ORIGINAL

NO. 65876

IN THE

SUPREME COURT OF THE STATE OF FLORIDA

FILED
SID J. WHITE
SEP 14 1984
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

JAMES DUPREE HENRY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

APPLICATION FOR LEAVE TO FILE PETITION FOR WRIT OF ERROR CORAM NOBIS AND/OR FOR EXTRAORDINARY RELIEF WITH REGARD TO PETITIONER'S SENTENCE OF DEATH

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Of Counsel

MICHAEL A. MELLO
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	)	
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_____	)	

APPLICATION FOR LEAVE TO FILE PETITION FOR WRIT OF ERROR CORAM NOBIS AND/OR FOR EXTRAORDINARY RELIEF WITH REGARD TO PETITIONER'S SENTENCE OF DEATH

Petitioner, JAMES DUPREE HENRY, through his undersigned counsel, requests leave from this Court to file a petition for writ of error coram nobis in the lower court seeking a new sentencing trial based upon newly available evidence that bears materially and significantly upon the question of the appropriate penalty in his case. In support thereof, petitioner states the following:

A. INTRODUCTION AND JURISDICTIONAL STATEMENT

Mr. Henry seeks leave of this Court to file in the Circuit Court a petition for writ of error coram nobis to permit a new sentencing trial. The basis for this petition is newly available evidence concerning Mr. Henry's mental condition at the time of the offense. This evidence is entirely new -- there was no pretrial mental health evaluation of Mr. Henry and there was no attempt to place in issue his mental condition at the time of the offense during the course of his trial. None of the evidence recently discovered was available to or known by the trial court, Mr. Henry, or his trial counsel. Nor could this evidence have been discovered by the use of due diligence prior to trial, for trial counsel exercised due diligence in investigating the possibility of mental mitigating circumstances and after a reasonable investigation determined that there was no such evidence available. Finally, the failure of Mr. Henry's sentencing trial to take this evidence into account "create[d] the risk that the death penalty [was] imposed in spite of factors which

[called] for a less severe penalty." Lockett v. Ohio, 438 U.S. 586, 605 (1978). The newly discovered evidence detailed herein was the only evidence which could have been presented to rebut the central evidence of aggravation relied on by the State in urging the imposition of the death sentence and by the trial judge in imposing the death sentence: Mr. Henry's history of violent behavior, culminating in the violence directed toward the homicide victim and the arresting police officer in this case. The newly discovered evidence clearly demonstrates that Mr. Henry's responsibility for his violent actions was substantially diminished as a result of mental impairment. Because this Court has recognized on numerous occasions "a legislative determination to mitigate the death penalty in favor of a life sentence" for persons whose violent behavior is causally connected to mental illness, see, e.g., Miller v. State, 373 So.2d 882, 886 (Fla. 1979), the sentencing of Mr. Henry without knowledge of the critical facts presented herein cannot be deemed reliable, just, or acceptable to the people of our State. Because of these circumstances, Mr. Henry seeks the equitable remedy of this Court.

Accordingly, jurisdiction of this Court is invoked pursuant to Article V, Section (3)(b)(7), Florida Constitution, and Rule 9.030(a)(3), Florida Rules of Appellate Procedure. In connection with his invocation of that jurisdiction, Mr. Henry also seeks a stay of his currently scheduled execution. On August 21, 1984, the Governor of Florida signed a Death Warrant for Mr. Henry, effective from noon September 13, 1984 through noon September 20, 1984. His execution has been scheduled for September 19 at 7:00 a.m. As of the filing of this pleading, no stay of execution has been ordered.

B. THE NEWLY DISCOVERED EVIDENCE

In April, 1984, Dr. Dorothy Lewis, a professor of psychiatry at New York University, conducted a psychiatric evaluation of Mr. Henry. On June 18, 1984, Dr. Lewis provided her report about Mr. Henry to the office of the undersigned counsel. Based upon a detailed medical and psychiatric history, in which Dr. Lewis

documented numerous incidents of serious injury to Mr. Henry's head, upon psychological testing, and upon an examination of Mr. Henry's current mental status, Dr. Lewis concluded as follows:

> Mr. Henry is an intellectually limited brain-damaged individual with episodic paranoia and very poor judgment. He has also been the victim of extreme physical abuse. He is not malicious or sociopathic. Rather his aggressive acts result from a combination of organic impulsiveness, paranoid ideation, and an inability to make independent judgments.

Appendix A (attached hereto), at 3.

Because of the findings by Dr. Lewis, which supported the view that Mr. Henry's "capacity . . . to conform his conduct to the requirements of law was substantially impaired" at the time of the homicide and the assault against the arresting officer, see Fla. Stat. §921.141(6)(f), current counsel for Mr. Henry conducted further investigation of Mr. Henry's mental condition. Due to Dr. Lewis' finding of brain damage and "organic impulsiveness," counsel arranged for a full neuropsychological evaluation of Mr. Henry by Dr. James Vallely and Dr. Harry Krop, of Community Behavioral Services, Gainesville, Florida.[1] The results of the neuropsychological testing confirmed Dr. Lewis' initial finding that Mr. Henry suffers from brain damage and provided much more information about the nature of that damage, the effect of that damage on Mr. Henry's responsibility for his behavior, and the likelihood that Mr. Henry suffered from this damage at the time of the homicide and assault herein. As reported by Dr. Vallely and Dr. Krop, the results of the neuropsychological tests indicated "a number of areas of cognitive and behavioral deficits indicative of brain dysfunction." Appendix B, at 4.

