse prior to her death. (R1416) A serologist determined that semen stains present "on the back, outside" of ladies underwear found in Hurst's automobile had factors from group "B" and group "H"; the semen on the underwear was consistent with having come from Hall. (R1438-44;1357-58) The serologist did **not** perform any comparisons using the vaginal swabbing taken from Mrs. Hurst by the medical examiner. (R1445)

When Mrs. Hurst was killed, Hall was on parole for the offense of assault with intent to commit rape. (R1517-18) In that respect, the State presented the testimony of Gordon Oldham, the ex-state attorney who had personally prosecuted Hall for the assault charge in 1968 and who later prosecuted Hall for the murders of Deputy Coburn and Mrs. Hurst. Oldham testified that, in 1968, Hall raped a white woman (Thelma Freelove) "about sundown" as she was walking home. He claimed that Hall tried to gouge out Freelove's eyes to prevent her from identifying him. (R1476-77) Oldham explained that "the jury must have had other reasons not to convict him of the rape so they convicted him of assault with intent to commit rape." (R1486)

The prosecutor categorically denied that Hall's race played any part in that prosecution, or any criminal prosecution:

> Defense counsel: Let's talk about that jury, Mr. Oldham. This was in **1968**, correct?
>
> Mr. Oldham: That's correct, sir.
>
> Q. In Sumter County, Florida, right?
>
> **A.** Yes, sir.
>
> Q. White woman?
>
> **A.** Yes, sir, she was white.
>
> Q. Who said **she** was raped by a black man?
>
> **A.** That's correct.
>
> Q. You would have to agree, wouldn't you, Mr. Oldham, that in Sumter County in **1968** that the alleged rape of a white woman by a black man caused outrage in that community?
>
> **A.** I would say not.
>
> Q. Not in **1968** in Bushnell, Florida?
>
> **A.** No, sir. I don't think any jury in Bushnell or anyplace else is going to convict somebody that is not guilty or the evidence isn't there, regardless of their race, creed or color. I don't believe it; never seen it happen.
>
> Q. Never?
>
> A. Never.

(R1486-87).

To counter Oldham's testimony, Hall presented the testimony of Hall's defense attorney, T. Richard Hagin. (R1535) Hagin's account of Hall's trial in 1968 differed drastically from

Oldham's, in that Hagin remembered deputies coming into the courtroom and segregating white spectators from the black spectators. (R1538) Hagin and his family received threats, such as, "Why are you representing this g.d. nigger?" and Hagin's six-year-old son being told, "You're daddy's a nigger lover." (R1537) Hagin recalled that the bailiff openly commented in a loud voice, "Look at that damn Hagin, trying to get that nigger off." (R1539)

Hagin stated that the alleged victim, a circus snake-charmer whose professional name was "Zoma the Snake Woman," admitted that she never saw who attacked her that night. (R1540) Based on his trial notes, Hagin stated that the incident occurred around 3 A.M. rather than at sundown as Oldham testified earlier. (R1536) Freelove's common law husband had informed a neighbor that the police had the wrong man in jail, that it wasn't Freddie Lee. (R1545-46) Hagin was adamant that, "Of all the people I've ever represented on a criminal case, Freddie Lee is the only one I ever felt was not guilty." (R1544) Hagin could not assist Hall in appealing the conviction, however, because he was elected to be the prosecuting attorney for Sumter County and was required to end his law practice before taking office. (R1544)

Hagin's assessment of Hall is that, "He is not an intelligent individual." (R1547) Other portions of the record establish without question that Hall is mentally retarded, and that he has been since birth. For instance, when asked whether Hall was an intelligent person growing up, Hall's neighbor, who later became principal of Arcadia Elementary School, answered:

> I would say no. And I guess I should explain why. Growing up together, at that particular time I did not know anything or classifications as far as mental retardation, for example, or learning disabled or dyslexia. I did not realize that there was such a term. I became more acquainted with it after becoming an educator.
>
> However, during that particular time I realized that there was something different about him. He did not learn as others learned as far as the academic ability was concerned. I felt that his cognitive skills were very lacking. But I thought that his gross motor skills as far as being able to run and play were fine. He had fine skills there, but not able to retain what was taught to him.

(R1577-78).

Hall was the sixteenth of seventeen children. (R1572) He dropped out of school in the eleventh grade, ranked 21st in a class of 21. (Defense Exhibit 1; R1556). However, before Hall dropped out, different teachers over a period of several years made official comments that were recorded in Hall's school records. Those comments provide substantial, independent, and totally objective evidence from several disinterested observers establishing that Hall's mental deficiencies were present during his childhood. Specifically, the teachers commented as follows:

> May 30, 1952: "His mental maturity is far below his chronological age."
> Fourth Grade: "Mentally retarded."
> Fifth Grade: "Freddie is slow in all phases of work; mentally unadjusted."
> Sixth Grade: "Mentally retarded."
> Seventh Grade: "Mentally retarded."
> Eighth Grade: "Mentally retarded."

(R1556) (Defense Exhibit 1).

Though Hall matured physically, his mind and behavior remained simple and childlike. (R1579) One of Hall's brothers, now fifty-one years old, testified that Hall was extremely frustrated at being unable to speak clearly or communicate with others, and that Hall had always been like that:

> Well, from a child he was -- as I said, he was slow with speech and he was mostly was slow to learn. He didn't understand as we did, what have you. He was most likely a child all the way up from child up to his manhood, as of now. And he just didn't have the knowledge to write or he couldn't defend himself in words and what have you. He was just slow.

(R1592).

Hall's mother was known as the "Root Lady." (R1630) She was an extremely superstitious person and at times she "read" cards for a local fortune teller. (R1622;1630-31) Hall's mother and father drank; they would fight each other with guns, knives, sticks or whatever. (R1593-95) Hall's father eventually left, but things got worse. (R1595) Though there was food, Hall's mother kept it from the children because she believed that a famine was about to occur. (1595-96) In that regard, a cousin who sometimes stayed with the Hall's recalled:

> It was plenty of food. And during the time that Mom was having problems with my father and we would stay there and we was not allowed to eat the food. The food was hid under the beds, in the freezer and it would just spoil. We was just waiting. You know, she said she was waiting on a famine so we were not allowed to eat the food.

(R1622).

The Hall children were physically abused by Mrs. Hall, but it seemed that Freddie always got the worst of it because he couldn't defend himself verbally. "He would -- that's why he mostly got punished I feel to the things, a lot of things that he didn't -- was accused of, he didn't do it, and he couldn't defend himself and he got more whippings than the others did." (R1597) An older brother of Hall remembered the beatings and described them as follows:

> Well, what she would do, she would tie their hands and tie them to the ceiling. It had just the joists crosswise. And she would throw a rope across and she would tie their hands and beat them, you know, naked.

(R1598). A cousin recounted a variation of this, stating that Hall's mother tied Hall in a croaker sack where "you couldn't see his head" and, as Hall would swing backward over a fire, she beat him. (R1620) Hall's mother also once buried Hall in the sand up to his neck in order to strengthen his legs. (R1622)

Mrs. Hall liked guns; sometimes she held guns on her boys and made them kneel as she poked them with sticks. (R1601) She gave her neighbors permission to punish Hall, and some placed Hall under their bed and made him stay there for the entire day: "That's what they called putting him in jail." (R1600) Hall's mother would also lock Hall in the smokehouse for long intervals, and neighborhood children would tease and mock Hall during this confinement. (R1659-60)

Hall's third oldest brother, Eugene Elliot, is now 61 years old. (R1625) He, too, recalled his mother tying the

children, placing them in sacks, then suspending them from the ceiling and beating them. (R1626) Eugene told the jury that he was one of the lucky children because when he was sixteen he left to escape the situation. However, on the weekends that Eugene returned he saw his mother tie and beat Hall. (R1629) Eugene also remembered that Hall would, at times, hallucinate. One night, while Hall was harvesting apples and staying with Eugene in New York, Hall imagined that things were coming after him. Hall broke through the door of the trailer in which they were staying and refused to go back inside. (R1628) Several people knew that Hall was afraid of the dark. (R1659) One cousin who was very close to Hall and who used to write letters for him testified that Hall often saw ghosts . . . "he always said he heard things." (111619) Everyone laughed at Freddie Lee Hall, and his reputation in the community was that he was "crazy." (R1619)

In addition to lay testimony that Hall was mentally retarded and abused as a child, experts also concluded that Hall is mentally disabled and functionally illiterate, with a short-term memory equivalent to that of a six-year-old. (R1717;1734) The highest score Hall achieved on a complete battery of tests administered by Dr. Bard in September of 1986 placed him at the sixth grade level; all other scores were at first and second grade levels. (R1718-19) There was no evidence whatsoever that Hall malingered to obtain these scores. (R1720) Hall also suffers from dysarthria and apraxia, which is an inability to voluntarily move the speech musculature. (R1722)

Dr. Bard testified that such speech impediments greatly affect childhood development; a child's inability to communicate with adults or other children isolates the child, which in turn restricts mental growth. (R1723) Dr. Bard listened to a recorded statement Hall gave to the police in 1978 and concluded that Hall's physical and mental deficiencies, as previously described, were evident on the tape recording. (R1724-30)

Dr. Toomer, an expert in forensic psychology, holds a bachelor, master, and Ph.D degree in psychology; he is also a diplomate of the American Board of Professional Psychology. (R1743-44) Hall, with an I.Q of 60, is mentally retarded; he suffers from organic brain damage. (R1745-50) Of particular significance is that, being retarded, Hall was not mentally capable of understanding and\or resolving the physical abuse he suffered at the hands of his mother and others as he grew up. (R1762-66;1771) Thus, while some of his siblings, such as Eugene Elliot, were able to realize that they were being abused and get away, Hall did not have the mental ability to comprehend what was happening or what he should do about it. (R1761-62)

> Because he quote, unquote, looked normal, people expected normal kinds of behavior and reaction from him, but they did not get it because even though he was developing physically, he was not developing mentally. And in this family constellation that was not considered a sign that something was wrong and something needed to be done. That led to further punishment because he supposedly was expected to know what to do and how to respond.

(R1766).

Dr. Toomer is certain that Hall was not malingering, a conclusion based not only on the reliability factors built into the various tests, but also on the vast quantity of objective evidence, derived from totally independent sources, that document long standing mental deficiencies. (R1755-60) Dr. Toomer concluded to a reasonable degree of medical certainty that, on February 21, 1978, the date Mrs. Hurst was murdered, Hall was under the influence of extreme mental disturbance and that Hall's ability to conform his conduct to the requirements of law was substantially impaired. (R1772-73)

Dr. Heide, accepted as an expert in psychology, also concluded to a reasonable degree of medical certainty that on February 21, 1978, Hall's ability to conform his conduct to the requirements of law was substantially impaired. (R1852-54) The doctor testified that Hall, mentally, is essentially a child:

> Well, what was clear in talking to him was he functioned at a low level. Very simple minded. He was -- for example, he thought in black and white dimensions. Very simple things. Things were -- he was very concrete. * * * In terms of developments, human developments, he functions on a level that's much younger than one would expect even of an adolescent. So, when he was explaining things to me it was in many events, answers, I would hear from somebody that was a child or a very immature adolescent. Certainly not what I would expect or what would normally be found among the mature adult.

(R1836-37). Significantly, as occurred with the other doctors, Dr. Heide did not learn of the abuse Hall suffered as a child from Hall himself, but instead from Hall's relatives: "Freddie

glossed over [the abuse] because 1 don't think he -- in fact, it's clear he didn't recognized the significance. So, most of the events that were very stressful did not come from Freddie's interview, but came from looking at some of the families' statements." (R1839)

Dr. Lewis testified that the mental evaluation of Hall that was performed by the team she supervised took four to five days. (SR 47-48)[4] That tests upon which Hall's evaluation was based were very detailed and comprehensive; the tests included a neurological evaluation done by Dr. Pincus, a neuropsychological evaluation by Dr. Richardson, an electroencephalogram by Dr. Pritchard from New York University, and psychological testing by Marilyn Feldman, as well as a two and one half hour interview of Hall by Dr. Lewis personally. (SR 7-9) Dr. Lewis noted that a two and a half hour interview alone, without reference to any of the foregoing information, would perhaps be adequate to make a basic competency determination, but any conclusions would be suggestive only, not conclusive. (SR 59)

> Q: (Defense counsel) Let's go back for a minute now to your personal one-on-one evaluation of Mr. Hall, which I believe you've testified took approximately two and a half hours; is that correct?
>
> A: (Dr. Lewis) Yes.
>
> Q: Is that enough time for a psychiatrist to come to conclusions about someone's problems?

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[4] (SR) refers to the supplemental record received by the undersigned on September 10, 1991.

> A: Oh, it varies. I don't think that you can generalize something like that. It would be more desirable to see somebody for a longer period of time. However, if you put together the amount of time evaluated, which is probably closer -- Dr. Richardson, he probably spent a couple of hours; Dr. Feldman, a couple of hours; Dr. Bard, a couple of hours. So his actual evaluations were probably closer to ten hours or so. But I think, just a two and a half hour evaluation, in and of itself, is probably -- is usually insufficient unless there is really very obvious evidence.

(SR 23-24).

