IN THE SUPREME COURT OF FLORIDA

FREDDIE LEE HALL,

Appellant,

vs. CASE NO. 92,008

STATE OF FLORIDA,

Appellee.

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ANSWER BRIEF OF THE APPELLEE

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This brief is presented in 12 point Courier New, a font that is not proportionately spaced.

STATEMENT OF THE CASE AND FACTS

(a) Prior Proceedings:

Freddie Lee Hall was convicted of first degree murder of Karol Hurst and sentenced to death and this Court initially affirmed the judgment and sentence. Hall v. State, 403 So.2d 1321 (Fla. 1981) (Hall I). Following the summary denial of post-conviction relief, a 3.850 motion, this Court again affirmed. Hall v. State, 420 So.2d 872 (Fla. 1982) (Hall II). The federal district court denied habeas corpus relief. Hall v. Wainwright, 565 F.Supp. 1222 (M.D. Fla. 1983) (Hall III). The Eleventh Circuit Court of Appeals affirmed in part, and reversed in part and remanded for a hearing on Hall's absence from the courtroom and on whether he deliberately bypassed state remedies on his post-conviction claims. Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1984), cert. denied, 471 U.S. 1111, 85 L.Ed.2d 862 (1985) (Hall IV). The district court denied relief following an evidentiary hearing and the Court of Appeals affirmed. Hall v. Wainwright, 805 F.2d 945 (11th Cir. 1986), cert. denied, Hall v. Dugger, 484 U.S. 905, 98 L.Ed.2d 206 (1987) (Hall V). This Court denied Hall's petition for writ of habeas corpus. Hall v. Dugger, 531 So.2d 76 (Fla. 1988) (Hall VI). On a second Rule 3.850 appeal this Court ordered a new sentencing proceeding. Hall v. State, 541 So.2d 1125 (Fla. 1989) (Hall VII). The Court opined that the jury might return a life recommendation upon

hearing the testimony of such mental health experts as Dr. Toomer and Dr. Lewis as well as family members. Three Justices dissented, finding any error to be harmless. Hall had a resentencing before a new jury which recommended death by a vote of eight to four and this Court affirmed Judge Tombrink's imposition of a sentence of death and his finding of the presence of seven statutory aggravating factors. Hall v. State, 614 So.2d 473 (Fla. 1993), cert. denied, 510 U.S. 834, 126 L.Ed.2d 74 (1993) (Hall VIII).

(b) The Instant Post-Conviction Motion:

On or about March 14, 1996, Hall filed his second amended Motion to Vacate Judgment and Sentence, raising some thirty-three claims (Vol. III, R. 338-447).[1] The state filed its Response thereto (Vol. IV, R 463-685). On July 11, 1997, Judge Tombrink entered an order noting that after a Huff hearing conducted on July 2, 1997, at which time "the defense through counsel having stated that they did not want to make argument at that time" (Vol. V, R. 736) ordered that an evidentiary hearing be held on the issue of Hall's competence to proceed at the resentencing hearing and held that the remaining issues were procedurally barred or legally insufficient (Vol. V, R. 736). An evidentiary hearing was held on

[1]Earlier he had filed a Motion to Vacate (Vol. I, R 1-75) and an Amended Motion to Vacate (Vol. II, R 140-253).

August 25, 1997 (Vol. VII, TR. 1-258). The state filed a post-hearing memorandum of law (Vol. V, R. 812-858) and the defense similarly submitted a closing argument memorandum (Vol. V, R. 859-878).

On October 30, 1997, the lower court entered a Final Order Resolving All 3.850 Issues denying relief (Vol. VI, R. 882-947).

This appeal - Hall IX - follows.[2]

(c) <u>The Evidentiary Hearing of August 25, 1997</u>:

Chief Assistant Public Defender Patricia Jenkins was one of the trial lawyers representing Hall (Vol. VII, TR. 6). Her assignment included trying to make sure Hall was okay during the penalty phase because he had prior outbursts in and out of the courtroom (Vol. VII, TR. 7). He seemed withdrawn (Vol. VII, TR. 8). She understood that he was on medication (Vol. VII, TR. 10). The judge issued an order that he receive his medications at her request (Vol. VII, TR. 11-12), and Hall became less expressive of anger (Vol. VII, TR. 12-13). Hall knew she was an attorney (Vol. VII, TR. 14). Hall wanted her to communicate with the judge about police mistreatment in a case that occurred years ago and she did

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[2]Appellee would correct a misstatement in appellant's statement of facts at Brief, p. 4. Dr. Kathleen Heide testified to a "reasonable degree of <u>psychological</u> certainty" not a medical certainty at R. 1853 of resentencing proceeding.

so (Vol. VII, TR. 16). She had rational conversations with him (Vol. VII, TR. 19). She filed change of venue motions on his behalf citing his fears (Vol. VII, TR. 22). Hall had a speech problem, but after sometime she was able to communicate with him (Vol. VII, TR. 28).

On cross-examination the witness conceded that attorney Johnson was lead counsel and spent more time with him than she did (Vol. VII, TR. 29). Mr. Johnson was among the most experienced in the Public Defender's office in December of 1990, an excellent attorney (Vol. VII, TR. 30). Hall had also been tried and convicted of the first degree murder of Hernando County Deputy Sheriff Lonnie Coburn; Hall was concerned that a portion of the proceedings were held in Hernando County and he wanted his objections made so that he could hear them in person (Vol. VII, TR. 31-32). He feared he would be physically abused if brought to or tried in Hernando County and given his fear he might not have appropriate courtroom behavior. His lawyers felt his fear was not irrational (Vol. VII, TR. 32-33). The witness acknowledged that the medical records provided by CCR showed Hall was on Pamelor, an anti-depressant in 1989 and 1990, not Haldol (Vol. VII, TR. 34). The witness admitted that at the resentencing proceeding the defense had introduced evidence that Hall was borderline retarded, possibly brain damaged and functionally illiterate, documented over

a period of time since the mid-1980s (Vol. VII, TR. 37). She acknowledged that Hall had become one of the "subjects" while on Death Row of Dr. Lewis and Dr. Barnard who testified at the resentencing (Vol. VII, TR. 38). Other mental health opinions had been solicited from Dr. Krop,[3] Dr. Toomer and Dr. Heide. They were of the opinion that Hall was competent to proceed (Vol. VII, TR. 39-40). Ms. Jenkins was reassured by Toomer, Krop and Heide that Hall was competent to go forward and that if they had told her he was not, she would have filed a motion (Vol. VII, TR. 40-41). Heide told her Hall was competent (Vol. VII, TR. 43). If she had had an opinion from an expert that Hall was incompetent to proceed, she would have alerted the court (Vol. VII, TR. 48).

Michael Johnson, currently a circuit judge, was the chief assistant public defender for the Fifth Circuit in December of 1990 (Vol. VII, TR. 54) and first started representing Hall in 1982 when the governor signed his first warrant (Vol. VII, TR. 56). He was lead counsel in the resentencing proceeding (Vol. VII, TR. 57). He had rational conversations with Hall (Vol. VII, TR. 62). There were times when Hall was cooperative and times when he wasn't (Vol. VII, TR. 63). The witness had a vague recollection of talking to Krop about the case (Vol. VII, TR. 65). For the most part Hall

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[3]While the transcript refers to "Croft" the mental health expert is Harry Krop.

behaved very well during resentencing. There were times when he became agitated but Ms. Jenkins helped him stay calm (Vol. VII, TR. 66). He recalled an incident in which Hall was pitching a fit one night at the jail because they would not let him use the phone because of the late hour; Hall was loud and boisterous (Vol. VII, TR. 68). Johnson filed a motion for change of venue because he didn't think he'd get a fair trial in this circuit (Vol. VII, TR. 77) due to its high profile nature and Hall's behavioral problems (Vol. VII, TR. 77-78). He recalled some conversation with Hall that he wanted to be tried in Sumter County because his people would not vote to execute him; Johnson disagreed with that (Vol. VII, TR. 79). Johnson thought the problem related to Hall's getting angry and his reaction, his behavior to that (Vol. VII, TR. 80). Johnson repeated Jenkins' testimony that two experts saw him and said he was not incompetent to stand trial and he's had clients worse off than Hall (Vol. VII, TR. 82).

On cross-examination Johnson acknowledged that prior to the resentencing in 1989 and 1990 there was a great deal of information available regarding Hall's mental condition and he spoke to all on the death row team that came down from NYU (Pincus, Lewis, Baird). He used Dr. Dorothy Lewis' videotaped deposition at resentencing and Dr. Toomer testified as well (Vol. VII, TR. 85). He assumed that he used Dr. Krop for competence since mental health issues

were the bulk of the focus for non-statutory mitigation. His recollection was that Krop told him Hall was competent to proceed to resentencing (Vol. VII, TR. 87). Johnson tried to present evidence of every problem they could think about, evidence that Hall was border-line retarded, functionally illiterate and possibly brain damaged, as well as the family history of abuse and neglect (Vol. VII, TR. 87-88). Hall understood that he was back in court for resentencing (Vol. VII, TR. 88). Hall maintained that a co-defendant killed Hurst (Vol. VII, TR. 89). Hall recognized and did not like Judge Booth, the original trial judge (Vol. VII, TR. 91). Johnson added, as Jenkins stated, that if there were professional expert support regarding the issue of competence, he would have filed a motion and requested a hearing on it (Vol. VII, TR. 93). If there were any change of behavior between September and December of 1990 that had caused a concern on Hall's mental status, he would have re-contacted Krop. Johnson's notes are presumably with CCR (Vol. VII, TR. 97).

The state called trial defense attorney Michael Graves who was involved in the Hall defense (Vol. VII, TR. 238). He responded to Johnson's effort to assemble the most qualified and experienced lawyers in the area regarding death penalty litigation (Vol. VII, TR. 239). He was aware of reports of Hall's history of acting out at previous hearings and trial (Vol. VII, TR. 241). Hall was a

perfect gentleman when they met with him and they had Dr. Krop to evaluate for sanity and competence (Vol. VII, TR. 242). He and Johnson discussed the facts of the case with Hall; it was a long story but Hall shifted responsibility for the most culpable acts to his co-defendant and his statements were consistent with his statements to law enforcement officers after his arrest (Vol. VII, TR. 243-244). He understood the nature of the resentencing proceeding. Hall's only desire was that it not be in Hernando County because he was concerned for his safety there (Vol. VII, TR. 244-245), where Deputy Coburn[4], the deputy sheriff, had been killed. Graves and his co-counsel discussed the issue of competence because of Hall's prior acting out. They met with Dr. Krop at a small hotel and after the meeting Graves asked Krop if his opinion on competency has changed (Vol. VII, TR. 247). Hall appeared to understand the defense theory, that since Ruffin received a fair sentence it was fair for Hall to receive the same (Vol. VII, TR. 249). Hall did not sleep in court during the resentencing (Vol. VII, TR. 250). The defense team drove to Gainesville to talk to Dr. Krop and Graves' opinion not to call Krop at resentencing prevailed. The reasons included the fact that Dr. Toomer's opinions were stronger, that Hall had talked more

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[4]While the transcript recites the name Colbert, the deputy's name was Lonnie Coburn.

factually about the case to Krop than he did to Toomer which would make Toomer less susceptible to cross-examination by the prosecutor. Graves interpreted Krop's remarks that there were certain aspects of the mental side of the case that did not equate with the actions (Vol. VII, TR. 251-252). Graves had earlier described Krop as one who would "give us the good, the bad and the ugly. He didn't always tell us what we wanted to hear" (Vol. VII, TR. 242).

