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

REPLY BRIEF OF APPELLANT

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STATE OF FLORIDA,		
	)	
Plaintiff/Appellee.	)	

PRELIMINARY STATEMENT

Despite express challenges contained in Hall's Initial Brief, (I.B. at 33-34, 44, 57-58), the State failed to provide **ANY** citation to the record that supports at least three of the contested findings made by the trial court. However, the State uses the factually-unsupported findings to argue that the death penalty is here appropriate. Accordingly, Hall respectfully asks this Court to refrain from accepting as valid the following findings made by the trial court until the State identifies with particularity what substantial, competent proof exists in the record to legally support/establish the following findings:

1. The finding (R640) that Hall sexually battered Mrs. Hurst.

2. The finding (R648) that Dr. Carrera's opinion is more credible than all of the defense experts'.

3. The finding (R651-52) that Hall goaded Ruffin into killing Mrs. Hurst "to prove himself as a man."

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 JUDICATA, LAW OF THE CASE, AND FUNDAMENTAL FAIRNESS.

The State contends that this issue has not been preserved for appellate review because, "[i]n the lower court appellant merely argued that double jeopardy under the state and federal constitutional (sic) precluded consideration of additional aggravating factors." (AB at 17) This error was preserved below when Hall moved in writing to preclude the use of the statutory aggravating factors previously rejected by the initial trial judge. In part, Hall's motion stated, "Because the trial court in 1978 specifically found that 'the State failed to prove [the statutory aggravating factors] beoynd (sic) a reasonable doubt' their reconsideration is foreclosed." (R392, paragraph 3).

Hall submits that the doctrines of res judicata, law of the case, and fundamental fairness are implicit in a proscription against double jeopardy. Where, as occurred here, the State does not contest the express rejection of statutory aggravating factors, where those findings are reviewed and affirmed on direct appeal, and where relief is collaterally obtained because of error concerning the presentation of mitigating evidence rather than anything to do with aggravation, it is fundamentally unfair for the State to relitigate factual matters which are otherwise properly presumed to be correct.

Specifically, Article 1, Section 9 of the Florida Constitution provides that "No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself." The meaning of this language is for this Court to decide. The State relies on the reasoning found in Poland v. Arizona, 476 U.S. 147 (1986), where the United States Supreme Court held that, when a defendant appeals from imposition of a death' penalty, the Double Jeopardy Clause in the United States Constitution does not preclude a state appellate court from reviewing whether an aggravating factor was erroneously rejected by the trial court:

> This concern with protecting the finality of acquittals is not implicated when, as in these cases, a defendant is sentenced to death, i.e., "convicted." There is no cause to shield such a defendant from further litigation; further litigation is the only hope he has. The defendant may argue on appeal that the evidence presented at his sentencing hearing was as a matter of law insufficient to support the aqsravatinq circumstances on which his death sentence was based, but the Double Jeopardy Clause does not require the reviewing court, if it sustains that claim, to ignore evidence in the record supporting another aggravating circumstance which the sentencer has erroneouslv rejected.

Poland, 476 U.S. 147, 156-57 (emphasis added).

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[1] The Supreme Court has previously recognized that the double jeopardy clause precludes appellate review of the erroneous rejection of a statutory aggravating factor when a sentence of life imprisonment was imposed. See Arizona v. Rumsey, 467 U.S. 203 (1984).

Thus, Poland concerned whether the federal constitution permits a state appellate court to review, on direct appeal, the sentencer's erroneous rejection of a statutory aggravating factor. The holding in Poland is essentially irrelevant here. If anything, the Poland line of cases stands for the premise that, if a sentencer erroneously rejects statutory aggravation, an appellate court is empowered to correct the erroneous ruling on direct appeal. Here, the sentencer's express rejection of statutory aggravating factors was not contested by the State or presented as an issue in 1978. The rejection of those factors was thus affirmed by this Court, which means that those rulings are presumptively correct as the law of the case.

