

IN THE SUPREME COURT OF FLORIDA

FREDDIE LEE HALL

Petitioner,

v.

Case No. SC00-1599

MICHAEL W. MOORE,

Respondent.

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RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

COMES NOW, Respondent, MICHAEL W. MOORE, by and through the undersigned Assistant Attorney General, and hereby responds to the Petition for Writ of Habeas Corpus filed in the above-styled case. Respondent respectfully submits that the petition should be denied, and states as grounds therefor:

FACTS AND PROCEDURAL HISTORY (PRIOR PROCEEDINGS)

Mr. Hall has had a lengthy history of appellate review - both state and federal - of the judgment and sentence of death imposed for his murder of Mrs. Hurst. See Hall v. State, 403 So.2d 1321 (Fla. 1981) (Hall I) (direct appeal affirming judgment and sentence); Hall v. State, 420 So.2d 872 (Fla. 1982) (Hall II) (affirming summary denial of Rule 3.850 motion for post-conviction relief); Hall v. Wainwright, 565 F.Supp. 1222 (M.D. Fla. 1983) (Hall III) (denying federal habeas corpus petition); Hall v. Wainwright, 733 F.2d 766

(11<sup>th</sup> Cir. 1984), cert. den., 471 U.S. 1111 (1985) (Hall IV); Hall v. Wainwright, 805 F.2d 945 (11<sup>th</sup> Cir. 1986), cert. den. Hall v. Dugger, 484 U.S. 905 (1987) (Hall V); Hall v. Dugger, 531 So.2d 76 (Fla. 1988) (Hall VI) (denial of petition for writ of habeas corpus); Hall v. State, 541 So.2d 1125 (Fla. 1989) (Hall VII) (2nd 3.850 appeal, resentencing ordered); Hall v. State, 614 So.2d 473 (Fla. 1993), cert. den., 510 U.S. 834 (1998) (Hall VIII) (affirming the sentence of death imposed on resentencing); Hall v. State, 742 So.2d 225 (Fla. 1999) (Hall IX) (affirming denial of Rule 3.850 motion for post-conviction relief).

Additionally, Hall appeared before this Court in the appeal from conviction of the Coburn murder. Hall v. State, 403 So.2d 1319 (Fla. 1981).

Hall now seeks further review, this time via habeas corpus.

I. THE INSTANT HABEAS CORPUS PETITION SHOULD BE DISMISSED AS UNTIMELY AND ABUSIVE.

Respondent recognizes that this Court previously denied the state's motion to dismiss in its order of October 23, 2000 without explanation. Respondent submits this argument for reconsideration.

Petitioner Hall seeks habeas corpus review after waiting some thirty-two months after the filing of the notice of appeal which sought review of the trial court's order denying a motion for post-conviction relief and more than two years after filing his brief in that appeal and seven years after his direct appeal became final.

Hall v. State, 614 So.2d 473, cert. den., 510 U.S. 834 (1993).

Such delay is unconscionable, dilatory and much of his petition is merely repetitious to claims previously presented and rejected by this Court and should therefore be deemed vexatious and abusive. See, e.g. Florida Rule of Appellate Procedure, 9.140(j)(3)(B):

"A petition alleging ineffective assistance of appellate counsel shall not be filed more than two years after the conviction becomes final on direct review unless it alleges under oath with a specific factual basis that the petitioner was affirmatively misled about the results of the appeal by counsel."

The rule became effective on January 1, 1997. See Amendment to Florida Rules of Appellate Procedure, 685 So.2d 773 (Fla. 1996). See also Russell v. State, 740 So.2d 567 (Fla. 1 DCA 1999). Hall has failed to satisfy the under oath provision with specific factual basis that he was affirmatively misled. Moreover in McCray v. State, 699 So.2d 1366, 1369 (Fla. 1997) this Court through Justice Overton, without dissent, opined:

"This case represents a perfect example of why the doctrine of laches should be applied to bar some collateral claims for relief. McCray has waited fifteen years to bring this proceeding and has made no representation as to the reason for the delay. Moreover, his claim is based on a brief reference to a collateral crime in his trial, which occurred seventeen years ago. This claim could and should have been raised many years ago. The unwarranted filings of such delayed claims unnecessarily clog the court dockets and represent an abuse of the judicial process.