Defense witness clinical psychologist Harry Krop testified that he evaluated Hall on March 15, 1990 for the resentencing proceeding (Vol. VII, TR. 115). He also saw Hall on September 25, 1990 at the Florida State Prison (Vol. VII, TR. 115). Because it was a resentencing Krop had a lot of material from prior evaluations as well as actual testimony (Vol. VII, TR. 118). He did not write a report on Hall initially since he communicated as much as he did with defense counsel Johnson, as a legal strategy (Vol. VII, TR. 121), but did a written report that was typed on January 8th. The resentencing proceeding had occurred in December (Vol. VII, TR. 122). Hall was taking anti-depressant medication (Vol. VII, TR. 123). He was not called to testify at the resentencing proceeding (Vol. VII, TR. 127). He never saw any psychotic behavior in Hall (Vol. VII, TR. 128). Krop stated that he had no contact with Hall after September 25, 1990, but did

consult with the lawyers up to the sentencing trial (Vol. VII, TR. 134). He always discussed with Mr. Johnson and the others what Hall's behavior was like (Vol. VII, TR. 134). Krop found that Hall had an IQ of 73, which is at the low end of the borderline range and Dr. Lewis found he had an IQ of 80 (Vol. VII, TR. 136). Hall knew who the Public Defender was, he trusted him; he felt positively about the people trying to help him. Hall knew he was there for a resentencing and knew he could be put back on death row and understood the seriousness of the trial's outcome (Vol. VII, TR. 137). Krop felt that Hall might act out verbally and become abusive if the courtroom setting were in Hernando County. Krop didn't find any indication that Hall has ever been found incompetent (Vol. VII, TR. 138). Hall felt comfortable with Johnson and the other attorneys (Vol. VII, TR. 139). Krop noted that Hall throughout his life had an adverse perceptual phenomenon (which could have occurred while he was sleeping)(Vol. VII, TR. 142). Krop did not regard them as hallucinations or psychotic-like episodes -- not severe enough to meet the criteria for schizophrenia (Vol. VII, TR. 143). Hall's superstitious interest in roots of voodoo was not particularly significant (Vol. VII, TR. 144). There was no question of Hall's competency in September of 1990 (Vol. VII, TR. 145).

On cross-examination Krop reviewed DOC medical records from

resentencing counsel's files which showed that from January 1989 to July 1990 the only medication given to Hall was Pamelor which Hall could have been taking for his reported sleep aide (Vol. VII, TR. 146-147). Krop reviewed the Marion County jail medical records for December of 1990 as well as the DOC Outpatient Medical and Treatment record for Hall from January 1989 through July 1990. There was no indication of any type of anti-psychotic medication (Vol. VII, TR. 147-150). There was a behavioral incident when he banged on and kicked the door of his cell and his attorney was contacted on December 13 (Vol. VII, TR. 150-151). Krop was aware that in part based on his suggestion defense counsel sought a change of venue to keep the trial out of Hernando County (Vol. VII, TR. 152). Krop consulted with defense counsel Johnson on October 17, 1990 for three hours and had a two-hour meeting in December, prior to the trial. In September he met with counsel and family members of Hall (Vol. VII, TR. 152). There were four or five lengthy meetings (Vol. VII, TR. 153). Competency was something always discussed, if not formally; his competency did not appear to be an issue based on his conversations with Mr. Johnson and Johnson's meeting with Hall (Vol. VII, TR. 153-154). He saw no evidence that Hall was ever incompetent (Vol. VII, TR. 154). He would not have waited for someone to ask before he brought it out if he had come to a conclusion about incompetency -- that would be

part of his obligation to point that out (Vol. VII, TR. 155).

Psychologist Dr. Jethro Toomer evaluated Hall in 1988 and testified at the 1990 resentencing proceeding (Vol. VII, TR. 163, 165).[5] Dr. Toomer recalled from that resentencing proceeding that while he had set Hall's IQ at 60, one of his predecessors had evaluated it at 80 and Dr. Krop scored it at 73 (Vol. VII, TR. 179). Toomer could not say that every person who is retarded cannot be competent and his reports that he made in 1988 don't reflect any indication that he believed Hall at that time to be incompetent (Vol. VII, TR. 180). Further, Toomer could not opine whether Hall either now or ever was legally incompetent (Vol. VII, TR. 181-182).

Psychiatrist Dr. Alfred Fireman reviewed Corrections medical records of Hall indicating that in December of 1990 the defendant was given the anti-inflammatory and muscle relaxant Pamelor, used for depression (Vol. VII, TR. 191-192). You can get a comfortable night's rest with Pamelor (Vol. VII, TR. 195). The records he referred to did not indicate that he was taking anti-psychotic medication in November of 1990 (Vol. VII, TR. 204-205). Dr. Fireman had never met Freddie Lee Hall and was <u>not</u> rendering an opinion whether Mr. Hall was incompetent to proceed to the

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[5]Toomer testified at the resentencing proceeding in December 1990, giving his opinion on mitigation including retardation and other matters (F.S.C. Appeal No. 77,564, Vol. XI, R. 1742-1800).

resentencing in 1990 (Vol. VII, TR. 205-206).

Psychologist Dr. Mark Zimmerman from Louisiana saw Hall in 1995 (Vol. VII, TR. 212), found his IQ to be 74 (Vol. VII, TR. 215). The witness did not ask Hall about the offense since he thought it was moot with Hall having been convicted (Vol. VII, TR. 231), nor did he think it relevant to ask Hall about the incident or his involvement (Vol. VII, TR. 232). He could not say whether Hall was competent now or in March or April of 1995, nor could he testify whether Hall was competent in December of 1990 (Vol. VII, TR. 232-233). There was nothing actively psychotic about Hall that he evaluated (Vol. VII, TR. 234).

Of the defense mental health experts who testified at the hearing -- Krop, Toomer, Fireman, Zimmerman -- none could testify that Hall was incompetent at the 1990 resentencing.

The Resentencing Appeal Record:

The resentencing direct appeal record (Florida Supreme Court Case No. 77,563) reflects that in January of 1990 trial defense counsel filed a motion to appoint confidential expert pursuant to Fla.R.Crim.Proc. 3.216(a) and F.S. 916.11(1). (Vol. I, R. 50). The Court appointed Dr. Harry Krop. (Vol. I, R. 51-55). The Court thereafter granted defense motions for continuance (Vol. I, R. 62, R. 70) and granted a defense request for the appointment of Kathleen Heide, an expert in the field of criminal justice (Vol. I,

R. 179-196). In July and August of 1990 the Court ordered the payment of expert fees to Dr. Krop, granted the motion to appoint Heide and granted a continuance of the trial (Vol. II, R. 284-289). Additionally, the Court authorized the defense use of experts Dr. Bard, Dr. Toomer, Dr. Dorothy Lewis, Dr. Leslie Prichep, Dr. Jonathan Pincus, Dr. George Barnard, Dr. Frank Carrera, Dr. Ellis Richardson and Dr. Harry Krop (Vol. II, R. 290). The defense filed a motion to take the deposition of Dr. Dorothy Lewis to perpetuate her testimony which was granted (Vol. II, R. 312-313, 334). On August 16, 1990, trial defense counsel moved for a change of venue with attachments (Vol. II, R. 347-371) which was reasserted by the defendant (Vol. II, R. 372) and in an amended motion for change of venue with attachments (Vol. II, R. 373-387). In October of 1990 the trial court granted the defense amended motion for change of venue (Vol. III, R. 417) and the resentencing proceeding was held in Marion County (Vol. III, R. 415).

The resentencing transcripts reveal that in addition to defense lay witnesses, the judge and jury heard the videotaped deposition of Dr. Dorothy Lewis (Vol. XI, R 1703; Supp. Record Vol. I, R. 1-87) and live testimony of Dr. Barbara Bard (Vol. XI, R. 1706-1739), Dr. Jethro Toomer (Vol. XI, R. 1742-1800), and Kathleen Heide (Vol. XI, R. 1822-1869). Following the jury recommendation the defense submitted a Notice of Request for Compulsory Judicial

Notice and of Filing Additional Reports (Vol. IV, R. 528-622) which the trial judge considered in its sentencing order (Vol. IV, R. 635; see also Vol XII, R. 2110). Appellee notes that in Dr. Krop's letter of January 8, 1991, Krop clearly indicates the view that Hall was competent to proceed (Florida Supreme Court Case No. 77,563, Vol. IV, R. 594).

SUMMARY OF THE ARGUMENT

ISSUE I: The instant sentence of death is not unconstitutional on the basis that the defendant allegedly is mentally retarded. The claim is procedurally barred for not having been presented in Hall's Second Amended Motion to Vacate and is alternatively meritless. The United States Supreme Court has refused to rule that the Constitution prohibits execution of the mentally retarded capital defendants. Penry v. Lynaugh, 492 U.S. 302, 106 L.Ed.2d 256 (1989). A majority of jurisdictions that have capital punishment have no such proscription, and Mr. Hall's mental or emotional qualities were considered by the trial judge at sentencing and by this Court in affirming the judgment and sentence on direct appeal.

ISSUE II: The trial court correctly ruled after conducting an evidentiary hearing that Mr. Hall was not incompetent to be resentenced in 1990. None of the mental health experts testified that he was incompetent at that time and trial counsel relied on experts at that time who opined he was competent.

ISSUE III: Execution by electrocution is not cruel and/or unusual punishment under the state and federal constitutions. See Jones v. State, 701 So.2d 76 (Fla. 1997), cert. denied, 140 L.Ed.2d 335 (1998); Remeta v. State, 710 So.2d 543 (Fla. 1998); Stano v. State, 708 So.2d 271 (Fla. 1998).

ISSUE IV: The trial court did not err in summarily denying relief on the remainder of appellant's claims. Most of the issues were procedurally barred as improper attempts to initiate or relitigate claims more properly presented for direct appeal if preserved, as the lower court determined (Vol. VI, R. 884). Additionally, the lower court explained in a thorough and comprehensive order why the asserted claims of ineffective assistance of resentencing counsel were meritless or frivolous and not deserving of an evidentiary hearing. Appellant makes no effort to urge with specificity any erroneous ruling by the lower court. Relief should be denied.

ISSUE V: Appellant's attempt to relitigate a prior direct appeal issue -- that mitigating factors outweighed aggravators -- is an impermissible use of the post-conviction vehicle. This Court previously correctly ruled that the aggravators merited the death penalty.

ARGUMENT

ISSUE I

WHETHER THE SENTENCE OF DEATH VIOLATES THE CONSTITUTION IN THAT THE CAPITAL SENTENCING STATUTE FACIALLY AND AS APPLIED ALLEGEDLY IS UNCONSTITUTIONAL IN ALLOWING IMPOSITION OF THE DEATH PENALTY ON A MENTALLY-RETARDED PERSON.

Initially, the trial court could not have committed reversible error because the instant claim was not among the thirty-three claims presented for his consideration below in the Second Amended Motion to Vacate Judgment and Sentence (Vol. III, R 338-447). Thus, it is axiomatic that an appellant may not urge as error a claim not presented to the trial court. Steinhorst v. State, 412 So.2d 332 (Fla. 1992); Lawrence v. State, 691 So.2d 1068 (Fla. 1997); Terry v. State, 668 So.2d 954 (Fla. 1996); Occhicone v. State, 570 So.2d 902 (Fla. 1990); Doyle v. State, 526 So.2d 909 (Fla. 1988)(claims which could have been raised on direct appeal or in motion to vacate judgment and sentence were procedurally barred and could not be raised for first time on appeal of denial of such motion).

Alternatively, appellee submits that the claim that the Constitution prohibits execution of criminal defendants who may be mentally retarded must be rejected as meritless. Hall correctly asserts that in Penry v. Lynaugh, 492 U.S. 302, 106 L.Ed.2d 256 (1989), the United States Supreme Court refused to rule that

execution of the mentally-retarded constituted cruel and unusual punishment. He also correctly asserts that in 1998 the Florida legislature did not pass legislation exempting mentally-retarded defendants from the death penalty. Thus, while at first blush it would appear to be a leap to ask the Court to conclude a constitutional violation is present -- and appellant further fails to mention this Court's rejection of a similar argument by Hall in his last appearance at the resentencing direct appeal -- the thrust of appellant's claim seems to be that a few states have decided to provide such immunity.[6]

The following thirteen jurisdictions are without capital punishment: Alaska, District of Columbia, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. (1998 NAACP Legal Defense

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[6]Appellee must dispute the correctness and analysis proffered in footnotes 1 and 2 of Hall's brief. In footnote 1, he cites twelve states that have legislated against the death penalty for mentally-retarded defendants; appellee contends that Missouri has no such proscription. In footnote 2, Hall recites in the second sentence that the following states have *de facto* abolished the death penalty: California, New Mexico, New York, North Dakota, Oregon and Vermont. He lists New Mexico and New York in both categories of *de facto* abolishing the death penalty and as legislating against the death penalty for mentally-retarded defendants. Appellee contends that California, New York and Oregon do have capital punishments statutes. Appellee does not fully comprehend what is meant by *de facto* abolished, but it is common knowledge that New York has legislatively re-instituted the death penalty and perhaps Hall's claim will be of some solace -- albeit belatedly and retroactively -- to Thomas Thompson who was executed by the State of California on July 14, 1998.