> In the first place, [Mr. Henry's] memory is mildly impaired for both spatial and verbal material. This impairment is most noticeable in early stages of learning or in one trial learning situations. With practice, information is stored and retained, but without

[1] Of all the diagnostic tools available for the assessment of brain damage, including electroencephalogram, pneumoencephalogram, angiogram, C.A.T. scan, skull X-ray, and gross neurological examination, neuropsychological testing by a complete neuropsychological test battery is far and above the most reliable, valid, and sensitive diagnostic tool. See, e.g., Golden, Validity of the Halstead-Reitan Neuropsychological Battery in a Mixed Psychiatric and Brain-Injured Population, 45 J. Consulting and Clinical Psychology 1043 (1977); Filskov and Goldstein, Diagnostic Accuracy of the Halstead-Reitan Battery, 42 J. Consulting and Clinical Psychology 382 (1974).

> practice it is not. This clearly suggests limited memory abilities in the face of adequate motivation and effort.
>
> A second area of impairment is seen in Frontal Lobe functioning, with a number of related deficits noted. [Mr. Henry's] ability to organize and plan visual spatial tasks is moderately impaired. He also shows moderate to severe restriction in his ability to benefit from feedback, problem solve and develop appropriate strategies to deal with novel or complex situations. Also related to deficits in the frontal portions of the brain are motor response problems exhibited in relative weakness and slowness in the left, dominant hand of [Mr. Henry].

Appendix B, at 4-5. Because of these organic impairments, Dr. Vallely and Dr. Krop concluded, with regard to Mr. Henry's responsibility for his behavior,

> that Mr. Henry would have a great deal of difficulty responding appropriately to novel or spontaneous situations. His responses under stress would be clearly compromised. Such deficits interfere with an individual's ability to employ adequate judgment, anticipate consequences and integrate past experiences into current situational demands. Often impulsivity would override logic, planning and judgment in times of stress for individuals with this type of pattern.

Appendix B, at 5. Finally, Dr. Vallely and Dr. Krop found that Mr. Henry's brain damage and the mental and behavioral impairments associated with that damage, likely existed at the time of the homicide:

> [Mr. Henry's] reported and documented history of repeated head trauma could account for the aforenoted neuropsychological deficits. As he does not report significant head trauma since 1974 and reports no medical history over the last ten years to suggest neurological disease, it can be assumed these cognitive and behavioral deficits predate his current incarceration.

Appendix B, at 5.

Accordingly, Dr. Lewis, Dr. Vallely, and Dr. Krop have all found hard, unequivocal evidence that at the time of the homicide and the assault of the arresting police officer herein, Mr. Henry suffered from a <u>legally significant</u> organic impairment of his brain. In the explicit terms of their evaluation, that organic damage "substantially impaired" Mr. Henry's "capacity . . . to conform his conduct to the requirements of law": in times of

stress, his brain lacked the ability to make the appropriate judgments and exercise the appropriate controls necessary to prevent spontaneous outbursts of violence.

At Mr. Henry's trial, no evidence was introduced to suggest that he suffered from any mental impairment at the time of the homicide. No such evidence was known to the trial court, to Mr. Henry himself, or to then-counsel for Mr. Henry, Harry Carls. Indeed, as recounted in the affidavit of Mr. Carls, attached hereto as Appendix C, Mr. Carls investigated the possibility of mental impairment and found no facts that suggested to him that there was such impairment. Mr. Carls talked with Mr. Henry, reviewed files in the public defender's office concerning other cases in which Mr. Henry was involved, and talked to people who knew Mr. Henry -- and found nothing to suggest to him that a mental health evaluation would be fruitful. There simply were no facts apparent to Mr. Carls on the basis of the investigation he undertook to support a request to have Mr. Henry evaluated by mental health professionals. As a result, no evaluation was ever conducted to determine whether Mr. Henry suffered from any impairment which might have mitigated the seriousness of his crimes.

In the ten years that intervened between the trial of Mr. Henry and the evaluation of Mr. Henry by Dr. Lewis, Dr. Vallely, and Dr. Krop, much has changed, in both the medical and the legal communities, to enable the significant new evidence about Mr. Henry's mental impairment to be discovered. During that time, the disciplines of psychiatry, psychology, neurology, and endocrinology have made giant strides in the study and understanding of violent human behavior. See Lewis, Vulnerabilities To Delinquency (1981) (excerpts attached hereto as Appendix D). Dr. Dorothy Lewis is in the forefront of scholarship and research devoted to a better understanding of this phenomenon. See the Foreword to Dr. Lewis' book, by Dr. Robert Cancro, the Chairman of the Department of Psychiatry, New York University School of Medicine (Appendix D). At the same time that the mental health disciplines have been expanding the frontiers of knowledge concerning the causes of violent behavior, the defense of persons

charged with capital crimes has taken quantum leaps. From 1974, when the only United States Supreme Court decision concerning the death penalty was the nine-opinion decision in Furman v. Georgia, 408 U.S. 238 (1972), and the use of character witnesses in a sentencing trial, as was done here, was seen as innovative, to the present, when psychiatric evaluation of a defendant is sought by the defense as a matter of course, see Bonnie, Psychiatry and the Death Penalty: Emerging Problems in Virginia, 66 Va. L. Rev. 167 (1980), defense counsel have learned a tremendous amount about the investigation of mitigating circumstances.