To remedy this abuse, we conclude, as a matter of law, that any petition for a writ of habeas corpus claiming ineffective assistance of appellate counsel is presumed to be the result of unreasonable delay and to prejudice the state if the petition has been filed more than five years from the date the petitioner's conviction became final. We further conclude that this initial

presumption may be overcome only if the petitioner alleges under oath, with a specific factual basis that the petitioner was affirmatively misled about the results of the appeal by counsel.

Accordingly, we find this petition is barred by laches and we deny the petition. (emphasis supplied)

See also Strange v. State, 732 So.2d 1117 (Fla. 5 DCA 1999); Hill v. State, 724 So.2d 610 (Fla. 5 DCA 1998). In McCray this Court held the claim time-barred by laches even though not time-barred by the rule. If McCray is no longer viable the Court should forthrightly and explicitly overrule it, rather than by doing so sub silentio.

Respondent recognizes that in Robinson v. Moore, \_\_\_ So.2d \_\_\_, 25 Fla. L. Weekly S647 (Fla. 2000) this Court rejected a procedural bar argument by the state and relied on Rule 3.851(b)(6) restricting the requirement of simultaneous filing of habeas petitions with the initial brief on appeal of the denial of the 3.850 motion. But Robinson did not address the McCray decision and its ruling that as a matter of law any petition for writ of habeas corpus claiming ineffective assistance is presumed to be the result of unreasonable delay and to prejudice the state if the petition has been filed more than five years from the date the petitioner's conviction became final. 699 So.2d at 1368. While Rule 3.851(b)(6) may have been intended to provide a window for more recent cases, it should not be extended to the more ancient cases like Hall's who could have sought habeas corpus relief any time in the last seven years. There is no policy reason to award him such

a windfall.

II. ALTERNATIVELY, THE CLAIMS SHOULD BE DENIED AS EXPLAINED, INFRA.

Claim I: Whether appellate counsel committed fundamental error by failing to raise on direct appeal of the resentencing proceeding that Hall is mentally retarded and his execution would allegedly violate the state and federal constitutions.

This Court has consistently rejected as improper the defense ploy of attempting to clothe previously rejected claims or claims that could or should have been or were raised previously under the new cloak of ineffective assistance of appellate counsel.

Petitioner now attempts to utilize this ploy. He candidly acknowledges that the Court was cognizant of his asserted mental retardation as violative of the cruel and unusual punishment provision of the Constitution by quoting from Justice Barkett's dissent in Hall v. State, 614 So.2d 473, 481 (Fla. 1993), a strategem he repeated on his last visit appealing the denial of post-conviction relief. Hall v. State, 742 So.2d 225 (Fla. 1999).

Post-conviction relief is not, has not been, and should not become a litigious game in which arguments twice rejected can now be asserted anew in the hope that eventually a court will change its mind - out of exhaustion - in order to accommodate the defendant's desires. See Rutherford v. Moore, \_\_\_ So.2d \_\_\_, 25 Fla. L. Weekly S891 (Fla. 2000) (while habeas petitions are proper vehicle to advance claims of ineffective assistance of appellate

counsel, such claims may not be used to camouflage issues that should have been raised on direct appeal or in a post-conviction motion). See also Thompson v. State, 759 So.2d 650 (Fla. 2000); Teffeteller v. Dugger, 734 So.2d 9 (Fla. 1999); Hardwick v. Dugger, 648 So.2d 100 (Fla. 1994); Breedlove v. Singletary, 595 So.2d 8 (Fla. 1992). To obtain relief it must be shown that appellate counsel's performance was deficient (alleged omissions are of such magnitude as to constitute a serious error or substantial deficiency falling measurably outside the range of professionally acceptable performance) and that prejudice resulted (that counsel's deficiency compromised the appellate process to such a degree as to undermine confidence in the correctness of the result). The failure to raise a meritless issue will not render counsel's performance ineffective and this is generally true as to issues that would have been found to be procedurally barred had they been raised on direct appeal. Rutherford, supra.