Fund Report, Death Row, USA). The remaining thirty-eight states have capital punishment statutes: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming.

Appellee prefers a different mathematical model than that offered by appellant. Of the thirty-eight states that have chosen to adopt the death penalty in its criminal justice system, only eleven or twelve states have provided legislation against the death penalty for the mentally-retarded -- less than one-third. That the Florida legislature has chosen to align this state with the two-thirds majority of capital states not to provide immunity from capital punishment to defendants who may have mental retardation hardly bespeaks a departure from the appropriate societal consensus.[7] Far from establishing a nationwide societal consensus, in the decade since Penry, two-thirds of the capital punishment

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[7]Moreover, this Court in another context has rejected the notion that the appearance of a trend signals that a current practice is unconstitutional. Jones v. State, 701 So.2d 76, 79 (Fla. 1997), citing Campbell v. Wood, 18 F.3d 662, 682 (9th Cir. 1994)("We cannot conclude that judicial hanging is incompatible with evolving standards of decency simply because few states continue the practice.").

states have refused to permit immunity from the capital sanction to defendants guilty of first degree murder who may have some mental retardation. Implicit in appellant's argument is that all these state statutory schemes are constitutionally defective. Appellee submits that is not so and that the tyranny of the minority should not be deemed a new constitutional rule.

In his brief appellant refers to a 1991 law journal article by V. Stephen Cohen, Comment: Exempting the Mentally Retarded from the Death Penalty, 19 Florida State University Law Review 457, which was also cited by the dissent in Hall's resentencing appeal. Hall v. State, 614 So.2d 473, 480 (Fla. 1993). Nothing new has happened to cause this Court to alter or reverse its decision since that appeal became final on March 22, 1993. The Court should reject the logic of appellant's argument that the legislature's failure to align itself with a minority of capital jurisdictions in providing death penalty immunity to the mentally-retarded demonstrates a growing societal consensus that vetoes the jury's recommendation of a sentence of death and this Court's prior approval of Judge Tombrink's comprehensive sentencing order.[8]

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[8]Moreover, the additional testimony of mental health experts Dr. Krop and Dr. Zimmerman, both of whom did not testify at the 1990 resentencing but who did testify at the hearing below, that Hall's IQ was 73 or 74 (Vol. VII, TR. 136, 215), Dr. Lewis who did testify at the resentencing via videotape deposition also found Hall's IQ to be 80 (Vol. VII, TR. 136) -- would not seem to meet the criteria of V. Stephen Cohen's article relied on in footnotes 4 and 9 of appellant's brief as that author states:

Finally, even if we were to consider anecdotal trend evidence, as the attachment to this brief by Keyes, Edwards and Perske indicates, prior to the June 26, 1989 Penry decision only eight capital defendants with mental retardation were executed (Goode, Stanley, Henry, Mason, Roach, Bowden, Celestine and Brogdon) while after Penry twenty-five more have been executed (Dunkins, Waye, Anderson, Prejean, Rector, Garrett, Harris, White, Martin, Grubbs, Singleton, Sawyer, Hance, Marquez, Clisby, Weeks, Davis, Adams, Fairchild, Correll, Mata, Bush, Washington, Mackall, Powell).[9] If anything, the trend seems to be toward capital accountability by exacting the ultimate sanction.

Hall has failed to demonstrate why the repetitious argument of his retardation -- rejected in the last appeal -- should alter the conclusion of this Court that:

> The aggravators clearly outweigh the mitigating evidence, and this cruel, cold-blooded murder clearly falls within the class

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> "Borderline" mental retardation refers to an IQ between 70 and 85. People within this range are no longer considered mentally retarded.
>
> Comment, Exempting the Mentally Retarded from the Death Penalty: A Comment on Florida's Proposed Legislation, 19 Fla. St. U.L. Rev. 457, 459 (1991)

[9]Even the subsequently enacted Arkansas legislation did not assist Barry Lee Fairchild since the prior rejection of his mental retardation claim constituted law of the case. Fairchild v. Norris, 876 SW.2d 588 (8th Cir. 1994), cert. denied, --- U.S. ---, 130 L.Ed.2d 357 (1994).

> of killings for which the death penalty is properly imposed.
>
> Hall v. State, 614 So.2d 473, 479 (Fla. 1993)

And the trial court's findings of fact in support of the death sentence (F.S.C. Case No. 77,563, Vol. IV, R. 661-662) recited:

> Likewise, the learning disabilities, mental retardation, and other mental difficulties, in this Court's mind, cannot be used to justify, excuse or extenuate the moral culpability of the defendant in this cause. While they certainly go to some degree to perhaps explain the crime, and, to some degree, do perhaps mitigate his culpability in the moral sense of the atrocity, such factors alone (or even in conjunction with all of the other mitigating circumstances in this case) do not serve to outweigh the substantial aggravation existing in the outrageous conduct of the defendant.
>
> Some of the defendant's behavior may be considered "impulsive" but much of his other actions defy that description. The initial decision of the defendant to steal the vehicle of the victim may have been impulsive, although even that is dubious, for the codefendants had discussed this matter in advance. However, throughout the ordeal leading up to the taking of the victim's life, the defendant had ample opportunity to make other decisions that would have spared the life of Karol Lea Hurst and her unborn child. The planning involved in this procedure, bearing in mind that Freddie Lee Hall was driving the victim alone from the grocery store in Leesburg for some 30 minutes prior to his first stop in the woods, shows considerable, conscious premeditation and planning. Moreover, even after the victim was raped, beaten and killed, the defendant still continued on his quest that same day to rob a convenience store for money. Even after the deputy was murdered at that bungled attempt at robbery, the defendant still demonstrated the

> mental faculties necessary to drive the getaway car at a high-speed chase in an attempt to avoid arrest. This Court does not believe that the defendant is as mentally, emotionally and cognitively disabled as the defense would have us believe. Here, the defendant shows more deliberation and planning than that which might be attributed to a typical retarded defendant. See, e.g., Kight v. State, 512 So.2d 922 (Fla.).
>
> This Court believes that the defendant had a meaningful choice as to whether or not to take the life of Karol Lea Hurst on February 21, 1978, and that the defendant, though impaired to some degree by his personal history, mental and emotional difficulties, nevertheless made the voluntary decision to take the life of Karol Lea Hurst, or at least to stand by and to do nothing to prevent the taking of such life. Moreover, there is evidence in the record to suggest that the defendant may have even encouraged his codefendant to take the life of the victim, if he himself was not the actual perpetrator.

The trial court at resentencing and this Court in approving that resentencing on the direct appeal properly took into account the evidence presented concerning Hall's mental qualities; merely repeating the assertion with different witnesses subsequently in a collateral pleading does not alter the fact that the Florida courts have properly determined that appellant's culpability in the fatal episode merits imposition of the death penalty. *See also* Alston v. State, --- So.2d ---, 23 Florida Law Weekly S453, 458 (Fla. 1998), wherein this Court most recently rejected a similar defense contention that low mental age precluded the death penalty:

> In his sixteenth issue, appellant alleges that the trial court erred in denying a

defense motion to prohibit imposition of the death penalty because of appellant's mental age. Appellant presented Dr. Risch, a clinical psychologist, who testified that because of appellant's borderline IQ, his mental age was between thirteen and fifteen. Appellant reasons that if executing a person who is chronologically less than sixteen years old is unconstitutional, *Allen v. State*, 636 So. 2d 494 (Fla. 1994), it follows that it would be unconstitutional to execute a person whose mental age is less than sixteen years. This claim has no merit. We have previously upheld the constitutionality of a death sentence upon a prisoner with a mental age of thirteen. *See Remeta v. State*, 522 So. 2d 825 (Fla. 1988).

ISSUE II

WHETHER HALL WAS RESENTENCED TO DEATH IN VIOLATION OF THE DUE PROCESS CLAUSE IN THAT HE IS ALLEGEDLY MENTALLY RETARDED PERSON WHO WAS NOT COMPETENT TO BE RESENTENCED.

Following the Huff hearing on July 2, 1997, the lower court ordered an evidentiary hearing "as to the issue of the Defendant Hall's competence to proceed in the re-sentencing hearing" (Vol. V, R. 736). Following an evidentiary hearing conducted August 25, 1997, the lower court entered its order denying relief. The court ruled:

> **SUB-CLAIM (B):** In its Order of July 2, 1997, this Court granted an evidentiary hearing on the issue of Defendant Hall's competence to proceed in the resentencing hearing. In support of the instant sub-claim, Defendant Hall presented the testimony of six witnesses during the evidentiary hearing held on August 25, 1997. Defendant Hall also introduced several documentary exhibits including his DOC inmate medical records for the period of time between 1978 and 1996.
>
> The State presented the testimony of one witness and introduced several documentary exhibits including Defendant Hall's inmate medical records from the Marion County Jail for the period of time immediately preceding and contemporaneous with the resentencing hearing.
>
> The evidence adduced during the evidentiary hearing on August 25, 1997, generally established that Defendant Hall possesses a variety of mental health deficits that have been diagnosed, and treated, by a plethora of mental health professionals since 1978. The testimony of Defendant Hall's resentencing counsel established that each member of his defense team was completely aware of Defendant Hall's mental condition and his mental history. Defendant Hall's

competence was a matter that each member of his resentencing defense team actively monitored as a result of their own interactions with Defendant Hall and with the experts who had evaluated him prior to the resentencing hearing. The subject of Defendant Hall's competence to proceed to the resentencing hearing was regularly discussed amongst the defense team themselves and was regularly discussed with the experts who had been appointed by this Court.

This Court was the same Court that presided over the Defendant in the resentencing hearing in 1990. This Court had the opportunity to then, and at numerous hearings since, observe and listen to the comments of the Defendant, and observe the interactions and interplay between counsel for the Defendant and the Defendant. The Court gives great weight to its opportunity to personally observe the Defendant in these proceedings, and to have the opportunity for the Defendant to speak to the Court in these various proceedings.

The Defendant was represented at the resentencing hearing by not one, not two, but three very competent, experienced, criminal defense attorneys. All three attorneys were extremely knowledgeable in criminal defense work at the time of resentencing, and were among the most experienced and able attorneys in this portion of central Florida at that time. All had considerable experience with death cases. All three continue to prosper in their legal careers, one having become a Circuit Court Judge, one having gone into private practice in criminal defense work, and the other being the most experienced attorney on the Public Defender's staff in the Fifth Judicial Circuit.

The Court has carefully considered all of the testimony received at the evidentiary hearing. While there is no doubt that the Defendant has serious mental difficulties, is probably somewhat retarded, and certainly has learning difficulties and a speech impediment, the Court finds that the Defendant was competent at the resentencing hearings. The

Court acknowledges that on this issue that reasonable minds may differ. In fact, there is a dispute in the evidence. Nevertheless, considering all of the evidence presented, including the Court's own knowledge of what occurred at the resentencing hearing by way of evidence, knowing the Defendant's involvement in the actual carrying out of the crime, and being otherwise advised in the premises, the Court believes that its ruling that the Defendant was competent at the time of resentencing is correct, at least by the greater weight of the evidence. The most substantial, competent evidence brought to bear on the issue supports this conclusion.

