IN THE

SUPREME COURT OF FLORIDA

Case Nos. 68,846 and 68,862

JAMES CARD, SR.,

Petitioner/Appellant,

v.

STATE OF FLORIDA

Respondent/Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE FIRST JUDICIAL CIRCUIT, IN AND FOR OKALOOSA COUNTY, FLORIDA (HON. FRED W. TURNER, PRESIDING BY APPOINTMENT), AND ON AN ORIGINAL PETITION FOR WRIT OF HABEAS CORPUS

INITIAL BRIEF OF PETITIONER/APPELLANT

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INTRODUCTION

This is an appeal from the trial court denial, without evidentiary hearing, of Defendant's Motion to Vacate Judgment and Sentence brought under Fla.R.Cr.Pr. 3.850, and further briefing of an Original Petition for Writ of Habeas Corpus. In this brief, the parties will be referred to as "Mr. Card" or "defendant" for the Defendant James Card, Sr., and "state" for Appellee State of Florida.

The following abbreviations will be used: "R" refers to the record on direct appeal, including the transcript of Mr. Card's trial; the Motion to Vacate Judgment and Sentence filed by Mr. Card in the Circuit Court of the fourteenth Judicial Circuit (Bay County, Florid) shall be referred to as the "Motion"; exhibits contained in the appendix submitted with the Motion shall be "Appendix [number designation]."

STATEMENT OF THE CASE

Mr. Card's trial was conducted January 18, 19, 20, 21, and 22, 1982, in Okaloosa County, after a change of venue from the Fourteenth Judicial Circuit. After a penalty phase hearing on January 22, 1982, the jury recommended death by a vote of 7-5. Mr. Card was convicted on all counts on January 28, 1982, and Judge Turner imposed a sentence of death.

Mr. Card appealed his convictions and sentences to the Florida Supreme Court. On June 4, 1984, this court affirmed;

rehearing was denied. Card v. State, 453 So.2d 17 (Fla. 1984). The facts of the crime as found by this Court are contained in that opinion. Factual matters relevant to this post-conviction action are set forth under each claim.

The Governor signed a death warrant on May 7, 1986. Execution was scheduled for June 4, 1986. Mr. Card filed a Motion to Vacate Judgment and Sentence on June 3, 1986, along with a Motion for Stay of Execution. Judge Turner heard argument, denied the Motion for Stay, and denied the 3.850 Motion, all without evidentiary hearing. An immediate Notice of Appeal to the Court was filed along with a Motion for Stay of Execution, which was granted. This Court has now established a briefing and argument schedule on Mr. Card's appeal, pursuant to which this initial brief of defendant Mr. Card is being filed.

ISSUE I

THE TRIAL AND SENTENCING OF MR. CARD BEFORE A COURT WHICH LACKED JURISDICTION VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ARTICLE V, AND ARTICLE I, SECTIONS 9 AND 16, FLORIDA CONSTITUTION

> If the provisions of the Constitution [are] not upheld when they pinch as well as when they comfort, they may as well be abandoned.

Home Building & Loan Assn. v. Blaisdell, 290 U.S. 398, 483 (1934).

I. INTRODUCTION

> Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what was previously clear seem doubtful, and before which even well settled principles of law will bend. What we have to do in this case is to find the meaning of some not very difficult words. . . .

Northern Securities Co. v. United States, 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting)

The "not very difficult words" of Article V define the source and limits of judicial power in this state. They left Judge Turner without the power to act in this case after it was transferred, and render void the convictions and the sentence of death. The Florida constitutional scheme affords the circuit

courts wide-ranging subject matter jurisdiction. "The circuit courts of the State of Florida are courts of general jurisdiction -- similar to the Court of King's Bench in England -- clothed with most generous powers under the Constitution, . . . " English v. McCrary, 348 So.2d 293, 297 (Fla. 1977), quoting, State ex. rel. B.F. Goodrich Co., et. al. v. Trammel, et. al., 140 Fla. 500, 192 So. 175 (1939). But that jurisdiction is not without geographical limits: "Even the Court of King's Bench in England . . . never imagined that it [had jurisdiction] in Scotland, Ireland, or the colonies." Phillips v. State ex. rel. Dorner, 155 Fla. 93, 77 So. 665 (Fla. 1918).

II. THE FACTS

Mr. Card was charged with first degree murder for a crime alleged to have occurred in Bay County, Florida. [R. 1-2]. He was indicted in Bay County, and it was there pretrial proceedings were held, the Honorable Fred W. Turner assigned to the case. [R. 9].

Trial counsel moved to change venue because of pre-trial publicity, and the motion was granted September 28, 1981. [R. 72-3; Tr. 212-50]. While the state suggested the case be moved to a County within the circuit, Judge Turner's order moved the venue of the case to Okaloosa County "pursuant to the provisions of Chapter 47, Florida Statutes." Bay County is in the Fourteenth Judicial Circuit, and Judge Turner is a judge of that circuit. Okaloosa County is in the First Judicial Circuit. Sec. 26.021, 26.22, Fla. Stat. (1981); Sec. 26.021, Fla. Stat. (1982

Supp.).

After transferring the case to the First Judicial Ciruit, Judge Turner continued to issue substantive orders in the case, finding Mr. Card competent to stand trial, and denying a number of defense motions. Trial was conducted in Okaloosa County, with jurors drawn from that circuit. After trial, Judge Turner transferred the file back to Bay County, and there imposed the sentence of death on Mr. Card. [R. 166-79]. At no time was Judge Turner appointed by the Chief Justice of the Florida Supreme Court to hear this case in the First Judicial Circuit.

This issue was not raised at trial or on appeal. On June 2, 1986, present counsel advised Chief Justice Boyd of the jurisdictional claim, and requested Judge Turner's appointment to hear the Rule 3.850 motion. That request was granted. A petition for a writ of habeas corpus was filed contemporaneously with this Court, raising the absence of jurisdiction as the sole claim, and the derivative claim of ineffective appellate counsel. On June 3, 1986, Judge Turner heard argument on this and other claims, and denied relief. Appeal was taken, and this Court entered a stay of execution and specifically requested the parties to brief the following issues:

> whether the non-assignment of Judge Turner to the First Judicial Circuit made all subsequent actions void, voidable or of no consequence. . . . [and]
>
> what effect, if any, the assignment of Judge Turner, nunc pro tunc, by the Chief Justice would have on the legality of the proceedings if there is a present impediment.