Dr. Lewis concluded to a reasonable degree of medical certainty that, on the day of the offense, Hall was under the influence of extreme mental or emotional distress and that his capacity to appreciate the criminality of his conduct was substantially impaired. (SR 39-40;82-83) Dr. Lewis concluded that Hall's mental retardation and brain damage have existed since childhood, and that saying simply that Hall has a "learning disability" **does** not do justice to Hall's condition. (SR42)

In rebuttal, the State presented the testimony of Frank Carrera, M.D., one of the two psychiatrists appointed by the court in **1978** to determine whether Hall was competent to stand trial. Dr. Carrera testified that, in **1978,** he examined Hall for one and a half hours per court appointment and found Hall to be competent to stand trial. (R1958) The doctor's report' from

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[5] Dr. Carrera explained that all he had was a typed report that had been prepared in connection with the examination; his original notes from the interview were lost so he could not be more specific. (R1960)

1978 indicated that, at first, Hall was sullen and depressed, but he soon became cooperative and correctly answered everything "but just a few" questions during the 1 1/2 hour interview. (R1957-60) Dr. Carrera could not elaborate or be more specific, however, because he had no independent recollection about what transpired during his examination of Hall in 1978. (R1977)

The typed report indicated that Hall abstracted 2 of 5 proverbs and that Hall admitted to have hallucinated only once. (R1954;1962) Dr. Carrera stated, "[Hall] talked about a twenty-seven year old sister who had been murdered two years previously and at this point Mr. Hall became very upset, cried, and seemed to show a lot of anger about what had happened." (R1951) Hall knew the day of the week and the month and year, but not the date. (R1957-58) Hall's immediate and short-term memory were moderately impaired. (R1578) Because Hall could answer "fairly well" questions asking what two times three was and who the President of the United States was, Dr. Carrera's impression was that Hall's intelligence was within the average range. (R1959)

Dr. Carrera determined that Hall was sane, in that he knew the difference between right and wrong. (R1966) Based on his 1978 report, which concededly was geared solely toward determining Hall's competence, and the specifics of which Dr. Carrera no longer recalled (R1969), Dr. Carrera opined that at the time of the offense Hall was able to appreciate the consequences of his acts and that his reasoning level was not substantially impaired. (R1968)

On cross-examination, Dr. Carrera explained that he has no independent recollection of the examination he gave Hall in 1978, and that he could only say "what we probably did." (R1977) Insofar as Dr. Carrera's opinion concerning the existence of mitigating considerations, his examination in 1978 was not done to investigate possible mitigation; he did not have any neurological test results in 1978; the only history he had about Hall was what Hall himself revealed. Dr. Carrera agreed that it is not unusual for abused persons to conceal such abuse or to deny having hallucinations; an overall psychological picture of Hall would be enhanced by the tests used by Hall's mental health experts. (R1970-1974)

Prior to the re-sentencing hearing, Hall sought to preclude the trial judge from utilizing any statutory aggravating factor(s) that had previously been expressly rejected by the initial trial judge in 1978 when Hall was first sentenced to death. (R 391-393; 431-435;) The motion was denied following a hearing. (R2196-2200) Similarly, a defense motion seeking to preclude proof of the cold, calculated and premeditated murder statutory aggravating factor due to a violation of the ex post facto clause was denied. (R2200)

At the instance of the State, the testimony of four members of Hall's family was excluded by the trial judge because it was "cumulative" to testimony that had previously been given by other family members. (R1641-52) The trial judge that the testimony was unfairly cumulative (R1633), and stated:

> Well, proffer away but now -- I understand that if there's something new that hasn't been covered, but I think you've covered everything three or four times. I think the jury's going to believe at this point and nothing else is going to make it better.

(R1634).

The trial judge agreed that the witnesses' depositions would serve as a proffer of the witnesses' testimony for appellate purposes. (R1648-49;SR 90-160). The judge then gave the following jury instruction:

> Ladies and Gentlemen of the jury, the Court became concerned that some of the testimony was repetitious. And in the interest of time, in the interest of your time as well as all of our time, I've gotten counsel to stipulate to the following. And this is the stipulation. I'm reading it to you.
>
> You are to consider this as evidence in the case. Weigh it and evaluate it the same as you would any other evidence in the case. 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. Okay.

(R1653).

In imposing the death sentence, the trial judge found seven statutory aggravating factors ta exist, to wit:

> A. The defendant was previously convicted of a felony involving the use of threat of violence to the person. Section 921.141(5)(b), Fla.Stat. (1989)
>
> B. The capital felony was committed by a person under sentence of imprisonment. Section 921.141(5)(a), Fla.Stat. (1989)

C. The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of a kidnapping or sexual battery. Section 921.141(5)(d), Fla.Stat. (1989)

D. The capital felony was committed for pecuniary gain. Section 921.141(5)(f), Fla.Stat. (1989)

E. The capital felony was especially heinous, atrocious or cruel. Section 921.141(5)(h), Fla.Stat. (1989)

F. The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Section 921.141(5)(i), Fla.Stat. (1989)

G. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest. Section 921.141(5)(e), Fla.Stat. (1989)

(R639-642)

The trial judge found that Hall established substantial mitigation, including the following considerations; Hall "may have been suffering from mental and emotional disturbance and that to some extent Hall may have been unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law" (R650); Hall suffers from organic brain damage **(R652);** Hall has been mentally retarded his entire life (R652); Hall suffers from mental illness **(R652);** Hall suffered tremendous emotional deprivation and disturbances throughout his life (R653); Hall suffered tremendous physical abuse and torture as a child (R654); Hall has learning disabilities and a distinct speech impediment that adversely affected his development (R655);

Hall cooperated with law enforcement and assisted them in the investigation (R657).

Though these and other mitigating considerations were found to have been adequately proved, the trial judge did **not** attribute any weight to these factors and deemed them to be "unquantifiable" because, "No one could say positively that the various alleged mitigating factors actually had an effect on [Hall] at the time of the crime[.]" (R645, #2) (emphasis added). The experts presented by Hall concluded that Hall was suffering from extreme mental or emotional distress at the time of the crime and that his ability to conform his conduct to the requirements of law was substantially impaired at the time of the crime. (R1772-73;1852-54;SR39-40;82-83)

SUMMARY OF ARGUMENTS

POINT I: The trial judge committed reversible error under the state and federal constitutions by allowing statutory aggravating factors, which were expressly rejected by the trial court in 1978 due to insufficient proof, to be used in sentencing Hall to death in 1988. The State did not timely contest the rejection of those aggravating factors, and the failure to do so bars the State from relitigating those issues because that determination has become the law of the case. The trial judge otherwise exceeded the mandate of Hall v. State, 541 So.2d 1125 (Fla.1988), which held that a new jury recommendation was necessary to determine whether the three aggravating factors found by the trial judge in 1978 outweighed the mitigation that had improperly been excluded. Finally, considerations of due process and fundamental fairness under the state and federal constitutions require that piecemeal litigation of the existence of statutory aggravating factors be avoided where possible. The death sentence must be vacated and a life sentence imposed as set forth in Point IV.

POINT II: The trial judge erred in finding that the murder was committed to prevent a lawful arrest. The trial judge's findings are conclusory and the proof is otherwise legally insufficient to establish beyond a reasonable doubt that Hall intended that Mrs. Hurst be killed primarily or solely to eliminate her as a witness. Because the recommendation and/or sentence was based on this improper factor, the death sentence must be vacated and a life sentence imposed as set forth in Point IV.

POINT III: The use of the cold, calculated and premeditated murder statutory aggravating factor by the jury and judge to recommend and sentence Hall to death is reversible error because it constitutes ex post facto application of legislation to the detriment of a defendant in violation of the state and federal constitution. Use of the factor is otherwise error due to lack of proof to show a heightened premeditation on Hall's part to kill Mrs. Hurst; the record affirmatively shows that Ruffin shot Mrs. Hurst, over Hall's protestations. Finally, a pretense of moral and legal justification exists. Hall's uncontroverted mental retardation stands as, at the very least, a "pretense" of moral or legal justification that precludes application of this statutory aggravating factor as a matter of law. Thus, if this Court finds that the death penalty may be proportionately imposed in light of the substantial mitigation found to exist by the trial judge as set forth in Point IV, the death sentence must be vacated and the matter remanded for a new penalty phase.

POINT IV: The trial judge found the existence of many significant mitigating considerations, but the court failed to attribute any weight to those factors and deem-d them to be "unquantifiable" because, "No one could say positively that the various alleged mitigating factors actually had an effect on [Hall] at the time of the crime[.]" That same analysis has been expressly rejected by this Court in Nibert v. State, 574 So.2d 1059, 1062 (Fla.1990).

The trial judge otherwise erred in rejecting as a mitigating consideration the fact that Ruffin, who was the actual triggerman, received a life sentence for Mrs. Burst's murder (R657-58), and in improperly accepting the testimony of Dr. Carrera which, as a matter of law, is incompetent due to lack of a sufficient predicate upon which a valid opinion can be based. Comparison of this case to others conclusively shows that a death sentence is not warranted in light of the substantial mitigation that is contained without contradiction in this record. The very existence of this much significant mitigation removes this case from the most aggravated and least mitigated of serious offenses. Thus, a death sentence is unwarranted.

POINT V: The trial judge applied the wrong legal standard to the jury recommendation because the judge ruled that the jury death recommendation must be followed unless "rare circumstances" exist. This standard is incorrect. The correct standard, set forth in State v. Dixon, infra, and refined by later cases such as Fitzpatrick v. State, infra, is that the death penalty is reserved for "the most aggravated and least mitigated of serious offenses." If substantial mitigation exists, a sentence of life imprisonment is to be imposed if the mitigation can reasonably support a sentence of life imprisonment, even in the face of a jury recommendation for death. When, as here, it can be shown either at trial or on appeal that such mitigation has, in the past, warranted a life sentence, imposition of a death sentence becomes arbitrary. Because this trial judge used the wrong

standard in imposing the death penalty and because the death penalty is unwarranted where the case is not the most aggravated and least mitigated of serious offenses, the death sentence must be reversed and the matter remanded for imposition of a sentence of life imprisonment with no possibility of parole for twenty-five years.

POINT VI: Hall timely requested in writing that the trial court inform the jury that the reason the new penalty had been ordered by Supreme Court of Florida was because, at the first sentencing proceeding, Hall had been improperly restricted in what could be presented in mitigation. The trial judge denied the request and instead merely told the jury that the Supreme Court of Florida required that a new penalty phase be conducted, without specifying why. Despite Hall's repeated requests and in violation of Hall's right to present evidence in his own behalf guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments and Article 1, Sections 9, 16, 17, and 22, the judge would not allow Hall to present evidence ***so*** that he could inform the jury why the new penalty phase was necessary. Hall proffered the testimony of his defense attorney from 1978 that would have been presented to establish that his prior defense attorney did not investigate or attempt to present anything other than statutory mitigating factors because the trial judge would not permit him to, and that this was the reason a new penalty phase had been required by this Court.

Hall was prejudiced by the omission of an "official" explanation of why the case was reversed and/or by being precluded from explaining to the jury why the evidence of his abuse was not presented earlier because the prosecutor insinuated that the testimony from Hall's relatives concerning non-statutory mitigation (abusive childhood and mental retardation) had been recently fabricated because it had not been presented earlier. Because Hall was denied a fair hearing by the omission of his requested instruction, the death sentence must be reversed and the matter remanded for a new penalty phase if this Court determines that the death penalty may proportionately be imposed.

POINT VII: The trial judge ruled that, if Hall introduced a certified copy of a judgment showing that Ruffin was convicted of the first-degree murder of Deputy Coburn, the court would then instruct the jury that, but for a legal technicality, Ruffin should only have been convicted for second-degree murder, as Hall had been. This ruling forced Hall to forego introducing Ruffin's judgment for the first-degree murder of Deputy Coburn. The ruling denied Hall a fair trial, the right to present evidence in his own behalf, and otherwise rendered the jury's recommendation unreliable under the state and federal constitutions.

POINT VIII: The trial judge ruled that Hall could not present the testimony of some of his relatives because the testimony was cumulative to that presented by some of Hall's other siblings. The testimony was not needlessly cumulative, in that it tended to establish that Hall was in fact abused as a child and that Hall

suffered from mental retardation as a child. Each sibling offered a different perspective of the abuse suffered by Hall. These considerations were disputed by the State, and Hall was prejudiced by the improper limitation of such testimony in violation of his rights to due process, a fair hearing, to present relevant evidence and to be heard in his own behalf guaranteed by Article 1, Sections 9, 16, 17 and 22 of the Florida Constitution and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

POINT IX: The especially heinous, atrocious or cruel statutory aggravating factor is unconstitutionally vague, in that it fails to channel the discretion of the jury and/or sentencer in the recommendation/imposition of the death penalty. The limiting construction placed on that factor by this Court fails to restrict the arbitrary and capricious imposition of the death penalty in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution.

POINT X: The death penalty is unconstitutional on its face and as applied because this Court, rather than the legislature, has provided the substance of the terms set forth in Section 921.141, in violation of the separation of powers doctrine. The statutory aggravating factors are too broad to sufficiently narrow the discretion of the jury/sentencer in recommending/imposing the death penalty, in that improper considerations factors are used under the broad umbrella of a statutory aggravating factor.

Further, the denial of notice as to which statutory aggravating factor(s) the State seeks to prove violates the notice and due process requirements of the state and federal constitutions. Finally, the death penalty legislation in Florida is unconstitutional because it places the burden on the defendant to prove that the mitigation outweighs the aggravation and, even when the burden shifting problem is corrected, the "outweigh" standard impermissibly dilutes the State's constitutional burden to prove beyond and to the exclusion of every reasonable doubt that the death penalty is warranted in a particular case. Thus, the death penalty violates the state and federal constitutions.

POINT XI: Hall exhausted his peremptory challenges and asked for another to strike potential juror Cavanaugh, who admitted seeing a newspaper article concerning Hall's re-sentencing and further admitted being present when other potential jurors discussed those articles and their attitudes about the re-sentencing being a waste of time and taxpayers' money. Cavanaugh claimed not to have read the newspaper article and not to have heard the content of what the other jurors said. The court denied Hall's request for another peremptory challenge to excuse Cavanaugh. In doing so, the court abused its discretion because a reasonable doubt exists as to whether Cavanaugh can be fair and impartial in light of his exposure to the newspaper article and the voiced attitudes of other potential jurors who were excused for cause. The death sentence must be vacated and the matter remanded for a new penalty phase.

POINT I

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

In 1978, when this matter was first tried, the trial judge found that the State had proved the existence of only three statutory aggravating factors, those being that Hall had previously been convicted of another capital offense or felony involving the use or threat of violence to another[6], the capital felony was committed while Hall was engaged in the commission of a kidnapping[7], and the capital felony was especially heinous, atrocious or cruel[8]. The trial judge expressly ruled that the State failed to prove the existence of other specifically enumerated statutory aggravating factors. (R432)

On direct appeal, this Court upheld the finding of three statutory aggravating factors; the State did not cross-appeal the trial judge's express rejection of other statutory aggravating factors. See Pardo v. State, 563 So.2d 77, 80 (Fla.1990) (successful cross-appeal by State where trial court erroneously rejected statutory aggravating factor). Also, in

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[6] Section 921.141(5)(b), Florida Statutes (1977).

[7] Section 921.141(5)(d), Florida Statutes (1977)

[8] Section 921.141(5)(h), Florida Statutes (1977)

performing its independent review, this Court did not conclude that other statutory aggravating factors applied. See Echols v. State, 484 So.2d 568, 576-577 (Fla.1985), cert. denied, 479 U.S. 871, 107 S.Ct. 241, 93 L.Ed.2d 166 (1986) (Florida Supreme Court sua sponte applies statutory aggravating factor erroneously overlooked by trial judge).

It is axiomatic that the failure of a party to timely contest legal rulings of a trial court results in a procedural bar to subsequent litigation through application of the doctrine of law of the case and/or res judicata, both of which apply with full force here. Greene v. Massey, 384 So.2d 24 (Fla.1980). See Gaskins v. State, 502 So.2d 1344 (Fla. 2d DCA 1987) (law of the case doctrine precludes re-litigation of all issues necessarily ruled upon by the court, as well as all issues on which an appeal could have been taken.); See also Flinn v. Shields, 545 So.2d 452 (Fla. 3d DCA 1989); Dunham V. Brevard County School Board, 401 So.2d 888 (Fla. 5th DCA 1981).

