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

REPLY BRIEF OF APPELLANT

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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.

A. MR.HALL'S RETARDATION AND INCOMPETENCY ARE NOT PROCEDURALLY BARRED

The State is inconsistent when it argues that Mr. Hall's retardation and incompetency are procedurally barred. In one breath, the State argues that Mr. Hall makes a repetitious argument of his retardation, while in another,they argue that the claim was not presented, by way of appellant's Second Amended Motion To Vacate.

The appellant states that his retardation and incompetency claims have been raised at every stage of the proceedings, including his Second Amended Motion to Vacate. In fact,that issue was raised in the Procedural History as well as in Claims IV ,V, VI, VII and XIII of the Post-Conviction Motion.

Moreover, this claim involves the deprivation of fundamental constitutional rights. This issue reaches into the very legality of the trial itself to the extent that a verdict could not have been obtained without the application of the error alleged. Gibson v. State, 194 So.2d 10 (Fla. App.2d 1967).

In any event, the cases which the State cites on the issue of procedural exclusion are distinguishable to the extent that they do

not involve issues of fundamental error. None of the State's cases cited deal with the constitutional and fundamental fairness of Florida's sentencing statute as applied to the mentally retarded.

B. THE IMPOSITION OF THE DEATH PENALTY ON THE MENTALLY RETARDED OR ON THE INCOMPETENT IS UNCONSTITUTIONAL.

In Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct 2934, 106 L. Ed. 2d 256 (1989), the United States Supreme Court held that states may impose the death penalty on mentally retarded persons provided that the sentencer considers all relevant mitigating evidence. (Id. at 2948-50) In Penry, the trial court therein had defined the jury instructions too narrowly to allow consideration of the mitigating evidence of mental retardation and childhood abuse; therefore preventing a reasoned moral response to Penry's culpability. The Court further stated that execution of the mentally retarded was not per se unconstitutional since, at the time, no national consensus existed against imposing the death penalty on mentally retarded persons. (Id. at 2952-2954)

The Court seemed to imply that if enough state legislatures statutorily prohibited the death penalty for the mentally retarded or entirely prohibit the death penalty, then evolving standards of decency would require that actions contravening these statutory prohibitions are violative of the Eighth Amendment. (Id at 2953)

Since Penry, there are at least eleven states plus the Federal Government which statutorily prohibit the death penalty.[1]

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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, New Mexico, New York, Tennessee, and Washington. The United States Government has also

Additionally, thirteen(13) states have totally abolished the death penalty.[2] The Appellant still prefers a different mathematical model than that offered by the Appellee.

Nearly half of the fifty states have declared the death penalty to be cruel and unusual punishment as applied to the mentally retarded. Additionally, the Federal Death Penalty Act, 18 U.S.C. S3596(c)(1994), bars the execution of mentally retarded persons convicted of Federal crimes. From that perspective, it is more than just the few states that have immunized the mentally retarded from the death penalty. Clearly, there is emerging evidence that shows a national consensus of excluding the mentally retarded from the death penalty.

Appellant does not dispute that New York has legislatively reinstituted the death penalty. However, interestingly, the death penalty for mentally retarded capital defendants has been abolished by statute as well. N.Y. Crim. Proc. §400.27(12)(e). New York amended its death penalty statute to include mental retardation as a determining factor in capital sentencings. The new amendments also provide that, if it can be substantiated that a defendant is mentally retarded, he or she may not be sentenced to death unless the killing occurred while in custody or confined in prison. Additionally, a hearing is required on mental retardation before

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passed legislation in 1988 and 1994 prohibiting the execution of individuals who have mental retardation.

[2]Alaska, District of Columbia, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin.

trial wherein the judge is the finder of fact as to whether the defendant meets the criteria for mental retardation.N.Y. Crim. Proc. § 400.27 (12)(d).

