ORIGINAL

IN THE

SUPREME COURT OF THE STATE OF FLORIDA

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illness

CHARLES KENNETH FOSTER, Petitioner, -v- LOUIE L. WAINWRIGHT, Secretary, Department of Corrections of the State of Florida, Respondent.	No. 65967

FILED
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PETITION FOR WRIT OF HABEAS CORPUS

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PETITION FOR WRIT OF HABEAS CORPUS

Petitioner, CHARLES KENNETH FOSTER, through his undersigned counsel, respectfully requests that this Honorable Court issue a writ of habeas corpus.

Two grounds are presented in support of this request. First, because the Court's consideration of whether to use non-record materials in the review of Mr. Foster's death sentence on direct appeal was not made known to counsel for Mr. Foster, Mr. Foster did not receive meaningful appellate review of his death sentence. Counsel for Mr. Foster discovered, during the pendency of his appeal, hospital records documenting a long and continuing history of severe psychotic disorders from which Mr. Foster suffered and for which he was sporadically treated up until the commission of the homicide for which he was sentenced to death. None of this evidence had been presented at trial. Had counsel known that the Court was considering whether to use a non-record psychological evaluation generated by Florida State Prison in the review of Mr. Foster's death sentence, or that such evidence was actually being considered in other cases, he would have proffered the hospital records he had discovered to be considered on appeal. Without the opportunity to do so, Mr. Foster was deprived of meaningful appellate review. Second, the circumstances of Mr. Foster's case -- in which the trial court record failed to reveal to this Court the extraordinary history of

severe mental illness which produced Mr. Foster's violent behavior -- compels the Court to hold that there is a grave risk that Mr. Foster's death sentence is disproportionate and to remand for a new sentencing proceeding.

In support of Mr. Foster's request for a writ of habeas corpus, he sets forth the following:

JURISDICTION

1. Jurisdiction of the Court is invoked pursuant to Article V, Sections 3(b)(1), (7), and (9), Florida Constitution, and Rule 9.030(a)(3), Florida Rules of Appellate Procedure.

STATEMENT OF THE CASE

A. Course of Prior Proceedings

2. On August 7, 1975, an indictment was filed in the Circuit Court for the Fourteenth Judicial Circuit in and for Bay County, charging Mr. Foster with the murder and robbery of Julian Franklin Lanier on July 15, 1975. (R. 1-2)[1] On October 3, 1975, following a three-day guilt-innocence trial, Mr. Foster was convicted of first degree murder and robbery. (R. 33-35) On October 4, 1975, following a sentencing hearing, Mr. Foster was sentenced to death on his conviction of murder in the first degree, and to life imprisonment on his conviction of robbery. (R. 44, 46).

3. On February 22, 1979, this Court affirmed both of Mr. Foster's convictions and sentences, and on May 10, 1979, denied rehearing. Foster v. State, 369 So.2d 928 (Fla. 1979). The Supreme Court denied certiorari on October 1, 1979. Foster v. Florida, 444 U.S. 885 (1979).

4. It was subsequently discovered that, in connection with its appellate review of capital cases, this Court had, ex parte, regularly solicited and reviewed prison-generated psychological reports and similar evaluations of death-sentenced inmates. On September 29, 1980, Mr. Foster joined with 122 other capital

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[1] References to the original trial proceedings and the record on direct appeal will be made as follows: "R" will be used to designate the Record on Appeal, and "T" will be used to designate the trial transcript.

defendants in filing an application for extraordinary relief and petition for writ of habeas corpus in this Court challenging such practice. The Court dismissed the application for failure to state a claim upon which relief could be granted. Brown v. Wainwright, 392 So.2d 1327 (Fla. 11981), and the Supreme Court denied certiorari, 454 U.S. 1000 (1981).

5. Thereafter, Mr. Foster filed a motion for post-conviction relief, pursuant to Rule 3.850, Fla.R.Crim.P., in the trial court. Relief was summarily denied. On appeal to this Court, the trial court's order denying post-conviction relief was affirmed. Foster v. State, 400 So.2d 1 (Fla. 1981).

6. Following the exhaustion of his state remedies, Mr. Foster pursued federal collateral remedies. On May 26, 1981 he filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Florida, and on July 2, 1981, judgment was entered denying his petition. Foster v. Strickland, 517 F. Supp. 597 (N.D. Fla. 1981). Thereafter, Mr. Foster appealed to the United States Court of Appeals for the Eleventh Circuit. On June 27, 1983, a panel of the eleventh circuit issued an opinion affirming in part, and reversing in part, the district court's judgment, and remanding for further proceedings. Foster v. Strickland, 707 F.2d 1339 (11th Cir. 1983). The reversal was on the basis of Mr. Foster's claim that the state trial court's inadequate findings in support of the sentence of death deprived him of his constitutionally protected right to meaningful appellate review of the sentencing decision in his case. The court reached this issue, which had been litigated in the district court, despite its not having been raised on appeal.

7. Thereafter, the respondents petitioned for rehearing and suggested rehearing en banc. On November 3, 1983, the court of appeals entered an order, apparently but not expressly in response to the petition for rehearing, striking that part of the opinion which had granted relief to Mr. Foster because of Mr. Foster's failure to have raised the issue in his appeal from the denial of the petition for writ of habeas corpus. Foster v. Strickland, 707 F.2d 1352 (11th Cir. 1983).

8. Mr. Foster's petition for writ of certiorari to review the eleventh circuit's opinion was denied on May 14, 1984. Foster v. Strickland, ___U.S.___, 104 S. Ct. 2375. Rehearing was denied on June 25, 1984, ___U.S.___, 104 S.Ct. 3564.

B. Material Facts: Trial Proceedings Before the Jury

9. Some time after 7:00 P.M. on July 14, 1975, Mr. Foster went to a bar in Panama City, Florida to drink and socialize. (T. 341-342) During the course of the evening, Mr. Foster met an older man, Julian Franklin Lanier, and the two of them spent much of the rest of the evening drinking and visiting. (T. 471-472) Toward midnight, at Mr. Lanier's insistence, Mr. Foster arranged to "party" with two women -- Gail Evans and Anita Rogers -- and the two women, along with Mr. Lanier and Mr. Foster, drove out into a rural section of Bay County in Mr. Lanier's camper. (T. 423-425)

10. Some time after Mr. Foster and Mr. Lanier joined Ms. Rogers and Ms. Evans, Ms. Rogers testified that Mr. Foster said to her that he was going to "rip the old man off" when Mr. Lanier had sex with Ms. Evans. (T. 256) Also during this period of time, Mr. Foster asked Ms. Rogers to trade rings with him. (T. 265-266) Mr. Foster's ring was a steel ring with a "K" on it, and Ms. Rogers' ring was a school class ring. (T. 265-266)

11. Enroute to the rural section of Bay County, Mr. Lanier, who had been driving his camper, asked Gail Evans to take over, because he was too intoxicated to drive further. (T. 424-425) During this same time, Mr. Foster was with Ms. Rogers in a bed in the rear of the vehicle. (T. 472) Upon stopping the camper in the area where they planned to go, Gail Evans began talking about having sex with Mr. Lanier. (T. 426) Mr. Lanier took his clothes off, and persuaded Gail Evans to remove her pants and have sex with him. (Id.)

12. At the very moment that this happened, Mr. Foster jumped up out of the bed with Ms. Rogers and screamed the following to Mr. Lanier: "You stupid mother fucker, are you going to try and fuck my sister." (Id.) Immediately thereafter, Mr. Foster began striking Mr. Lanier in the face, then pulled out

a knife, and for no apparent reason, held the knife to Mr. Lanier's throat and cut him. (T. 257-258, 473). The two women and Mr. Foster then dragged Mr. Lanier from the camper into some nearby bushes where they laid him face down and covered him with some pine branches and leaves. (T. 428-429) Ms. Rogers testified that, at this point, the three of them could still hear air coming out of Mr. Lanier, and at that point, Mr. Foster cut Mr. Lanier's spine at the base of his neck. (T. 261-262)

13. Following these events, Mr. Foster, Ms. Rogers, and Ms. Evans returned to the camper, and the three of them decided to go to the beach area of Panama City. (T. 262-263) On their way back to the beach, Ms. Rogers found Mr. Lanier's wallet, and the money remaining in the wallet was then divided among the three of them. (Id.) Upon arriving at the beach, Mr. Foster, Ms. Rogers, and Ms. Evans abandoned the camper in the parking lot of a motel (T. 264). Thereafter, they parted ways, at approximately 2:00 A.M. on July 15, 1975. (T. 373).

