IN THE SUPREME COURT OF FLORIDA
NO. _____

FREDDIE LEE HALL,

Petitioner,

v.

MICHAEL W. MOORE,

Secretary,
Florida Department of
Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Mr. Hall's first habeas corpus petition in this Court following re-sentencing. Art. l, Sec. 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, claims demonstrating that Mr. Hall was deprived of the right to a fair, reliable, and individualized sentencing proceeding and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional precepts.

Citations shall be as follows: The record on appeal concerning the original court proceedings shall be referred to as "R. ___" followed by the appropriate page number. The postconviction record on appeal will be referred to as "PCR.___"

The Florida Supreme Court's opinion on Mr. Hall's initial direct appeal will be referred to as Hall I, 596 So.2d 991 (Fla. 1992). The Court's opinion on his appeal of the postconviction decision will be referred to as Hall II. All other references will be self-explanatory or otherwise explained herein.

INTRODUCTION

Significant errors which occurred at Mr. Hall's capital trial and re-sentencing were not presented to this Court on

direct appeal due to the ineffective assistance of appellate counsel.

The issues, which appellate counsel neglected, demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr. Hall. "[E]xtant legal principles...provided a clear basis for ... compelling appellate argument[s]." Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla. 1986). Neglecting to raise fundamental issues such as those discussed herein "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwright, 474 So.2d 1162, 1164 (Fla. 1985). Individually and "cumulatively," Barclay v. Wainwright, 444 So.2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So.2d at 1165 (emphasis in original).

Additionally, this petition presents questions that were not ruled on in direct appeal, but should now be visited in light of case law or in order to correct error in the appeal process that denied fundamental constitutional rights. As this petition will demonstrate, Mr. Hall is entitled to habeas relief.

PROCEDURAL HISTORY

The Circuit Court of the Fifth Judicial Circuit, Sumter County, entered the judgments of conviction and sentence under consideration.

In June, 1978, Mr. Hall was found guilty of first-degree murder of Karol Lea Hurst and sentenced to death following a jury trial. The judgment and sentence were upheld on direct appeal. Hall v. State, 403 So. 2d 1321 (Fla. 1981).

Mr. Hall's death sentence was later vacated by the Florida Supreme Court and remanded for re-sentencing because the trial judge improperly restricted the scope of mitigation that could be presented on behalf of Mr. Hall. Hall v. State, 541 So. 2d 1125 (Fla. 1989).

Re-sentencing was held before a jury in December, 1990 in Marion County after a change of venue. The jury recommended death by a vote of eight (8) to four (4) four and the trial court imposed death.

The Florida Supreme Court affirmed Mr. Hall's conviction and sentence on direct appeal. State v. Hall, 614 So. 2d 473 (Fla. 1993). Justices Barkett and Kogan dissented and said that Mr. Hall is mentally retarded and that the trial judge did not understand the nature of mental retardation. The justices said imposing death on the mentally retarded is excessive and cruel.

A Writ of Certiorari to the United States Supreme Court was denied on October 4, 1993, 114 S.Ct. 109 (1993).

Subsequently a postconviction motion was filed on February 14, 1997. The Florida Supreme Court affirmed the trial courts denial of all claims in the 3,850 on July 1, 1999. The mandate is dated August 3, 1999.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.l00(a). See Art. l, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Art. V, Sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process and the legality of Mr. Hall's sentence of death.

Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So.2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the context of a capital case in which this Court heard and denied Mr. Hall's direct appeal. See Wilson, 474 So.2d at 1163 (Fla. 1985); Baggett v. Wainwright, 229 So.2d 239, 243 (Fla. 1969); cf. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Hall to raise the claims presented herein. See, e.g., Way v. Dugger, 568 So.2d 1263 (Fla. 1990); Downs v. Dugger, 514 So.2d 1069 (Fla. 1987);

Rilev v. Wainwright, 517 So.2d 656 (Fla. 1987); Wilson, 474 So.2d at 1162.

This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So.2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So.2d 362 (Fla. 1984). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Hall's claims.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Hall asserts that his capital conviction and sentence of death were obtained and then affirmed during this Court's appellate review process in violation of his rights as guaranteed by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

CLAIM I

APPELLATE COUNSEL COMMITTED FUNDAMENTAL ERROR FOR FAILING TO RAISE IN THE DIRECT APPEAL THAT FREDDIE LEE HALL IS MENTALLY RETARDED AND HIS EXECUTION WOULD BE A VIOLATION OF THE UNITED STATES AND FLORIDA CONSTITUTION.