Some states have passed statutes prohibiting capital punishment of mentally retarded individuals in all circumstances, reasoning that there is a consensus that execution of the mentally retarded makes no measurable contribution to acceptable goals of punishment, i.e. retribution or deterrence. [3]

Even in Texas, the state from which Penry evolved, the Texas Court of Criminal Appeals, in Rios v. Texas,846 S. W.2d 310 Tex. Crim App.1992) permitted the defendant's mental retardation to play a different role in sentencing than it had in Penry . In Rios, even though the aggravators outweighed the mitigators, Rios was entitled to an instruction that would allow the jury to impose a sentence less than death. The Rios court opined, based on Penry, that the jury must have an outlet for its "reasoned moral response" because of evidence of a defendant's mental retardation (Rios at 315).

Post Penry, this Court has not decided if the state can execute the mentally retarded; it has considered a person's low intelligence in its discussion of whether the death penalty should be imposed.[4] However, it has rarely considered mental retardation

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[3]Fleming v. Zant(1989) 259 Ga 687, 386 SE2d 339 (executing a retarded offender destroys public confidence in the criminal justice system) and Trimble v. State (1990) 321 Md 248, 582 A2d 794 (appeal after remand, 90 Md App 705, 603 A2d 899).

[4]In Livingston v. State, 565 So.2d 1288 (Fla. 1990), this Court reduced defendant's death sentence to life in prison despite jury recommendation of death. The facts were not dissimilar to the instant case in that the defendant's childhood was scarred by

as a mitigating factor by itself.[5]

Florida has, however, recognized that sentencing for the mentally retarded must be on a individualized basis. Mental retardation is not merely part of a persons character. Rather, it is a lifetime disability with substantial limitations in ability to cope with and function in the everyday world. Cleburne v. Cleburne Living Center, 473 U.S. 432, 442 (1985).

At the same time, Florida has increasingly treated the mentally retarded both with compassion and differently than those with other mental disabilities as evidenced by a recent Bill Of Rights for the mentally retarded (Fla. Stat. § 916.107) and separate statutory provisions regulating the commitment of the mentally retarded to state care (Fla. Stat. § 393.11(1989).

Additionally, an expert in evaluating mental retardation is statutorily required to be part of the committee examining the suspected retarded person for commitment. Id. Moreover, if a

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severe beatings and parental neglect and his intelligence was marginal. See also Brown v. State, 526 So.2d 903 (Fla. 1988) - defendant had I.Q. of 70-75 and was emotionally handicapped since age ten. This court reduced his death sentence to life.

[5]In a more current case, Bryant v. State, this Court remanded a death penalty case for resentencing on the grounds that the trial court erred in refusing to instruct the jury concerning mitigating evidence of the defendant's emotional disturbance resulting from his mental retardation and physical parental abuse. See also Cochran v. State, 547 So.2d 928 (1989), where this Court remanded a death penalty case for resentencing where the judge disregarded mitigating evidence of the defendant's mental retardation and emotional disturbance, holding that the trial judges rejection of the jury's sentence was not warranted where extensive mitigating evidence of the defendant's mental deficiency with an I.Q. of 70, severe learning disability, and likelihood of becoming emotionally disturbed under stress, had been presented in mitigation.

mentally retarded person has been charged with a crime , the allegation will be dismissed if he remains incompetent to stand trial for more than two (2) years. This is not the same standard used for those who are mentally ill, but not mentally retarded. Fla. Stat. § 916.145.

Thus, Florida has exhibited its willingness to treat the mentally retarded defendant differently than others charged with crimes. This is compelling evidence in view of the polls showing that 71 percent of Floridians oppose the execution of the mentally retarded. See Penry, Infra at 2954.

The imposition of the death penalty on a person with diminished capacity to make responsible decisions or appreciate the consequences of his/her acts and relate competently to the world is simply incompatible with contemporary standards of decency, and violative of constitutional fundamental rights.

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.

Although the State correctly states that Mr. Hall's mental or emotional qualities were considered by the trial judge, his documented mental retardation and resultant incompetency were never considered to the extent that they should have been because they were not fully understood by the court.