When this Court determined that a new penalty phase must be conducted, it was because a harmless error analysis could not be performed, that is, this Court could not determine beyond a reasonable doubt whether the exclusion of all non-statutory mitigating evidence would or would not have made a difference at the initial proceeding, where only three statutory aggravating factors had been established. Accordingly, when the new penalty phase was ordered, it was for the judge and jury to determine whether the new mitigating evidence would have made a difference:

> We cannot say beyond a reasonable doubt that the three aggravating circumstances found at Hall's original sentencing proceeding would have outweighed all of [the wrongfully omitted mitigating evidence].

Hall v. State, 541 So.2d 1125, 1128 (Fla.1989) (emphasis added).

The State did not contest this Court's decision or suggest that other aggravating factors should come into play in the harmless error analysis or Hall's re-sentencing. Thus, this Court's ruling that there are only three statutory aggravating factors pertinent to the re-sentencing is the law of the case. In that regard, the trial court exceeded its jurisdiction by deviating from the mandate expressed in Hall v. State, 541 So.2d 1125 (Fla.1989), which was to have the jury weigh the previously omitted mitigating evidence against the three statutory aggravating factors that had been established and recommend an appropriate sanction. The proceedings exceeded the mandate, they were improper, and the result requires reversal pursuant to Milton v. Keith, 503 So.2d 1312 (Fla. 3d DCA 1987), Dow Corning Corp. v. Garner, 452 So.2d 1 (Fla. 4th DCA 1984), and Stuart v. Hertz Corp., 381 So.2d 1161 (Fla. 4th DCA 1980).

CONSIDERATIONS OF FUNDAMENTAL FAIRNESS

Even if this Court declines to accept the foregoing reasoning, it is respectfully submitted that considerations of fundamental fairness and the need to avoid piecemeal litigation in capital cases require that the only aggravating factors that can apply here are the three statutory aggravating factors found in 1978, the ones approved on appeal and in post-conviction

proceedings. As noted by the Supreme Court of New Jersey, even assuming that the sentencer's initial rejection of statutory aggravating factors does not constitute an "acquittal" for double jeopardy purposes, it is none-the-less fundamentally unfair for the State to present evidence of new aggravating factors after a defendant succeeds on appeal. State v. Biegenwald, 110 N.J. 521, 542 A.2d 442 (N.J. 1988).

In Biegenwald, the New Jersey Supreme Court, after noting the considerations set forth in Poland v. Arizona, 476 U.S. 147 (1986), Arizona v. Rumsey, 467 U.S. 203 (1984) and Bullington v. Missouri, 451 U.S. 430 (1981), expressly ruled that, double jeopardy considerations aside, fundamental fairness requires that the State, with all its resources, prove all of the statutory aggravating factors of which it has evidence when the matter is first tried. The State will be allowed to prove new aggravating factors "only when it proves to the court that it has discovered new evidence sufficient to establish at re-sentencing a new aggravating factor and that such evidence was unavailable and undiscoverable at trial despite the State's diligent efforts." Biegenwald, 542 A.2d at 452.

Recently, that court again addressed the propriety of permitting re-litigation of aggravating factors that were not initially proved by the State at a defendant's initial trial:

> The State is not seeking here to submit new evidence of a new aggravating factor, but rather is relying on old evidence to satisfy a new aggravating factor. Fundamental-fairness concerns do not dissipate in that situation. If

> the State knew the facts and failed to allege an aggravating factor on the basis of those facts at the first trial, it should not thereafter be able to submit that factor to the jury on retrial.

State v. Cote, 119 N.J. 194, 574 A.2d 957, 973-974 (N.J. 1990).

The rationale behind this is simple; there is no bona fide reason for the State not to pursue, at the time a defendant is initially sentenced, all of the statutory aggravating factors that can arguably apply to a defendant's case. This requirement avoids piecemeal litigation and the unnecessary expenditure of judicial time, labor and resources. Such considerations already play a significant role in Florida's guideline sentencing. See Pope v. State, 561 So.2d 554 (Fla.1990); State v. Jackson, 478 So.2d 1054 (Fla.1985), receded from on other grounds, Wilkerson v. State, 513 So.2d 664 (Fla.1987); and Shull v. Dugger, 515 So.2d 778 (Fla.1981). They should likewise control in capital sentencing proceedings.

It is respectfully submitted that this Court should, under Article 1, Sections 9 and 16 of the Florida Constitution, expressly hold that as a matter of fundamental fairness and due process, the State cannot now re-litigate whether statutory aggravating factors exist after those factors have been rejected by the sentencer when a death sentence is initially imposed and when that ruling was uncontested by the State and approved, either expressly or implicitly, by this Court on direct appeal. See Walls v. State, 580 So.2d 131, 133 (Fla.1991).

If this Court finds that the death penalty may be proportionately applied in light of the overwhelming mitigation that exists without contradiction as discussed in Point IV, the instant sentence of death must be vacated and the matter remanded for a new penalty phase to determine whether the three statutory aggravating factors found by the trial judge in 1978 outweigh the mitigation. Such relief is appropriate because fundamental fairness requires it, because the trial judge exceeded the mandate of this Court in Hall v. State, 541 So.2d 1125 (Fla. 1989), and because the court otherwise violated principles of law of the case and res judicata.

Hall respectfully submits, however, that based on the argument set forth in Point IV, imposition of a death sentence is disproportionate in light of the mitigation that was found by the trial judge and that otherwise exists without contradiction. Accordingly, the death sentence should be vacated and the matter remanded with directions that a life sentence be imposed.

POINT II

THE TRIAL JUDGE ERRED IN FINDING THAT THE MURDER WAS COMMITTED FOR THE PURPOSE OF ELIMINATING A WITNESS, IN THAT THE FINDING IS CONCLUSORY AND OTHERWISE NOT SUPPORTED BY SUBSTANTIAL, COMPETENT PROOF.

The trial judge found that the statutory aggravating factor of a murder committed for the purpose of avoiding a lawful arrest had been established as follows:

> **(7)** The capital felony was committed for the purpose of avoiding or preventing a lawful arrest.
>
> (a) The evidence clearly demonstrates the defendant discussed with his co-defendant 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).**

(R642).

The trial judges's findings are inadequate, factually erroneous and conclusory. Hall vehemently disagrees with the finding that the evidence shows that Hall discussed Mrs. Hurst's killing with Ruffin, and respectfully submits that there is absolutely no evidence whatsoever in the record to support that

conclusion. It should be a simple matter for the State to set forth in the Answer Brief those part or parts of this record that exists to support the trial judge's statement.

Ruffin may be said to have intended to murder Mrs. Hurst for the purpose of witness elimination based on his statement to Deputy Freeman. In that regard, Deputy Freeman testified as follows:

> Q: (by defense attorney) During one of those occasions when you had contact with Mr. Ruffin did you have an opportunity to discuss with Mr. Ruffin what happened back on February 21st when Carol Lea Hurst was shot?
>
> A: (Arthur Freeman) I did.
>
> Q: Did Mr. Ruffin, sir, tell you who shot Carol Hurst?
>
> A: Yes, he did.
>
> Q: Who did Mr. Ruffin say shot Mrs. Hurst?
>
> A: He said he did.
>
> Q: What else did Mr. Ruffin say?
>
> A: He just explained to me how he done it.
>
> Q: Please describe what he said.
>
> A: By taking a 32 revolver, snapping it several times and it wouldn't --
>
> Q: When you say snapping, what do you mean?
>
> A: Well, he hit in the back of her head, you know, to shoot her with it. Snapped it several times and it wouldn't shoot so he got Hall's revolver and popped her in the back of the head.

Q: Did he say anything **else** to you about that?

A: No more than he said that, you know, he had to kill her because he didn't want her to talk.

Q: Mr. Ruffin was telling you that?

A: Right.

Q: Do you recall anything else Mr. Ruffin told you about that?

A: No more than that he had to prove himself as a man.

Q: What was the context of that statement?

A: Well, he explained to me previously that they had robbed quite a few stores and that him and Hall ran together and he told him that he had to prove himself if he wanted to run with him.

(R1605-1606) (emphasis added).

A defendant's statement that a person was killed to eliminate him or her as a witness is sufficient to support this statutory aggravating factor. See Wright **v.** State, 473 So.2d **1277, 1282** (Fla.1985) (defendant's statement that he killed victim because she recognized him and he did not want to go back to prison supports finding of witness elimination). However, a codefendant's statement that he killed a person for that reason cannot automatically be imputed to a defendant. Rather, the record must establish that a person was killed either primarily or solely to eliminate him or her as a witness as part of a pre-arranged scheme or plan before this factor may legally be found to exist beyond and to the exclusion of every reasonable doubt.

See Garcia v. State, 492 So.2d 360, 363;367 (Fla.1986) (evidence showing defendant and three accomplices discussed for four days plan that "included the murder of witnesses" sufficient to establish factor of witness elimination.)

Determining whether the death penalty is an appropriate sanction to be imposed in a particular case is an individualized determination that concentrates on whether the moral and legal culpability of the defendant warrants imposition of the most severe penalty available. Unless it can be shown beyond a reasonable doubt that a prearranged plan existed to murder a person primarily or solely to eliminate that person as a witness to a crime, this factor is inapplicable. Bates v. State, **465** So.2d **490** (Fla.1985); Rembert v. State, 445 So.2d 337 (Fla.1984).

The trial judge's citation to Lopez, supra, fails to support the instant finding, in that Lopez stated to his accomplice that the victim had to be killed because they could not afford to leave any witnesses behind. Lopez, **536** So.2d **at 230**. Thus, the factor certainly applies for Lopez, and perhaps under those **facts** to the accomplice who was evidently consulted by Lopez prior to the murder about why it was necessary to murder the victim. Here, however, there is simply no proof to support this factor. Ruffin stated that he killed Mrs. Hurst to eliminate her as a witness. The factor thus applies to Ruffin. That said, there is no evidence from which a valid conclusion can be made beyond a reasonable doubt that Hall intended that Mrs. Hurst be killed to eliminate her as a witness or, indeed, for any

other reason. This is discussed in depth in Point III in the context of the inapplicability of the cold, calculated and premeditated murder statutory aggravating factor.

Because the State cannot show beyond a reasonable doubt that the presence of this factor did not affect the jury when the recommendation was made and/or judge when the sentence of death was imposed, the death sentence must be vacated and the matter remanded for re-sentencing if this Court determines, as presented in Point IV, that the death penalty can proportionately be imposed in light of the substantial mitigation that was properly found to exist by the trial judge.

POINT III

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

Assuming, but not conceding', that application of this statutory aggravating factor, created in **1979,** to a crime which was committed in **1978** does not violate the ex post facto clause of the state and federal constitutions, and assuming, but not conceding, that the State could otherwise prove, as an exception to the proscription advanced in Point I, supra, that this factor now applies because it did not exist in **1978,** it is respectfully submitted that the cold, calculated and premeditated statutory aggravating factor is wholly improper here because it is not supported by substantial, competent proof. Not only is there **NO** evidence that Hall premeditated Mrs. Hurst's death, the presence of a pretense of moral justification otherwise renders the application of this factor improper as a matter of law.

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[9] It is acknowledged that this Court has rejected claims that a violation of the ex post facto clause results under these circumstances, that is, where this statutory aggravating factor is applied to murders that occurred after the statutory factor was passed. See Stano v. **Dugger, 524 So.2d 1018, 1019** (Fla.1988). However, Hall is constrained to again expressly assert that use of a statutory aggravating factor, passed into existence in 1979, to aggravate a sentence for a crime committed in **1978** violates the **ex post** facto clause of the state and federal constitutions. This Court is asked to reconsider and recede from precedent to the contrary. The use of this factor was expressly objected to by Hall at trial, (R388-390), and the error is presented here in summary form only because of limitations on the size of briefs and in light of direct authority from this Court contrary to the position presented here. Hall adopts by reference the argument (Point 111) concerning the ex post facto use of this factor that was just rejected by this Court in Sireci v. State, Fla. Sup. Ct. Case No. **76,087.**

Specifically, the judge found the cold, calculated and premeditated murder ("CCP") statutory aggravating factor to have been established by the following:

> (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 (sic) 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 (sic) 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 justification.

(R641).

Conspicuously absent is a finding that Hall shot Mrs. Hurst. The judge did **not** find that Hall shot Mrs. Hurst because the record does not support such a conclusion. Instead, the record affirmatively establishes that Ruffin confessed to Deputy Freeman that in fact he (Ruffin) hit Mrs. Hurst and then shot her. (R1877) The judge ruled, however, that regardless of **whether** Hall shot Mrs. Hurst, the CCP aggravating factor applied based on the totally of circumstances surrounding the murder. It is respectfully submitted that the proof wholly fails to show that Hall had the extent of heightened premeditation necessary for this statutory aggravating factor to be properly found.

The CCP aggravated factor is reserved for cases showing that a murder was the product of **"a** careful plan or prearranged **design."** Rogers v. State, 511 So.2d 526, 533 (Fla.1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988).

> The level of premeditation needed to convict in the guilt phase of a first-degree murder trial does not necessarily rise to the level of premeditation required in Section 921.141(5)(i). This aggravating circumstance has been found when the facts show a particularly lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator.

Nibert v. State, 508 So.2d 1, 4 (Fla.1987) (emphasis in original).

Here, the trial judge did not find that Hall intended to kill Ms. Hurst when she was initially abducted, instead finding "that during the course of the events later on the

afternoon of the crime [Hall] formed a preconceived plan that the victim would have to be murdered, and he accomplished that fact either himself, or by encouraging [Ruffin] to do the evil deed." (R656, at "s") The evidence fails to support a conclusion that Hall formed the intent to eliminate Mrs. Hurst as a witness (**See** Point II, supra), that he intended that Hurst be shot, or that Hall "encouraged his accomplice to do the evil deed."

The first three paragraphs of the trial judge's findings of fact pertaining to this factor, set forth previously, mirror the language contained in the prosecutor's sentencing memorandum. (R477-478) The finding totally disregards Ruffin's confession to Deputy Freeman, and it disregards Hall's statement given in 1978, which flatly disputes that he was the shooter or that he joined in Ruffin's premeditated design to murder Mrs. Hurst. (R1496-1513) Nothing has been presented by the State that is inconsistent with what Hall claimed in his statement or what Ruffin told Deputy Freeman.

In his statement, Hall notes that Ms. Hurst pleaded for her life and the life of her unborn child, but rather than "failing to be dissuaded" as found by the trial judge, Hall claims to have reassured Mrs. Hurst that she would not be hurt, after which Ruffin committed the murder. Her murder occurred essentially without warning and over Hall's protestations. In pertinent part, in 1978 Hall testified:

> Q: (Prosecutor) Okay. Let's get on down here to this deal about this pregnant woman. So Ruffin rapes her and then she begs for her life, doesn't she?