Furthermore, the experienced defense counsel for Mr. Hall at resentencing were very aware of his health issues and concerns. The defense availed themselves of numerous experts to evaluate the Defendant's mental status. Defense counsel were well aware of their ethical and legal obligations in regard to the issues concerning Mr. Hall's competence in regard to the resentencing hearing. Defense counsel were in continuous contact with Mr. Hall, as they had arranged for Mr. Hall to be incarcerated locally during the proceeding. This Court has no doubt that should these experienced, competent counsel have had any qualms as to whether or not Mr. Hall was legally competent to proceed at resentencing, that they would have brought this issue to the Court's attention in the appropriate manner. Accordingly, this Court finds absolutely no credibility to the claims of the Defendant that defense counsel were ineffective in any significant way in their alleged failure to bring the issues of the Defendant's alleged competency or not to the Court's attention at resentencing.

The testimony of the mental health experts offered during the evidentiary hearing wholly failed to establish that Defendant Hall was incompetent to proceed to the resentencing hearing in 1990. One of the experts opined that he believed that Defendant Hall was legally incompetent at the time of his evaluation in 1995, but could not render an

> opinion as to Defendant Hall's competence in 1990. The only expert who testified during the evidentiary hearing who ***did*** have an opinion regarding Hall's competence relevant to the resentencing hearing, Dr. Harry Krop, indicated that Hall was legally competent. Nothing has been demonstrated by the Defendant that undermines this Court's confidence in the outcome of the resentencing proceeding. The Court believes the Defendant received a very fair resentencing hearing.
>
> In sum, Defendant Hall has failed to establish, by any legal standard even arguably applicable to a post-conviction motion, that he was incompetent to proceed to the resentencing hearing. To the extent Defendant Hall alleges ineffective assistance of counsel as an element of the instant sub-claim, he has similarly failed to establish that the sub-claim has legal or factual merit.
>
> As **SUB-CLAIM (B)** of **CLAIM V** is without legal or factual merit, it is therefore **DENIED ON THE MERITS.**

(Vol. VI, R. 898-901)

(a) <u>The Evidentiary Hearing</u>:[10]

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[10]Appellee must respond to some of Hall's allegations. Hall argues (Brief, p. 22) that he required medication in order to maintain proper courtroom decorum. Dr. Krop testified that Hall had been taking anti-depressant, not anti-psychotic, medication.(Vol. VII, TR. 123) and the cross-examination of Dr. Fireman revealed that the anti-psychotic medication he found in the prison medical records were for years before and after -- not during -- the resentencing period in 1990. Fireman had never met Hall and did not have an opinion as to Hall's competence at that time (Vol. VII, TR. 205-206). Hall also refers to his I.Q. of 73 and brain damage -- matters which were covered by other experts in the resentencing proceeding, and significantly Krop opined below that Hall was competent for resentencing (Vol. VII, TR. 145,154). Krop saw no psychosis and Hall's illusions or adverse perceptual phenomenon were not viewed as hallucinations (Vol. VII, TR. 142-143). Hall's interest in superstition was not particularly significant in terms of competency to be resentenced (Vol. VII, TR. 144). As to Dr. Toomer -- who did testify at the resentencing proceeding in 1990 -- he could not testify that every retarded person cannot be competent (Vol. VII, TR. 180) and he was not asked by CCR to evaluate Hall's

The trial court correctly denied relief on the defense claim that Hall was incompetent to proceed at the 1990 resentencing. None of the four mental health experts called by the defense for the purpose of establishing Hall's alleged incompetence to be resentenced gave testimony opining that he was incompetent. Dr. Krop, who had been utilized by the defense team in preparation for the resentencing proceeding, testified that he did not find any indication Hall had ever been found incompetent (Vol. VII, TR. 138), there was no question of his competency in September of 1990 (Vol. VII, TR. 145) and his competency did not appear to be an issue based on his meeting with attorney Johnson and Johnson's meeting with Hall. He saw no evidence that Hall was ever incompetent and would not have waited to be asked if he had observed it (Vol. VII, TR. 153-155).

Dr. Toomer, who testified at resentencing about Hall's mental retardation and related problems, could not opine whether Hall was ever incompetent (Vol. VII, TR. 181-182) and stated that his 1988 reports don't reflect any indication he believed Hall to be

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competency in 1990 (Vol. VII, TR. 182). Defense attorney Graves thought Hall knew he was in the courtroom and that defense attorneys were trying to help him (Vol. VII, TR. 256). Dr. Zimmerman -- who repeated the resentencing experts testimony about low I.Q. and learning disability -- stated that Hall was on medication during his evaluation in 1995, five years after the resentencing proceeding (Vol. VII, TR. 212, 220); he could not opine whether Hall was competent now or in March or April of 1995 or in December of 1990 (Vol. VII, TR. 232-233).

incompetent (Vol. VII, TR.180).[11]

Psychiatrist Dr. Fireman has never met Hall and was not rendering an opinion on his mental competence in 1990 (Vol. VII, TR. 205-206). Psychologist Zimmerman could not testify whether Hall was incompetent in 1990 (Vol. VII, TR. 232-233).

Trial co-counsel Jenkins noted that with his medications Hall became less expressive of anger (Vol. VII, TR. 12-13). Hall knew she was an attorney, wanted her to communicate with the judge about prior police mistreatment years ago and she did so (Vol. VII, TR. 14, 16). She had rational conversations with him (Vol. VII, TR. 19) and filed a change of venue motion on his behalf citing his fears, which his lawyers believed were not irrational (Vol. VII, TR. 22, 32-33). Although Hall had a speech problem she was able to communicate with him (Vol. VII, TR. 28). At the resentencing proceeding the defense had introduced evidence of borderline retardation and that Hall was functionally illiterate (Vol. VII, TR. 37) and the mental health opinions solicited from Dr. Krop, Dr. Toomer and Dr. Heide was that he was competent to proceed (Vol. VII, TR. 39-40). Lead counsel Johnson stated that at times Hall was cooperative, at times not (Vol. VII, TR. 63). Ms. Jenkins helped him stay calm when he became agitated (Vol. VII, TR. 66). Hall wanted to be tried in Sumter County for a lesser chance of

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[11]Even had Toomer opined that Hall was incompetent and Judge Tombrink had rejected his testimony, that would not be an unprecedented occasion. James v. Singletary, 995 F.2d 187 (11th Cir. 1993).

being sentenced to death and Johnson filed a change of venue motion on his behalf (Vol. VII, TR. 77-79). The experts said he was not incompetent and Johnson had clients who were worse off (Vol. VII, TR. 82, 87). He utilized the services of Dr. Dorothy Lewis and Dr. Toomer whose testimony was presented to the jury and Dr. Krop (Vol. VII, TR. 85). Johnson testified that Hall understood that he was back in court for resentencing, maintained that a co-defendant killed Hurst, recognized and did not like the original trial judge, Judge Booth (Vol. VII, TR. 88-91). Johnson was able to present not only expert testimony of Hall's mental health problems but also lay evidence of a family history of abuse and neglect (Vol. VII, TR. 87-88). Co-counsel Graves testified that he and Johnson discussed the facts of the case with Hall, Hall shifted responsibility for the most culpable acts to the co-defendant and his statements were consistent with those previously given to law enforcement officers after his arrest. He understood the nature of the resentencing proceeding and desired not to be tried in Hernando County where the deputy sheriff had been killed (Vol. VII, TR. 243-245). Hall did not sleep during the resentencing proceeding and appeared to understand the defense theory that he should get life imprisonment since Ruffin had received that sentence (Vol. VII, TR. 249-250).

(b) Legal Analysis:

Florida Rule of Criminal Procedure 3.211(a) codifies what is

known as the Dusky[12] standard of competence, i.e. "whether the defendant has sufficient present ability to consult with counsel with a reasonable degree of rational understanding and whether the defendant has a rational, as well as factual, understanding of the pending proceedings".[13]

In the instant case, after conducting an evidentiary hearing in which no expert testified that Hall was incompetent to be resentenced in 1990 and in which the only expert who did have an opinion -- Dr. Krop who contemporaneously in 1990 had dealt with Mr. Hall -- thought appellant was legally competent (Vol. VI, TR. 145). According to Dr. Krop, Hall knew who the Public Defender was and trusted him; he felt positively about the people trying to help him. Hall knew he was there for resentencing and could be put back on death row (Vol. VII, TR. 137). Hall understood the seriousness of the outcome of the proceeding (Vol. VII, TR. 137). There was no indication he had ever been found incompetent (Vol. VII, TR. 138). Based on his evaluation of Hall and his knowledge of the history

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[12]Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960)

[13]On this appeal Hall is asserting only a substantive claim that he was in fact not competent to be resentenced in 1990; he does not contend that he was denied procedural due process of law by the trial court's failure *sua sponte* to conduct a competency hearing. For a comprehensive discussion on the difference between the two types of claims, see generally James v. Singletary, 957 F.2d 1562, 1569-1574 (11th Cir. 1992); Medina v. Singletary, 59 F.3d 1095, 1106-1107 (11th Cir. 1995); Card v. Singletary, 981 F.2d 481, 482-485 (11th Cir. 1992); Watts v. Singletary, 87 F.3d 1282, 1286-1290 (11th Cir. 1996), cert. denied, 138 L.Ed.2d 200 (1997).

and materials he reviewed Krop saw no evidence that Hall was ever incompetent. He always felt him to be competent (Vol. VII, TR. 154). Supportive of Dr. Krop's view, lead trial counsel Michael Johnson (currently a circuit judge) testified that he had rational conversations with Hall, who was sometimes cooperative and sometimes not (Vol. VII, TR. 62-63). For the most part Hall behaved very well during the resentencing, at times he became agitated and he spent time looking at a book (Vol. VII, TR. 66). Johnson had two experts reporting that Hall was competent (Vol. VII, TR. 82,87). Johnson could only recall one occasion in court during the course of the resentencing when Hall became a little loud at the table but he calmed down (Vol. VII, TR. 92). There was no change of behavior by Hall between the end of September and the December resentencing proceedings (Vol. VII, TR. 96). Hall understood that he was back in court for resentencing (Vol. VII, TR. 88). At diverse times they discussed some of the facts of the case and Hall consistently maintained that the co-defendant was responsible for the killing (Vol. VII, TR. 89-90).

Supporting testimony was also adduced from second chair counsel Michael Graves who testified that he and Johnson discussed the facts of the case with Hall, who shifted responsibility for the most culpable acts to his co-defendant and his statements were consistent with his post-arrest statements to law enforcement officers (Vol. VII, TR. 243-244). They discussed with Hall why he

was returning to court and he understood a decision was going to be made. Hall expressed a desire not to be tried in Hernando County because he feared for his safety there (Vol VII, TR. 245-247). Graves observed no difference or change with Hall between September and their meeting with Dr. Krop in Gainesville prior to jury selection (Vol VII, TR. 247). Defense counsel explained to Hall who would be testifying and what their purpose was (they were difficult stories about his past) (Vol. VII, TR. 248). And they explained the strategy of pointing out to the jury that co-defendant Ruffin had received a life sentence and that Hall should not receive a more severe sentence (Vol. VII, TR. 249). Hall recognized some of the witnesses including a witness from the 1968 trial. Hall was paying attention to what was going on (Vol. VII, TR. 250-251). See James v. Singletary, 995 F.2d 187, 188 (11th Cir. 1993), cert denied, 510 U.S. 896, 126 L.Ed.2d 214 (1993)(district court finding after an evidentiary hearing that defendant was competent not clearly erroneous where Dr. Mussenden opined that he was competent at the time of trial, counsel testified that he had no reason to believe defendant was incompetent, and under all the facts and circumstances, James had a reasonable degree of rational understanding both in terms of consulting with his lawyer and otherwise participating in the proceedings). And in Watts v. Singletary, 87 F.3d 1282 (11th Cir. 1996), cert denied, --- U.S. ---, 138 L.Ed.2d 200 (1993), the Court

of Appeals overturned the district court's grant of habeas corpus relief to a petitioner who failed to establish a bona fide doubt as to his competency during trial even though he slept through seventy percent of the proceedings. Some of the court's comments are apropos here:

> [10] Because legal competency is primarily a function of defendant's role in assisting counsel in conducting the defense, the defendant's attorney is in the best position to determine whether the defendant's competency is suspect. Accordingly, failure of defense counsel to raise the competency issue at trial, while not dispositive, is evidence that the defendant's competency was not really in doubt and there was no need for a *Pate* hearing.
>
> (Id. at 1288)

* * *

> Competency is contextual. (FN9) A criminal defendant represented by counsel generally has limited responsibilities in conducting his defense: (FN10) primarily, recognizing and relating relevant information to counsel and making the few trial-related decisions reserved for defendants (i.e., whether to plead guilty, whether to request a jury trial, whether to be present at trial, and whether to testify). The defendant need not participate in the bulk of trial decisions, which he may leave left entirely to counsel (how to select jurors, which witnesses to call, whether and how to conduct cross-examination, what motions to make, and similar tactical decisions). In this case, the judge monitored Watts throughout the trial, in particular confirming that Watts understood and stood by his decision not to testify, and verifying that Watts was communicating with his attorney. *See* Trial tr. at 482. We might speculate that Watts was unable to be of

> much use to his attorney in monitoring the testimony of witnesses and providing responsive information that could be useful for cross-examination. If Watts's attorney had encountered unforeseen or problematic testimony, however, there is no reason to believe that he could not have awakened Watts--requesting a recess if necessary--to explain and discuss the matter. (FN11) The record reveals nothing to suggest that Watts was incapable of providing the level of input necessary to mount an adequate defense. (FN12)

(Id. at 1288-1289)

The court concluded that even though Watts slept through much of the trial as a result of smoking crack at night the record was devoid of substantial evidence that Watts could not understand the proceedings or assist counsel in his defense and did not unequivocally generate a substantial doubt about his competency to stand trial. Id. at 1290.