Appellate counsel failed to raise or argue that Freddie Lee Hall is mentally retarded and his execution would be a violation of the Eighth Amendment of the United States Constitution and Art. I section 12 of the Florida Constitution. Despite the fact that this issue was not raised in the direct appeal, Justices Barkett and Kogan issued a dissenting opinion stating that Mr. Hall should not be executed because he is mentally retarded Hall v. State, 614 So.2d 473, 478 (Fla. 1993). The dissenting opinion stated that execution of a retarded person is cruel or unusual punishment in violation of Article I section 17 of the Florida constitution. The dissenting opinion stated:

> First, because a mentally retarded person such as Mr. Hall has a lessened ability to determine right from wrong and to appreciate the consequences of his behavior imposition of the death penalty is excessive in relation to the crime charged.....I believe imposing the death on mentally retarded defendants is excessive, serves no purpose except to dispose of those some might deem to be “unacceptable members” of society and therefore, is “cruel”. Second, executing a mentally retarded defendant such as Mr. Hall is “unusual” because it is disproportionate. Because mentally retarded individuals are not as culpable as other criminal defendant’s, I would find that the death penalty is always disproportionate when the defendant is proven to be retarded....In evaluating both the

> "cruel" and "unusual" punishment prohibitions of Art. I section 17 and the evolving standards of decency in Florida regarding the mentally retarded I find that executing the mentally retarded violated the State Constitution. Consequently, I would remand Mr. Hall's case for imposition of life imprisonment.

Id. at 182.

Mr. hall then attempted to raise the issue of his mental retardation', and the unconstitutionality of applying the death sentence to him, in his post conviction 3.850 motion. Hall v. State, 742 So.2d 225, 226 (Fla. 1999). Both the circuit court and the Florida Supreme Court found that the claim was procedurally barred because it was not raised on direct appeal. Id at 230.

> Counsels failure to present the mental retardation claim in the direct appeal denied Mr. Hall the opportunity to present the argument to the full court that evolving standards of decency have rendered the execution of mentally retarded persons a violation of the United States and Florida constitutions. Counsels omission prevented the presentation of compelling objective evidence of current societal opposition to the execution of retarded persons. The legal arguments which should have been presented to the Court on direct appeal are as follows:
>
> The Supreme Court last addressed the issue of whether the execution of a mentally retarded person convicted of capital murder is prohibited by the Eighth Amendment in Penry v. Lynaugh, 109 S. Ct. 2934 (1989). The defendant in Penry presented psychiatric testimony that he suffered from a combination of organic brain damage and moderate retardation which resulted in poor impulse

> control and an inability to learn from experience. Id. at 2939.

The Court outlined the appropriate standard to be utilized in determining whether, in modern day society, the death penalty can be imposed upon a mentally retarded person. The Court stated:

> The Eighth Amendment categorically prohibits the infliction of cruel and unusual punishments. At a minimum the Eighth Amendment prohibits punishment considered cruel and unusual at the time the Bill of Rights was adopted. The prohibitions of the Eighth Amendment are not limited, however, to these practices condemned by the common law in 1789. The prohibition against cruel and unusual punishments also recognizes the "evolving standards of decency that mark the progress of a maturing society." In discerning those "evolving standards", we have looked to objective evidence of how our society views a particular punishment today. The clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures. Id. at 2592, 2593.

The Court then examined the objective evidence at the time of the Penry case and determined there was insufficient evidence of a national consensus against executing mentally retarded persons convicted of capital murder. Id. at 2955. The Court based that conclusion on the fact that, at that time, only two states, Georgia and Maryland, along with the Federal Government, banned the execution of retarded persons. Id. at 2954. The Court then left open future reconsideration of the issue by stating:

> The public sentiment expressed in these and other polls[1] and resolutions may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which we can rely. But at present, there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment. Id. at 2955.

There is now ample evidence that contemporary societies values have evolved since the Penry decision so that execution of a mentally retarded person, such as Freddie Hall, is prohibited by the Eighth Amendment. This evolution is best demonstrated in the actions of many states in enacting recent legislation banning the execution of the mentally retarded.

Since the 1989 decision in Penry, 12 other states have joined Georgia and Maryland in banning the execution of the mentally retarded. Those states are: Arkansas (Ark. Code Ann 5-4-618(b) (1993), Colorado (Colo. Rev. Stat. 16-9-403 (1994), Indiana (Ind. Code Ann. 35-36-9-6 (1994), Kansas (Kan. Stat. Ann 21- 4623(d) (1994) Kentucky (Ky. Rev. Stat. Ann. 532.140 (1990), Nebraska (Neb. Rev. Stat. 28-105.01(2) (1997), New Mexico (N.M. Stat. Ann. 31-20A-2.1(B) (1994), New York (N.Y. Crim. Proc. Law 400.27(12) (1995), South Dakota (S.D. Codified Laws Ch. 112 section 1 (2000), Tennessee (Tenn. Code Ann. 39-13-203(b)(1991) (), and Washington

[1]The polls cited by the Court are to several polls taken at the time of the case which indicated strong public opposition to the death penalty for the mentally retarded. One of the polls cited showed opposition by Floridians at 71%.