This brief follows.

III CIRCUIT COURTS HAVE NO POWER TO ACT ON CASES OUTSIDE THEIR CIRCUIT

Even though Judge Turner continued to hold court after transferring the case, every act after the venue change ordered September 18, 1981, was the equivalent of no act at all. The trappings of judicial process, a courtroom and robes, mean nothing without jurisdiction. The essential requirement of jurisdiction, "a court's power to hear and determine a controversy," Calhoun v. New Hampshire Ins. Co., 354 So.2d 882, 883 (Fla. 1978), resided not with Judge Turner after venue was transferred; it was vested in the First Judicial Circuit.

Circuit court jurisdiction is defined according to geographical areas.[1] Judge Turner initially had subject matter jurisdiction of this capital offense in the sense that it is among the general "class of cases" assigned circuit courts by

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[1]Mr. Card's claim does not rise and fall on whether it is defined as error affecting the subject matter jurisdiction of the Court. Even if this Court determines the issue should be analyzed solely as one of territorial jurisdiction, his conviction and sentence are void. Judge Turner lost the power to act on the case, over both the subject matter and parties, upon ordering venue to be transferred. Kern v. Kern, 309 So.2d 563 (Fla. 2d DCA 1975); University Federal Savings and Loan Assoc. v. Lightbourn, 201 So.2d 568 (Fla. 4th DCA 1967).

Article V, Section 2. Hatcher v. Dodd, 439 So.2d 977 (Fla. 3d DCA 1983), Florida Power & Light Co. v. Canal Authority, 423 So.2d 421 (Fla. 5th DCA 1982), but the constitution limits a circuit court's jurisdiction over the subject matter and parties to cases assigned to its own circuit. That clear and fundamental limitation was exceeded here.

No Florida court can act on cases beyond its territorial limits. The Florida Constitution restricts circuit court jurisdiction to the circuit within which it sits:

> The judicial power shall be vested in a supreme court, district courts of appeal, circuit courts and county courts. No other courts may be established by the state, any political subdivision or any municipality. The legislature shall, by general law, divide

Art. V, Sec. 1, Fla. Const. (1968).

The Constitution also provides that each circuit court shall serve its own judicial circuit, in Article V, Section 5, and in Section 7 mandates that a "circuit or county court may hold civil and criminal trials and hearings in any place within the territorial jurisdiction of the court. . ." Section 20 of the same article provides "there shall be judicial circuits" in the course of describing circuit court subject matter jurisdiction. These provisions "sharply define" circuit court jurisdiction, and leave no room for reading in a more expansive grant under accepted principles of constitutional construction. Ex Parte Cox, 44 Fla. 537, 33 So. 509 (Fla. 1902).

In Chapter 26, Florida Statutes, the legislature has by general law divided the state into circuits along county lines,

as constitutionally required. The lines reflect the sovereignty of circuit courts, which cannot be crossed by judges outside the circuit:

> Florida's constitution delegated the legislature with the mandatory responsibility of dividing the state into judicial circuits along county lines. See Art. V, Sec. 1, Fla. Const. (1968). Acting pursuant to the command of the constitution, the legislature divided the state into twenty judicial circuits along county lines. See Sec. 26.01, Fla. Stat. (1981). By the very act of providing for this type of division of the state into judicial circuits, the constitution clearly contemplated territorial limitations upon each circuit court. The geographical boundaries of a circuit court along county lines was designed and described with a definite object in view-to constrict the extent of a circuit court's operation and authority. . . .

Bd. of Trustees, Internal Improvement Trust Fund v. Mobil Oil Corp., 455 So.2d 412 (Fla. 2d DCA 1984), affirmed, 11 FLW 223, 225 (Fla. May 23, 1986). (emphasis supplied). That courts are limited to exercising power within their designated territory is nothing new. It is black letter law. 21 C.J.S. Courts Sec. 91 ("a court created within and for a particular territory within the state is limited in its jurisdiction to such territory."); Phillips v. State, 75 Fla. 93, 77 So. 665 (Fla.); See Hotchkiss v. Martin, 52 So.2d 113, 114 (Fla. 1951)

In the Mobil Oil case, supra, the Court held that the location of the land under litigation in a different circuit deprived the court of jurisdiction, in an in rem action. In distinguishing venue from jurisdiction issues, the Court held the territorial limitations of the constitution, in in rem actions at least, were an element of the definition of circuit court subject matter jurisdiction. The principle is analogous here.[2] In Game and Fresh Water Fish Comm. v. Williams, et. al., 28 So.2d 431 (Fla. 1940), the circuit court was found to be without jurisdiction to act on matters outside its territory.

Other cases attest to the unquestioned vitality and fundamental nature of this principle. For instance, in a habeas corpus case, the circuit court was found to lack jurisdiction to enter an order when nothing was pending in its circuit and the inmate resided outside its territory, in State v. Sampson, 297 So.2d 120 (Fla. 4th DCA 1974). See, McCall v. Adams, 116 Fla. 558, 156 So. 524 (Fla. 1934); State v. Clark, 4 So.2d 517 (Fla. 1941), and Gilman v. Morgan, 29 So.2d 372 (Fla. 1947) Phillips v. State, 75 Fla. 93, 77 So. 665 (1981) (circuit court limited to matters and res within territorial jurisdiction); See also, Ex

[2]This is not a case in which Mr. Card challenges the residency of a trial judge otherwise empowered to act within the circuit, as in State v. Schaag, 115 So.2d 783 (Fla. 1st DCA 1959).

Parte D'Alessandro, 143 So. 660 (Fla. 1930) ("The county judge is judge of the county court wherever established...") While the Constitution authorizes legislation permitting extraterritorial service of process and enforcement of judgments, Chapman v. Reddick, 41 Fla. 120, 25 So. 673 (1899), it does not permit courts of one circuit to act in cases residing in another, absent authorization.

IV. THE VENUE TRANSFER DEPRIVED JUDGE TURNER OF JURISDICTION, AND RENDERED ALL SUBSEQUENT ORDERS VOID OR OF NO CONSEQUENCE

The constitutional territorial scheme of the circuit courts discussed above supports the view of the numerous district courts which hold judges are without power to act after ordering a change of circuit venue.

