IN THE SUPREME COURT OF FLORIDA
CASE NO. SC15-1662

ENOCH D. HALL
Appellant,

vs.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT IN AND FOR VOLUSIA COUNTY, FL
Lower Tribunal No. 2008-33412 CFAES

INITIAL BRIEF OF THE APPELLANT

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REQUEST FOR ORAL ARGUMENT

Undersigned counsel for the Appellant respectfully requests the opportunity to present oral argument pursuant to Fla. R. App. P. 9.320. This is a capital case, the resolution of the issues presented will determine whether Enoch D. Hall will live or die, and a complete understanding of the complex factual, legal and procedural history of this case is critical to the proper disposition of this appeal.

JURISDICTIONAL STATEMENT

This is a timely appeal from the trial court's final order denying an original motion for postconviction relief from a judgment and sentence of death. This Court has plenary jurisdiction over death penalty cases. Fla. Const. art. V, § 3(b)(1); Orange County v. Williams, 702 So.2d 1245 (Fla. 1997).

PRELIMINARY STATEMENT ABOUT THE RECORD

References to the record on direct appeal are designated "R" followed by the page number. References to the postconviction record are designated "PCR" followed by the page number. All references to volumes are designated as "V" followed by the volume number.

Every page of the record on direct appeal has been assigned a volume. However, the clerk did not assign volume numbers to the postconviction record. The court reporter assigned volume numbers (1-7) for the transcription of the evidentiary hearing. Volumes 1-7 correspond to pages 151-1052 of the PCR.

STATEMENT OF THE CASE AND FACTS

The procedural history and facts presented at the trial were summarized by this Court in its direct appeal opinion. In part, they are as follows:

On July 10, 2008, Hall was indicted by grand jury for the first degree murder of Florida Department of Corrections Officer (hereinafter "CO") Donna Fitzgerald. R1017-1018/V7 The State filed a Notice to Seek the Death Penalty. R1022/V7

Trial counsel unsuccessfully contested the legality of Florida's death penalty statute under Ring v. Arizona, 536 U.S. 584 (2002). R1124-1172/V8 Counsel's request for interrogatory verdicts for the penalty phase was also denied. R1429-1432/V9; R1592/V10 The trial court denied the Defense's motion to suppress three statements made to Florida Department of Law Enforcement (hereinafter "FDLE") at the time of Hall's arrest. R1411/V9; R1520/V10

This case proceeded to jury trial on October 12, 2009. R1623/V10 The evidence at trial established the following. Hall was an inmate at Tomoka Correctional Institute (hereinafter "TCI"), who worked as a welder in the Prison Rehabilitative Industries and Diversified Enterprises, Inc. (hereinafter "PRIDE") compound, where inmates work refurbishing vehicles. Sergeant Suzanne Webster was working as the TCI control room supervisor, where she was responsible for getting a count from all areas of the prison as to the number of inmates in each area. When Webster had not heard from CO Fitzgerald, who was working in the PRIDE

compound that night, Webster radioed CO Chad Weber, who went to the PRIDE facility with Sergeant Bruce MacNeil to search for Fitzgerald. Weber saw Hall run through an open door on the other end of one of the PRIDE buildings and Weber and MacNeil pursued Hall. Weber caught up to Hall, who repeatedly stated "I freaked out. I snapped. I killed her." Hall remained outside with other officers while Captain Shannon Wiggins and Officers Weber and MacNeil entered the building and located Fitzgerald's body. Fitzgerald's body was found lying face down on top of a cart in the paint room. Hall gave three statements to FDLE agents throughout the night regarding the events of the murder. Hall v. State, 107 So. 3d 262, 267-8 (Fla. 2012). The jury returned a verdict of guilty of first degree murder. R2893/V30

On October 27, 2009, this cause proceeded to a penalty phase. R1666/V10 Following deliberations, the jury unanimously recommended death. R1725/V11

A Spencer[1] hearing was held on December 7, 2009. R1729/V11 In the Sentencing Order, the trial court found that five aggravating circumstances and been proven by the State, including that the offense was cold, calculated and premeditated (hereinafter "CCP") R1790-1799/V11 The court did not find any statutory mitigators had been established. R1810/V11 The Defense also argued for twelve non-statutory mitigators, but the court found that only eight had been proven.

[1]Spencer v. State, 615 So. 2d 688 (Fla. 1993).

R1800-1810/V11 The trial court concluded that the aggravating factors "far outweighed" the mitigating factors and sentenced Enoch Hall to death on January 15, 2010. R1810/V11

On direct appeal, the Florida Supreme Court held that the trial court's finding of CCP was not supported by competent, substantial evidence. Accordingly, the CCP aggravator was stricken. Id. at 278-279. However, the convictions and sentence were affirmed. Id. at 281. Mr. Hall's Cert. Petition was denied on October 7, 2013. Hall v. Florida, 134 S. Ct. 203, 187 L. Ed. 2d 137 (2013).

CCRC-Middle was appointed to represent Mr. Hall in his postconviction proceedings on February 8, 2013. Mr. Hall filed his Motion for Postconviction Relief pursuant to Fla. R. Crim. P. 3.851 on September 17, 2014. PCR1188-1266 Mr. Hall raised 11 claims.

At the hearing, held on May 4-7, 2015, Mr. Hall called 10 witnesses:

1) Lt. Stephen Farrow was called to lay a foundation for a video of Mr. Hall which showed him limping down the hall while being transported to Florida State Prison (hereinafter "FSP"). PCR174-181/V1

2) Former Inspector General John Joiner was called to lay a foundation for photographs of Mr. Hall, which showed injuries after his arrest. He also testified as to findings of the Department of Corrections (hereinafter "DOC")

from their administrative review of the issues and concerns surrounding the death of CO Fitzgerald at TCI. PCR182-211/V1

3) Elizabeth Lasseter is Mr. Hall's half-sister. She testified to her history of epilepsy and her experience with taking Tegretol. PCR214-222/V1

4) Michael Maher, M.D. offered testimony pertaining to both guilt and penalty phase issues. He advised the court of how long Tegretol could likely be detected in the blood and urine of an individual. He explained how a black eye develops and how long that takes. He viewed the video of Mr. Hall limping down the hall at FSP and rendered his opinion. He explained the effects a head injury, epilepsy, post-traumatic stress disorder and cognitive disorder NOS could have on memory.

He discussed the significance of Mr. Hall's mother cheating on the father as it related to Mr. Hall's reaction to CO Fitzgerald laughing at him. He explained the relevance of Mr. Hall's sister's reaction to Tegretol and her history of epilepsy. Dr. Maher reviewed Mr. Hall's MRI, medical and psychological histories and agreed with Dr. Krop's conclusion that Mr. Hall suffered with a cognitive disorder NOS. Dr. Maher also educated the court about the uses of Trilifon, an anti-psychotic drug given to Mr. Hall after the murder. PCR227-408/V1-2

5) Rodney Callahan was an inmate at TCI who worked at PRIDE as a welder. He testified about the working conditions of a welder and the reasons Mr. Hall was stressed at the time of the murder. He described the various methods for assembling stragglers at the end of the overtime shift. He verified that many inmates had unsupervised access to scrap metal and grinders at PRIDE. PCR423-465/V3

6) Jesse Eugene Hall is Mr. Hall's uncle on his father's side. He testified to Mr. Hall's mother's infidelity. PCR468-471, 484-485/V3

7) Enoch James Hall is Mr. Hall's father and confirmed that Mr. Hall's mother cheated on him. She laughed at him when he confronted her. Mr. Hall would have been present at that time. PCR473-483/V3

8) Trial counsel, James Valerino, responded to questions about his decisions concerning the ineffective assistance of counsel claims. PCR488-646/V3-4

9) Walter Schell was an inmate at TCI who worked at PRIDE as the de facto inmate supervisor over the conversion process. He explained why inmates working at PRIDE were stressed and why Mr. Hall appeared stress around the time of the murder. PCR650-657/V4

10) Trial counsel, Matthew Phillips, responded to questions about his decisions concerning the claims of ineffective assistance of counsel. PCR666-817/V5

The State called 3 witnesses:

1) Investigator Steven Miller interrogated Mr. Hall. PCR827-848/V6

2) PD Investigator Robert Ryan interviewed Mr. Hall for mitigation evidence. PCR849-880/V6

3) Jeffrey Danziger, M.D. evaluated Mr. Hall. PCR885-977/V6-7

The Defense and State made oral closing arguments. PCR983-1049/V7

The postconviction court denied all the claims on July 8, 2015. PCR2254-2281 Mr. Hall's Motion for Rehearing was denied on August 7, 2015. PCR2283-2286 This appeal follows.

STANDARD OF REVIEW

Claims of ineffective assistance of counsel are governed by Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). To establish deficiency under Strickland, the defendant must prove that counsel's performance was unreasonable under "prevailing professional norms." Morris v. State, 931 So. 2d 821, 828 (Fla. 2006) (quoting Strickland, 466 U.S. at 688). To establish prejudice, the defendant must prove that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. (quoting Strickland, 466 U.S. at 694). Both prongs of the Strickland test present mixed questions of law and fact.

For this reason, the Court employs a mixed standard of review, deferring to

the factual findings of the circuit court that are supported by competent, substantial evidence, but *de novo* review of legal conclusions. See, Sochor v. State, 883 So. 2d 766, 771-72 (Fla. 2004).

In Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527 (2003), the United States Supreme Court held that "Strickland does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy. Rather a reviewing court must consider the reasonableness of the investigation said to support that strategy." Wiggins, 539 U.S. 510. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation… In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness." Id. at 521 (quoting Strickland, 466 U.S. at 690 91).

Prejudice, in the context of claims of penalty phase ineffective assistance of counsel, is shown where, absent the deficient performance, there is a reasonable probability that the balance of aggravating and mitigating circumstances would have been different or the deficiencies substantially impair confidence in the outcome of the proceedings. Lynch v. State, 2 So. 3d 47, 70 (Fla. 2008); Floyd v. State, 18 So. 3d 432, 453 (Fla. 2009).

NOTE: Cases cited throughout the brief may be applicable to other claims, but will not necessarily be repeated for purposes of efficiency.

SUMMARY OF THE ARGUMENT

Issue 1. Trial counsel failed to challenge juror Rapone for cause, costing the Defense a peremptory strike, which would have been used on biased juror Roddy who was seated.

The court did not apply the same standard to Mr. Hall, and denied the cause challenge against juror Roddy. Counsel was ineffective for failing to request an additional peremptory to be used against Professor Roddy when their cause challenge was denied, thereby failing to preserve the issue for appeal.

Issue 2. Mr. Hall was denied the effective assistance of counsel at the guilt phase of his capital trial, because they failed to adequately investigate the case, develop a defense and challenge the State's assumptions and conclusions.

A. Mr. Hall told his trial attorneys that he had stayed behind at the end of the overtime shift, because he was looking for more of the , which he needed becasue he was stressed out from work. Counsel did not present evidence or call fellow PRIDE coworkers to testify and establish the conditions under which Mr. Hall worked and explain why he was stressed. The only evidence that was presented on Mr. Hall's behalf was a video of him sitting on a bench waiting to be interrogated.

B. The State argued that Mr. Hall was lying in wait for CO Fitzgerald and knew she would be coming to look for him alone and unarmed. Counsel did not provide evidence about the various methods CO Fitzgerald could have used to assemble

stragglers at the end of the overtime shift at PRIDE. They did not present evidence about DOC procedures and the equipment that a corrections officer is expected to carry. Counsel could have easily countered the State's assumptions about Mr. Hall's expectations if he stayed behind at the end of his shift. Since premeditation is an important element of first degree murder, it was essential to challenge the State's argument that Mr. Hall lie in wait to attack a defenseless CO Fitzgerald.

C. In his statement to police, Mr. Hall said that while he was looking for pills in Frank Prince's office, he found a concealed shank and pocketed it. Counsel did not provide evidence, from inmate testimony, as well as the DOC Administrative Review, that all the inmates working at PRIDE had unsupervised access to scrap metal and grinders, which could be used to create this homemade weapon. They did not introduce evidence that there was a roll of sheet metal right outside of Frank Prince's office with a piece cut out of it that was consistent with the metal used to make the shank used to kill CO Fitzgerald.

D. According to DOC regulations, they had the right to test Mr. Hall if they had reason to believe he took drugs illegally. The State argued against the Tegretol being the motive to stay late and that there was no proof of what medication Mr. Hall may have taken earlier in the day. Counsel did not request the court order the DOC to draw blood and obtain a urine sample from Mr. Hall, so that the Defense could perform drug tests, nor did the Defense argue that the DOC failed to test Mr. Hall's

urine themselves, thereby leaving the issue in question.

E. During the proffer of neuropharmacologist, Daniel Buffington, defense counsel offered the expert's testimony in order to argue diminished capacity of Mr. Hall from ingesting Tegretol. Counsel failed to offer the doctor to explain the effects of Tegretol and the withdrawal symptoms of Tegretol to enable the jury to understand Mr. Hall's motivation for searching for more of these pills after work.

F. Counsel did not use an expert to analyze the physical evidence to rebut the testimony of corrections officers, who denied they were the source of Mr. Hall's injuries at the time of his arrest. They did not provide expert testimony of how being beaten effects memory, in order to explain the inconsistencies in Mr. Hall's post-arrest statements.

G. Counsel did not provide a mental health expert who could have testified about the effects of head trauma, epilepsy, cognitive disorders and post-traumatic stress on memory. This is information the jury should have been able to consider in deciding why Mr. Hall's statements changed during the course of his interrogation.

H. The cumulative effect of failing to present the above enumerated evidence and defenses was to deny Mr. Hall a fair trial at the guilt phase.

Issue 3. CO Frederick Evins was not listed as a State witness. Nevertheless, he testified for the State about how he closed the PRIDE facility at the end of the overtime shift, which had no bearing on how CO Fitzgerald did it. His testimony

was misleading, because PRIDE had no set procedures, and CO Evins did not even train CO Fitzgerald. The State failed to establish the relevance of his testimony. Mr. Hall was denied the effective assistance of counsel at the guilt phase of his capital trial, when counsel failed to object to the testimony of CO Frederick Evins.

Issue 4. Defense counsel was ineffective for failing to adequately investigate Mr. Hall's family history. Had they contacted Gene Hall, Mr. Hall's uncle, they would have learned that Mr. Hall's mother cheated on the father, and that Mr. Hall would have been present at the time. When confronted by the father, the mother laughed at the father. This circumstance was relevant, because when Mr. Hall was asked during his interrogation why he snapped, he insisted that CO Fitzgerald laughed at him. A mental health expert could have explained to the jury why the laughing was a trigger for Mr. Hall, who was already stressed out, and finally snapped.

Issue 5. Mr. Hall was denied the effective assistance of counsel during the penalty phase when counsel failed to present known mitigating information from psychologist, Harry Krop, PhD. They withheld Dr. Krop's testimony until the Spencer hearing, after a unanimous death recommendation from the jury. This had a rippling effect. It also prevented the jury from knowing about the MRI that supported Dr. Krop's diagnosis, as well as limited Dr. Buffington's testimony.

Issue 6. Trial counsel knew that evidence had been presented during trial that Mr. Hall used drugs the day of the murder. Counsel argued that drug use led Mr. Hall to

snap. However, counsel failed to request the statutory mitigating instruction for extreme mental or emotional disturbance

Issue 7. Mr. Hall was denied the effective assistance of counsel during the guilt and penalty phases of his trial when counsel failed to ensure that a mental health expert was aware of relevant medical information.

A. During Dr. Krop's testimony at the Spencer hearing, it seemed that he believed Mr. Hall had not had an epileptic seizure since 1994. DOC medical records reveal that Mr. Hall reported an episode in 2002. Defense counsel admitted that Mr. Hall talked about having an episode a short time before the homicide, however, counsel failed to make their expert aware of this information.