(Wash. Rev. Code Ann. 10.95.030(2) (1995). Connecticut has recently passed new legislation that, while not specifically banning the execution of mentally retarded, does eliminate the death sentence for a defendant who, at the time of the offense "his mental capacity was significantly impaired or his ability to conform his conduct to the requirements of law was impaired but not so impaired in either case as to constitute a defense to prosecution" (CT ST 53a-46a (h) (2000).

The passage of legislation banning the execution of mentally retarded persons by twelve states in the relatively short period of eleven years since Penry is strong evidence that the standards of society have evolved toward elimination of the death penalty for that class of defendant. Combined with the 13 states that do not have the death penalty brings the total number of states that do not execute the mentally retarded to a majority of 27.[2] It is also important to note that in the same period of time since Penry was decided not **one** state that has passed legislation banning the execution of retarded persons has repealed that legislation.

Congress has reaffirmed the Federal Governments opposition to the death penalty for the mentally retarded with the passage of the Federal Death Penalty Act of 1994. (18 U. S. C. 3591-3597 (1994))

[2]The number grows to 28 when the recently passed moratorium on the death penalty in Illinois is considered.

The Act states, “A sentence of death shall not be carried out upon a person who is mentally retarded.” Id. at 3596(c).

The record in the trials of Freddie Lee Hall conclusively establishes that he is mentally retarded. The Sentencing Judge, Richard Tombrink Jr., also made a specific factual finding that Freddie Lee Hall **has been mentally retarded his entire life**.

Appellate counsel had a duty to research and investigate legal claims to assert in Mr. Halls direct appeal. That would include an understanding of the Courts opinion in Penry recognizing that the evolving standards of decency could render the death penalty unconstitutional as applied to retarded persons. Appellate counsel was ineffective for failing to assert that claim in the direct appeal. There is a reasonable probability that had counsel properly presented this claim on direct appeal, that the death sentence given to Mr. Hall would have been overturned because it is contrary to the United States and Florida Constitutions under contemporary standards of human decency. Therefore, the petitioner moves his sentence of death be vacated.

CLAIM II

APPELLATE COUNSEL VIOLATED THE FOURTEENTH AMENDMENT BY FAILING TO POINT OUT TO THE COURT THAT THE FACTUAL FINDING THAT FREDDIE LEE HALL WAS THE "LEADER" OF THE CRIMINAL ACTS COMMITTED BY HALL AND CO-DEFENDANT MACK RUFFIN WAS NOT SUPPORTED BY THE EVIDENCE.

In the final sentencing order, the Circuit Court addressed the issue of the proportionality of sentencing Freddie Lee Hall to death while co-defendant Mack Ruffin received a life sentence. Judge Tombrink, while acknowledging the legal impropriety of sentencing a defendant to death where a equally culpable co-defendant received a life sentence, then made the factual findings regarding that issue.

> The operative words in supporting mitigation under this broad category of disparate treatment of an accomplice are the words "who was of equal or greater culpability". [R. 663] In the case at bar, the evidence would suggest that Freddie Lee Hall was the more culpable and dangerous of the two defendants charged in this crime.
>
> This court believes that the evidence present in the instant case would demonstrate that Mr. Hall was the more culpable, and that thus, Mack Ruffin, Jr. was not an accomplice who was of equal or greater culpability.
>
> The facts of the instant case reflect clearly that Mr. Hall was primarily responsible for the kidnaping of Karel Lee Hurst. He alone drove the car away from the grocery store while the victim sat in the front seat. There is substantial evidence to suggest that Mr. Hall raped the victim. There is substantial evidence that Mr. Hall at least encouraged or dared Mr. Ruffin to execute the victim, if in fact, Mr. Hall was not himself the executioner.

> Though the court admits that there is some confusion throughout all the testimony in this cause as to who actually pulled the trigger that caused the death of Karel Lee Hurst and Deputy Lonnie Colburn, it is clear that Mr. Hall was the older and larger of the two defendants. **Everything in the evidence indicates that Mr. Hall was the leader of the pact of two that accomplished this varied and random violence on February 21, 1978. This court believes that the totality of the reasonable inferences in the entire evidence available in this case indicates that the defendant, Freddie Lee Hall is the more culpable defendant**. [R 663](Emphasis added)

On direct appeal, the Florida Supreme Court affirmed the trial Court's findings and stated:

> We also reject hall's claims that his death sentence is not proportionate. These crimes were a joint operation, with each defendant responsible for other's acts. Even though Ruffin received a life sentence, the different treatment given Hall is appropriate. As noted by the trial judge, Hall was the bigger and older than Ruffin and was the leader. Before the date of this crime he had been convicted of a violent crime and was on parole, whereas Ruffin had no criminal history. Also, Ruffin's resentencing jury recommended that he be sentenced to life imprisonment. Hall, on the other hand, has received the death sentence from every jury he has appeared before. The disparate treatment is fully warranted.