A. The Change of Venue Order Vested Jurisdiction in the Transferee Court

Florida courts have uniformly held that a change of venue vests the subject matter jurisdiction of the case in the transferee court. The jurisdictional law is clear: upon a change of venue, the "transferee court becomes vested with jurisdiction over the cause as full and complete as if the action had been originally commenced in that court." Davis v. Florida Power Corp., 486 So.2d 34, 35 (Fla. 2d DCA 1986), citing Lightbourn, 201 So.2d at 570. The only dispute involves what residual authority over the case remains in the hands of the transferor court, and that dispute only concerns the period between when the order transferring venue is made and when the

transferee court receives the files of the case.

In Church of Scientology of California, Inc., v. Cazares, 401 So.2d 810 (Fla. 2d DCA 1981) the court held that once a judge made the decision to change the venue of the case to another circuit, it must enter an order doing so and could not retain jurisdiction over the case while merely transferring the trial. The Cazares sued the Church of Scientology and Mary Sue Hubbard in the circuit court in Pinellas County. The defendants moved for a change of venue. The circuit court ordered the trial held in Volusia County, in a separate circuit, but also ordered that jurisdiction of the case would remain in Pinellas. The Second District Court of Appeal vacated the order. "Once the court determined [that the case should be transferred], it had to enter an order transferring the action to a court of the same jurisdiction in another county. Sec. 47.141, Fla.Stat. (1979). The court's authority at that point was limited to entry of an order transferring jurisdiction." Id. Accord, Kern v. Kern, 309 So.2d 563 (Fla. 2d DCA 1975); University Federal Savings and Loan Association v. Lightbourn, 201 So.2d 568 (Fla. 4th DCA 1967).

Other districts hold that while change of venue does transfer jurisdiction of the case, the court retains residual authority to rule upon non-substantive matters until the transferee court has assumed jurisdiction, at which point the transferee court has complete control of the action. Florida Elections Commn. v. Smith, 354 So.2d 965 (Fla. 3d DCA 1978); Ven-Fuel v. Jacksonville Electric Authority, 332 So.2d 81 (Fla. 3d DCA 1975) (jurisdiction

vests with the transferee court upon receipt of the case file). The distinctions are irrelevant for the Card case since Judge Turner obviously ruled on substantive issues and made rulings after the transferee court obtained jurisdiction.

Two cases also apply the same rule to criminal cases. In Cole v. State, 280 So.2d 459 (Fla. 1st DCA 1973) and Talbot v. State, 283 So.2d 47 (Fla. 4th DCA 1973) the Fourth District Court of Appeal held that, where the venue of a case was moved upon motion of the defendant and ordered returned to the original circuit for sentencing upon completion of the trial, the order to return was improper and that the jurisdiction of the case remained in the circuit court in which the trial took place. "We conclude that once the cause was transferred to and actually tried in the Criminal Court of Record for Polk County, jurisdiction remained in that court for the purpose of adjudication and sentencing." 283 So.2d at 47. Accord, Wasley v. State, 254 So.2d 243 (Fla. 4th DCA 1971).

The rule established in these cases applied to Mr. Card's case as well. At the latest, once the clerk at the First Judicial Circuit Court in Okaloosa County received the case file for Mr. Card, the jurisdiction of the case vested in the First Judicial Circuit. Any order not issued by a judge of the First Judicial Circuit or a properly appointed temporary judge had no legal effect.

It is not an unusual principle that a single piece of paper means the difference between jurisdiction and its absence, or

that a circuit judge can deprive himself or herself of jurisdiction by its own order, though that is not its intent. While circuit courts have broad "inchoate" jurisdiction, it has no power over subject matter or parties until initially invoked. Hatcher v. Dodd, 439 So.2d 977 (Fla. 4th DCA 1983). Jurisdiction terminates by the same simple method. For instance, a trial court order is void when entered after the term of court or time for acting has run, Solomon v. State, 341 So.2d 537 (Fla. 2d DCA 1977) (change in sentence under Rule 3.800, Fla. R.Crim.P.), when a case has been voluntarily dismissed, Anderson v. Watson, 475 So.2d 1315 (Fla. 2d DCA 1985), when a judgment has been satisfied, State ex. rel. Seaboard Air Line Railroad Co. v. Kehoe, 133 So.2d 459 (Fla. 3d DCA 1961), when time for rehearing has expired, Shelby Mutual Ins. Co. of Shelby, Ohio v. Pearson, 236 So.2d 1 (Fla. 1970); State v. Pinto, 273 So.2d 408 (Fla. 3d DCA 1973); Nahoom v. Nahoom, 341 So.2d 257 (Fla. 2d DCA 1977); 13 Fla.Jur.2d Courts and Judges Sec. 31, and when a notice of appeal has been filed.

Even lawfully invoked jurisdiction has a stop. Judge Turner's jurisdiction over this case ended when he transferred venue.

V. JUDGE TURNER WAS WITHOUT POWER TO ACT ON THIS CASE AFTER THE CHANGE OF VENUE

The principle that circuit court jurisdiction is limited to cases pending within the respective circuits does not change when it is an individual circuit judge attempting to act on a case out

of his or her circuit. There is only one way for a circuit judge to have jurisdiction to act on a case outside the designated circuit, and that is to obtain the constitutionally required authority to do so.

Article V, Sec. 2 of the 1968 Florida Constitution sets out the only authority for judges to act outside their circuit, providing that the Chief Justice "shall have the power to assign justices or judges, to temporary duty in any court for which the judge is qualified and to delegate to a chief judge of a judicial circuit the power to assign judges for duty in his respective circuit."[3] This specific delineation of outhority in the constitution leaves no other method for conferring jurisdiction for a judge to act without his or her circuit. "Our state Constitution is a limitation upon power . . ." Prettyman v. Florida Real Estate Commn. ex. rel Branham, 109 So. 442, 445 (Fla. 1926), and the words used to express that limitation are to be given full effect: "[i]t may be assumed that, in drafting the instrument that is to serve as the basic framework of our government, the framers of our constitution selected each word to express precisely their intent." State ex. rel. Jones v. Wisehart, 245 So.2d 849, 851 (Fla. 1971).

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[3]The only instance in which a trial judge has been permitted to act outside his or her circuit without appointment is in the exercise of contempt power, as recognized in Cormack v. Coleman, 161 So. 844 (Fla. 1935).

> The principle is well established that, where the Constitution expressly provides the manner of doing a thing, it impliedly forbids its being done in a substantially different manner. Even though the Constitution does not in terms prohibit the doing of a thing in another manner, the fact that it has prescribed the manner in which the thing shall be done is itself a prohibition against a different manner of doing it. . . Therefore, when the Constitution prescribes the manner of doing an act, the manner prescribed is exclusive, . . .