B. Likewise, it seemed from Dr. Krop's testimony that he believed Mr. Hall had only been prescribed anti-psychotic drugs back in 1994. DOC records reveal that Mr. Hall was also prescribed the anti-psychotic drug, Trilifon, from June 2008 to January 2010 for PTSD and Psychosis. This information was not shared with the jury or the court.

Issue 8. The cumulative effect of failing to present the evidence and defenses was to deny Mr. Hall a fair trial at both the guilt and penalty phases of his trial.

Issue 9. Mr. Hall's 8th Amendment right of the U.S. Constitution, and the corresponding amendments to the Florida Constitution against cruel and unusual punishment will be violated as he may be incompetent at the time of execution.

ARGUMENT ISSUE 1 – Trial counsel was ineffective for failing to challenge a juror for cause and for allowing a biased juror to serve without preserving the issue for appeal, thereby depriving Mr. Hall of a fair trial and an impartial jury under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

The trial court found this claim is without merit. That was error. Juror, Rapone, informed the court that she heard on the news that a female prison guard was killed by a prisoner serving a life sentence for rape and that she had formed an opinion that Mr. Hall is guilty. R499-501/V15 The Defense used a peremptory challenge to strike Ms. Rapone. R1911/V23 Had Ms. Rapone served as a juror, she would have been aware of information during the guilt phase to which a juror would not have been privy. There is a high likelihood she would have poisoned the entire panel with this information. Failure to challenge this juror for cause ended up costing defense counsel one of their precious peremptory challenges.

Later, when trial counsel was denied a challenge for cause against juror, George Richard Roddy, he ended up serving on the jury. At this point, trial counsel had already exhausted their peremptory challenges and did not renew their request for additional challenges. The Defense challenged Professor Roddy, because one of the instructors at Dayton State College that reports directly to Roddy is also a full-time corrections officer at TCI, where the victim worked. R1941/V23 Roddy even had a conversation about the case with this instructor. R1329/ V19 Roddy assured

the State and Defense that he was not conflicted due to his relationship with the corrections officer who reported directly to him. R1332-1336/V19

Contrast this situation with juror, Lawrence Henderson. Mr. Henderson was a former colleague of defense counsel, but repeatedly assured the court that he could be fair, he could consider the death penalty and that he had shielded himself from the facts of this case when he learned he would be a juror. R1646, 1658, 1661, 1663, 1665-1669/V21 Yet when the State asked that he be stricken for cause, the court granted that challenge in order to "protect the integrity of the judicial process." R1719/V21 The same standard should have been used against Professor Roddy, but it was not. The court allowed Roddy to serve. Trial counsel was ineffective for failing to challenge juror, Rapone, for cause, wasting a much need peremptory challenge that would have been used against Roddy. Furthermore, counsel was ineffective for failing to request an additional peremptory to be used against Roddy. As a result, Professor Roddy, a juror with a bias against Mr. Hall, ended up being seated. Where a juror with an actual bias is allowed to serve, this Court has granted a post-conviction challenge to jury selection.[1]

In denying Claim I, the Court reasoned that Juror Rapone had been rehabilitated from her pre-conceived notion that Mr. Hall was guilty, and that there

[1] Carratelli v. State, 961 So. 2d 312, 323 (Fla. 2007). See also, Smith v. Phillips, 455 U.S. 209, 222-223, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982)

was no showing a cause challenge would have been appropriate. However, it seems the Court failed to consider the fact that Rapone heard on the news that the victim was killed by a prisoner serving a life sentence for rape. Furthermore, the Court relied on trial counsel's assertion that he felt tactically it was not to their advantage to seek another preemptory challenge when their cause challenge for Roddy was denied. This tactic was based on the assumption that the request probably would not be granted, because the court had already granted several other requests for extra preemptory challenges.

Juror Roddy was the last juror to be selected. Once trial counsel's cause challenge was rejected, the panel was accepted. Consequently, a biased juror was allowed to serve. There was no benefit to not asking for a preemptory, even if counsel thought the court probably would have denied the request. The request was necessary to preserve the issue for appeal. Trial counsel could not explain the rationale behind their alleged strategy to make an objection, yet not preserve the issue for appeal. PCR557-558/V4 In order to legitimately be considered a trial tactic, the decision should further some purpose, otherwise every failure to act will be turned into a trial tactic or strategy.

The value of any one juror's input in the deliberation process cannot be discounted. The prejudice is Mr. Hall's conviction for first degree murder, rather than second degree murder. A new trial is the remedy.

ARGUMENT ISSUE 2 – Mr. Hall was denied the effective assistance of counsel at the guilt phase of his capital trial, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. Trial counsel failed to adequately investigate, develop a defense and challenge the State's case, and as a result, the conviction for first degree murder and death sentence is unreliable.

Mr. Hall was denied the effective assistance of counsel at the guilt phase of his capital trial, because they failed to adequately investigate the case, develop a defense and challenge the State's evidence, assumptions and conclusions. The trial court denied this claim, based on the opinion that trial counsel was not deficient. That was error. Failing to present this evidence or make proper objections deprived Mr. Hall of a fair trial. The prejudice is the unreliable conviction for first degree murder.

2. A. Overtime and Stress at Work

Trial attorneys, James Valerino and Matthew Phillips, testified that they developed their strategies of the case together and agreed on what that strategy would be. PCR492/V3 and PCR673-674/V5 When asked whether their defense included the idea of Mr. Hall being stressed out because of work, Matt Phillips replied, "That's the reason [Mr. Hall] gave us that he sought out this other inmate and consumed this other inmate's medication was that he had indicated that he was stressed out. Yes." PCR671/V5 Nevertheless, the only evidence presented by the Defense was a video of Mr. Hall sitting on a bench waiting to be interrogated. R2719-2733, 2740/V29

Mr. Hall's PRIDE time card for the two weeks before the murder showed he had worked a total of about 117 hours, compared to the 80 hours that folks normally work. On Wednesday, June 25th, the day of the offense, he had worked from 7:12 a.m. to at least 6:00 p.m. or 10:48 hours. Defense Exhibit 13, PCR 2230-2239

Mr. Valerino conceded that inmates who were asked about stress reported that both "[they] and Mr. Hall were feeling stress." PCR566/V4 Once the inmates denied that they were punished for missing deadlines, Mr. Valerino did not inquire further as to why they all reported feeling stressed. PCR572-573/V4 None of Mr. Hall's coworkers were called by the Defense to testify during the guilt phase of his trial to establish the working conditions that contributed to Mr. Hall finally snapping, though they were available and most were willing to testify at both trial phases. Mr. Callahan was called during the penalty phase, but was not asked about Mr. Hall's stress. R3323-3329/V33 Mr. Callahan and Mr. Schell testified at the evidentiary hearing.

Rodney Callahan was an inmate at TCI for 22 years and knew Mr. Hall for 15 of those years, from working together at PRIDE. PCR425/V3 Mr. Callahan was the lead welding tech in the Special Projects department. PCR425/V3 Mr. Hall was a lead tech for the Welding Shop, a separate department. PCR426/V3 On mostly a daily basis, Mr. Callahan discussed with Mr. Hall the various projects that they had going on. PCR426/V3

As a lead tech, Mr. Hall was the one who had to answer to the PRIDE supervisors or the client about the progress of a project. PCR426/V3 Mr. Callahan testified, "I believe that at the time he was under quite a bit of stress to – he had various projects that were behind. He was receiving a lot of – a lot of flak, I guess you would call it, from his supervisors and, of course, from other inmates in various other departments that might – he may have been holding up based on his inability to come – get the various projects done on a time – timely manner." PCR427/V2 Some project were charged in excess of a hundred dollars a day if they were late. PCR430/V3 Workers were concerned about their position if they missed a deadline. Mr. Callahan explained, "I would say that sometimes if -- if we were late, we would be reprimanded because of it. Sometimes if we were extremely late, there was times we would be given time off. Sometimes we would be demoted based on our inability to perform the task in a timely manner." PCR430/V3 Mr. Callahan confirmed that he was asked about stress at work by the inspector general, as well as by trial counsel during deposition, but not during his testimony at any phase of Mr. Hall's trial, though he remembers telling counsel, "...we were all under a lot of stress because of reasons I just stated." PCR431-432/V3 Deadlines were affected by delays outside a worker's control or because a client asked they be moved up. PCR433-435/V3

Mr. Callahan testified, "Well, on the days leading up to the death of Officer Fitzgerald, I noticed that Enoch was becoming more stressed. I think he was

becoming more upset with the fact he was – he was getting in – in conversations with the supervisors or altercations, I could say, arguments, as far as meeting certain deadlines and with various other individuals, too." He described the arguments as "just mostly verbal." PCR436/V3 Mr. Callahan believed the problem was that a supervisor may want a vehicle to go out whether or not the worker felt it was ready. PCR436-287/V3 Walter Schell was an inmate at TCI who worked at PRIDE from 1994 to 2008 and knew Mr. Hall during that time. PCR651/V4 Mr. Schell was the de facto inmate supervisor over the conversion process. PCR651/V4 Mr. Schell testified, "PRIDE was normally a stressful place. We were going crazy most of the time." PCR 651/V4 Around the time of the murder, he said, "We were – we were pretty busy right then with a lot of work. And we had just gotten a request from a customer in Miami that we were building a SWAT vehicle for to see if we could move up a delivery date… the original delivery date…was around the end of July. They were hoping to move it up and get it for 4th of July." PCR651-652/V4 Mr. Hall had four or five different jobs going on at the same time. PCR652/V4 Mr. Schell could tell that he was stressed. He used the words "frazzled" and "kind of looked tired and intent" to describe Mr. Hall the day of the murder. PCR 653/V4

Mr. Schell explained that to an inmate, "…punishment is a DR, when you go to confinement." People were not "punished" for missing a deadline, but they might get reassigned to an area where deadlines weren't critical. Such a move would

"virtually [eliminate] the overtime. The fire-apparatus and conversion departments were the ones that got all the overtime." PCR654/V4

If defense counsel had further deposed the inmates who worked at PRIDE and asked about why Mr. Hall was stressed, they would have discovered that the jobs at PRIDE were coveted positions, because no other jobs in the DOC system pay a salary (except four positions in the canteen), and only PRIDE offered many hours of overtime. Mr. Callahan testified post-conviction that there were over a thousand inmates at TCI. PCR443-446/V3 On the average, only 20 to 22 PRIDE workers were afforded the opportunity to work overtime, which included the lead tech. PCR446-448/V3 Without a paying job, the only way to have money to buy something from the canteen was for someone on the outside to send an inmate money. The jobs at PRIDE were coveted for the independence it gave an inmate. PCR448/V3 Sometimes the supervisors at PRIDE even gave their workers bonuses or parties, which was a nice perk considering an inmate's bleak existence. PCR448-449/V3

It was not just the salary that made PRIDE jobs superior to other types of labor that one could be assigned to in prison. As opposed to the monotony of sweeping or mowing lawns, PRIDE jobs kept the mind engaged and challenged. Mr. Callahan testified that inmates valued their job at PRIDE because it also gave them a sense of accomplishment and pride in being able to give back to the community from which

they had taken so much. PCR459/V3 Mr. Callahan also observed that Mr. Hall didn't have too much else in his life. He didn't have many visitors, and only occasionally had time for sports or events offered through the chapel. PCR460/V3 In Dr. Maher's opinion, "his work at PRIDE was, by objective assessment and by his own assessment, mutually, the best thing he ever did in his life." PCR288/V2 Being the lead welder was about as high status as you could get as an inmate worker. Dr. Maher found that Mr. Hall's job at PRIDE was "extremely important to him." PCR294/V2

Mr. Hall related to Dr. Maher that though he liked his job, he experienced a good deal of pressure meeting deadlines, especially pressure from his peers. PCR290/V2 Mr. Hall expressed a fear that, ultimately, missing deadlines could result in his losing the job or the opportunity to work on certain projects. PCR291/V2 He described symptoms that corroborate his statements about feeling stressed. He reported difficulty sleeping, anxiety, as well as intrusive thoughts that people were critical of him, didn't like him and were trying to undermine him. PCR291/V2 Dr. Maher explained that even if Mr. Hall's fears were unfounded, from a psychological point of view, it is the fear of the consequence that is significant, regardless of whether the consequence is likely to occur. PCR292-293/V2 Dr. Maher described Mr. Hall as having a "Type-A Personality."

PCR293/V2 The fact that he liked his work does not negate Mr. Hall's report that he was stressed about work, "especially if [he] worried about losing it." PCR295

Mr. Hall related to Dr. Maher that to cope with stress, "…he would occasionally try to get some drugs, medication …prescription medication that wasn't prescribed to him, but helped him sleep, feel less agitated at work and calmed him down." PCR296/V2 It was Dr. Maher's diagnosis that Mr. Hall took these drugs "not to get high or for entertainment, but so that he could function in the environment that he found himself in and was stressful to him." The drugs were used to "help him … maintain a higher, more consistent level of work." PCR297-298/V2 Dr. Maher testified, "Typically, people who are taking drugs for the purpose of functioning better are working very hard to show a normal outward functioning. So it is, in fact, very difficult for employers …to identify an employee who's using a drug for the purpose of being able to come to work and do their job because, in fact, that employee is very attuned to how they present." PCR298-299/V2 If this information had been elicited during the trial, it would have helped to establish motive for staying late, and more importantly, why Mr. Hall's co-workers weren't aware of his drug use.

Had the Defense simply asked the inmates who worked at PRIDE why did they consider the situation so stressful, counsel would have learned that the pressure also came from their peers. If someone failed to meet their deadline, it could cause

a domino effect, throwing off other groups and causing them to miss their own deadlines. It would be difficult to live and work among fellow prisoners who were angry and blamed him because he caused them to miss their deadlines, lose their perks, and whose positions would be jeopardized by his delays, as well.

Mr. Valerino testified at the evidentiary hearing that he never discussed with the witnesses, nor presented to the jury, why receiving a salary made working at PRIDE such a boon, and that besides a few positions in the Canteen, only PRIDE paid a salary. PCR573-574/V4 He did not present testimony to the jury, at any stage of the proceedings, about why a position that worked a lot of overtime would be good for an inmate. PCR573-574/V4 He didn't even ask the inmates what it meant to them to be able to work at PRIDE. PCR574/V4 Understanding the value of a position that offered overtime sheds light on why there was so much stress reported by the inmates working at PRIDE, when deadlines were harder and harder to meet.

In addition to long hours and high stress, the confrontation with CO Fitzgerald occurred in the summer in Florida. Mr. Callahan testified at the evidentiary hearing that the temperatures in June of 2008 at TCI were in the nineties and occasionally up in the hundreds. PCR438/V3 It was usually a lot hotter for welders, who had to wear a leather jacket, gloves, chaps, bib and boots, as well as a helmet. PCR439/V3 And of course, the torches used to weld exposed the welder to a "great amount of heat, as well." PCR439/V3 Also, welding galvanized pipe and sheet metal creates

fumes that cause a welder to experience nausea, headaches and fatigue. PCR439-290/V3 Mr. Valerino testified that he was not aware of the uniform a welder wears. PCR575/V4 He did not present evidence to the jury about fumes from welding and the side effects from these fumes that a welder suffers. PCR575/V4

Add to the above listed factors Mr. Hall's statements that, at the end of his shift, he had come down from his high earlier in the day and was anxious to find more pills before he left for the evening. All these factors together led to the moment that Mr. Hall, while highly agitated, was confronted by CO Fitzgerald, she laughed at him when he asked for more time, and he "snapped."