Hall v. State, 614 So.2d 473, 478 (Fla. 1993).

Appellate Counsel had a duty to argue to the Court the facts and circumstances that refute the trial courts determination that Hall was the "leader" of the criminal activities committed by Mr. Hall and Mr. Ruffin. Counsel failed to do so. Specifically, appellate counsel failed to argue to the Court critical testimony

contained in the pre-trial deposition of Detective Bernard Bishop of the Hernando County Sheriff's Office. Detective Bishop, a five year veteran with the Sheriff's Office at the time of his involvement in the Hall case, made the following comparisons as to the intellectual abilities of Mr. Hall relative to Mack Ruffin as well as stating his opinion as to who, based upon his interactions and observations, was the actual leader of the criminal activities. He stated:

> A. Also you've got to take into account the intelligence of the two individuals.
>
> Q. Compare those for me, as far as your perceptions.
>
> A. Hall was kind of dim witted. He would do whatever he was told by Ruffin. Ruffin was very intelligent. He never made, as far as I know, any reference to any crime that he had ever committed. And it was very apparent to me, watching them, if they were like on a trial, in a trial atmosphere, there was continuous eye contact between Ruffin on Hall. He was very, very con-wise, Ruffin was. Hall, on the other hand, even when the man did not know I was watching him, did not change his demeanor, his way of voicing things. The man was not playing a game. He just was not quick mentally.[Depo of Deputy Bishop P23 L 5-19]
>
> *
>
> ... But, like I say my impression was that the man did not have the mental capacity to think three thoughts ahead of himself. And he was typical - - when I say typical, I mean an uneducated criminal - - a typical uneducated criminal who really didn't have the ability to plan too far ahead.
>
> Q. Contrary to Mr. Ruffin.

> A. I watched Mr. Ruffin; I was very careful of Mr. Ruffin. It was plain to see that he was a manipulator. Whether it be with the system, whether it be with another individual, whatever Mr. Ruffin had to do to get what he wanted, that's what he would do. If it meant coping out, then he would cop out, if he got what he wanted. Now as far as who actually shot Lonnie Coburn, only two people know that. [Deposition of Bernard Bishop P25 L24, P 26 L 1-12]

The opinions of Detective Bishop, based upon his observations and interactions with the two men, concerning the relative mental abilities of Mr. Hall and Mr. Ruffin are compelling, not only because they are the observations of a highly trained law enforcement officer, but because his conclusions are consistent with other evidence presented in the case. That other evidence is as follows:

> As there were no eye-witnesses to the killing of Carol Lea Hurst, the facts and circumstances of the relative involvement of Freddie Lee Hall and Mack Ruffin comes from statements and testimony of Mr. Hall and Mr. Ruffin which were introduced at the resentencing trial. Deputy Arthur Freeman testified as to a statement made to him by Mack Ruffin:
>
> Q. Did Mr. Ruffin, sir, tell you who shot Carol Hurst?
>
> A. He said **he did**.[R 1605](emphasis added)
>
> Q. Did he say anything else to you about that?

A. No more than you know, he had to kill her because he didn't want her to talk.[R 1606]

Q. Now, you testified yesterday about the statement that Mack was telling you about what Freddie said.

A. Right.

Q. What was that statement?

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

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

A. No, I can't say it was made at the time of the shooting. [R 1872]

The state introduced the previous testimony of Mr. Hall:

Q. Lets go to the crime you have been convicted of. Did you and your partner decide to steal a car so you could commit an armed robbery ?

A. At first it was like here, all right. We left. We didn't put that in mind until we got near to Leesburg, about stealing the car.

*

A. We didn't steal it. Like I said in the beginning, I asked the lady: I'd like to borrow your car - The lady said - she slid over just like that. [R 1502]

*

Q. You were going to tie her up in the wooded area but you weren't going to let her out along the road.

A. Tie her up and also go ahead and do what we're going to do and come back and give her car.

Q. Ruffin raped this woman down there?

A. Yes

*

Q. What?

A. When he hit the lady, the lady fell. And I said "Hey man". He hit the lady three times and I said "Hey man don't do that, black her eye like that". And then he shot her.