Respondent totally repudiates the notion advanced in Hall's last appeal and repeated here that Florida courts and juries do not understand the concept of mental retardation and that if the argument is advanced ad nauseam it might eventually become accepted. This Court should - once again - forcefully repudiate petitioner's attempt to relitigate a year after the last rejection Hall's mental retardation claim.

While it should not be necessary for respondent to repeat the argument asserted on the last appeal, since petitioner apparently

has chosen to do so, in order to save space, respondent is attaching as Exhibit I the excerpt of its last brief (Issue I) on the retardation claim to the instant response.

Petitioner now continues to cite and rely on Penry v. Lynaugh, 492 U.S. 302 (1989). He cannot validly assert that appellate counsel was ineffective for failing to cite Penry because in fact appellate counsel did urge Penry at page 48 of his brief to support an argument that Hall's alleged mental retardation constituted a "pretense" of moral or legal justification for the CCP aggravator. Appellate counsel could not successfully argue that Penry precluded executing the retarded because it did not. Thus, there was no deficiency under Strickland v. Washington, 466 U.S. 668 (1984).<sup>1</sup> Appellate counsel could not be ineffective in failing to cite judicial or legislative actions for example in other states that occurred subsequent to his brief or this Court's decision since the Constitution does not mandate upon counsel the obligation to correctly predict the future on what this or any court or body may do. Obviously, appellate counsel who wrote his brief in 1991 was

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<sup>1</sup>Appellant cites Wilson v. State, 474 So.2d 1162 (Fla. 1985) concerning appellate counsel's failure to raise sufficiency of the evidence but that decision must be deemed questionable in light of the subsequently-decided contrary unanimous decision in Hardwick v. Wainwright, 496 So.2d 796, 798 (Fla. 1986) ("In our review of cases involving imposition of the death penalty we have been confronted with a wide range of appellate strategies; some advocates raise every conceivable issue while others present only those issues the advocated feels are the most meritorious. There is no single correct approach. Further, this Court independently reviews each conviction and sentence to ensure they are supported by sufficient evidence.")

not deficient in referring to legislative actions elsewhere in 1993 or 1997.<sup>2</sup> In the instant case the sentencing judge and the recommending jury were well aware of Hall's alleged mental deficits.

The claim of appellate counsel's ineffectiveness is meritless.

Claim II: Whether appellate counsel was ineffective for failing to challenge the finding that Hall was the leader of acts committed by Hall and Ruffin.

The record reflects that appellate counsel acted as a capable advocate asserting eleven issues for judicial review in a one hundred and four page brief.<sup>3</sup> As stated in Atkins v. Dugger, 541 So.2d 1165 (Fla. 1989):

"Most successful appellate counsel agree that from a tactical standpoint it is more advantageous to raise only

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<sup>2</sup>Moreover, appellate counsel did make a similar argument to that now advanced by referring to pending legislation in Florida and noted that four states had passed legislation to prohibit the execution of the mentally retarded in his reply brief at Page 13 in his continued challenge to the CCP finding and pretense of moral or legal justification.

<sup>3</sup>(1) jury recommendation and death sentence are invalid because based on improper statutory aggravating circumstances; (2) trial judge erred in finding that murder was committed for the purpose of eliminating a witness; (3) trial judge erred in finding the CCP aggravator was present; (4) trial judge used wrong legal standard in considering mitigating evidence; (5) trial court applied wrong legal standard when following the jury recommendation; (6) trial judge erred in refusing to explain to jury why new penalty phase was necessary thirteen years after conviction; (7) trial judge erred in its ruling regarding the Coburn homicide; (8) trial judge erred in excluding testimony of siblings; (9) whether the HAC aggravating factor is vague; (10) whether F.S. 921.141 is unconstitutional; (11) whether there was an abuse of discretion in refusing an additional peremptory challenge.



the strongest points on appeal and that the assertion of every conceivable argument often has the effect of diluting the impact of the stronger points." (Id. at 1167)

That surely would have been the case here had appellate counsel chosen to adopt current counsel's suggestion to challenge the trial court's finding that appellant was the leader between Hall and Ruffin.