The only fact that came out at the guilt phase of the trial was that if Mr. Hall worked passed 3:30 pm, then he was working overtime. R2141-2143/V24 CO Frederick Evins testified that he worked the overtime shift and got to know Enoch Hall. R2571/V27 He did not testify how often Mr. Hall worked overtime and this was not elicited on cross-examination. R2577-2579/V27

Trial counsel was ineffective for not using Mr. Hall's fellow inmates to establish important factors that led to Mr. Hall snapping. The Defense conceded second degree murder at the outset of the trial, yet failed to present any evidence that would help the jury understand Mr. Hall's emotions when he lost control. All the jury ever got to see was the horrible aftermath of Mr. Hall's frenzied outburst. Failing to present this evidence deprived Mr. Hall of a fair trial and led to the

unreliable conviction for first degree murder. The prejudice continued into the penalty phase, where stress would also have been a mitigating factor.

2. B. PRIDE Procedures at the Close of the Overtime Shift.

The State revealed their theory of the case during motions before jury selection. They argued that the Mr. Hall had a sexual motivation for staying late after work. R28-32/V12 The court allowed the State to argue this motivation in closing. R2826/V30 In their opening and closing, during their argument against a directed verdict, they argued that Mr. Hall knew CO Fitzgerald would be coming to look for him and so he hid and waited for her. R1973/V23, R2805, 2807/V30, and R2658/V28

If trial counsel had questioned the PRIDE inmates, they would have learned that there was no way for Mr. Hall to be certain that CO Fitzgerald would come looking for him by herself if he was running late. Rodney Callahan testified that it was more likely that CO Fitzgerald would have used the intercom to call Mr. Hall to the front or she could have called security as backup to retrieve Mr. Hall. PCR463/V3 On June 25, 2008, when Mr. Callahan realized that Mr. Hall was running late for count, he asked CO Fitzgerald if she would like him to go get Mr. Hall, but she declined the offer. PCR452, 455/V3 In his 22 years working at PRIDE, Mr. Callahan testified that he had never known of an officer to release every single overtime employee and then go back alone to get the lone straggler.

PCR456/V3

At the evidentiary hearing, former Inspector General, John Joiner testified that he had gathered information for the Department of Corrections: Review of Administrative Issues and Procedure Surrounding the Death of Officer Donna Fitzgerald Department of Corrections. (Hereinafter "DOC Admin. Review") Mr. Joiner determined that at the time of the murder, there was no DOC procedure for gathering stragglers at the end of the overtime shift. PCR194/V1 He also determined that policies and procedures in place at the time that CO Fitzgerald was killed dictated that CO Fitzgerald should have been carrying a body alarm, a chemical agent and a radio while working at PRIDE. PCR188, 202-203, 205-206/V1 Mr. Callahan confirmed that most of the time, a correction officer working overtime carried a radio, a body alarm and a chemical agent. PCR456/V3 Therefore, if Mr. Hall had any expectation at all concerning CO Fitzgerald on June 25, 2008, it would be that she was prepared for a confrontation with an inmate and ready to call for back up. Mr. Valerino testified that he was aware of the DOC Admin. Review. PCR558/V4 The inspectors questioned inmates under oath and these transcripts were given to defense counsel before inmate depositions. PCR559/V4

If the defense is that this was a second degree murder, than whether Mr. Hall was lying in wait for CO Fitzgerald is an important issue to defend against, as it would strongly support premeditation. Nevertheless, Mr. Valerino did not present

available evidence that CO Fitzgerald going back by herself, after releasing everybody else, and without a radio, chemical agent and/or body alarm was a very unusual circumstance. PCR559, 552/V4 Mr. Valerino need not have argued that it was CO Fitzgerald's fault this happened to her in order to discredit the State's arguments concerning Mr. Hall's expectations. At the evidentiary hearing, he tried to deflect his ineffectiveness by raising this red herring. PCR560-563/V4

Trial counsel was ineffective for failing to present this evidence, which directly challenges the State's theory of the case. Mr. Hall was deprived of a fair trial and the conviction for first degree murder is unreliable.

2. C. Inmates' Unsupervised Access to Scrap Metal and Grinders

Frank Prince was an inmate working as a maintenance man at PRIDE. Mr. Hall told FDLE that he found the shank used to kill CO Fitzgerald while searching Frank Prince's office for pills. R2245-2246/V25 He pocketed the shank, which was a useful item to have in prison. Therefore, he happened to have it on his person when CO Fitzgerald came upon him while he was looking for drugs. He did not arm himself as preparation for a confrontation with CO Fitzgerald.

The State presented testimony that Mr. Hall had grinders and scrap metal in his area to infer that he was the one that made the shank. Cpt. Wiggins testified that sheet metal is kept in the welding area, as well as a bin of scrap metal and machines

used to cut and sharpen. R2094-2096/V24 On cross-examination, Cpt. Wiggins agreed that he has seen more than one welder in the welding area. R2143-2144/ V24

CO Olavarria testified that he found the shank, and that it was made from sheet metal that was blow torched or machine cut and potentially grinded down to a fine tip. R2308/V25 During their cross, defense counsel did not establish that is was possible for *anyone* working at PRIDE to have made that weapon. R2314-2317/V25

If the Defense would have questioned PRIDE inmates, they would have been able to present to the jury the fact that the welding area was very open and easily accessible to all the PRIDE workers. At the evidentiary hearing, Mr. Callahan testified the metal that the welders used was not well_supervised. Besides the welding department, at least two or three other departments had grinders. PCR440-441/V3 It would have been easy for anyone on the PRIDE compound to covertly obtain a piece of scrap metal and to use a grinder to sharpen it into a shank.

Mr. Valerino agreed that anyone at PRIDE would have had access to sheet metal, and could have made the sort of shank used to kill CO Fitzgerald. PCR576/V4 However, the only evidence the jury heard was that "other welders" would have had access to those materials and tools. R2143-2144/V24 Frank Prince was not a welder. The failure to establish that Prince could have made the shank calls Mr.

Hall's statement, that he found the shank in Prince's office while looking for pills, into question.

Mr. Callahan's testimony was further corroborated by the Inspector General's findings in the DOC Admin. Review. John Joiner testified that he took photographs of the PRIDE facility. Class-A tools were photographed on July 23rd and August 1st of 2008. PCR186/V1 Mr. Joiner defined a Class A Tool – "It needs … more supervision directly because it is a tool in its own right that could be used for escape, harm, could cause bodily injury." PCR187/V1 Roughly a month after the murder, the inspector general found that there was not appropriate supervision of these tools, according to DOC procedures. PCR188/V1

Mr. Valerino testified that he reviewed Inspector General Glover's report. Nevertheless, he did not present evidence that near Prince's office, an officer found a roll of sheet metal with a piece cut out that was consistent with the shank. PCR578/V4 Instead, Mr. Valerino just relied on Mr. Hall's statement that he found the shank near Prince's office, without offering the corroborating evidence.

In their Closing, the State emphasized Mr. Hall's access to the materials and machinery necessary to make the shank. R2808-2809/V30 In Closing, the Defense pointed out that Mr. Hall was not the only welder who worked at PRIDE and that photos showed sheet metal lying around. R2847/V30 The photos leave unanswered questioned about inmate supervision and whether Frank Prince, a maintenance man,

also had access to the tools and materials used to create the shank. The Inspector Generals' findings are far more compelling. Testimony of other inmates further corroborates those findings.

Trial counsel was ineffective for failing to present evidence that would definitively establish there was insufficient evidence to draw any conclusions about who created the shank or why Mr. Hall was carrying it before the confrontation with CO Fitzgerald. The issue is relevant because it goes to the question of planning, intentions and premeditation. Failing to present this evidence deprived Mr. Hall of a fair trial, resulting in an unreliable verdict.

2. D. Toxicology

At the time of Mr. Hall's arrest, CO Brian Dickerson, escorted Mr. Hall to the building where he was interviewed. When asked if Mr. Hall made any statements while he was waiting in the hallway to be interviewed by FDLE, CO Dickerson testified, "He was mumbling all he wanted was some pills. All he wanted to do was get high. And that was – he mumbled over and over and over and over again. That's all he was saying." R312-313/V3 Upon being interrogated immediately after the murder by FDLE Agent, Steven Miller, Mr. Hall continuously admitted, "I freaked out. I freaked out. I took some pills and I freaked out." R5/Exhibits V1 During his interrogation, Mr. Hall told law enforcement that he had been given pills by inmate, Frank Prince, around lunch time (R2181-2182/V25); then after work, he was looking

for more drugs in order to get high again, when he was confronted by the victim, CO Fitzgerald. R2190-2192/V25 Despite the role that drugs played in the commission of this offense, defense counsel did not perform a toxicology analysis on Mr. Hall to corroborate his statement that he had drugs in his system at the time of the offense.

At First Appearance on June 26, 2008, Asst. Public Defender, James Valerino, was appointed to represent Mr. Hall. R1016/ V7 Mr. Valerino testified that it is the policy of the public defender's office to interview a defendant charged with first degree murder immediately after arrest. Mr. Valerino told the court that he had an opportunity to speak with Mr. Hall before the hearing. Defense Exhibit 12, PCR2224-2229 Counsel did not indicate to the court that he needed additional time to confer with his client before he was returned to the jail. Id.

Had trial counsel spoken to Mr. Hall about the case, he would have realized he needed to ask the court to order the DOC to immediately draw blood and obtain a urine sample from Mr. Hall, so that the Defense could determine if Mr. Hall had any drugs in his system at the time of the murder. Counsel's failure to speak with his client on June 26th about the circumstances of the murder cost them valuable time.

At the evidentiary hearing, Dr. Michael Maher testified that Tegretol can be detected in the blood for up to five days, and can be detected in the urine for at least a couple of weeks, possibly up to five weeks later. PCR332-333/V2

On June 26th, Mr. Hall was not entitled to a bond because he was serving a prison sentence at the time of the offense. Defense counsel failed to ask the judge during First Appearance to order that Mr. Hall remain at the Volusia County Jail pending trial. Id. Mr. Hall was transported back to Florida State Prison that evening.

On July 7, 2008, defense counsel finally requested that an investigator be assigned to this case, and Robert Ryan was assigned that same day. PCR508-509/V3 However, no one from the defense team actually interviewed Mr. Hall until more than three weeks after First Appearance, on July 21, 2008. PCR509/V3 They had waited until Mr. Hall was brought back to town for arraignment. PCR510/V3 At this point, a toxicology analysis would not have been much use. Defense counsel had a duty to investigate and gather evidence that could aid their defense at both the guilt and penalty phases. The unreasonable delay in speaking with a client accused of murder caused them to lose the opportunity to preserve valuable evidence for trial.

A search of Frank Prince's office in the PRIDE compound revealed a prescription for Tegretol, as well as a prescription for Ibuprofen. R2397-2400/V26, PCR673/V5 Mr. Phillips admitted that they did not ask Dr. Buffington how long Tegretol would stay in the blood or urine. PCR 672/V5 Mr. Phillips explained this oversight by claiming that they felt confident that Prince having these pills in his filing cabinet was enough to prove that Mr. Hall had consumed Tegretol. PCR672/V5 Despite their confidence, the State went on to argue that the evidence

pointed to Ibuprofen being taken, not Tegretol, and that the Defense never proved which pill Mr. Hall took. PCR673/V5

Trial counsel's theory was that Mr. Hall was interrupted while searching for these pills, causing him to snap and freak out. R2848/V30 In closing, the State countered, "What evidence is there to support the blanket statement, 'I wanted to get high?' Four ibuprofen – or ibuprofen versus the sexual motivation." R2862/V30. Without a blood test, there is no way to know for sure which drugs Mr. Hall had actually taken and the concentration of those drugs in his system on the day of the offense. A urine screen would have at least established that certain drugs were in his system and would support his statements that he had gotten high earlier that day and was trying desperately to find some more drugs. Trial counsel failed to secure the much needed corroboration of Mr. Hall's motivation for staying behind after work.

Mr. Joiner, testified that he has conducted numerous investigations concerning drugs being used in prison. It is fairly common that they get in. They come in through guards, visitors or inmates illegally distributing medication that was prescribed to them. PCR201/V1 If DOC has reason to believe someone has used drugs illegally, they have the right to do a urine screen. PCR199-200/V1

Though the State argued that the only evidence of drug use was Mr. Hall's statement, the State made no attempt to determine whether Mr. Hall had Tegretol or

any controlled substance in his system at the time of the offense. Two DOC nurses saw Mr. Hall on June 26, 2008. However, during trial, defense counsel never presented evidence to the jury that Mr. Hall was seen by medical personnel right after his arrest. R319-325, 329-340/V3 The Inspector General for DOC knew Mr. Hall was claiming he took drugs the day of the incident. Mr. Joiner testified that during his first contact with Mr. Hall, Mr. Hall "seemed to be dazed." He appeared to be impaired by a substance such that drug testing would have been appropriate under DOC policy. PCR204/V1 The signs of impairment were "obvious to all persons" present, yet they took no measures to give him a urine screen. PCR205/V1

Mr. Valerino testified that he was aware that DOC had a right to do a urine screen once Mr. Hall admitted to taking drugs illegally while in prison. PCR578-579/V4 Though the State argued that there was no evidence Mr. Hall actually took drugs that day, Mr. Valerino did not argue the State created that doubt by not testing Mr. Hall's urine when they had the right and ability to do so. PCR579/V4

Mr. Hall has two claims of ineffective assistance of counsel, one for failure to ask the court to order a blood draw and urine sample in order to test for drugs, and one for not challenging the DOC's motive for also failing to do so.

2. E. Daniel Buffington, Neuropharmacologist

The Defense contended that Mr. Hall had stayed behind after work to look for the drug, Tegretol, which he believed fellow inmate Frank Prince had in his office.

Trial counsel proffered the testimony of neuropharmacologist, Daniel Buffington, to establish that some of the side effects of Tegretol are headaches, dizziness, drowsiness, aggression, hallucinations, disturbance of balance, confusion, speech abnormality, depression with agitation and visual disturbances. R2707/V29 Dr. Buffington also testified that Tegretol could have unmasked underlying psychiatric conditions the evening of the attack against CO Fitzgerald. R2707-2708/V29 Dr. Buffington reviewed records that revealed that Mr. Hall had a previous psychiatric history of depression, anxiety, epilepsy, schizophrenia and PTSD. R2708/V29

The court found that the only purpose for this evidence *as presented* was to argue that the Defendant's "underlying mental health condition, whatever that may be, was somehow brought to the fore by his excessive use of the medications described." (Emphasis added) R2711/V29 Further, the court found, "...it is a form of mental health defense and ...there was no notice of intent to rely on such a defense filed prior to trial, as required by 3.216B." Relying on Spencer v. State, 842 So. 2d 52 (Fla. 2003), where the Court continued to adhere to the rule that expert evidence of diminished capacity is inadmissible on the issue of mens rea, the trial court disallowed Dr. Buffington's proffered testimony at the guilt phase of the trial. R2710-2712/V29

Tegretol is not a widely known drug and it is unlikely that the average person knows for what the drug is commonly used and what effects it has on the human

body. Dr. Buffington would have helped the jury understand the effects of ingesting Tegretol and why a person under a great deal of stress would have craved these pills. Mr. Phillips did agree that expert testimony is offered in cases to help educate a jury about something they would not commonly know. PCR745/V5 This evidence would have been invaluable to counter the State's argument that Mr. Hall stayed after work "laying in wait" for CO Fitzgerald. R31/V12

The jury would have also been informed about how a person would feel when withdrawing from ingesting these pills. A jury would have had a better understanding of how and why Mr. Hall "snapped." They could see that he had a reason to be irritable and agitated. Far from arguing diminished capacity or an unmasked mental illness, the defense in this case is that Mr. Hall's emotions and frustrations on the day in question rose to such a boiling point that he reacted without thinking. He was enraged. He did not reflect on his actions for even a second. This was the Defense's argument, yet they never presented the circumstances that would help a jury evaluate for themselves whether it is reasonable to conclude that Mr. Hall acted without thinking first about the consequences.