Wisehart, 245 So.2d at 852, quoting Weinberger v. Board of Public Instruction, 93 Fla. 470, 112 So. 253, 256 (1927).

Wisehart interpreted the predecessor provision in the state constitution to vest authority exclusively in the chief justice to make temporary appointments.[4] "This section authorizes the chief justice . . . temporarily to assign circuit judges to judicial service on the Supreme Court, a District Court of Appeal, or another circuit court. . . ." Id. at 852. The 1972 revision of Article V did not alter this basic principle, but simply expanded the range of positions over which the Chief Justice has the power of assignment. The temporary assignment of a circuit judge to another circuit resides in the Chief Justice is plainly specified in of Article V, Section 2. Wisehart, 245 So.2d at 853; In re Assignment of Justices and Judges, 222 So.2d 22 (Fla. 1969). Given the exclusive authority

[4]Legislation enacted under our old Constitution permitted a judge of another circuit to act when (the only) judge of the proper circuit was absent. Hathcock v. Societe' Anonyme La Floridenne, et. al., 45 So. 22 (Fla. 1907).

of the section, it is clear Judge Turner was without authority to temporarily assign himself to be a judge of the First Judicial Circuit. Without the authority of the Chief Justice, he had no power to act as a judge of that circuit. The Courts have in numerous cases voided acts taken by judges when corresponding provisions of Section 2 have not been followed.

In Klosenberg v. Klosenberg, 419 So.2d 421 (Fla. 3d DCA 1982), the Court voided a contempt citation issued by a county judge in a domestic relations case when that judge had not been appointed by the chief judge of the circuit. In State ex. rel. Wesley Const. Co. v. O'Connell, 347 So.2d 442 (Fla. 3d DCA 1977), the court issued a writ of prohibition against a circuit judge whose temporary appointment had expired, and found all orders after that point to have been rendered without jurisdiction. Similarly, in Rose v. State, 9 FLW 689, withdrawn on rehearing, 451 So.2d 1067 (Fla. 5th DCA 1984), the court voided a conviction when a temporary assignment of a circuit judge had apparently ended on the second day of trial. On rehearing, the state provided the court a copy of the assignment order previously entered, and the opinion was withdrawn.

Where a three-judge panel was convened by a circuit court prior to the approval of the Chief Justice, the appellate court voided the decision of that panel, in Jennings Construction Corp. v. Metropolitan Dade County, 373 So.2d 79 (Fla. 3d DCA 1979). A 1972 Attorney General Opinion concluded a county judge was without authority to hold court any place but the county seat,

absent appointment. AGO 072-112 (Mar. 12, 1972). Compare In Re Guardianship of Bentley, 342 So.2d 1045 (Fla. 4th DCA 1977) (all judges of circuit can exercise jurisdiction over cases in circuit, regardless of division assignment).

Few reported cases address the legal consequences arising when a judge acts on a case outside of his or her circuit without being appointed to do so, and we have found none addressing the issue directly since the 1972 revision of article V. Decisions construing the authority of the governor to make such appointments under the preceding constitutional provision have held the absence of an appointment to be jurisdictional and to render any action void.

"Generally, in the absence of express authorization, a judge cannot make orders in a cause pending in a court outside the limits of his territorial jurisdiction . . ." 48A C.J.S. Sec. 73 JUDGES. The constitution which now expressly authorizes the Chief Justice to make such appointments previously permitted legislation authorizing the governor to do so. Such appointments have been upheld, and when made, liberally construed. In re Advisory Opinion to the Governor, 14 So.2d 663 (Fla. 1943); State ex. rel. Johnston v. Adkins, 197 So. 526 (Fla. 1940); Cormack v. Coleman, 161 So. 844 (Fla. 1935); McCall v. Adams, 156 So. 524 (Fla. 1934). The necessity for an appointment, and its jurisdictional nature, however, has been firmly established and enforced.

In Stearns v. Stearns, 143 So. 642 (Fla. 1932), this Court held that the lack of an appointment order rendered void a final

judgment entered by an out of circuit judge. The case arose under a disqualification statute permitting the transfer of a case to another circuit in the time when there was only on judge per circuit in Florida. Because no appointment order appeared in the record, the judgment of the succeeding judge was voided. This Court held:

> when an appeal is taken from an order made by a nonresident judge in a cause pending in which the nonresident judge was acting for the resident judge by the governor's order, the executive order authorizing a nonresident judge to act should be entered of record and appear in the record of the transcript on appeal, or be subsequently, by appropriate procedure, seasonably made a part of the record on appeal or the appeal will be dismissed. Forcum v. Symmes, 101 Fla. 1266, 133 So. 88.
>
> . . . Judge West resided in Escambia County, but he was not a judge of the court of record of that county. He was a judge of the circuit court in Escambia County.
>
> The transcript of the record here does not show that Judge C.M. Jones [disqualified Judge] has ever been accorded the legal right to determine whether he has been properly challenged under the 1925 statute, nor that he has acted thereon. Therefore it does not appear that the judge of the First judicial circuit, who signed the decree appealed from, had any authority to make such a decree in the cause which was pending in a court over which he had no jurisdiction to act except under special circumstances. The final decree appealed from being void, the appeal should be dismissed and the cause remanded tor further proceedings. . . .

Stearns, 143 So. at 644. See also, Theo. Hirsch Co. v. McDonald Furniture Co., 114 So. 517 (Fla. 1927).

Cases invoking the principle of "de facto" judicial

authority do not apply. They deal generally with the right of an official to hold an office already in existence, or "de jure," State ex. rel. Hawthorne v. Wisehart, 28 So.2d 539 (Fla. 1946), and with instances in which some appointment order has been entered State v. Himes, 184 So.2d 244 (Fla. 1938). Judge Turner held only a circuit judgeship in the Fourteenth Judicial Circuit and made no claim to a First Circuit office, and no order appointing him was ever entered.

The constitutional imperative is clear: circuit judges have power to hear and determine cases only in their circuit, absent appointment by the chief justice, and without such appointment, they are totally without jurisdiction to act.