The trial court in explaining in its sentencing findings the appropriateness of sentencing Hall to death when the co-defendant Ruffin received a life sentence stated:

Nevertheless, the operative words in supporting mitigation under this broad category of disparate treatment of an accomplice, are the words "who was of equal or greater culpability." In the case at bar the evidence would suggest that Freddie Lee Hall was the more culpable and dangerous of the two defendants charged in this crime. Though this state does not have before it the record of the sentencing proceeding of Mr. Ruffin, and thus does not know what evidence was presented to the jury in Mr. Ruffin's case, this Court believes that the evidence present in the instant case would demonstrate that Mr. Hall was the more culpable, and that thus Mack Ruffin, Jr., was not an accomplice who was "of equal or greater culpability."

The facts of the instant case reflect that clearly Mr. Hall was the defendant who was primarily responsible for the kidnapping of Karol Lea Hurst. He alone drove the car away from the grocery store while the victim sat in the front seat. There is substantial evidence to suggest that Mr. Hall raped the victim. There is substantial evidence that Mr. Hall at least encouraged and dared Mr. Ruffin to execute the victim, if in fact Mr. Hall was not himself the executioner. Though the Court admits that there is some confusion throughout all the testimony in this cause as to who actually pulled the trigger that caused the death of Karol Lea Hurst and deputy Lonnie Coburn, it is clear that Mr. Hall was the older and the larger of the two defendants. Everything in the evidence indicates that Mr. Hall was the leader of the pact of two that accomplished this varied and random

violence on February 21, 1978. This Court believes that the totality of the reasonable inferences in the entire evidence available in this case indicates that the defendant, Freddie Lee Hall, is the more culpable defendant. (R662-663)

This Court agreed, 614 So.2d 473, 479 (Fla. 1993):

[20] We also reject Hall's claim that his death sentence is not proportionate. These crimes were a joint operation, with each defendant responsible for the other's acts. *James v. State*, 453 So.2d 786 (Fla.), cert. denied, 469 U.S. 1098, 105 S.Ct 608, 83 L.Ed.2d 717 (1984). Even though Ruffin received a life sentence, the different treatment given Hall is appropriate. As noted by the trial judge, Hall was bigger and older than Ruffin and was the leader. Before the date of this crime he had been convicted of a violent crime and was on parole, whereas Ruffin had no such criminal history. Also, Ruffin's resentencing jury recommended that he be sentenced to life imprisonment. Hall, on the other hand, has received a death recommendation from every jury he has appeared before. The disparate treatment is fully warranted. (FN6) The aggravators clearly outweigh the mitigating evidence, and this cruel, cold-blooded murder clearly falls within the class of killings for which the death penalty is properly imposed. *E.g.*, *Swafford* (victim abducted, raped, and killed); *Engle* (same); *Cave* (co-perpetrators abducted, raped, and killed victim; defendant not actual killer); *Copeland* (same).

Hall now argues that appellate counsel should have urged the pre-trial deposition of Detective Bernard Bishop<sup>4</sup>, and excerpts of testimony of Deputy Freeman, the prior testimony of Hall, and of Deputy Janes to show that Ruffin shot Hurst, Coburn and at the pursuing deputies.

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<sup>4</sup>Petitioner does not advise where in the appellate record the deposition of Detective Bishop can be found; obviously, appellate counsel is not derelict in not relying on a deposition not made part of the appellate record.