14. At approximately 9:00 A.M. on July 15, 1975, Anita Rogers and Gail Evans went to the Bay County Sheriff's Office and gave statements to the authorities concerning what had happened. (T. 242-243) At approximately noon, Mr. Foster turned himself over to the authorities and was charged with the murder and robbery of Julian Lanier. (T. 475)

15. On July 20, 1975, at approximately 4:00 A.M., Mr. Foster asked to talk with the authorities at the Bay County Sheriff's Office. (T. 464) Within the next two hours, a statement was taken from Mr. Foster in which he recounted the events leading up to Mr. Lanier's death and confessed that he had killed Mr. Lanier (T. 463-484) However, he insisted that he had not robbed Mr. Lanier, and he insisted that he did not know why he killed Mr. Lanier. (T. 483)

16. Mr. Foster's trial began on October 1, 1975. The State's case in the guilt-innocence trial consisted of the foregoing evidence. Mr. Foster's case rested entirely upon his testimony, in which he suggested that one of the women had killed Mr. Lanier. (T. 510) However, at the point at which he so

testified, Mr. Foster broke down and made a witness stand confession consistent with his confession to the police (T. 510-511).

17. Following Mr. Foster's witness-stand confession, the jury convicted him of murder in the first degree and robbery, and the sentencing trial commenced immediately thereafter. The evidence presented to the jury in Mr. Foster's sentencing trial consisted entirely of the following: the testimony of two witnesses, Mr. Foster's former wife, Frances Foster, and Dr. John Mason;[2] and two composite documents identified by Dr. Mason.

18. Ms. Foster testified about "abnormalities in [Mr. Foster's] behavior" which she described as the following:

> Well, he cut himself all the time and he has cut all the arteries in his arms and he has cut the heel strain in two and he has burnt steel wool on his leg. Just all kinds of things. The only reasons he doesn't kill hisself [sic] is because he thinks that that is the one crime that he cannot be forgiven for.

(T. 623). Although Ms. Foster thereafter made an impassioned plea not to kill Mr. Foster because he was a "very sick person" (T. 625-626), she provided no more details of his sickness.

19. Dr. Mason testified that he was a psychiatrist and had seen Mr. Foster on "at least four" occasions, two of which were "in the hospital setting" (T. 615-616). He then was asked to identify the documents pertaining to two involuntary commitment proceedings against Mr. Foster and was asked simply to read from these papers what his diagnosis had been on each occasion. He responded that on November 25, 1970 (defendant's exhibit one), his diagnosis was "paranoid reaction" (T. 616), and on February 21, 1974 (defendant's exhibit two), his diagnosis was "suicidal depression with overdose of medication and self mutilative [sic] behavior" (T. 617). Dr. Mason's testimony concluded[3] with a series of questions which began with his observation that he had examined Mr. Foster and "ma[de] a report to the Court" subsequent

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[2] This evidence was presented by the defense. The only evidence adduced by the State in the sentencing trial was additional photographs of the victim's wounds. (T. 597-613)

[3] No additional insight into Mr. Foster's mental state was elicited on cross-examination or redirect examination (T 619-621).

to the homicide herein. He was then asked to assume that Mr. Foster had consumed "four or more beers" on the day of the homicide, and on this basis was asked if he could provide his "opinion as to how long Kenny Foster could retain a premeditation for one thought" (id.). Dr. Mason responded,

> Not when the question is phrased quite that way. Certainly I would feel that from past experience Mr. Foster has very poor control when intoxicated and certainly intoxication would effect [sic] his ability to maintain a thought or to maintain a plan or carry it through. But as to estimate exactly how long he would be able to do so I don't think I could really do that.

(T. 617-618).

20. The involuntary commitment documents identified by Dr. Mason, which were also admitted into evidence (T. 614), provided no more insight into the nature or legal consequences of Mr. Foster's illness than did Dr. Mason's testimony. The documents reflecting the involuntary commitment on November 25, 1970 (defendant's exhibit one, a copy of which is included in the Appendix hereto, at 1a-13a) show only that Mr. Foster was deemed to be "incompetent by reason of paranoid reaction; ... that his incompetency is acute ... [and] chronic...[and] that his propensities are delusional thinking...." App. 9a, 10a. And while a "paranoid reaction with delusional thinking" probably referred to Mr. Foster's psychosis in 1970, see infra, there was no testimony presented -- despite Dr. Mason's presence on the witness stand -- to say this, to explain this in any way, or to relate Mr. Foster's condition in 1970 to his homicide in 1975 or to his history of psychosis before and subsequent to this diagnosis.[4]

21. Similarly, the documents reflecting the involuntary commitment on February 21, 1974 (defendant's exhibit two, a copy of which is included in the Appendix hereto, at 14a-22a) show only that the two psychiatrists who evaluated Mr. Foster both found that he was "mentally ill." At that time Mr. Foster was diagnosed as suffering from

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[4] Dr. Mason was asked only to read his diagnosis from this exhibit, which he did, reading only "paranoid reaction" (T. 616). Dr. Mason was not asked, nor did he testify, that as a result of this commitment, Mr. Foster spent nearly one year in Florida State Hospital before he was granted a competency discharge with a diagnosis of "schizophrenia, paranoid type, in remission." See infra, at 13-14.

> suicidal depression...evidenced by: overdose of medication [and] self-mutilative behavior ...[,]

App. 14a (Dr. John Mason's diagnosis), and

> depressive reaction...evidenced by: near-lethal suicide attempt; drug abuse; self-mutilation; [and] hostile, combative behavior ...[,]

Ibid. (Dr. John Sapoznikoff's diagnosis). As with defendant's exhibit one, only Dr. Mason's diagnosis was read (by Dr. Mason) and no further testimony was elicited concerning the disorders noted there and how they fit into Mr. Foster's pattern of mental illness.

22. The foregoing represents every shred of evidence adduced in Mr. Foster's sentencing trial in support of mental mitigating circumstances.

C. Material Facts: The Additional Evidence "Presented" to the Trial Judge

23. After the conclusion of the sentencing hearing, Mr. Foster's counsel neither presented nor drew the trial judge's attention to any evidence in addition to that presented at the hearing. However, on his own the trial judge considered the reports of Mr. Foster's pre-trial competency evaluation by three psychiatrists in the course of determining Mr. Foster's sentence. See Foster v. State, 369 So.2d at 931.[5]

24. These reports provided the first -- and only -- evidence in the trial court of Mr. Foster's history of psychosis and severe impairment of his ability to appreciate the criminality of his conduct as a result thereof. However, as noted, only the trial judge was exposed to this evidence, and the evidence only scratched the surface of Mr. Foster's history of severe mental illness. The history was sketchily pieced together by all three psychiatrists:

> On one occasion early in 1971 he slashed his arms with a razor blade while in jail and was transferred to Florida State Hospital where he remained for nine months being treated, he says, with Thorazine and Mellaril. The use

[5] "Before imposing the death sentence, the trial judge considered three psychiatric reports (with which defendant's attorney was familiar)...." The Court knew this only because the trial judge reported that he had done so in his "Gardner" response, filed in the Florida Supreme Court on June 29, 1977.

> of these antipsychotic drugs suggests that he was at that time thought to be psychotic and he says he was improved at the time of his release but it seems possible that the improvement may have been due to enforced abstinence from alcohol. He has since reported occasionally to the Panama City Guidance Clinic where he has been given Valium, which is used for anxiety but is not an antipsychotic drug. He reports having had three seizures over the last 6 to 8 years but admits all of these followed alcohol withdrawal, hence a diagnosis of epilepsy is not indicated.

App. 23a (report of Dr. Lathan Crandall).[6]

> Mr. Foster is a known patient of mine. I have been his psychiatrist on three admissions to the Mental Health Unit, namely from September 7 to September 29, 1972, January 14 to January 20, 1973, and October 17 to November 19, 1974. I have also treated him in the Day Care Program at Memorial Hospital from November 19, 1974 to December 3, 1974. According to records, he has also been hospitalized on the Mental Health Unit by Dr. John F. Mason in 1968 and then for 9 days in February 1974 and 12 days in September 1974. A third psychiatrist, namely Dr. John F. Cluxton hospitalized him on the Mental Health Unit from October 5, to October 8, 1974. A fourth local psychiatrist, namely Dr. Paul Bittick, Jr. has been involved with him followed [sic] at the Bay County Guidance Clinic from February 24, 1972 to the present. In addition, the patient relates being hospitalized at Florida State Hospital for approximately nine months in 1970.... My clinical impression with these hospitalizations has been that of EMOTIONALLY UNSTABLE PERSONALITY, CHRONIC, WITH PSYCHOPATHIC TRAITS MANIFESTED BY ANXIETY AND DESPONDENCY WHEN UNDER STRESS; ACUTE AND CHRONIC ALCOHOLISM; SUICIDAL DEPRESSION; AND DRUG DEPENDENCE OF A PSYCHOLOGICAL TYPE TO ALCOHOL AND OTHER AGENTS. On numerous occasions over the years, attempts have been made to provide treatment to Mr. Foster for his drug abuse and emotional problems without success.