Instead, they proceeded with a defense of diminished capacity even though Mr. Phillips believed, "The only way to get a – a doctor to testify during a guilt phase here in Florida is if you're seeking an insanity defense, which we didn't have with Mr. Hall." PCR741/V5 In fact, Mr. Phillips acknowledged, "I mean, it's clear,

under Florida law, for almost 25 years now, you can't pursue a diminished-capacity defense." PCR741-742/V5 It was incompetent to offer Dr. Buffington's testimony to argue a diminished capacity defense, which defense counsel admits knowing was not legally permissible, because they could not establish insanity.

Mr. Phillips seemed to not understand that Dr. Buffington could have been called to testify to the properties of Tegretol, as that information would relate to motive to stay behind and look for more pills, why someone under stress might want it, or might want more of it if they were experiencing withdrawal symptoms. PCR744/V5 Mr. Phillips testified, "And what he – what Mr. Hall described during his interrogation and to us was that, yes, he stayed late at the PRIDE compound looking for more of the pills." PCR744/V5

Mr. Valerino conceded that the motive to be at the scene of the crime could very well be relevant. PCR585/V4 Defense counsel was ineffective, because they made the wrong argument for why Dr. Buffington's testimony was relevant, and therefore lost the opportunity to present important information to the jury. Failing to present this evidence deprived Mr. Hall of a fair trial. The prejudice is the unreliable conviction for first degree murder.

2. F. Mr. Hall's Injuries - Independent Medical Exam and Review of Evidence

Mr. Hall's injuries were visible during his First Appearance hearing. Defense Exhibit 2, PCR2168-2169, and Defense Exhibit 11, PCR2218-2223 Mr. Valerino

agreed that the photo of Mr. Hall with the black eye, Exhibit 2, is "pretty much how he looked the afternoon of first appearance." PCR503/V3 Mr. Hall's face was badly swollen. Furthermore, after his arrest, Mr. Hall walked with a limp. R323/V3 However, Mr. Valerino could give no reason why he didn't ask the court at that time to appoint an independent medical expert to examine Mr. Hall to determine the extent of his injuries. PCR504/V3 An independent medical exam performed shortly after his arrest could have corroborated Mr. Hall's testimony at the suppression hearing that he had suffered a beating, not just under his eye, but also to his ribs, back and head, where he had been repeatedly kicked by the guards. The affidavit establishing probable cause to detain Mr. Hall, which is available to defense counsel prior to first appearance, reveals that Mr. Hall gave a confession right after his arrest. Defense Exhibit 14, PCR2240-2243, PCR504-505/V3 Competent counsel would have realized that voluntariness would likely be an issue.

The Defense argued during a Motion to Suppress Statements, "... [Mr. Hall] was abused physically throughout the evening by different members of the DOC. And that he made this statement or these three statements to the Florida Department of Law Enforcement because he was in fear for his life. He was afraid for his safety. And, I think, he basically boiled it down to he would do about anything to get out of Tomoka ...and get to the Volusia County Branch Jail." R503-504/V4 Mr. Hall made a statement during his second interrogation, "I probably ain't going to make it to

tomorrow." R76/Exhibits V1 Again, at the gatehouse, Mr. Hall told FDLE agent, Steven Miller, "I'm not going to make it out of here alive." R444-445/V4

John Gordon, a registered nurse at the Volusia County Jail, testified at the suppression hearing that his encounter with Mr. Hall was brief. He confirmed that the first nurse who saw him that night noted a limp. 322-323/V3 However, he did not even ask Mr. Hall to remove his shirt to determine the extent of his injuries. R326/V3 Ms. Gordon's exam was being monitored by guards and supervisors who were also there while the perfunctory exam was conducted. R328/V3

Mr. Valerino was satisfied the cursory exam performed by DOC staff and Mr. Hall's testimony were sufficient to establish the extent of Mr. Hall's injuries, so they did not hire a medical expert. PCR527-528/V3 He believed this even though he didn't believe the court would grant the motion he presented. PCR513-514/V3 An independent medical exam would have been much more thorough and could have supported Mr. Hall's suppression hearing testimony, challenging the corrections officers who all denied the use of excess force against Mr. Hall.

At the very least, the Defense should have called a medical expert to review photos and video taken of Mr. Hall within hours after his arrest. At the evidentiary hearing, Mr. Hall called Michael Maher, M.D who had viewed a video of Mr. Hall being escorted at FSP at around 8:30 pm. on June 26, 2008. Defense Exhibit 1, PCR2167 Dr. Maher testified that the video is consistent with Mr. Hall being

diagnosed with a limp, having trouble with his balance and being weak on his right side. PCR255-257/V1 He is "bouncing or bumping along the wall, using the wall to steady himself." PCR256/V1 The shackles would not explain Mr. Hall's need to steady himself against the wall. PCR256/V1 Having viewed Mr. Hall walking when they first met for his interview, Dr. Maher could make a comparison to the walking in the video. When they met, "…he did walk very differently… He had no trouble standing, balancing. He didn't rely on the table or the doorway or anything to steady himself." PCR396/V2

The Defense only submitted a video of Mr. Hall sitting in the hallway of Y-Unit while waiting to be interrogated. R250-252/V3 and R2722/ V29 They failed to enter into evidence the video of Mr. Hall limping at Florida State Prison, after arriving back from court in Volusia County. The photo of Mr. Hall's back, the transport video and a doctor should have been used to corroborate the Defense's position that Mr. Hall had been beaten and was afraid for his life. Defense Exhibit 3, PCR2170-2171

On cross-examination at the suppression hearing, the State asked Mr. Hall about his 2003 knee surgery, implying that it was the source of his limp after his arrest. The Defense never asked Mr. Hall on re-direct about all the sports he has played since that surgery. Mr. Valerino admitted that he was aware Mr. Hall played sports. PCR526-527/V3 Furthermore, Mr. Valerino didn't attempt to challenge the

State's position by pointing out that just prior to being arrested, Mr. Hall had no trouble "running" from the DOC officer chasing him. PCR528/V3 Dr. Maher testified that Mr. Hall's knee surgery in 2003 would not explain the alteration in his gait that is seen in the video, and his participation in sports did not include a substantial limp related to his knee surgery. PCR258/V1

The State argued against the motion to suppress, "...the only evidence that somebody can even argue is extrinsic to the defendant saying he was beaten is the picture of the defendant's black eye." R507/V4 However, there was evidence that could have been presented that would have logistically contradicted the correction officers' denials that they abused Mr. Hall.

It was an hour and twenty minutes after the last person clocked out of PRIDE before the correction officers went to look for CO Fitzgerald. Defense Exhibit 13, PCR2230-2239, PCR544-545/V4, R286/V3, R2047-2049/V24 It was established that the murder occurred in a room where Mr. Hall did some of his welding. PCR548/V4 It would not have taken her long to locate him near his work station. It is reasonable to estimate that the confrontation between Mr. Hall and CO Fitzgerald took place no later than 6:40 pm. This is twenty minutes after the next to last inmate left PRIDE, plenty of time to locate Mr. Hall and for the confrontation to take place. Per the medical examiner, it would not have taken CO Fitzgerald more than five minutes before she died. R2636/V28 Mr. Hall's third statement described multiple

events that took place after he killed CO Fitzgerald.[2] R2267-2273/V25, PCR545-546/V4 That would give Mr. Hall about an hour to accomplish these tasks before correction officers arrived to investigate the situation.

CO Chad Weber was only 10 to 11 feet away when he confronted Mr. Hall. PCR529/V3, R264/V3 CO Weber, the first corrections officer on the scene, arrested Mr. Hall outside the PRIDE building at 7:45 p.m. while it was still daylight. R269, 272/V3 During his observation of Mr. Hall, he did not notice any injury to Mr. Hall's face. R268, 273/V3 Mr. Valerino never argued that it was odd that CO Weber did not notice any injury on Mr. Hall, though CO Weber testified that it was still daylight outside.

Captain Wiggins was the third officer to respond to the scene a few minutes later. R287-289/V3 He noticed a small bump under one of Mr. Hall's eyes. PCR530, 532/V3, R297/V3

CO Bryon Dickerson and CO Gary Schweit escorted Mr. Hall to the Multi-Treatment Center (hereinafter "MTC building") at 7:55 p.m. R310/V3 Mr. Valerino

[2] Mr. Hall wrapped CO Fitzgerald up in a blanket R2267- 2268; He found a place to hide the knife. R2268; He put kitty litter or sand and spread it out to try to mop up the blood. R2268; After the litter finished absorbing the blood, he used a broom to sweep it past the fence. R2268; Mr. Hall carried CO Fitzgerald to a cart located on the other side of the PRIDE complex and moved the body to an office in another building. R2269, PCR545-546/V4; He changed his clothes. PCR545-546/V4; He went to the sandblast room to look for pills. R2270; He walked around the building looking, just mad. R2270; He removed her pants. R2272; Police arrived and he tried to run. R2273

established during his cross of CO Dickerson that he did not notice the puffiness in Mr. Hall's eye until they were in the hallway between the MTC building and Y Unit confinement. This was the first time he noticed an injury to Mr. Hall's eye. PCR534/V3, R312, 314/V3 This was after they had been with Mr. Hall out at the PRIDE building and had escorted him up to the MTC building. R315/V3 CO Schweit added that the swelling started small and it continued during the time they guarded Mr. Hall, which was over an hour or so. PCR534-535/V3, R350-351/V3 Dr. Maher testified that a black eye is caused when trauma ruptures small veins and capillaries in and around the eye. Swelling and bleeding there collects very quickly. It would only take a few minutes for pooling to occur. PCR261-262/V1 The injuries observed by the TCI corrections officers are consistent with an injury that would have been caused at the time of Mr. Hall's arrest. If they had been caused by the victim, Mr. Hall's eye would have been very swollen by the time of his arrest, which was at least an hour after CO Fitzgerald's death.

This conclusion is supported by the appearance of CO Fitzgerald's face right after the murder. The medical examiner testified that CO Fitzgerald was alive when she was punched in the face. He explained, "If she had been dead, it would not bruise. The tissue would just stay the same color or it would have a slightly yellowish discoloration. The blood would not flow into the damaged area and it would not become bluish." R2618/V28 The evidence of blunt force trauma only

took minutes to appear on the victim's face, which we know because she did not survive long after the attack. R2636/V28

Trial counsel did not hire a medical expert to testify about how quickly a black eye will form, nor did they use the medical examiner's testimony about CO Fitzgerald's black eye, which formed before she died, to establish how quickly a black eye will develop. PCR549-552/V4 Physical evidence is impartial, which makes it powerful, especially when someone's word is being challenged by twelve biased witnesses. Trial counsel's failure to rebut the statements of the guards by showing that their testimony is inconsistent with the physical evidence was a highly prejudicial omission.

Mr. Valerino explained their reason for filing a motion to suppress statements, "…Mr. Hall had indicated that he had made the statements because he was being beaten by corrections officers, and was afraid." PCR511/V3 Mr. Valerino understood that this was not a "false confession." PCR513/V3 When asked what they were trying to accomplish with the motion, he responded, "I don't know because I had – I had mixed feelings about the issue of even filing the motion to suppress because I – but felt that I needed to because he said the statement was coerced." In his professional opinion, he would have preferred the statement come in than have to rely on Mr. Hall testifying. He was not disappointed with the Court's ruling. PCR513-514/V3

Despite Mr. Valerino eliciting testimony about the timing of the eye injury during his cross-examination of the guards, he failed to use this information to argue that the physical evidence was consistent with the injury originating after Mr. Hall's arrest, and inconsistent with the injury occurring during an earlier confrontation with CO Fitzgerald. Mr. Valerino's failure to make use of this information only makes sense if it is considered in conjunction with his admission that he didn't really want to win the motion, he just felt obligated to file it. PCR513-514, 531/V3

Once they lost the motion to suppress, defense counsel abandoned the allegation that Mr. Hall had been beaten. Photographs showing that Mr. Hall received injuries to his face were not shown to the jury. Defense Exhibit 2.

At trial, it became their strategy to present Mr. Hall's statements as an account of what happened. PCR553/V4 During the trial, the Defense made no mention during cross-examination, during their case or during Closing that Mr. Hall's black eye, injuries to his body and his limp were caused by the guards, and that Mr. Hall was in fear for his life after the murder. The State argued that Mr. Hall kept changing his statement, because he was ashamed. R2828/V30 More likely, his fear of the guards motivated him to keep tweaking his statement, until law enforcement was satisfied and Mr. Hall could be transported out of TCI to the county jail.

Mr. Valerino acknowledged that the State argued Mr. Hall's statements were inconsistent because he couldn't tell the truth, "it was just too damning."

PCR553/V4 He acknowledged that Mr. Hall even changed the circumstances of the altercation. PCR556/V4 Nevertheless, they made no attempt to explain the inconsistencies by presenting to the jury the idea that receiving blows to the head could affect memory, could explain his struggling with the details. PCR554/V4

Trial counsel's failure to retain a medical expert to establish the timing of the black eye and the full extent of Mr. Hall's injuries was a lapse in judgment that went to the issue of Mr. Hall's credibility and amounted to ineffective assistance of counsel. According to Mr. Valerino's testimony at the evidentiary, it seemed that defense counsel just went through the motion of trying to suppress the statements, without really wanting to be successful. Their filing of the motion to suppress was perfunctory, devoid of available supporting evidence. If they had considered that the beatings could be used to explain the inconsistencies in the statements, then perhaps they would have tried harder to discredit the guards and Mr. Hall would have received the benefit of competent counsel. Failing to present this evidence deprived Mr. Hall of a fair trial. The prejudice is the unreliable conviction for first degree murder.

2. G. Expert testimony about the effects of head trauma, epilepsy, cognitive disorders and post-traumatic stress on memory

Dr. Maher opined, "If he had, in fact, been beaten … by the guards…, it would be a normal and expected reaction that he would have been frightened, anxious, withdrawn, unwilling to trust, to reveal information, but also felt very compelled and

under duress to do so as he may have felt that further retaliation against him was imminent." PCR272-273/V2 The jury never heard about the beating, so they never considered Mr. Hall's condition when making his statements.

In addition to fearing the guards, there are other plausible reasons why Mr. Hall's account of the incident changed over the course of the three interrogations, as Mr. Hall struggled to piece together the events of the murder. Dr. Maher explained that the four basic components of memory are perception, processing, storage and retrieval. PCR273/V2 A head injury shortly after an event could disrupt the storage and consolidation process. This could cause an individual to be unable to recall all or part of the event, even though their brain was functioning properly at the time the event was perceived. It would be as though there was only a "snapshot" recording, rather than a continuous recording of the event before the head injury. PCR274-275/V2

From a review of the first interview, it is apparent that Mr. Hall is barely coherent. He's crying and slouched over. Mr. Hall mumbled to himself throughout his detention prior to questioning. R290, 312-313,361-362/V3 During the first interrogation, he was asked over and over to explain what had happened. Mr. Hall was only capable of repeatedly responding, "I freaked out." R1-92/Exhibit V1 Dr. Krop, who only testified at the Spencer hearing, found that Mr. Hall seemed confused and unable to describe motive and exactly the events that transpired,

though he never denied culpability. R662-663/V5

Dr. Maher reviewed the recorded interrogation of Mr. Hall. In his opinion, during the first interrogation, Mr. Hall seemed "confused about what happened and what was going on" and was "in a bit of a daze." PCR262, 264/V1 "His memory … appeared to be less substantial and reliable." PCR263/V1 He was "having difficulty being fully aware of his circumstances, repeating his questions, in effect, to clarify his own thought processes." PCR264/V1 Dr. Maher also found that Mr. Hall's demeanor in the first interview is consistent with being hit in the face, as the bruise shows, and suffering from a minor concussion, which is quite common in head injuries. A blow to the head effects cognitive functioning, creating a period of confusion, in addition to any fear that follows being assaulted. The Defense never presented to the jury the significance of these observations as they relate to Mr. Hall's claim that he was beaten and why his statements to the police varied.