The lower court's order reflects that it observed the interactions and interplay between counsel and the defendant at the 1990 resentencing (Vol. VI, R. 899) and it is undisputed that resentencing counsel did not seek a competency hearing and would have done so if there were expert support for it (Vol. VII, TR 40-41, 48, 93). *See also* Medina v. Singletary, 59 F.3d 1095, 1106-1107 (11th Cir. 1995)(a petitioner raising a substantive claim of incompetency is entitled to no presumption of incompetency and must demonstrate incompetency by a preponderance of the evidence; not every manifestation of mental illness demonstrates incompetence to stand trial and similarly, neither low intelligence, mental

deficiency, nor bizarre, volatile, and irrational behavior can be equated with mental incompetence to stand trial); McCune V. Estelle, 534 F.2d 611, 612 (5th Cir. 1976). The lower court's determination that Hall was competent at his resentencing proceeding in 1990 is not clearly erroneous and this Court should affirm. *See* United States v. Hogan, 986 F.2d 1364, 1372 (11th Cir. 1993)("We hold that a district court's determination that a defendant is competent to stand trial is not reviewed de novo, it is not reviewed with a hard look, it is not reviewed under anything other than a clearly erroneous standard."); *see also* Demosthenes v. Baal, 495 U.S. 731, 109 L.Ed.2d 762 (1990)[14].

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[14]Appellee respectfully submits that Hall failed in the lower court even to establish entitlement to an evidentiary hearing since his claim of the availability of experts to show Hall's I.Q. in the 70's range had already been submitted to judge and jury (and this Court) at resentencing and appeal; and any claim of incompetency based thereon could have been litigated at the direct appeal stage rather then collaterally. Presumably, out of an abundance of caution, the prosecutor's response to the Rule 3.850 motion suggested the desirability of an evidentiary hearing; Hall's resultant failure of proof at the hearing thus occasioned no harm. This Court should acknowledge the view expressed in Medina v. Singletary, 59 F.3d 1095, 1106 (11th Cir. 1995) that "To show entitlement to a post-conviction evidentiary hearing on a substantive competency claim 'the standard of proof is high [and] the facts must positively, unequivocally and clearly generate the legitimate doubt'". *See also* Card v. Singletary, 981 F.2d 481, 484 (11th Cir. 1992), cert. denied, 510 U.S. 839, 126 L.Ed.2d 86 (1993); Watts v. Singletary, 87 F.3d 1282, 1290 (11th Cir. 1996) cert. denied, --- U.S. ---, 138 L.Ed.2d 200 (1997).

ISSUE III

WHETHER EXECUTION BY ELECTROCUTION IS CRUEL AND/OR UNUSUAL PUNISHMENT UNDER THE STATE AND FEDERAL CONSTITUTIONS.

The question of whether execution by electrocution is unconstitutional as violative of the prohibition against cruel and unusual punishment is apparently not one of first impression in this jurisdiction. Appellee's research has unearthed Jones v. State, 701 So.2d 76, 80 (Fla. 1997), cert. denied, 140 L.Ed.2d 335 (1998), where a majority determined:

> We hold that electrocution in Florida's electric chair in its present condition is not cruel or unusual punishment.

See also Buenoano v. State, No. 92,622 (Fla. March 24, 1998) (order); Remeta v. State, 710 So.2d 543 (Fla. 1998); Stano v. State, 708 So.2d 271 (Fla. 1998).[15]

Since Florida's quadruple executions in March of this year, the States of Alabama, Georgia and Virginia have executed by electrocution Steven Allen Thompson on May 8, 1998, David Cargill on June 9, 1998, and Kenneth Manuel Stewart on September 23, 1998, respectively, with no judicial prohibition.

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[15]That other states may have in recent years either changed its method of execution or allowed an alternative method may be of some historical interest and obviously the State of Florida has no interest in dictating to sister states what their policy should be, but even in the examples cited by appellant, Virginia and South Carolina apparently retain electrocution as an optional choice. One wonders how barbaric the method can be if the prisoner is permitted to choose it?

The trial court also correctly ruled that such a challenge was procedurally barred as an issue that could properly be presented via direct appeal (Vol. VI, R 942-943).

ISSUE IV

WHETHER THE SUMMARY DENIAL OF ALL BUT ONE CLAIM IN THE 3.850 MOTION VIOLATED DUE PROCESS.

(a) Ineffective Assistance of Resentencing Counsel:

In the lower court appellant contended that resentencing counsel rendered ineffective assistance in failing to investigate and prepare additional mitigating evidence (Claim II, below, Vol. III, R. 346-350), in failing to provide mental health experts with available information (Claim IV, Vol. III, R. 352-357), again failed to adequately investigate and prepare the defense case (Claim VII, Vol. III, R. 369-375), and in failing to convince the judge for additional peremptory challenges at resentencing (Claim XXIV, Vol. III, R. 418).

Since appellant's abbreviated argument does not discuss the lower court's reasons for summary disposition of the claim, appellee will refer to the lower court's order:

> **CLAIM II**
>
> **CLAIM II** is among those claims found by this Court to be procedurally barred or legally insufficient and, therefore, was summarily denied by this Court's Order of July 2, 1997. The Court makes the following findings of fact and conclusions of law in support of its previous Order regarding this claim:
>
> Defendant Hall alleges generally that Defendant Hall's trial counsel were ineffective in their investigation, preparation and conduct of the resentencing proceeding. Specifically, Defendant Hall asserts that the attorneys who represented Mr. Hall during his resentencing proceeding failed

to present, or otherwise pursue, evidence that Mack Ruffin admitted shooting Karol Hurst.

Contrary to allegations raised in the instant claim, Defendant's resentencing counsel called Arthur Pepper Freeman to testify as a defense witness during the resentencing proceeding. In response to questions posed by Defendant's counsel, Mr. Freeman testified that he was a Deputy Sheriff with the Sumter County Sheriff's Office in 1978 and, in that capacity, had several contacts with Mack Ruffin, Jr. Mr. Freeman's testimony proceeded as follows:

> [Defendant's resentencing counsel]
> Q. 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 [sic] Lea Hurst was shot?
>
> [Arthur Freeman]
> A. I did.
>
> Q. Did Mr. Ruffin, sir, tell you who shot Carol [sic] 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 you [sic] 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 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.

Q. So Mr. Ruffin shot her to prove himself to be a man?

A. (Nodding head.)

RT.[1] 1605-1606.

In addition to presenting the testimony of Arthur Freeman, Defendant's counsel made

[1] References to the transcript of the resentencing proceeding, as paginated in the Record on Appeal, will be indicated as "RT. [pg. no.]".

the following arguments to the jury:

> Recall Deputy Freeman's testimony, former Deputy Freeman. He was in and out of here so many times yesterday I couldn't keep up with him. He testified that Mack told him that the reason he shot Ms. Hurst was because she could identify him, Mack. Interesting that the State didn't call Mr. Freeman to the stand initially. We had to call Mr. Freeman to the stand initially. Curious question, perhaps the State didn't want you to hear that Mack Ruffin had admitted sexually Battering Ms. Hurst. Perhaps the State didn't want you to hear that Mack Ruffin shot Ms. Hurst.

RT. 2061-2062.

> Now, you see, Mr. Freeman testified back in 1978 after Mack Ruffin was convicted. He's not making that up. Mack Ruffin told him, I shot the girl... We called him, cause we wanted you to hear the truth about who killed Mrs. Hurst on February 21st.

RT. 2063.

> Because of his [Defendant Hall's] immaturity and his level ofdevelopment he tried to talk Mack out of shooting her. Mack Ruffin, a smarter person, the one with mental health, the one with the capacity to kill, what does he do, he says initially, Freddie did it. But Detective Freeman, Arthur Freeman, he says, I shot Carol [sic] Hurst. Mack Ruffin got life... And finally number twenty-nine. Mack Ruffin, the actual killer, the person convicted for sexual battery, the man who shot Deputy James, the man

who had Ben Hurst's lighter in his pocket, got life.

RT. 2082.

The factual basis asserted to support the instant claim is misleading and fails to address the evidence that *was* presented by Defendant's resentencing counsel when Ruffin refused to testify. Notwithstanding the fact that the instant claim is refuted by the record, Defendant Hall's allegation that resentencing counsel could be found to have rendered ineffective assistance because the co-defendant refused to testify is absurd and devoid of merit on its face.

To the extent that Defendant Hall also asserts that resentencing counsel were ineffective for failing to present evidence that he was "treated differently" than Ruffin, his claims are similarly refuted by the record. Defendant's resentencing counsel introduced evidence establishing that Ruffin was sentenced to life for his role in the murder of Karol Hurst and argued the significance of that evidence to the jury.

As **CLAIM II** is refuted by the record and otherwise without merit, it is therefore **SUMMARILY DENIED**.

(Vol. VI, R. 888-892)

* * * *

CLAIM IV

CLAIM IV is among those claims found by this Court to be procedurally barred or legally insufficient and, therefore, was summarily denied by this Court's Order of July 2, 1997.

This Court makes the following findings of fact and conclusions of law in support of its previous Order regarding this claim:

Defendant Hall alleges **(A)** that he was denied effective assistance of counsel "in that counsel failed to provide mental health

experts with available information which the experts needed to make an accurate competency determination." Defendant Hall further alleges **(B)** that "the state withheld material exculpatory information needed to reach such a determination."

SUB-CLAIM A: The instant sub-claim is evidenced by Defendant Hall's repeated allegation that he was not "re-evaluated" on the issue of his competence in connection with the resentencing proceeding, and Defendant Hall's further allegation that resentencing counsel failed to conduct an adequate investigation into Defendant Hall's background and failed to provide information necessary for an expert to make an accurate competency determination. Defendant Hall professes that he is now in possession of a plethora of expert opinions that would establish: (a) that he is mentally retarded having an IQ of 73; (b) that he if functionally illiterate; (c) that he has memory deficits and probable brain damage; (d) that he was under the influence of extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and (e) that an expert will testify that the said information was available during Defendant Hall's resentencing but was not presented. This Court finds that the record of the resentencing proceeding clearly reveals that the instant allegations are false. Defendant Hall's allegations are, in fact, so completely refuted by the record that they can only be characterized as spurious.