A: (Hall) Yes.

Q: And she begs for it, she says don't hurt and don't kill her baby. Didn't she tell you that?

A: She said she wanted to have her baby. She didn't say it in those words. She said, "Don't hurt it." I said, "Lady, I give you my word." I said, "You won't get hurt."

Q: And then she was shot in the back of the head, wasn't she?

A: She was shot after she was hit.

Q: After she was beaten?

A: Yes.

Q: With the gun butt?

A: No, not the butt; with the barrel of it.

Q: Did she try to give you all $20,000 for you just not to kill her? Did she do that?

A: Yeah, she said that.

Q: And didn't she write that check out but never filled out the amount in it; isn't that right?

A: I think so.

Q: Was she beaten with that pistol?

A: Yes.

Q. She is, isn't she?

A: Yeah. When he hit the lady, the lady fell.

Q: What?

A: When he hit the lady, the lady fell. And I said, "Hey, man." He hit the lady about two or three times and I said,

"Hey, man, don't do that, black her eye like that." And then he shot her.

Q: After he had hit her behind the head with the gun, then he shot her?

A: Yes.

Q: So, you just leave her there, don't you? You leave her there?

A: Yes. She was dead.

(R1506-1507). The State failed to present any competent evidence that is inconsistent with Hall's claim that Ruffin shot Mrs. Hurst, essentially without warning over Hall's protestations.

It is important to understand that Hall does not dispute that there is sufficient evidence to convict him of first-degree murder. However, it is respectfully submitted that, as a matter of law, there is insufficient evidence to show that Hall had a heightened premeditation to murder Mrs. Hurst, especially where Hall's statement is not contradicted by any evidence. See Cannady v. State, 427 So.2d 723, 730 (Fla.1983) (error to find CCP statutory aggravating factor where defendant's uncorroborated statement that victim was shot in self defense was not contradicted by any evidence).

The trial judge's determination that Hall "encouraged" Ruffin to kill Mrs. Hurst is elaborated upon later in the judge's findings of fact when the judge rejects as a mitigating factor the premise that Hall's participation in Mrs. Hurst's murder was relatively minor, and considering that in the context of this factor is enlightening. Specifically, the trial judge reasoned:

> [Hall] relies upon his own self-serving statements and a portion of the testimony of Arthur Freeman to suggest that the evidence herein establishes that [Ruffin] is solely responsible for the murder of Karol Lea Hurst. From his own statements and all the testimony of Arthur Freeman, it is abundantly clear that [Hall] was a knowing, willing, and active participant in the series of events leading up to and following Karol Lea Hurst's death. The statements of [Hall], considered alone, irrefutably establish that his participation in the crime was anything but minor. The totality of testimony offered by Arthur Freeman, if it is to be considered, supports the proposition that [Hall] was the dominant and motivating force behind the killing, and that Mack Ruffin, Jr., if he in fact is the one who actually killed Karol Lea Hurst, pulled the trigger only after he was goaded and cajoled into performing the act by the defendant in order to prove to the defendant that he was a "man" and "worthy" enough to be his partner.

(R651-652).

The testimony of Deputy Freeman, cited by the trial judge to support this factual determination, does not in any way support the finding; there is absolutely no competent testimony that Hall goaded Ruffin into killing Mrs. Hurst to prove his manhood. Hall expressly challenges this finding as inaccurate and without any factual support whatsoever and, again, it should be a simple matter for the State to meet this challenge by setting forth in the Answer Brief the portions of the record that adequately support the judge's finding. Freeman's testimony is found in the record at pages **1604-1612, 1871-1877, and 1897-1907.** In pertinent part, Freeman testified as follows:

Q: (by defense attorney) During one of those occasions when you had contact with Mr. Ruffin did you have an opportunity to discuss with Mr. Ruffin what happened back on February 21st when Carol Lea Hurst was shot?

A: (Arthur Freeman) I did.

Q: Did Mr. Ruffin, sir, tell you who shot Carol Hurst?

A: Yes, he did.

Q: Who did Mr. Ruffin say shot Mrs. Hurst?

A: He said he did.

Q: What else did Mr. Ruffin say?

A: He just explained to me how he done it.

Q: Please describe what he said.

A: By taking a 32 revolver, snapping it several times and it wouldn't --

Q: When you say snapping, what do you mean?

A: Well, he hit in the back of her head, you know, to shoot her with it. Snapped it several times and it wouldn't shoot so he got Hall's revolver and popped her in the back of the head.

Q: Did he say anything else to you about that?

A: No more than he said that, you know, he had to kill her because he didn't want her to talk.

Q: Mr. Ruffin was telling you that?

A: Right.

Q: Do you recall anything else Mr. Ruffin told you about that?

A: No more than that he had to prove himself as a man.

Q: What was the context of that statement?

A: Well, he explained to me previously that they had robbed quite a few stores and that him and Hall ran together and he told him that he had to prove himself if he wanted to run with him.

(R1605-1606) (emphasis added).

The contention that Hall told Ruffin to shoot Mrs. Hurst to prove himself as a man was then thoroughly explored. **Deputy** Freeman unequivocally testified that he could not remember the context of Ruffin's statement; whether it referred to Ruffin proving himself to be a man by committing robbery or murder:

Q: (defense attorney) Now, Mr. Freeman, you said that Mr. Ruffin had indicated to you that Mr. Hall had told him, "You have to prove yourself to be a man?"

A: (Freeman) If he want to run with him.

Q: That conversation between Mr. Hall and Mr. Ruffin did not take place at the time of the shooting; that was a previous conversation?

Prosecutor: Objection, leading, your honor.

Trial court: Sustained.

Q: What exactly did Mr. Ruffin say to you?

A: He just told me that he -- Hall told him if he wanted to run with him, he had to prove himself as a man.

Q: When had Mr. Hall said that to Mr. Ruffin: before the shootins, at the time of the shooting? When?

A: I don't really know whether it was before the shootins or what. You know, it was just a conversation that was carried on between me and him.

(R1610-1611).

Q: (defense counsel) Now, you testified yesterday about the statement that Mack was **telling you about what** Freddie said?

A: (Deputy Freeman) Right.

Q: What was that statement?

A: He told me that -- in talking with me -- while we was talking he told me that Hall told him if he wanted to run with him he will have to prove himself.

Q: Was that statement made at the time of the shooting per your understanding of Mack Ruffin's testimony -- or statement to you?

A: No, I can't say it **was** made at the time of the shootins. I just --

Q: It was just a statement he made?

A: Just a statement he made, yeah. Something he said.

(R1872).

What is clear from Deputy Freeman's testimony is that Ruffin admitted killing Mrs. Hurst. There is no competent evidence in this record from which the judge could, with any degree of reliability, determine that goaded Ruffin into shooting Mrs. Hurst to prove himself as a man. It is as reasonable here that Ruffin's, "I had to prove myself to be a man" statement **was** made in the context of committing robberies, not murder. Any conclusion that Hall goaded or cajoled Ruffin into shooting Mrs. Hurst to prove himself to be a man is specious.

The trial judge's application of the CCP aggravating factor is also based on the observation that Hurst was abducted from a public place and taken to a wooded area. That, either in and of itself or combined with other circumstances, fails to support as the only reasonable premise that Hall intended to murder her. Even assuming for the sake of argument that Hall's statement is not to be believed and that he participated in raping Mrs. Hurst, any "plan" to steal her car or to take her to a secluded area and sexually molest her is not determinative of a heightened intent to murder her. See Thompson v. State, 565 So.2d 1311, 1317-1318 (Fla.1990) ("Heightened premeditation can be demonstrated by the manner of the killing, but the evidence must prove beyond a reasonable doubt that the defendant planned or pre-arranged to commit murder before the crime began.").

Hall's explanation that he believed that Mrs. Hurst would be turned loose and given back her car after it was used in the robbery is the type of reasoning one would expect by a mentally retarded person who fails to appreciate the consequences of his actions. This leads into the other element of the CCP statutory aggravating factor, that is, that not even a "pretense of moral or legal justification" exist for the murder. Hall's mental retardation constitutes at the very least a "pretense" of moral or legal justification that precludes a finding of this statutory aggravating factor. See Penry v. Lynaugh, 492 U.S. ___, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989)

In Banda v. State, 536 So.2d 221 (Fla.1988), the working definition of the term "pretense of moral or legal justification" was set forth as follows:

> We conclude that, under the capital sentencing law of Florida, a "pretense of justification" is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise cold and calculating nature of the homicide.

Banda, 536 So.2d at 225 (emphasis added). This Court then defined "pretense" as "something alleged or believed on slight grounds; an unwarranted assumption . . . ." Banda, 536 So.2d at 225 (Footnote 2). See Cannady v. State, 427 So.2d 723, 730-731 (Fla.1983).

It is respectfully submitted that the fact that a defendant is mentally retarded when he or she commits a murder, a fact that is here uncontroverted, presents a "pretense" of moral justification such that the CCP statutory aggravating factor is inapplicable as a matter of law. Using the definition of a pretense of moral justification set forth above, mental retardation presents a ground that, though insufficient to reduce the degree of homicide, nevertheless acts to rebut the cold and calculating nature of the homicide. At least one state, Georgia, has, in response to a "societal consensus", legislatively proscribed executions of the mentally retarded. See Fleming v. Zant, 259 Ga. 687, 386 S.E.2d 339, 340 (Ga.1989) ("We conclude that the new statute reflects a societal consensus against the execution of mentally retarded defendants.")

If retardation serves as a legal and/or moral basis to totally bar in one state execution of a retarded defendant who committed first-degree murder, it cannot be doubted that mental retardation qualifies as, at the very least, a pretense of moral or legal justification in Florida. Though mental retardation does not absolutely bar imposition of capital punishment in Florida, it nonetheless must be recognized as a "pretense of moral justification" which precludes the finding of this one statutory aggravating factor.

Based on the foregoing, it is respectfully submitted that the trial judge erred in instructing the jury on the CCP statutory aggravating factor and in thereafter finding and applying that factor in imposing the death sentence. For those reasons, use of the CCP aggravating factor violates the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 9, 16 and 22 of the Florida Constitution. This factor also renders the recommendation and/or sentence unreliable under the Eighth and Fourteenth Amendments and Article 1, Section 17 of the Florida Constitution. Accordingly, the death sentence must be vacated and, if this Court finds that death may be proportionately imposed in light of the substantial mitigation that exists as discussed in the following point, the matter must be remanded for a new penalty phase.

POINT IV

THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR BY USING THE WRONG LEGAL STANDARD IN FINDING, REJECTING, AND/OR IN WEIGHING MITIGATION WHEN THE DEATH SENTENCE WAB IMPOSED: THE SUBSTANTIAL MITIGATION THAT EXISTS IN THIS CASE WITHOUT CONTRADICTION RENDERS THE DEATH SENTENCE DISPROPORTIONATE BECAUSE THIS CASE IS NOT THE MOBT AGGRAVATED AND LEAST MITIGATED OF MOST SERIOUS OFFENSES.

FAULTY WEIGHING AND FACT FINDING

A trial judge is required by statute and case law to make written findings of fact with "unmistakable clarity" to afford meaningful appellate review of a sentence of death. Mann v. State, 420 So.2d 578, 581 (Fla.1982). Here, the trial judge entered a written order which expressly found the existence of substantial mitigating considerations. However, the majority of those considerations were not attributed weight in opposition of imposition of the death penalty because the judge was unable to determine what weight should be given such factors.

Though numerous compelling factors were found to have been proved, those substantial mitigating considerations were effectively eliminated from the weighing process because the trial judge deemed such considerations to be "unquantifiable." It appears that the factors were deemed to be "unquantifiable" because the trial judge could not tell to what extent that particular mitigating consideration affected Hall at the time of the murder. Specifically, the trial judge analyzed these factors as follows:

Organic Brain Damage:

"This fact was uncontroverted in the record, but its mitigating value is unquantifiable." (R652-653)

Lifelons Mental Retardation:

"There is substantial evidence in the record to support this finding. Again, however, there is difficulty in relating this factor back to determine how it affected the defendant's state of mind at the time of the crime. The mitigating factors of this fact are thus unquantifiable." (R653)

Lifelons Mental Illness:

"The greater weight of the evidence would likely demonstrate some mental illness on behalf of the defendant most likely evident at the time of the crime. However, what mental illness was present and the extent to which it affected the thinking of the defendant at the time of the crime is unquantifiable." (R653)

Tremendous Lifelons Emotional Deprivation and Disturbance:

"The evidence of this fact was overwhelming. Again, however, There (sic) is a considerable (sic) difficulty in determining how and to what extent this circumstance should be allowed to mitigate the behavior of the defendant. How such a horrible childhood affected the defendant at the time of his childhood is apparently impossible to ascertain. Such a factor is thus unquantifiable." (R653)

Tremendous Physical Abuse and Torture as a Child:

"The evidence on this alleged mitigating circumstance was overwhelming. The extent to which such abuse and torture affected his state of mind at the time of the crime is unascertainable and thus unquantifiable. (R654)

Among other non-statutory mitigating **factors** similarly found by the trial judge to have been sufficiently proved but deemed to be **"unquantifiable"** are the following: (l) Hall suffers from a speech impediment; (m) Hall **suffers** from learning disabilities; (n) Hall is illiterate; (z) Hall's parents were alcoholics; and, (aa) Hall's mother may have been mentally ill. (R654-658) The labeling of these factors as **"unquantifiable"** leads to but one reasonable conclusion; the factors exist but were afforded no weight whatsoever in the weighing process.

There is substantial evidence in the record to support each of these mitigating factors. In fact, the existence of most of these factors is uncontroverted. There is no legal basis or authority for the trial judge to avoid attributing weight to such valid factors by deeming them **"unquantifiable."** To do so was error and in direct contravention of Campbell v. State, 571 So.2d 415 (Fla.1990), which holds that, if a trial judge determines that a mitigating circumstance has been reasonably established by competent proof, weight must be afforded that factor when the weighing analysis is performed to determine whether a sentence of death or **life** imprisonment **is** appropriately imposed.

The undersigned is not asking that this Court determine the existence of mitigating factors from **a** cold record. These factors have already been found to exist by the trier of fact. Rather, Hall is respectfully asking for this Court fulfill its promise to provide meaningful appellate review of the reasoning used by a trial judge to impose a death penalty . . . this is a

question of law that is performed to insure that the ultimate sanction will not be arbitrarily or capriciously imposed. See State v. Dixon, 283 So.2d 1, 8 (Fla.1973) ("Discrimination and capriciousness cannot stand where reason is required, and [the statutory requirement of written factual findings] is an important element added for the protection of the defendant.")

> A court's written finding of fact as to aggravating and mitigating circumstances constitutes an integral part of the court's decision; they do not merely serve to memorialize it. Without these findings this Court cannot assure itself that the trial judge based the oral sentence on a well-reasoned application of the factors set out in section 921.141(5) and (6) and in Tedder v. State, 322 So.2d 908 (Fla.1975).