Only because these simultaneous developments have occurred in the ten years since Mr. Henry was tried has it been possible to discover the evidence presented in this petition. As Dr. Lewis noted in her evaluation of Mr. Henry, Mr. Henry "appears more intact socially and intellectually than he is.... [He] gives the impression of greater intellectual and social confidence than is truly the case. He is agreeable and cooperative and without guile." Appendix A at 3. Because of these qualities about Mr. Henry, lawyers who had no in-depth exposure to the advances in understanding violent behavior made by the scientific community over the past decade would still have had no reason to suspect that Mr. Henry was brain damaged or to have asked competent professionals to evaluate Mr. Henry for such an impairment. However, because the undersigned counsel have had such exposure over the past two years, counsel learned enough about Mr. Henry to have noticed that psychiatric and neuropsychological evaluations were in order. Solely because of the work counsel has undertaken with Dr. Lewis over the past two years, counsel has now learned what information must be collected in order to make an intelligent assessment, as a lawyer, of the fruitfulness of investigating mental impairment. In short, through working with Dr. Lewis counsel has learned that a history of head trauma coupled with experiences of losing control, being surprised at one's actions, of sudden mood changes, and acting on impulse, are sufficient facts to warrant full psychiatric and neuropsychological investigation of a client's mental condition. The work of scholars like Dr. Lewis has taught us that these pheno-

mena, coupled with a history of head trauma, are often associated with the kind of impairment that causes a person to be unable to control his or her behavior under stress. Upon learning that James Henry had suffered from these things, counsel knew that an evaluation was mandatory, and the results already discussed above are the fruits of counsel's investigation.

In the context of Mr. Henry's sentencing trial, there can be no dispute that the evidence of brain impairment which has been newly discovered would have been critical evidence. In that trial, the State focused its evidentiary presentation upon Mr. Henry's history of violent, assaultive behavior. To show Mr. Henry's history of violence, the State presented the testimony of Officer Ferguson, who attempted to arrest Mr. Henry for the homicide herein. Officer Ferguson testified that he and Mr. Henry began to fight, that during the fight Mr. Henry took Officer Ferguson's service revolver from him, and that Mr. Henry thereafter chased Officer Ferguson and shot him several times with the service revolver (T. 386-390).[2] The State also presented certified records of Mr. Henry's prior convictions for aggravated assault and aggravated battery, both of which involved assaults by Mr. Henry against people whom he perceived to be threatening him (T. 390-391).

The prosecution's evidentiary emphasis, in turn, became the primary basis for the trial judge's decision to impose a death sentence. Summarizing why he had decided to impose the death sentence, the trial judge wrote as follows (after death had been imposed upon oral findings in open court):

> The defendant has a lengthy history of violence of an extremely serious nature which has been demonstrated by the defendant having been charged on a previous occasion with Assault with Intent to Commit a Felony and having been allowed to plead guilty to the lesser included offense of Aggravated Assault, and having also been charged on a prior occasion with Aggravated Assault and allowed to plead guilty to a lesser included offense in that instance, and having also demonstrated his viciousness and callous indifference to human life when he assaulted Officer Ferguson with the officer's own pistol at the time of his arrest for the charges in this case, at which time he shot the police officer three times, the last time while

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[2] References to the original trial record will be designated "T" (trial transcript) and "R" (record on appeal).

> the officer was on his knees begging not to be shot anymore. The facts in this case in themselves are atrocious, horrible and cruel almost beyond belief. The defendant has clearly demonstrated that he cannot live in a civilized society in a trustworthy fashion....

(R. 101). The predominant effect of Mr. Henry's violent history on the trial judge's decision to impose death was also the theme of the judge's findings at the time he sentenced Mr. Henry to death, as demonstrated by his repeated reference to that history:

> [After finding that a homicide committed in the course of a robbery, as here, was the kind of homicide for which death was the most fitting sentence, the judge further found that] I can think of no other robbery murder that I have been associated with as a lawyer or as a Judge where the circumstances were more atrocious and cruel and violent, and where the defendant's background supported a finding of cruelty, atrocity, and repulsiveness as in this particular case where the defendant has a prior history of violence and aggravated assault, assault with intent to commit murder, and where he again tried to commit murder on a police officer
>
> . . . .
>
> Item B, whether the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person; I think it is clear he has a violent background and is a violent human being, and our society cannot tolerate him living among us. He is a danger and menace to society.
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> . . . .
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> Item E, whether the capital felony was committed for the purpose of avoiding or preventing a lawful arrest of effecting an escape from custody; no, it was not, but about four days later he tried his best, and he shot a police officer three times, and I think that it certainly should be taken into consideration.
>
> . . . .
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> Item G, the age of the defendant at the time of the crime; I don't think this was ever mentioned. It is this Court's understanding he is twenty-four years old, twenty-four years old is not a child. In fact, statistics back up that most crimes are committed between the ages of 17 and 27, and so he is an old man in the area of crime, he is a veteran, he is hardened, he has prior prison time on his record, and he has demonstrated clearly that he is a violent human being; and in this Court's estimation no longer fit to live in our society.

