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

REPLY TO ANSWER BRIEF OF APPELLEE

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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. References to the State's Answer Brief are designated as "A" followed by the page number of the brief.

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.

REPLY TO STATE'S ANSWER

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 State begins answering this claim by arguing, "Primarily, Hall did not make the argument below that counsel was deficient for failing to request more [sic] preemptory challenges. (*See* R1198-1201). Therefore, that argument is procedurally barred here." A48 However, the Post-Conviction Record reveals that this claim was in fact made by Mr. Hall in his original post-conviction motion. The motion states, "Trial counsel was ineffective for failing to challenge juror, Rapone, for cause, wasting a much need peremptory challenge that would have been used against Professor Roddy. Furthermore, counsel was ineffective for failing to request

an additional peremptory to be used against Professor Roddy." PCR1200, line 8-11

This claims compares a cause challenge granted to the State against juror, Henderson, with a cause challenge made by the Defense against juror, Roddy, in arguing that if the court was using the same standard for both parties, Roddy was also biased. The State answers by making the following distinction, "Henderson knew Hall was serving a life sentence *for rape* at the time of the murder." (Emphasis added) A55 What Henderson actually said during voir dire is, "I don't know why he was at Tomoka. I think he was serving a life sentence, but I don't recall specifically, but I think he was serving a life sentence. And I don't know the underlying offense as to why he was there." R1643/V21 at lines 16-20.

Juror, Rapone, did know that Mr. Hall was serving a sentence for rape and this damaging information made it impossible to rehabilitate her, because she could have poisoned the entire panel with this information. R499-501/V15 This would be information that could have caused a mistrial if the State had elicited it during the guilt phase of the trial. The State was claiming Mr. Hall had a "sexual motive" for being late to clock out and was "lying in wait" for CO Fitzgerald. It would be highly prejudicial for a juror to know that he was serving a sentence specifically for rape. Rapone could not have been rehabilitated. She should have been challenged for cause. The peremptory challenge trial counsel wasted on Rapone could have been used on Roddy and a biased juror would not have been seated on Mr. Hall's jury.

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 claim is broken out into several sub-parts.

2. A. Overtime and Stress at Work

The State answers this claim by arguing that all the inmates at PRIDE worked under stressful conditions and still loved their job, so it was strategically reasonable not to mention stress as part of the defense that Mr. Hall snapped when he killed CO Fitzgerald. A59-60. The State further argues that *no one indicated* that Mr. Hall was particularly stressed the day of the murder. (Emphasis added) A60. This position ignores the testimony of Walther Schell that around the time of the murder, "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. PCR653/V4

The State’s assertion also ignores the testimony of Rodney Callahan, “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

The second part of the State’s argument implies that the PRIDE employees liked their work, so the deadlines must not have been a negative. Actually, liking one’s work would be the reason for the stress, because the unrealistic deadlines caused them to worry about losing a coveted position. Rodney Callahan testified, “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 Walter Schell explained that if a worker missed deadlines, they could be reassigned or demoted. PCR654/V4

The State points out that trial counsel Valerino testified that stress was not

part of their defense, though co-counsel Phillips testified, "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 The State answers that it was their "theory of defense that the pills unmasked a psychological condition." A60 However, evidence to support that theory was never presented to the jury during the guilt phase. Nevertheless, these two theories of defense are not mutually exclusive. Stress would explain why externally Mr. Hall seemed "normal", but inside, the pressure was building to a breaking point. That is why he needed the pills.

The post-conviction motion does not suggest that stress excuses Mr. Hall's actions and that Mr. Hall should have been found innocent. However, it may be a defense to pre-meditated murder, because it would give a motive for Mr. Hall to stay late to look for the pills and it would help the jury understand why he snapped when he could not find them. Nevertheless, the only evidence presented by the Defense during the entire guilt phase was a video of Mr. Hall sitting on a bench waiting to be interrogated. R2719-2733, 2740/V29 This was not a reasonable defense strategy. 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.