Van Royal v. State, 497 So.2d 625, 628 (Fla.1986); See Mann v. State, 420 So.2d 625, 628 (Fla.1982) ("The trial judge's findings in regard to the death sentence should be of unmistakable clarity so that we can properly review them and not speculate as to what was found. . . ."). As in Nibert v. State, 574 So.2d 1059, 1063 (Fla.1990), it is evident here that this trial judge "failed to properly weigh a substantial number of statutory and nonstatutory mitigating circumstances."

The legal reasoning set forth by this trial judge is demonstrably faulty; this judge otherwise erred in arbitrarily rejecting and\or failing to properly weigh significant mitigation that was overwhelmingly established by the evidence. The legal analysis repeatedly used by this trial judge to avoid attaching any mitigating worth to valid mitigating considerations which

were otherwise found to have been adequately proved has been expressly rejected by this Court.

For instance, in analyzing the mitigating worth of Hall's childhood abuse, the judge reasoned as follows:

> The evidence of this alleged mitigating circumstance was overwhelming. The extent to which such abuse and torture affected his state of mind at the time of the crime is unascertainable and thus unsuantifiable.

(R654). That Hall was tortured as a child is itself mitigating, itself worthy of substantial weight. It is wholly unnecessary that a defendant show a concrete nexus between childhood abuse and subsequent criminal actions for such childhood abuse to be afforded weight in opposition of a death sentence:

> Nibert produced uncontroverted evidence that he had been physically and psychologically abused in his youth for many years. The trial court found this to be "possible" mitigation, but dismissed the mitigation by pointing out that "at the time of the murder the Defendant was twenty-seven (27) years old and had not lived with his mother since he was eighteen (18)." We find this analysis inapposite. The fact that a defendant had suffered through more than a decade of psychological and physical abuse during the defendant's formative childhood and adolescent years is in no way diminished by the fact that the abuse finally came to an end. To accept that analysis would mean that a defendant's history as a victim of child abuse would never be accepted as a mitigating circumstance, despite well-settled law to the contrary.

Nibert v. State, 574 So.2d 1059, 1062 (Fla.1990) (emphasis added).

The fact that a child is repeatedly, horribly abused by a parent during the formative childhood years is mitigating in nature because that child is denied guidance. Instead of being taught expected societal mores, Hall was instead taught, by repeated example if nothing else, that violence is the acceptable mode of behavior. What real chance did Hall, with an IQ of *60* and a **speech** impediment, have of developing attributes whereby he could conform his conduct to the requirements of law when his own mother tortured him as she did?

The trial judge applied that same faulty analysis to the majority of the mitigation that was established by Hall, that is, the judge rejected as mitigation considerations that were otherwise established simply because there was no concrete showing of the extent that Hall was affected by those mitigating factors on the date Mrs. Hurst **was** murdered:

> The Court does find that it is **"reasonably** convinced" that one or more of their alleged mitigating circumstances has been established by the defendant. However, there is a paucity of evidence before the Court establishins anv logical nexus between the alleged past or present problems of the defendant and the atrocity of his conduct on February 21, 1978. None of the defendant's experts offered any explanation or opinion as to the dynamics of who or when the mental conditions and deficits they noted eight to twelve years after the murder of Karol Lea Hurst, contributed to its occurrence. It is unknown how the defendant's upbringing affected the circumstances of February 21, 1978. The portrait of Freddie Lee Hall sresented to the Court, while it does evoke sympathy, does **not** establish ***ANY*** **aspect**

> **of the defendant's character or record, or ANY circumstance of this offense that mitigates the extreme brutality of this offense.**

(R659) (emphasis added). The legal reasoning here was expressly rejected in Nibert, supra. It is clearly erroneous as a matter of law because there is no requirement that mitigation concerning a defendant's character conclusively be shown to have affected his or her actions at the time of a murder. Mitigation need not be established beyond a reasonable doubt, which appears to be the requirement of this trial judge.

The trial judge's conclusion (as to the absence of conclusive proof that Hall was affected by the several mitigating concerns at the time of the murder) otherwise disregards the testimony of Hall's experts. The reason that the trial judge discounted the testimony of all of the defense experts and accepted the testimony of the sole State psychiatrist (Dr. Carrera) was stated to be as follows:

> The Court is impressed with the qualifications and credibility and sincerity of the expert witnesses presented by the defense. Nevertheless, their 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"

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[10] This finding by the trial court is inconsistent with the previous finding that the mitigation was rejected because there was no proof that Hall suffered from adverse affects of his childhood torture and mental difficulties at the time of the crime. The court does not specify why the opinions of the experts "are of no utility in determining the actual mental

> confident 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 on 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.

(648). This particular finding by the trial judge is expressly challenged by Hall; the finding is illogical, without competent factual support, **and** it is otherwise based on a faulty legal predicate.

Specifically, Dr. Carrera's opinion is not based on the examination performed in 1978 except in the most convoluted sense possible. Dr. Carrera cannot remember anything about the 1 **2/2** hour interview he did in 1978, and instead is forming an opinion now based on a report that dealt solely with questions of Hall's sanity and competence in 1978. Hall respectfully submits that the trial court's acceptance of the opinion of Dr. Carrera, which is based on a sanity interview of forgotten content lasting one and one-half hours with no outside information or research, over the testimony of many respected mental health experts who formed opinions after hours of modern objective and subjective testing and extensive research revealing substantial relevant evidence from credible, independent and diverse sources is so arbitrary

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status of the defendant at the time of the offense."

that it constitutes an abuse of discretion as a matter of law.

Further, the trial judge applied at least **two** faulty legal standards in arriving at the conclusion that Dr. Carrera's testimony was superior to that of the defense experts', and such legal error requires that the death sentence be vacated and the matter remanded for resentencing if this Court finds that the death penalty may constitutionally be imposed as discussed at the conclusion of this Point. It is not required that an expert be able to "positively predict" that a defendant suffers from a particular mental infirmity for the testimony **to** be credible **or** for the opinion to be valid, which is what this trial judge required of the defense experts here. Such a **standard** could never realistically be attained and, indeed, due **to** the inherent subjectivity in the sciences of psychiatry and/or psychology, any psychiatrist or psychologist that professes an **ability** to conclusively diagnose the inner workings of a particular mind with 100 per cent accuracy is, to be generous, suspect, even when the examination is performed simultaneously with the formulation of such an opinion.

Dr. Carrera's opinion is otherwise without a sufficient predicate, in that his opinion (as to the existence of mitigating factors) was **not** made in 1978, but instead in 1988. The issue here is not Hall's sanity, but instead whether he now has, and/or had at the time of the crime, mental problems which mitigate his criminal culpability. The significant testimony of Dr. Carrera,

however, which renders his opinion (as to whether Hall's mental condition at the time of the crime mitigates his conduct) legally unacceptable, is that at the time he formed the opinion in 1988 he had no independent recollection of what transpired in 1978. In that regard, Dr. Carrera's opinion is based on, by far, less than the opinions of Hall's experts.

Dr. Carrera admits that his opinion is based solely on the contents of the sanity-competency **report,** whereas the opinions of the defense experts are based on examinations of Hall that they personally conducted and on a complete battery of mental and physical examinations expressly designed to provide a complete picture of the psychiatric condition of an individual. In that regard, Dr. Carrera's opinion, formed in 1988, is incompetent **as** a matter of law because it is based solely on a sanity\competency report which was not shown by the State to be adequate to form a valid opinion as to the existence of mental mitigating factors.

As admitted by Dr. Carrera on cross-examination, the more information a mental health expert has, the better, and the tests performed by the defense experts were expressly designed to provide a complete mental evaluation. Dr. Carrera's report was based on a one and one-half hour interview designed solely to determine whether Hall was sane and competent to stand trial; the specifics of the test Doctor Carrera no longer recalled, and Dr. Carrera admitted that the report upon which he now based his opinion was made without reference to *any* outside source of

information. (R1969-74) Dr. Carrera further confirmed that defendant's often do not reveal significant information because there is a natural tendency for people to conceal the things that make the person look bad . . . "I think none of us like to look stupid." (R1976;1972)

The technical requirements for admission of such expert testimony aside, for the judge to accept the testimony of Dr. Carrera over that of the many defense experts who all reached the same conclusion based on independent testing was, under these circumstances, error and an abuse of discretion as a matter of law. The judge's rejection of the existence of the statutory mitigating factors which concern a defendant's mental condition at the time of a murder is arbitrary and not supported by any competent, substantial evidence.

The trial judge took exception to the extent of Hall's mental retardation because Hall was physically able to abduct Mrs. Hurst from the parking lot and drive her to the location where she was sexually molested and murdered, and to thereafter drive her car in the high-speed chase while Ruffin fired at the pursuing officers. (R649) The judge overlooked the testimony of Hall's siblings, neighbors, and experts which explained that there is nothing wrong with Hall's physical attributes. Hall can run and play fine; he simply cannot reason as an adult.

It is ironic that Hall was punished as a child for the same faulty reasoning . . . people see a physically mature person that can do physical things well and they therefore expect Hall

to be mentally mature also. The trial judge, in deciding that there is nothing in this record to provide an explanation for Hall's ability to plan the abduction of Hurst if he is as retarded as the defense experts say he is (R649), overlooks the presence and influence of Mack Ruffin. There is absolutely no basis for concluding that Ruffin was not the prime thinker here; Ruffin could well have masterminded Hurst's abduction and committed her sexual battery and murder.

The mitigating worth of Hall's mental retardation[11] was deemed **"unquantifiable"** because no concrete nexus was shown between the retardation and the murder. (R653) In that regard, it is evident that the trial judge's again used the same faulty legal analysis to avoid attributing weight to this mitigation. This, too, was error which renders imposition of the death penalty error.

The judge further erred in concluding that the fact that Ruffin got a life sentence for the murder of Mrs. Hurst is **not** a mitigating factor. The trial judge ruled:

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[11] It is pertinent to note that, when the trial judge rejected Hall's mental age as a mitigating factor, the court discounted Hall's chronological age by 33 1/3%, a totally arbitrary and factually unsupported figure. (R652) The testimony of the experts who administered several tests to Hall was that the highest score Hall attained was at the sixth grade level; all other scores **placed** him at the **first** or second grade. (R 1718) The testimony of Hall's teachers at those grade levels **was** that he was mentally retarded . . . and the lay testimony of Hall's siblings and neighbors was that he was childlike. (R1556;1577-78;1626-27) The record simply does not support the trial court's arbitrary determination that Hall is only 33 1/3% impaired **mentally.**

> (y) Mack Ruffin, Jr., the "actual killer" of Karol Lea Hurst, received a life sentence for her death. There is no doubt in the record that Mack Ruffin, Jr., received a life sentence for her death. There is some doubt in the record as to who was the actual killer of Karol Lea Hurst. The fact that Mack Ruffin, Jr., was given a life sentence for his role in the death of Karol Lea Hurst is **not considered** a **mitigating factor** by this Court under the particular facts of this case.

(R658)

It is respectfully submitted that the above ruling by the trial judge is also wrong as a matter of law, in that it is absolutely contrary to the evidence which conclusively shows that **Mack** Ruffin is **the** person who killed Mrs. Hurst, and the ruling otherwise improperly rejects the established legal premise that it is a mitigating consideration for a triggerman to receive a life sentence when the triggerman is at least as culpable as the defendant. The proof in this record leaves no doubt as to who actually shot Mrs. Hurst. Deputy Freeman testified that Mack Ruffin confessed that he (Ruffin) shot Mrs. Hurst. In pertinent part, Deputy Freeman testified:

> Q: (by defense attorney) During one of those occasions when you had contact with Mr. Ruffin did you have an opportunity to discuss with Mr. Ruffin what happened back on February 21st when Carol Lea Hurst was shot?
>
> A: (Arthur Freeman) I did.
>
> Q: Did Mr. Ruffin, sir, tell you who shot Carol Hurst?
>
> A: Yes, he did.

Q: Who did Mr. Ruffin say shot Mrs. Hurst?

A: He said he did.

Q: What else did Mr. Ruffin say?

A: He just explained to me how he done it.

Q: Please describe what he said.

A: By taking a 32 revolver, snapping it several times and it wouldn't --

Q: When you say snapping, what do you mean?

A: Well, he hit in the back of her head, you know, to shoot her with it. Snapped it several times and it wouldn't shoot so he got Hall's revolver and popped her in the back of the head.

Q: Did he say anything else to you about that?

A: No more than he said that, you know, he had to kill her because he didn't want her to talk.

Q: Mr. Ruffin was telling you that?

A: Right.

(R1605-1606) (emphasis added).

Q: (defense attorney) Just a couple, Mr. Freeman. Mack Ruffin told you that he hit her behind the head?

Q: (Freeman) Right.

Q: Mack Ruffin told you he shot her?

A: Right.

Q: No further questions.

(1877).

The statement Hall gave in 1978 was that Ruffin was the person who shot Mrs. Hurst, over Hall's protestations. (R1507) Under any scenario that is established or can be reasonably inferred from this record, Ruffin is at the very least as culpable as Freddie Lee Hall. In that regard, the law is clear; equally culpable defendant's should receive the same treatment. See Slater v. State, 316 So.2d 539, 542 (Fla.1975) (death penalty unwarranted where triggerman received life sentence . . . "When the facts are the same, the law should be the same."). This trial judge said that Ruffin's life sentence was not a mitigating consideration. This was error as a matter of law.

A DEATH SENTENCE IS NOT PROPORTIONATE HERE:

As set forth in the Point V, infra, it is respectfully submitted that, as shown by the trial judge's written findings of fact, this judge applied the wrong standard when considering what legal significance to give the jury's recommendation of death. Assuming, however, that a valid death recommendation was rendered, the death penalty is here disproportionate to other cases where life sentences have been imposed based on similar mitigating considerations.

Even where a jury recommends the death penalty, the presence of such uncontroverted, substantial mitigation in the record removes this cases from the category of being the most aggravated and least mitigated of serious offenses and thus, because of this significant mitigation, as a matter of law the death penalty is unwarranted. See Penn v. State, 574 So.2d 1079,

1083-84 **(Fla.1991)** ("On the circumstances of this case, including Penn's heavy drug use and his wife's telling him that his mother stood in the way of their reconciliation, this is not one of the least mitigated and most aggravated murders."); Nibert V. State, **574** So.2d 1059, 1063 (Fla.1990) (trial court incorrectly weighed substantial mitigation and, based on record, death penalty is disproportional to other cases decided by Florida Supreme Court); Farinas v. State, **569** So.2d 425, **431** (Fla.1990) (based on record, Florida Supreme Court concludes that "death sentence is not proportionately warranted"); Livingston v. State, 565 So.2d 1288, 1292 (Fla.1990) (The record discloses several mitigating factors effectively outweigh the remaining valid aggravating circumstances."); Fitzpatrick v. State, ***527*** So.2d 809, 812 (Fla.1988) (noting that the record contained substantial mitigation, the Florida Supreme Court finds "that this case **does** not warrant the imposition of our harshest **penalty.").**

Even when the mitigating evidence is viewed under the auspices of only three general categories of mitigation, these particular categories of mitigation make imposition of the death penalty disproportionate because such mitigation has in the past warranted a sentence of life imprisonment in other substantially similar cases. Imposition of the death penalty here is thus unconstitutionally arbitrary under the Eighth and Fourteenth Amendments to the United States Constitution and Article 1, Section 17 of the Florida Constitution because life sentences

have been imposed in other cases under substantially these same material facts.