B. The Conviction and Sentence are Unconstitutional

If a convicting court lacks jurisdiction, the conviction obviously violates the due process clause of the Fourteenth Amendment to the United States Constitution. In Lowery v. Estelle, 696 F.2d 333 (5th Cir. 1983), the petitioner had been convicted of robbery with firearms. The petitioner had been charged with this offense, but the court had reduced the charge to robbery by assault. It later revived the firearm charge. Petitioner claimed that this revivication was improper because the court lost subject matter jurisdiction over the charge when it reduced it. The Fifth Circuit concludes "An absence of jurisdiction in the convicting court is, as Lowrey claims, a basis for federal habeas corpus relief cognizable under the due

process clause". Branch v. Estelle, 631 F.2d 1233 (5th Cir. 1980); Bueno v. Beto, 458 F.2d 457, 459 (5th Cir.) cert. denied 409 U.S. 884 (1982); Murphy v. Beto, 4166 F.2d 98, 100 (5th Cir. 1969)." 696 F.2d at 337.

VI. LACK OF JURISDICTION IS NOT WAIVABLE, AND ACTS TAKEN SUBSEQUENT TO THE CHANGE OF VENUE ARE NULL VOID, OR OF NO CONSEQUENCE, NOT MERELY VOIDABLE

The cases set out in the preceeding sections have uniformly held that circuit judge action in cases pending in another circuit are null and void. The theoretical framework used by this Court for deciding whether acts are void or voidable provides a sound and reasonable basis for those decisions.

The cases distinguishing void acts from voidable errors are distinguishing rights personal to the party from the Court's power to hear a case. In Malone v. Meres, 109 So. 677 (Fla. 1926), this Court held that defects in the procedure used by a trial court did not render its judgment void, and set forth the analysis used to this day for determining whether acts are void or voidable. The Court held the existence of subject matter jurisdiction, and jurisdiction over the parties, was sufficient to render a trial court's decree immune from collateral attack. "'Jurisdiction', in the strict meaning of the term, as appled to judicial officers and tribunals, means no more than the power lawfully existing to hear and determine a cause. . . ." Id. at 683. It distinguished rights personal to the parties:

> Jurisdiction does not relate to the right of the parties, as between each other, but to thepower of the court. The question of its existence is an abstract inquiry, not involving the existence of an equity to be enforced, nor the right of the plaintiff to avail himself of it if it exists. It precedes these questions, and a decision upholding the jurisdiction of the court is entirely consistent with a denial of any equity, either in the plaintiff or in any one else.

Malone, 109 So. at 684.

Where a court acts in the absence of jurisdiction, the remedy is clear: the court's acts are null and void, and can be collaterally attacked at any time.

> Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and, whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void.

Id. at 683. Accord, Caudell v. Leventis, 43 So.2d 833 (Fla. 1950).

The difference in the law governing waiver of rights personal to the defendant and claims directed to the Court's power to hear a case are also exemplified by this Court's decisions in two recent cases, King v. State, 426 So.2d 12 (Fla. 1983), and Tucker v. State, 459 So.2d 306 (Fla. 1984). In King, the Court held the failure to charge a juvenile by information, instead charging by indictment, was not a jurisdictional bar but a "right" and "this right, as with all other rights, may be waived if not asserted in a timely fashion." Id. at 14. In

Tucker, this Court held the failure of an information to allege venue did not pose a jurisdictional bar to the conviction because venue is a privilege, and does not address the power of the Court to act. Treating the issue as one involving the sufficiency of an indictment, the Court held:

> Nor is the allegation of venue properly considered to be a jurisdictional requisite, as we held in Black. The issue is, as the Third District noted, solely one of venue, not affecting the power of the court to hear that case but rather addressing the propriety of that particular trial court to hear that particular case. This Court, inn the same year it decided Black, discussed the difference between the two concepts in Lane v. State, 388 So.2d 1022, 1026 (Fla. 1980).
>
> > Venue should not be confused with jurisdiction although some of the original common law cases appear to concern venue. . . . Jurisdiction is the very power of the state to exert the influence of its courts over a criminal defendant, and it cannot be waived. Venue on the other hand is merely a privilege which may be waived or changed under certain circumstances.

Tucker, 459 So.2d at 308.

The absence of subject matter jurisdiction over Mr. Card's case after its transfer to another circuit render his conviction and sentence void. The cases holding lack of subject matter jurisdiction voids a conviction are legion, and the following are illustrative. Malone v. Meres, supra; Waters v. State, 354 So.2d 1277 (Fla. 2d DCA 1978); DiCaprio v. State, 352 So.2d 78b (Fla. 4th DCA 1977); Steel-Den of America v. Roof Structures, Inc., 438 So.2d 882 (Fla. 4th DCA 1983); Schueren v. State, 402 So.2d 570

(Fla. 1st DCA 1981); Christopher v. State, 397 So.2d 406 (Fla. 5th DCA 1981).

Jurisdiction cannot be "conferred by consent, acquiescence or waiver", In Interest of G.L.T., 352 So.2d 79, 80 (Fla. 4th DCA 1977), Worley v. State, 396 So.2d 1153, 1154 (Fla. 2d DCA 1981), and lack of jurisdiction is fundamental error which can be raised at any time, "before trial, after trial, or by habeas corpus." State v. Gray, 435 So.2d 816, 818 (Fla. 1983).

Even if this Court views the trial court's attempt to exercise power in a case not pending in his circuit as distinct from subject matter jurisdiction, the cases cited in the previous sections, which void extra-circuit judgments entered without appointment authority, require reversal here. See, e.g. Phillips, 77 So. at 665 (actions outside territory as nullity); Kenn[5]

Voidability principles apply only when some order has been entered, but is attacked because of some technical defect. In such cases, the courts have permitted the order to be amended. See State ex. rel. Datov Himes, 184 So. 244 (Fla. 1938), State ex. rel. Johnston v. Adkins, 197 So. 526 (Fla. 1940).

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[5]The analogous principle rendering the conviction void is illustrated by cases holding that while a court may have "inchoate" jurisdiction, it is without power until the proper pleading is filed. Krivitsky v. Nye, 19 So.2d 563, 568 (Fla. 1944). Hatcher v. Dodd, 439 So.2d 977 (Fla. 3d DCA 1983); Fla. Power & Light, Supra. While the Court could have had jurisdiction, it was never provided the authority. Its judgment is no less void.