A mental health expert should also have been consulted and called to testify to the effect a traumatic event could have on someone's memory of that event. Dr. Maher testified that the manner in which CO Fitzgerald was killed, multiple stab wounds in a relatively unsystematic manner, is consistent with an agitated emotional state. "It is not consistent with reflection during the acts, but rather with impulsive emotion-driven desperation, fear, anger, rage." PCR275-276/V2 Dr. Maher strongly rejected the State's theory that Mr. Hall stabbing the guard 22 times could

be consistent with him "enjoying the feeling of stabbing someone." PCR398-399/V2 While no one would categorize Mr. Hall as the victim in this case, killing a human being is in fact a traumatic event, especially where there is evidence of an emotional frenzy. In Dr. Maher's experience in evaluating people convicted of murder, "it is a traumatic event, almost universally…It tends, especially in individuals who have been exposed to previous trauma and violence, to reenact, renew, their feelings and experience and memories of trauma at someone else's hands when they may, in fact, have been the victim." PCR276-277/V2 "[Hall's] state of mind [during the first interrogation] is consistent with an individual who's suffering some impairment in his ability to think, understand, react, process information, both from a psychological point of view, having suffered a trauma, and a physiological point of view, having suffered some physical trauma consistent with a concussion." Dr. Maher went on to testify, "… a person processes a traumatic event more according to how they feel about it than what they have literally seen or heard or experienced during the time it happens. So our memory of trauma tends to be somewhat unreliable when it comes to details…" PCR 277-278/V2 Dr. Maher noted that Mr. Hall has a history of being diagnosed with epilepsy. His demeanor or aspect while waiting to be questioned and during his first interrogation is consistent with a postictal state or the period after an epileptic seizure, which can last up to several hours. The postictal period "is characterized by sleepiness,

confusion, lack of awareness, inability to think clearly, inability to understand complex information and questions and answer complex information and questions." PCR278-279/V2

Dr. Maher also testified that not only would a traumatic experience and epilepsy affect memory, but a cognitive disorder would affect a person's ability to recall recent events, as well. He explained that a cognitive disorder NOS could affect perception, the way we consolidate and understand our experience, and so it also affects the way we can report them back. Both Dr. Krop and Dr. Maher diagnosed Mr. Hall with this impairment of thought processing. R656/V5 and PCR280-281/V2 This disorder would be exacerbated by Mr. Hall's history of epilepsy. PCR331/V2 If Mr. Hall had lapses in memory, then his ability to correctly report an event would be compromised. Over the course of the three interrogations, which began at 10:40 p.m. and finally concluded at 3:40 a.m., Mr. Hall attempted to remember and make sense of what happened, as he was being pressured by the authorities to give a reasonable explanation for something he did not understand himself. Had the Defense retained a mental health expert to evaluate Mr. Hall's state of mind after the killing, they would have discovered valuable information that the jury should have been allowed to consider when weighing Mr. Hall's credibility. Clearly, the expert would not have been used to establish diminished capacity or lack of pre-meditation. However, this evidence is relevant to Mr. Hall's memory of the events that occurred,

which was handicapped by his ability to perceive, which has bearing on the statements given to law enforcement.

The State raised the issue of Mr. Hall's credibility by drawing the jury's attention to the variances in his statements during their Opening and the direct examination of Agent Stephen Miller, thereby opening the door to rebuttal. R1987-1989/V23 and R2275/V25 The State argued in Closing that Mr. Hall kept changing his story, because "the truth is just too damning, was just too hard for him to say." R2828/V30 The Defense had an obligation to lessen the impact of the State's argument by presenting evidence that explained Mr. Hall's difficulty with recalling the murder. Additionally, he feared for his life if he remained at TCI, so he kept trying to piece the events together, until the authorities were satisfied.

Failure to employ a psychiatrist for the purpose of challenging the State's assumption about Mr. Hall's statements deprived Mr. Hall of an important aspect of his defense and amounted to ineffective assistance of counsel. Failing to present this evidence deprived Mr. Hall of a fair trial. The prejudice is the unreliable conviction for first degree murder.

2. H. Cumulative Effect

Taken together, failing to present the evidence listed in items 2. A. through G. deprived Mr. Hall of a fair trial. The only witness called by the Defense was an inspector general for DOC, John Joiner. R2719/V29 This witness had already been

called by the State (R2348/V26) and cross-examined by the Defense. R2365/V26 The purpose of calling Inspector Joiner as a defense witness appears to be for the publication of a video of Mr. Hall after his arrest being detained at the MTC Y-Unit. Mr. Hall is seen sitting on a bench mumbling to himself.

Defense counsel filed many motions and took numerous depositions. However, when it came down to actually presenting a defense, their effort was sorely lacking. Due to ineffective assistance of counsel, the verdict in this case is unreliable. Failing to present this evidence deprived Mr. Hall of a fair trial. The prejudice is the unreliable conviction for first degree murder.

Legal Argument – Claim II

Reasonable attorney performance obliges counsel "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 685. "One of the primary duties defense counsel owes to his client is the duty to prepare himself adequately prior to trial." Magill v.Dugger, 824 F.2d 879, 886 (11th Cir. 1987); "pretrial preparation, principally because it provides a basis upon which most of the Defense case must rest, is, perhaps, the most critical stage of a lawyer's preparation." House v. Balkom, 725 F.2d 608, 618 (11th Cir.), cert. denied, 469 U.S. 870 (1984); Weidner v. Wainwright, 708 F.2d 614, 616 (11th Cir. 1983). As stated in *Strickland,* an attorney has a duty to undertake reasonable investigation or "to make a reasonable decision that makes particular investigations

unnecessary." 466 U.S. at 691. No tactical motive can be ascribed to an attorney whose omissions are based on ignorance Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991), or on the failure to properly investigate or prepare. This brief demonstrates, as the Florida Supreme Court stated in State v. Fitzpatrick, No. SC11-1509 (Fla. June 27, 2013), "[although] 'the duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up,' Rompilla v. Beard, 545, U.S. 374, 383 (2005), postconviction evidence demonstrates that counsel's preparation and performance were constitutionally inadequate, and his decisions before and during trial were not tactical or reflective of a *reasonable* trial strategy." (Emphasis added)

In addition to considering an attorney's reasons for performing in an allegedly deficient manner, counsel's cross-examination of the State's witnesses is reviewed to determine if weaknesses in the State's evidence was brought out and whether those weaknesses were argued to the jury. See, State v. Riechmann, 777 So. 2d 342, 354 (Fla. 2000), citing Card v. Dugger, 911 F.2d 1494, 1507 (11th Cir. 1990). See also, Commentary to ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.7 (2003). This claim demonstrates repeated instances of counsel's failure to competently defend against the State's evidence.

Even if counsel provides effective assistance at trial in some areas, the defendant is entitled to relief if counsel renders ineffective assistance in his or her

performance in other portions of the trial. Washington v. Watkins, 655 F.2d 1346, 1355, rehearing denied with opinion, 662 F.2d 1116 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982). See also, Kimmelman v. Morrison, 106 S.Ct. 2574 (1986). Even a single error by counsel may be sufficient to warrant relief. Nelson v. Estelle, 642 F.2d 903, 906 (5th Cir. 1981) (counsel may be held to be ineffective due to single error where the basis of the error is of constitutional dimension), Nero v. Blackburn, 597 F.2d 991, 994 (5th Cir. 1979) ("sometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard").

An effective attorney must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970); see also Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990) (en banc) (failure to present theory of self-defense); Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978). This error also violates defendant's right to present a meaningful defense. See Crane v. Kentucky, 476 U.S. 683 (1986). Failure to present a defense that could result in a conviction of a lesser charge can be ineffective and prejudicial. Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990).

In this brief, Mr. Hall has demonstrated substandard representation by trial counsel in each sub claim, A. through G. This claim demonstrates that counsel has failed to present readily available evidence to challenge the State's case. Counsel also failed to cross-examine State witnesses to reveal weaknesses in their testimony,

therefore these weaknesses were never called to the jury's attention. Each sub claim establishes Mr. Hall's right to a new trial, as the omitted evidence calls into question the reliability of the jury's verdict. Considered together, the argument is even more compelling. Mr. Hall's conviction for first degree murder and sentence of death is the resulting prejudice.

ARGUMENT CLAIM III – Mr. Hall was denied the effective assistance of counsel at the guilt phase of his capital trial, in violation of the Fifth, Sixth, Eight and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. Counsel failed to object to the testimony of Corrections Officer Frederick Evins, who was not noticed as a witness and whose testimony was irrelevant and misleading, and as a result, the conviction for first degree murder and death sentence are unreliable.

The trial court denied this claim, based on the opinion that trial counsel's failure to object to CO Evins's testimony was not prejudicial, though it went to the logistics of Mr. Hall's statements. That was error. At trial, the State called corrections officer, Frederick Evins, to testify about how he closed down the PRIDE facility at the end of an overtime shift. He testified which doors would be locked, preventing access to certain departments and equipment once PRIDE was closed. R2571-2573/V27

The State did not list CO Evins as a witness in any of their notices of discovery. R1026-1029, 1032-1035, 1039-1042, 1044-1054, 1174-1175, 1177, 1181-1182, 1184-1193, 1195, 1197-1198, 1200, 1202-1203, 1205, 1211-1214, 1219-1220, 1223-1224, 1230-1233, 1382-1384, 1391, 1402-1403, 1418-1419, 1467,

1494, 1502-1503, 1506-1507, 1576, 1594, 1605-1606, 1614-1615, 1622, 1630, 1664/V 8-11 Trial counsel failed to object to CO Evins testifying without the Defense first being properly noticed that he would be a witness. R2569/V27

CO Evins did not testify about DOC procedures for locking down PRIDE. The State did not lay a proper predicate that PRIDE even had an official policy and procedure for closing down PRIDE and that CO Evins followed that policy and procedure. R2571/V27 Defense counsel failed to object to this lack of predicate. Id. In fact, former Inspector General, John Joiner testified that per the DOC Admin. Review, PRIDE does not offer formal training for DOC officers working as security officers. PCR192/V1 There is no specific department policy, procedure or guideline that guides staff working at PRIDE. PCR192-194/V1 The State failed to establish that there was a "typical" procedure for locking down PRIDE at the end of the overtime shift, even if there was no formal one.

CO Evins responded to the State's question about the procedure for locking down PRIDE using the first person, in other words, what steps *he* normally took to lock down PRIDE. R2571-2574/V27 He did not testify that he trained CO Fitzgerald. Defense counsel failed to object to CO Evins' testimony as irrelevant. CO Evins did not lock down PRIDE on June 25, 2008, CO Fitzgerald did.

On cross-examination, trial counsel failed to elicit from CO Evins that he did not work the overtime shift at PRIDE on June 25, 2008 and had no personal

knowledge of what procedure was actually utilized for locking down PRIDE that evening. At the evidentiary hearing, Mr. Valerino admitted that CO Evins had no personal knowledge of how the PRIDE facility was locked down the evening of the murder. PCR565/V4 In sum, CO Evins's testimony about how he closed the PRIDE facility, which doors he would lock and in what order he would perform these procedures was irrelevant to Mr. Hall's case. It served no purpose other than to mislead the jury that the way CO Evins did things is the way other officers did them. Mr. Valerino's only excuse for not objecting to the testimony of this State witness is that he didn't understand how the testimony was objectionable. PCR565/V4 The State established that Mr. Valerino is a seasoned trial attorney and yet he does not comprehend that irrelevant testimony is objectionable.

Legal Argument – Claim III

In Capehart v. State, 583 So. 2d 1009 (Fla. 1991), the Florida Supreme Court, discussed the failure of trial counsel to object, in the following manner:

> The law is clear that error predicated on the admission of such evidence must be preserved for review by appropriate objection at trial. Grossman v. State, 525 So. 2d 833 (Fla. 1988), Grossman v. Florida, 489 U.S. 1071, 109 S. Ct. 1354, 103 L. Ed. 2d 822 (1989). Accordingly, we do not address the merits of Capehart's claim. The defense counsel's failure to object to the admission of this evidence and the resulting prejudice, if any, is a question appropriately decided in a proceeding for post-conviction relief. *See* Fla. R. Crim. P. 3.850; see also, e.g., Kelly v. State, 486 So.2d 578 (Fla.), cert. denied, 479 U.S. 871, 107 S.Ct. 244, 93 L.Ed.2d 169 (1986). Id. at 1014.

Moreover, in Nero v. Blackburn, 597 F.2d 991, 994 (5th Cir. 1979), the court held:

> To decide if Nero was denied his sixth amendment right to effective assistance of counsel because of his attorney's failure to request a mistrial, we must examine "the totality of the circumstances and the entire record" to see "whether reasonably effective assistance was rendered." United States v. Gray, 565 F.2d 881, 887 (5th Cir. 1978). Appellee argues that under our totality of the circumstances test, the failure of Nero's counsel to request a mistrial cannot alone render his assistance ineffective. We disagree. Sometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the sixth amendment standard. This case presents such an error. Id. at 994.

If defense counsel had objected to CO Evins's testimony, then they would have been able to challenge the State's argument in Closing that Mr. Hall expected CO Fitzgerald to come looking for him by herself and so he laid in wait for her. R2805/V30 The State would have been arguing facts not in evidence.

Eliminating CO Evins as a witness leaves the State with a speculative argument concerning Mr. Hall's intent, and whether the murder was planned versus spontaneous. Defense counsel's allowing the testimony of this witness was highly prejudicial to Mr. Hall's case and amounted to ineffective assistance of counsel. Failing to object to this evidence deprived Mr. Hall of a fair trial. The prejudice is the unreliable conviction for first degree murder. A new trial is the remedy.

ARGUMENT CLAIM IV – Trial counsel failed to fully investigate Mr. Hall's family history. Mr. Hall was denied the effective assistance of counsel in the penalty phase of his trial in violation of his Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

The trial court denied this claim, based on the opinion that trial counsel's

failure to discover the mother's infidelity was not prejudicial. That was error. Mr. Valerino described Mr. Hall, "He was a very good cooperative client….He seemed to answer our questions. A very good client." PCR498/V3 Mr. Valerino went on to testify that Mr. Hall was cooperative in the penalty phase and gave his defense team names of witnesses. PCR586-588/V4 Mr. Valerino knew Mr. Hall's parents were divorced, but did not try to find out why. PCR587/V4 Furthermore, when Mr. Phillips was asked if he was surprised with the report that there were no issues with Mr. Hall's family, he testified that in the 25 years of practicing criminal defense law, "It -- it was out of the ordinary. Most of the clients I've represented …on homicide cases or even non-homicide cases, often we get people with more dysfunctional family histories. PCR678/V5

While the Defense had notes on names of other family members, they chose to only speak to Enoch James Hall (father), Betty Hall (mother) and Adrian Hall (brother). PCR585-586/V4 When Mr. Ryan was asked at deposition who did Mr. Hall ask him not to contact, Mr. Ryan couldn't remember their names. PCR866/V6 It had been seven years since he interviewed Mr. Hall, so he referred to his notes. Nowhere in any of Mr. Valerino's notes or his investigator's, Ryan's, notes is there an indication that Mr. Hall asked his defense team not to contact any witness. PCR588/V4 and PCR866/V6 Their notes do contain names of witnesses and the relationship to Mr. Hall, including the name Gene Hall. Mr. Ryan testified that he

was told not to contact Mr. Hall's uncles, though he made no contemporaneous note of this request. It makes no sense that someone would give the full name of a witness he didn't want contacted, rather than just refuse to disclose any information at all about the witness. Even stranger, Mr. Ryan claimed that it wasn't all uncles that Mr. Hall didn't want him to contact, just the two uncles whose names Mr. Hall provided for him. The names of other aunts and uncles who could be contacted weren't provided. PCR855/V6 Mr. Ryan admitted that he had an opportunity to review Mr. Hall's 3.851 motion before testifying, along with the State's Response, and Mr. Hall's Witness List. PCR497-498/V3 and PCR865-866/V6

Mr. Ryan claimed that Mr. Hall was originally "reluctant for us to contact anybody." PCR854/V6 This claim directly contradicts Mr. Valerino's description of Mr. Hall as "a very good cooperative client," referring also to his behavior at the penalty phase of trial preparation. PCR498/V3 and PCR586-588/V4 Mr. Ryan confirmed at the evidentiary hearing that when he interviewed Mr. Hall, the attorneys were present and would know whether or not Mr. Hall was responsive to questions the same as Mr. Ryan would, because they were there. PCR863-864/V6 Mr. Ryan's excuse for failing to follow up on names he received from Mr. Hall, claiming that Mr. Hall didn't want them to be contacted, is not credible.