App. 24a-25a (report of Dr. John Sapoznikoff).

> Mr. Foster does present a history of a major seizure disorder dating back at least 8 years, and has been taking Dilantin, an anticonvulsant, to prevent these. He has not been observed having a seizure in any of his several hospitalizations here and I am unable to confirm or deny the presence of a seizure disorder.
>
> Foster also has a long history of abuse of various drugs and alcohol. He has had a number of hospitalizations on the mental health unit and has received various diagnoses including schizophrenia and character

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[6] All three reports are included in the Appendix filed herewith.

> disorder. Both times he has been diagnosed as psychotic have followed bouts of alcohol abuse.

App. 29a (report of Dr. John Mason). From these accounts of Mr. Foster's history, it is clear that a form of psychosis was consistently but not unanimously found in connection with his multiple psychiatric hospitalizations and commitments. However, the quality of the psychosis is difficult to ascertain from these accounts, and it is impossible to reconcile the diagnoses of Dr. Sapoznikoff with the diagnoses recounted by Dr. Mason and Dr. Crandall.

25. These differences, however, are not reflected so much in the three psychiatrists' conclusions with respect to Mr. Foster's sanity at the time of the offense. Dr. Mason found no evidence that Mr. Foster was insane but did find a "high probability" that his capacity to appreciate the criminality of his conduct was significantly impaired:

> At the time of the alleged offense, Mr. Foster freely admits he has been drinking, and it is highly probable that his ability to discriminate between right and wrong, or to adhere to the right is significantly impaired by alcohol. I can find no evidence, however, that he was or is insane.

App. 29a. Dr. Crandall agreed with Dr. Mason, but with less certainty:

> It is well known that excessive consumption of alcohol may produce temporary psychosis (insanity) in certain individuals and it seems possible that Foster may have been suffering from this condition at the time of the alleged crime but I know of no way of determining whether or not this was the case.

App. 23a. Dr. Sapoznikoff took no position on the impaired capacity issue but found only that Mr. Foster was sane at the time of the offense.[7]

26. This, then, along with the testimony and documents described supra, was the entirety of the evidence available to the trial judge in his assessment of the mental mitigating circumstances relied on by Mr. Foster.

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[7] Dr. Sapoznikoff did note that in his experience with Mr. Foster, he had "never seen him to be psychotic." App. 63a.

D. Material Facts: The Findings By The Trial Judge In Support Of The Death Sentence

27. On the basis of the record described herein, the trial judge sentenced Mr. Foster to death. His findings in support of the sentence were as follows:

> The Court finds, from the evidence, that sufficient aggravating circumstances exist as enumerated in Subsection (5) of Section 921.141, Florida Statutes, that justify a sentence of death, and that there are insufficient mitigating circumstances, as enumerated in Subsection (6) of said Section 921.141, to outweigh the aggravating circumstances. The aggravating circumstances found by the Court are as follows:
>
> 1. The murder of JULIAN FRANKLIN LANIER was committed while the Defendant was engaged in the commission of a robbery.
>
> 2. That the capital felony was especially heinous and atrocious.

(Supp. R. 3) Despite being urged by Mr. Foster's trial counsel to find that the evidence of mental and emotional disturbance and impairment was of sufficient mitigating weight to require the imposition of a life sentence instead of a death sentence,[8] the trial judge simply found, without more, that there were "insufficient [statutory] mitigating circumstances ... to outweigh the aggravating circumstances."

E. Material Facts: Mitigating Evidence Not Presented At Trial

28. In his Rule 3.850 proceeding, which was litigated in May, 1981, Mr. Foster charged that his trial lawyer, Virgil Mayo, deprived him of effective assistance of counsel by his failure to investigate and present to the trial court Mr. Foster's extraordinarily documented history of severe mental illness. Foster v. State, No. 60636, Motion for Post-Conviction Relief at 8-17. In support of this claim, Mr. Foster alleged that Mr. Mayo had failed to review the medical records from the two hospitals which had treated him for mental illness over the many years preceding the homicide of Julian Lanier. He alleged that the investigation of these records would have allowed the presentation of qualitatively different and far stronger evidence in support of the

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[8] Mental mitigation was the only mitigation argued by counsel. However, as Mr. Foster urged on direct appeal, the evidence demonstrated as well that Mr. Foster had "no significant history of prior criminal activity," Fla. Stat. § 921.141 (6)(a).

sentencing trial defense, that he suffered from a severe mental illness at the time of the homicide which substantially impaired his responsibility for his acts. On appeal, this Court affirmed the trial court's denial of the Rule 3.850 motion without an evidentiary hearing, on the basis that Mr. Mayo's presentation of the evidence of mental mitigation in the manner discussed supra, at pages 6-8, was "a matter of judgment." Foster v. State, 400 So.2d at 4.

29. In the petition sub judice, it is this same evidence, from the hospital records, that must be examined anew in relation to the evidence which was presented to the trial jury and the trial judge, discussed supra. The evidence from the hospital records shows what the evidence presented to the trial court did not show: (a) that for at least seven years preceding, but continuing through the time of the homicide, Mr. Foster was consistently diagnosed and treated as suffering from severe psychotic illnesses, including paranoid schizophrenia, alcohol-induced episodic psychosis, and psychotic toxic brain syndrome; and (b) that these severe mental disorders very frequently caused Mr. Foster to behave violently toward himself or other people. In stark contrast, the testimonial and documentary evidence presented to the jury during the sentencing trial did not show that Mr. Foster suffered from such a serious mental illness as psychosis, nor did that evidence show that Mr. Foster's mental illness caused him to behave violently toward other people. Further, while the psychiatric evaluations available only to the trial judge suggested that Mr. Foster might have suffered previously from alcohol-induced episodes of psychosis, and could well have suffered from a significant impairment of his ability to control violent behavior at the time of the homicide, these reports were so fragmentary and tentative -- in comparison to the hospital records -- that the trial judge could properly have given little or no weight to mental mitigation in the process of weighing aggravating and mitigating circumstances.

30. The trial judge could not properly have done this had he been presented with Mr. Foster's hospital records. These records are included in the Appendix filed herewith, and we urge

the Court to read through them in their entirety.[9] In order to assist the Court and to demonstrate the qualitative and striking differences between the hospital records and the evidence adduced in support of mental mitigation, however, we have set forth below excerpts from these records showing, in chronological order, the indisputably severe and legally significant disorders chronically suffered by Mr. Foster prior to and at the time of the homicide of Julian Lanier.

> [From the record of Mr. Foster's hospitalization at Bay County Memorial Hospital, hereinafter "BCMH," October 25-31, 1968, Dr. John F. Mason, attending psychiatrist:]
>
> He presents with a twelve year history of antisocial behavior, numerous brushes with the law, repeated fights, self-mutilation, and difficulty in following any form of social acceptance. He was seen in the Bay County Guidance Clinic on the day of admission, where psychological testing revealed borderline psychosis. It was felt that he was about to break out into a full blown psychosis at any time, and he was admitted to the Psychiatric Unit as a psychiatric emergency to prevent this with medication....
>
> COURSE IN HOSPITAL: The patient was placed on Thorazine Spansules 350 mg. daily and Artane without any side effect.... He rapidly reconstituted and came under control, and while his physician was out-of-town he became irritated at all restrictions at being in the hospital and signed out of the hospital against medical advice.
>
> FINAL DIAGNOSIS:
>
> SCHIZOPHRENIC REACTION, LATENT TYPE; SELF-INFLICTED LACERATION WITH STAPHAUREUS INFECTION.

Appendix 32a-34a.

> [From the records concerning Mr. Foster's involuntary hospitalization at Florida State Hospital, December 14, 1970 through September 2, 1971; notes from a General Staff Conference concerning whether Mr. Foster should be granted a competency discharge:]
>
> Dr. Cespedes: "I believe this patient is in remission and that he may be sent back to the court to respond to his charges. His diagnosis is Schizophrenic, Paranoid Type, In remission."
>
> Mr. Auerbrach: "I believe that the patient should not be released and remain in the hospital for further treatment."
>
> Dr. Cook: (Psychl): "I agree with Mr. Auerbach."