In responding to this claim, the State's Answer disregards the reason DOC

policies are an important part of the defense. Instead, an obviously unacceptable reason to present this evidence has been created and this new premise is what has been challenged. The State does not answer the claim stated in the post-conviction motion and appellate brief. The reason to present DOC policies is to make the jury understand the unlikelihood that Mr. Hall could have anticipated that an unarmed guard would go back to retrieve him, all by herself, after having released all the other workers to go back to their dorms. The jury would then realize that the State's theory, that Mr. Hall planned the murder and was lying in wait for his defenseless victim, is unsupported by the facts. Many unlikely events had to happen for the events of that evening to take place.

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 Furthermore, 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. If trial counsel had

properly defended Mr. Hall, then the jury would realize that the State's accusation that Mr. Hall was "lying in wait" for her is baseless.

Rather than defend the claim as presented, the State relies on the red herring that Mr. Valerino used at the hearing to deflect blame. Mr. Valerino did not want to present an argument to the jury that CO Fitzgerald did not follow proper procedures and so she "deserved what she got." A61 Of course, he would not present that argument. That argument has nothing to do with this claim. The claim is not about blaming CO Fitzgerald, it is about attacking the State's theory of pre-meditated murder, which qualifies Mr. Hall for the death penalty. When questioned further, Mr. Valerino states:

> Q: Okay. So this isn't about it's her fault this happened to her. It's the – it's the question of expectation.
> A: Okay.
> Q Okay? Did you ask the – and did you consider that? You didn't give a defense to that, correct?
> A: No.

PCR561 Trial counsel was ineffective for failing to present this evidence, which directly challenges the State's theory of the case.

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

The State answers this claim by citing to the trial court's order, "Arguably, the issues raised in sub-claims A- C would have demonstrated the state's theory of the case was wrong. That the murder had been unplanned and occurred in a frenzy. Clearly, that information was presented to the jury, whether by the state or defense;

the jury did not find it compelling." A62 and PCR2265. At trial, the State did not argue that the murder was unplanned and occurred in a frenzy while also claiming that Mr. Hall was lying in wait to murder CO Fitzgerald. The only evidence the Defense presented to the jury was Mr. Hall sitting in a hallway after the murder mumbling to himself. The State played Mr. Hall's interrogation for the jury, wherein he explains that he just wanted the pills and he says that he freaked out. However, no one explained to the jury why he wanted the pills and what the surrounding circumstances were that caused him to snap. The trial court and State concede that the issues raised in A-C would have challenged the State's theory of the case, yet virtually no evidence was presented to support Mr. Hall's statements and make the defense argued by trial counsel plausible.

In addressing sub-claim C specifically, the State alleges that the availability of prison-made shanks to various inmates was covered in trial. A62 In fact, the only discussion of shanks that was covered in trial came from the testimony of Cpt. Wiggins and CO Olavarria. 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 The only evidence presented at trial was that *welders* had the availability of prison-made shanks.

Frank Prince is not a welder. Establishing that he too could have made a shank was crucial to the defense, because Mr. Hall claimed he found the shank he was carrying in Frank Prince's office while searching for the pills. That is a much different scenario from the one presented by the State, that Mr. Hall armed himself and was waiting for CO Fitzgerald to come look for him after work. Happening to have a shank in his pocket versus arming himself goes directly to the issue of premeditation. It is no small oversight for trial counsel to have failed to make sure the jury knew that *anyone* working at PRIDE had access to sheet metal and grinders, including Frank Prince.