Q. And where did you go then?

A. Well you've already got the statement. Like you said before, we went back and got Ruffin's car.

Hall went on to explain what happened during the shooting of Deputy Coburn:

A. Then I turned around and grabbed him. And when I grabbed him - I think he was - I think he shot that gun. When he shot the gun I kind of pushed him. When I pushed him, that's when Ruffin shot him. [R 1510]

In describing the chase that occurred after Hall said:

Q. How fast were you driving that car?

A. Ok Ill say 50 MPH.

Q. And Ruffin was shooting at the Deputy?

A. Not on 301, not until we got on the other road.

Although there were no eye-witnesses to the killing of Carol Hurst, there was an eye-witness account of the police chase that

occurred thereafter. Deputy Michael Janes testified as to what occurred during the chase:

> A. At the first curve we picked up enough speed that they almost spun out sideways and I started to ram them, backed off, and about that time the passenger in the passengers side rolled down the window, half of his body out extended and commenced firing a .357 magnum at me. [R 1308]
>
> Q. But the only person you saw with the gun hanging out that window was the smaller person of the two?
>
> A. Yes sir.
>
> Q. That's the only person you ever saw firing a weapon?
>
> A. Yes sir.
>
> Q. That was Mack Ruffin?
>
> A. Yes sir. [R 1315]

These facts establish that (1) Mr. Ruffin shot Carol Hurst. (2) Mr. Ruffin shot Deputy Coburn. (3) Mr. Ruffin shot at the pursuing deputies. (4) It was Mr. Ruffin's car used to drive to the convenience store. These facts, along with the observations of Deputy Bishop, were not properly pointed out to the Court by Appellate counsel.

In addition to the facts surrounding the homicide as presented at the resentencing trial, the observations of Detective Bishop are also consistent with the mental health testimony concerning Mr. Hall.

Dr. Barbara Bard, professor at Central Connecticut State University in the Department of Special Education, testified that she evaluated Petitioner in September of 1986. [R. 1708] She used the Woodcock-Johnson Psycho-Educational Battery of testing on Petitioner to test language and writing skills. [R. 1709] She stated that Petitioners ability to comprehend letters and simple words is approximately on a third grade level. [R. 1713] In the Passage Comprehension test Petitioner scored on the first grade level. [R. 1715] The profile of the testing was consistent with a mentally retarded adult. [R. 1718] In regard to language screening, Petitioners scoring was indicative of a neurologically based speech disorder caused by brain damage. [R. 1721, 22] Dr. Baird also testified, after viewing a tape of Petitioners confession, that he is functionally illiterate because he could not read words he himself had written. [R. 1734]

Dr. Jethro Toomer, a forensic psychologist, testified that he administered a battery of psychological tests on Petitioner. [R. 1746-8] The results of the Bender-Gestault test showed brain damage caused by trauma. [R. 1748] The results of the IQ test was a 60, reflective of severe deficits in intellectual functioning and placed the Petitioner in the mentally retarded category. [R.1749] Dr. Toomer testified within a reasonable degree of medical probability, that Petitioner is mentally retarded. He also stated that the mental retardation has been longstanding.

[R. 1760] He further testified, within a reasonable degree of medical certainty that on February 21, 1978 Petitioner was under the influence of extreme mental and emotional disturbance,[R. 1772] and that he was unable to appreciate the criminality of his conduct. [R. 1773] Additionally, Dr. Toomer also testified that, at the time of offense, Petitioner suffered from a form of Psychosis. [R. 1774]

Dr. Kathleen Heidi was qualified in Court as an expert in personality assessment, criminology, with experience and training in the field of psychology and dysfunctional families. [R. 1831] She testified that, in her opinion, Petitioner could not appreciate the criminality of his conduct on the day of the offense and that his ability to conform his behavior was substantially impaired. [R. 1854] She also stated that Mr. Hall's personality development was very limited or it was low. His way of seeing things was very limited. He was also very impulsive. This is not someone capable of long term planning. He is not evaluative. He's not gotten to that point. The best way of thinking of him is somebody who could be carried along by events. Who, because of those deficits or that limited personality development, is sort of flying by the seat of his pants. Just kind of going through things. [R 1847]

Dr. Dorothy Lewis testified via video tape that Mr. Hall was brain damaged, learning disabled, mildly retarded, chronically

psychotic and has a speech disorder. (*see video tape of Dr. Lewis's testimony*) She also stated that Mr. Hall cannot function as an adult and cannot think long term. (*see video tape of Dr. Lewis's testimony*)

The mental health testimony of mental retardation and low intellectual functioning is entirely consistent with Detective Bishop's observations of Mr. Hall as dim witted. It is also consistent with Deputy Bishops observations that Mr. Ruffin, not Mr. Hall, was the "leader" of the criminal enterprise and directly refutes the factual finding by the court that Hall was the leader because he was older and larger. There is a reasonable probability that the outcome of the appellate procedures would have been different i.e. a vacation of the death sentence and a sentence of life imprisonment based upon a proportionality analysis, had appellate counsel properly presented this critical evidence from Detective Bishop. Therefore, his sentence of death should be vacated.

