IN THE SUPREME COURT OF FLORIDA

CASE NO. ~~77,563~~ 92008

FREDDIE LEE HALL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE FIFTH JUDICIAL CIRCUIT COURT,
IN AND FOR SUMTER COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an appeal from a denial of collateral relief following the remand of this case by the Florida Supreme Court to the Honorable Richard Tombrink, Jr., Circuit Judge, for a resentencing. A subsequent appeal of the second imposition of the death penalty was denied. A motion was filed pursuant to Fla. R. Crim. P. 3.850, and a hearing was held on Mr. Hall's claims that his trial attorney was ineffective and that Mr. Hall was not competent during the resentencing. The trial court denied all relief. Mr. Hall appeals the denial of relief and the death sentence which violates the constitutions of both the State of Florida and the United States.

Citations in this brief shall be as follows: the record on appeal concerning the resentencing proceedings shall be referred to as "R. ___" followed by the appropriate page number. The supplemental record on appeal shall be referred to as SR.___." The record on appeal from the Rule 3.850 proceedings shall be referred to as "HR.___." All other references will be self-explanatory or otherwise explained herein.

STATEMENT OF THE CASE AND FACTS

The appellant was tried in Putnam County in 1978. The jury found him guilty of first degree murder and recommended that the death sentence be imposed. The original trial court imposed the death sentence June 27, 1978, which was affirmed by this Court in Hall v. State, 403 So. 2d 1321 (Fla. 1981). The appellant filed a motion to vacate in September of 1982, which was denied; this Court affirmed the denial in Hall v. State, 420 So. 2d 872 (Fla. 1982). On petition for writ of *habeas corpus* the federal district court denied relief. Hall v. Wainwright, 565 F.Supp. 1222 (M.D. Fla. 1983). The Eleventh Circuit affirmed in part and reversed in part, and remanded for a hearing. Hall v. Wainwright, 733 F.2d 766 (11th Cir. 1984), *cert. denied*, 471 U.S. 1107, 105 S.Ct. 2344, 85 L.Ed.2d 858 (1985). On remand, the district court again denied relief and the circuit court affirmed. Hall v. Wainwright, 805 F.2d 945 (11th Cir. 1986). The appellant then sought certiorari review in the United States Supreme Court based upon Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987), which was denied. Hall v. Dugger, 484 U.S. 905, 108 S.Ct. 248, 98 L.Ed.2d 206 (1987). This Court denied the appellant's petition for *habeas corpus* in Hall v. Dugger, 531 So. 2d 76 (Fla. 1988), where he sought a new sentencing proceeding.

On March 9, 1989, this Court reversed the appellant's sentence and remanded for a new sentencing proceeding. Hall v. State, 541 So. 2d 1125 (Fla. 1989). The original trial judge recused himself from the proceedings, and the case was reassigned. Resentencing commenced on December 10, 1990.

At the resentencing hearing, there was considerable testimony regarding the appellant's mental retardation. The appellant was the sixteenth of seventeen children. (R. 1572). He

dropped out of school in the eleventh grade, last in his class. (R. 1555). While the appellant was in school, several teachers over the years commented in the appellant's records that the appellant's mental maturity was far below his chronological age, and that he was slow and mentally retarded. (R. 1556).

Although the appellant matured physically, his mind and behavior remained that of an elementary-school child. (R. 1579). Roosevelt Johnson, one of the appellant's brothers, testified that the appellant was frustrated at being unable to speak clearly or communicate with others, and had been all his life. (R. 1592).

The appellant's mother was known as the "Root Lady." (R. 1599, 1630). She was superstitious, believed in voodoo, and occasionally worked for a local fortune teller. (R. 1622, 1630-31). Hall's parents both drank heavily, and fought violently, often with weapons. (R. 1593). The appellant's mother refused to feed her children, choosing instead to hoard the family's food in anticipation of a famine she believed was coming. (R. 1595-96).

All of the Hall children were abused, although the appellant often got the worst of it as he was the slowest. (R. 1597). The mother would tie the children's hands to the ceiling crossbeams and beat them naked. (R. 1598). She also put a "croaker sack" over his head and beat him while he swung backward over a fire. (R. 1620, 1626, 1629). Hall's mother once buried him in sand up to his neck in order to strengthen his legs. (R. 1622). She pointed guns at her sons and made them kneel as she poked them with sticks. (R. 1601). She also gave the neighbors permission to punish the appellant, and some forced him to stay under their beds for entire days. (R. 1600). His mother would also lock him in the smokehouse for long intervals, and neighborhood children would mock Hall during this confinement. (R. 1659-60).

One of Hall's brothers testified at resentencing that Hall would hallucinate, often imagining things were after him. (R. 1627-28). His fear of the dark was well-known. Another cousin testified that Hall often saw ghosts and heard things. (R. 1619). His reputation in the community was that he was crazy. (R. 1619).

Expert testimony revealed that not only was Hall mentally retarded and abused as a child, but that he is currently mentally disabled and functionally illiterate, with a short-term memory equivalent to that of a six-year-old child. (R. 1717, 1734). The highest score Hall achieved on a complete battery of tests administered by Dr. Barbara Bard in September of 1986 placed him at the sixth-grade elementary level; all other scores were at first and second grade levels. (R. 1718-19). There was no evidence that the appellant malingered to obtain these scores. (R. 1720). Hall also suffers from dysarthria and apraxia, which is an inability to voluntarily move the speech musculature. (R. 1722). Dr. Bard testified that such speech impediments greatly affect childhood development; a child's inability to communicate with adults or other children isolates the child, which in turn restricts mental growth. (R. 1723). Dr. Bard listened to a recorded statement Hall gave to the police in 1978 and concluded that Hall's physical and mental deficiencies, as previously described, were evident on the tape recording. (1724-30).

Dr. Jethro Toomer, an expert in forensic psychology, testified that Hall had an I.Q. of 60, which makes him mentally retarded. Dr. Toomer also testified that Hall suffers from organic brain damage. (R. 1745-48). Being retarded, Hall was not mentally capable of understanding or resolving the physical abuse he suffered at the hands of his mother and others as he grew up. (R. 1762-66, 1771). Dr. Toomer was certain that Hall was not malingering, a conclusion based not only on the reliability factors built into the various tests, but also on the vast quantity of

objective evidence, derived from totally independent sources, that document long-standing mental deficiencies. (R. 1755-60). Dr. Toomer concluded to a reasonable degree of medical certainty that, on the date Mrs. Hurst was murdered, Hall was under the influence of extreme mental disturbance and that Hall's ability to conform his conduct to the requirements of law was substantially impaired. (R. 1772-73).

Dr. Kathleen Heide also concluded to a reasonable degree of medical certainty that on the day of the murder Hall's ability to conform his conduct to the requirements of law was substantially impaired. (R. 1852-54). Dr. Heide also testified that Hall is mentally a child, and that he functions on a level that is much younger than one would expect even of an adolescent. (R. 1836-37).

Dr. Dorothy Lewis concluded to a reasonable degree of medical certainty that, on the day of the offense, Hall was under the influence of extreme mental or emotional distress and that his capacity to appreciate the criminality of his conduct was substantially impaired. (SR. 39-40, 82-83). Dr. Lewis concluded that Hall's mental retardation and brain damage have existed since childhood, and that saying simply that Hall has a "learning disability" does not do justice to Hall's condition. (SR. 42).

In rebuttal, the State presented the testimony of Dr. Frank Carrera, one of the original psychiatrists appointed to determine whether Hall was competent to stand trial in 1978. Dr. Carrera had originally found Hall to be competent to stand trial. (R. 1958). The appellant was again sentenced to death by a jury vote of eight to four. This Court again affirmed the sentence. Hall v. State, 614 So. 2d 505 (Fla. 1993). A Motion to Correct or Vacate Sentence was filed.

All but one issue was summarily denied, and an evidentiary hearing regarding the appellant's competency to proceed was held on August 25, 1997.