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[9] The records from Bay County Memorial Hospital are set forth at App. 30a-68a, and those from Florida State Hospital are set forth at App. 69a-79a.

Dr. Dunin: "I wish to disagree with psychological department, but this time I agree. I think that this patient is improved, yes, but no [sic] to such an extent that he can be considered a candidate for discharge. If there would be any possibility of releasing him on trial visit I probably would agree with Dr. Cespedes and release the patient, but I feel that the patient did not receive sufficient benefits from hospitalization by one or another reasons and he is still floating and his associations are not such that he will be able to provide for his needs and the needs of his family. I propose trial visit status rather than competency discharge."

Dr. Cordoba: "I agree."

Dr. Pierson: "In my opinion there is little doubt that this was schizophrenic and he is currently schizophrenic in remission. The problem is whether he should continue in the hospital or a deliberate calculated risk should be taken and he should be released. In my opinion this patient will not gain anything further from hospitalization and although he does represent a risk, I think, this is a risk that has to be taken, otherwise, this patient will remain permanently institutionalized until he dies because I do not imagine there will be any further improvement from either chemotherapy, group therapy or hospital milieu-therapy and I would therefore recommend that he be released only understanding he does present a more than average risk."

Appendix 74a-75a.

[From the records concerning Mr. Foster's admission to BCMH from September 27-29, 1972, Dr. John Sapoznikoff, psychiatrist attending:]

Mr. Foster is a 25 year old divorced white male who was admitted to the Mental Health Unit on the 27th of September, 1972. Patient had been placed in jail because of indecent exposure charges by his mother. This occurred while he was intoxicated. The patient had been seen in initial evaluation at the jail by Mr. Ben Curry, Social Worker at the Bay County Guidance Clinic, who felt that the patient was possibly pre-psychotic. Mr. Curry recommended Mental Health Unit admission for further evaluation and treatment, and I concurred.... During the patient's hospitalization there were no signs nor symptoms of any formal thought disorder process or gross psychotic thinking or behavior. It was felt that the patient is basically a chronic severe emotionally unstable personality with psychopathic traits who experiences anxiety.

DISCHARGE DIAGNOSES:

(1) EMOTIONALLY UNSTABLE PERSONALITY WITH PSYCHOPATHIC TRAITS, CHRONIC.

(2) SEIZURE DISORDER, BY HISTORY, WELL CONTROLLED WITH DILANTIN.

(3) CHRONIC ALCOHOLISM.

Appendix 40a-41a.

[From the record of Mr. Foster's admission to BCMH, January 14-20, 1973, Dr. John Sapoznikoff, psychiatrist attending:]

Mr. Foster is a 26 year old divorced white male, who was admitted to the Mental Health Unit on a Voluntary Admission basis on the 14th of January, 1973. The patient was brought to the Hospital Emergency Room by local police after cutting his wrist, forearms in an apparent suicide attempt. The patient talked of ending his life. He was very anxious in the Emergency Room, was given Thorazine 100 mg. intramuscularly and Valium 10 mg. intramuscularly, which made him groggy. The Emergency Room Physician sutured his lacerations and called me stating that he felt psychiatric hospitalization for further evaluation and treatment was indicated. I authorized admission for such evaluation and treatment.

The patient has been previously treated on the Mental Health Unit by me, and discharged with a diagnosis of Emotionally Unstable Personality with Psychopathic Traits. Upon his discharge from the Mental Health Unit follow-up at the Bay Guidance Clinic was recommended, but the patient did not follow through with this....

DISCHARGE DIAGNOSES:

(1) EMOTIONALLY UNSTABLE PERSONALITY, CHRONIC WITH PSYCHOPATHIC TRAITS MANIFESTED BY ANXIETY AND DESPONDENCY WHEN UNDER STRESS.

(2) SEIZURE DISORDER, BY HISTORY.

Appendix 46a-47a.

[From the records of Mr. Foster's admission to BCMH, February 12-21, 1974, Dr. John F. Mason, psychiatrist attending:]

This is the third Mental Health Unit admission for this 27 year old white male. His previous admissions have been diagnosed as latent schizophrenia or emotionally unstable personality. On each occasion he had either attempted suicide or used self mutilative behavior. On this occasion he was brought to the emergency room by the Springfield Police asked [sic] he took 30 tablets of 5 mg. Valium and an unknown quantity of Tuinal. He was lavaged there, was unconscious and was admitted for treatment. I saw him in consultation and he was transferred to the Mental Health Unit on 2-13-74. He was put back on Dilantin 100 mgs. every 8 hours and Form 32 instituted for involuntary hospitalization, It was my feeling that he was suffering from a psychotic organic brain syndrome and has an antisocial personality who when uses alcohol or barbituates becomes psychotic. He cleared up on his regimen however and it was not felt that he could be committed to the State Hospital. He made arrangements to follow up at the Sana Rosa Guidance Clinic and he was discharged on

2-21-74 with a one month supply of medication, Dilantin 100 mgs. three times a day. Thorazine 100 mgs. three times a day.

FINAL DIAGNOSIS:

ATTEMPTED SUICIDE BY DRUG INGESTION; EMOTIONALLY UNSTABLE PERSONALITY.

Appendix 52a.

[From the records of Mr. Foster's admission to BCMH, September 4-16, 1974, Dr. John F. Mason, psychiatrist attending:]

This 27 year old divorced Caucasian male with a long history of Schizophrenia was seen again in the Emergency Room complaining of bizarre symptomology, namely his brains were hurting and rotting. He was admitted to the Mental Health Unit where physical exam was essentially normal....

COURSE IN HOSPITAL: The patient was placed on the Mental Health Unit Involuntarily and was seen by Dr. Sapoznikoff in consultation regarding Involuntarily [sic] Hospitalization. He was placed on Dilantin 100 mg. every eight hours, Haldol 10 mg. every eight hours and Cogentin 2 mg. every eight hours. He was transferred to Voluntary status. He rapidly reconstituted on this medication and quit complaining of crazy thinking.... He was set up for After Care at the Bay County Guidance Clinic and discharged on Dilantin 100 mg. three times a day, Haldol 10 mg. three times a day, and Artane 2 mg. three times a day, and Stress Tabs one daily.

FINAL DIAGNOSIS:

PARANOID SCHIZOPHRENIA; SEIZURE DISORDER, BY HISTORY; NUTRITIONAL ANEMIA.

Appendix 57a.

[From the records of Mr. Foster's admission to BCMH, October 5-8, 1974, Dr. John F. Cluxton, psychiatrist attending:]

Young white male with multiple admissions for alcohol and drug abuse. He came in through the emergency room this time with a toxic brain syndrome from combination of alcohol and Artane. He experienced a rapid clearing of symptoms. He was started on Antabuse and arrangements were made for follow up through the Bay County Guidance Clinic.

DISCHARGE DIAGNOSIS:

TOXIC BRAIN SYNDROME SECONDARY TO ALCOHOL AND ARTANE.

Appendix 60a.

[From the records of Mr. Foster's admission to BCMH, October 17 through November 19, 1974, Dr. John Sapoznikoff, psychiatrist attending:]

> Mr. Foster is a 27 year old divorced white male admitted to the Mental Health Unit on an emergency admission basis with a tentative diagnosis of suicidal depression with near lethal overdose attempt with alcohol and barbituates, acute and chronic, uncontrollable alcoholism....
>
> The patient was seen in medical consultation by S. A. Daffin III, who felt that the patient initially had Type B Hepatitis but his discharge diagnosis was infectious hepatitis.
>
> The patient was treated with individual, group and milieu-psychotherapy, occupational therapy, recreational therapy, day care activities with good results. He improved gradually. His hepatitis gradually improved. A hearing was held under the Meyers Act and the patient was ordered to civil commitment in the hospital under my care. A follow up civil commitment was done prior to discharge with his being ordered in my care in the Day Care Program.
>
> On the 19th of November, the patient was felt to have achieved optimum and maximum benefit of psychiatric and medical hospitalization and was discharged to follow up on the day care program 7 days a week, full time basis. The patient will continue to see the alcoholism counselor. He will get periodic blood ammonia levels....
>
> DISCHARGE DIAGNOSIS:
>
> (1) SUICIDAL DEPRESSION.
>
> (2) INFECTIOUS HEPATITIS.
>
> (3) DRUG DEPENDENCE, PSYCHOLOGICAL TYPE, ALCOHOL AND OTHER AGENTS.