Hall cannot improve on the sound reasoning of the New Jersey Supreme Court found in State v. Cote, 119 N.J. 194, 574 A.2d 957, 973-974 (N.J. 1990) and State v. Biegenwald, 110 N.J. 521, 542 A.2d 442 (N.J. 1988), as argued on pages 30-32 of Hall's Initial Brief[2]. This Court is respectfully asked to reject the aggravating factors that were expressly rejected by the trial judge in 1978 and, if this Court determines that a death sentence can be proportionately imposed as discussed in Point IV, to remand for a new penalty hearing with a new jury recommendation based solely on the three statutory aggravating factors found in 1978.

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[2] Substantially this same issue is presented as Point I in the pending appeal of Preston v. State, Florida Supreme Court case number 78,025, which was orally argued November 7, 1992.

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.

Hall's Initial Brief challenged the State to identify the portions of the record that support the finding that Hall's dominant or sole motive for Hurst's murder was to eliminate her as a witness. I.B. at 33-34. In response, the State at page 21 of the Answer Brief points to the following considerations, discussed here in the order they are advanced:

HALL'S KNOWLEDGE THAT HE WAS CARRYING A GUN AND DISCOVERY OF THAT FACT WOULD SEND HIM TO PRISON. (R 1510)

The considerations that Hall had a gun and that he did not want to go to prison do not create an inference that Hurst was murdered to eliminate her as a witness. Hall's encounter with Deputy Coburn, occurring after Hurst's murder, does not assist the State's reasoning because Hall wrestled with Deputy Coburn to avoid being sent to prison for being armed; Hall did not kill Deputy Coburn for that or any other premeditated reason. Hall v. State, 403 So.2d **1319 (Fla.1981)**. Hall did not want to go to prison. However, no one else wants to go to prison. That truism does not establish that a person would kill to avoid going there. If it did, this factor could always be found. See Garron v. State, 528 So.2d *353*, 360 (Fla.1988) (fact that victim on phone calling police when murdered does not imply that she was killed to eliminate her as a witness or to avoid arrest).

HURST'S ATTEMPT TO SPARE HER LIFE BY PLEADING FOR HER UNBORN CHILD AND BY WRITING OUT A CHECK FOR $20,000. (R1506)

During cross-examination by the State in 1978, Hall agreed that Hurst begged for her life and the life of her unborn child, and that she wrote a *$20,000* check in an effort to avoid being killed. (R1506) However, Hall contemporaneously testified that he was trying to console Hurst by telling her that she would not be hurt, after which Ruffin beat and shot her over Hall's protestations. (R1506-1507). Hall's testimony stands as direct evidence that he did not intend that Hurst be killed. Even if Hall's testimony is rejected, the fact that the victim was pleading for her life does not suggest that she was killed solely or primarily to eliminate her as a witness; it is instead just emotionally inflammatory and legally irrelevant to this factor.

RUFFIN'S STATEMENT THAT HE (RUFFIN) KILLED HURST BECAUSE HE (RUFFIN) DID NOT WANT HER TO TALK; THAT HALL TOLD RUFFIN THAT HE (RUFFIN) HAD TO PROVE HIMSELF TO BE A MAN IF HE (RUFFIN) WANTED TO RUN WITH HALL, AND THAT RUFFIN OBTAINED HALL'S GUN WHEN HIS OWN MISFIRED. (R1605-1606;1610)

In the Initial Brief, Hall covered at length why Ruffin's statement - that he (Ruffin) killed Hurst to prevent her from talking - cannot be attributed to Hall in the absence of any showing that Hall knew of and/or agreed with Ruffin's reasoning. I.B. at 34-36. That discussion was not rebutted by the State and it need not be repeated here. In reply to the State's contention that the statutory aggravating factor concerning a murder to avoid arrest is supported by the premise that Hall goaded Ruffin into killing Hurst to prove himself as a man and that Ruffin obtained Hall's gun when his own misfired, Hall respectfully

points out that the "prove yourself to be a man" statement is being mischaracterized by the State, just as it was by the trial judge.