2. D. Toxicology

The State's Answer alleges that trial counsel's ineffectiveness for failing to "challenge the DOC's motive for also failing to [order a blood and urine sample]" was not argued in the post-conviction relief and should be barred from appeal. A64 The following argument was made in the post-conviction motion:

> The DOC and the Inspector General for DOC were well aware by this time that Mr. Hall claimed to have taken drugs the day of the incident, yet they took no measures to give him a urine screen. The jury was never asked to consider the DOC's role in creating reasonable doubt as to what occurred the night of the murder. Mr. Hall has two claims of ineffective assistance of

> counsel, one for failure to immediately 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*. (Emphasis added) PCR1213-1214

This claim also argues that trial counsel was ineffective for waiting so long to interview a first degree murder client that it was too late to test his urine or blood for drugs, because they would have left Mr. Hall's system by the time they got around to talking to their client, about a month after being assigned to the case. The State alleges that trial counsel could not have asked for a screen unless they knew for which drugs they were testing. A63-64 and PCR604-605 This excuse was presented by trial counsel, not a neuropharmacologist. No expert testified for the State that it is impossible to screen for a broad range of drugs, like they regularly do in prison.

2. E. Daniel Buffington, Neuropharmacologist

The State answers this claim alleging that the following argument was not presented below and cannot be presented for the first time in this appeal:

> "Defense counsel was ineffective, because they made the wrong argument for why Dr. Buffington's testimony was relevant," and "[i]t 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." (*IB* at 38). A64

In fact, the post-conviction motion states:

> Defense counsel failed to make the proper legal argument for why Dr. Buffington should be allowed to testify during the guilt phase. Their argument centers on the unmasking of a psychiatric disorder. *Case law is clear that diminished capacity is not relevant in the guilt phase.* A

> defendant's motivation to be at the scene of the crime is relevant. The fact that Mr. Hall staying late after work had nothing to do with a desire to harm Ms. Fitzgerald is relevant. *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. (Emphasis added) PCR1216-1217

Since defense counsel, Phillips, did not testify until the evidentiary hearing, his admission that he *knew diminished capacity was not a legal defense* was added to the appellate brief to emphasize the ineffectiveness of their decision to present it as a reason to offer Dr. Buffington's testimony about the effects of Tegretol. PCR742 Whether Mr. Phillips admitted knowing the law or not, he is responsible for knowing it and acting accordingly when making "strategic" decisions.

The State's Answer further misconstrues this claim by shifting the focus away from the fact that trial counsel failed to make the proper legal argument that would have enabled them to get Dr. Buffington's testimony into evidence. This claim is about the failure of counsel to understand that they could have offered Dr. Buffington's testimony to explain the effects of ingesting Tegretol and why a person under a great deal of stress would have craved these pills. This evidence would have been invaluable to counter the State's argument that Mr. Hall stayed after work to have sex with Ms. Fitzgerald. Dr. Buffington's testimony should have been offered to support the defense's theory of *motivation* to stay late and look for Tegretol. Motivation for one's actions can be a legal reason to present evidence. The Answer

misdirects this claim away from the actual argument presented in the post-conviction motion and appeal, which is that trial counsel failed to make the *proper legal argument* for offering Dr. Buffington's testimony. PCR1216 Rather, the Answer rephrased this claim to say, "What was preserved below is the argument that trial counsel was deficient for failing *to have* Dr. Buffington describe the side effects and withdrawal symptoms of Tegretol." A65 The State goes on to argue that trial counsel did try to get the testimony in and when they could not, they proffered it. This claim is not about whether or not trial counsel "tried" to get the evidence in. This claim is that they tried to get it in using an obviously illegal ground, so naturally they failed. If they were competent, they would have offered the evidence using a legal ground, such as motivation, and would have succeeded. The Answer misapprehends the claim, hence the argument that follows does not address the allegation that was pled.

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

This claim encompasses more than trial counsel's failure to request an independent medical exam, which is how the Answer re-titled this sub-claim and then only addressed that part of the claim.

As to the failure to request an independent medical exam, the pictures and video admitted into evidence at the hearing speak for themselves. Defense exhibits 1, 2, 11; PCR2167, 2168, 2218-2223.

Despite the lay witness opinions offered by the State at the hearing that no one noticed any injuries to Mr. Hall, Dr. Maher, M.D. 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 Healthy people do not limp.