(R. 104-108).

Thus, the predominant aggravating feature of Mr. Henry's case -- his propensity to commit violent acts -- was, unbeknownst to the trial judge, the jury, or defense counsel, a symptom of mental illness, not of evil intent. At the very least, therefore, the facts of Mr. Henry's brain damage and its behavioral and cognitive consequences should have been known to the jury and the judge before they determined his sentence, for "a large number of the statutory mitigating factors reflect a legislative determination to mitigate the death penalty in favor of a life sentence for those persons whose responsibility for their violent actions has been substantially diminished as a result of a mental illness, uncontrolled emotional state of mind, or drug abuse." Miller v. State, 373 So.2d at 885. To allow this critical factual omission to go uncorrected would be to sanction a per se violation of due process of law -- the "attach[ment] [of] the 'aggravating' label ... to conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness." Zant v. Stephens, ___U.S.___, 103 S.Ct. 2733, 2747 (1983) (citing Miller v. State, supra).

C. ARGUMENT

The requirements for error coram nobis upon the basis of newly discovered evidence are well-settled in this State. The newly discovered evidence must be (a) genuinely new evidence, not just a new opinion drawn from evidence already known, (b) that was not known by the trial court, by the party, or by counsel at the time of trial, (c) which could not have been discovered by the use of due diligence, and (d) which, had it been known to the trial court, would conclusively have prevented the entry of the judgment. Hallman v. State, 371 So.2d 482, 484-85 (Fla. 1979); Scott v. Wainwright, 433 So.2d 974, 975-76 (Fla. 1983); Riley v. State, 433 So.2d 976, 979-80 (Fla. 1983). In the discussion that follows, Mr. Henry demonstrates that the foregoing newly discovered evidence satisfies the first three requirements of Florida law with respect to error coram nobis. With respect to the fourth requirement, that the new evidence would have conclusively prevented the entry of the judgment, Mr. Henry concedes that his

evidence fails to meet this requirement. However, he submits that this Court's analysis cannot end at that point, for the conclusiveness requirement establishes an impossible threshold with respect to newly discovered evidence that pertains to capital sentencing determinations. The Court cannot sanction such a result under the Constitution. The eighth amendment requires not only that there be a meaningful state remedy for after-discovered evidence but also that the State provide new sentencing trials where the after-discovered evidence would have been relevant, material, and significant in determining the appropriateness of the death sentence in a particular case.

The first three requirements for error coram nobis are indisputably met by the newly discovered evidence presented herein. First, the newly discovered evidence is genuinely evidence. There was no evidence presented at trial, or known by anyone during the pre-trial or trial process, which even remotely suggested that Mr. Henry's mental state at the time of the homicide was a mitigating factor. His mental state simply was not at issue. Thus, the newly discovered evidence presented herein is genuinely that -- it is not merely new expert "findings ... based on the same information on which ... medical testimony presented at trial was based ...." Booker v. State, 413 So.2d 756 (Fla. 1982). See also Elledge v. Graham, 432 So.2d 35, 37 (Fla. 1983).

Second, the new evidence concerning Mr. Henry's mental impairment obviously was not known to the trial court, to Mr. Henry himself, or to his then-trial counsel prior to or doing the trial. There was no evidence presented concerning any mental impairment, so the trial judge could not have known about impairment. At the time of his trial, Mr. Henry had never been evaluated by a psychiatrist or psychologist, and he had no

knowledge at all that he suffered from a mental impairment.[3] Finally, Mr. Henry's trial counsel, despite his reasonable investigative efforts, did not know that Mr. Henry suffered from an organic impairment that would have established a significant mitigating circumstance in his case. See Appendix C.

Third, Mr. Henry's trial counsel exercised due diligence in investigating whether Mr. Henry suffered from any mental impairment, and he found nothing to suggest that a psychiatric or psychological evaluation of Mr. Henry would be worthwhile, much less that such an evaluation would establish a mitigating circumstance. In Florida, the exercise of due diligence means that a lawyer has done "everything reasonable within his power" to investigate and discover available evidence. Clair v. Meriwether, 127 Fla. 841, 174 So. 591, 594 (1936). See also Ogburn v. Murray, 86 So.2d 796, 798 (Fla. 1956) (en banc) (reaffirming the Court's adherence to Clair v. Meriwether). Thus, the inquiry into "due diligence" is substantially the same as the constitutional inquiry into whether counsel has provided effective assistance: "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms," Strickland v. Washington, ___U.S.___, 104 S. Ct. 2052, 2065 (1984).