The hearsay testimony concerning Hall's "if you want to run with me, you have to prove yourself to be a man" statement came from Deputy Freeman, who repeatedly stated that he did not know when or in what context Hall made the statement. (R1605-06; 1610-11;1872)[3]. Deputy Freeman's testimony that Ruffin said that Hall said, "If you want to run with me, you have to prove yourself to be a man" is too equivocal to support the conclusion that Hall was goading Ruffin to murder Mrs. Hurst. Even assuming, solely for the sake of argument, that Hall did goad Ruffin into killing Hurst to prove himself to be a man and that, contrary to Hall's testimony, Hall gave Ruffin a gun when Ruffin's misfired, how does that help the State prove the application of this aggravating factor? See Perry v. State, 522 So.2d 817, 820 (Fla.1988) ("In applying this factor where the victim is not a law enforcement officer, we have required that there be strong proof of the defendant's motive (citation omitted), and that it be clearly shown that the dominant or only motive for the murder was the elimination of a witness."). If Hurst was killed by Ruffin so that Ruffin could prove his manhood, it necessarily follows that "the sole or dominant motive" for Hurst's murder was not to eliminate her as a witness.

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[3] The text of these record citations is set forth in the Initial Brief of Appellant at pages 44-47.

THE TRIAL COURT'S FINDING THAT HALL SEXUALLY BATTERED HURST, SHOWN BY THE TESTIMONY OF DRS. SHUTZE AND MORRISON. (R640;1440-1441).

This assertion is wholly bogus and totally unsupported by competent, substantial evidence. The enzyme and/or blood analysis performed by Shutze and Morrison concerned a semen stain present on panties found in Hurst's car. That said, there was absolutely no nexus shown between that undergarment and Mrs. Hurst. The panties were not identified as hers. Was the semen stain old or fresh? The panties were found "in the rear of Wurst's automobile," (R1357-58), but where? In the back seat? Under the back seat? In the trunk? Did they fall from a laundry basket weeks before the crime? Does her husband have the same blood characteristics as Hall?

The State introduced ten pictures of Hurst's body, all showing that, when she was found, Hurst was wearing jeans, a Levi type jacket, blouse and shoes. (State's exhibits 16, 17, 19-26), The State did **NOT** present the results of any comparisons between Hall's blood and specimens taken from Mrs. Hurst or the clothes she was wearing when she was found. Instead, the State compared (R1440-45) Hall's blood characteristics solely with semen stains on State's Exhibit 50, (R1438), the panties found "in the rear" of Hurst's automobile. (R1357-58) Such circumstantial evidence is equivocal and legally insufficient to show beyond a reasonable doubt that Hall sexually battered this woman. This faulty premise cannot stand as evidence that Mrs. Hurst was killed to eliminate her as a witness and/or to avoid arrest.

As a matter of law, there is insufficient evidence to establish that the Mrs. Hurst was murdered in order to avoid arrest. In that regard, not only does the erroneous conclusion that Hall sexually battered Mrs. Hurst fail to support the finding that Hurst was murdered to eliminate her as a witness, it also infects the overall weighing process conducted by the trial judge. It is respectfully submitted that, in the absence of findings as to how the jury used this aggravating consideration in recommending the death penalty, this Court cannot perform a meaningful harmless error analysis that comports with the requirements of fairness, reliability, and due process contained in the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and/or Article 1, Section 9, 16 and 22 of the Florida Constitution. In any event, the error was not harmless in light of the substantial mitigation that exists here without contradiction.

If this Court determines that the death penalty remains a possibility in light of the substantial mitigation presented by Hall and found by the trial court as discussed in Point IV of this appeal, this Court is asked to vacate the death sentence and to remand for a new penalty phase due to the improper use of this factor by the jury and/or 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.

In an attempt to support a trial court ruling, the State mischaracterizes the evidence. Hall does not claim that the misrepresentations are intentional, but the following claims are misrepresentations none-the-less. The State asserts, "For example, Hall did not admit to participating in the rape of Mrs. Hurst - he said Ruffin did it (R1505) **whereas the medical testimony of Drs. Shutze and forensic serologist Roger Morrison showed that Ruffin could not have left all the semen discovered ON THE BODY. (R1440-1444)**" Answer Brief at 25, emphasis **added.** This above-emphasized representation of what was supposed to have been presented below is flat out wrong, **as** was just **discussed** in the previous point. The pages of the record referred to by the State are set forth in an appendix to this brief, as well as pages **1357-58,** which conclusively show that State's Exhibit 50 - the ladies panties - were found in the rear of Hurst's automobile rather than "on" her body.