Patricia Jenkins represented Mr. Hall at the resentencing. (HR. 6). She testified that she defended him through penalty phase, and did not remember how many witnesses she dealt with, but did remember that she "was to assist with Freddie, himself. I was to try to make sure that Freddie was okay during the proceedings." (HR. 7). This was so because there had been occasions where Mr. Hall had outbursts both in the courtroom and in other places. (HR. 7). The other attorneys felt that as long as there was someone there with Mr. Hall during the proceeding, everything would run more smoothly. (HR. 7). Therefore, her role was to "take care" of Mr. Hall. (HR. 8).

She testified that, "[d]uring the proceedings, Freddie was, in most instances, fairly withdrawn. The judge gave us permission to have hard candy there at the table and Freddie liked that and he was able to have candy. He had a Bible." (HR. 8). He stared at the Bible all day, rarely looking at witnesses on the stand. (HR. 9). Ms. Jenkins had hardly any communication with Freddie, and did not think he paid any attention to the witnesses. (HR. 9-10).

It was her understanding that Mr. Hall was on medication and that he had been on medication for a good period of time. (HR. 10). At one point, the trial court had to order that Mr. Hall receive his medication from the jail, as he was becoming agitated. (HR. 12). After being medicated, Mr. Hall went from being very agitated and angry to being very "compliant and easy for me to deal with in the courtroom." (HR. 13).

Ms. Jenkins testified that, "Freddie never really seemed focused on the proceedings at all. . . . Most of the time what he was fixated on during the trial was me." (HR. 13). He wanted

to know what perfume she wore, wanted a handkerchief with a sample of it, and took the part of her cup with her lipstick imprint on it. (HR. 13-14). She testified that, "[d]uring the time that I was representing Freddie, the conversations that Freddie would have with me concerning a case were always about the case that occurred years ago." (HR. 16). She did not believe Mr. Hall had the capability to help with trial strategy. (HR. 20).

His attorneys filed a Motion for Change of Venue because Mr. Hall was afraid and they believed his fear might have rendered him incompetent during the resentencing proceedings. (HR. 22). Regarding Mr. Hall's ability to assist in his defense, Ms. Jenkins testified:

> In terms of the ability to have an understanding of, of -- of communication, long-term communication concerning anything technical, you just didn't. It -- we couldn't. First of all, I had to overcome the language problem. We came up with a way of communicating that was fairly simplistic. So in terms of knowledge, understanding of what's going on, Freddie has probably been the worst. . . . It's just that when I first met Freddie and began to talk to him, I couldn't understand anything he said. I needed Mike Johnson to interpret As we began to, as I began to visit with him and talk with him, we were able to communicate.

(HR. 27-28).

Ms. Jenkins could not say that Mr. Hall communicated relevantly with her, as he looked at the book and the table the whole time. (HR. 35-36). She personally had concerns about his legal competence. (HR. 37). However, the doctors who examined him thought Mr. Hall was competent to proceed. (HR. 40, 43).

Thomas Michael Johnson was also one of the Mr. Hall's resentencing lawyers. He testified that there were numerous issues with regard to Mr. Hall's mental health. (HR. 60). It was difficult to keep Mr. Hall focused on the proceedings. (HR. 61). Mr. Johnson testified regarding Mr. Hall's ability to assist in his defense:

> He had a book. . . . It was some sort of a book that had, I think, religious pictures. Pictures of Bethlehem and those kinds of pictures. And he spent the bulk of his time looking at the book. There were times when he got agitated. Miss Jenkins was very competent in helping him to stay calm. I had been through at least one or two other proceedings in years past where Freddie did not stay real calm. And I wanted to make sure that he behaved himself as best as possible. And Miss Jenkins did that very well. He looked at a book a lot. There were times when he got agitated about things.

(HR. 66).

Mr. Johnson was forced to go to the jail one night because "Freddie was having a problem down at the jail, spent the night at the jail. . . ." (HR. 67-68). Apparently, Mr. Hall "wanted to use the phone and he was pitching a fit and they wouldn't let him use the phone because of the lateness of the hour. And he was going to tear the plumbing fixtures off the wall and they called up to tell me that they were going in to put him in restraints." (HR. 68).

Mr. Johnson dictated a memo to the file regarding the transfer of the case stating,

> I suspect, based upon the demeanor of Freddie during this interview, if it is a test, they're referring, I think, to the MRI test, if it is a test that they want to put him to sleep, that he will not participate and may get violent. The defendant again discussed the root man who is located in Groveland and indicated that his sister, Katie, knows all about the root man so I need to get Katie in to discuss with her the root man. . . . The root man is a voodoo man and there was somebody in Groveland that Freddie believed could put hexes on folks and his mother had been involved in a belief, in some of the supernatural stuff.

(HR. 75-76).

Mr. Johnson testified that he always had concerns about Mr. Hall's mental state. However, he also believed the doctors who informed him Mr. Hall was competent to proceed. (HR. 82). His main concern was that Mr. Hall maintain appropriate courtroom behavior, which meant paying attention to the witnesses, and "sitting there and not acting out. Acting

appropriately means being able to-- helping me when I need to and sometimes he could and sometimes he didn't." (HR. 92, 95).

Dr. Harry Krop testified that he evaluated Mr. Hall in March and September 1990. (HR. 115). In addition to his own interview, Dr. Krop reviewed many of the previous psychiatric reports, affidavits, and school records regarding Mr. Hall. (HR. 117). Dr. Krop believed that Mr. Hall was on medication when he was being evaluated, most likely an anti-depressant and possibly a pain-killer. (HR. 123). Dr. Krop had no contact with Mr. Hall after September of 1990 and did not testify at the December 1990 resentencing. (HR. 127). He testified that he felt Mr. Hall suffered from some neuropsychological impairment, had limited cognitive ability, brain damage, and "an I.Q. of 73, which is at the lower end of the borderline range." (HR. 136). The doctor believed Mr. Hall's "thinking was concrete, but that he was easily distracted and would have difficulty understanding complex or abstract concepts." (HR. 136).

Dr. Krop testified that at least in September of 1990, Mr. Hall knew who the Public Defender was, knew he was having a resentencing, and knew he could return to death row. (HR. 137). The doctor's only concern about Hall's competence was the possibility of inappropriate courtroom behavior, in that he felt Mr. Hall could act out in an abusive manner, possibly interfering with his ability to participate in the trial proceedings. (HR. 138). Dr. Krop pointed out that Mr. Hall's coping skills were primitive and limited, and that he would function in a fairly simplistic manner, as his social skills were very limited. (HR. 139). Dr. Krop testified that he always felt Mr. Hall was competent, although brain-damaged and with psychological problems. (HR. 154). Dr. Krop did not evaluate Mr. Hall in December 1990, immediately prior to the resentencing. (HR. 156).

Dr. Jethro Toomer testified that he first became involved with Mr. Hall's case in August of 1988. (HR. 162). After a battery of standard psychological tests to determine possible mitigation, Dr. Toomer found several mitigating factors including cognitive and organic impairment, intellectual deficiency, and family dysfunction. (HR. 164). The doctor also found Mr. Hall to be mentally retarded with an I.Q. of 60. (HR. 165). There was some dissention among the experts as to Mr. Hall's true I.Q. (HR. 179). Dr. Toomer was not asked to re-evaluate Mr. Hall in December 1990, although he was available. (HR. 166-67). Dr. Toomer testified that he did not believe sitting and staring at a Bible throughout the proceedings was appropriate courtroom behavior. (HR. 172).

> When you are looking at an issue such as mental retardation, you are talking about impaired functioning that covers a number of particular areas. It impacts not only intellectual functioning, it also impacts with emotional functioning. It also impacts how a person interacts with his or her social environment. What you are talking about when you talk about mental retardation, you are talking about an individual who is unable to process information appropriately. Who is unable to interact appropriately with his or her environment because of those particular deficits. In other words, the individual's overall development chronologically has advanced. While his ability to process information, to interact appropriately with his environment has remained consistent with someone of a much younger chronological age. That would be, for example, such as the ability to reason concretely and abstractly. As we grow and develop, we begin to manifest the ability to reason abstractly, to go beyond the meaning of the words, to be able to project consequences, to weigh alternatives. If we are functioning at a much younger level then you are not able to do that. Our reasoning is more concrete. Our reasoning is more object based. So as a result, whenever we are put in a situation that requires abstract reasoning, that requires those higher thought processing such as weighing the consequences, weighing alternatives and the like, we are equipped to function. So you are talking about an individual who is experiencing a deficit intellectual functioning being unable to address, to appropriately process information that may impact on his decision making, long-term range and the like.