Under a reasonableness analysis, there can be no question that trial counsel reasonably considered and investigated whether Mr. Henry suffered from a mental impairment that would have established a mitigating circumstance. As demonstrated in the affidavit of Mr. Henry's trial counsel, Appendix C, he actively sought to develop a mental mitigating circumstance. He spent time talking with Mr. Henry in order to make his own assessment of Mr. Henry's mental functioning, and he perceived nothing to suggest to him that Mr. Henry was impaired. However, trial

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[3] Obviously, Mr. Henry would have known about his history of head trauma, as well as his various experiences -- of losing control, of being surprised at his actions, of sudden mood changes, and of acting on impulse -- that suggested, to Dr. Lewis, that Mr. Henry suffered from brain damage. However, without ever having had any exposure to a mental health professional, Mr. Henry would have had no knowledge that this history or these experiences were at all significant in mitigation.

counsel's investigation did not end at this point, although it reasonably might have. Counsel went further. He reviewed the files in the public defender's office of other cases in which Mr. Henry had been involved, looking for any evidence of mental impairment, and he found none. Moreover, counsel talked with people who had known Mr. Henry for many years, and none of these people reported any sign of mental impairment. Thus, upon reasonable investigation Mr. Henry's trial counsel found no fact to suggest that he was mentally impaired. Even with the benefit of current knowledge about Mr. Henry's organic impairment, it is readily understandable how a reasonable investigation would have missed the signs of that impairment, for as Dr. Lewis has critically noted, "[Mr. Henry] appears more intact socially and intellectually than he is.... [H]e gives the impression of greater intellectual and social confidence than is truly the case." Appendix A, at 3.

Moreover, that this evidence has now been discovered is not an indication that Mr. Carls' investigation was unreasonable. As we have demonstrated in the discussion of the new evidence supra, at the time of his investigation, Mr. Carls' investigation was undoubtedly reasonable. The growing knowledge of the mental health disciplines about violent behavior was not nearly as advanced or as widely known as it is now. Moreover, the defense function in capital cases, had not advanced to the point where reasonably competent defense counsel were knowledgeable enough to be capable of detecting the symptoms of organic impairment suffered by Mr. Henry. Even today, this Court would be reluctant to charge capital defense lawyers with the duty of knowing the signs of organic impairment that had to be known in order to suggest that psychiatric and neuropsychological evaluation of Mr. Henry should be done. Certainly ten years ago, counsel could not have been charged with such a duty. Accordingly, Mr. Carls did "everything reasonable within his power" at that time to discover a mental mitigating defense for Mr. Henry, and he found nothing. The due diligence requirement of error coram nobis is, therefore, satisfied.[4]

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[4] If the Court, nevertheless, entertains enough doubt about Mr.

The fourth requirement of error coram nobis in our State -- that the newly discovered evidence "conclusively would have prevented the entry of the judgment," Hallman v. State, 371 So.2d at 485 (emphasis in original) -- requires much more analysis in the context of Mr. Henry's case. At the outset, Mr. Henry concedes that the newly discovered evidence of organic impairment would not have conclusively prevented the imposition of the death sentence in his case. If this Court is to fulfill its duty under the Constitution of the United States, however, that concession cannot be the end of the inquiry. The inquiry must, instead, turn to an analysis of the conclusiveness test itself, for that test will always require the denial of error coram nobis directed to a capital sentencing determination when the newly discovered evidence is evidence of mitigating circumstances.

Certainly there would be no disagreement in the Court that Mr. Henry would be entitled to a new sentencing trial had the newly discovered mitigating evidence described herein been proffered and excluded by the trial judge from evidence. No clearer violation of Lockett v. Ohio, supra, or of Eddings v. Oklahoma, 455 U.S. 104 (1982), could be imagined. In the context of error coram nobis, a similiar question must be explored: whether the eighth amendment requires a meaningful remedy for after-discovered mitigating evidence that should have been, but was not, considered in the sentencing process. Since the consequences are the same for the capital defendant whether the sentencer failed to consider mitigating evidence because it was excluded from trial or because it was not known and therefore not presented at trial -- in either event the sentencer failed to consider evidence which the eighth amendment says must be considered in order to render a reliable sentencing determination -- this Court must determine whether its error coram nobis rule, and in particular its conclusiveness test under that rule, is at fundamental cross-purposes with the eighth amendment.

Carls' exercise of due diligence that it is inclined to find that due diligence was not exercised, it should order a fact-finding procedure to resolve this doubt fairly. Due diligence, like any other standard of care inquiry, is factual, depending upon the circumstances that existed at the time in question.

Mr. Henry is cognizant of the history of this issue before this Court. See Hallman v. State, 371 So.2d at 486-87 (Overton, J., concurring in part and dissenting in part, joined by Boyd, J., and Hatchett, J.); Riley v. State, 433 So.2d at 981 (Overton, J., concurring in part and dissenting in part); id. at 982-983 (Boyd, J., dissenting); Tafero v. State, 447 So.2d 350 (Fla. 1983) (Overton, J, dissenting, joined by Boyd, J.). Mr. Henry urges, nontheless, that the Court reconsider this issue in light of the new decision from the United States Supreme Court concerned with the role of post-trial review of death sentences, Pulley v. Harris, ___U.S.___, 104 S.Ct. 871 (1984), and in light of the terribly unjust results for Mr. Henry if there is no remedy for what is, in light of the newly discovered evidence, an arbitrary imposition of the death sentence. See Ziegler v. State, ___So.2d___, ___, 9 F.L.W (S.C.O.) 256, 257 (Fla. 1984).