Mental retardation has traditionally been associated with mental illness. However, they are not one and the same. Forensic psychiatrists and forensic psychologists evaluate primarily for mental illness, which is rarely the issue for an individual with mental retardation. Defendants with mental retardation are often not recognized by these evaluators. Additionally, law enforcement officers, prosecutors, judges and even the individual's own defense attorney commonly fail to perceive and fully understand mental retardation, since part of the nature of mental retardation is for the individual to attempt to hide their stigmatizing behavior.[6]

It is abundantly evident that the trial court did not understand Mr. Hall's mental retardation and its effect on his competency in either the 1990 resentencing or in the 1997 evidentiary hearing:

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[6]Mental retardation is usually considered a permanent disability while mental illness may be temporary, cyclical and episodic. (F. Menolascino; Mental Illness in the Mentally Retarded: Diagnostic and Treatment Issues in Mental Retardation and Mental Health, Treatment, Services (J. Stark, ed, 1988).

> "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 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.

(R. Vol. VI, 898-901). Mere observation of an individual will unlikely reveal the severe defects of mental retardation. That is because the Defendant is with mental retardation deflects attention from his or her disabilities instead of bringing them to the attention of his/her lawyer or the Court.[7]

The American Association of Mental Retardation, has recently defined mental retardation[8] as,"significantly sub average general intellectual functioning existing concurrently with related limitations in at least two (2) of ten (10) adaptive skill areas and manifested during the developmental period."[9] The individual must be able to meet a three pronged test to be considered mentally

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[7]R. Edgerton, The Cloak of Competence: Stigma in the Lives of the Mentally Retarded 1967.

[8]The AAMR (1992) definition includes I.Q. standard scores of approximately 70 to 75 in its definition of mental retardation.

[9]Mental Retardation: Definition, Classification and Systems of Support (American Association on Mental Retardation, 1992). The adaptive areas included are communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work.

retarded under this definition.[10]

In as much as individuals with mental retardation are not a homogeneous group, the purpose of this new definition was to alleviate the problems associated with just the use of I.Q. scores. The evaluator looks to adaptive function, which unlike intellectual behavior, is, by its very nature unquantifiable.[11] Mental retardation may affect ones functioning in many ways that make him or her incompetent to stand trial. A defendant's language skills, vocabulary, conceptual ability and low level of general knowledge may impair his/her ability to participate in the defense. Coupled with his or her efforts to avoid detection of the disability it is unlikely the mentally retarded defendant will act in a bizarre or disruptive way, signalling the indicia of incompetence to the court.[12]

Additionally, The ABA has defined mental retardation in its discussion of who should be spared the death penalty. The ABA definition places mental illness and mental retardation under the

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[10]Fla. Stat. Ann. § 393.063 (43) (West Supp. 1993) (defines "retardation" as "significantly subaverage general intelligence functioning existing concurrently with defects in adaptive behavior and manifested during the period from conception to age 18.)

[11]Classification in Mental Retardation 12 (Herbert J. Grossman, M.D. ed, 1983) (defining adaptive behavior as "significant limitations in an individual's effectiveness in meeting the standards of maturation, and/or social responsibility that are expected for his average level and cultural group as determined by clinical assessment and usually standardized scales.")

[12]James W. Ellis and Ruth A. Luckasson Mentally Retarded Criminal Defendants, 53 Geo.Wash.L.Rev. 414, 455-458 (1985).

umbrella term "mental incompetence."[13]

Under the ABA Standards, a retarded person should not be executed when he or she "cannot understand the nature of the pending proceedings, what he or she was tried for, the reasons for the punishment, or the nature of the punishment.

The criminal justice system is, however, more familiar with mental illness and insanity which makes it less likely that mental retardation will be recognized without the additional presence of mental illness. Therefore, the issue of competency is likely to be raised only when the defendant is acting in a bizarre or disruptive fashion.

Therefore, it is likely that mental retardation will not be recognized without the additional presence of mental illness. Because Mr. Hall sat there quietly rather than being disruptive is not an indication that he was competent. Rather, the greater weight of the evidence, from his own attorneys, was that he was unfocused on the proceedings and that he hardly interacted with his lawyers. (HR. 225).