Jesse Gene Hall, Mr. Hall's uncle on his father's side, was never contacted by trial counsel or the public defender's investigator. He would have been available

and willing to testify for his nephew had he been asked to do so. PCR484-485/V3 Gene Hall testified at the evidentiary hearing about his brother's marriage to Mr. Hall's mother, indicating that she was not faithful to his brother. He based this opinion on seeing her at different men's houses and seeing a taxicab driver at his brother's house on several occasions when his brother wasn't home. PCR469-470/V3 Mr. Hall and his brothers were home when the men visited their mother. PCR471/V3

Mr. Hall's father, Enoch James Hall, testified at the evidentiary hearing. The father advised the court that when Mr. Hall was a child, he worked a lot, usually 2 to 3 jobs at a time. PCR474/V3 Of Mr. Hall's mother, Bettie Hall, he said that she had a loving relationship with her sons. PCR474/V3

When asked about his relationship with Mr. Hall's mother, based on information received from Gene Hall, the father confirmed that Mr. Hall's mother was unfaithful to him. PCR475/V3 He went on to describe heated arguments with his ex-wife and told of her pointing a gun at him one time. PCR475/V3 He confirmed that Mr. Hall was there when this happened. PCR475-476/V3 The boys were often in the house and able to hear the raised voices and experience the tension in the household. PCR476/V3 At one point, Bettie Hall moved in with another man and took Mr. Hall and his brothers with her. (Enoch would have been 16 years old at the time.) Eventually, they moved back home. PCR476-477, 480/V3 The father

described Mr. Hall's mother as someone who was "messy", meaning she "kept stuffed stirred up all the time…conflicts between different folks." PCR477/V3 When the father confronted Mr. Hall's mother about her cheating, "She said I'm never catch her, just starting laughing." PCR477/V3 Ultimately, Mr. Hall's parents were divorced because of this cheating. PCR478/V3

Had Mr. Hall's family background been thoroughly investigated, the Defense would have discovered from the father, Enoch James Hall, what undersigned counsel discovered, simply because he was asked directly to go into that difficult time in his life. The ability to ask relevant questions came from delving further into the family's background after realizing that the parent's initial description of an idyllic childhood was inconsistent with the vast majority of death penalty mitigation investigation findings. A seasoned trial attorney, would have questioned further or looked deeper to get to the truth of Mr. Hall's family history.

This information was a crucial missing element of Mr. Hall's background as it explains his anger toward women. Dr. Maher explained at the evidentiary hearing that we learn how to behave from our first relationships, and in that respect, "mothers are probably … the most important human beings in the world. Without good mothers, none of us would be able to function adequately in society." PCR310/V2

In early conversations with Dr. Maher, Mr. Hall reported that his childhood was relatively normal. The family was intact as a unit and they were supportive of

his school and sports. PCR389/V2 Generally, families are not forthcoming about conflicts within the family dynamic and do not volunteer this information for mitigation purposes. They make an effort to present themselves in the best light. PCR316/V2 "What is essential is to continue, respectfully, to attempt to gain trust of the family members and to begin to ask them more and more direct and specific questions about who lived in the home, when they lived in the home, when there were absences from people who lived in the home, what the relationships were in a very specific and concrete manner rather than in a general manner. So then one can begin to discover inconsistencies to the generalization that everybody was happy and healthy and at home and enjoying the company of each other." PCR317/V2

Mr. Hall's feeling towards his mother are ambivalent, a mixture of "strong attachment, love, depending on his mother," as well as "great feelings of confusion, anger, disappointment, even rage at her for humiliating and betraying his father." PCR312/V2 Dr. Maher explained the basis for his conclusion, "My understanding is that this is a – a young boy who wanted to be closer to his father, wanted to identify with his father, wanted to be emotionally close and connected to his father, and felt that his father was unavailable. He also felt very strongly that his father was being mistreated, exploited, and humiliated by his mother – betrayed by his mother in a way that a man never should be. And this was an obstacle, a barrier to him making a meaningful ongoing respectful connection to his father. So he wanted that, but did

not, and to this day has not, ever felt fulfilled in that regard. He felt close to his mother, but in some respect hated her because of what she did to his father." PCR314/V2

On the day of the murder, Mr. Hall had been under the influence of drugs (R2182/V25), was exhausted from working overtime as a welder in the middle of summer, was anxious about looming, unrealistic deadlines, and was frustrated when he could not find more drugs to self-medicate and reduce his stress R2198, 2210, 2223, 2226/V25 Mr. Hall indicated to CO Fitzgerald that he needed more time before he had to leave PRIDE, by telling her to "get out" when she came for him. R2199/V25 During his first interrogation, when Agent Miller asks, "Well, what did she say when you told her to get out? Enoch Hall replied, "She laughed." R2199/V25 When the officer attempts to expound on Mr. Hall's statement that she laughed at him, Mr. Hall ties this humiliating act together with his mounting frustration at being blocked from reaching his goal, "I wanted them pills." PCR382/V2, R2199-2201/V25 Agent Miller revisited this question, "Tell me what triggered it, then, besides the fact that you wanted to keep looking for the pills. Why do you think you stabbed her?" Mr. Hall answers, "She was laughing." R2204/V25 The laugh appears to be the trigger, after which, in Mr. Hall's own words, he "freaked out." R2183-2188, 2190-2196, 2208-2211, 2213-2216, 2224, 2227/V25 Dr. Maher explained his opinion concerning the psychological motivation for the

murder:

> "The – a terrible theme that runs through Mr. Hall's life is his experience and reaction to humiliation. And it is my best conclusion that this killing occurred in part because of his feelings of – and his reaction to feeling humiliated." PCR360/V2

As to why Mr. Hall may have felt humiliated by CO Fitzgerald, Dr. Maher recalled,

> "And the one thing that stood out in his interview with me about his state of mind and any motivations of this and what he remembered was her laughing at him. And it was,…somewhat of a snapshot. It was not offered in a context in a clear logical rational context, but it seemed to him to be very important. He came back to it. He certainly didn't say that they were laughing together or that there was a joke that they both understood, but that she was laughing *at* him. Whether, in fact, she was or not, there is no way to tell, but his state of mind certainly makes it more likely that he would have felt laughed at rather than laughed with – if something occurred. And that is a humiliation to a person. And under the circumstances that may have existed, it is my belief that that was a factor of some significance in precipitating his murderous-rage reaction." PCR364-365/V2

Knowing the role his mother's infidelity played in injuring his mental stability, one can better understand why the events of that day led to this crime, why the laugh sounded like a taunt and was the final trigger to Mr. Hall's spontaneous act of violence. Due to the ineffective representation of counsel, mitigating facts were not adequately developed which would have helped the jury understand one of the important factors that contributed to Mr. Hall's actions. The prejudice is the jury's misguided recommendation of the death penalty and Mr. Hall's sentence of death.

Legal Argument – Claim IV

State and federal courts have repeatedly held that trial counsel in capital sentencing proceedings have a duty to investigate and prepare available mitigation evidence for the sentencer's consideration. Phillips v. State, 608 So. 2d 778 (Fla. 1992). "Events that result in a person succumbing to the passions or frailties inherent in the human condition necessarily constitute valid mitigation under the Constitution and must be considered by the sentencing court." Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990). It cannot be said that there is no reasonable probability that the results of the sentencing phase of the trial would have been different if the evidence discussed had been presented to the sentencer. The key aspect of the penalty phase is that the sentence be individualized, focusing on the particularized characteristics of the defendant. Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion).

In analyzing whether additional evidence presented at a post-conviction hearing is merely cumulative, the Eleventh Circuit in Hosley V. Warden, 694 F.3d 1230 (11th Cir. 2012) relied upon the Supreme Court's findings in Cullen v. Pinholster, 563 U.S. 170, 131 S.Ct. 1388 (2011), "…evidence presented … is 'cumulative' or 'largely cumulative' to or 'duplicative' of that presented at trial when it tells a more detailed version of the same story told at trial or provides more or better examples or amplifies the themes presented to the jury." The testimony of Hall's uncle and father presented during the post-conviction paints a very different

picture of Hall's family and offers insight into what may have triggered Mr. Hall to snap.

Furthermore, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Wiggins v. Smith, 539 U.S. 510, at 528, 123 S.Ct. 2527 (2003), (quoting Strickland, 466 U.S. at 690-91). In Johnson v. Secretary, DOC, 643 F.3d 907, 933 (11th Cir. 2011), the Eleventh Circuit referred to their findings in Ferrell v. Hall, 640 F.3d 1199 (11th Cir. 2011) where the decision of counsel to end the investigation was not reasonable even though his investigator had interviewed 40-45 witnesses about Ferrell's character, because he "did not speak with any penalty-phase witnesses, or potential witnesses, *aside from the parents*, until immediately following the guilt phase..." (Emphasis added) The court found that if counsel had adequately utilized the family members he had spoken with, or had asked Ferrell's other family members about his background they would have elicited significant and powerful additional mitigating evidence from the witnesses who were willing to testify.

In Sears v. Upton, 130 S.Ct. 3259, 3261 (2010), the Court reversed a death sentence where trial counsel's deficient performance resulted in an inaccurate portrayal of the defendant's childhood. Counsel unreasonably relied on information from family members and therefore told the jury Sears' "childhood [w]as stable,

loving, [middle class], and essentially without incident." Ultimately, the evidence of Sears' stable and advantaged upbringing was used against him during the State's closing argument. Id. at 3262.

Mr. Hall's counsel admitted that the report of a perfectly happy childhood and family dynamic was unusual for a person who had committed the crimes Mr. Hall was convicted of committing. However, trial counsel chose to ignore this red flag and not pursue the opportunity to question family members outside the immediate family, even though they were provided with the names of Mr. Hall's uncles. Due to counsel's ineffective assistance, the jury and judge were incapable of making an individualized assessment of the propriety of the death sentence in this case. The prejudice is the jury's recommendation of death and Mr. Hall's sentence are unreliable. Mr. Hall's sentence should be vacated and he receive a new penalty trial.

ARGUMENT CLAIM V – Mr. Hall was denied effective assistance of counsel at the penalty phase of his capital trial, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. Counsel failed to present known mitigating information from psychologist, Harry Krop, Ph.D. Trial counsel failed to adequately challenge the State's case and as a result, the death sentence is unreliable.

The trial court denied this claim, based on the opinion that trial counsel was not deficient. That was error. Under the excuse of trial strategy, defense counsel failed to call Harry Krop, Ph. D. to testify during penalty phase, yet they deemed his testimony helpful and credible enough to present it during the Spencer hearing.

Mr. Phillips testified at the evidentiary hearing that Dr. Krop did not receive any new information between the penalty phase and the Spencer hearing, and he did not provide the Defense with any new reports during that time. PCR680-681/V5

The State forecasted the inevitable objection from post-conviction counsel, as this strategy was blatantly ill conceived. The State attempted to preempt a challenge to this decision by listing trial counsel's motivations for failing to present this vital witness. Dr. Krop would have revealed that Mr. Hall was not forthcoming about his prior criminal history of sexual battery, about what kind of pills he took that day and whether or not he pulled the victim's pants down after the murder, and if so, why he did it; Dr. Krop did not perform tests for malingering as part of his neuropsychological exam; Dr. Krop took back some of his original diagnosis after his last interview with Mr. Hall, removing intermittent explosive disorder, posttraumatic stress disorder; Dr. Krop modified his substance abuse disorder diagnosis. R3155-3157/V32 and PCR683/V5

Mr. Phillips agreed with the proffer. PCR693 The only thing that Mr. Phillips could add to the proffer is that Mr. Hall told Dr. Krop during their last interview that he "probably" thought about raping CO Fitzgerald *after* her death. PCR694-695/V5 Of course, a victim must be alive in order for someone to be charged with rape, and there was no sign that Mr. Hall did, in fact, violate CO Fitzgerald sexually after her

death. R2606, 2655/V28 Mr. Phillips also claimed concern that "[Mr. Hall] had failed the various malingering tests performed by Dr. Danziger." PCR695/V5

Dr. Krop was not changing his testimony regarding his diagnosis of cognitive disorder, "particularly in the area of memory and executive function." PCR695-696/V5 These impairments went to "issues of impulse control and flexibility – in your ability to re – pull back from a behavior." PCR705/V5 Mr. Phillips said that they were also concerned that putting Dr. Krop on the stand "would require Dr. Krop to elaborate on [Mr. Hall's] prior history of sexual violence." PCR696/V5 This was inconsequential, because the jury was well informed about the prior rape convictions from the victims' penalty phase testimony. R2969-3006 and 3023-3038/V31 The only thing this "strategy" accomplished was that there was no mitigation offered from a mental health expert. No attempt was made to help the jury understand Mr. Hall's mental disorders.

We don't have to speculate whether Dr. Krop would have made a good penalty phase witness, because we have his Spencer hearing testimony. Mr. Phillips admitted that when Dr. Krop testified before the court, Dr. Krop gave reasonable explanations for the things about which defense counsel claimed were of concern. PCR701/V5 Dr. Krop was able to address and neutralize any potentially harmful testimony, which left the "positive mitigation about [Mr. Hall's] neurocognitive deficits" that counsel wanted to get out. PCR697/V5 Even the State's mental health

expert, Dr. Danziger, testified at the evidentiary hearing, "Did I see anything to indicate that [Dr. Krop] did an inadequate job or poor job? No. In my deposition, I read his reports. He did appropriate testing. I thought it was a reasonable job." PCR943/V6 Mr. Phillips agreed that Dr. Krop was able to testify that Mr. Hall never denied culpability. PCR699/V5 Mr. Phillips agreed that Dr. Krop presented to the court that Mr. Hall's motive for staying behind was to get the pills, and that motive never varied. PCR699-700/V5 Dr. Krop even offered an explanation for Mr. Hall's inconsistent statements to Dr. Danziger, after having just been convicted of first degree murder. PCR700-701/V5 Dr. Krop educated the court about the screening tests for malingering, their purpose and why such a screening was unnecessary after his extensive, full battery of test. PCR701-703/V5 The excuses given by counsel for not letting the jury hear Dr. Krop's testimony don't hold water.