(HR. 173-74).

Dr. Alfred Fireman testified that Mr. Hall had been receiving neuroleptic drugs and anti-depressants while in prison. (HR. 190). Specifically, Mr. Hall had received Thorazine, Trilafon, Mellaril, Pamelor, and Progestin. (HR. 191). He testified that an anti-depressant such as Pamelor would have an effect on testing for competency and retardation. (HR. 199, 204-05). He also testified that anti-psychotics such as Trilafon, Mellaril, and Thorazine were also prescribed in 1983, 1988, 1993, 1994, and 1995. (HR. 200, 205). He testified that:

> In Mr. Hall's case, they make reference to a personality disorder, or make reference to it, and I think the lay person somehow doesn't appreciate the severity of that sub-category of character illness. Which basically suggests that that person lives in a wonderland, where psychotic decompensation is like a whisper away. Couple that with mental retardation and you have a person who is transiently delusional, transiently paranoid, transiently out of contact with reality. And they are stress vulnerable.

(HR. 201-02).

However, Dr. Fireman had never met Mr. Hall, and would not render an opinion regarding Mr. Hall's competence. (HR. 205-06).

Dr. Mark Zimmerman testified that he evaluated Mr. Hall in May 1995. (HR. 212-13). He found Mr. Hall's I.Q. to be 74. (HR. 215). After interviewing family members, Dr. Zimmerman discovered that Mr. Hall functions lower than the doctor estimated, and had never really functioned as an adult. (HR. 217-18). Testing revealed that Mr. Hall functions at a second or third grade level, and that he was clearly learning disabled. (HR. 218-19). Other tests revealed a 66% probability Mr. Hall has brain damage. (HR. 220). Dr. Zimmerman did not assess Mr. Hall for "psychiatry disorders" because he was on anti-psychotic medication. (HR. 220). Dr. Zimmerman concluded that Mr. Hall is mentally retarded, brain damaged, and possibly

suffers from psychosis. (HR. 221). Mr. Hall's mental age is anywhere from seven or eight to twelve. (HR. 223). Dr. Zimmerman opined that Mr. Hall could not have been competent for the 1995 evaluation due to his mental retardation and brain damage. (HR. 224). At the competency hearing, the doctor testified that Mr. Hall was not currently exhibiting appropriate courtroom behavior and did not appear to be able to work with his attorneys. (HR. 225). Dr. Zimmerman believed that Mr. Hall had a basic understanding of what was happening to him. (HR. 226).

Michael Graves also represented Mr. Hall at the resentencing. (HR. 238). He testified that the defense team was always concerned with Mr. Hall's competency based upon "stories regarding Mr. Hall's acting out that were almost legendary at previous trials." (HR. 241). He testified that Mr. Hall was able to tell his attorneys what happened on the night of the crime, and shifted responsibility to his codefendant. (HR. 243). Graves did not find Mr. Hall to be cogent. (HR. 243). He believed Mr. Hall understood what was happening with the resentencing. (HR. 244). The defense team discussed their strategy with Mr. Hall before resentencing. (HR. 248). One of the things they explained to Mr. Hall was:

> [W]hen Mr. Ruffin received a life recommendation, we told Mr. Hall how we were going to attempt to use that to his benefit. We explained to him that we had testimony that since Mr. Ruffin had admitted that he was in fact the person that shot Carol and he was going to be sentenced to life, that it was only fair that since he did not shoot her, that he should not receive the more severe sentence.

Mr. Graves believed Mr. Hall understood that. (HR. 249).

Mr. Graves testified that he was able to speak with Mr. Hall during the trial, and that Mr. Hall recognized his family members when they came in to testify. (HR. 250). He also noted Mr. Hall staring at his Bible for long periods of time. (HR. 254). He stated that Mr. Hall leaned

over to him during closing arguments and informed him that Jesus was on the wall behind the jury box. (HR. 255).

Following the hearing, the trial court issued an order denying all relief. Specifically, the trial court summarily denied all but one of the claims raised in the 3.850 motion (Claims I-IV, V(A), VI-XXXIII). As to Claim V(B), the trial court found that Mr. Hall is mentally deficient, and that each member of his defense team was aware of his condition. (Order dated October 30, 1997, p. 18). The court found that Mr. Hall was represented by three competent attorneys who actively monitored his competence. (Order at 18).

> 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 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, including the Court's own knowledge of what was presented 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.

(Order at 19). This appeal followed.

SUMMARY OF ARGUMENTS

I. Mr. Hall's death sentence is unconstitutional as applied to mentally retarded offenders. It is cruel and unusual punishment to execute an individual who has neither the capacity to understand what he has done nor the ability to comprehend the seriousness of the penalty. This Court should declare that it is unconstitutional to execute the mentally retarded and commute Mr. Hall's sentence to life in prison.

II. Mr. Hall's death sentence is also unconstitutional because he was sentenced to death while incompetent. Mr. Hall is mentally retarded and as such was unable to assist or participate in his defense in any way. It is a denial of due process to try and execute a person who is not competent. This Court should commute Mr. Hall's sentence to life in prison.

III. The death penalty as it is effected in Florida is unconstitutional as electrocution is cruel and unusual punishment. The gruesome physical reality of what happens to the human body when electrocuted speaks for itself. This Court should declare execution by electrocution to be unconstitutional.

IV. Mr. Hall was deprived of a full and fair evidentiary hearing on his motion for postconviction relief. In a motion of over 30 issues, the trial court allowed a limited hearing on one sub-issue. Given the sheer volume of issues raised in the postconviction motion, this Court should remand for further hearings on the remaining issues.

V. The trial court has repeatedly misunderstood the mitigating factors as applied to Mr. Hall. Each of Mr. Hall's mental retardation and brain damage mitigating factors, and all of the evidence relating to his tortured childhood were dismissed out of hand as unquantifiable. If the trial court had properly considered the mitigating factors, Mr. Hall would have been sentenced

to life in prison. This Court should commute Mr. Hall's sentence to life, or in the alternative, remand for a further sentencing hearing.

ARGUMENT I

MR. HALL'S SENTENCE OF DEATH VIOLATES THE UNITED STATES AND FLORIDA CONSTITUTIONS' GUARANTEE OF DUE PROCESS AND PROHIBITION OF CRUEL AND UNUSUAL PUNISHMENT IN THAT THE FLORIDA CAPITAL SENTENCING STATUTE FACIALLY AND AS APPLIED IS UNCONSTITUTIONAL BY ALLOWING IMPOSITION OF THE DEATH PENALTY ON AN INCOMPETENT OR MENTALLY RETARDED PERSON.

The issue of the application of the death penalty to a mentally retarded person is not new or novel. There have been changes in the societal consensus that are evidence that our society is maturing in its attitude toward mentally retarded individuals. In Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), the United States Supreme Court refused to rule that execution of the mentally retarded was cruel and unusual punishment at that time because there was not a national consensus to that effect, in that only one state had legislated against the execution of mentally retarded offenders.

However, since Penry, numerous states have enacted specific statutory provisions barring imposition of the death penalty on the mentally retarded.[1] Thirteen states and the federal government as of this date do not permit execution of the mentally retarded. This is in addition to the ten states that have totally abolished capital punishment as well as another five which have eliminated it in a *de facto* manner.[2] The total is now twenty-eight states which have either

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[1] States that have legislated against the death penalty for mentally retarded defendants include Arkansas, Colorado, Georgia, Indiana, Kansas, Kentucky, Maryland, Missouri, New Mexico, New York, Tennessee, Washington, and the United States Government.