The State called Dr. Danziger, M.D. to testify, but they did not ask him to review the video of Mr. Hall limping back to his cell at FSP. They only questioned him about the video of Mr. Hall sitting in the hallway. PCR916. As to the video he did view, Dr. Danziger was only asked to comment on whether he noticed signs of overdose of Tegretol. Id. Therefore, Dr. Maher's expert medical opinion was unrefuted.

As to the second part of this sub-claim, there was physical evidence that could have been evaluated and presented to disprove the statements of the guards, who denied beating Mr. Hall after a beloved female guard was stabbed to death 22 times.

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 However, CO Weber, the first officer on the scene to observe Mr. Hall, did not notice any injury to Mr. Hall's face. R268, 273/V3 The injuries observed by subsequent TCI corrections officers that had contact with Mr. Hall 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 CO Weber saw Mr. Hall, which was at least an hour after CO Fitzgerald's death. 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. These beatings had an impact on the statements Mr. Hall made to law enforcement.

According to Mr. Valerino, "[Mr. Hall] made 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

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. 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

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 The jury never heard about the beating, so they never considered Mr. Hall's condition when making his statements. Therefore, the issue of the beating is important whether or not trial counsel wanted Mr. Hall's statements suppressed. Mr. Hall's statements could have been heard by the jury, rather than

have Mr. Hall testify, *and* trial counsel could have addressed concerns the jury may have had about the differences in the three statements by presenting evidence that those statements were made after being beaten by the guards. The Answer fails to address this point.

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

Both the court order and the State's Answer seem to have misapprehended this sub-claim. This is a claim about trial counsel's failure to use expert testimony at the *guilt* phase to explain the effects of head trauma, epilepsy, cognitive disorders and post-traumatic stress on memory. The question of Mr. Hall's memory is relevant in light of the differences in the three statements he gave law enforcement during the hours after his arrest. The State called into question Mr. Hall's veracity and motive in changing his story. The defense failed to present an expert who would explain how Mr. Hall's memory could be effected by the above listed issues, causing him to struggle to reconstruct the events of the evening.

Instead, the court order and Answer have changed this sub-claim into an issue of ineffective assistance of psychological expert at the *penalty* phase of trial. The trial court's ruling and the State's Answer focus on trial counsel's decision to not call Dr. Krop until the Spencer[1] hearing, rather than during penalty phase, and

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

whether trial counsel conducted a reasonable mental health mitigation investigation. PCR2270-2271 and A69-70 Claim 2 is not a claim about the woefully lacking expert evidence of mental illness as mitigation in the penalty phase of Mr. Hall's murder trial. That argument is made in Claim 5. Brief at 69-87. Claim 2 of the appellate brief states, "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. (Emphasis added) Brief at 17. See also, post-conviction motion at PCR1201-2102.

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.

Concerning Mr. Hall's statements, Mr. Valerino confirmed that he did not consult a medical expert to talk about Mr. Hall's memory or ability to recall. PCR516 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. The claim as pled has not been answered or refuted.

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. Many of the sub-claims that make up Claim 2 were not actually addressed by the State or the trial court, or were based, in part, on an incorrect statement of facts. Therefore, conclusions drawn from arguing a different claim than what was pled lack relevance.

Claim 2 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.

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 State answers this claim by simply restating the fact that Frederick Evins

testified to the procedures he *personally* followed. A72-73

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. At the evidentiary hearing, it was established that PRIDE had no standard procedures for closing the facility, nor was there even testimony that CO Evins trained CO Fitzgerald. PCR192-194/V1 CO Evins testimony served no purpose other than to mislead the jury that the way CO Evins did things is the way other officers did them.

The Answer never addresses the claim that what procedures Fred Evins *personally* followed at PRIDE are not relevant to any issue in this case. The Answer does not address the claim that Mr. Valerino was ineffective for not even understanding that irrelevant testimony is objectionable. The State argues that Mr. Valerino's decision not to object to this testimony was a strategic decision. A72-73 Failing to recognize a legal basis for an objection cannot be considered a strategic decision. Ignorance is not a strategy.