Appendix 65a.

GROUNDS FOR HABEAS CORPUS RELIEF

I.

> BECAUSE THE COURT'S CONSIDERATION OF WHETHER TO USE NON-RECORD MATERIALS IN THE REVIEW OF MR. FOSTER'S DEATH SENTENCE ON DIRECT APPEAL WAS NOT MADE KNOWN TO COUNSEL FOR MR. FOSTER, MR. FOSTER DID NOT RECEIVE MEANINGFUL APPELLATE REVIEW OF HIS DEATH SENTENCE.

In Pulley v. Harris, ___U.S.___, 104 S.Ct. 871 (1984), the Supreme Court held that the eighth amendment requires "some form of meaningful appellate review" of death sentences. Concurring in the judgment in Pulley, Justice Stevens declared unequivocally "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. Although the majority in Pulley did not 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."

In the discussion that follows, we will demonstrate that Mr. Foster did not receive a meaningful appellate review of his death sentence. This deprivation occurred because of two simple facts. First, unknown to Mr. Foster's appellate counsel, the Court had before it during the pendency of Mr. Foster's appeal a psychological screening report prepared by personnel at Florida State Prison which could have critically influenced the disposition of Mr. Foster's appeal of his death sentence. Second, unknown to the Court, during the pendency of Mr. Foster's appeal, appellate counsel for Mr. Foster obtained the hospital records from Bay County Memorial Hospital and from Florida State Hospital, supra, which flatly contradicted and overwhelmingly rebutted the psychological screening report from Florida State Prison. Because counsel did not know that the court was considering whether to utilize non-record material in the resolution of Mr. Foster's appeal, counsel did not tender the hospital records to the court.

As we demonstrate in the discussion that follows, because of these simple facts, Mr. Foster was deprived of the assistance of counsel on appeal and of his right to an appellate review process that appeared to be based on reason rather than caprice.

A. Mr. Foster Was Deprived Of The Assistance Of Counsel On Appeal

Four factors operated to deprive Mr. Foster of the assistance of counsel on the appeal of his death sentence. First, the Court had available to it during the pendency of his appeal a psychological screening report from Florida State Prison which

characterized Mr. Foster as suffering from antisocial personality traits, which made him homicidal, rather than from mental illness. Second, notwithstanding the court's holding in Brown v. Wainwright, 392 So.2d 1327 (Fla.), cert denied, 454 U.S. 1000 (1981), that its receipt and review of non-record material in connection with pending capital appeals was irrelevant to its sentence review function in such cases, Mr. Foster's case fell into a very narrow exception to the holding of Brown. Third, counsel for Mr. Foster had discovered, several months after the oral argument in Mr. Foster's case, the hospital records from Bay County Memorial Hospital and Florida State Hospital which overwhelmingly demonstrated that Mr. Foster suffered from a severe and chronic form of psychosis that caused him to behave violently. Fourth, Mr. Foster's appellate counsel did not know that the hospital records he had discovered should have been presented to the Court in order to rebut the Florida State Prison psychological report, for he did not know that non-record materials were available for consideration and could play a critical role in the resolution of Mr. Foster's appeal. Taken together, these factors deprived Mr. Foster of the essential assistance of counsel that he needed on appeal.

After the petition was filed in Brown v. Wainwright, the Clerk of the Court prepared two lists of all the cases involved in Brown, indicating in which cases the Court had received post-sentence reports. These lists are included in the Appendix filed herewith, at 80a-93a. On the basis of the Court's own reporting, the Court received a psychological screening report concerning Mr. Foster from Florida State Prison on June 9, 1976. App. 85a, 88a. At the time the Court prepared the lists of cases involved in Brown, the psychological screening report for Mr. Foster was no longer in the Court's files. App. 88a. However, a review of Mr. Foster's Florida State Prison record reveals that prior to June 9, 1976, Mr. Foster had undergone only three mental health-related examinations: a "psychiatric evaluation" dated October 10, 1975, a "social history" dated December 31, 1975, and a "psychological screening report" dated February 27, 1976. Accordingly, if the Florida State Prison files are complete, the

psychological screening report dated February 27, 1976 was the report noted as received by the Court on June 9, 1976. Accordingly, a copy of that psychological screening report is included in the appendix at 94a.

This psychological screening report characterized Mr. Foster as "in good contact with reality" and as "free of psychopathology." The report explained that Mr. Foster "has a very poor self image" and as a result, "has gone to any length to prove his manhood and personal worth ... ." Because of Mr. Foster's perception of himself, the report concluded that Mr. Foster "should be considered an escape risk, and a dangerous, perhaps homicidal inmate." Supportive of the view that Mr. Foster would resort to violent behavior in order to prove his manhood, the Florida State Prison psychologist indicated that Mr. Foster "does not appear to be in the least remorseful about the incident" which brought him to death row.

Obviously, if the court's review of this report could have influenced its disposition of Mr. Foster's appeal, that influence would have been powerful. The only mitigating evidence offered on behalf of Mr. Foster in his sentencing trial was that Mr. Foster suffered from mental illness to such a degree that his capacity to be responsible for his behavior was seriously compromised. The Florida State Prison psychological report drew into serious question whether Mr. Foster's violent behavior was a product of mental illness or of antisocial personality. Thus, to the extent that this report might have influenced the court's view of the only mitigating circumstance in Mr. Foster's case, the report's influence would have been powerful.

The Court has held, however, in Brown v. Wainwright, that its receipt and review of such reports could not have influenced its review of pending cases. The Court reached this result because of its view that

> [n]either of our sentence review functions, it will be noted, involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances. Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances. If the findings of aggravating and mitigating

> circumstances are so supported, if the jury's recommendation was not unreasonably rejected, and if the death sentence is not disproportionate to others properly sustainable under the statute, the trial court's sentence must be sustained even though had we been triers and weighers of fact, we have might have reached a different result in an independent evaluation.

Brown v. Wainwright, 392 So. 2d at 1331 (footnote omitted).

Notwithstanding this rationale, we submit that there is a very narrow class of cases which is necessarily an exception to the rationale. This class of cases involves those in which the trial judge has made insufficient findings of fact concerning mitigating circumstances. In such cases, the trial judge makes no specific findings of fact as to the presence or absence of specific mitigating circumstances. Instead, the trial judge finds only that the mitigating circumstances are insufficient to outweigh the aggravating circumstances. In some of these cases, the Court has remanded the cases, either for more explicit fact-finding as to mitigating circumstances, or for reimposition of the sentence with a requirement that the findings regarding the sentence be made explicit. See, e.g., Magill v. State, 386 So.2d 1188, 1191 (Fla. 1980); Kampff v. State, No. 48,895 (Order for Clarification, April 18, 1977). The rationale for such a disposition was explained in Magill:

> It is apparent that the trial judge used a reasoned judgment and, in the absence of sufficient mitigating circumstances, the death penalty was justified. The Court found that there were "no mitigating circumstances which outweigh the aforementioned aggravating circumstances." However, the Court did not specifically list the mitigating circumstances which he may or may not have considered. Even though the trial judge may have considered some mitigating circumstances, he is charged with the further responsibility of articulating them, so as to provide this Court with the opportunity of giving a meaningful review of the sentence of death.

386 So.2d at 1191.

In such cases, it is apparent that this Court must make a threshold determination of the sufficiency of mitigating circumstances. This is so, because a remand would be unnecessary if there were no evidence of mitigating circumstances, see Aldridge v. State, 351 So.2d 942, 944 (Fla. 1977) (interpreting the trial

court's finding that there were insufficient mitigating circumstances to outweigh the aggravating circumstances as a finding of no mitigating circumstances), or if the evidence of mitigating circumstances were not sufficient to support a finding of mitigating circumstances. In making such a threshold determination, the Court necessarily must "weigh" or "evaluate" the evidence of mitigating circumstances. Because the trial court has not weighed the mitigating circumstances in such a manner that this Court can review the weighing process, the Court must engage in the weighing process itself on appeal.