[2] The following states have abolished the death penalty: Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, Rhode Island, West Virginia, Wisconsin, and the District of Columbia. The following states have de facto abolished the death penalty: California, New Mexico, New York, North Dakota, Oregon, and Vermont.

abolished, eliminated, or statutorily precluded imposition of the death penalty not only against the mentally retarded, but others as well, in all but limited cases.

Additionally, in the 1998 session the Florida legislature debated the issue of an exemption of mentally retarded persons from the death penalty in Senate Bill 914. Although the bill was defeated, it is further evidence that the State of Florida is cognizant of the issue, and realizes the moral and legal problems associated with the execution of mentally retarded offenders.[3]

Thus, we find today that a majority of the states and the federal government do not agree with execution of the mentally retarded. This is mainly because mentally retarded people share similar traits. Mental retardation impairs memory and communication skills; the mentally retarded have poor impulse control; they have immature concepts of blameworthiness and causation, rarely seeing the consequences of their actions. Even when recognized, characteristics unique to the mentally retarded place them at a severe disadvantage in the criminal justice system. These types of defendants often waive rights without understanding the implications of their actions, they tend to confess eagerly to please authority figures, and they are easily manipulated.[4]

As stated above, the United States Supreme Court has recognized this debate over whether capital punishment is cruel and unusual as applied to the mentally retarded in violation of the Eighth Amendment to the United States Constitution. In the landmark 1989 decision of Penry v. Lynaugh, the Court stated that this was not a static concept, but instead is one which changes in recognition of the "evolving standards of decency that mark the progress of a maturing

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[3] Sponsor, Senate Bill 914 (1998), Criminal Justice Committee, Senator Jorman.

[4] V. Stephen Cohen, Comment, *Exempting the Mentally Retarded From the Death Penalty: A Comment on Florida's Proposed Legislation*, 19 FLA.ST.U.L.REV. 457 (1991).

society." Penry, *supra*. It has now been almost ten years since that court revisited or reviewed this issue and the consensus has changed.

Historically, the mentally retarded have been subjected to abuse including burning at the stake, opening their skulls to let out evil spirits, hangings, sterilization, and a multitude of other unthinkable and unimaginable horrors simply because they are different. Mr. Hall's mother put a "croaker sack" over his head and beat him while he swung backward over a fire. She would tie her children's hands to the ceiling crossbeams and beat them while they were naked. Those with mental retardation have been segregated from the rest of society; hidden by family members, and institutionalized at the whim of others. All of Mr. Hall's siblings testified that he got the worst of the beatings because he could not defend himself. All of this occurred because of fear, ignorance, and prejudice.[5]

The mentally retarded also were thought to be witches and demonically possessed, and they have been tortured in every conceivable manner by a society that simply could not understand them.[6] They do not have the mental ability to make choices beyond the most simple decisions, and quite often their actions are more of a reflex or emotional reaction just like a child.

The only hope for the mentally retarded is our judicial system. Perhaps it can guard them against unfair, ignorant, and biased treatment. Surely, the judicial system cannot blind itself to the injustice, or aid and condone it, by refusing to recognize the profound difficulties affecting the mentally retarded. Due process mandates that the courts ensure that this identifiable group

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[5] Laura A. Lorenzo, Comment, *Societal Prejudice Reflected in Our Courts: The Unfavorable Treatment of the Mentally Retarded*, 2 SETON HALL CONST. L.J. 771 (1992).

[6] Id.

of persons receive consideration for their limited mental capabilities. Failure to do otherwise once returns our society to the dark ages, leaving us as a society no more enlightened than when we burned the mentally retarded at the stake.

This Court has decided that anyone under the age of 15 cannot be put to death. Allen v. State, 636 So. 2d 494 (Fla. 1994). Yet, ironically, this court has decided that a person chronologically over the age of 15 with the mind of a 10 year old can be put to death. Common knowledge tells us that there are 15-year-old children who have mental capabilities exceeding their chronological age. How can we then in good conscience accept the converse and say with any conviction that a person over the chronological age of 15 should be put to death when in fact he or she has the mind of one considerably less than the magical age? Mr. Hall is a physically mature person, and has been for some time. He was in his thirties when this crime was committed. However, his mind and behavior are that of an elementary school child. Expert testimony has repeatedly revealed that not only was he mentally retarded, brain damaged, and severely abused as a child, but that he continues to be mentally disabled and functionally illiterate.

The capacity of Mr. Hall is abundantly clear from the record that he operates between the mental ages of six and twelve at best. Logically, Mr. Hall should not be put to death simply because he has an adult body beyond the chronological age of 15. He lacks the mental capacity of one that age, and is in fact mentally substantially younger. The sentence of death imposed on Mr. Hall is unconstitutional and should be commuted to life where he will depend on the institution of prison for most of his needs with his limited capacity to care for himself. That will be the only liberty he will ever know.

Rather than evaluating the constitutionality of a punishment under antiquated norms, the Eighth Amendment prohibition on unusual punishments "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Trop, 356 U.S. at 101; Fierro v. Gomez, 856 F.Supp. 1387, 1409 (N.D. Cal. 1994)(noting that "[a]s the concepts of dignity and civility evolve, so too do the limits of what is considered cruel and unusual."). The United States Supreme Court has indicated that a court considering a constitutional challenge to a type of punishment should review as much objective evidence as possible regarding contemporary society's attitude toward the penalty. Penry, *supra*; Stanford v. Kentucky, 492 U.S. 361, 369 (1989); McCleskey v. Kemp, 481 U.S. 279, 300 (1987); Enmund v. Florida, 458 U.S. 782, 786-88 (1982); Coker v. Georgia, 433 U.S. 584, 592 (1977). *Accord* Allen v. State, 636 So.2d 494, 498 n.7 (1994)(court engaging in legislative trend analysis to determine "unusualness" under Art. I, § 17 of the Florida Constitution). Thus, in determining whether electrocution is constitutionally unusual when applied to the mentally retarded, this Court should examine objective evidence of the modern acceptability of the same.

"The clearest and most reliable evidence of the contemporary values is the legislation enacted by the country's legislatures." Penry, *supra*; Gregg v. Georgia, 428 U.S. at 181. The Supreme Court has held punishments to be violative of the Eighth Amendment based, in part, on evidence of a consensus rejecting the type of punishment at issue. *See, e.g.,* Thompson v. Oklahoma, 487 U.S. 815, 826-30 (1988)(considering state trend regarding death penalty for juveniles); Ford v. Wainwright, 477 U.S. 399, 408 (1986)(considering state trend regarding execution of insane persons); Enmund v. Florida, 458 U.S. 782, 788-96 (1982)(considering state trend regarding death penalty for felony murder); Coker v. Georgia, 433 U.S. 584, 593-97 (1977).

The fact that few states presently authorize a method of execution relative to the past is also important evidence of an evolving standard of decency rejecting the punishment. Fierro, *supra*.

It is clear that society has matured to the point where we no longer fear the mentally retarded. However, that is insufficient progress when we consider the great disadvantage from which they already operate and the way in which it impacts their everyday life. They continue to suffer great prejudice and face often insurmountable obstacles in their struggle to have normal lives.

While in 1989, the Supreme Court recognized the battles the mentally retarded and especially the mentally retarded offender face, the Court was yet unwilling to state that the execution of mentally retarded offenders is cruel and unusual punishment. Since then, many states have legislated against that very punishment. Florida should join those states in sentencing the mentally retarded offender convicted of first degree murder to life in prison and refuse to execute those who do not understand why they are going to their deaths.

ARGUMENT II

MR. HALL WAS RESENTENCED TO DEATH IN VIOLATION OF DUE PROCESS GUARANTEED BY THE UNITED STATES AND FLORIDA CONSTITUTIONS IN THAT HE IS A MENTALLY RETARDED PERSON WHO WAS NOT COMPETENT TO BE RESENTENCED.

The conviction of an incompetent defendant denies him of the due process of law guaranteed in the Fourteenth Amendment. Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966); James v. Singletary, 957 F.2d 1562, 1573 (11th Cir. 1992). "A person accused of an offense or a violation of probation or community control who is mentally incompetent to proceed at any material stage of a criminal proceeding shall not be proceeded against while he is incompetent." Fla. R. Crim. P. 3.210(a). Competence is based upon a defendant's ability to consult with his lawyer with some degree of rational understanding. James, at 1574, *citing* Dusky v. United States, 362 U.S. 402, 80 S.Ct. 788, 4 L.Ed.2d 824 (1960).