CLAIM III

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO POINT OUT TO THE COURT THAT THE 1968 CONVICTION AGAINST MR. HALL SHOULD NOT HAVE BEEN USED AS AN AGGRAVATING CIRCUMSTANCE BECAUSE IT WAS OBTAINED IN A RACIST ATMOSPHERE IN VIOLATION OF DUE PROCESS AND BECAUSE THE TRIAL COURT DID NOT INFORM MR. HALL OF HIS APPELLATE RIGHTS AND BECAUSE TRIAL COUNSEL DID NOT FILE A NOTICE OF APPEAL.

In Mr. Hall's case the court found the aggravating circumstance of a prior violent felony conviction. That aggravator was based upon a 1968 conviction for assault with intent to commit rape. [Hall v. State, 614 So.2d at 477 (Fla. 1993)]

Appellate counsel has the duty to put forth claims on appeal which rise to the level of a due process violation of a fundamental constitutional right. In this case appellate counsel failed to assert claims concerning the state's use of the aggravating circumstance of a prior violent felony conviction. More specifically, appellate counsel failed to raise the issues that the 1968 conviction was invalid due to the racist atmosphere surrounding the trial, and that Mr. Hall was never informed of his right to appeal, and Mr. Hall's counsel never filed a notice of appeal.

(A) The racist atmosphere surrounding Mr. Hall's conviction.

In Mr. Hall's resentencing trial the defense called attorney T. Richard Hagin who represented Mr. Hall in the 1968 rape case. [R 1533] He testified as to the racial overtones surrounding the case. He had a number of threats to his home, office, and family. Attorney Hagin stated:

> Q. What did they say Mr. Hagin.
>
> A. "Why are you representing this g.d. nigger." You know, and to my six-or-seven-year-old son, you know: "Look at him trying to get that nigger off," and "nigger this" and "nigger that" and "nigger the other." It bothered my kids.
>
> Q. I understand, sir. Did that racial atmosphere invade the courtroom Mr. Hagin?
>
> A. yes
>
> Q. Tell us about that.
>
> A. During the course of the trial there was an elderly gentleman that had been appointed bailiff to serve on the jury by the name of Luther Shaira(phonetic) who was very definitely prejudiced against black people and he had a number of comments to make to the spectators in the courtroom.
>
> Q. During the course of the trial?
>
> A. During the course of the trial.
>
> Q. What were those comments Mr. Hagin?
>
> A. Well, he told a lot of spectators that they better be careful, that the black spectators were carrying knives and possibly guns and if the jury turned Mr. Hall aloose or if the judge continued to rule against Mr.

> Hall there was going to be some severe consequences. In addition to that, several of the sheriff's deputies came into the courtroom toward the end of the trial and had all the white spectators move over to the west side of the courtroom away from the black spectators.
>
> Q. Do you recall where this bailiff made comments about Mr. Hall or Freddie?
>
> A. Seemed like toward the last day of the trial **when all the jurors were sitting in the box** – - and back then the jurors and some of their friends had come to court with them to see. This was a fairly big trial for Sumter County in those days. So they were all sitting there. And it was about 9:30 in the mourning and me and Freddie Lee were sitting over at the table talking and **Luther was at the end of the jury box and in a very loud voice going on, talking about, you know: "Look at that damn Hagin trying to get that nigger off. Look at him sitting over there reading his bible.**" He said: "**He better read that bible because he's in serious trouble now.** And Hagin was unmerciful on this Freelove in his cross examination," and just going on and on you know, telling them they all better be careful, jurors, wives and friends.[R 1538,39 *emphasis added*]
>
> Q. So is it fair to say that race did enter into the Sumter County Courthouse?
>
> A. Very definitely.

The statements of the bailiff in open court , in the presence of the jury, denied Mr. Hall of fundamental due process rights. The United States Supreme Court addressed this issue in Parker v. Gladden, 385 U.S. 363 (U.S. 1966). In that case the bailiff stated to certain jurors that the defendant was a wicked fellow and was guilty and that if there was anything wrong in

finding the defendant guilty, the Supreme Court would correct it. Id at 470. The Court stated:

> We believe that the unauthorized conduct of the bailiff involves such a probability that prejudice will result that it is deemed inherently lacking in due process. As we stated in Turner v. State it would be blinking reality not to recognize the extreme prejudice inherent in such statements that reached at least three members of the jury and one alternative member. Id.

In the case at bar, the comments by the bailiff in open court were far more inflammatory and represent a greater likelihood of prejudice than those in Parker. Appellate counsel had a duty to bring forth on appeal fundamental constitutional violations which occurred in Mr. Hall's resentencing trial. The use of the 1968 conviction as an aggravator in Mr. Hall's case, given the racist and prejudicial remarks by the bailiff, is a violation of Mr. Hall's fundamental rights which appellate counsel had a duty to raise on direct appeal.