As to the issue of prejudice, the State answers:

> Even if the objection had been sustained and [sic] they jury had not heard the procedures for locking down the PRIDE facility, it would not have changed the prosecutor's closing argument or theory of the case. Evins's testimony did not lay the foundation for the state's theory that Hall was lying in wait for CO Fitzgerald. The evidence was clear that CO Fitzgerald had to return to escort Hall out of the facility at the end of the shift. A73-74

At the evidentiary hearing, Rodney Callahan called the State's assertion into question when he testified that in his 22 years working at PRIDE, 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

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 lay 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.

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 State answers this claim by noting how thorough the mitigation investigation was and listing other witnesses that were interviewed besides Mr. Hall's family members. A75-76 People outside of the family would not have information about the issues raised in this claim, the mother's infidelity and how Mr. Hall was exposed to her behavior. The issues between the father and mother are matters that would only be known within the family dynamic. The Answer never addresses the fact that Mr. Ryan noted the names of two of Mr. Hall's uncles, but made no notation that he should not contact them. PCR866 Even stranger, Mr. Ryan claimed that it was not all uncles that Mr. Hall did not want him to contact, just the two uncles whose names Mr. Hall provided for him. However, the names of other aunts and uncles who could be contacted were not provided. PCR855

The State removes the duty of defense counsel to probe into a client's history where the report is idyllic and a seasoned attorney would realize it is uncommon. In fact, trial counsel did admit that what they learned from the immediate family sounded too good to be true. PCR678 Dr. Maher explained that, 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 "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

The trial court denied this claim, based on the opinion that trial counsel's failure to discover the mother's infidelity was not prejudicial. However, this information was a crucial missing element of Mr. Hall's background as it explains his anger toward women. When Mr. Hall was interviewed, he said he "freaked out." Trial counsel presented no evidence to help the jury draw the conclusion that perhaps Mr. Hall did snap when he lashed out at CO Fitzgerald.

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 However, the jury never heard about the stress or the work environment.

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

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. 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.

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. 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 argues that if Dr. Krop testified, the jury would have heard that Mr. Hall has the sexual disorder of paraphilia NOS. A83 This argument ignores the fact that the jury heard evidence about two different rapes during the penalty phase. R2969-3006 and 3023-3038/V31 Dr. Krop diagnosing Mr. Hall with a sexual disorder does not bring to light some new damaging information the jury would not otherwise have heard. Actually, if Mr. Hall has a disorder, Dr. Krop would be explaining what drove Mr. Hall to commit the rapes.

Furthermore, 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 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 to being a 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 State forecasted the inevitable objection from post-conviction counsel, as the decision not to call Dr. Krop 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. However, 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 It is also important to note that Dr. Danziger found that Mr. Hall does not have an anti-social personality disorder. R774/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 do not hold water. 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.

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 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 In the State's Answer, footnote 20 is misleading, "The EEG and PET scan results were normal, but reflected asymmetry. (R708)" A84 Actually, while the EEG and PET were normal, the MRI showed "asymmetry where the right brain has more atrophy. Cognitive deficits may result from such atrophy." PCR708-709 Mr. Phillips agreed that Dr. Tanner found, "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*." (Emphasis added) 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

The State's Answer reduces the importance and impact of Dr. Krop's testimony by focusing on the word "mild" cognitive impairment, rather than the fact that the impairment is "particularly in the area of memory and executive functions." A85 Ultimately, 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.*" (Emphasis added) R661/V5

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 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 Nevertheless, the State's Answer continues to put forth this argument. A85

The Answer incorrectly assumes 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.

In responding to Claim 5, the State's Answer continued to allege that "the testimony of the PRIDE inmates … established that [Mr.] Hall was not under any particular stress…" A85 This assertion ignores the testimony of PRIDE inmates, Rodney Callahan and Walter Schell, who observed the opposite. They both saw signs that indicated Mr. Hall was becoming more stressed just before the murder.