King and Haddock v. State, 129 Fla. 701, 176 So. 782 relied on by the state, are distinguishable. The circuit court in King did have jurisdiction, over both felonies and juveniles, so the case did not present a jurisdictional bar. In Haddock, a transfer order had been entered, unlike this case where no order was entered, and the only issue was its sufficiency. Such errors are voidable, not void.[6]

The court can reach this issue through the original habeas petition or the Rule 3.850 motion.[7]

VII. THE ABSENCE OF JURISDICTION OF THE TRIAL COURT CANNOT BE CURED THROUGH THE ENTRY OF AN ORDER NUNC PRO TUNC

The purpose of an order nunc pro tunc lies solely in the correction of the record to ensure that it accurately reflects that which has actually occurred in prior proceedings. It cannot be used to make up lost jurisdictional ground. Jurisdictional errors, being of a fundamental, substantive nature, do not fall within the ambit of correction through an entry nunc pro tunc. "The power to make a nunc pro tunc order should be exercised

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[6]The state's contention Mr. Card's request for a change of venue waives this claim is answered by the discussion above and by the firmly established principle that a defendant cannot be forced to waive one constitutional right -- to a fair trial. Garrity v. New Jersey, 385 U.S. 493 (1967); Simmons v. United States, 390 U.S. 377 (1968).

[7]This claim is also raised as ineffective assistance of trial and appellate counsel, to the extent this Court holds it should have been raised earlier.

cautiously and as justice requires. Its office is to speak what has been done, not to create; it cannot supply a jurisdictional defect by requiring something to be done which has not been done." State v. Hooper, 364 S.W.2d 542, 543 (Mo. 1982) (emphasis supplied). Accord, Emmons v. Stillwell, 156 A.2d 54, 56 (N.J. 1945); Order of Assignment - Nunc Pro Tunc, 1946 Op. Att'y Gen. Fla. 046-188 (May 3, 1946).

Only where a court has actually entered an order which, through inadvertance or mistake, was omitted from the record of action, may an order nunc pro tunc be entered so that the record will properly reflect the entry of that order. Applestein v. Alberring, 291 So.2d 207 (Fla. 3d DCA 1974); Freeman v. Blackburn, 92 So.2d 262 (Fla. 1957). The complete omission by a court of an order which it might or ought to have made, however, cannot afterward be corrected nunc pro tunc. In Nichols v. Walton, 90 So. 157, 158 (Fla. 1921), for example, this Court upheld as proper the entry by the trial judge of an order nunc pro tunc which merely effectuated an order actually made by him but inadvertantly omitted from the minutes of the court. On the other hand, in Estate of Riha v. Harding, 369 So.2d 369 (Fla. 2d DCA 1979), the entry by the trial court of an order nunc pro tunc was held to be reversible error where no prior order requiring correction had been made.

In Sawyer v. State, 113 So. 736 (Fla. 1927), this Court further clarified the parameters within which corrections to a record may be effected:

> The general rule is that formal and clerical amendments may be made at any time, but that substantial or judicial amendments or changes in a judgment cannot be made after the expiration of the term. If anything has been omitted from a judgment or order which is necessarily or properly a part of it and which was intended and understood to be a part of it but failed to be incorporated in it through negligence or inadvertence of the court or the clerk, the omission may be supplied by an amendment or correction after the term. But if the proposed amendment is a mere afterthought, something not really intended and pronounced, it cannot after the expiration of the term be brought in by way of amendment nunc pro tunc or otherwise.

Sawyer, 113 So. 736, 738.

No order was entered by the judge in the instant case which would transfer venue to a court within which he would have retained jurisdiction to conduct the trial. Moreover, the erroneous change of venue to a court in which the judge lacked jurisdiction to try the case may not now be cured through the entry of an order nunc pro tunc to retroactively endow the trial judge with jurisdiction which he never had. The attempt by the trial judge to continue the preside over the case after transferring the case to a court outside his jurisdiction was void ab initio, since the judge was without authority to unilaterally expand his own territorial jurisdiction. Only the Chief Justice of the Florida Supreme Court could have entered an order authorizing the trial judge to proceed in a court outside his jurisdiction. Wisehart, supra. To attempt to do so now would violate the mandate of Article V, Sec. 2, of the Florida Constitution and its clear implication that judicial assignment

must precede the power to act. No such order was entered, and none can now be made, else the constitutional provision be rendered inoperative.

In the case at bar, to enter an order nunc pro tunc for the purpose of retroactively granting jurisdiction to the trial judge would be to sanction the illegal, unilateral extension of his judicial authority beyond constitutionally prescribed limits, without recourse by the defendant. Because the trial judge's actions were not within the scope of his jurisdictional authority, an order nunc pro tunc cannot serve to validate that order. See Fiehe v. R.E. Householder Co., 125 So. 2 (Fla. 1929).

Although the jurisdictional issue does not exclusively concern rights personal to the defendant, any attempt to retroactively apply jurisdiction to the trial court through the entry of an order nunc pro tunc would violate the right of the defendant to due process of law under the Fourteenth Amendment to the United States Constitution and Article I, Sections 9 and 16, Florida Constitution. Such a retroactive application of jurisdiction by judicial mandate would be no different in its consequences than would be the retroactive application of jurisdiction by legislative mandate, which this court has held is constitutionally prohibited.

The state and federal courts have been consistently reluctant to modify the rights of a citizen retroactively, whether through a change in statute, constitutional amendments, or official rules. In Rio Vista Hotel & Imp. v. Belle Meade Dev.

Corp., 182 So. 417 (Fla.), this Court held the legislature could not retroactively create jurisdiction where none previously existed. Two Florida Supreme Court cases make it clear that unless there is a demonstration of clear legislative intent, a statute will not be applied retroactively. In Trustees of Tufts College v. Triple R. Ranch, 275 So.2d 521 (Fla. 1973) this Court held that the statute in question should not have retrospective application. This Court reasoned that the bias against retroactive legislation is deeply rooted in the Anlo-American law, and that a new state of law ought to affect the future, not the past. Holding that statute will not be construed as prospective unless the intention of the legislature to give it a retroactive effect is clear and explicit, this Court went on to state that a legislative act is invalid if vested rights are destroyed or adversely affected, or when a new obligation or duty is created or imposed, or an additional disability is established in connection with transactions or considerations previously had.

Eight years later, in Seddon v. Harpster, 403 So.2d (Fla. 1981) this court reiterated this same principle, holding that it could find no basis for giving retroactive application to a certain statute. The Seddon case, therefore, stands for the proposition that there exists a presumption against retroactive application of a law in the absence of an express manifestation of legislative intent to the contrary.