The Florida Legislature has reserved the death penalty "only to the most aggravated and unmitigated of most serious crimes." Fitzpatrick v. State, 527 So.2d 807, 811 (Fla.1988). As found by the trial judge and as overwhelmingly established by this record, substantial mitigation exists here. The quantity and quality of the mitigating evidence renders the death penalty disproportionate. The eight-to-four death penalty recommendation and death sentence are faulty because both are based in significant part on improper aggravating circumstances as set forth previously. In that respect, the death penalty recommendation is unreliable and should be totally disregarded when this Court compares this case to others where a life sentence was found to be the appropriate sanction under substantially these same circumstances. Even if the death recommendation by the jury is deemed valid, comparison of this case to others containing substantially this same mitigation conclusively demonstrates that the death penalty is here disproportionate. See Livingston v. State, 565 So.2d 1288, 1292 (Fla.1990) (death penalty not warranted where defendant abused as child and where intellectual functioning can be described as "marginal at best.")

Under the totality of the evidence in this case, it is clear that this case does not qualify for imposition of the death penalty due to the substantial amount of significant mitigation

that was found to exist by the trial judge. The record otherwise shows that a substantial amount of other significant mitigation was erroneously rejected by the trial judge. Such mitigation renders imposition of the death penalty unwarranted here and, accordingly, the death sentence should be vacated and the matter remanded for imposition of a life sentence. Assuming that the death penalty may be proportionately imposed, the faulty legal analysis by the trial judge and the use of improper statutory aggravating factors otherwise requires that this death sentence be vacated and the matter remanded for resentencing.

POINT V

THE TRIAL COURT ERRED BY APPLYING THE WRONG LEGAL STANDARD WHEN FOLLOWING THE JURY'S SENTENCING RECOMMENDATION.

In a separate section of the written sentencing order, the trial judge explained that he must accept and follow the jury death recommendation unless "rare circumstances" exist. The judge stated:

> After all of the evidence that the jury was given by the defense in the way of mitigation and extenuation during this six-day re-sentencing 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, 1075** (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.

(R654-665) (Emphasis **added).** The foregoing shows that the trial judge did more than simply afford the jury recommendation great weight. Rather, the standard he used was that the recommendation must be rejected unless "rare circumstances" exist. That standard is incorrect as a matter of law.

Specifically, the need for a high degree of procedural regularity derives squarely, and solely, from imposition of a death sentence. A sentence for a term of years may properly be imposed for any reason that can reasonably support a sentence of life imprisonment. Stated another way, if the mitigation that exists in the record is substantial and otherwise has in the past supported life sentences, and here such mitigation has, a trial judge must impose a life sentence regardless of a death recommendation because the case does not qualify as one of the **"least"** mitigated of most serious offenses. The eighth amendment concerns are heightened for imposition of a death sentence, but not a sentence for a term of years.

What is required to reject a recommendation of death is **not** a "rare circumstance" but instead an objective, measured and consistent application of the death penalty. This follows because the existence of substantial mitigation that has been recognized to be sufficient to support a life sentence in one case must be recognized to warrant a similar result in another case even where the jury, composed of lay people, recommends a death sentence. When the facts of the crime and the character of the defendant are substantially the same, it is arbitrary to impose the death penalty in one case yet not in another.

The recommendation alone cannot carry the day for imposition of the death penalty when the other material facts are substantially the same. This very concept was recognized early on by the Supreme Court of Florida:

> To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard of activity which can only be developed by involvement with the trials of numerous defendants. Thus, the inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience.

State v. Dixon, 283 So.2d 1, 8 (Fla.1973).

This trial judge believed that "rare circumstances" must exist before a jury recommendation of death can be rejected. That standard is incorrect. Instead, the correct standard is, according to the foregoing language in Dixon, a balancing of the facts of the case against the standard of activity "in the light of judicial experience." Such judicial experience necessarily entails the range of cases where sentences of life have been imposed. A trial judge has his or her own judicial experiences to tap when making that comparison, whereas this Court has statewide exposure.

According to statewide application of the death penalty, where a trial judge makes a factual determination that as much mitigation exists as was found here, a death sentence is simply unwarranted because the case is not the most unmitigated of serious offenses. Thus, this death sentence must be vacated and the matter remanded for imposition of a life sentence, with no possibility of parole for twenty-five years.

POINT VI

THE TRIAL JUDGE COMMITTED REVERSIBLE ERROR 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 OF KAROL HURST.

Hall was found guilty in 1978. Hall requested that the court explain to the venire why a new proceeding was being held 12 years after that initial conviction. (R689;429-30) The proposed instruction stated the following:

> Ladies and Gentlemen of the jury, you are here to be considered for selection on what is known as a penalty phase jury. FREDDIE LEE HALL was previously convicted of a capital crime.
>
> Following his conviction, a penalty phase proceeding was **held**. Mr. Hall was tried after Florida's capital punishment statute was enacted in 1972. At the time that penalty phase proceeding was conducted, the trial judge, the prosecutor, and the defense attorney operated **under** the mistaken belief that the penalty phase jury was limited to considering only certain specific mitigating circumstances. As a consequence of that mistaken belief, the jury was not permitted to hear certain other evidence which may be presented in this proceeding. In addition they were told to consider only certain specific mitigating evidence.
>
> Because this involves a life or death question, the Florida Supreme Court has ordered a new penalty phase trial where the jury will not be improperly limited in what they may consider. You should note that neither the court, the prosecutor, nor the defense attorney were involved in the initial trial of this case.

(R429).

The trial judge denied the request, ruling, "I think if we simply tell them that the Supreme Court has ordered that we redo it, then that's enough to let them know why we're here." (R691) In that regard, the Court instructed the venire:

> I am Judge Tombrink. I am a circuit court judge in Hernando County. I'm on assignment here to Marion County to conduct the trial of this case. The defendant, who is seated at this table wearing a red sweater, is Freddie Lee Hall. He has previously been convicted of the crime of first degree murder of Karol Lea Hurst on February 21st, 1978 in Sumter County, Florida.
>
> Ladies and Gentlemen of the potential jury, you are here to be considered for the selection on what is known as a penalty phase jury. As I indicated previously, the defendant has previously been found guilty of murder in the first degree. Consequently, you will not concern yourself with the question of his guilt. The Florida Supreme Court has ordered that the defendant be resentenced. That's why we're here. Your responsibility in this case is to recommend punishment to the Court.

(R726).

It is respectfully submitted that the trial judge erred in refusing to give the fair and accurate instruction properly requested in writing by Hall and/or in refusing to permit Hall to introduce evidence to explain this consideration to the jury. The omission of this information denied Hall the right to a fair trial and a reliable jury recommendation under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 9, 16, 17 **and** 22 of the Florida Constitution.

The facts of this case affirmatively show that Hall was prejudiced by the suppression of this information as to why the new penalty phase was necessary. When Dr. Lewis was cross-examined, the prosecutor stated that Hall was previously sentenced to death and, more significantly, that a death warrant had been signed for Hall's execution. (SR 51-52) By zeroing in on "at what point in the criminal proceedings" this information was presented by Hall, the prosecutor improperly implied that Hall's siblings fabricated the abuse and mental problems suffered by Hall in order to avoid the scheduled execution because they had not come forward with such testimony previously.

The gravamen of his questioning was that, if the abuse and mental problems really existed, the testimony should have been presented a lot sooner than it had been. This invidious suggestion would have properly been dispelled had the jury been informed by the judge that the previous penalty phase had been conducted under the mistaken belief that such testimony was not to be considered by the jury. Simply telling the jury that this Court had ordered a new penalty phase, but not telling them why, fostered nothing but speculation.

During voir dire, some of the prospective jurors expressed concern at the length of time between imposition of a death sentence and execution of a defendant, and defense counsel again asked the court to explain to the jury that the case was back for re-sentencing because the first jury had only heard evidence of statutory mitigation. (R839-840;930-32) When the

judge refused to provide an explanation that could be used during voir dire to explore the potential jurors attitudes and biases on undue delay, defense counsel asked for permission to explain what happened in order to address the speculation that was obviously occurring. (R840) The judge ruled, "I don't think you should explain; I won't let you explain." (R841) The judge clarified his ruling: questions would be allowed to explore the animation that several veniremen exhibited when the topic of undue delay came out, "but I will not let you explain the reason for the delay." (R842) In light of that ruling, defense counsel could not meaningfully pursue the topic further. (R843) Despite the assurances that were given that the jurors would not be distracted, it became evident during voir dire that a brief but accurate explanation of why the new penalty phase was ordered was necessary to satisfy the normal curiosity of the jurors.

In Hitchcock v. State, 16 FLW 323, 325-326 (Fla. Dec. 20, 1990), this Court held that the trial court did not abuse its discretion in refusing to give such an instruction, noting in footnote 8 that, "The defense did not submit a written copy of the proposed instruction." Apparently, the issue was decided on the lack of preservation grounds rather than on the merits. See Pittman v. State, 440 So.2d 657 (Fla. 1st DCA 1983) (specially requested instruction must be requested in writing to preserve issue for appellate review.); Fla.R.Crim.P. 3.390(c).

Here, unlike Hitchcock, Hall preserved the issue by timely submitting a written, accurate jury instruction, and Hall

was prejudiced by the trial judge's refusal to provide the brief, accurate and fair explanation of why the case was back for re-sentencing. The instruction was necessary to set the stage for the new penalty phase and to dispel any assumptions that the case was sent back because of some insignificant technicality. Certainly, it was unfair for the prosecutor, who knew that Hall was previously limited to statutory mitigating concerns, to take advantage of the absence of such an instruction and insinuate that testimony concerning Hall's childhood abuse and mental infirmity lacked credibility because it had not been discovered or presented at an earlier stage of Hall's criminal proceedings.

It is respectfully submitted that under the facts of this case the trial judge abused his discretion in refusing to give Hall's proposed jury instruction. In the absence of that instruction from the Court, Hall should have been permitted to present evidence as to how he had been limited in what he could present at the first penalty phase conducted in 1978. Because this information was unfairly withheld from the jury, the death sentence must be reversed and, if this Court determines that the death penalty can be proportionately imposed, the matter must be remanded for a new penalty phase.

POINT VII

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 MURDER.

Because Hall initially received the death penalty for the murder of Deputy Coburn, his case was appealed directly to the Supreme Court of Florida. Ruffin, who was also convicted of the first-degree murder of Coburn, received a life sentence and appealed his conviction to the Fifth District Court of Appeal. Hall's first-degree murder judgment was reduced to a conviction for second-degree murder, whereas Ruffin's appeal was Per Curiam: Affirmed. See Hall v. State, 403 So.2d 1319 (Fla.1981); Ruffin V. State, 390 So.2d 841 (Fla. 5th DCA 1980).

At the State's insistence, the trial judge at Hall's resentencing expressly ruled that, if Hall introduced Ruffin's Judgment and Sentence showing that Ruffin was convicted of first-degree murder for Coburn's murder, the court would instruct the jury that Ruffin should only have been convicted for second-degree murder:

> Trial court: Okay. Let me just make sure, I think you both understand what the ruling from the court is. First of all, I agree with the cases cited by defense counsel that they have an absolute right to put in any evidence that in any way might be relevant and material to any mitigating factors, statutory or non-statutory, [that] are available in the totality of the evidence in this case.

> However, it is grossly unfair to allow the defense to do that in such a manner that the State would be handcuffed and that the jury would be misled and confused. You are doing that by putting something in the record that is a result of a lesal technicality and not necessarilv the result of a factual resolution in court. And then I presume, and I'm presuming this, that it will be argued strongly by the defense in closing that that supports their theory as to who was most culpable in the various events of the date at issue. I will not allow that to happen.
>
> Now, I don't know exactly what the language of the explanation will be, but I'm not suggesting that it be one that gives them a lot of -- a lot of information. It would be -- I suggest that it would be very vague and very nebulous and, yes, it will leave them with some doubts, but it will also give both sides a fair opportunity to argue the significance of this conviction to the jury at closing.
>
> Now, that's how I'm ruling and that's why I'm ruling the way I am. If the defense, based on that ruling, does not want to put in this evidence, that's their decision.
>
> Defense counsel: And that is our decision.
>
> Trial court: And if that's your decision, that's so noted for the record.

(R1917-18). When defense counsel renewed the objection to not being allowed to introduce a certified copy of Ruffin's Judgment of first-degree murder for Coburn's murder, and the trial judge again ruled, "I'm not saying you can't put it in -- you're welcome to put it in, but I am going to give some sort of explanatory instruction if you do so." (R1922)

It is respectfully submitted that the trial judge erred in ruling that the first-degree murder judgment and sentence of life imprisonment could only be introduced if accompanied by an instruction from the court that, but for a "legal technicality", Ruffin's judgment would also have been for second-degree murder rather than first-degree murder. A per curiam affirmance by an appellate court, with no opinion, has absolutely no precedential value. There is no basis upon which an informed decision can be made to determine why a conviction and/or sentence was affirmed on appeal. A particular issue may not be adequately preserved for one defendant at trial, but perfectly preserved for the co-defendant. Ruffin may not have moved for a judgment of acquittal at trial on the same grounds as Hall or preserved the issue for appellate review; even if preserved, he may not have presented the same issue(s) to the Fifth District Court of Appeal, and thereby waived them.

There is no basis in law or fact for the judge to accept the State's specious claim that Ruffin's judgment of guilt should be the same as Hall's, that but for the "legal technicality" that Hall appealed to this Court while Ruffin appealed to a different court. Because the judge accepted the State's erroneous argument, the sentencing decision is itself unreliable under the Eighth and Fourteenth Amendments, because the judge patently would not have attributed the correct amount of weight to this consideration when imposing the death sentence. Such an instruction to the jury here, where a re-sentencing was

inexplicably[12] ordered by this Court after twelve years, is so clearly intimidating that it necessarily and improperly compelled Hall to forego presentation of Ruffin's first-degree murder conviction.