As the Statement of Facts herein has made quite clear, Mr. Foster's case falls into this very narrow exception to the rule of Brown. In Mr. Foster's case, the trial judge made no specific findings as to mitigating circumstances, finding only "that there are insufficient mitigating circumstances ... to outweigh the aggravating circumstances." Thus, in order to determine whether to remand Mr. Foster's case for further fact finding and/or for reimposition of sentence, this Court necessarily had to determine whether there was sufficient evidence of mitigating circumstances in the trial record to warrant a remand. On the basis of the result in Foster, the Court obviously determined that there was not enough evidence of mitigating circumstances to warrant a remand. However, this was a close question. As we have demonstrated in the Statement of Facts, there was evidence in the record of the mitigating circumstance of impaired capacity. On the basis of that evidence, the issue for the Court on appeal was whether Mr. Foster's capacity was really impaired by mental illness or whether his character traits simply predisposed him toward violent behavior. On such a record, the psychological screening report from Florida State Prison could have been the deciding factor in the determination not to remand Mr. Foster's case for further factfinding. Since that report provided strong confirmation of the view that Mr. Foster suffered no mental illness that impaired his capacity, if the Court considered the report, it could very well have been the most significant factor in the Court's threshold determination of the sufficiency of the mitigating evidence.

Under these circumstances, the Court should have had available to it Mr. Foster's psychiatric hospital records. It cannot be disputed that these records flatly contradict the psychological screening report from Florida State Prison and further, that these records demonstrate persuasively, that Mr. Foster's violent behavior was the product of a mental illness, not of a bad actor. In short, the psychiatric records would have tipped the balance the other way in Mr. Foster's case -- establishing that the mitigating circumstances were sufficient enough to require a remand to the trial judge for further fact-finding or for reimposition of sentence.

The moral and legal tragedy is that counsel for Mr. Foster on appeal had discovered his psychiatric hospital records during the pendency of the appeal, see the Affidavit of Louis G. Carres included in the Appendix at 95a-96a, but he had no knowledge that the court might be considering non-record material in connection with Mr. Foster's appeal, Appendix 95a. Further, counsel for Mr. Foster had no basis to believe that a motion to supplement the record on appeal with the hospital records would have succeeded, for counsel was aware that such efforts in other cases had failed in the past. Thus, even though counsel for Mr. Foster had available non-record evidence which could have materially affected the outcome of Mr. Foster's appeal, counsel did not proffer that evidence to the Court because he had no basis to believe that the Court might consider such evidence.

Accordingly, Mr. Foster was deprived of the assistance of counsel at the very point at which he most needed counsel's assistance. The deprivation of assistance was not the fault of counsel, however. Despite the obvious benefit to Mr. Foster of tendering the non-record psychiatric evidence to the Court, counsel did not believe that he could tender such evidence without "cast[ing] a pall on the integrity of the painful process" by which appointed counsel for a capital defendant must "deal with the responsibility [he] has been assigned." Brown v. Wainwright, 392 So.2d at 1333. Nonetheless, on the basis of what is now known, it is clear that counsel did not provide assistance

to Mr. Foster at a time that was critical, which could have been provided had he simply known that non-record evidence was a matter for consideration by the Court in his client's case.

This deprivation of the assistance of counsel can still be remedied, however, the Court now has before it the psychiatric hospital records which should have been considered in determining whether the mitigating evidence in Mr. Foster's case was sufficiently strong to require a remand for further fact-finding or for reimposition of the sentence. At the very least, that evidence tips the balance toward finding the mitigating circumstances sufficiently strong to require a remand.

B. The Appellate Review of Mr. Foster's Death Sentence Does Not Appear To Have Been Based On Reason Rather Than Caprice.

In case after case decided by the Supreme Court since Furman v. Georgia, 408 U.S. 238 (1972), the Court has held that the qualitative difference of the death penalty from any other kind of punishment requires qualitatively greater assurance that the death penalty has been fairly and rationally imposed. In what has been the most frequently cited articulation of this constitutional rule, the Court stated that "[i]t is 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, 430 U.S. 349, 358 (1977) (emphasis supplied). With the Court's recent recognition in Pulley v. Harris that meaningful appellate review is constitutionally required as a safeguard against capricious capital sentencing decisions, there can be no question that a capricious capital sentencing review process is now as unconstitutional as a capricious capital sentencing imposition process.

In the foregoing section of this argument, Mr. Foster demonstrated that the Court's failure to provide notice to his attorney that non-record materials might be considered in the disposition of his appeal denied him the assistance of counsel. That same lack of notice also created the appearance that Mr. Foster's death sentence was affirmed not on the basis of reason, but on the basis of caprice.

This claim requires a careful comparison between Mr. Foster's case and the case of Paul Magill, cited above, 386 So.2d 1191 (Fla. 1980). For purposes of the analysis here, Mr. Magill's case and Mr. Foster's case are identical in all material respects. The findings of fact in support of the imposition of Mr. Foster's death sentence rest upon the finding of two aggravating circumstances (homicide committed in the course of committing a robbery; and heinous, atrocious, or cruel) and the finding "that there are insufficient mitigating circumstances, as enumerated in Subsection (6) of said Section 921.141, to outweigh the aggravating circumstances." In material respects, the findings in support of Mr. Magill's death sentence are identical:

> 1. The three felonies, namely, Murder in the First Degree, Involuntary Sexual Battery and used or threatened to use in the process thereof a deadly weapon, and Robbery and in the course thereof carried a firearm, were committed by the Defendant, PAUL EDWARD MAGILL.
>
> 2. The capital felony of Murder was committed while the Defendant was engaged in the commission of, or flight after committing, the crime of Robbery and Rape.
>
> 3. The said capital felony was especially heinous, atrocious and cruel, as there existed no logical or compelling reason for the Defendant to kill said robbery and rape victim and same was the heinous act of a person evincing a depraved criminal mind.
>
> 4. The said capital felony was committed in connection with the crime of robbery which was perpetrated for pecuniary gain.
>
> 5. The court finds no mitigating circumstances which outweigh the aforementioned aggravating circumstances.
>
> 6. The Jury who heard said trial also heard all the facts and circumstances concerning aggravating and mitigating circumstances and after hearing same and after argument of counsel and instructions by the Court, rendered an Advisory Sentence recommending death as the penalty for the commission of the said Murder.
>
> 7. Based upon the above facts, findings and circumstances, and the other matters as reflected in the record and the pre-sentence investigation, the Court hereby concludes that the advisory sentence of the Jury should be followed and that the death sentence should be imposed upon said Defendant.

Magill v. State, No. 51699 (Record on Appeal, 79).

Although, as in Mr. Foster's case, the trial court in Magill made no findings concerning specific mitigating circumstances, the evidence proffered in mitigation in Magill was of the same character as the evidence proffered in mitigation in Mr. Foster's case. All of the evidence proffered in mitigation in Magill was relevant to mental mitigating factors. Included in the Appendix filed herewith is an excerpt from Mr. Magill's brief on appeal, dated February 17, 1978, which discusses all of that evidence. Appendix 97a-104a. As this summary of the evidence proffered on behalf of Mr. Magill indicates, Mr. Magill began having mental health problems several years before the homicide for which he was convicted. Although he was not committed involuntarily, as was Mr. Foster, Mr. Magill did see two psychologists and a youth services counselor for several years prior to the homicide. Mr. Magill's psychological problems manifested themselves in his exposing himself to other people. The mental health professionals who counseled Mr. Magill all indicated that Mr. Magill kept his emotions bottled up and seldom expressed any emotion. As a result, the mental health professionals characterized him as maladapted, but no one characterized him as suffering from any severe mental illness. Further, one of the psychiatrists who evaluated Mr. Magill prior to his trial, Dr. George Barnard, testified that while he saw no personality disorder of major dimension in Mr. Magill, he did find that Mr. Magill suffered from an adjustment reaction to adolescence, which caused Mr. Magill some difficulty in controlling his impulses and in using poor judgment. Upon cross-examination, however, Dr. Barnard testified that Mr. Magill was not under the influence of extreme mental or emotional disturbance at the time he committed the crime.

Accordingly, while the evidence proffered in support of mental mitigating circumstances in Mr. Magill's case was similar in character to the evidence proffered in Mr. Foster's case, the evidence in Mr. Foster's case suggested more serious mental or emotional disturbances. Mr. Foster was demonstrated to have a history of suicidal and self-mutilative behavior, as well as to have a serious problem in controlling his violent behavior when

under the influence of alcohol. Further, Mr. Foster was shown to have been involuntarily committed for these problems on at least two occasions. Thus, to the extent that the evidence proffered in either trial was strong enough to support a finding of mental mitigation, the evidence proffered on behalf of Mr. Foster was more likely to support such a finding than the evidence proffered on behalf of Mr. Magill.

The results of this Court's review of Mr. Magill's case and Mr. Foster's case, however, were the opposite of the results suggested by the evidence. As noted previously, Mr. Magill's case was remanded for resentencing by the trial judge, solely because of the judge's failure to specify his findings regarding mitigating circumstances. 386 So.2d at 1191. However, Mr. Foster's case was affirmed, "[a]lthough the findings of the trial judge ... were not expansive ...." Foster v. State, 369 So.2d at 931.