Defendant's resentencing counsel moved for, and was granted, a confidential mental health expert (RT. 50). The record also reveals that the trial court ordered the expert, Dr. Harry Krop, to examine Defendant Hall in accordance with Fla.R.Crim.P. 3.216(a) and to report directly to Defendant's resentencing counsel relative to "whether the Defendant is competent to stand trial pursuant to the criteria set forth in 916.12(1) Florida Statutes" (RT. 51). An order was subsequently

entered directing payment to Dr. Krop in the amount of $425.00 for expert services including a "psychological evaluation" (RT. 67).

The record further reveals significant effort by Defendant's resentencing counsel to develop and present evidence regarding Defendant Hall's background. During the resentencing hearing, Defendant Hall's counsel introduced the following evidence:

(1) testimony of Defendant Hall's attorney from Hall's 1967 rape trial (RT. 1533);
(2) testimony of the custodian of records for the Sumter County school system who introduced all of Defendant Hall's school records, including teacher comments, dating back to 1952 (RT. 1553);
(3) testimony from Defendant Hall's attorney from the original trial of the instant cause (RT. 1562);
(4) testimony from five of Defendant Hall's nine surviving siblings (RT. 1571, 1590, 1625, 1632, 1654);
(5) testimony from two of Defendant Hall's nieces (RT. 1616, 1658); and
(6) testimony from a long-time family friend (RT. 1574).

Hall's resentencing counsel also submitted, for inclusion in the record, the deposition transcripts of three other surviving siblings (Suppl.[2] 90, 123, 148).

The record also reveals that Defendant's resentencing counsel:

(1) introduced the testimony of a psychiatrist (RT. 1703; Suppl.

[2] References to the "Supplemental Transcript To The Record On Appeal" of the resentencing proceeding will be indicated as "Suppl. [pg. no.]".

1), a psychologist (RT. 1742), and a criminologist/licensed mental health counselor (RT. 1822) all of whom testified that Defendant Hall was mentally retarded [the psychologist placing Defendant Hall's IQ at 60 (RT. 1749)], and all of whom testified that they were provided, and relied upon, information from Defendant Hall's siblings as to his background, medical and mental history, and upbringing;

(2) introduced the testimony of a speech pathologist who testified that Defendant Hall was functionally illiterate (RT. 1706);

(3) introduced, through the previously mentioned psychiatrist, the report of a neurologist whose examination of Defendant Hall revealed "evidence of poor memory and probable retardation" and indications of "disfunction or possible injury" on the right side of the brain (Suppl. 19-20), as well as the report of a neuropsychologist who examined Defendant Hall and concluded that Defendant Hall's test results were "characteristic of patients with serious brain damage: (Suppl. 21); and

(4) introduced the testimony of the said psychiatrist, psychologist and criminologist/licensed mental health counselor who all opined that Defendant Hall was under the influence of an extreme mental or emotional disturbance, that he lacked the capacity to appreciate the criminality of his conduct and that his ability to conform his conduct to the requirements of

the law was substantially impaired (Suppl. 39-40, RT. 1772-1773, RT. 1848-1854).

In sum, this Court finds that Defendant Halls's claims regarding the investigation and evidentiary presentation of his mental health mitigation by his resentencing counsel are completely refuted by the record and therefore are summarily denied on the merits.

Defendant Hall also alleges that "trial counsel" failed to present evidence and argument that "Mr. Hall's mental retardation and brain damage precluded him from forming the 'intent' needed for the first-murder" [sic]. Defendant Hall's suggestion that counsel was ineffective for failing to present evidence and argument that Defendant Hall's mental condition precluded him from forming the intent necessary to commit murder either misapprehends the intent relevant in a capital sentencing proceeding or, in the alternative, relates to a guilt phase issue. In either instance, this Court concludes as a matter of law that the claim is procedurally barred as it should have been raised on direct appeal.

As **SUB-CLAIM (A)** of **CLAIM IV** is without merit and/or procedurally barred, it is therefore **SUMMARILY DENIED.**

(Vol. VI, R. 893-896)

* * * *

CLAIM VII

CLAIM VII is among those claims found by this Court to be procedurally barred or legally insufficient and, therefore, was summarily denied by this Court's Order of July 2, 1997.

This Court makes the following findings of fact and conclusions of law in support of its previous Order regarding this claim:

Defendant Hall alleges that he was "denied effective assistance of counsel at the resentencing phase of his trial", that Defendant's resentencing counsel "failed to adequately investigate and prepare the defense

case and challenge to the state's case" and that "a full adversarial testing did not occur".

This claim is evidenced initially by Defendant Hall's allegation that his resentencing counsel failed to request that Defendant Hall be re-evaluated for his competency prior to the resentencing trial. As discussed above, regarding **CLAIM IV**, this Court finds that the instant allegation is false and clearly refuted by the record.

Defendant Hall next alleges that Defendant's resentencing counsel were ineffective for failing to ask questions of the potential jurors regarding mental health issues. Defendant Hall specifically alleges that "Defense counsel only asked one question about the juror's opinions about mental health experts... [and nothing about] biases and feelings about psychiatrists and psychologists in general, and the importance of forensic mental health testimony." This Court finds that the record reveals Defendant Hall's characterization to be misleading. During the questioning of the initial panel of prospective jurors, Defendant's resentencing counsel inquired of the panel as a whole, and four individual jurors in particular, as to their opinions about mental health experts in general and experts' ability to understand a person's behavior (RT. 833-836). Counsel was met with mixed responses including two jurors who indicated that they worked with mental health professionals (RT. 835-836). The second panel was asked similar questions with the addition of counsel's inquiry as to the jurors' personal experiences with persons suffering from mental illness (RT. 947-949). The subject was again part of counsel's inquiry with the third, and final, panel of jurors (RT. 1177). As the record refutes Defendant Hall's allegations with regard to the *voir dire* conducted by Defendant's resentencing counsel on mental health issues, the claim is summarily denied.

Even if Defendant Hall's allegation had been accurate and counsel had asked only "one question" regarding mental health issues,

Defendant Hall has cited no authority to support the proposition that such conduct would constitute constitutionally deficient performance by his attorneys. Similarly, this Court finds that Defendant Hall has failed to allege, much less establish, that this purported deficiency had any affect on the outcome of the proceedings. The claim is improperly pled and therefore is summarily denied for failing to allege a claim of ineffective assistance of counsel within the requirements of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Defendant Hall also alleges that Defendant's resentencing counsel rendered ineffective assistance in that they did not present evidence or argument that Defendant Hall's mental condition prevented him from forming the intent necessary to find the "HAC" aggravator[3]. The record reflects the argument made by Defendant's resentencing counsel on this aggravator was directed to Defendant Hall's evidence that the co-defendant was responsible for the murder (RT. 2062-2063). Defendant Hall's mental condition was argued as mitigation (RT. 2064-2073). Assuming that Defendant Hall's intent is an issue as to the "HAC" aggravator, clearly, the claimed deficiency represents no more than counsel's logical choice of tactics. Having presented evidence that Defendant Hall was not the murderer, this Court finds that it would be completely inconsistent to then argue that his mental condition prevented him from forming the "intent" necessary to find the "HAC" aggravator proven. The record refutes the allegation and the claim therefore is summarily denied.

In the alternative, this Court finds that the instant allegation is conclusory as it neither cites any authority in support of the proposition that "intent" is an element of the "HAC" aggravator, nor alleges that the claimed deficiency would have had any affect upon the jury's recommendation or the trial court's

[3] §921.141(5)(h) Florida Statutes.

sentence.

As **CLAIM VII** is refuted by the record and/or legally insufficient, it is therefore **SUMMARILY DENIED.**

(Vol. VI, R. 902-905)

* * * *

[CLAIM XXIV]

SUB-CLAIM (B): Defendant Hall also alleges that his resentencing counsel rendered ineffective assistance of counsel when counsel "failed to convince the judge for [sic] additional peremptory challenges during his sentencing hearing." The claim is evidenced by Defendant Hall's further allegation that "[t]he failure of the trial court to provide the defense counsel with an additional preemptory [sic] challenge violated Mr. Hall's rights..."

The issue of the trial court's denial of Defendant Hall's request for additional peremptory challenges was raised on direct appeal to the Florida Supreme Court. ***Hall VIII***, 614 So.2d at 476.

As this issue already has been decided on direct appeal, the issue is procedurally barred. *Procedural Bar cases.* The Florida Supreme Court has held that a procedural bar cannot be avoided by simply couching otherwise-barred claims in terms of ineffective assistance of counsel. *Procedural Bar cases.*

As **SUB-CLAIM (B)** of **CLAIM XXIV** is procedurally barred, it is therefore **SUMMARILY DENIED.**

(Vol. VI, R. 937)

That appellant has not addressed at all why he perceives the lower court's thorough, detailed, comprehensive and well-reasoned order to be erroneous is telling; it tells this Court that he cannot find any and that there is no error.

I. **THE LEGAL STANDARD**.

The courts have repeatedly acknowledged that highly deferential review of counsel's conduct is warranted in an ineffective assistance challenge especially where strategy is involved; intensive scrutiny and second-guessing of attorney performance are not permitted. Spaziano v. Singletary, 36 F.3d 1028 (11th Cir. 1994); Routly v. Singletary, 33 F.3d 1279 (11th Cir. 1994). Judicial scrutiny is highly deferential because the craft of trying cases is far from an exact science and is replete with uncertainties and obligatory judgment calls. Bolender v. Singletary, 16 F.3d 1547 (11th Cir. 1994). The test for determining whether counsel's performance was deficient is whether some reasonable lawyer at trial could have acted under the circumstances as defense counsel acted at trial; the test has nothing to do with what the best lawyers would have done or what most good lawyers would have done. White v. Singletary, 972 F.2d 1218 (11th Cir. 1992).

The standard is not how present counsel would have proceeded in hindsight, but rather whether there was both a deficient performance and whether the deficiency compromised the process to such a degree as to undermine confidence in the correctness of the result. Ferguson v. Singletary, 632 So.2d 53 (Fla. 1993). *See* Woods v. State, 531 So.2d 79, 82 (Fla. 1988)("More is not necessarily better"); Maxwell v. State, 490 So.2d 927, 932 (Fla.

1986)("The fact that a more thorough and detailed presentation could have been made does not establish counsel's performance as deficient"); Foster v. Dugger, 823 F.2d 402, 406 (11th Cir. 1987)(the mere fact that other witnesses might have been available or other testimony might have been elicited is not a sufficient ground to prove ineffectiveness); Stewart v. Dugger, 877 F.2d 851 (11th Cir. 1989)(proffer of additional character witnesses would not have had significant impact on the trial as it was merely cumulative); Kennedy v. Dugger, 933 F.2d 905 (11th Cir. 1991)(failure to present cumulative witnesses did not amount to ineffectiveness); Waters v. Thomas, 46 F.3d 1506, 1511 (11th Cir. 1995)(en banc)("we have never held that counsel must present all available mitigating circumstance evidence in general. . .").

Appellee would encourage the Court to disabuse Hall of the mistaken notion that the mere invocation of the Sixth Amendment right to effective assistance of counsel -- like some mantra in a Hindu rite -- suffices to be awarded an evidentiary hearing. Both the state and federal courts have not hesitated in approving the summary denial of post-conviction relief where the pleadings and record demonstrate that a hearing is unnecessary. *See, e.g.*, Provenzano v. Singletary, 148 F.3d 1327 (11th Cir. 1998); Provenzano v. Dugger, 561 So.2d 541 (Fla. 1990); Provenzano v. State, 616 So.2d 428 (Fla. 1993); Atkins v. Singletary, 965 F.2d 952 (11th Cir. 1992); Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989);

Kennedy v. Dugger, 933 F.2d 905 (11th Cir. 1991); Kennedy v. State, 547 So.2d 912 (Fla. 1989); Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988); Puiatti v. Dugger, 589 So.2d 231 (Fla. 1991).