The trial judge abused his discretion in tying the introduction of Ruffin's certified Judgment and Sentence for the first-degree murder of Deputy Coburn to an instruction from the court that, but for a legal technicality, Ruffin's conviction would be the same degree crime as Hall's. The ruling denied Hall a fair trial and the right to present evidence in his own behalf and otherwise rendered the jury recommendation unreliable under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 9, 16, 17 and 22 of the Florida Constitution. Accordingly, the death sentence must be reversed and, if this Court determines that the death penalty may be proportionately imposed, the matter remanded for a new penalty phase.

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[12] At least, it would have been inexplicable to the jurors. This emphasizes the unfairness of <u>not</u> telling these jurors why a re-sentencing was necessary for Hall, yet threatening to tell the jurors that, because of a "legal technicality" (R1891), Ruffin stands convicted for the first degree murder of Coburn rather than having a second degree murder conviction, as does Hall.

POINT VIII

THE TRIAL JUDGE ERRED IN EXCLUDING THE TESTIMONY OF THE DEFENDANT'S SIBLINGS, THEREBY DENYING DUE PROCESS AND THE RIGHT TO PRESENT EVIDENCE IN YOUR OWN BEHALF AS GUARANTEED BY THE STATE AND FEDERAL CONSTITUTIONS.

At the instance of the State, the testimony of four members of Hall's family was excluded because it was cumulative. (R1641-52) The trial judge agreed that the depositions of those witnesses would serve as a proffer of the witnesses' testimony for appellate purposes. (R1648-49) The depositions are contained in the supplemental record at (SR 90-160). It is respectfully submitted that the exclusion of this testimony was a denial of due process and the right to present evidence under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article 1, Sections 9 and 16 of the Florida Constitution. Further, the exclusion of this evidence rendered the death penalty recommendation and/or sentence unreliable under the Eighth and Fourteenth Amendments to the United States Constitution and Article 1, Section 17 of the Florida Constitution.

It is by now very clear that "the State cannot bar relevant mitigating evidence from being presented and considered during the penalty phase of a capital trial." Saffle v. Parks, 494 U.S. ___, 110 S.Ct. 1257, 1261, 108 L.Ed.2d 415, 425 (1990). To do so runs squarely afoul of the holdings in Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982). See Skipper v. South Carolina, 476 U.S. 1, 7-8 (1986) (excluded

testimony of prison guards concerning how well the defendant had behaved while incarcerated not harmless error, even where defendant's relatives had so testified).

This Court has previously held that the improper exclusion of relevant mitigating evidence is subject to a harmless error analysis. Correll v. Dugger, 558 So.2d 422 (Fla.1990) See Wright v. State, 473 So.2d 1277 (Fla.1985) (error of excluding defense witness because of violation of rule of sequestration harmless error where excluded testimony would not have affected the verdict.) Exclusion of this evidence was not harmless. Hall was prejudiced by the exclusion of his siblings testimony concerning the abuse Hall suffered as a child because the state, in cross-examining Dr. Lewis, sought to undermine her opinion by contending that she did not know whether Hall was really abused as a child . . . after all, she was not there . . . she instead had to rely on the reports of such abuse from Hall's siblings, reports obtained after a death warrant had been signed for Hall's execution:

> Q: (prosecutor) You indicated that Mr. Hall's recollection of the abuse that he suffered as a child was minimal compared to what you read from his siblings?
>
> A: (Dr. Lewis) Well, 1 said that he revealed less. I don't know if he didn't recall it or whether he was trying to cover it up a bit.
>
> Q: Well, you don't really know whether it happened; do you?
>
> A: Well, I was not there at the time. However, we know from what his

siblings -- what other people have said, that that degree of abuse did occur.

Q: You know what they told you, or at least told someone that it occurred?

A: Yes.

Q: But you don't know whether it occurred: that's true, isn't it?

A: Yes.

Q: You have to rely on other people's statements about that?

A: Certainly.

Q: You referred to at least a couple of affidavits that were prepared by family members; is that correct?

A: Right.

Q: There were some interview summaries and some affidavits?

A: Right.

Q: Do you know in what context those affidavits were prepared, what stage of Mr. Hall's criminal proceedings they were at when those affidavits were prepared?

A: To the best of my knowledge, they were after we had done our evaluation.

Q: In the context of his situation in the criminal justice system, do you know what stage of the proceedings they were prepared?

A: I would assume they were at the time of an appeal of his death sentence.

Q: Are you aware that they were done at or about the time --

(defense counsel) I object to this question.

(prosecutor) You can object, but I'm going to ask it.

Q: Are you aware that they were done at or about the time a death warrant had been signed upon Mr. Hall?

A: No.

Q: And that his attorneys were seeking emergency relief from the execution of the warrant itself?

A: No.

Q: You cannot testify as to the veracity of any of the statements that You have: can you?

A. No. I didn't interview them.

(SR49-52); see also (SR76-77).

In light of the foregoing cross-examination of Dr. Lewis by the prosecutor, it cannot reasonably be claimed that Hall was not prejudiced by the exclusion of the testimony of four members of his family who would have corroborated the other witnesses' testimony that Hall was **abused** by his parents. Such testimony was essential, and it cannot reasonably be deemed **"cumulative."** Because Hall was denied the ability to fully and fairly present evidence in **his** own behalf which resulted in a deprivation of the aforesaid constitutional rights, the death sentence must be reversed and the matter remanded for a new penalty phase if this Court otherwise finds that the death penalty can be lawfully imposed in face of such overwhelming mitigation.

POINT IX

THE STATUTORY AGGRAVATING FACTOR OF AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL MURDER IS UNCONSTITUTIONALLY VAGUE UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9,16 AND 17 OF THE FLORIDA CONSTITUTION.

In Smalley v. State, 546 So.2d 720 (Fla.1989), this Court rejected a claim that Florida's especially heinous, atrocious or cruel statutory aggravating factor ("HAC" factor) is unconstitutionally vague under the eighth and fourteenth amendments because application of that factor by Florida juries and trial judges is later reviewed on appeal:

> It was because of [the State v. Dixon] narrowing construction that the Supreme Court of the United States upheld the aggravating circumstance of heinous, atrocious or cruel against a specific Eighth Amendment vagueness challenge in Proffitt v. Florida, 428 U.S. 242 (1976). Indeed, this Court has continued to limit the finding of heinous, atrocious or cruel to those conscienceless or pitiless crimes which are unnecessarily torturous to the victim. (citations omitted). That Proffitt continues to be good law today is evident from Mavnard v. Cartwright, wherein the majority distinguished Florida's sentencing scheme from those of Georgia and Oklahoma. See Mavnard v. Cartwrisht. 108 S.Ct. at 1859.

Smalley v. State, 546 So.2d 720, 722 (Fla.1989).

Even more recently, however, the United States Supreme Court decided Shell v. Mississippi, 498 U.S. __, 111 S.Ct. 313, 112 L.Ed. 2d 1 (1990) and re-affirmed the holding in Mavnard v. Cartwrisht, 486 U.S. 356 (1988). The concurring opinion in Shell

explains why the limiting constructions being utilized by the various states are not up to constitutional standards:

> The basis for this conclusion [that the limiting construction used by the Mississippi Supreme Court was deficient] is not difficult to discern. Obviously, a limiting instruction can be used to give content to a statutory factor that "is itself too vague to provide any guidance to the sentencer" only if the limiting instruction itself "provide[s] some guidance to the sentencer." Walton v. Arizona, 497 U.S. __, __, 111 L.Ed.2d 511, 110 S.Ct. 3047 (1990). The trial court's definitions of "heinous" and "atrocious" in this case (and in Maynard) clearly fail this test; like "heinous" and atrocious" themselves, the phrases "extremely wicked or shockingly evil" and "outrageously wicked and vile" could be used by "'[a] person of ordinary sensibility [to] fairly characterize almost every murder.'" Maynard v. Cartwright, supra, at 363, 100 L.Ed.2d 372, 1108 S.Ct. 1853 (quoting Godfrey v. Georgia, 446 U.S. 420, 428-429, 64 L.Ed.2d 398, 100 S.Ct. 1759 (1980)(plurality opinion)(emphasis added).

Shell v. Mississippi, 112 L.Ed.2d at 5. Significantly, the terms of the "limiting construction" condemned by the United States Supreme Court in Shell as being too vague are the ones used by this Court to review the HAC statutory aggravating factor.

It is respectfully submitted that the limiting construction used by this Court as to this statutory aggravating factor is too vague and indefinite to comport with constitutional requirements. The definitions of the terms of the HAC statutory aggravating factor do not provide any guidance to the jury when the factor is first used to make a sentencing recommendation, by

the sentencer when the factor is next used when the sentence is imposed, or by this Court when the factor is reviewed and the "limiting" construction is belatedly applied. The inconsistent rulings by this Court applying or rejecting the HAC factor under the same or substantially similar factual scenarios shows that the factor remains prone to arbitrary and capricious application.

The standard of review vacillates. For instance, in Hitchcock v. State, 16 FLW S26 (Fla. December 20, 1990), this Court stated that application of the HAC statutory aggravating factor "pertains more to the victim's perception of the circumstances than to the perpetrator's." Hitchcock, 16 FLW at S26. Yet, in Mills v. State, 476 So.2d 172, 178 (Fla.1985), the analysis concerned the perpetrator's intent: "The intent and method employed by the wrong-doers is what needs to be examined." Mills, 476 So.2d at 178 (emphasis added).

"It is of vital importance to the defendant and the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner V. Florida, 430 U.S. 349, 358 (1977). "What is important . . . is an individualized determination on the basis of the character of the individual and the circumstances of the crime." Zant v. Stephens, 462 U.S. 862, 879 (1983). It is an arbitrary distinction to say that one murder is especially heinous because, for a matter of seconds while being strangled, a victim perceived that death may be eminent, yet say that another murder was not

heinous because, for hours after the fatal wound was inflicted, a victim suffered and waited to die.

Because the HAC statutory aggravating factor is too vague and because the limiting construction used by this Court is also too vague and indefinite to provide consistent application, Florida's HAC statutory aggravating factor violates the eighth and fourteenth amendments as set forth in Maynard v. Cartwrisht, supra, Godfrey v. Georgia, supra, and Shell v. Mississippi, supra. The instant death sentence imposed in reliance on this unconstitutional factor must be vacated and the matter remanded for a new penalty phase before a new jury.

POINT X

SECTION 921.141, FLORIDA STATUTES (1987) IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

Violation of Separation of Powers

It is respectfully submitted that, by defining the operative terms of the statutory aggravating factors set forth in Section 921.141, this Court is promulgating substantive law in violation of the separation of powers under Article 11, Section 3 of the Florida Constitution. The Florida Legislature is charged with the responsibility of passing substantive laws. Article 111, Florida Constitution (1976). Legislative power, the authority to make laws, is expressly vested in the Florida Legislature.

In an exercise of that power, the Florida Legislature passed Section 921.141, Fla. Stat. (1975), which purportedly established the substantive criteria required for authorization of imposition of the death penalty. However, the statutory aggravating factors as written are unconstitutionally vague and overbroad. See Shell v. Mississippi, 498 U.S. __, 111 S.Ct. 313, 112 L.Ed. 2d 1 (1990); Maynard V. Cartwright, 486 U.S. 356 (1988). In actuality, the substantive legislation was authored in State v. Dixon, 283 So.2d 1 (Fla.1973), where this Court provided the working definitions of the statutory aggravating factors ostensibly already promulgated by the Florida Legislature. This Court is not empowered to enact laws, either directly or indirectly.

As noted in the preceding point on appeal, this Court has rejected the premise that Florida's especially heinous, atrocious and cruel statutory aggravating factor is unconstitutionally vague based on Maynard, susra, because the working definition of the terms set forth in the HAC factor are provided by this Court through a limiting construction of that factor. See Smalley v. State, 546 So.2d 1201 (Fla.1989). Other instances where the definitions of statutory aggravating factors have been provided by this Court demonstrate that the violation of the separation of powers doctrine is unacceptably pervasive. See Peek v. State, 395 So.2d 492, 499 (Fla.1980) (parole and work release constitute being under sentence of imprisonment, but probation does not); Johnson v. State, 393 So.2d 1069 (Fla.1981) (more than three people required to constitute a great risk of death or injury to many persons)[13]; Banda v. State, 536 So.2d 221, 225 (Fla.1988) ("We conclude that, under the capital sentencing law of Florida, a 'pretense of justification' is any claim of justification or excuse that, though insufficient to reduce the degree of homicide, nevertheless rebuts the otherwise

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[13] Interestingly, the initial working definition provided this statutory factor by this Court in King v. State, 390 So.2d 315 (Fla. 1980) was, after seven years of usage by juries and trial judges, categorically rejected when the King case was again reviewed by this Court. See King V. State, 514 So.2d 354, 360 (Fla. 1987) ("this case is a far cry from one where this factor could properly be found.") If King is a "far cry" from the proper case to find the "great risk to many persons" factor, how did the factor get approved in the first decision and, more importantly, why does this Court feel compelled to provide the working definitions of the substantive terms of the statutory aggravating factors?

cold and calculating nature of the homicide."). The passage of such broad legislation for it to be refined, defined and given substance by the Supreme Court of Florida is tantamount to a delegation of legislative power and a violation of the separation of powers doctrine of state and federal constitutions. In that regard, candid and objective application of the law concerning the separation of powers doctrine, as discussed by this Court in Chiles v. Children A, B, C, D, E, and F, etc., 16 FLW S708 (Fla. October 29, 1991), requires that the Section 921.141, Florida Statutes (1989) be declared unconstitutionally vague and an impermissible delegation of authority (and responsibility) to this Court to substantively define the operative terms of the statute.

FAILURE OF AGGRAVATING FACTORS TO ADEQUATELY CHANNEL THE SENTENCER'S DISCRETION TO IMPOSE THE DEATH PENALTY.

"An aggravating circumstance must genuinely limit the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983). Supposedly, the things that may be considered as "aggravation" by a sentencer in Florida are limited to those statutory aggravating factors expressly listed in Section 921.141(5), Florida Statutes (1989). See Brown v. State, 381 So.2d 690 (Fla.1980); Elledge V. State, 346 So.2d 998 (Fla.1976); Purdy V. State, 343 So.2d 4, 6 (Fla.1977). It is respectfully submitted, however, that these "factors" are but open windows through which virtually unlimited facts may be put

before the sentencer to achieve a death sentence, thereby providing unfettered discretion to recommend/impose a death penalty in violation of the Eighth and Fourteenth Amendments, Article I, Section 17 of the Florida Constitution and the holding of Furman v. Georgia, 408 U.S. 238 (1972).