That these contradictory results were reached in Magill and Foster cannot be explained by reference to matters of record. As previously noted, in determining whether to remand a case like Magill or Foster -- where the trial judge has made insufficient findings as to mitigating circumstances -- the threshold determination by this Court must be whether the evidence of mitigating circumstances is sufficiently strong to support a finding of mitigating circumstances. Thus, in reaching such a determination, the Court must weigh the strength of the evidence of mitigating circumstances. As noted, weighing such evidence in Mr. Foster's case and in Mr. Magill's leads to the conclusion that the evidence was stronger in Mr. Foster's case. But Magill's, not Foster's, case was remanded for resentencing.

There is, nonetheless, a reasonable explanation of the contradictory results in Magill and Foster if the non-record evidence before the Court in each case is examined. In Mr. Foster's case, as noted in the previous section of this argument, the Court had available to it a psychological screening report from Florida State Prison which significantly diminished the strength of the mitigating evidence proffered on behalf of Mr. Foster at trial. Similarly, there was a non-record psychological

screening report from Florida State Prison also available to the Court in Mr. Magill's case. See Appendix 109a-113a.[10] In sharp contrast to the prison-generated psychological report concerning Mr. Foster, however, the psychological report concerning Mr. Magill increased the strength of the mitigating evidence proffered at trial on behalf of Mr. Magill. Psychological testing of Mr. Magill had revealed "very limited control [of Mr. Magill's antisocial behaviors] in stressful situations." Appendix 112a. Further, rather than considering Mr. Magill homicidal, as Mr. Foster had been considered, the prison psychologist considered Mr. Magill to be suicidal.

That the Court's consideration of this non-record material in Mr. Magill's case increased its concern that the trial court may have overlooked substantial evidence of mental mitigating circumstances is demonstrated by the Court's own characterization of this report during the oral argument in Mr. Magill's case. During the course of the argument by the Assistant Attorney General, Justice Overton made the following comments:

> We have a copy of the psychological screening report and that screening report says in part that he shows very limited control in stressful situations and then also it shows that he will become possibly suicidal. Now I guess the question that Justice England asked you is whether or not, under the circumstances the psychological reports, whether or not the trial judge must in fact address those particular problems, particularly in view of subsection (f) of paragraph 6 of the [sic] 921.141, which deals with the matter of the capacity of the defendant to conform his conduct to the requirements of law, and whether or not it is impaired or not.

Appendix 115a-116a.

There is no conclusive proof that this Court in Magill actually used the non-record psychological report in determining whether to affirm Mr. Magill's death sentence or to remand his case for reimposition of the death sentence. However, a reasonable person could unquestionably infer from the comments of the

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[10] The materials included at Appendix 109a-113a are the motion directed to the Court by counsel for Mr. Magill when counsel was provided notice of the Court's consideration of a non-record psychological report in Mr. Magill's case, the Court's order permitting counsel for Mr. Magill to review that report, the report itself, and a letter from the Clerk of the Court indicating that the prison-generated psychological report "will be stricken" from Mr. Magill's case at some unspecified time.

Court that the prison-generated psychological report had caused the Court to view the evidence of mental impairment as stronger than that evidence appeared in the record. In Mr. Foster's case, we have no circumstantial evidence -- as there was in Mr. Magill's case -- that the Court actually considered or utilized the non-record psychological report. However, when Mr. Magill's case and Mr. Foster's case are placed side by side, it is reasonable to infer that while the psychological report in Magill substantiated the Court's concern that the trial court overlooked mitigation, the psychological report in Foster -- if it was even considered -- diminished the Court's concern that the trial court may have overlooked mitigation. Further, whether or not the Court actually considered the psychological report from the prison in Mr. Foster's case, the fact remains that -- by all reasonable appearances -- the Court accorded a benefit to Mr. Magill, by reviewing a mitigation-substantiating, non-record psychological report, and failed to accord the same benefit to Mr. Foster, by inviting the submission of psychiatric records which might have substantiated the seriousness of the mental mitigation in Mr. Foster's case.

There can be no clearer example of the capricious review of capital sentences. To extend to one -- by chance -- an opportunity for favorable submissions, but not to extend to another -- by chance -- the same opportunity, is the essence of caprice. For these reasons, Mr. Foster was denied, at least in appearance, an appellate review based upon reason rather than upon caprice. The eighth amendment cannot tolerate such a result and thus requires, at the very least, a new appellate proceeding for Mr. Foster.

II

THE STATE-BASED CONCERN FOR PROPORTIONALITY IN CAPITAL SENTENCING REQUIRES A REMAND FOR REIMPOSITION OF SENTENCE IN MR. FOSTER'S CASE

The concern that there be relative proportionality among death sentences in this state is at bottom a concern for equity. As the Court explained in State v. Dixon, 283 So.2d 1, 10 (1973), in its review of capital cases the Court attempts to guarantee proportionality --

> that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. No longer will one man die and another live on the basis of race, or a woman live and a man die on the basis of sex. If a defendant is sentenced to die, this Court can review this case in light of the other decisions and determine whether or not the punishment is too great.

Although the concern for proportionality is certainly flexible enough to take into account facts outside a particular record -- so long as those facts bear materially and significantly upon the lawful reasons that someone should live or die -- the Court has indicated in Brown v. Wainwright that its proportionality review function is nonetheless limited to the record:

> The record of each proceeding, and precedent, necessarily frame our determinations in sentence review.... Factors or information outside the record play no part in our sentence review role.

392 So.2d at 1332. Mr. Foster submits that the circumstances of his case require a recasting of the Brown rule -- where non-record evidence demonstrates a grave risk that the death sentence is disproportionate. The concern for equity demands a remedy under such circumstances.

In affirming Mr. Foster's death sentence, the Court conducted a proportionality review, finding the sentence proportionate in comparison to Sullivan v. State, 303 So.2d 632 (Fla. 1974); Proffitt v. State, 315 So.2d 461 (Fla. 1975); and Henry v. State, 328 So.2d 430 (Fla. 1976). Foster v. State, 369 So.2d at 931. However, the Court did not then know -- because the evidence was not of record --- that Mr. Foster had an extraordinarily-documented history of psychosis, from which he chronically suffered and was treated, for many years before and continuing through the time of Julian Lanier's homicide. Thus, the Court had no difficulty determining that Mr. Foster's death sentence was proportionate to other death sentences, where the aggravating circumstances were similar and the mitigating circumstances were just as insubstantial as the mitigating circumstance in Mr. Foster's case -- mental and emotional impairment -- seemed.

Had this Court known that Mr. Foster suffered from psychosis, however, and known as well that for many years before the homicide, this psychosis had caused Mr. Foster to be violent, primarily to himself but occasionally to others, the Court would have had grave doubts about the proportionality of Mr. Foster's sentence. This conclusion necessarily flows from the quality of the evidence contained in Mr. Foster's hospital records. The quality of the evidence is such that, had it been presented in the trial court, the judge would have been required as a matter of law to find the presence of the statutory mental mitigating circumstances.[11] Moreover, when evidence of mental mitigation is of such quality, this Court has been wont to sustain a death sentence as proportionate.

In Florida, the standards governing the proof of the statutory mental mitigating circumstances are well-developed, having been applied in more than fifty cases by this Court. Pursuant to these standards, had the medical-record-based evidence of Mr. Foster's psychosis and impaired capacity been presented to the trial court, the judge would have been compelled to "find" and give substantial weight to the statutory mental mitigating circumstances.

In our state, unless the evidence rises to a certain level, "[s]o long as all the evidence is considered, the trial judge's determination of lack of mitigation will stand absent a palpable abuse of discretion." Pope v. State, 441 So.2d 1073, 1076 (Fla. 1984). The finding that there is no mental mitigating circumstance will amount to an abuse of discretion, however, when three conditions are met:

(a) when there is "almost total agreement" among experts, Huckaby v. State, 343 So.2d 29, 33 (Fla. 1977), or "overwhelming evidence," Quince v. State, 414 So.2d 185, 187 n.3 (Fla. 1982), that the defendant suffers from a mental illness;[12]

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[11] Fla. Stat. §§ 921.141(6)(b), (f).