The prejudice associated with use of the prior conviction as an aggravator is exemplified in the opinion of this Court in Mr. Hall's direct appeal. The Court used the existence of the previous aggravator as a distinguishable feature in a proportionality analysis as between the life sentence given co-defendant Mack Ruffin and the death sentence given to Mr. Hall. The court stated:

> As noted by the trial judge, Hall was bigger and older than Ruffin and was the leader.

> Before the date of this crime he had been convicted of a violent crime and was on parole, whereas Ruffin had no such criminal history ...[Hall v. State, 614 So.2d at 478 (Fla. 1993)]

The above excerpt from the opinion clearly demonstrates that under a proportionality analysis, without the prior violent felony aggravator, this Court would have vacated Mr. Hall's death and imposed a life sentence. The omissions of appellate counsel in failing to bring this issue in the direct appeal was prejudicial to Mr. Hall.

(B) Failure of the trial court to inform Mr. Hall that he had 30 days to appeal the judgment and sentence of the court.

Appellate counsel had a duty to file claims based upon a fundamental denial of Mr. Hall's constitutional rights. In the 1968 rape case, Mr. Hall was not advised and informed by the court that he had 30 days to appeal the judgment and sentence of the court. Furthermore, Appellate counsel has a duty to supplement the record when necessary for proper appellate review. The transcript of the sentencing hearing on Mr. Hall's 1968 case is such a record necessary for proper appellate review of Mr. Hall's death sentence. [Addendum A Pages 3 to 4]

Florida law is clear that at the time of sentencing, a criminal defendant must be informed of the time allowed for appealing the conviction. Fla.R.Crim.P. 3.670 specifically mandates:

> When a judge renders a final judgment of conviction...the judge **shall forthwith inform the defendant concerning the rights of appeal therefrom, including the time allowed for taking an appeal.**[emphasis added]

The transcript of Mr. Hall's sentencing establishes that Mr. Hall was not informed of the time allowed by law for taking an appeal. [Addendum A Page 3, 4]. Nor did his attorney file a notice of appeal on his behalf.[R1544 , 1545] Therefore, Mr. Hall was not given an opportunity to file an appeal challenging the racial aspects, as well as other legal aspects, of his 1968 conviction. It is a fundamental violation of Mr. Hall's constitutional rights to use a prior violent felony aggravator where appropriate appellate review of the previous conviction was not properly provided, especially where racial slurs by the bailiff during the trial contaminated proper due process.

Simultaneously with the filing of this Writ, counsel for Mr. Hall is filing a motion with the circuit court to appoint Mr. Hall a lawyer to represent him on a belated appeal pursuant to Florida Rules of Appellate Procedure 9.140(j). In the interests of justice, Mr. Hall moves this court to postpone ruling on this claim in the Writ until a proper decision can be made in Circuit Court as to appointment of counsel for the appeal, as well as the District Court of Appeal's review of the conviction. As the attached motion reveals, there are numerous legal questions associated with the conviction in need of appellate review.

CLAIM IV

FREDDIE HALL'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS DEFENDANT MAY BE INCOMPETENT AT TIME OF EXECUTION.

1. In accordance with Florida Rules of Criminal Procedure 3.811 and 3.812, a prisoner cannot be executed if "the person lacks the mental capacity to understand the fact of the impending death and the reason for it." This rule was enacted in response to Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595 (1986).

2. The undersigned acknowledges that under Florida law, a claim of incompetency to be executed cannot be asserted until a death warrant has been issued. Further, the undersigned acknowledges that before a judicial review may be held in Florida, the defendant must first submit his claim in accordance with Florida Statutes. The only time a prisoner can legally raise the issue of his sanity to be executed is after the Governor issues a death warrant. Until the death warrant is signed the issue is not ripe. This is established under Florida law pursuant to Section 922.07, Florida Statutes (1985) and Martin v. Wainwright, 497 So.2d 872 (1986)(If Martin's counsel wish to pursue this claim, we direct them to initiate the sanity proceedings set out in section 922.07, Florida Statutes (1985).

3. The same holding exists under federal law. Poland v. Stewart, 41 F. Supp. 2d 1037 (D. Ariz 1999) (such claims truly are not ripe unless a death warrant has been issued and an execution

date is pending); Martinez-Villareal v. Stewart, 118 S. Ct. 1618, 523 U.S. 637, 140 L.Ed.2d 849 (1998)(respondent's Ford claim was dismissed as premature, not because he had not exhausted state remedies, but because his execution was not imminent and therefore his competency to be executed could not be determined at that time); Herrera v. Collins, 506 U.S. 390, 113 S. Ct. 853, 122 L.Ed.2d 203 (1993)(the issue of sanity [for Ford claim] is properly considered in proximity to the execution).