Dr. Shutze took blood samples, identified as State's Exhibit 51, **(R1471),** from **Mack** Ruffin and Freddie Lee Hall. Serologist Morrison testified that the semen stains on State's Exhibit 50 - the panties found in Hurst's car - were consistent with having come from Hall **and** not Ruffin. On cross-examination Morrison testified that he was not given the opportunity to

examine any vaginal swabs from Mrs. Hurst. (R1445) It is neither fair nor accurate to claim "the medical testimony of Drs. Shutze and forensic serologist Roger Morrison showed that Ruffin could not have left all the semen discovered on the body." A.B. at 25.

The State also asserts, "Hall fails to mention the totality of Ruffin's confession to Freeman that Hall had urged Ruffin TO KILL THE VICTIM 'if he wanted to run with him he had to prove himself as a man'." (sic), A.B. at 25 (emphasis added). This, too, is an inaccurate characterization of the testimony. To be precise, Deputy Freeman testified that Ruffin said that Hall said, "You have to prove yourself to be a man if you want to run with me." (R1610) This statement has been fully addressed in the Initial Brief of Appellant at pp. 44-47; that discussion will not be repeated here. However, the pertinent portions of the record are set forth in the appendix to this brief. It should suffice to say that there is no record support for the claim that Hall ever urged Ruffin "to kill" Hurst to prove himself as a man. These misrepresentations fail to show that the murder was committed in a cold, calculated and premeditated manner with no pretense of moral or legal justification.

Hall was found guilty of first-degree murder. Because there is sufficient evidence to support that verdict on a theory of felony murder, the sufficiency of evidence to support the conviction is not at issue. However, as a matter of law the evidence fails to show that Hall had the extent of heightened premeditation necessary to find the CCP factor. Further, Hall

submits that there is at the very least a "pretense" of moral or legal justification for Hall's actions.

PREMEDITATION:

Premeditation is necessarily present in every first-degree premeditated murder. "Simple premeditation of the type necessary to support a conviction for first-degree murder is not sufficient to sustain a finding that a killing was committed in a cold, calculated, and premeditated manner." Holton v. State, 573 So.2d 284, 292 (Fla.1990).

> The Court has adapted the phrase "heightened premeditation" to distinguish this aggravating circumstance from the premeditation element of first-degree murder. 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 arranged to commit the murder before the crime began.

Porter v. State, 564 So.2d 1060, 1064 (Fla.1990) (citations omitted). There is absolutely no showing here that Hall planned Hurst's death prior to her abduction. In the absence of such proof, Ruffin's acts cannot supply the degree of scienter necessary for this factor.

PRETENSE OF MORAL OR LEGAL JUSTIFICATION:

The State agrees that, "If [Banda v. State, 536 So.2d 221 (Fla.1988)] is as expansive as Hall urges, the instant case would be the appropriate vehicle to overrule (sic) Banda." Answer Brief at 27. Hall's contention is that mental retardation serves as a "pretense of moral or legal justification" for a defendant's actions. The State claims that Hall is insulting those mentally

retarded citizens who choose to lead a law-abiding life, and emotionally argues, "Appellee is unaware of one precedent by this Court which suggests that retardation constitutes justification for the first degree murder of a seven months pregnant woman after she has been raped and beaten." A.B. at 26. At least four states have passed legislation to prohibit the execution of the mentally retarded, and similar legislation is pending in Florida. (Senate Bill 42; House Bill 615). To the undersigned, such legislation signifies societies' recognition that, due to an impairment in the ability to reason, the mentally retarded are not to be held to the same standard as people with higher intellect and reasoning ability.