Mr. Hall's death sentence is unconstitutional because he was resentenced to death while incompetent. The evidence overwhelmingly indicates that Mr. Hall did not understand the proceedings against him at the time of his resentencing. He was completely unable to assist in his own defense. Competent defendants appreciate the charges or allegations against them as well as the range and nature of possible penalties, understand the adversary nature of the legal process, are able to disclose to counsel facts pertinent to the proceedings at issue, can manifest proper courtroom behavior, and can testify relevantly. Fla. R. Crim. P. 3.211(a)(2)(A). At the evidentiary hearing, all concerned testified that Mr. Hall was unable to contribute to his own defense in any way, and completely failed to manifest proper courtroom behavior.

At the evidentiary hearing, it became clear that Mr. Hall is mentally retarded, brain damaged, and required medication in order to maintain proper courtroom decorum. (HR. 123, 200). Dr. Krop testified that Mr. Hall was medicated with anti-depressants such as Pamelor both during his resentencing and during his evaluations. (HR. 123, 125, 127). He also stated that he found Mr. Hall to have neuro-psychological impairment, limited cognitive ability, and an intelligence quotient (I.Q.) of 73, which is at the low end of the borderline retarded range. (HR. 136). Mr. Hall's I.Q. is low due to his brain damage, resulting in functional retardation. (HR. 137, 139, 154). His coping skills are limited and primitive at best. (HR. 139). Dr. Krop knew of Mr. Hall's hallucinations, and diagnosed him as having a schizophrenic personality disorder, with difficulty differentiating reality from fantasy. (HR. 142-44).

While Dr. Toomer was not asked to evaluate Mr. Hall for competence, he also found Mr. Hall to be brain damaged and mentally retarded. (HR. 164). Dr. Toomer found Hall's I.Q. to be 60, well into the mentally deficient range. (HR. 165). He was also aware of Mr. Hall's hallucinations. (HR. 181). Dr. Toomer stated that he had never seen where an individual who was brain damaged and mentally retarded would be found competent to participate in legal proceedings. (HR. 176, 180).

Dr. Zimmerman found Mr. Hall's I.Q. to be 74, and found him to be low-functioning and learning disabled. (HR. 216-17, 219). He also found Mr. Hall to be brain damaged, and stated that Mr. Hall was medicated during his evaluation. (HR. 220). Dr. Zimmerman's clinical diagnosis of Mr. Hall was that he is mentally retarded, brain damaged, and possibly psychotic. (HR. 221). He placed Mr. Hall's mental age between eight and twelve. (HR. 223). When Dr. Zimmerman evaluated Mr. Hall in 1995, he did not believe Hall was competent. (HR. 224).

Competence to stand trial impacts all aspects of a fair trial, especially the right of effective assistance of counsel. Cooper v. Oklahoma, 517 U.S. 348, 116 S.Ct. 1373, 134 L.Ed.2d 498 (1996); Riggins v. Nevada, 504 U.S. 127, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992). (Kennedy, J., concurring). The competency inquiry "focuses on the criminal defendant's capacity to contribute sufficiently to his own defense to allow a fair trial and, ultimately, serves to protect both the defendant and society against erroneous convictions." Watts v. Singletary, 87 F.3d 1282, 1286 (11th Cir. 1996).[7]

All of Mr. Hall's resentencing counsel testified to their concerns regarding Mr. Hall's competency. (HR. 82, 93, 241). Ms. Jenkins was specifically there to sit with Mr. Hall and keep him calm during the proceedings. (HR. 7, 8, 66, 92). She testified that he became fixated on her to the point where he asked for a sample of her perfume and furtively took the part of her drinking cup with the imprint of her lipstick. (HR. 13-14). All counsel testified that Mr. Hall

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[7] The American Bar Association explains the functional, trial-related nature of the competency inquiry as follows:

> A finding of mental incompetence to stand trial may arise from mental illness, physical illness, or disability; mental retardation or other developmental disability; or other etiology so long as it results in a defendant's inability to consult with defense counsel or understand the proceedings.
> . . . Because the fundamental purpose of the rule [of nontriability of incompetent defendants] is to promote accurate factual determinations of guilt or innocence by enabling counsel to evaluate and present available defenses to fact finders, defendants should have at least the intellectual capacity necessary to consult with a defense attorney about factual occurrences giving rise to criminal charges. Obviously, to accomplish that, defendants require a minimal understanding of the nature of criminal proceedings, the importance of presenting available defenses, and the possible consequences of either conviction or acquittal.

Watts v. Singletary, at 1287 n. 4, *quoting* ABA Criminal Justice Mental Health Standards § 7-4.1(c) & commentary (2d ed. 1986)

had a large-print Bible at which he stared all day. (HR. 8-9, 36, 66, 254). Ms. Jenkins testified that Mr. Hall was withdrawn, rarely looked at witnesses, and never seemed focused on the proceedings. (HR. 8-9, 13,36). Mr. Hall had no discussion with his attorneys during the resentencing hearing, and Ms. Jenkins could not say that he communicated relevantly with her. (HR. 10, 27, 35, 90). In fact, Mr. Hall only spoke of an old rape trial which took place in 1968, not 1990. (HR. 13, 16, 44, 58, 61).

Mr. Hall did not help his attorneys with strategy; Ms. Jenkins did not know if he could. (HR. 20). At no point was he fully focused on the proceedings, and even actively hallucinated, once remarking to one of his attorneys that he saw Jesus on the wall in the jury box. (HR. 13, 61, 255). Sitting and staring at a book and stealing one's lawyer's lipstick mark is not appropriate courtroom behavior. (HR. 172). Mr. Hall scarcely interacted with his lawyers. (HR. 225).[8]

Further, the trial court incorrectly found the appellant to be competent both at resentencing and following the evidentiary hearing. In the Final Order Resolving All 3.850 Issues, the court found that the appellant failed to establish that he was incompetent to proceed. The court stated that the appellant's competence was discussed by all concerned, and that "each member of his resentencing defense team actively monitored" Mr. Hall. The trial judge stated that he had the opportunity to observe the appellant, and to "observe the interactions and interplay between

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[8] "The competency rule did not evolve from philosophical notions of punishability, but rather had deep roots in the common law as a by-product of the ban against trials in absentia; the mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself." Stone v. United States, 358 F.2d 503, 507 (9th Cir. 1966), *citing* Ashley v. Pescor, 147 F.2d 318, 319 (8th Cir. 1945); Youtsey v. United States, 97 F. 937, 940-46 (6th Cir. 1899).

counsel for the Defendant and the Defendant." However, resentencing counsel testified that not only did Mr. Hall barely interact with them, when he did, it rarely if ever had anything to do with the proceedings.

The trial court found that:

> 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 [sic] 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 was presented 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.

In Carter v State, 22 Fla. L. Weekly S706 (Fla. 1997), this Court stated that in postconviction proceedings, if a trial court makes specific findings as to an individual's competency, that court must make the findings as the court would in a trial. Here, the trial court failed to follow the dictates of Fla.R.Crim.P. 3.211, and failed to consider the factors set forth in subdivision (a)(2).

In Pate v. Robinson, *supra*, the United States Supreme Court held that failure to hold an inquiry on competence is a denial of the constitutional right to a fair trial. Where the evidence raises a bona fide doubt as to a defendant's competency to stand trial, the court *sua sponte* must impanel a jury and conduct a sanity hearing. The burden is placed on the trial court to hold a competency hearing. Mental alertness at trial is not sufficient to eliminate a need for a hearing.

Here, the trial court failed to follow the proper procedures, and regardless, incorrectly found the appellant to be competent.