4. However, most recently, in In Re: Provenzano, No. 00-13193 (11th Cir. June 21, 2000), the 11th Circuit Court of Appeals has stated:

> Realizing that our decision in In Re: Medina, 109 F.3d 1556 (11th Cir. 1997), forecloses us from granting him authorization to file such a claim in a second or successive petition, Provenzano asks us to revisit that decision in light of the Supreme Court's subsequent decision in Stewart v. Martinez-Villareal, 118 S.Ct. 1618 (1998). Under our prior panel precedent rule, See United States v. Steele, 147 F.3d 1316, 1317-18 (11th Cir. 1998)(en banc), we are bound to follow the Medina decision. We would, of course, not only be authorized but also required to depart from Medina if an intervening Supreme Court decision actually overruled or conflicted with it.[citations omitted]
>
> Stewart v. Martinez-Villareal does not conflict with Medina's holding that a competency to be executed claim not raised in the initial habeas petition is subject to the strictures of 28 U.S.C. Sec 2244(b)(2), and that such a claim cannot meet either of the exceptions set out in that provision.

Id. at pages 2-3 of opinion

5. Given that federal law requires, that in order to preserve a competency to be executed claim, the claim must be raised in the initial petition for habeas corpus, and in order to raise an issue in a federal habeas petition, the issue must be raised and exhausted in state court. Hence, the filing of this petition.

6. The defendant has been incarcerated since1978. Statistics have shown that an individual incarcerated over a long period of time will diminish his mental capacity. Inasmuch as the defendant may well be incompetent at time of execution, his Eighth Amendment right against cruel and unusual punishment will be violated.

7. The facts on the record concerning Mr. Hall's mental capacity are as follows:

Dr. Barbara Bard, professor at Central Connecticut State University in the Department of Special Education, testified that she evaluated Petitioner in September of 1986. [R. 1708] She used the Woodcock-Johnson Psycho-Educational Battery of testing on Petitioner to test language and writing skills. [R. 1709] She stated that Petitioners ability to comprehend letters and simple words is approximately on a third grade level. [R. 1713] In the Passage Comprehension test Petitioner scored on the first grade level. [R. 1715] The profile of the testing was consistent with a mentally retarded adult. [R. 1718] In regard to language screening,

Petitioners scoring was indicative of a neurologically based speech disorder caused by brain damage. [R. 1721, 22] Dr. Baird also testified, after viewing a tape of Petitioners confession, that he is functionally illiterate because he could not read words he himself had written. [R. 1734]

Dr. Jethro Toomer, a forensic psychologist, testified that he administered a battery of psychological tests on Petitioner. [R. 1746-8] The results of the Bender-Gestault test showed brain damage caused by trauma. [R. 1748] The results of the IQ test was a 60, reflective of severe deficits in intellectual functioning and placed the Petitioner in the mentally retarded category. [R.1749] Dr. Toomer testified within a reasonable degree of medical probability, that Petitioner is mentally retarded. He also stated that the mental retardation has been longstanding. [R. 1760] He further testified, within a reasonable degree of medical certainty that on February 21, 1978 Petitioner was under the influence of extreme mental and emotional disturbance, [R. 1772] and that he was unable to appreciate the criminality of his conduct. [R. 1773] Additionally, Dr. Toomer also testified that, at the time of offense, Petitioner suffered from a form of Psychosis. [R. 1774]

Dr. Kathleen Heidi was qualified in Court as an expert in personality assessment, criminology, with experience and training in the field of psychology and dysfunctional families. [R. 1831] She testified that, in her opinion, Petitioner could not appreciate

the criminality of his conduct on the day of the offense and that his ability to conform his behavior was substantially impaired. [R. 1854] She also stated that Mr. Hall's personality development was very limited or it was low. His way of seeing things was very limited. He was also very impulsive. This is not someone capable of long term planning. He is not evaluative. He's not gotten to that point. The best way of thinking of him is somebody who could be carried along by events. Who, because of those deficits or that limited personality development, is sort of flying by the seat of his pants. Just kind of going through things. [R 1847]

Dr. Dorothy Lewis testified via video tape that Mr. Hall was brain damaged, learning disabled, mildly retarded, chronically psychotic and has a speech disorder. (*see video tape of Dr. Lewis's testimony*) She also stated that Mr. Hall cannot function as an adult and cannot think long term. (*see video tape of Dr. Lewis's testimony*).

Habeas relief is warranted.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Hall respectfully urges this Honorable Court to grant habeas relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing ***PETITION FOR WRIT OF HABEAS CORPUS*** has been furnished by United States Mail, first-class postage prepaid, to all counsel of record on ***July 31, 2000***.

_____

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