Certainly, if a mentally retarded person consciously decides to kill another person, if he or she appreciates the consequences of a deed and then kills someone, a first-degree premeditated murder has been committed. Such an act is not "justified" by mental retardation, and a first-degree murder will have been committed. That said, depending on the passage of the foregoing legislation in Florida, the mentally retarded who commit first-degree murder may or may not be subject to the death penalty as a possible sanction. The question, however, concerns the applicability of one statutory aggravating factor, not the applicability of the death penalty as a whole. That said, to conclude beyond a reasonable doubt that there is no PRETENSE of moral or legal justification for such conduct by the mentally

retarded when legislation exists that totally exempts the mentally retarded from the death penalty is simply untenable.

Even if this Court rejects mental retardation as a pretense of moral or legal justification, Hall maintains his claim that application of this factor constitutes ex post facto application of legislation, See footnote 9, p. 38 of the Initial Brief of Appellant. The CCP aggravating factor here is otherwise wholly unsupported by substantial competent evidence. It is also respectfully submitted that, in the absence of findings as to how the jury used this aggravating consideration in recommending the death penalty, this Court cannot perform a meaningful harmless error analysis that comports with the requirements of fairness, reliability, and due process contained in the Fifth, Eighth and Fourteenth Amendments to the United States Constitution and/or Article 1, Section 9, 16 and 22 of the Florida Constitution. In any event, the erroneous use of this factor was not harmless in light of the substantial mitigation that was found by the trial court and that otherwise exists here without contradiction.

If this Court determines that the death penalty remains a possibility in light of the substantial mitigation presented by Hall and found by the trial court, this Court is asked to vacate the death sentence and to remand for a new penalty phase due to the improper consideration of this factor by the jury and/or trial judge.

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 WAS IMPOSED: THE SUBSTANTIAL MITIGATION THAT EXISTS IN THIS CASE WITHOUT CONTRADICTION RENDERS THE DEATH SENTENCE DISPROPORTIONATE BECAUSE THIS CASE IS NOT THE MOST AGGRAVATED AND LEAST MITIGATED OF MOST SERIOUS OFFENSES.

The trial court's sentencing order and findings of fact are set forth in the appendix to this brief. The State asserts that the trial judge properly conducted a weighing analysis pursuant to Campbell v. State, 571 So.2d 415 (Fla.1990). Answer Brief at 28. In reply, Hall respectfully asserts that the trial judge stated time after time in clear terms that, unless Hall could demonstrate that the consideration he was advancing as mitigation positively affected him at the time of the time, the premise would **NOT** be considered a mitigating factor:

> (4) The term "Mitigating Circumstance" (at least as to nonstatuatory (sic) mitigating circumstances) to the undersigned is a two-pronged test: "Mitigating Circumstance" means:
>
> 1. That the circumstance is reasonably proved by the evidence, and
>
> 2. That such circumstance (sic) has proved that it is at least potentially "mitigating"; that is, that such factor has been found by the preponderance or greater weight of the evidence to be a reason why the defendant should be considered less culpable for his part in the alleged crime. **For my considerations herein, statutory mitigating factors will be treated as "mitigating" per se, and the only requirement will be that their mere existence be proved by the**

greater weight of the evidence. (citation omitted). Thus, for purposes of determining nonstatutory "mitigating circumstances," THIS COURT WILL REQUIRE THAT BOTH PRONGS OF TWIG TEST (BOTH THE EXISTENCE OF THE FACT AND THAT IT REDUCED MORAL OR LEGAL CULPABILITY) HAVE BEEN FOUND BY THE GREATER WEIGHT OF THE EVIDENCE.

(R644-645).

The trial judge must be taken at his word. When this Court reviews Judge Tombrink's rejection of the nonstatutory mitigating considerations, made pursuant to the above-stated, express qualifier that precedes those findings, there can be no doubt that, in the first portion of the written findings, the judge is finding that the facts sufficiently establish the occurrence of the event that is being advanced as a non-statutory mitigating consideration. In that regard, other than the finding concerning the acceptance of Dr. Carrera's opinion over those of the defense experts, Hall does not contest those factual determinations.