The trial court was plainly unfamiliar with mental retardation and confused mild mental retardation with borderline retardation and mistakenly believed Mr. Hall is not seriously disabled. Regardless of a mentally retarded person's classification, the considerable limitations in mental ability and behavior as a result of mental retardation severely reduce the ability of every mentally retarded person to perform in the everyday world.[9]

Mental retardation impairs communication skills and memory. In Mr. Hall's case, this limitation is compounded by his severe speech impediment. As even those individuals whose communication skills are close to normal may not be dependable participants in court proceedings, Mr. Hall's level of participation was practically nonexistent. His reduced intellectual ability made it difficult for him to understand even the simplest questions. Mentally retarded individuals have poor impulse control, which leads to severe deficits in attention span. Mr. Hall was completely unable to concentrate on the court proceedings, instead he stared at his book or slept. He obviously did not understand the significance of his situation.[10]

Further, Mr. Hall's impaired intellectual ability and limited memory denied him the ability to participate in his own defense and severely hampered his attorneys' efforts on his behalf. Mr. Hall was convicted of murder and sentenced to death in a proceeding in which he was a non-

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[9] *See* V. Stephen Cohen, Comment, *Exempting the Mentally Retarded From the Death Penalty: A Comment on Florida's Proposed Legislation*, 19 FLA.ST.L.REV. 457 (1991); John Blume and David Bruck, *Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis*, 41 ARK.L.REV. 725 (1988); James W. Ellis and Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO.WASH.L.REV. 414 (1985).

[10] Id.

participant. He was therefore denied the due process of law guaranteed by the United States and Florida Constitutions and his death sentence should be overturned.[11]

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[11] Mental retardation may affect an individual's functioning in ways that make him incompetent to stand trial. A defendant's receptive and expressive language skills, vocabulary, conceptual ability, and low level of general knowledge may all impair his ability to participate in his defense. Even at the higher levels of mild mental retardation, a defendant may be unable to understand a concept like waiver or the elements of the crime with which he is charged unless special efforts are made to explain them and assist him in understanding them.

Ellis and Ruth, *Mentally Retarded Criminal Defendants*, 53 GEO.WASH.L.REV. at 455-56 (1985).

ARGUMENT III

EXECUTION BY ELECTROCUTION IS CRUEL AND/OR UNUSUAL PUNISHMENT AND VIOLATES MR. HALL'S CONSTITUTIONAL RIGHTS UNDER THE FLORIDA AND THE UNITED STATES CONSTITUTIONS.

Execution by electrocution is mandated by Florida Statutes, section 922.10 (1997). It is acknowledged at the onset that the appellant recognizes that the issue of death by electrocution has been previously decided by this court. However, the sentence imposed by this Court is unconstitutional since it entails Mr. Hall being subjected to electrocution which today constitutes cruel and unusual punishment in violation of the Florida and Federal constitutions. The sentence pronounced by the trial court requires that Mr. Hall be electrocuted to death.

The Constitution of the United States prohibits punishment that is cruel and unusual. U.S. Const. Amend. VIII. The Florida Constitution bars any punishment that is either cruel or unusual. Fla. Const. Art. I, § 17. Electrocution violates both the state and federal standards. Without question, there is a significant likelihood that Mr. Hall will remain conscious and suffer intense horror, dread, and excruciating pain. His face may turn red or purple and his eyes will bulge. Mr. Hall will lose control of his bodily functions, vomiting, urinating, and defecating on himself.

During the electrocution of Mr. Hall, the electrical current will cause massive burns of his skin, violent and complete contraction of his muscles, and damage to his internal organs caused by heat-related distension. The electrocution will not cause Mr. Hall's brain to cease functioning immediately. Therefore, he will experience excruciating pain for an indeterminate,

variable period of time. Eventually, his heart will stop and his brain cease to function, but not before the State of Florida has subjected him to excruciating and inhumane pain.

Perhaps, like Pedro Medina executed in Florida's electric chair on March 25, 1997, or like Jesse Tafero, executed in Florida's electric chair on May 4, 1990, Mr. Hall's head will catch on fire, and he will literally burn to death. If so, perhaps he will still be breathing after the first jolt of electricity. Indeed, as in Jesse Tafero's case, it may take three distinct jolts of electricity to terminate Mr. Hall's life. Possibly, like Jerry White, executed in Florida's electric chair on December 4, 1995, Mr. Hall will cry out in pain while up to two thousand volts of electricity are course through his body.

Mr. Hall will suffer disfigurement and mutilation gratuitously inflicted by a State that refuses to adopt a more civilized form of execution. In fact, legislators have expressed the desire to provide a more civilized form of the death penalty. They adopted death by lethal injection if the electrocution method is determined to be unconstitutional which shows that Florida is reflecting the general national societal consensus that death by electrocution is cruel and unusual.

Electrocution is constitutionally "cruel" because it inflicts conscious pain and suffering and offends basic notions of human dignity. Additionally, it is constitutionally "unusual" because it does not comport with evolving standards of decency that govern modern society.

Modern science demonstrates that electrocution does not result in instantaneous death as was once believed. Rather, there is substantial and competent medical evidence demonstrating that the condemned person experiences intense pain for an indeterminate period of time during electrocution. Given the progress and advances in scientific knowledge and given the

malfunctions in the executions of Jesse Tafero, Jerry White, and Pedro Medina, Mr. Hall will likely suffer excruciating pain.

In Farmer v. Brennan, 511 U.S. 825, 114 S. Ct. 1970 (1994), the Supreme Court held that a state official's failure to prevent harm to prisoners constitutes cruel and unusual punishment in violation of the Eighth Amendment if the official shows "deliberate indifference" to the prisoners' well-being. Farmer, 511 U.S. at 835, 114 S.Ct. at 1978. When prisoners challenge the general conditions of their confinement, rather than their conviction or sentence, the court considers whether the conditions complained of are "materially different from those affecting other prisoners." Hutto v. Finney, 437 U.S. 678, 686 (1978). If this requirement is met, the court must apply the deliberate indifference standard to determine whether the state conduct violates the Eighth Amendment. In Hutto, the Court noted that although isolation cells are not necessarily unconstitutional, they might be depending on the duration and conditions of confinement. Similarly, Mr. Hall is challenging the method Florida chooses to carry out executions as well as the persistent malfunctions of Florida's electric chair. Thus, his claim is also a conditions of confinement claim and this Court must apply the deliberate indifference standard.

A state official's knowledge of the risk to a prisoner can be proved by inference from circumstantial evidence, from the obviousness of the risk, and/or from exposure to information about the risk. Farmer, *supra*. Deliberate indifference should be determined "in light of the ... authorities' current attitudes and conduct." Helling, *supra*. Importantly, "a remedy for unsafe conditions need not await a tragic event." Id. at 33. Clearly, the actions and statements by Florida officials in the wake of Pedro Medina's execution reveal a widespread attitude of

deliberate indifference to the risk of torturing Mr. Hall when it carries out the execution imposed on him.

First, the failure of the Florida Department of Corrections to adopt appropriate protocol for electrocution substantially increases the risk of pain Mr. Hall faces. *See* Fierro, *supra*, at 1390-91, 1413. The most crucial aspects of execution procedure are unwritten, leaving the designated staff ignorant of the fundamentals of electrocuting a person to death. The Department of Corrections similarly lacks any written procedure regarding the salve or gel that is rubbed onto the inmate's head and calf to conduct electricity into the body without causing excessive burning to his skin.

The imprecise manner in which Florida executes prisoners precludes a reliable determination of the cause of electric chair malfunctions. Prison staff who participated in and witnessed Mr. Medina's execution were unable to explain why flames and smoke surrounded his head. Because the Department of Corrections has failed to implement guidelines, it is impossible to choose from among these suggestions and the many other possible explanations.

Florida's execution protocol merely deals with issues such as the location for housing the condemned person, staff procedure, media relations, procedures for moving the condemned to the electrocution chamber, and the last meal of the condemned person. Noticeably absent are any scientific specifications which would reduce or eliminate the risk of an electrocution being mismanaged or account for variability in individual physiological resistance. Essentially, Florida's execution protocol is designed to ensure that the condemned person is smartly attired, marched elegantly to the electric chair, and that his or her death is duly reported; omitted, however, are substantive guidelines on how to prevent the condemned person from being turned

into a human torch. As a result of this absence of care, the Department of Corrections demonstrates a deliberate indifference to the fate of Mr. Hall, in violation of constitutional protections. *See* Farmer, *supra*.