PCR436 and 653 Instead, the State's Answer relies on hearsay from trial counsel.

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 State's Answer alleges that it makes no difference whether Dr. Krop testified in the penalty phase or at the Spencer hearing because the judge, not the jury, determines the balance of the aggravators and mitigators. A86 This argument reduces the jury to mere window dressing and puts the entire onus on the judge to make findings of fact. Furthermore, any rationalization that withholding the expert's testimony until the Spencer hearing would benefit Mr. Hall because it could negatively impact the jury fails, because the reality of the situation is: by presenting Dr. Krop at the Spencer hearing, the ***court*** could have been exposed to any negative aspects of Dr. Krop testifying, because the court was the actual sentencer at the time. However, even under our unconstitutional statute, the jury made recommendations, which were supposed to be given great weight by the trial judge. The prejudice in

Hall's case is that the omitted evidence would have had a reasonable probability of reducing Hall's sentence.

The State's Answer also disregards the Unites States Supreme Court's findings in Hurst[2] and asks this Court to continue using an unconstitutional system in analyzing whether or not Mr. Hall's mitigation was properly considered by the triers of fact, the jury. 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. Pursuant to Hurst, the prejudice for the deficient performance in the instant case is enhanced and multiplied. Trial counsel's decision was unreasonable, and Dr. Krop's Spencer hearing testimony was rendered useless and meaningless.

A final 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.

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.

[2] Hurst v. Florida, 136 S.Ct. 616, 577 US __, 193 L. Ed. 2d 504 (2016).

The State answers this claim by alleging that there was no evidence to support this instruction. Mr. Hall's statements that he used drugs are evidence. Furthermore, this was evidence submitted to the jury by the State. Additionally, 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).

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.

7. A. Epilepsy

The State's Answer to this sub-claim relies on Mr. Phillip's testimony that he is sure he discussed with Dr. Krop the ongoing nature of Mr. Hall's seizures. Nevertheless, Mr. Phillips cannot explain why this information is not included in Dr. Krop's report. A94 and PCR727 If trial counsel did in fact discuss Mr. Hall's seizures with Dr. Krop, that information would be in the expert's report or trial counsel would know why it was not included. The inference drawn here is that counsel failed to ensure this important information was considered by their expert.

7. B. Psychosis

The State's Answer points out that any medication prescribed at the county jail for PTSD could have been given because the murder itself may have caused symptoms of PTSD. A96 This response does not take into consideration that when Mr. Hall was pressed to explain his actions during his interview with the police all he could answer was that he "freaked out." R2183-2188, 2190-2196, 2208-2211, 2213-2216, 2224, 2227/V25 Although Mr. Hall knew he had killed CO Fitzgerald, he could not articulate *why* he did it. "Freaking out" would be consistent with his prior diagnosis of PTSD, so the jury should have been made aware that he was again being treated for PTSD after the murder. While it does not conclusively prove that PTSD caused Mr. Hall to commit the murder, it is evidence that supports his theory

of defense. Dr. Krop mentions drugs being given to Mr. Hall in 1995, but he makes no mention in his report of Mr. Hall once again being prescribed psychotropic drugs in 2008. This fact is conspicuously missing from his report. The jury was not made aware of the medications that Mr. Hall was given at the county jail, because it appears that defense counsel failed to make Dr. Krop aware of the medications he was given after the murder. This failure amounts to ineffective assistance of counsel. Mr. Hall's sentence of death is the prejudice.

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.

Several claims were misconstrued so as not to be fully addressed by the State or the trial court. Therefore, conclusions drawn from arguing a different claim than what was pled lack relevance. Mr. Hall contends that he did not receive a fundamentally fair trial, 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).

CONCLUSION AND RELIEF SOUGHT

WHEREFORE, Appellant respectfully requests this Honorable Court grant this appeal and reverse the trial court's denial of his post-conviction motion.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Reply to Answer 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 24th day of June, 2016.

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

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