With or without Dr. Krop's testimony, the State challenged Mr. Hall's veracity because of the variations in the three statements he made while being interrogated by law enforcement after his arrest. The jury was also made painfully aware of the fact that Mr. Hall was convicted of several violent felonies, which the State may use to argue his lack of credibility. R111-125/Exhibit V3 The addition of testimony that Mr. Hall was ashamed of his prior rapes and pulling down the victim's pants, therefore he denied these acts, would hardly be surprising to a jury or add much to the State's arguments against Mr. Hall. In fact, rather than

damage Mr. Hall's credibility further, Dr. Krop would have put his varying statements to the police in perspective. At the Spencer Hearing, Dr. Krop gave his impressions of FDLE's interrogation of Mr. Hall:

> He seemed to be just really distraught and uncertain as to what was going on.
>
> When you listened or watched or read the interrogation, he sort of perseverated. By that, I mean he repeated a number of times that he – I think he used the word, I flipped, which is what he told me about.
>
> Again, he never denied to me that he engaged in the homicide. But he basically was unable to fully describe motive and exactly the events that transpired. But he never denied culpability for the offense from day one. R662-663/V5

It was understood that if Dr. Krop did not testify, then the State would not need to call their psychiatrist, Dr. Danzinger, to rebut Dr. Krop's opinion. This would have the benefit of keeping out Mr. Hall's statement to Dr. Danzinger that he was trying to pull the victim's pants off so he could change clothes and escape. R3156/V32 However, Dr. Krop explained at the Spencer Hearing that Mr. Hall spoke to Dr. Danzinger after Mr. Hall had just been convicted of first degree murder. Dr. Krop testified, "– if you watch Mr. Hall closely, [on the videotaped interview], he almost wasn't paying full attention to some of Dr. Danzinger's questions. Because he had already been convicted. He was depressed." R664/V5

While there is no way around it, the State's psychological expert will always be at a disadvantage, because they will be evaluating an individual after he has just

received devastating news – after he has been convicted of first degree murder. Dr. Krop explained, "It would be very different than the person's mental state when the defense expert evaluates him." R664-665/V5 If Dr. Krop had been allowed to testify before the jury, he would have been able to explain some of Mr. Hall's inconsistent statements, which further dilutes the reasoning for excluding him.

It is important to also note that Dr. Danziger found that Mr. Hall does not have an anti-social personality disorder. R774/V6 Dr. Maher agreed. PCR356-357/V2 Mr. Hall does not qualify for this diagnosis because of his ability to have close personal relationships over a long period of time, as evidenced by his relationship with his family. Dr. Maher added, "Before this tragic murder, he demonstrated that he was a good inmate and a good worker and somebody that could be trusted and depended on. …he demonstrated those things, and not simply for a few weeks or months, but for years." PCR358/V2 Also, the presence of posttraumatic stress disorder and cognitive disorder NOS would exclude an anti-social personality disorder diagnosis. PCR357/V2

Dr. Krop explained fully why he did not need to test for malingering:

> Q: And isn't it true that you didn't do any specific tests for malingering when you gave him your tests?
> A: That's true. Because again –
> Q: Okay.
> A: – there – he wasn't – first of all, he was not presenting with psychiatric symptoms. So there's no reason to do any kind of malingering tests with regard to his psychiatric issues.

> And in terms of the neuropsychological testing, there was no evidence from within the test data itself to suggest that he was being malingering. In other words, he did quite well on many of the neuropsychological test, did poorly on some of the others. So that's usually not consistent with malingering. Usually a person who's malingering can't be – isn't sophisticated enough – and certainly Mr. Hall isn't – to say, all right, I'm going to do poorly only on those tests that make me look a certain way but do well on those tests otherwise. R681-682/V5

He also educated the State on the purpose of a test for malingering and how it differs from a test of a person's character for truthfulness:

> "I'm saying that he was not being totally honest, admittedly deceptive. But in terms of – malingering refers to psychiatric issues. It doesn't necessarily – or neurological issue or physical issues in terms of part of the evaluation. It doesn't necessarily refer to whether a person's being honest or not in terms of historical information. So I'm saying, in terms of mental health issues, in terms of neuropsychological issues, I do not have evidence that he was malingering." R681/V5

According to Dr. Maher, "[Dr. Krop] did a variety of other tests from which information regarding malingering can be obtained." In Dr. Maher's opinion, "…if malingering was present, it would have been – the evidence of it would have been apparent." PCR335/V2 Dr. Danziger only performed a mini test and some screening tests, the M-FAST and SIMS. PCR335/V2 Dr. Maher testified that these screening tests "are most reliable in identifying a specific group of people who are definitively not malingering and then identifying a group of people who are or may be malingering and for whom it is appropriate to do further, more detailed testing to evaluate their symptoms." These screening tests, which are about five to ten minutes

long, do not establish malingering. PCR336-337/V2

Dr. Krop testified at the Spencer Hearing that Mr. Hall's claim that he was raped in jail when he was younger was supported by behavioral observations of his family, before there was a motive to prevaricate. R646, 668-669/V5, PCR704/V5 It was also supported by Mr. Hall's attempted suicide shortly thereafter, for which Dr. Krop had medical documentation. R647-648/V5, PCR704/V5 Both facts lend credibility to Mr. Hall's assertion that he had been raped when he was about nineteen years old. Dr. Krop explained how the rape was a turning point in Mr. Hall's life. It turned him against society in general and then he manifested his anger by sexually acting out his rage. R645-646, 657/V5 Mr. Phillips admitted, "I mean, that was kind of the *focus of our mitigation* in a way. I mean, that was the big event in Mr. Hall's life that we were able to learn about that his behavior changed significantly after that." (Emphasis added) PCR704/V5 Mr. Phillips conceded that during the penalty phase, the jury would hear testimony from the victims that Mr. Hall raped, after he went from being the victim himself to the perpetrator. PCR705/V5 Mr. Phillips testified that they were trying to put Mr. Hall's behavior into context when they presented the jury with information about his being raped. PCR705/V5 Nevertheless, they failed to call an expert witness that would tie the events together and accomplish that purpose.

The most important point of all was that Dr. Krop never changed his evaluation that Mr. Hall has a cognitive disorder NOS, which was corroborated by an MRI. R654/V5 The results of the MRI supported the conclusions Dr. Krop drew from the neuropsychological testing, which showed deficiencies in areas of the brain responsible for executive functions. R652-656, 686/V5

Dr. Krop had suggested that the Defense bring in a neurologist. PCR707/V5 Dr. Tanner was hired and ordered an MRI, which he determined showed "asymmetry where the right brain has more atrophy. Cognitive deficits may result from such atrophy." PCR708-709/V5 Mr. Phillips agreed that Dr. Tanner testified during his deposition that as to the atrophy, "it could also be associated with schizophrenia and epilepsy." PCR710/V5 It could also be consistent with PTSD and head traumas. PCR716/V5 Dr. Tanner also found "scattered white-matter", which can be present with head trauma. PCR716-717/V5 Mr. Phillips understood Dr. Tanner to be telling him, "…the brain is not normal, that there's an abnormality in this MRI, and that that could be a biological reason for a lack of control." PCR714-715/V5 Dr. Tanner's finding supported Dr. Krop's diagnosis. PCR712/V5 and R652-656, 686/V5 Their plan was to have "[Dr. Tanner's] findings being testified to by Dr. Krop and kind of incorporated in his overall diagnosis." PCR717/V5 Regrettably, since Dr. Krop was not called to testify for Mr. Hall before the jury during the Penalty Phase, the jury never learned about Dr. Tanner's findings either.

PCR715/V5

> During the Spencer hearing, Dr. Krop testified for the court:
>
> "He also showed mild to moderate impairment on tests of memory and also test of executive functions. And what I mean by executive functions are those – those functions that constitute a higher level of cognition, such as problem solving, planning, being able to be flexible in terms of changing and shifting with what you're doing at the time.
>
> Probably one of the most important aspects of executive functions is *impulse control*. (Emphasis added) So persons who have frontal lobe impairment typically will have difficulty in terms of impulse control and some of these other executive functions." R652-653/V5

It was Dr. Krop's conclusion, "If you look at the interaction of the various psychological and physiological, I guess, factors that were going on, I would say that he had an emotional disorder, a serious emotional disorder at the time in questions." R661/V5 If Dr. Krop had been allowed to testify before a jury, they would have learned that Mr. Hall suffered brain trauma when, during a suicide attempt, he jumped through a car windshield. PCR720/V5 Dr. Krop stated, "Any type of traumatic brain injury where there is either a concussion or some type of blow to the head could contribute to brain damage." R649/V5 This event would be further evidence that would support the neuropsychological test results, as being a possible cause of Mr. Hall's cognitive disorder. PCR721/V5 Dr. Maher agreed with Dr. Krop, explaining that a cognitive disorder NOS diagnosis is common among people with head injuries, but not among the general population. PCR334/V2

Dr. Maher reported that Mr. Hall has a four-inch scar on his forehead consistent with the frontal-lobe region of the brain. He explained, "The frontal lobe, that is, the part of the brain that lies right behind the forehead, is especially vulnerable for a number of reasons anatomically…It is the part of the brain that is especially related to executive functioning…what one does when one uses good judgment in complex situations …It affects impulse control, understanding of one's environment, and judgment about social interaction." PCR346/V2 He added, "…people who have frontal-lobe impairment have trouble getting stuck on something. Once they start something, they have trouble pulling away from it." PCR346/V2 Since Dr. Krop did not testify before the jury, they were not given the opportunity to understand the impact this injury could have on Mr. Hall's behavior.

Dr. Krop's testimony supported and augmented Dr. Buffington's description of the side effects of Tegretol. Dr. Krop explained, "I think it's probably more likely, given that he has, in my opinion, some neurological issues, that it would probably – I guess when you have a person who already has impulse control and judgment problems, that Tegretol could probably have an impact on those and exacerbate those kinds of issues." R662/V5

Mr. Phillips agreed that Dr. Krop told the court that Mr. Hall had a "serious emotional disorder" at the time of the murder, and that Tegretol would have exacerbated his cognitive disorder. PCR721/V5 Mr. Phillips conceded, "That was

kind of *the focus of our whole mitigation presentation*, in a way." (Emphasis added) PCR721/V5 However, this presentation was not made before the jury, who then recommended that Mr. Hall should be put to death.

Furthermore, had Dr. Krop been allowed to testify during penalty phase, then Dr. Buffington's testimony about Tegretol would not have been limited during penalty phase. R3149/V32 Dr. Buffington would have been able to render his full opinion about Tegretol for the jury to consider, which he had proffered, "…a product that mechanically affects someone's central nervous system, brain, spine, nerve impulses, and that medication given to an individual who already has some facet or caveat of psychiatric disorder, whether that's depression in its wide varieties, it has the potential to have an exaggerated effect." R2670/V28 He would have also added when asked if Tegretol would have the effect of unmasking Mr. Hall's underlying psychiatric issues, "It is a high level of concern, yes." R2680/V28 The opinion of this neuropharmacologist supported the opinion of the Defense's neuropsychologist. Therefore, the decision to eliminate Dr. Krop as a mitigation witness for the jury created a domino effect of negative consequences for Mr. Hall's case.

Going back to the issue of Mr. Hall's cognitive disorder, the State brought out the fact that Mr. Hall functioned well as a welder in PRIDE, where he worked for nine years, and asked if Dr. Krop considered Mr. Hall's job performance in forming his opinion. R700/V5 Dr. Krop confirmed that he took into account Mr. Hall's work

history and IQ, but added, "The fact that he did well in open general prison population has nothing to do with whether he has a cognitive disorder." R700-701/V5 Dr. Krop:

> I believe that he probably – again, when we're talking about a cognitive disorder, I'm not saying that he has brain damage to the point where he can't function on a day-to-day basis.
>
> He actually does better than most inmates who have been in his situation, with the exception of that particular night. And I'm certain – I'm certainly not trying to minimize how horrible that event was. But if you look at the totality of his behavior, he does very well when he's not in a stressful situation.
>
> Whatever happened certainly, in my opinion, triggered some of his issues that constitute a cognitive disorder. R701/V5

Mr. Phillips agreed that Dr. Krop would have advised the jury that Mr. Hall's impairment doesn't affect all brain functions, rather it goes to impulsivity, control and flexibility – pulling back from an action once committed to it. PCR747/V5

Had Dr. Krop been allowed to testify, the Defense could have used Mr. Hall's Disciplinary Report from April 28, 2000 as an example of him not being able to pull back once he commits to an action. On that day, Mr. Hall was confronted by another inmate that accused him of cutting the line. Mr. Hall avoided the conflict. However, when Mr. Hall was later threatened by the same inmate with a bed rail, Mr. Hall grabbed it from the inmate, struck him in the head and face with it and chased him. In Dr. Maher's opinion, "…it reflects an impairment in his ability to maintain his usual level of rule-abiding social interaction with his fellows. And in that respect, it

appears to be an incident of his inability to restrain his feelings. He describes at one point that he did what he did out of fear. …it is clear to me that he responded well beyond what was necessary for self-defense." PCR350-353/V2

The State incorrectly assumed that good job performance indicates an absence of cognitive disorder. If the State drew the wrong conclusion or misunderstood the nature of Mr. Hall's mental illness, then it's likely the jury had the same misconception. If the Defense had offered Dr. Krop's testimony about Mr. Hall's cognitive disorder to the jury, Dr. Krop would have been able to offer an explanation for Mr. Hall's behavior, while easily handling the State's rebuttal arguments. Counsel's failure to let Dr. Krop testify before the jury kept this vital information from them.

The defense is that Mr. Hall snapped, that he freaked out, that he lost control of his temper and blindly lashed out at CO Fitzgerald. Dr. Krop's testimony about Mr. Hall's impaired impulse control is crucial to Mr. Hall's case. Dr. Krop's testimony does not depend on Mr. Hall's honesty, but on scientific tests and brain scans. Furthermore, scoring deficiencies in memory testing could only help to explain why Mr. Hall is such a poor historian. Failing to present at penalty phase what Dr. Krop testified to at the Spencer Hearing deprived Mr. Hall of essential mitigation evidence and a meaningful defense. The decision was highly prejudicial and rises to the level of ineffective assistance of counsel.

On August 28, 2009, Mr. Phillips told the court he needed Mr. Hall's trial to be continued about a month from the date that it was set, October 5, 2009, because "…we still haven't got the mitigators in focus, yet." PCR669/V5 The court only gave the Defense an extra week. PCR669/V5 Mr. Phillips asked for another continuance on October 12, the day of trial, because they had just received a witness list from the State for 15 people. R35-41/V12, PCR670/V5 The continuance was denied. R1623/V10 After the jury found Mr. Hall guilty of first degree murder, Mr. Phillips only had one day to take 15 depositions and get his mitigators into focus. It would appear that he did not have enough time to reflect on his decision to withhold Dr. Krop's testimony from the jury. This is not a case of ineffective assistance of mental health expert. We are not arguing that the Defense should have called Dr. Maher, instead of Dr. Krop. The argument is that it was an unreasonable decision to prevent the jury from hearing the valuable and crucial mental health evidence of the expert they hired, Dr. Krop. It was a hurried decision made without enough time to fully consider its impact and the alternatives. After a 12-0 recommendation from the jury, anything Dr. Krop had to say to the court during the Spencer hearing would be less that useless.

A further consequence of trial counsel's decision not to call Dr. Krop was that it led to trial counsel not requesting the mitigating instruction for extreme mental or emotional disturbance. R3485, 3590-3591/V35 The failure to call Dr. Krop during

the penalty phase resulted in the jury's misguided recommendation of the death penalty and Mr. Hall's sentence of death. Mr. Hall's death sentence should be vacated and he should receive a new penalty phase trial.

Legal Argument – Claim V

In Hildwin v. Dugger, 654 So. 2d 107, 109 (Fla. 1995) the Florida Supreme Court held that trial counsel's performance at sentencing was deficient and woefully inadequate where trial counsel failed to unearth a large amount of mitigating evidence which could have been presented at sentencing. In Hildwin, counsel presented limited testimony of lay witnesses, but failed to present any mental health mitigation. Id. at 110. This case is similar to Hildwin, except that trial counsel had employed a neuropsychologist, but chose not to present the mitigating evidence to the jury. While trial counsel may not be found ineffective merely because current counsel disagrees with trial counsel's strategic decisions, those decisions must still be "reasonable under the norms of professional conduct." Occhicone v. State, 768 So. 2d 1037, 1048 (Fla. 2000). In State v. Larzelere, 979 So. 2d 195 (Fla. 2008), defense expert, Donald West, testified that there is "probably no worse timing" than to hire an expert after the jury recommendation because "at that point, all you can do is ask the court to override…a jury's recommendation which, by law, the court is required to give great weight."