Second, evidence of botched executions in Florida suggests that the risk of electrocution wantonly inflicting pain violates the Farmer "deliberate indifference standard" and is thus unconstitutional. Prison officials in 1990 claimed to have solved the problem of condemned prisoners igniting during execution; clearly, however, the tragedy surrounding the electrocution of Pedro Medina casts doubt on the State's solution in violation of the cruel and unusual prohibition of the Florida and United States Constitutions.

The Florida Constitution requires that this Court consider whether the use of judicial electrocution by the State of Florida is cruel *or* unusual. Art. I, § 17, Fla. Const. The use of the disjunctive in Florida's Constitution has been held to mean that a challenger need only show that the method meets one standard. Allen v. State, 636 So.2d 494, 497 n.5 (Fla. 1994); Tillman v. State, 591 So.2d 167, 169 n.2 (Fla. 1991).

Electrocution is "cruel" under both the Florida and federal constitutions because it wantonly inflicts pain, denigrates human dignity, and creates a substantial risk of pain, violence, and mutilation. The United States Supreme Court has held as violative of the Eighth Amendment all punishments that involve "the unnecessary and wanton infliction of pain," Gregg, 428 U.S. at 173 (opinion of Stevens, Powell, and Stevens, JJ.), penalties which are an affront to "nothing less than the dignity of man," Trop v. Dulles, 356 U.S. 86, 100 (1958), or punishments which fail to minimize the risk of unnecessary pain, violence and mutilation. Eddings v. Oklahoma, 455 U.S. 104, 118 (1982)(O'Connor concurring)(holding that Eighth Amendment requires all feasible

measures be taken to minimize the risk of problems in administering capital punishment). *See also* Coker, *supra* at 592 (holding that punishment is unconstitutionally excessive if it is "nothing more than the purposeless and needless imposition of pain and suffering"). This standard should apply to the Court's analysis of the constitutional cruelty of electrocution.

The key question to be answered in determining whether electrocution is unconstitutionally "cruel" is how much pain the inmate suffers. "Objective evidence of pain must be the primary consideration." Fierro, 865 F.Supp. 1387, 1412 (N.D. Cal. 1994), *aff'd*, 77 F.3d 301 (9th Cir. 1996), *vacated on other grounds*, 64 U.S.L.W. 3820 (Oct. 15, 1996); *accord* Campbell v. Wood, 18 F.3d 662, 685-687 (9th Cir. 1994). Death where unconsciousness is "likely to be immediate or within a matter of seconds" may arguably be within constitutional limits. Campbell, at 685. The gas chamber was held to be "cruel and unusual punishment" because it was "determined that inmates are likely to be conscious for anywhere from fifteen seconds to one minute from the time that the gas strikes their face." Id., at 1413.

Moreover, duration of consciousness and the intensity of pain endured are both extremely relevant to a determination of whether a particular method of execution is cruel and unusual. Judicial electrocution is unconstitutional because inmates are not rendered immediately unconscious. Fierro, *supra* at 307. Rather, the condemned experiences excruciating pain for an indeterminate period of time.

Human dignity "is the basic concept underlying the Eighth Amendment." Trop, 356 U.S. at 100. Judicial electrocution does not comport with Eighth Amendment principles because it violates human dignity in at least three ways. First, case law makes clear that mutilation, even if accomplished *after* death and thus perhaps without infliction of conscious pain, offends notions

of basic human dignity. Weems v. United States, 217 U.S. 349, 372 (1910)(noting prohibition on cruel and unusual punishments extends beyond laws that "inflict bodily pain or mutilation"); Wilkerson v. Utah, 99 U.S. 130, 135 (1879)(noting constitutional bar on drawing and quartering and on beheading); Rupe v. Wood, 863 F.Supp. 1307, 1314 (W.D. Wash. 1994)("a hanging that is likely to result in decapitation" is "contrary to public perceptions of standards of decency"); State v. Brown, 326 S.E. 2d 410, 411 (S.C. 1985)(surgical "castration, a form of mutilation, is prohibited" by state constitution's prohibition on cruel and unusual punishments). *See also* Glass v. Louisiana, 471 U.S. 1080, 1084 (1985)(Brennan and Marshall, JJ., dissenting from denial of certiorari); Furman v. Georgia, 408 U.S. 238, 266 (1972)(Brennan, J., concurring).

Mutilation involves the disintegration of the body. It can be as subtle as scarring or discoloration of the skin. Autopsy reports of persons executed in Florida's electric chair strikingly indicate the mutilation of the condemned's body.

Violence is the brute physical force applied by a state upon the body of the condemned. If the execution apparatus restrains, jerks, burns, breaks or punctures the human body then it is excessive and thus violative of human dignity because it "treat[s] members of the human race as nonhumans, as objects to be toyed with and discarded." Furman v. Georgia, 408 U.S. 238, 272-73 (1972)(opinion of Brennan, J.). Electrocution burns the skin and cooks internal organs. The burns are so severe that the skin in contact with the electrodes loosens and tears, allowing bodily fluids to ooze forth. These effects caused by the electric chair fail to minimize physical violence to the condemned's body and make electrocution cruel.

Third, the personal autonomy of the human body is inviolable. Schmerber v. California, 384 U.S. 757, 772 (1966)("The integrity of an individual's person is a cherished value of our

society."). *See also* Cruzan v. Director, Missouri Dep't. of Health, 497 U.S. 261, 305 (1990)(Brennan, J., with Marshall and Blackmun, JJ., dissenting)("'The inviolability of the person' has been held as 'sacred' and 'carefully guarded' as any common-law right.")(citations omitted). When a state's execution apparatus takes away control of a person's bodily functions in the throes of death, the state robs the condemned of dignity in the most visceral sense. This kind of degradation includes involuntary urination, defecation, and spasms of all kinds.

An increasing body of evidence demonstrates that electrocution is a cruel and barbaric method of extinguishing human life. It is an inescapable fact that America's 100-year history of electrocution has been characterized by repeated failures to execute swiftly and the resulting need to send recurrent charges into condemned prisoners to ensure their deaths.

The United States Supreme Court has indicated that a court considering a constitutional challenge to a type of punishment should review as much objective evidence as possible regarding contemporary society's attitude toward the penalty. Penry v. Lynaugh, *supra;* Stanford v. Kentucky, *supra*; McCleskey v. Kemp, *supra*; Enmund v. Florida, *supra*; Coker v. Georgia, *supra*.

Contemporary standards analysis accounts for the absolute number of states utilizing a particular method of execution. Fierro, *supra*. Presently, 38 states authorize capital punishment as a criminal penalty. Of these states, only six - including Florida - mandate the use of electrocution as their method of execution. The fact that few states presently authorize a method of execution relative to the past is also important evidence of an evolving standard of decency rejecting the punishment. Fierro.

A quick reflection on the past provides a view of the technological progress that has been made in the manner of imposing death. There was a time when individuals were put to death by drawing and quartering. Then beheading by axe or guillotine came into vogue. Soon hanging became the means for death, and then the firing squad. Next came the gas chamber and eventually electrocution. Man has shown considerable advancement in making the imposition of death more painless and instantaneous. Today, more states are imposing the death penalty by lethal injection, considering the same as a humane method of killing, if killing can ever be said to be humane no matter what method is used to take a life. Since 1949, no State has adopted electrocution as a method of execution. The rejection of electrocution in the second half of the century is significant and relevant evidence that electrocution offends evolving standards of decency. Enmund, 458 U.S. at 792; Coker, 433 U.S. at 594.

The shift away from electrocution is even more pronounced in recent years. Seven states have dropped electrocution as the exclusive means of carrying out the death penalty. In 1991, Louisiana abandoned electrocution altogether. In 1993, Ohio provided the option of lethal injection. Also in 1993, three Justices of the United States Supreme Court questioned whether electrocution was constitutional in a Virginia case. Poyner v. Murray, 508 U.S. 931, 933 (1993). Thereafter, in 1994, Virginia established lethal injection as the means for carrying out a death sentence, unless the condemned chooses electrocution. Finally, in 1995, Connecticut and Indiana abandoned electrocution, New York, when readopting the death penalty, abandoned electrocution as the method of execution, and South Carolina extended lethal injection as an execution option.