Hall does specifically contest the second portion of the written findings, where the judge is rejecting the consideration as being a mitigating factor because Hall has not proved by a preponderance of the evidence that the concededly established premise is a non-statutory mitigating consideration, that is, that Hall was actually affected by that particular consideration at the moment the crime was committed. This second requirement is not a factual determination, but instead an arbitrary and erroneous legal requirement that is fully

reviewable by this Court. One example should suffice, because all of the trial court's findings follow the same format. The trial court found the following:

> (f) Freddie Lee Hall suffered 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). Applying the analysis Judge Tombrink said would be used and in plain terms, the court found that Hall suffered tremendous physical abuse and torture as a child, but the abuse is not mitigating in nature because Hall failed to show how and to what extent the abuse affected him at the time of the crime.

As a matter of law, the ruling is erroneous and in direct contradiction of Nibert v. State, 574 So.2d 1059 (Fla.1990), where this Court rejected the same faulty analysis:

> 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 trial court's rejection of Hall's child abuse and other recognized non-statutory factors is based on the identical

reasoning rejected in Nibert, supra. Even assuming that Hall must demonstrate some nexus between the proposed mitigation and the crime, that logical nexus may be presumed as a matter of law for several of the considerations erroneously rejected by the trial judge. Thus, at the very least, resentencing is required. However, Hall respectfully points out that Judge Tombrink's written order specifically finds that substantial non-statutory mitigating considerations were proved by overwhelming evidence, as set forth on pages 52 and 53 of Hall's Initial Brief. Thus, this Court can at this time conduct a proportionality analysis to determine whether, pursuant to Fitzpatrick v. State, 527 So.2d 809 (Fla.1988), this case qualifies as the most aggravated and least mitigated of serious crimes. Hall respectfully submits that it does not, and asks that the matter be remanded for imposition of a life sentence, with no possibility of parole for twenty-five years.

POINT V

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

Hall relies on the argument and authority set forth in the Initial Brief of Appeal, except to respond to footnote 8 of the State's brief, which in pertinent part states, "It is not entirely clear to appellee why a jury recommendation of life should carry inordinate weight when compared to a death recommendation when in either case no one can discern the basis of the recornmendation." AB at 38. The State has touched on why, when a jury recommends the death penalty and error has occurred during the penalty phase, this Court cannot reliably perform a harmless error analysis. Only when the jury recommends life can it be assumed that any error was harmlesss.

However, insofar as why a jury recommendation of life rather than death is so significant at trial and on appeal, it is a finding by at least six reasonable people that, as a factual matter, the established mitigation can outweigh the established aggravation. Thus, the evidence as to both mitigation and aggravation must be viewed by the trial and appellate courts in a light most favorable to the life recommendation, because that is the standard of review that is constitutionally required when the death penalty is imposed. A jury's life recommendation must therefore be followed unless, as a matter of law, the mitigation cannot possibly outweigh the aggravation, viewed in a light consistent with the recommendation.

However, that same standard of review does not apply when the trial judge imposes any sentence other than the death penalty. Imposition of a life sentence cannot be reviewed by an appellate court so, if the sentencer determines on his or her own that a life sentence is appropriate as a factual and legal matter made de novo by the sentencer, that is the sentence that is to be imposed.

It is fair for a judge to be influenced by an error-free jury recommendation for the death penalty; a trial judge is entitled to give a valid death recommendation great weight. That, however, is not the same as a standard used here, where the judge stated that he must follow the death recommendation absent "rare circumstances." (R654-665)

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 relies on the argument and authority set forth in the Initial Brief of Appeal.

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.

Hall relies on the argument and authority set forth in **the** Initial Brief of Appeal,

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,

Hall relies on the argument and authority **set** forth in **the** Initial Brief of Appeal.

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.

Hall relies on the argument and authority set forth in the Initial Brief of Appeal.

POINT X

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

Hall relies on the argument and authority set forth in the Initial Brief of Appeal.

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.

Hall relies on the argument and authority set forth in the Initial Brief of Appeal

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. Lois Avenue, Suite 700, Tampa, FL 33607 and to Freddie Lee Hall, #022762, P.O. Box 747, Starke, FL 32091, this 24th day of February, 1992.

LARRY B. HENDERSON
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