In 1983, this Court held that a constitutional amendment

that did not clearly state that it would be applied retroactively would be given prospective effect only. Stating the well-established rule of construction that in the absence of clear legislative expression to the contrary, a law is presumed to operate prospectively, this Court ruled that an amendment should be treated in the same manner. State v. Lavazzoli, 434 So.2d 321 (Fla. 1983).

In Buskirk v. Suddath of South Florida, Inc., 400 So.2d 810 (Fla. 2d DCA 1981) the court held that the Florida Supreme Court's enactment of the Rules of Judicial Administration should not be given a retroactive effect. The court stated that a law is presumed to have only prospective effect absent clear intent to the contrary, and since no clear intent mandating retroactive application appears in the rules, they should be given prospective effect only.

"Retroactivity, even where permissible, is not favored by the courts except under the clearest mandate." Isthmain Lines, Inc. v. Seaboard Coast Line Railroad Co., 363 F.Supp. 156 (M.D. Fla. 1973). In general, retroactive effect is not given to legislation which would impinge on the substantive rights of an individual. "[N]ew statutes that affect antecedent rights will not apply retroactively while those that affect only procedure or remedy will apply retroactively." U.S. v. Fernandez-Toledo, 749 F.2d 703, 705 (11th Cir. 1985); see, e.g., U.S. v. Vanella, 619 F.2d 384, 385-6 (5th Cir. 1980). Similarly, the substantive right of the defendant to due process of law should not be

violated by retroactively creating jurisdiction through the entry of an order nunc pro tunc.

This Court's duty is as clear as the constitution which controls. The convictions and sentences, obtained in the complete absence of jurisdiction, must be vacated. The integrity of Article V, and the democratic principle that the Constitution and not convenience controls the courts, is at stake.

ISSUE II

MR. CARD WAS DEPRIVED OF A PRETRIAL COMPETENCY HEARING WHEN REASONABLE GROUNDS EXISTED TO BELIEVE HE WAS NOT COMPETENT TO STAND TRIAL, RENDERING HIS CONVICTIONS AND SENTENCES VIOLATIVE OF DUE PROCESS, THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION, ARTICLE I, SECTION 9, FLORIDA CONSTITUTION

Deprivation of Competency Hearing

Hill v. State, 473 So.2d 1253 (Fla. 1985), is a textbook case vividly describing the Constitutional necessity for a trial court to hold a hearing on the issue of competency when doubt is presented. It settles the question of the propriety of raising competency questions in post-conviction: the issue is what post-conviction relief is all about. See Bishop v. United States, 350 U.S. 961 (1956); Pate v. Robinson, 383 U.S. 375 (1966) (issue of competency at trial raised during trial, and relief granted in post-conviction.)

A defendant has a constitutional due process right to a competency hearing in the trial court during the initial trial proceedings: "The significance of the Robinson decision is that it places the burden on the trial court, on its own motion, to make an inquiry into and hold a hearing on the competency of the defendant when there is evidence that raises questions as to that competence." Hill, 473 So.2d at 1255; Mason v. State, No. 67,101 (Fla. Jun. 12, 1986). When the trial court should have conducted a competency hearing, and failed to do so, due process is violated, and the ground cannot be made up:

The question remains whether petitioner's due

> process rights would be adequately protected by remanding the case now for a psychiatric examination aimed at establishing whether petitioner was in fact competent to stand trial in 1969. Given the inherent difficulties of such a nunc pro tunc determination under the most favorable circumstances, see Pate v. Robinson, 383 U.S., at 386-87; Dusky v. United States, 362 U.S., at 403, we cannot conclude that such a procedure would be adequate here.

Drope, 420 U.S. 183. On the "right to a hearing ab initio" issue, it matters not whether the defendant was in fact incompetent, and that need not be decided. The violation is the failure to conduct a hearing when one should have been conducted: "the failure to do so deprive[s a defendant] of the right to a fair trial." Hill, 473 So.2d at 1255. This court recently reaffirmed Hill in State v. W.C.S., 11 FLW 131 (Fla. Mar. 27, 1986). There now can be no question a defendant does not have to prove, in post-conviction, that he was incompetent at trial to obtain relief; only that doubt as to competency should have been apparent to the trial court:

> "a hearing to determine whether respondent was competent at the time he was tried cannot be held retroactively because respondent's 'due process rights would not be adequately protected' under such a procedure. Drope v. Missouri, 420 U.S. 162, 183 (1975). Such a hearing must be conducted contemporaneously with the trial. Pate v. Robinson, 383 U.S. 375, 387 (1966)."

Id. at 131.

Pate teaches three factors are relevant to determine whether a violation of its mandate has occurred, focusing on the trial court's awareness of:

1. evidence of the defendant's irrational behavior;

2. his demeanor at trial; and

3. any prior medical opinion on his competency to stand trial.

Drope v. Missouri, 420 U.S. 162, 180 (1975); Thompson v. Wainwright, No. 84-5815 (11th Cir. Apr. 10, 1986).

Florida Rule of Criminal Procedure 3.211 lists indicia of incompetency. While there are "no final or immutable signs which invariably indicate the need for further inquiry," Drope, 420 U.S. at 162, the Florida list is a good starting point:

> (1) In considering the issue of competence to stand trial, the examining experts should consider and include in their report, but are not limited to, an analysis of the mental condition of the defendant as it affects each of the following factors:
>
> (i) Defendant's appreciation of the charges;
>
> (ii) Defendant's appreciation of the range and nature of possible penalties;
>
> (iii) Defendant's understanding of the adversary nature of the legal process;
>
> * * (iv) Defendant's capacity to disclose to attorney pertinent facts surrounding the alleged offense;
>
> * * (v) Defendant's ability to relate to attorney;
>
> * * (vi) Defendant's ability to assist attorney in planning defense;
>
> * * (vii) Defendant's capacity to realistically challenge prosecution witnesses;
>
> * * (viii) Defendant's ability to manifest appropriate courtroom behavior;
>
> (ix) Defendant's capacity to testify relevantly;
>
> * * (x) Defendant's motivation to help himself in the legal process;
>
> * * (xi) Defendant's capacity to cope with the stress of incarceration prior to trial.