In Orme v. State, 896 So. 2d 725, 732 (Fla. 2005), counsel knew about, but

did not present evidence of bipolar disorder as a defense during the penalty phase, stating that there was a disagreement on how to diagnose Orme at the time. The experts agreed about Orme's cocaine addiction, so only that evidence was presented. This court found counsel's performance deficient in both the investigation and presentation of Orme's mental illness. Likewise, in State v. Duncan, 894 So. 2d 817, 825-826 (Fla. 2004), counsel failed to present testimony of Dr. Berland, the mental health expert hired by counsel at the time of trial. This court found that Dr. Berland was a credible witness and further stated, "The doctor's testimony satisfies Duncan's burden of identifying particular omissions made by his penalty phase counsel that were outside the broad range of reasonably competent performance."

The State attempted to rehabilitate trial counsel during penalty phase by putting on the record reasons not to call Dr. Krop. The reasons stated have been challenged above. This case is distinguishable from Nelson[3] where the jury did hear mental health mitigation from a neuropsychologist, though not from a psychiatrist, because in Hall no mental health mitigation was presented.

This case is also distinguishable from Sexton[4] where at least the PET scan was admitted to demonstrate brain damage, and potentially inflammatory testimony from a psychiatrist concerning Sexton's history of bizarre sexual and criminal behavior

[3] Nelson v. State, 43So.3d 20 (Fla. 2010).
[4] Sexton v. State, 997 So. 2d 1073 (Fla. 2008).

was eliminated. In the instant case, not even the MRI, which showed a compromised frontal lobe, was revealed to the jury.

Likewise, this case is distinguishable from Willacy[5] where counsel decided not to call their mental health expert in order to avoid their own expert testifying that the defendant was a sociopath. In that case, the Court found, "… presenting [the] mitigating evidence 'would have likely been more harmful than helpful.'" Id. (quoting Evans v. State, 946 So. 2d 1, 13 (Fla. 2006). As demonstrated above, any harm caused by Dr. Krop testifying would have been negligible compared to the helpful mitigating information he would have provided the jury. Neither Dr. Krop nor the State's experts found that Mr. Hall had anti-social personality disorder. As the U.S. Supreme Court stated in Strickland, "Those strategic choices about which lines of defense to pursue are owed deference commensurate with the reasonableness of the professional judgments on which they are based."[6] Trial counsel's decision not to present Dr. Krop's testimony to the jury was unreasonable and fell below the standard of competent professional representation.

The Eleventh Circuit Court of Appeals has held in DeBruce v. Comm'r, 758 F.3d 1263, 1275-1276 (11th Cir. 2014), "…the primary purpose of the penalty phase is to insure that the sentence is individualized by focusing on the particularized

[5] Willacy v. State, 967 So. 2d 131 (Fla. 2007).
[6] Strickland v. Washington, 466 U.S. 668, 690-691, 104 S.Ct. 2052 (1984).

characteristics of the defendant. Brownlee v. Haley, 306 F.3d 1043, 1074 (11th Cir. 2002) (internal quotation marks omitted). To ensure that the penalty phase achieves this purpose we have held that a petitioner is prejudiced where the mitigation evidence omitted by counsel's deficient investigation 'paints a vastly different picture of [the petitioner's] background than that created by' the actual penalty-phase testimony. Williams v. Allen, 542 F.3d 1326, 1342 (11th Cir. 2008). 'By failing to provide such evidence to the jury, though readily available, trial counsel's deficient performance prejudice[s a petitioner's] ability to receive an individualized sentence.' Brownlee, 306 F.3d at 1074 (internal quotation marks omitted)." In Hall's case, the jury never learned that he suffered from deficiencies in areas of his brain responsible for impulsivity. There could be a biological reason for a lack of control. The prejudice in Hall's case is that the omitted evidence had a reasonable probability of reducing Hall's sentence.

ARGUMENT CLAIM VI – Mr. Hall was denied the effective assistance of counsel at the penalty phase of his capital trial, in violation of his Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions to the Florida Constitution. Counsel failed to request the statutory mitigating instruction for extreme mental and emotional disturbance, and as a result the death sentence is unreliable.

The trial court denied this claim, based on the opinion that trial counsel was not deficient. That was error. During penalty phase, the Defense requested and the State had no objection to the Court instructing the jury that they could consider as mitigation, "…the defendant was under the influence of drugs at the time of the

homicide." R3484-34855, 3591/V35 Mr. Phillips agreed that "drug use that led someone to snap" was their defense. Nevertheless, he did not think he could request the instruction for extreme mental and emotional disturbance based on Mr. Hall's drug use. PCR747, 749/V5 His decision is not consistent with case law.

Even without Dr. Krop's testimony, the Defense could have requested the extreme mental or emotional disturbance mitigator in light of evidence that Mr. Hall had used drugs the day of the murder. See, Smith v. State, 492 So. 2d 1063 (Fla. 1986), Bryant v. State, 601 So. 2d 529, 533 (Fla. 1992), and Fla. Stat. Ann. § 921.141(6)(b) (West). Mr. Hall was deprived of the benefit of a statutory instruction for which he was qualified. This omission by trial counsel satisfies the first prong of Strickland's test.

This decision is another example of why the jury's recommendation of death is unreliable. The prejudice to Mr. Hall is his sentence of death. Since Mr. Hall did not receive the benefit of a statutory instruction for which he was qualified, Mr. Hall's death sentence should be vacated and he should receive a new penalty phase trial.

ARGUMENT CLAIM VII – Mr. Hall was denied the effective assistance of counsel at the guilt and penalty phases of his capital trial, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution. Counsel failed to adequately investigate Mr. Hall's medical history and make their expert aware of relevant medical information, which would enable the expert to establish statutory and non-statutory mitigation, as well as explain

Mr. Hall's behavior during his interrogation. The result was an unreliable conviction and sentence.

The trial court misstated the claim reframing it to say that counsel failed to "provide an expert to establish … mitigation," rather than, as pled, failed to "provide…an expert *with relevant medical information* which would have enabled the expert to establish…mitigation." (Emphasis added) The court denied this claim, based on the opinion that trial counsel was not deficient. That was error.

7. A. Epilepsy

Dr. Krop testified that he thought Mr. Hall had seizures when he was younger, after his head injury, but that he had not had them for awhile. R650/V5 A report written by Dr. Krop indicates that he was under the impression that Mr. Hall had not had a seizure since his incarceration, which was in 1994. PCR1296-1297

Mr. Hall reported to Dr. Maher that his seizures began shortly after a head injury, which occurred when he attempted suicide by jumping through a car windshield. PCR319/V2 According to Dr. Maher, "Most seizures are not grand mal seizures,… and many seizures are not easily observable, even by trained individuals." PCR320/V2 A person having an absence seizure will appear absent from the environment for a while, as though his mind was wandering. PCR320/V2 Dr. Maher testified, "…I wouldn't expect a correctional officer to have the ability to observe and identify a seizure as a seizure or even as a clinically significant medical event." PCR320-321/V2

In January 1999, Mr. Hall reported that his last seizure was over four years ago, which would have been in 1995. He used this information to remove a medical restriction from his DOC records. He then made sure that the update in his medical jacket was delivered to PRIDE, so that he could be considered for a position there. Defense Exhibit 5, PCR2174-2175 However, a closer inspection of DOC's medical records would have disclosed a different picture. When Mr. Hall was seen at the clinic for chronic lower right jaw pain on October 30, 2002, the medical history indicated that Mr. Hall had his last epileptic seizure just six months earlier. Defense Exhibit 4, PCR2172-2173 and PCR285-136/V2 Based on the medical records in Exhibits 4 and 5, Dr. Maher believes that Mr. Hall was aware his seizures occurred infrequently and made the decision to try to hide that in order to get into PRIDE. Dr. Maher explained, "This is very, very common pattern in individuals who suffer from seizure disorder…they don't want the world to restrict them from doing things because of their seizure disorder. PCR283-284/V2

Mr. Phillips remembered Mr. Hall talking about having an epileptic episode "a short period of time before the homicide." PCR722, 727/V5 Mr. Phillips was aware that Mr. Hall didn't report his seizures because he didn't want to lose his PRIDE job. PCR724, 727/V5 Mr. Phillips did not make sure that their mental health expert was aware of this incident, nor did he bring to Dr. Krop's attention the 2002 seizure reported to the DOC dentist. Defense Exhibit 4, PCR2172-2173 He just

relied upon Dr. Krop reading through over 500 pages of DOC medical records and whatever Dr. Krop learned from Mr. Hall during his interview. PCR725-727/V5 Apparently, from his testimony, Dr. Krop was not advised of the fact that Mr. Hall continued to have epileptic seizures right up until the time of the offense.

Had defense counsel questioned family members more thoroughly, they would have discovered that Mr. Hall's older half-sister, Elizabeth Ann Simmons, also suffers with epilepsy or "seizure disorder" and is prescribed Tegretol. PCR216-222/V1 Dr. Maher testified that this information is relevant because "seizure vulnerability sometimes runs in families" and "would help guide us in our index of suspicion." PCR175/V2 His sister discontinued her use of Tegretol because she "was having blackouts, memory loss, and suicidal thoughts." PCR218-219/V1 It also gave her a feeling of heightened irritation. PCR220/V1 This is relevant, because "reaction to medicine also sometimes runs in families." PCR326/V2 His sister's report that stress can bring on an episode is very common among people who suffer with a seizure disorder. PCR221/V1 and PCR327/V2

Dr. Maher testified that a person who has a cognitive disorder would have his ability to reason clearly further diminished if he also had a history of seizure disorder, because a seizure disorder and cognitive disorder are "mutually aggravating to each other…the sum of the parts is greater than the arithmetic sum of the components." PCR331/V2 Dr. Maher also found that Mr. Hall's MRI results

are consistent with a seizure disorder. PCR323/V2 In addition, Dr. Maher would note that Mr. Hall's apathetic, sleepy, confused state of mind during his first interrogation is consistent with a postictal state. PCR278-279/V2 A seizure could explain why Mr. Hall had trouble during his first interrogation relaying to law enforcement recent events beyond the fact of the murder.

Trial counsel was ineffective for not ensuring that a mental health expert was aware of all the evidence of Mr. Hall's seizures since being incarcerated. This information is relevant to Mr. Hall's statements to FDLE at the guilt phase. It is also relevant as mitigation for the penalty phase, where it would make Dr. Krop's finding of a cognitive disorder, in conjunction with a history of epilepsy, even more of a concern. Failing to present this evidence deprived Mr. Hall of a fair trial. The prejudice is the unreliable conviction for first degree murder. Counsel is also ineffective for failing to use the information to establish statutory and non-statutory mitigation during the penalty phase. The prejudice is the jury's misguided recommendation and Mr. Hall's sentence of death.

7. B. Psychosis

Dr. Krop noted in his testimony that Mr. Hall had been diagnosed with schizophrenia. R650/V5 He also confirmed that Mr. Hall had been placed on anti-psychotic medication at the county jail. R650-651/V5 Dr. Krop's testimony refers to a 1994 diagnosis and the medication prescribed at that time. It appears that

defense counsel failed to make Dr. Krop aware of the medications that Mr. Hall was given after the murder, while in the county jail, as Dr. Krop makes no mention of Mr. Hall once again being prescribed psychotropic drugs.

Mr. Hall's prison records reflect that after the murder and continuing as late as January 19, 2010, he was prescribed Trilifon, 4 mg. and Cogentin, 1 mg. to treat his PTSD and Psychosis. Defense Exhibit 6, PCR2176-2177 and Defense Exhibit 7, PCR2178-2180 According to Dr. Maher, "[Trilifon] is also used in institutional settings very frequently for behavior control of individuals who experience some impulsivity and agitation." PCR340/V2 Dr. Maher was aware that in the 1990's Mr. Hall was diagnosed with schizophrenia, for which he was prescribed Sinequan. PCR340/V2 He wouldn't necessarily say that the diagnosis at that time was wrong, but he did not diagnose Mr. Hall with schizophrenia. PCR341/V2 Dr. Maher explained, "Individuals can have psychotic experiences which are not consistent with schizophrenia, but are consistent with a genuine psychotic disorder that makes the use of antipsychotic medication indicated. So it is my belief that, presently, the proper diagnosis is posttraumatic stress disorder. And, historically, the diagnosis of posttraumatic stress disorder may have been underappreciated, and the diagnosis of schizophrenia may have been over appreciated." PCR342/V2 Supporting his conclusion, Dr. Maher found the primary diagnosis of the prescribing physician at the Volusia County Jail was also PTSD. PCR343/V2

The Defense had a neuropharmacologist, Daniel Buffington, under subpoena, who should have been asked about the drugs prescribed for Mr. Hall after the murder at the Volusia County Jail and what they are used to treat. He would have been able to tell the jury that Trilifon is commonly used to treat psychotic disorders. The fact that Mr. Hall suffered from a serious mental illness before he was sentenced to prison in 1994, which became evident again after he murdered a guard, because he "snapped", should have been developed by the Defense. In retrospect, it appears that Mr. Hall was not cured of his mental disorders during his time at TCI.

Defense counsel failed to investigate and present important mental health evidence that would support the statutory mitigator that Mr. Hall committed the murder while under an extreme mental or emotional disturbance. This failure amounts to ineffective assistance of counsel. Mr. Hall's sentence of death is the prejudice. His sentence should be vacated and he should receive a new penalty trial.

Legal Argument – Claim VII

The same arguments made under Claims II, IV and V are incorporated herein for issues raised under Claim VII. Additionally, no tactical motive can be attributed to an attorney whose omissions are based on ignorance, or on the failure to properly investigate or prepare. See, Williams v. Taylor, 529 U.S. 362, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000).

ARGUMENT CLAIM VIII – Mr. Hall's trial was fraught with procedural and substantive errors which cannot be harmless when viewed as a whole, since the combination of errors deprived him of a fair trial under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

The trial court denied this claim, based on the opinion that trial counsel was not deficient. That was error. Mr. Hall contends that he did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See, Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991). The process itself failed him. It failed because the sheer number and types of errors involved in his trial at both the guilt and penalty phases, when considered as a whole, virtually dictated the sentence that he would receive. State v. Gunsby, 670 So. 2d 920 (Fla. 1996).

The flaws in the system which sentenced Mr. Hall to death are many. They have been pointed out throughout not only this pleading, but also in Mr. Hall's direct appeal; and while there are means for addressing each individual error, the fact remains that addressing these errors on an individual basis may not afford adequate safeguards against an improperly imposed conviction and death sentence -- safeguards which are required by the Constitution. These errors cannot be harmless. The results of the trial and sentencing are not reliable. Rule 3.851 relief must issue.

ARGUMENT CLAIM IX - Mr. Hall's 8th Amendment right under the United States Constitution, against cruel and unusual punishment, will be violated as he may be incompetent at the time of execution.

This claim was raised below and stipulated as being premature. However, it is necessary to raise it here to preserve the claim for federal review. In re Provenzano, 215 F.3d 1233 (11th Cir. 2000). Mr. Hall suffers from brain damage. His already fragile mental condition could only deteriorate under the circumstances of death row causing his mental condition to decline to the point that he is incompetent to be executed.

CONCLUSION AND RELIEF SOUGHT

In light of the facts and legal arguments presented above, Mr. Hall contends that his constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, and corresponding provisions of the Florida Constitution, have been violated. Mr. Hall respectfully requests that his conviction and death sentence be vacated.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Initial Brief has been furnished via electronic transmission to Stacey.Kircher@myfloridalegal.com, and CapApp@myfloridalegal.com; and by U. S. Mail to Enoch D. Hall, DOC# 214353, Florida State Prison, 7819 NW 228th St., Raiford, Florida 32026 , on this 4th, day of February 2016.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Initial Brief was generated in Times New Roman 14-point font pursuant to Fla. R. App. P. 9.210.

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