[12] See also Mines v. State, 390 So.2d 332, 337 (Fla. 1980); Mann v. State, 420 So.2d 578, 581 (Fla. 1982). Cf. Goode v. State, 365 So.2d 381, 382-83, 384 (Fla. 1979) (two of three psychiatrists found no psychosis; no finding of mental mitigation required); Moody v. State, 418 So.2d 989, 995 (Fla. 1982) (only lay testimony as to defendant's belief he was told by God what to do; no finding of mental mitigation required); Martin v. State, 420 So.2d 581, 584 (Fla. 1982) (experts evenly divided; no finding of

(b) and that illness was a "controlling influence," Huckaby 343 So.2d at 33, on the defendant at the time of the crime, ibid.; Mines v. State, 390 So.2d at 337; cf. McCrae v. State, 395 So.2d 1145, 1149-50, 1154-55 (Fla. 1981) (jury's life recommendation overruled because it could have been based only on psychiatric testimony, but the psychiatrist could not state "with any degree of medical certainty" whether the mental illness was a controlling influence);[13] Adams v. State, 412 So.2d 850, 857 (Fla. 1982) (little or no causal relationship; no finding of mental mitigation required); Michael v. State, 437 So.2d 138, 141 (Fla. 1983) (no evidence of causation even though mental illness may have made defendant incompetent to stand trial; no finding of mental mitigation required); and

(c) the illness is a form of psychosis or its equivalent, in that there is settled opinion in the mental health community concerning the impairment of criminal capacity occasioned by such illness.[14]

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mental mitigation required); Johnson v. State, 442 So.2d 185, 189 (Fla. 1984) (same).

[13] In general the "life recommendation" cases proceed under a different standard -- whether the jury reasonably could have based its recommendation on mental mitigating circumstances --but McCrae makes it clear that the "proximate cause" element must be satisfied even in life recommendation cases. See Gardner v. State, 313 So.2d 675, 679 (Fla. 1975); Jones v. State, 332 So.2d 615, 617-19 (Fla. 1975); Chambers v. State, 339 So.2d 204, 205, 207-08 (Fla. 1976); Burch v. State, 343 So.2d 831, 833-34 (Fla. 1977); Shue v. State, 366 So.2d 387, 389-90 (Fla. 1978); Stevens v. State, 419 So.2d 1058, 1064 (Fla. 1982); Cannady v. State, 427 So.2d 723, 731-32 (Fla. 1983).

[14] The presence of psychosis thus compels the finding of mental mitigating circumstances, despite contrary findings by the trial judge: Huckaby v. State, supra (schizophrenia; brain damage causing violent behavior); Mines v. State, supra (paranoid schizophrena); Mann v. State, supra (psychotic depression; paranoid feelings of rage). Intoxication from alcohol and/or drugs at the time of the offense, however, does not compel the finding of mental mitigation: Songer v. State, 322 So.2d 481, 484 (Fla. 1975); Hall v. State, 403 So.2d 1321, 1324-25 (Fla. 1981); Buford v. State, 403 So.2d 943, 947, 953 (Fla. 1981); Combs v. State, 403 So.2d 418, 420, 421 (Fla. 1981); Hitchcock v. State, 413 So.2d 741, 747 (Fla. 1982); Simmons v. State, 419 So.2d 316, 319, 320 (Fla. 1982); Harich v. State, 437 So.2d 1082, 1084-85, 1086, 1087 (Fla. 1983) (despite uncontradicted testimony by psychologist that statutory mitigating circumstances were met); Randolph v. State, ___So.2d___, 8 F.L.W., S.C.O. 446 (11-18-83); Preston v. State, ___So.2d___, 9 F.L.W., S.C.O. 26, 28, 29 (1-19-84). Nor do personality or character disorders: Hargrave v. State, 366 So.2d 1, 5-6 (Fla. 1979); Stone v. State, 378 So.2d 765, 772, 773-74 (Fla. 1980); Lucas v. State, 376 So.2d 1149, 1153-54 (Fla. 1979); Sireci v. State, 399 So.2d 964, 971 (1981); Smith v. State, 407 So.2d 894, 899, 901-903 (Fla. 1983); Fitzpatrick v. State, 437 So.2d 1072, 1078, 1079 (Fla. 1983). While post-traumatic stress syndrome may yet rise to the level of psychosis

Accordingly, when the evidence tendered in support of mental mitigating circumstances satisfies these three conditions, mental mitigation must be found and given substantial weight, cf. Quince v. State, 414 So.2d at 186-187 ("great weight" need not be given to mental mitigation unless the trial judge was compelled to find it), in the balancing process of sentence determination. A trial judge's finding that there is no mental mitigating circumstances under such conditions will be set aside as a "palpable abuse of discretion." Pope v. State, 441 So.2d at 1076.

There can be little doubt that if the hospital-record-based evidence of Mr. Foster's history of mental illness and its impact upon his capacity to differentiate right from wrong had been presented, the finding of mental mitigating circumstances would have been compelled and substantial weight would have been required to be accorded these circumstances in the sentencing process. On the basis of Mr. Foster's complete medical history, there is certainly "overwhelming evidence" and "almost total agreement" with respect to his suffering mental illness, which included an incurable form of paranoid schizophrenia, acute and chronic alcohol-induced psychotic episodes, and psychotic organic brain syndrome. Moreover, these records and the expressed opinions of the psychiatrists who evaluated Mr. Foster before trial show that it is "highly probable" that Mr. Foster's illness impaired his capacity to appreciate the criminality of his conduct on the night of the homicide herein.

Had this evidence been presented, therefore, there would have been unequivocal evidence that Mr. Foster fit into that special category of persons whom the legislature has determined

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in Florida law, "[t]he evidence...is not yet clear enough" to compel the finding of a mental mitigating circumstance. Middleton v. State, 426 So.2d 548, 553 (Fla. 1983); accord, Pope v. State, 441 So.2d 1073, 1076 (Fla. 1984). Finally, when there is no evidence of "psychosis," "insanity," "mental illness," or "emotional disturbance," despite the occasional occurrence of bizarre behavior or the presence of "some disorder," the finding of mental mitigation is not compelled: Alvord v. State, 322 So.2d 533, 538-40 (Fla. 1975); Meeks v. State, 336 So.2d 1142, 1143, 1145 (Fla. 1976); LeDuc v. State, 365 So.2d 149, 150-52 (Fla. 1978); Goode v. State, 365 So.2d 381, 382-83, 384 (Fla. 1979); Jackson v. State, 366 So.2d 752,757 (Fla. 1978); Adams v. State, 412 So.2d 850, 857 (Fla. 1982); Moody v. State, 418 So.2d 989, 995 (Fla. 1982); King v. State, 436 So.2d 50, 55 (Fla. 1983); Mason v. State, 438 So.2d 374, 379 (Fla. 1983).

should not be sentenced to death: those whose mental illness rather than their bad character, has caused them to commit violent acts. Indeed, because

> 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 882, 885 (Fla. 1979), this Court has not yet sustained a death sentence where the mental mitigating evidence was so strong as to compel a finding of the mental mitigating circumstances. See, e.g., Huckaby v. State, supra; Mines v. State, supra; Mann v. State, supra.

Under these circumstances, the necessity of safeguarding proportionality compels the Court to look beyond the trial record and to hold that its determination on appeal that Mr. Foster's death sentence was proportionate, was erroneous. If the requirement of proportionality is, as Dixon articulated it, a requirement that equity prevail, the circumstances here cry out for the application of that equitable principle. Accordingly, the Court should find that there is a grave risk in Mr. Foster's case that his death sentence is disproportionate and should remand for a new sentencing proceeding in which the hospital-record-based evidence can be presented for the sentencers' consideration.

WHEREFORE, petitioner respectfully requests that this Honorable Court:

1. Immediately issue its order staying his execution;

2. Issue its order to show cause to respondent as to why the Court's writ should not be issued;

3. Issue the writ of habeas corpus;

4. Vacate petitioner's sentence of death; and/or

5. Grant such further relief as may be warranted by the justice of this cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by delivery to GREGORY C. SMITH, Assistant Attorney General, The Capitol, Tallahassee, Florida, 32302-2048, this 5th day of October, 1984.

Richard H. Burr III
Of Counsel

VERIFICATION

STATE OF FLORIDA)

COUNTY OF BRADFORD)

Before me, the undersigned authority, this day personally appeared CHARLES KENNETH FOSTER who, first being duly sworn, said that the allegations of the foregoing ORIGINAL APPLICATION are true and correct.

Charles Kenneth Foster
CHARLES KENNETH FOSTER

Sworn to and subscribed before me this 4th day of October, 1984.

Susan Carey.
NOTARY PUBLIC

Notary Public, State Of Florida At Large
My Commission Expires April 17, 1987
Bonded By SAFECO Insurance Company of America