Because of the nature of a capital sentencing determination, the use of a conclusiveness test with respect to newly discovered mitigating evidence creates a barrier that cannot be overcome. Unlike the decision as to guilt or innocence, the capital sentencing decision cannot be made simply on the basis of whether there is evidence in the record to support each of the elements of the charged crime. Rather, a capital sentencing decision involves a judgmental and evaluative process. First, if aggravating factors are found, these factors must be "weighed" to determine whether they are "sufficient" to warrant the imposition of the death sentence. After that evaluation has been accomplished, mitigating factors must then be "weighed" to determine whether they "outweigh" the aggravating factors found to exist. Even then, a death sentence is never required, despite the finding of aggravating factors in a case where no mitigating factors are found. The capital sentencing decision is thus an evaluative process, in which a large measure of subjective judgment is involved. As this Court has taught for more than a decade,

> [i]t must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require

> the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.

State v. Dixon, 283 So.2d 1, 10 (Fla. 1973).

The process of capital sentencing decision-making is so inherently a "reasoned judgment" that this Court has held that it "cannot know" whether a capital sentencing determination based upon the consideration of both aggravating and mitigating factors would have been different if the jury or the judge had not had before it even one of several aggravating factors. See Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977). If this Court itself cannot determine whether the result of a sentencing determination would be the same under Elledge's circumstances, how can a capital defendant ever show conclusively that the failure of the jury or judge to consider mitigating evidence would produce a different result?

As a practical as well as legal matter, a capital defendant can never meet such a burden. So long as at least one "sufficient" statutory aggravating circumstance exists, the capital sentencer in Florida is authorized, at least in theory, to impose the death sentence. "When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in Florida Statutes §921.141 (7), F.S.A." State v. Dixon, 283 So.2d at 9. Accordingly, the only way that newly discovered evidence could conclusively prevent the imposition of the death sentence is for that evidence to demonstrate that there are no aggravating factors. See Barclay v. Florida, ___U.S.___, 103 S.Ct. 3418, 3431 n.4 (1983) (Stephens, J., joined by Powell, J., concurring in the judgment).

In a case like Mr. Henry's, where the conviction is based upon a felony murder theory, this could never be done without, simultaneously, conclusively demonstrating that the conviction itself had no factual basis. Further, it could never be done with the presentation of newly discovered mitigating evidence alone. So long as one aggravating circumstance existed, a capital defendant could not show, no matter how powerful the mitigating evidence, that the consideration of that evidence

would have conclusively prevented the imposition of the death sentence. Accordingly, the utilization of the conclusiveness standard for error coram nobis in Florida precludes any meaningful error coram nobis relief in relation to a capital sentencing decision.

Mr. Henry submits that the eighth amendment cannot tolerate such a result any more than it can tolerate the non-availability of a meaningful appellate review of a capital sentencing decision. While this question has never been decided, Mr. Henry submits that it can and must be decided upon the basis of established eighth amendment principles.

The starting point for this analysis is the oft-noted, but still-honored observation that there is a "significant constitutional difference between the death penalty and lesser punishments." Beck v. Alabama, 447 U.S. 625, 637 (1980).

> From the point of view of the defendant, it is different in its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action.

Gardner v. Florida, 430 U.S. 349, 357-58 (1977). "Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). It is, accordingly, "of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, supra. "To insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion,' [the Supreme Court has] invalidated procedural rules that tended to diminish the reliability of the sentencing determination." Beck v. Alabama, 447 U.S. at 638.

One of those procedural rules referred to in Beck as diminishing the reliability of the sentencing determination is a rule that precludes "the sentencer in all capital cases from giving independent mitigating weight to aspects of defendant's

character and record and to circumstances of the offense proffered in mitigation...." Lockett v. Ohio, 438 U.S. at 605. Because such a procedural rule "creates the risk that the death penalty will be imposed in spite of factors which a call for a less severe penalty[,] ... [w]hen the choice is between life and death, that risk is unacceptable and incompatible with commands of the eighth and fourteenth amendments." Id. Accordingly, the rule is now settled that the exclusion of relevant mitigating evidence, or the failure as a matter of law to consider such evidence, is constitutionally reversible error. Lockett v. Ohio; Eddings v. Oklahoma, supra.

This same underlying concern for the reliability of the capital sentencing decision is what led Justice Stevens to declare unequivocally in Pulley v. Harris "that appellate review plays an essential role in eliminating the systemic arbitrariness and capriciousness which infected death penalty schemes invalidated by Furman v. Georgia, ... and hence that some form of meaningful appellate review is constitutionally required." 104 S. Ct. at 881-82 (emphasis supplied). While the majority in Pulley declined to make the express declaration made by Justice Stevens, the majority's analysis of the issue before it conceded as much. Faced with the question in Pulley whether the eighth amendment requires that there be comparative proportionality review of death sentences on appeal, the majority framed its answer to the issue presented so as to rule that proportionality review is not required, while conceding that some form of meaningful appellate review is required. 104 S.Ct. at 877, 879. After Pulley, therefore, it is apparent that the eighth amendment requires "some form of meaningful appellate review."

If meaningful appellate review is required under the eighth amendment, we submit that meaningful error coram nobis procedures are required as well. The reason for this is simple, but compelling. Appellate review, by its terms, is limited to an assessment of legal error on the basis of the record created in the trial court. As this Court has held, it reviews that record to "determine if the jury and judge acted with procedural rectitude in applying Section 921.141 and our case law." Brown

v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981). Appellate review thus does not encompass errors of fact, for such errors necessarily require matters outside the record. Instead it is the province of error coram nobis to remedy errors of fact. "The function of a writ of error coram nobis is to correct errors of fact, not errors of law." Hallman v. State, 371 So.2d at 485.