Expert testimony in both the resentencing hearing and the evidentiary hearing brought forth substantial evidence that Mr. Hall is mentally retarded, that he suffers from organic brain damage; that he was severely abused as a child; that he operates at a mental age of between six (6) and twelve (12) years of age and that in February of 1978, Mr. Hall was under the extreme mental or

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[13]Criminal Justice Mental Health Standards 7-5.6 (ABA Criminal Justice Standards Comm. 1987.)

emotional distress so that his capacity to appreciate the criminality of his conduct was impaired. Yet, the trial court, in its Findings of Fact for Sentencing Order, states its finding as to non-statutory (emphasis added) mitigation:

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

(R. 653).

Had Mr. Hall been evaluated by an expert in the field of mental retardation, who applied the statutory adaptive skills test as well as the I.Q. tests, and had the trial court understood the true permanent nature of mental retardation, Mr. Hall would not be sitting on death row today.

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.

Appellant at the onset admits that this court has previously ruled that electrocution is not cruel and unusual punishment, however, with the advent of change in societal consensus, this issue still remains open to challenge and is being preserved herein for such purposes. Mr. Hall would urge the court to reconsider this issue and determine that such a method of execution is cruel and unusual.

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.

The appellee's argument on this issue evades the real question by attempting to conceal it with the weight of paper. The constant recitation of the order and regurgitating of the record does little to debride the argument presented by the appellant.

Clearly, the trial court's comment:

> While there is no doubt that the Defendant has serious mental 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". (emphasis supplied) In fact there is a dispute in the evidence.

This indicates that the court is acknowledging that it could be mistaken in its ruling. Thus, it could also be mistaken as to the remainder of the order denying a hearing on the other issues.

The record speaks for itself and therefore a lengthy argument serves no purpose unless you are avoiding the issue. The Appellees' characterization of the trial court's order as thorough, detailed, comprehensive and well reasoned is a mere convenient opinion. The court's order states most claims are procedurally barred and then proceeds to rationalize its decision.

A closer reading of the order reveals that many issues were summarily denied which should have been given an evidentiary hearing. A restatement of these issues would merely be repetitive of the initial brief and in the interest of judicial economy they will not be so stated.

ARGUMENT V

THE MITIGATING FACTORS OUTWEIGHED THE AGGRAVATING FACTORS.

On both direct appeal and re-sentencing, this Court has held that the mitigating factors outweighed the aggravating factors. Accordingly, throughout post-conviction proceedings both the Court and the State have refused to deal with this issue by considering it procedurally barred. Appellant concedes that this brief is not a second appeal and not the avenue to re-litigate issues that could have been brought up on appeal. Medina v. State, 573 So.2d 293 (Fla. 1990).

However, even the Medina court noted the caveat that fundamental error was not barred during post-conviction litigation. Medina, 573 So.2d at 294. The Supreme Court has re-iterated this position on fundamental error in Larkins v. State, 655 So.2d 95,98 (Fla. 1995). Although no fundamental claims were raised in Larkins, this case was remanded for failure to adhere to the requirements of Campbell v. State, 571 So.2d 415 (Fla. 1990), and failure to consider statutory and non-statutory mitigating evidence.

F.A.R Rule 6.16 (F.S.A), provides that upon an appeal, the Court may in its discretion, if it deems it is in the interest of justice, may review anything said or done in the cause which appears in the appeal record. "Florida cases are extremely wary in permitting the fundamental error rule to be the 'open sesame' for consideration of alleged trial errors not property preserved. One of these errors is where the issue reaches down into the very

legality of the trial itself to the extent that a verdict could not have been obtained without the assistance of the error alleged. Gibson v. State, Supra. "'Fundamental error,' which can be considered on appeal without an objection in the lower court, is error which goes to the foundation of the case and to the merits of the cause of action." Sanford v. Ruben, 237 So.2d 134, 137 (Fla. 1970).

As a matter of record, the defendant hallucinates. (R.1627-28). He is retarded, illiterate, and has the mental capacity of a six-year old child. (R.1717, 1743). He also has a speech impediment (R.1722) and organic brain damage. (R.1745-1748). It is well beyond the scope of this brief to restate the varying mitigating factors that lead to the court and direct appeal ruling.