This dramatic change away from electrocution is reflected in the fact that of the 90 executions carried out in 1995 and 1996, 86% have been by lethal injection and only 11% by

electrocution. As such, the legislative rejection of electrocution constitutes strong objective evidence of an evolving standard of decency that prohibits this barbaric practice.

The electrocution of Mr. Hall in Florida's electric chair constitutes cruel and/or unusual punishment and should be overturned and commuted to a life sentence.

ARGUMENT IV

THE TRIAL COURT'S SUMMARY DENIAL OF ALL BUT ONE ISSUE RAISED IN MR. HALL'S 3.850 MOTION VIOLATED MR. HALL'S RIGHTS TO SUBSTANTIVE AND PROCEDURAL DUE PROCESS.

Mr. Hall is entitled to a full and fair evidentiary hearing on all claims raised in his 3.850 motion. Mr. Hall pled specific, detailed claims for relief which are not conclusively refuted by this record. Under rule 3.850, a movant is entitled to an evidentiary hearing unless the motion and record conclusively show that the movant is entitled to no relief. Valle v. State, 705 So.2d 1331 (Fla. 1997), *citing* Harich v. State, 484 So.2d 1239, 1240 (Fla.1986). Thus the trial court must treat the allegations as true except to the extent they are rebutted conclusively by the record. Harich, at 1241.

The law strongly favors full evidentiary hearings in death row post-conviction cases, especially where a claim is grounded in factual as opposed to legal matters. "Because the trial court denied the motion without an evidentiary hearing . . . our review is limited to determining whether the motion conclusively shows on its face that [the defendant] is entitled to no relief." Gorham v. State, 521 So. 2d 1067, 1069 (Fla. 1988) (remanded for lack of evidentiary hearing on Brady violation). *See also* LeDuc v. State, 415 So. 2d 721 (Fla. 1982) (remand for failure to hold evidentiary hearing on ineffective assistance of counsel); Mills v. State, 559 So. 2d 578 (Fla. 1990) (same); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984) (same).

The appellant's request for a postconviction evidentiary hearing is based upon, *inter alia*, several claims regarding ineffective assistance of counsel. Gorham and its progeny dictate that postconviction evidentiary hearings are mandatory unless the record clearly refutes the claims. Here, the record does not clearly refute that Mr. Hall's resentencing counsel were ineffective

considering his multitude of mental difficulties and his complete inability to assist his counsel with his defense.

Some fact-based post-conviction claims by their nature can *only* be considered after an evidentiary hearing. Heiney v. State, 558 So. 2d 398, 400 (Fla. 1990). "The need for an evidentiary hearing presupposes that there are issues of fact which cannot be conclusively resolved by the record. When a determination has been made that a defendant is entitled to such an evidentiary hearing (as it should be in this case), denial of that right would constitute denial of all due process and could never be harmless." Holland v. State, 503 So. 2d 1250, 1252-53 (Fla. 1987). "The movant is entitled to an evidentiary hearing unless the motion or files and records in the case conclusively show that the movant is entitled to no relief." State v. Crews, 477 So. 2d 984, 984-985 (Fla. 1985). "Accepting the allegations. . . at face value, as we must for purposes of this appeal, they are sufficient to require an evidentiary hearing." Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (Fla. 1989).

Accordingly, given the fact that several of Mr. Hall's allegations are not clearly refuted by the record, this Court should remand for a full evidentiary hearing on the remaining claims in the motion for postconviction relief.

ARGUMENT V

THE MITIGATING FACTORS OUTWEIGHED THE AGGRAVATING FACTORS.

A trial judge is required to make written findings of fact with "unmistakable clarity" to afford meaningful review of a sentence of death. Mann v. State, 420 So. 2d 578, 581 (Fla. 1982). Here, the trial judge entered a lengthy sentencing order outlining all aggravating and mitigating circumstances. However, the majority of those considerations were not attributed weight in opposition of imposition of the death penalty because the judge was unable to determine what weight should be given such factors. Though numerous compelling factors were found to have been proved, those substantial mitigating considerations were effectively eliminated from the weighing process because the trial judge deemed such considerations to be "unquantifiable." Almost every factor found by the trial judge to be unquantifiable dealt with Mr. Hall's family background and mental retardation.

In 1996, the Florida Legislature passed Florida Statutes, section 921.141(6)(h), allowing as a statutory mitigating factor anything in the defendant's background that would mitigate against the imposition of the death penalty. By this, many mitigating circumstances that were previously classified as non-statutory mitigating factors could now be classified as statutory mitigators. Mr. Hall submits that many of his so-called unquantifiable mitigating factors would have to be considered under this option.

Specifically, the trial court completely discounted the statutory mitigating factors available to the mentally challenged with the blanket statement that no one could relate the mental retardation and brain damage back to the time of the offense. He further did not believe that Mr. Hall is as mentally retarded as the experts testified he is. This again points to the fact that the

trial court did not understand the nature of mental retardation and its effect on Mr. Hall and his culpability.

Further, the trial court found that Mr. Hall's organic brain damage, a fact uncontroverted at both sentencing and the evidentiary hearing to be unquantifiable. He found the fact of Mr. Hall's mental retardation, also supported by substantial evidence, to be unquantifiable. He found the evidence of Mr. Hall's horrible and tortuous childhood to unquantifiable. He found the overwhelming evidence of the physical abuse and torture suffered by Mr. Hall throughout his life to be unquantifiable. In all, the trial court found each of Mr. Hall's non-statutory mitigating factors to be either unquantifiable or not a mitigating factor at all. This proves that the trial court misunderstood and continues to misunderstand mitigation.

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

The legal reasoning set forth by the trial judge in both the original sentencing order and the order denying 3.850 relief is demonstrably faulty; the judge otherwise erred in arbitrarily rejecting and failing to properly weigh significant mitigation and Mr. Hall's mental retardation that was overwhelmingly established by the evidence. This clearly is not one of the most

aggravated and least mitigated murders for which the ultimate penalty is reserved. Robertson v. State, 699 So.2d 1343 (Fla. 1997); Kramer v. State, 619 So.2d 274, 278 (Fla.1993). The legal analysis repeatedly used by the trial court to avoid attaching any mitigating worth to valid mitigating circumstances and reasons for postconviction relief which were otherwise found to have been adequately proved is incorrect, and Mr. Hall's sentence should be commuted to life in prison.

CONCLUSION

WHEREFORE, Mr. Hall is a mentally retarded adult convicted of first degree murder. His death sentence is unconstitutional not only because executing the mentally retarded is cruel and unusual punishment, but because he was incompetent to be resentenced. Further, the use of the electric chair is an antiquated method of execution and is a cruel and unusual method of carrying out the death penalty. Mr. Hall's death sentence should be commuted to life in prison.

In addition, Mr. Hall was denied the right of a full and fair evidentiary hearing on his motion for postconviction relief, and this cause should be remanded for further hearings.

Additionally, the trial court misapplied several mitigating factors at sentencing. Mr. Hall's sentence should be commuted to life in prison.

Respectfully Submitted,

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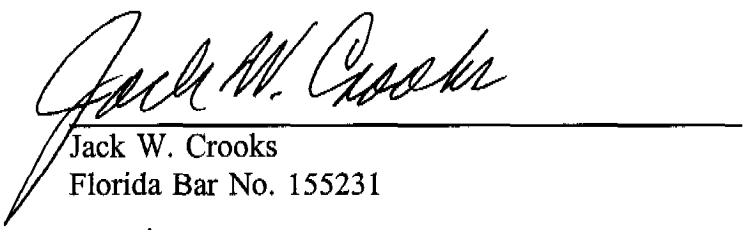
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by United States Mail, first class postage prepaid, to all counsel of record on July 14, 1998.



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