The testimony at trial by Deputy Janes regarding the car chase following the Coburn shooting was that Ruffin, the smaller occupant in the passenger seat fired the gun at him while Hall, the larger man, drove in the attempt to evade the officers (R. 313-14). Hall's testimony from the 1978 trial was introduced in which Hall admitted that he and Ruffin planned this robbery (R. 1495), admitted having stolen the .38 used in the Hurst murder from his mother (R. 1501), admitted stealing the car to use in the armed robbery (R. 1502-03), claimed Ruffin raped her (R. 1505), and agreed she was beaten and shot (R. 1507). They subsequently did not rob the convenience store because there were too many people in there (R. 1508).

Former deputy sheriff Arthur Freeman testified for the defense that in 1978 Ruffin told him he shot Hurst (R. 1605) and also that Hall told Ruffin "if he wanted to run with him, he had to prove himself as a man" (R. 1610) and when recalled by the state explained Ruffin stated that Hall told him if he wanted to be with him and run with him he'd have to prove himself to be a man after they picked up the woman in the parking lot. After they had sex and Ruffin hit her in the back of the head, Hall told him "you've got to prove yourself to be a man." Ruffin pulled the trigger of the .32 three times - it snapped. Hall told him he had a gun so Ruffin took Hall's gun and killed her (R. 1874-75).

Appellate counsel simply would have been unsuccessful in attempting to challenge the trial court's finding regarding Hall's

culpability in the incident with Ruffin.

Petitioner next turns to the supportive testimony of Dr. Bard regarding Hall's illiteracy (R. 1708-34), psychologist Dr. Toomer (R. 1746-74), Kathleen Heidi (R. 1831-69) and Dr. Dorothy Lewis' videotaped testimony (R. 1703). But a review of the initial brief submitted by appellate counsel shows counsel's focusing on Hall's perceived mental deficits (See Brief, pp. 6-8, 10-14 [relating to the testimony of Drs. Bard, Toomer, Heidi and Lewis], 49-50, 52-53, 62).

Nothing that petitioner now points to changes the lower court's resolution at sentencing. The trial judge observed the "professional overkill" of the defense experts:

Moreover, the Court suspects that the defense experts are guilty of some professional overkill. If the testimony of the defense experts is believed and taken to its logical conclusion, the defendant is practically a vegetable. However, his behavior at the time of the crimes for which he stands convicted, as well as some of the statements that he made previously (such as his previous testimony at trial), would belie the fact of his severe psychosis and mental retardation. Nothing of which the experts testified could explain how a psychotic, mentally-retarded, brain-damaged, learning-disabled, speech-impaired person could formulate a plan whereby a car was stolen and a convenience store was robbed. Bear in mind that the facts of this case conclusively showed that Freddie Lee Hall was the one that kidnapped Karol Lea Hurst from the Pantry Pride grocery store. Freddie Lee Hall alone was the one that drove Karol Lee Hurst, in broad daylight, through the city of Leesburg to a spot in the woods some eighteen miles distant. There is no evidence as to whether or not Freddie Lee Hall possessed a driver's license, but he was certainly driving a car in broad daylight through city traffic with a kidnapped victim inside. Moreover, after the killing of Deputy Coburn at the convenience store in Ridge Manor, Hernando County, Florida, the evidence is

uncontroverted that it was Freddie Lee Hall who was driving the getaway car during a high-speed chase while Mack Ruffin, Jr. was firing at the pursuing deputy. Freddie Lee Hall was able to drive the car in such a manner as to elude the deputy after approximately a five-mile chase and to get the car into an orange grove where he and his codefendant made their escape on foot. On foot they made their way some six to seven miles distance, eluding a massive manhunt, until they were captured in the early morning hours of the following day. Nothing in the evidence can explain how Freddie Lee Hall could live a more or less normal life, obtain employment, and substantially remain outside of violation of the law during the five (5) years that he was on parole after his first rape conviction. Nothing in the evidence can explain the statements that the defendant made when he testified in his own behalf during his first trial. Those statements appear to the Court to be an attempt to place blame on others for his involvement in the crime, but his statements are no different than those made by the "normal" defendant in almost any criminal trial conducted. In other words, the clinical characterization of the defendant presented by the testimony of the defense experts does not seem to comport with the other evidence of the defendant's background and behavior that are clear from other aspects of the evidence in this case. Thus, this Court believes that the evidence of the experts, for whatever reason or reasons, is exaggerated to some extent. (R. 649-650)