However, Florida law has had an abundance of capital cases remanded because of mental impairment of the defendant. In Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988), this Court held that mitigating factors of a defendant's extreme emotional or mental disturbance, his substantially impaired capacity to conform conduct to requirements of law, and his low emotional age outweighed aggravating factors so that the death penalty was inappropriate for first-degree murder.

In Songer v. State, 544 So.2d 1010 (Fla. 1989), this Court held that the death penalty would be inappropriate for a defendant convicted of first-degree murder where defendant's reasoning abilities were substantially impaired by addiction to hard drugs and he had undergone positive changes while in prison. Similarly,

in Smalley v. State, 546 So.2d 720 (1989), murder of a 28-month-old child and an aggravator of heinous, atrocious or cruel circumstances was overcome by mitigating factors which included agitated mental state at the time of the offense. Given that the Defendant in the instant case is a victim of severe mental impairment, it is unfathomable that similar reasoning was not applied to his case.

Failure to find that the mitigators outweigh the aggravators should be fundamental error because juries are unable to quantify mental retardation mitigators. Florida judges and juries have traditionally all but ignored mental retardation as a mitigator in capital cases. See, Rutherford v. State, No. 89, 142 (Fla. 1998); Donaldson v. State, Fla. L. Weekly S245 (Fla. 1998); Hawk v. State, 718 So.2d 159 (Fla. 1998); Hardy v. State, 716 So.2d 761 (Fla. 1998); Jorgenson v. State, 714 So.2d 423 (Fla. 1998); Urbin v. State, 714 So.2d 411 (Fla. 1998); Johnson v. State, 720 So.2d 232 (Fla. 1998); San Martin v. State, 717 So.2d 462 (Fla. 1998).

In Taylor v. State, 630 So.2d 1038, 1043 (Fla. 1994) the court held that the death penalty could be imposed despite mental retardation which was given "slight" weight. Similarly, in Thompson v. State, 648 So.2d 692 (Fla. 1995), the court gave "considerable weight" to mental retardation of the defendant while still sentencing him to death. Similarly in Knight v. State, 512 SO.2d 922, 932-933 (Fla. 1987), the Supreme Court found no error when the trial court ignored the mitigating circumstance of mental retardation.

Fla. Stat. § 921.414((6)(f) which describes "substantial impairment" and (g) which describe non-statutory mitigation are both areas under which mental retardation is normally considered during sentencing. Failure to consider mental retardation is reversible error under Manson v. State, 597 So.2d 776 (Fla. 1992), a jury is free to disregard this mitigator entirely in capital cases. Walker v. State, 707 So.2d 300, 317 (Fla. 1997), reh'g den'd.

In accordance with Campbell v. State, supra, Judge Tombrink in his final order enumerated the various mitigating and aggravating circumstances. In his sentencing order he wrote,

> "If the testimony of the defense experts is believed and taken to its logical conclusion, the defendant is practically a vegetable. However, his behavior at the time of the crimes for which he stands convicted . . . would belie the fact of his severe psychosis and mental retardation."

(R.649). Then Judge Tombrink went on to describe why the defendant could not be as mentally-challenged as he claims in contravention of the plain weight of the expert testimony.

The precepts of Campbell v. State, supra, hold that the weights assigned to each mitigating factor are within the province of the sentencing court, **but to be sustained they must be supported by sufficient competent evidence in the record.** (emphasis added). Campbell, infra. Chief Justice Barkett dissented on this very issue from the majority opinion when the instant case was remanded. Hall v. State, 614 So.2d 743, 479 (Fla. 1993). This alone is an indication that there is doubt that the sentence of death was not

supported by the greater weight of the evidence.

Mental retardation and brain damage are not easily quantified, and based on testimony, as in Frangi v. State, 699 So.2d 1312, 1324 juries may decide that such disabilities do not exist upon hearing the evidence. It is this unfettered discretion that makes mental retardation mitigators illusory, and failure of the Court to hold that the mitigators outweigh the aggravators should be found to be fundamental error. By the mere fact that Florida instructions provide no empirical standards by which to show that mitigators can outweigh aggravators, the judges and juries are left to their own emotions which constitutes fundamental unfairness.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by United States Mail, first-class, to all counsel of record on December 21, 1998.

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