For instance, this Court has held that the State is permitted to establish the full details of a defendant's prior conviction for a violent felony in order to allow the juror and/or sentencer an informed basis whereby "weight" can be meaningfully attributed to the Section 921.141(5)(b) factor. See Francois V. State, 407 So.2d 885 (Fla.1981); Elledge v. State, 346 So.2d 998 (Fla.1977). However, this Court has at the same time recognized that such testimony is presumptively prejudicial. See Castro v. State, 547 So.2d 111, 115 (Fla.1989) (improper admission of irrelevant collateral crimes evidence is presumptively harmful). Allowing such prejudicial testimony to come before the jury/sentencer under the general heading of a statutory aggravating factor permits the use of constitutionally improper considerations to impose the death penalty. Though the statutory reasons offered under this category may be constitutional in the broad sense of the word, the unstated, underlying considerations (such as sympathy for victims of other unrelated crimes, as occurred here with the sexual assault of Thelma Freelove and/or murder by Ruffin of Deputy Coburn, or other improper considerations such as racial bias toward defendants and/or victims) are unconstitutional.

This rationale applies to other statutory aggravating factors, which are in essence but categories through which unfairly prejudicial evidence is put before the jury/sentencer. Because the statutory aggravating factors fail to adequately channel the jury's and/or sentencer's discretion in recommending/ imposing the death penalty, the factors are unconstitutionally vague and overbroad in violation of the Eighth and Fourteenth Amendments to the United States Constitution and Article I, Sections 9 and 17 of the Florida Constitution.

FAILURE TO ADEQUATELY INSTRUCT SENTENCER ON STANDARD OF PROOF

Due process under the Fourteenth Amendment must comport with prevailing notions of fundamental fairness. California v. Trombetta, 467 U.S. 479 (1984). In order to recommend/impose the death penalty in Florida, the statute requires that statutory aggravating factors "outweigh" the mitigation. Section 921.141(2) and (3), Florida Statutes (1989). In fact, the statute places the burden on the defendant to prove that "sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist." Section 921.141(2)(b), Fla. Stat. (1989). This Court has concluded that the burden is on the State to prove that the aggravating factors outweigh the mitigating factors. See Arrango v. State, 411 So.2d 172, 174 (Fla.1982); Alvord v. State, 322 So.2d 533, 540 (Fla.1975) ("No defendant can be sentenced to capital punishment unless the aggravating factors outweigh the mitigating factors.") As written by the Florida Legislature, the statute places the burden of proof on the defendant in violation

of the Fifth and Fourteenth Amendments, Article I, Section 9 of the Florida Constitution and the holding of Mullaney v. Wilbur, 421 U.S. 684 (1975). Rather than deviating from the clear language of the statute, this Court should declare it to be unconstitutional. Putting a constitutional gloss on a statute is not the same as rewriting the substantive terms of it.

Even when the statute is changed by judicial fiat to place the burden on the State to demonstrate that the statutory aggravating factors "outweigh" the mitigation, a violation of due process under the Fifth and Fourteenth Amendments and Article I, Section 9 of the Florida Constitution occurs because the bare "outweigh" standard fails to adequately apprise either the jury or sentencer of what must objectively be present to determine whether imposition of the death penalty is warranted. This is especially so here, where the trial court determined that a substantial amount of mitigation was adequately proved by Hall, but the mitigation was "unquantifiable" because Hall could not demonstrate to what extent that mitigation directly affected Hall on the day Mrs. Hurst was murdered.

As worded, the standard instructions dilute the requirement that the State prove beyond and to the exclusion of every reasonable doubt that the death penalty is warranted. The standard instruction requires only that the State show that the death penalty is warranted by a mere preponderance of the evidence, thereby resulting in a violation of due process. See Francis v. Franklin, 471 U.S. 307 (1985); Sandstrom v. Montana,

442 U.S. 510 (1979). Imposition of the death penalty based on a preponderance of the evidence is unconstitutional. In re: Winship, 397 U.S. 358 (1970). By showing that the aggravation "outweighs" the mitigation the State achieves death penalty recommendations and/or sentences by a mere preponderance standard in violation of the aforesaid cases and the constitutional requirements to due process.

LACK OF NOTICE

Hall moved for the court to require the State to provide notice as to which of the statutory aggravating factors the State would attempt to prove. (R151) The judge denied Hall's motion. (R317) It is respectfully submitted that the failure of the State to provide adequate notice as to which factors the State would attempt to prove denied due process and violated the notice requirement of the state and federal constitutions. The denial of such notice constitutes a denial of due process of law guaranteed under Article I, Sections 9 and 16 of the Florida Constitution and the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

> For more than a century the central meaning of procedural due process has been clear: "Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified." (citations omitted). It is equally fundamental that the right to notice and an opportunity to be heard "Must be granted at a meaningful time and in a meaningful manner." (citation omitted).

Fuentes v. Shevin, 407 U.S. 67, 80 (1972).

The concept of adequate is a significant constitutional protection. See Mavs v. State, 519 So.2d 618, 619 (Fla.1988) ("We

agree that due process requires notice and an opportunity to be heard prior to an assessment of costs under Section 27.3455."); See also, Jenkins v. State, 444 So.2d 947 (Fla.1984). As the United States Supreme Court noted in Fuentes, "It has long been recognized that 'fairness can rarely be obtained by secret, one sided determination of facts decisive of rights. And [n]o better instrument has been devised for arriving at truth than to give a person in jeopardy OF a serious loss notice of the case against him and the opportunity to meet it.' (citation omitted)." Fuentes, 407 U.S. at 81.

Procedural due process is not a static concept. The minimum procedural requirements necessary to satisfy due process requirements depend on circumstances and interests of the parties involved. See Cafeteria Workers V. McElroy, 367 U.S. 886, 895 (1961) ("Due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."); Morrissey v. Brewer, 408 U.S. 471, 481 (1972) ("[D]ue process is flexible and calls for such procedural protections as the particular situation demands.").

The sentencing considerations set forth in Section 921.141(5) are both substantive and procedural statutory factors which, when proven by evidence, authorize imposition of the death penalty. See Banda v. State, 536 So.2d 221 (Fla.1988) (imposition of the death penalty not authorized if no statutory aggravating factors exist.) Unless the defendant is provided notice prior to a penalty phase as to which statutory aggravating factors the State intends to prove and/or rely on to seek the death penalty, a defendant is denied the ability to meaningfully confront the

state's witnesses and to rebut the evidence presented in connection with those statutory aggravating factors.

Belated notice that the State is seeking a particular statutory aggravating factor works a denial of due process under the Fifth, Sixth and Fourteenth Amendments and Article I, Sections 9 and 16 of the Florida Constitution. The Sixth Amendment right "to be informed of the nature and cause of the accusation" is applicable to the states through the due process clause of the Fourteenth Amendment. In re: Oliver, 333 U.S. 257, 273-74 (1948). "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge . . . are among the constitutional rights of every accused." Cole v. Arkansas, 333 U.S. 196, 201 (1948) (emphasis added). In Cole, Petitioners were convicted at trial of one offense but the convictions and sentences were affirmed on appeal based on evidence on the record indicating that a different, uncharged offense had been committed. A unanimous United States Supreme Court reversed, finding a denial of procedural due process:

> It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. . . . To conform to due process of law, Petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined by the trial court.

Cole v. Arkansas, 333 U.S. at 201-2 (emphasis added). The same reasoning applies here, where issues concerning imposition of the

death penalty were litigated without notice and/or a meaningful opportunity to be heard at the time. See Presnell v. Georgia, 439 U.S. 14, 16 (1978) (footnote 3) ("in the present case, when the Supreme Court of Georgia ruled on Petitioner's motion for rehearing it recognized that, prior to its opinion in the case, Petitioner had no notice, either in the indictment, in the instructions to the jury or elsewhere, that the State was relying on the rape to establish the bodily injury component of aggravated kidnapping.").

Relying on Spinkellink v. Wainwright, 578 F.2d 582, 609-10 (5th Cir. 1978), this Court has previously rejected a Sixth Amendment "lack of notice" challenge. See Preston v. State, 444 So.2d 939, 945 (Fla.1984); Sireci v. State, 399 So.2d 964, 970 (Fla.1981); Menendez v. State, 368 So.2d 1278, 1282 (Fla.1979) (footnote 21). Careful review shows that the Fifth Circuit in Spinkellink decided the lack of notice issue on lack of preservation grounds. "A review of the record indicates that neither Spenkellink (sic) nor his attorney objected at trial to the indictment, which Fla.R.Crim.P. 3.190(c) requires in order for the alleged defect to be preserved for appellate review. Accordingly, the defect, if any, was waived." Spinkellink, 578 F.2d at 609-10 (emphasis added). Any further discussion by the Fifth Circuit was dicta. Further, the instant challenge is not only being brought under the Sixth Amendment, but also as part of procedural due process required under the Fifth Amendment, and Article I, Sections 9 and 16 of the Florida Constitution.

It cannot reasonably be claimed that the interests of fairness do not require a defendant to know when evidence is

being presented what statutory aggravating circumstances the State is attempting to prove. To say that the aggravating factors are limited to those specified in statutes does not satisfy the notice requirement. All crimes are contained in statutes. It is incumbent on the state, as the prosecuting party, to notify the defendant which statutes apply. It is incumbent on the court, as the neutral enforcer of Constitutional rights, to require proper notice. The denial of Hall's motions seeking notice of which factors would be utilized by the State constituted a denial of due process.

INABILITY OF SUPREME COURT TO PERFORM MEANINGFUL AND CONSISTENT APPELLATE REVIEW

Hall moved for a special verdict form requiring that the jury articulate which factors it used in issuing the sentencing recommendation. (R151;159) This request was denied. (R317;320) The absence of this information deprives this Court of a factual predicate whereby meaningful appellate review can be performed. Such review is now based solely on speculation and assumption. The absence of this information prejudices Hall by arbitrarily denying him the ability to demonstrate that the jury's use of an improper statutory aggravating factor was not harmless error. The absence of this information deprives this Court of the minimal information that is necessary to perform an intelligent and informed analysis of whether error was harmless. The absence of such information constitutes a denial of due process and results in arbitrary and capricious application of the death penalty in violation of the Fifth, Sixth, Eighth and

Fourteenth Amendments to the United States Constitution and Article I, Sections 9, 16, 17 and 22 of the Florida Constitution.

For the aforesaid reasons, the death penalty in Florida is unconstitutional on its face and as applied. Accordingly, it should be declared unconstitutional and the death sentence reversed.

POINT XI

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

The trial judge admonished the prospective jurors that they must take precautions to avoid the massive publicity that was expected to appear in the papers. (R964-965) Despite the warnings, prospective juror Cavanaugh, in going through the Ocala Star Banner at his home, saw headlines and a picture that concerned Hall's case. (R 1128-29) Cavanaugh claimed not to have read the articles. (R1129-31) However, Cavanaugh was also present when other prospective jurors openly discussed the media coverage. (R1115-1118) Cavanaugh admitted being present during those discussions, but claimed not to have heard what was said. (R1130-31)

As fate would have it, Hall exhausted his peremptory challenges, including an additional strike the trial court gave to compensate for not striking another juror that had been challenged by Hall for cause. Hall's request for an additional peremptory to strike Cavanaugh was denied (R1201-02), and Cavanaugh became a member of the jury. In asking for an additional challenge, Hall's attorney stated, "Judge, the only thing I'm aware of that is because of the issues that came up this morning, I need some more." (R1203)

The issues to which Hall war referring concerned the court's reconsideration of a prior ruling which, at the instance of the state, initially forbade Hall from addressing, during voir

dire and opening statement, the imposition of a life sentence received by Ruffin, Hall's co-defendant, for the murder of Mrs. Hurst. **(R691-695)** That ruling controlled questioning through the initial stages of voir dire, until the court reconsidered and ruled that Hall could introduce evidence of Ruffin's sentence of life imprisonment and, more importantly, that if Hall did introduce Ruffin's life sentence the state could then introduce the statement Ruffin made to explain why the jury may have tied in its sentencing recommendation. (R998-1003)

In light of that ruling, Hall was permitted to ask the potential jurors that had already been preliminarily qualified as to their ability to accept the general premise that the law should treat similarly situated defendants the same. (R1185-1190) Thereafter, Hall exhausted his peremptory challenges, asked for and was denied more, and Hall specifically identified Cavanaugh as the person that would be removed from the jury had another peremptory challenge been awarded. (R1201-1205)

A defendant charged with a capital offense is entitled to a sentencing recommendation from a fair, impartial jury. The constitutional standard set forth in the Sixth Amendment requires that a defendant have "a panel of impartial, 'indifferent' jurors." Irvin v. Dowd, 366 U.S. 717, 722 (1961). The standard under Article I, Sections 9 and 22 of the Florida Constitution is as strict. In Singer v. State, 109 So.2d 7 (Fla.1959), the Supreme Court of Florida set forth the analysis to be used by Florida courts in ruling on questions concerning the fairness and/or impartiality of a prospective juror. In pertinent part, this Court explained:

> [I]f there is basis for any reasonable doubt as to any juror's possessing that state of mind which will enable him to render an impartial verdict based solely on the evidence submitted and the law announced at the trial he should be excused on motion of a party, or by the court on its own motion.

Singer, 109 So.2d at 2324.

The foregoing rule has been consistently adhered to by this Court. See Hamilton v. State, 547 So.2d 630 (Fla.1989) (denial of challenge for cause of juror who had **preconceived** opinion which would require evidence to displace was reversible error despite juror's assurance that she could hear case with open mind); Moore v. State, 525 So.2d 870 (Fla.1988) (refusal of trial court to grant challenge for cause to juror who gave equivocal answers concerning **his** ability to accept insanity **as** defense was reversible error); Hill v. State, 477 So.2d 553 (Fla.1985) (**"a** jury is not impartial when one side must overcome a preconceived opinion in order to prevail."); See also Auriemme v. State, 501 So.2d 41 (Fla. 5th DCA 1986) (jurors ability to be fair and impartial must be unequivocally asserted in the record).

Here, there is a reasonable doubt as to whether juror Cavanaugh can be fair and impartial based on his exposure to the newspaper article(s) and the conversations of other potential jurors who admitted discussing the matter in front of Cavanaugh and who were ultimately excused for cause because of that misbehavior. Because the trial judge abused **his** discretion under the particular facts of this case, the death sentence must be vacated and the matter remanded for a new penalty phase.

CONCLUSION

Based on the argument and authority set forth in Point IV, Hall contends that the death penalty should be reversed and the matter remanded for imposition of a life sentence with no parole for twenty-five years because this case is not the most aggravated and least mitigated of murders. If a death sentence can lawfully be imposed here, the errors set forth in Points I through XI, either individually or cumulatively, require that the death sentence be vacated and the matter remanded for a new penalty phase.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that a true and correct copy of the foregoing has been mailed to the Honorable Robert A. Butterworth, Attorney General, 2002 N. Louis Avenue, Suite 700, Tampa, FL 33607 and to Freddie Lee Hall, #022762, P.O. Box 747, Starke, FL 32091, this 21st day of November, 1991.

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