The seminal decision in this area Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674 (1984) explained the deleterious cost to society in the automatic grant of post-conviction inquiry:

> Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy."
>
> * * *
>
> The availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation would encourage the proliferation of ineffectiveness challenges. Criminal trials resolved unfavorably to the defendant would increasingly come to be followed by a second trial, this one of counsel's unsuccessful defense. Counsel's performance and even willingness to serve could be adversely affected. Intensive scrutiny of counsel and rigid requirements for acceptable assistance could dampen the ardor and impair the independence of defense counsel, discourage the acceptance of assigned cases, and undermine the trust between attorney and client.
>
> (80 L.Ed.2d at 694-95)
> (emphasis supplied)

The Strickland Court even concluded with the observation that:

> The state courts properly concluded that the ineffectiveness claim was meritless without

holding an evidentiary hearing.

(80 L.Ed.2d at 702)

In the recent decision of Provenzano v. Singletary, *supra*, the court rejected the defense argument that he should have been accorded an evidentiary hearing on the claims that the trial court improperly failed to grant a change of venue even though counsel tactically chose not to pursue the remedy; habeas counsel argued that an evidentiary hearing was needed to determine the reasonableness of the tactic, pointing to an affidavit submitted by another defense lawyer. The Court of Appeals explained its reasons for rejecting the argument:

> Even if the affidavit had said that its author would have insisted on a change of venue, it would establish only that two attorneys disagreed about trial strategy, which is hardly surprising. After all, "[t]here are countless ways to provide effective assistance in any given case," and "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." Strickland v. Washington, 466 U.S. 668, 689, 104 S. Ct. 2052, 2065 (1984); accord, e.g., Waters v. Thomas, 46 F.3d 1506, 1522 (11th Cir. 1995) (en banc) ("Three different defense attorneys might have defended Waters three different ways, and all of them might have defended him differently from the way the members of this Court would have, but it does not follow that any counsel who takes an approach we would not have chosen is guilty of rendering ineffective assistance."). In order to show that an attorney's strategic choice was unreasonable, a petitioner must establish that no competent counsel would have made such a choice. See, e.g., White v. Singletary, 972 F.2d 1218, 1221 (11th Cir. 1992) (defendant must establish

"that the approach taken by defense counsel would have been used by no professionally competent counsel"); Harich v. Dugger, 844 F.2d 1464, 1470-71 (11th Cir. 1988) (same). Even if accepted as gospel, the affidavit does not do that.

There is another more fundamental reason why Provenzano is not entitled to an evidentiary hearing on the reasonableness of his counsel's decision to forego a change of venue, regardless of any affidavit he may have proffered. Our Jackson, Horton, and Bundy decisions establish that the reasonableness of a strategic choice is a question of law to be decided by the court, not a matter subject to factual inquiry and evidentiary proof. Accordingly, it would not matter if a petitioner could assemble affidavits from a dozen attorneys swearing that the strategy used at his trial was unreasonable. The question is not one to be decided by plebiscite, by affidavits, by deposition, or by live testimony. It is a question of law to be decided by the state courts, by the district court, and by this Court, each in its own turn.

Provenzano v. Singletary, 148 F.3d 1327 at 1331-1332 (11th Cir. 1998)

* * *

Our strong reluctance to second guess strategic decisions is even greater where those decisions were made by experienced criminal defense counsel. See Spaziano v. Singletary, 36 F.3d 1028, 1040 (11th Cir. 1994) ("[T]he more experienced an attorney is, the more likely it is that his decision to rely on his own experience and judgment in rejecting a defense without substantial investigation was reasonable under the circumstances.") (quoting Gates v. Zant, 863 F.2d 1492, 1498 (11th Cir. 1989)). At the time of Provenzano's trial, one of his two counsel had tried eighty-seven criminal cases and had been lead counsel in nine capital cases. The other attorney had tried even more criminal cases in general and

> capital cases in particular, had been practicing twenty years, and had earned the reputation in the Bar and community as a leading criminal defense attorney. Clearly, these two experienced criminal defense attorneys knew what they were doing; their decisions were informed by years of experience with juries in capital and non-capital cases. We will not second guess their considered decision about whether Provenzano stood a better chance, however slim it may have been, with a jury in Orlando than with a jury in St. Augustine. As we said in Spaziano, 36 F.3d at 1039, cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between, and cases in which deliberate strategic decisions have been found to constitute ineffective assistance are even fewer and farther between. This is not one of those rare cases.
>
> Provenzano v. Singletary, 148 F.3d 1327 at 1332 (11th Cir. 1998)

With respect to a claim that Provenzano's trial counsel rendered ineffective assistance at the penalty phase for failing to put on additional mitigating evidence pertaining to mental health, the Court determined:

> In this case, Provenzano has brought forth a report from another mental state expert indicating that additional mitigating circumstance evidence could have been put before the jury. See id. We noted in Waters that it is "a common practice" to file affidavits from witnesses who say they could have provided additional mitigating circumstance evidence, but "the existence of such affidavits, artfully drafted though they be, usually proves little of significance." See id. at 1513. We reiterated in that decision what we had said more than once before: "The mere fact that other witnesses might have been available or that other

testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel." Id. at 1514, quoting Atkins v. Singletary, 965 F.2d 952, 960 (11th Cir. 1992); Foster v. Dugger, 823 F.2d 402, 406 (11th Cir. 1987).

In this case, Provenzano's experienced criminal defense attorneys retained investigators, interviewed myriad witnesses including family members, examined medical records, and assembled background information about their client. They forwarded that information to the mental state experts they obtained. See Provenzano v. Singletary, manuscript op. at 33, 1997 WL 909440 at *19. At trial, they presented two mental state experts, who were well versed in Provenzano's background and behavior, and who testified to his serious mental problems, giving their opinion that he was insane at the time of the crime. See id., manuscript op. at 32-33, 59-61, 1997 WL 909440 at *19, *32-34. Counsel used that expert testimony skillfully in arguments to the jury at the penalty stage. See id., manuscript op. at 59-60, 1997 WL 909440 at *32-*34.

Provenzano's counsel also used his sister as a guilt stage witness on the insanity issue. She testified in depth about her brother's life and problems. At the penalty stage, counsel called a detective who testified about Provenzano's paranoid behavior, and also about Provenzano having told officers about explosives in his apartment because he did not want them to get hurt. They also called Provenzano himself as a witness in his own behalf at penalty stage, and it appears from the record that he testified for about two hours. See Waters v. Zant, 46 F.3d at 1519 (recognizing that skilled defense counsel sometimes put a capital defendant on the stand to "humanize" him, because "it may be more difficult for a jury to condemn to death a man who has sat on the stand a few feet from them, looked them in the eyes, and talked to them."). Provenzano received effective assistance of counsel at the penalty stage.

Provenzano v. Singletary, 148 F.3d 1327 at 1333 (11th Cir. 1998)

In the instant case trial counsel acted as an advocate as required by Strickland as the trial record and the lower court's order confirms. This Court should affirm the denial of post-conviction relief.

Finally, it is not clear whether appellant seeks to challenge the lower court's determination rejecting Hall's view that counsel rendered ineffective assistance in violation of the Sixth Amendment with regard to Hall's alleged incompetency at the resentencing proceeding. It would be understandable if Hall were to abandon such a claim because after the lower court heard the testimony of resentencing counsel Jenkins, Johnson and Graves, the court ruled:

> Furthermore, the experienced defense counsel for Mr. Hall at resentencing were very aware of his health issues and concerns. The defense availed themselves of numerous experts to evaluate the Defendant's mental status. Defense counsel were well aware of their ethical and legal obligations in regard to the issues concerning Mr. Hall's competence in regard to the resentencing hearing. Defense counsel were in continuous contact with Mr. Hall, as they had arranged for Mr. Hall to be incarcerated locally during the proceeding. This Court has no doubt that should these experienced, competent counsel have had any qualms as to whether or not Mr. Hall was legally competent to proceed at resentencing, that they would have brought this issue to the Court's attention in the appropriate manner. Accordingly, this Court finds absolutely no credibility to the claims of the Defendant that defense counsel were ineffective in any significant way in their alleged failure to bring the issues of the Defendant's alleged

competency or not to the Court's attention at resentencing.

(Vol. VI, R. 900-901)

If Hall is now abandoning such a claim by the failure to advance it on appeal -- see, e.g., Duest v. Dugger, 555 So.2d 849, 852 (Fla. 1990)(Merely making reference to arguments below without further elucidation does not suffice to preserve issues...) that abandonment would be understandable. *See* Provenzano v. Dugger, 561 So.2d 541, 546 (Fla. 1990)("The mere fact that Provenzano has now secured an expert who might have offered more favorable testimony is an insufficient basis for relief."); Hill v. Dugger, 556 So.2d 1385 (Fla. 1990)(proffer of additional information by mental health expert is nothing more than cumulative to the evidence already presented to the jury); Stano v. State, 520 So.2d 278, 281 (Fla. 1988)("That Stano has now found experts whose opinions may be more favorable to him is of no consequence.").

(b) No Other Issues Require an Evidentiary Hearing:

Appellant implicitly acknowledges that the only claim subject to an evidentiary hearing was the assertion that resentencing counsel rendered ineffective assistance (by failing to address any other ruling of the lower court).[16] While appellee agrees that the

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[16]Similarly, the lower court's order of July 11, 1997 following the Huff hearing noted defense counsel's declining "to make argument at that time" (Vol. V, R. 736). It is reminiscent of Hall's counsel's deliberate bypass years ago in presenting evidence. Hall v. Wainwright, 805 F.2d 945, 948 (11th Cir. 1986)(Hall V); Hall v. State, 420 So.2d 872 (Fla. 1982)(Hall II).

question of resentencing counsel's effectiveness is cognizable via Rule 3.850 -- but the lower court properly denied an evidentiary hearing as explained, *supra* -- the remainder of the claims either contained no supporting facts, were cognizable on direct appeal, were procedurally barred as claims that could have, should have been or were raised on prior appeal or prior post-conviction applications and thus barred as successive and abusive pleadings. And the lower court correctly so ruled. See Hall I, II, III, IV, V, VI (see also, Vol. VI, R. 887, 892, 902, 905, 918, 919, 920, 922, 924, 926, 928, 930, 931, 932, 933, 934, 936, 937, 939, 940, 941, 943, 944, 945). *See e.g.*, Kokal v. Dugger, --- So.2d ---, 23 Florida Law Weekly S397, fn. 14, 15 (1998); Buenoano v. State, 708 So.2d 941, 951, n 8 (Fla. 1998)(defendant not permitted to continue to raise ineffective counsel claims in piecemeal fashion); Pope v. State, 702 So.2d 221 (Fla. 1997); Melendez v. State, --- So.2d ---, 23 Florida Law Weekly S350 (Fla. 1998); Diaz v. State, --- So.2d ---, 23 Florida Law Weekly S332, fn. 6 & 7 (Fla. 1998); N. Parker v. State, --- So.2d ---, 23 Florida Law Weekly S293 (Fla. 1998)(claims procedurally barred on second 3.850 Motion for failure to object at trial, for having raised issue on direct appeal, for having raised issues in prior motions or petitions); Demps v. State, --- So.2d ---, 23 Florida Law Weekly S205 (Fla. 1998); Johnston v. State, --- So.2d ---, 23 Florida Law Weekly S128 (Fla. 1998); Robinson v. State, 707 So.2d 688 (Fla. 1998); Grossman v. Dugger, 708 So.2d

249, fn. 6 (Fla. 1998); Clark v. State, 690 So.2d 1280 (Fla. 1997) (no error in failing to hold evidentiary hearing on Brady, Giglio claims where facts insufficiently alleged).

ISSUE V

WHETHER THE MITIGATING FACTORS OUTWEIGHED THE AGGRAVATING FACTORS.

The lower court disposed of this claim -- issue XXVII, below, as follows:

> **CLAIM XXVII** is among those claims found by the Court to be procedurally barred or legally insufficient and, therefore, was summarily denied by the Court's Order of July 2, 1997.
>
> This Court makes the following findings of fact and law in support of its previous Order:
>
> Defendant Hall alleges that the resentencing court failed to independently weigh aggravating and mitigating circumstances and applied the wrong legal standard. These issues were raised on the direct appeal and specifically addressed by the Florida Supreme Court. ***Hall VIII***, 614 So.2d at 477.
>
> Post-conviction motions are not to be used as second appeals and claims or issues raised in a post-conviction motion that were, or could have been, raised on direct appeal are procedurally barred. *Procedural Bar cases*. The Florida Supreme Court also has held that a procedural bar cannot be avoided by simply couching otherwise-barred claims in terms of ineffective assistance of counsel. *Procedural Bar cases*. To the extent Defendant Hall incorporates a claim of ineffective assistance of counsel herein, the issue constitutes impermissible "couching" and is subject to procedural bar.
>
> As **CLAIM XXVII** is procedurally barred, it is therefore **SUMMARILY DENIED**.