Surely, however, the reliability-assurance role of appellate review must be just as much concerned with factual error as with legal error. For example, in the very terms of the issues presented by Mr. Henry, from his perspective his death sentence is unreliable and arbitrary because the persons who sentenced him to death did not consider the relation between the organic impairment of his brain and his violent behavior. What is unreliable, from Mr. Henry's perspective and from the perspective of the eighth amendment, is that his death sentence was imposed without considering those critical facts. It does not matter to Mr. Henry, nor, we submit, to the eighth amendment, whether the cause of the sentencer's failure to consider that evidence was legal -- because of the exclusion of proffered evidence -- or factual -- because the evidence of organic brain impairment was not known at the time of his trial. In either event, Mr. Henry's death sentence is unreliable under the express terms of Lockett v. Ohio.

That the eighth amendment's underlying concern for reliability requires a meaningful error coram nobis remedy, as well as meaningful appellate review, is further confirmed by the time-honored place of error coram nobis in our jurisprudence. Coram nobis has been recognized since the sixteenth century as an essential, common law appellate remedy. Janiec v. McCorkle, 52 N.J.Super. 1, 144 A.2d 561, 568 (1958). Its creation was the result of the failure of the common law courts to resolve errors of fact on appeal. United States v. Morgan, 346 U.S. 502, 507 (1954). This common law creation was transported to this country and utilized from our nation's earliest days. See, e.g., Strode v. Stafford Justices, 23 Fed. Cas. 236, 1 Brock 162 (C.C. Va.

1810) (death of one party prior to rendition of judgment); Davis v. Packard, 8 Pet. 312, 8 L.Ed. 957 (____) (defendant was diplomatically immune from suit).

While of limited use, coram nobis has persisted as a remedy to prevent injustice in the state courts. See, e.g., Sanders v. State, 85 Ind. 318 (1882); Davis v. State, 200 Ind. 88, 161 N.E. 375 (____); Nickels v. State, 86 Fla. 208, 98 So. 502 (1923); Hallman v. State, supra. That it has a vital function in the federal courts as well was made clear in United States v. Morgan, supra. The Court recognized in Morgan that even though there were provisions for a motion for a new trial and for habeas corpus, a writ "in the nature of" coram nobis was essential to decide questions of fact outside the record where the defendant had already served his sentence. 346 U.S. at 512. The federal courts still recognize the "salutory function" that coram nobis serves. See United States v. Dellinger, 657 F.2d 140, 144 (7th Cir. 1981).

The central reason that error coram nobis has persisted as a post-trial remedy is that it serves as a "remedy against injustice when there is no other avenue of judicial relief." People v. Bennett, 323 N.Y.S.2d 616, 617 (N.Y.Sup. Court 1971), affirmed, 283 N.E.2d 747 (1971). This is nothing less than concern for "considerations of fundamental justice," Janiec v. McCorkle, 144 A.2d at 571, and a reflection of the common law rule that there must be "a remedy wherever there is a wrong." State v. Tellock, 264 Minn. 185, 118 N.W. 2d 347, 350 (1962). Compare Zeigler v. State, ___So.2d at ____, 9 F.L.W. (S.C.O.) at 257 (The unavailability of error coram nobis to the capital defendant "would have the unfortunate result of leaving an appellant with no remedy when there is possible misconduct or bias on the part of the trial judge relating to sentencing and discovered after the trial. The law does not intend such unjust results, particularly in the case of a death sentenced individual.") Error coram nobis thus fills a procedural gap and its vitality is due to its capacity to prevent a "miscarriage of justice." See Comment,

Coram Nobis and The Convicted Innocent, 9 Ark.L.Rev. 118, 128 (1954). See also Anderson v. Buchanan, 292 Ky. 810, 168 S.W.2d 48 (1943).

Accordingly, coram nobis is a necessary adaptive mechanism to accomodate serious challenges to the truth, as this Court so adequately noted in Ex parte Welles, 53 So.2d 708, 711 (Fla. 1951).

> The very essence of judicial trial is a search for the truth of the controversy. When the truth is discovered, the pattern for dispensing justice is obvious. All that we are importuned to do at this time is to open the way for the trial court to examine and correct its record with reference to a vital fact not known to the court when the judgment of conviction is entered.

The antiquity of the remedy does not impair its importance even today, because "[i]t is primarily in extraordinary situations that its utility will be appreciated, [and] in a proper case the urgency of the need will demonstrate its usefulness." Comment, The Writ of Error Coram Nobis -- Kentucky's Answer to the Expanding Federal Concept of Procedural Due Process in Criminal Cases, 39 Ky. L.J. 440, 447 (1950-51). Because of this critical function in the process of doing justice, it should come as no surprise that Florida's error coram nobis remedy was viewed more than forty years ago by the Supreme Court as Florida's response to the Supreme Court's mandate that the States provide a "corrective judicial process," Mooney v. Holohan, 294 U.S. 103, 113-14 (1934), for state criminal convictions. See Hysler v. Florida, 315 U.S. 411, 415 (1941).