While it may be understandable that Hall and his counsel may continue to disagree with the result reached by the trial court and this Court in prior proceedings, nevertheless there is no legitimate basis for the granting of relief simply because rejected and discarded arguments are advanced anew - this time asserting that the capable advocacy of prior appellate counsel should now be labeled violative of the Sixth Amendment upon proving unsuccessful.

Claim III: Whether appellate counsel was ineffective for failing to argue that the 1968 conviction should not have been used

as an aggravating circumstance because it was allegedly obtained in a racist atmosphere and because the trial court did not inform Hall of his appellate rights.

A. The allegedly racist atmosphere and appellate ineffectiveness.

On this sub-issue Hall now argues that appellate counsel rendered ineffective assistance for failing to challenge the prior 1968 conviction used as an aggravator on the basis that it had a racist atmosphere and he claims appellate counsel was ineffective since Hall allegedly was not informed of his right to appeal and that Hall's prior counsel did not file a notice of appeal.

Hall's appellate counsel alluded to the testimony of Mr. Hagin, Hall's counsel in 1968, in the Statement of Facts at pages 5 and 6 of the initial brief. In the resentencing proceeding former State Attorney Oldham testified that he had prosecuted Hall who was convicted in 1968 of assault with intent to commit rape (R. 1474) and had prosecuted to a conviction Hall for the murder of Deputy Coburn (R. 1479) as well as the offenses on the Hurst crimes (R. 1483). On cross-examination by the defense Oldham denied that there was a "hue and cry" for the conviction of a black man on the white woman in 1968 (R. 1487-88).

Defense witness Mr. Hagin testified that he represented Hall on the rape charge and stated there were strong racial overtones to the case (R. 1537-40). The court permitted the witness to give an opinion about whether he thought Hall was guilty of that charge in 1968 (he didn't) and Hagin added that he did not appeal the case

because he had been elected prosecuting attorney for Sumter County, that he talked to Hall about taking an appeal and he didn't think one was taken because at sentencing Hall told the judge that the NAACP was going to take care of him and that he would get his own lawyer (R. 1544-45). On cross-examination Hagin repeated that the jury didn't feel like he was guilty of rape (R. 1549); the jury found him guilty of a lesser crime (R. 1549).

Appellate counsel was not deficient in failing to challenge the prior violent felony conviction aggravator on the record he had since there had been no determination made by a court of competent jurisdiction that the prior conviction was invalid. See Eutzy v. State, 541 So.2d 1143 (Fla. 1989); Roberts v. State, 678 So.2d 1232 (Fla. 1996); Buenoano v. State, 708 So.2d 941 (Fla. 1998); Stano v. State, 708 So.2d 271, 275 (Fla. 1998). Moreover, even if appellate counsel thought the rape conviction were somehow challengeable, his effort would have been unsuccessful since there remain the valid prior violent convictions for the 1978 murder of Deputy Coburn and the 1978 conviction of shooting into the vehicle occupied by Deputy Janes (R. 639). Stano, supra; Rivera v. State, 717 So.2d 477, 486 (Fla. 1998). Consequently, appellate counsel cannot be deemed to have been ineffective for having failed to argue an issue that would have been meritless and unsuccessful.

- B. The failure of the trial court to inform Hall that he had thirty days to appeal the judgment and sentence of the court.