(Vol. VI, R 939-940)

On Mr. Hall's last visit to this Court, the direct appeal from the resentencing imposing a sentence of death, this Court wrote on January 14, 1993:

[17] Hall also attacks the trial judge's findings in regards to the mitigating evidence. We disagree that the judge committed reversible error or that death is disproportionate for this killing. The judge considered four statutory mitigators and more than twenty items of nonstatutory mitigating evidence grouped into three general areas, i.e., mental, emotional, and learning disabilities; abused and deprived childhood; and disparate treatment of co-perpetrator. Although the judge initially stated that some of the mitigating evidence was "unquantifiable," he later spent almost six pages analyzing the mitigating evidence and concluded that whatever mitigators had been established did not outweigh the aggravators.

[18][19] In considering allegedly mitigating evidence the court must decide if "the facts alleged in mitigation are supported by the evidence," if those established facts are "capable of mitigating the defendant's punishment, i.e., ... may be considered as extenuating or reducing the degree of moral culpability for the crime committed", and if "they are of sufficient weight to counterbalance the aggravating factors." Rogers v. State, 511 So.2d 526, 534 (Fla.1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988); Campbell v. State, 571 So.2d 415 (Fla.1990). "The decision as to whether a mitigating circumstance has been established is within the trial court's discretion." Preston, 607 So.2d at 412. The judge carefully and conscientiously applied the Rogers standard and resolved the conflicts in the evidence, as was his responsibility. Gunsby v. State, 574 So.2d 1085 (Fla.), cert. denied, --- U.S. ---, 112 S.Ct. 136, 116 L.Ed.2d 103 (1991). The record supports his conclusion that the mitigators either had not been established or were entitled to little weight. Preston; Ponticelli v. State, 593 So.2d 483 (Fla.1991), vacated on other grounds, --- U.S. ----, 113 S.Ct. 32, 121 L.Ed.2d 5 (1992).

> [20] We also reject Hall's claim that his death sentence is not proportionate. These crimes were a joint operation, with each defendant responsible for the other's acts. James v. State, 453 So.2d 786 (Fla.), cert. denied, 469 U.S. 1098, 105 S.Ct. 608, 83 L.Ed.2d 717 (1984). Even though Ruffin received a life sentence, the different treatment given Hall is appropriate. As noted by the trial judge, Hall was bigger and older than Ruffin and was the leader. Before the date of this crime he had been convicted of a violent crime and was on parole, whereas Ruffin had no such criminal history. Also, Ruffin's resentencing jury recommended that he be sentenced to life imprisonment. Hall, on the other hand, has received a death recommendation from every jury he has appeared before. The disparate treatment is fully warranted. (FN6) The aggravators clearly outweigh the mitigating evidence, and this cruel, cold-blooded murder clearly falls within the class of killings for which the death penalty is properly imposed. E.g., Swafford (victim abducted, raped, and killed); Engle (same); Cave (co-perpetrators abducted, raped, and killed victim; defendant not actual killer); Copeland (same).
>
> Hall v. State, 614 So.2d 473, 478-479 (Fla. 1993)

The affirmance of the death sentence was over the spirited dissent of Justice Barkett whose views on Hall's asserted mental problems could not command a majority. If appellant is seeking a belated rehearing -- five years later -- asking this Court to now determine the opposite, that mitigating outweighs the aggravating factors, he is both untimely and the effort is successive since this Court denied rehearing on March 22, 1993. Appellee submits that it should accord Hall no benefit for current counsel to parrot

Justice Barkett's disagreement with the trial judge that "It would appear that the trial judge did not understand the nature of mental retardation." 614 So.2d at 481. (Brief, p. 41). Obviously, the majority voting for affirmance understood the appropriate, relevant concepts.

The law is well settled that a capital defendant may not use the post-conviction vehicle as a substitute for a second appeal or to relitigate prior considered claims. *See* Kokal v. Dugger, --- So.2d ---, 23 Florida Law Weekly S397 (1998), fn. 15; Medina v. State, 573 So.2d 293, 295 (Fla. 1990).[17]

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[17]Even if the Court were to permit the merits to be addressed, the instant case involves the rare presence of seven valid aggravators, F.S. 921.141(5)(a)(prior violent felony conviction), (d)(during the commission of kidnapping and sexual battery), (e)(to avoid or prevent arrest), (f)(for pecuniary gain), (h)(heinous, atrocious or cruel), and (i)(cold, calculated and premeditated) and the meager mitigation presented renders this claim frivolous.

CONCLUSION

Based on the foregoing arguments and authorities, the judgment and sentence should be affirmed.

Respectfully submitted,

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COUNSEL FOR APPELLEE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail to Tracy L. Martinell, Staff Attorney, Capital Collateral Regional Counsel - Middle Region, 405 North Reo Street, Suite 150, Tampa, Florida 33609-1004, this 16TH day of October, 1998.

COUNSEL FOR APPELLEE

IN THE SUPREME COURT OF FLORIDA

FREDDIE LEE HALL,

Appellant,

vs. **CASE NO. 92,008**

STATE OF FLORIDA,

Appellee.

_____/

INDEX TO ATTACHMENT

A Mental Retardation and the Death Penalty: Defendants with Mental Retardation executed in the United States since the death penalty was resinstated in 1976. By Dr. Denis Keyes, William Edwards, Esq., & Robert Perske; updated by Death Penalty Information Center.

MENTAL RETARDATION AND THE DEATH PENALTY

- To date, 33 offenders with mental retardation have been executed.
- Twelve states forbid execution of the mentally retarded: AR, CO, GA, IN, KS, KY, MD, NE, NM, NY*, TN, WA, and U.S.

*except for murder by a prisoner

Sources for additional information:

●"The Penry Penalty: Capital Punishment and Offenders with Mental Retardation" by Emily Fabrycki Reed; Lanham: University Press of America (1993).

●"The Criminal Justice System and Mental Retardation: Defendants and Victims" by Ronald W. Conley, Ruth Luckasson, and George N. Bouthilet; Baltimore:
Paul H.Brookes Publishing Co. (1992).

Defendants with Mental Retardation executed in the United States since the death penalty was reinstated in 1976

By Dr. Denis Keyes, William Edwards, Esq., & Robert Perske; updated by Death Penalty Information Center

	Name	State	Race	I.Q.	Date of execution
1.	Arthur F. Goode, III	FL	W	60-63	4/5/84
2.	Ivon Ray Stanley	GA	B	62	7/12/84
3.	James Dupree Henry	FL	B	low 70s	9/20/84
4.	Morris Odell Mason	VA	B	62-66(note 1)	6/25/85
5.	James Terry Roach	SC	W	69-70(note 2)	1/10/86
6.	Jerome Bowden	GA	B	59-65(note 3)	6/24/86
7.	Willie Celestine	LA	W	(68-81) 77	7/20/87
8.	John Brogdon	LA	W	mildly retarded	7/30/87
9.	Horace Dunkins	AL	B	65-69(note 4)	7/14/89
10.	Alton Waye	VA	B	untested (probable MR)	8/30/89

11.	Johnny Ray Anderson	TX	W	70	5/17/90
12.	Dalton Prejean	LA	B	71-76	5/18/90
13.	Ricky Ray Rector	Ar	B	(MR due to lobotomy)	1/24/92
14.	Johnny Frank Garrett	TX	W	dual diagnosis/MI	2/11/92
15.	Robert Alton Harris	CA	W	Fetal Alcohol(note 5)	4/21/92
16.	Billy Dwayne White	TX	B	66-69(note 6)	4/23/92
17.	Nollie Lee Martin	FL	W	dual diagnosis/MI	5/12/92
18.	Ricky Lee Grubbs	MO	W	72(note 7)	10/21/92
19.	Cornelius Singleton	AL	B	55-67	11/20/92
20.	Robert Wayne Sawyer	LA	W	65-68(note 8)	3/5/93
21.	William Henry Hance	GA	B	mild MR	3/31/94
22.	Mario Marquez	TX	L	65(note 9)	1/17/95
23.	Willie Clisby	AL	B	mild MR	4/28/95
24.	Varnell Weeks	AL	B	mild MR/MI	5/12/95
25.	Girvies Davis	IL	B	borderline MR	5/17/95
26.	Sylvester Adams	SC	B	mild MR	8/18/95
27.	Barry Lee Fairchild	AR	B	60-63(note 10)	8/31/95
28.	Walter Milton Correll	VA	W	68	1/4/96
29.	Luis Mata(note 11)	AZ	L	68-70	8/22/96
30.	John Earl Bush	FL	B	borderline MR, organic brain damage	10/21/96
31.	Terry Washington	TX	B	58-69	5/6/97
32.	Tony Mackall	VA	B	64	2/20/98
33.	Reginald Powell	MO	B	65	2/25/98

Note 1: On Feb. 10, 1972, Morris Mason was diagnosed with mild mental retardation by Dr. Javier Fernandez and Mr. Buckley, psychologists at the Eastern State Hospital in Virginia. He was 17 years of age when admitted to the hospital. See Hospital admission report dated 2/9/72. WAIS scores indicated that the VIQ was 70, and FSIQ was 66.

Note 2: Terry Roach also had Huntington's Disease, causing the brain to continually deteriorate. He was 17 years old when executed.

Note 3: At the age of 14, Jerome Bowden had an IQ of 59. The full extent of his mental retardation was not discovered until after his execution. His last IQ was estimated at 65. His conviction was based solely upon a signed statement he could not even read. He signed the statement because a

police officer told him he would help him.

Note 4: Horace Dunkins's attorney never told the jury he was mentally retarded, with an IQ estimated at 65. When newspapers reported this several years later, one juror told the press she would not have voted for the death penalty had she known of his retardation. The accomplice to this crime was given a life sentence.

Note 5: There is considerable debate about the mental status of Robert Alton Harris. While significant evidence existed supporting fetal alcohol effect, there is doubt that he actually had mental retardation. The first author evaluated him in San Quentin in 1989. While deficits in adaptive skill areas were clearly noted, intellectual skills were estimated to be below average, and could not be diagnosed as mentally retarded.

Note 6: The attorney for Billy White failed to investigate and present any evidence of his life-long mental retardation. His MR was first diagnosed by the Houston Public School system in 1966, when, at age 8, Billy's IQ was estimated at 69.

Note 7: The attorney for Ricky Lee Grubbs never requested his school records or contacted any of his teachers. School records revealed IQ scores in the "borderline" range of intellectual functioning and failing grades during his first 8 years of school.

Note 8: At trial, Robert Sawyer's attorney never raised the issue of his mental capacity. Had the jury been informed of his fetal alcohol status, they would have voted for execution. His accomplice (a younger brother) received a life sentence after turning State's evidence.

Note 9: Mario Marquez had an IQ estimated at 65, with adaptive skills of a 7 year-old. His trial counsel testified at a clemency hearing that they did not present any evidence of Mario's mental retardation becaue of a legal flaw in the Texas death penalty statute. This flaw was recognized by the Supreme Court in Penry v. Lynaugh (1989).

Note 10: It was only after Barry Fairchild was sentenced to die that mental retardation became a factor in his case. Two psychologists evaluated him and both IQ estimates were in the low 60s. However, the State's psychologist (who testified to having had no experience in mantal retardation) testified that Fairchild malignered in his presentation, while the defense expert (at the time, a Ph.D. candidate in mental retardation) maintained that he could not have faked on 2 separate IQ tests and still had such a similar profile. Arkansas effectively broke their own statute when the executed Barry Lee Fairchild.

Note 11: Mata was born with water on his brain and suffered other brain damage from a severe fall when he was young.