If Florida's error coram nobis remedy was seen by the United States Supreme Court as a response to that Court's demand that "[a] State ... furnish a corrective process to enable a convicted person to establish that in fact a sentence was procured under circumstances which offend 'the fundamental conceptions of justice which lie at the base of our civil and political institutions'" Taylor v. Alabama, 335 U.S. 252, 272 (1948) (Frankfurter, J., concurring), then surely that remedy can be shaped to provide a meaningful remedy for after-discovered evidence pertaining to a capital sentencing decision.

If, as we have argued, the eighth amendment does require a meaningful error coram nobis remedy with respect to the capital sentencing determination, there is no doubt that a standard can be articulated to replace the conclusiveness standard in relation to such determinations which takes into account both the eighth amendment concern and the concern for finality. Indeed, that standard has already been articulated by Justice Overton and by Chief Justice Boyd in their separate opinions in Hallman v. State. If the newly discovered evidence pertaining to a capital sentencing decision is "a material and relevant factor which should be considered in determining the appropriateness of the sentence," and "would be a significant but not controlling factor in determining the appropriateness of the death sentence in [a particular] cause," 371 So.2d at 487, leave should be granted to the error coram nobis petitioner to allow the petitioner to file his pleading in the trial court. This formulation of the standard takes into account the eighth amendment concerns that "material and relevant" factors in mitigation not be ignored in the death sentencing process, Lockett v. Ohio, as well as the State's "need for finality in judicial proceedings," Hallman v. State, 371 So.2d at 485, by requiring that the newly discovered evidence be "significant ... in determing the appropriateness of the death sentence [in a particular] cause," 371 So.2d at 47. Under this formulation, there is a clear limiting principle -- of significance -- as well as an accomodation of the critical need for reliability.[5]

Under this reformulation of the conclusiveness standard, Mr. Henry must be granted leave to file a petition for writ of error coram nobis in the trial court. Since the capital defendant's mental state at the time of the offense is unquestionably

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[5] Under this formulation, the interest in finality would be protected as well by the other three traditional requirements for error coram nobis in Florida: that the newly discovered evidence be genuinely evidence; that the evidence have been unknown to the trial court, the parties, or counsel; and that the evidence have been undiscoverable by the use of due diligence. As this Court's prior decisions make quite clear, these standards are significant limiting principles in and of themselves. See, e.g., Scott v. State, 437 So.2d at 976; Elledge v. Graham, 432 So.2d at 37; Dobbert v. State, 414 So.2d 518, 520 (Fla. 1982); Booker v. State, 413 So.2d at 756-757.

relevant and material under the eighth amendment definition of relevance and materiality, see Lockett v. Ohio, 438 U.S. at 604-605, there can be no question that the evidence of Mr. Henry's organic brain impairment, demonstrated to be causally related to his behavior at the time of the homicide, meets the "relevance" and "materiality" aspects of this standard. Further, there can be no dispute that this evidence was "significant" in determining the appropriateness of the death penalty for Mr. Henry. The introduction of this evidence would have established mitigating circumstances in a case where, without this evidence, the trial judge found that "there [were] absolutely none" (R. 106). Even more significantly, however, the introduction of this evidence would have prevented, or at least significantly diminished the weight of, the trial judge's "attach[ing] the 'aggravating' label ... to conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness. Cf. Miller v. Florida, 373 So.2d 882, 885-86 (Fla. 1979)." Zant v. Stephens, 103 S.Ct. at 2747. Given the predominant weight of the aggravating circumstance of Mr. Henry's history of violent behavior, the tendency of the evidence of organic brain impairment to counter that aggravating factor --and even to cause it to be viewed as mitigating, rather than aggravating -- is extraordinarily significant. Finally, given that the jury recommended death for Mr. Henry by only a 7-5 vote even without this evidence of organic impairment -- based solely on the circumstances of the offense and the evidence of Mr. Henry's good character -- there can be little doubt that the jury very likely would have recommended life had it known that Mr. Henry's violence was a function of an organic impairment of his brain.

Newly discovered evidence of this quality must be provided a meaningful remedy in Florida. To fail to do so is to permit Mr. Henry to be executed on the basis of a sentence that is, by constitutional definition, unreliable. "The law does not intend such unjust results, particularly in the case of a death-sentenced individual." Zeigler v. State, 9 F.L.W. (S.C.O.) at 257.

D. CONCLUSION

For the reasons articulated herein, Mr. Henry respectfully requests that the Court grant his application for leave to file petition for writ of error coram nobis and/or for extraordinary relief with regard to his death sentence.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by Greyhound Bus to Evelyn D. Golden, Assistant Attorney General, 125 N. Ridgewood Avenue, 4th Floor, Daytona Beach, Florida 32014, this 13th day of September, 1984.

_____
Of Counsel

V E R I F I C A T I O N

I, CRAIG S. BARNARD, being duly sworn do hereby verify that the facts set out in the foregoing Application for Leave to File Petition for Writ of Error Coram Nobis aretrue and correct to the best of my knowledge.

DATED this 13th day of September, 1984.

CRAIG S. BARNARD

SWORN to and SUBSCRIBED before me
this 13th day of September, 1984

Florestine Wilson

NOTARY PUBLIC

My Commission Expires:

Notary Public, State of Florida
My Commission Expires Sept. 23, 1985
Bonded Thru Troy Fain - Insurance, Inc.