Respondent repeats its argument, *supra*, that Hall should be deemed to have abused the writ by waiting several years before initiating this contention. Additionally, appellate counsel can not be deemed deficient nor can prejudice be discerned since the appellate record available to counsel - which included the resentencing testimony of Oldham and Hagin - indicates only that Hagin had talked to Hall about taking an appeal and that at sentencing Hall told the judge that the NAACP was going to take care of him and that we would get his own lawyer (R. 1544-45). In light of that record testimony, Hall's counsel on appeal from the reimposed sentence of death could properly conclude that such an issue need not be raised. Even if Addendum A attached to the petition were somehow available to appellate counsel that document reflects Hall's awareness of a right to an appeal.

Claim IV: Competency to be Executed

Hall also asserts that he may be incompetent to be executed. Although he acknowledges that this claim is not currently ripe for judicial review, since no execution is pending, he suggests that he is including this claim in his current habeas petition in order to preserve the issue for federal court review. Clearly, there is no basis for this Court to rule on Hall's present claim of possible incompetence.

Florida law provides specific protection against the execution



of an incompetent inmate. In order to invoke judicial review of a competency to be executed claim, a defendant must file a motion for stay of execution pursuant to Florida Rule of Criminal Procedure 3.811(d). Such motion can only be considered after a defendant has pursued an administrative determination of competency under Florida Statutes 922.07, and the Governor of Florida, subsequent to the signing of a death warrant, has determined that the defendant is sane to be executed. Since the prerequisites for judicial review of this claim have not occurred in this case, there is no basis for consideration of this issue in Hall's present habeas petition. Compare, Provenzano v. State, 751 So.2d 37 (Fla. 1999); Provenzano v. State, 760 So.2d 137 (Fla. 2000) (detailing procedural history of similar claim); Medina v. State, 690 So.2d 1241 (Fla. 1997) (remanding for evidentiary hearing on issue in postconviction appeal from Bradford County).

Hall's concern with preservation of this issue for federal review does not offer a reason for a premature ruling by this Court. Although the federal courts have refused to permit successive federal habeas petitions in order to secure federal review of this claim, that default may be avoided if a defendant presents the issue prematurely in his initial habeas petition. See, Stewart v. Martinez-Villareal, 523 U.S. 637 (1998). Whether Hall will be deemed to have already defaulted this claim due to his failure to present it in his previously litigated federal petition, or whether he will be permitted to pursue it in his currently

pending federal petition, are questions to be properly resolved by the federal courts, not this Court. No federal decision requires this Court to consider and address the claim now presented, contrary to state law, in order to preserve Hall's federal rights.

Since Hall's claim of incompetence to be executed is not properly before this Court, it must be denied.

Finally, while petitioner endeavors to revisit the testimony of various witnesses from the resentencing proceeding (Bard, Toomer, Heidi, Lewis), he conveniently overlooks the testimony presented and the findings made at the more recent 3.850 motion to vacate evidentiary hearing - and the finding of competence approved by this Court in Hall v. State, 742 So.2d 225 (Fla. 1999). As Dr. Krop testified in the prior evidentiary hearing there was no question of Hall's competency in September of 1990 (Vol. VII, TR. 145, FSC Case No. 92,008).

WHEREFORE, Respondent respectfully requests that this Honorable Court DENY the Petition for Writ of Habeas Corpus filed in this case.

Respectfully submitted,

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ATTORNEY GENERAL

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COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Regular Mail, to Eric Pinkard, CCRC, Office of the Capital Collateral Regional Counsel, 3801 Corporex Park Drive, Suite 210, Tampa, Florida 33619, this \_\_\_\_\_ day of November, 2000.

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COUNSEL FOR RESPONDENT

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INDEX TO EXHIBITS

- I Freddie Lee Hall v. State of Florida, Florida Supreme Court Case No. 92,008, Answer Brief of the Appellee, Issue I.
  
- II Mental Retardation and the Death Penalty: Defendants with Mental Retardation executed in the United States since the death penalty was reinstated in 1976. By Dr. Denis Keyes, William Edwards, Esq., & Robert Perske; updated by Death Penalty Information Center.