Rule 3.211. The asterisks reflect factors which were lacking in Mr. Card at different points prior to trial, from the facts actually apparent to the trial court. But the trial court found Mr. Card competent prior to receiving the report of a forensic psychiatrist he appointed, a report raising serious competency concerns. While the psychologists opined Mr. Card was competent, that legal question cannot be abdicated to psychologists. The description of Mr. Card's mental status provided by the mental health experts as the basis for their opinion raised sufficient evidence of erratic and bizarre behavior by Mr. Card to require a hearing, and are set forth in detail in the 3.850 Motion, pages 3 - 13. They include opinions of his possible "schizophrenic" and paranoia, among others. Dr. Berland, one of the psychologists who examined Mr. Card pre-trial, now concludes from evidence he never before considered that "there is a substantial possibility that he [Mr. Card] declined sufficiently between [the initial examination] and his trial in January, 1982 to render him incompetent for trial." (Appendix 50, 3.850 motion, pp. 10-11). Sufficient evidence of incompetency and the inadequacy of the pre-trial evaluation now exists to require a 3.850 hearing. Mason, Slip. op. at 4-6. Compare James v. State, Case No. 68,476 (Fla. Jun. 13, 1986). It was clear Mr. Card's relationship with his attorney deteriorated (along with his mental condition) as the months in custody ground by, attorney-client communication is the central consideration of competency determiniations, and is esential to a fair trial. But there is more here. Compare,

James, supra. Evidence was available to show the breakdown was not because Mr. Card was a difficult client. He presented very real and identifiable symptoms of a mental illness directly related to his ability to stand trial. Incompetency need not be proven in order to obtain a hearing on it, else the Constitution is violated. Pate. The required hearing is to determine competency. No hearing has been had, and serious competency questions existed. A 3.850 hearing is mandatory. Jones v. State, 478 So.2d 346 (Fla. 1985).

ISSUE III

MR. CARD WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT AND PENALTY PHASES OF TRIAL CONTRARY TO THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, AND THE TRIAL COURT ERRED IN REFUSING TO GRANT AN EVIDENTIARY HEARING.

A. Background and Guilt Phase

On Friday, January 15, 1982 at 3:00 p.m., just two days before the capital trial of James Card, his counsel notified the court that he and co-counsel were totally unprepared to defend their client.

> Judge, on James Card, this is going to make you angry, but I have something that I have got to tell you. I am not ready to defend that man. I have discussed it with Mr. Greene, and I have filed an additional Motion for Continuance in this case. Mr. Greene has agreed with me that we are not prepared to defend him in this case.

(R. 387).

On January 15, 1982, two days before trial counsel had yet to even examine the state's discovery, notwithstanding discovery was made available by the state on August 11, 1981, five months earlier (R. 19-24). Two days before trial counsel had failed to take critical depositions and had conducted no investigation. Because counsel ignored the case until two days before trial, crucial witnesses were not subpoenaed. The case was admittedly unprepared. Counsels' performance exhibited a reckless disregard for the client tantamount to professional malpractice.

Two days before trial counsel notifed the court:

> I am going to have to say that in my opinion I would not be able to competently represent him at the trial if it goes Monday. As for the reasons as to why I am not prepared up to this time, I will be happy to go into those with you at a later date, but I have not had time this week to properly prepare a Motion for Continuance.
>
> As you know, we have tried and tried and have been taking depositions in double shifts since the first of the year. Mr. Greene has taken some; I have taken probably more than half. I received the first of those transcripts of those depositions late Friday afternoon, a week last. They have been bringing them to me all of this week while we have been fooling with this case. I have not had an opportunity to review any of the depositions. Only today Mr. Greene asked my secretary to take the file up to him to review it. He is less familiar, in my opinion, with the case than I am. There are witnesses that my client desires that I talk to that have not been contacted yet; there are witnesses that I feel I should talk to that have not been contacted yet. And, I want to tell the court that if this case, you know, when this case is called Monday morning, when you ask if the state is ready and they say yes, and when you ask me if I am ready, I am going to have to say no; and whatever the consequences of that are, you know, if I lose my job or Virgil fires me or whatever I'm just going to have to stick with that. .. I don't believe that at this point that I would stand up very well at all to Mr. Card's ACLU lawyer questioning me as to whether or not this case was properly prepared for defense. I just really don't believe it has been done. . . And I think that if I had a day or two I could sit down and list what I think needs to be done, but I am -- from what I have learned about it, I will represent to you that I am in an almost state of confusion as to what I anticipate the testimony is going to be.

(R. 387-390).

This was not the first admission of counsels' inability to understand the case or prepare for trial. Three months prior to

the January 15, 1982 confession of incompetence counsel admitted to not being prepared. On September 28, 1981, two weeks prior to the then trial date, counsel moved for a continuance admitting that he did not yet know what depositions to take. At this point, two weeks before trial, there was a total failure of preparation (R. 236-241). Considering counsel's lack of preparation, the court set the trial for January 18, 1982 (R. 91).

On December 18, 1981, six months after assuming representation defense counsel again moved for a continuance, again claiming a failure of preparation. Again counsel told the court they were incapable of properly defending their client (R. 114).

Less than one month before trial defense counsel had yet to begin to investigate the case or prepare a defense. (Indeed, on November 13, 1981, the defendant filed a motion to dismiss his counsel for failure to prepare his case and to interview witnesses (R. 101-02).)

On December 18, 1981, six months after assuming representation and less than one month before trial, counsel admitted that at least twenty-five depositions still needed to be taken. Counsel did not even know what was in the state's discovery. Both counsel did absolutely nothing for six months (R. 286-288).

> Now Judge, we presently have a motion for continuance if I can find that motion. The most recent notice of taking deposition have

> six police officers scheduled for January 5th, three police officers the 6th, seven on the 18th, six on the 19th, one on the 20th in Tallahassee, three on the 21st in Pensacola and we have yet to take the deposition of the persons for the motions today that. . . . The depositions as now scheduled, I don't believe we could prepare to try this case on January 18th. I would [sic] that you set it over.

(R. 286-88). With the trial set for January 18, 1982 it is reprehensible that counsel would be setting depositions, after trial, on January 19, 20 and 21, 1982.

The court denied the motion to continue (R. 119).

Faced with the fact that they would have to go to trial on January 18, 1982 defense counsel frantically began to set depositions for January, 1982. Counsel had set forty-two depositions for November and December, of which only ten were taken (Ex. 36).

On the 21st of December, 1981, Mr. Greene, defense co-counsel to Mr. Ingles, set twenty-three depositions for January 4, 1982 through January 8, 1982, one week before trial. Amongst those to be deposed were key prosecution witnesses, Joe Newington, Frank McKeithen and Vicky Sue Elrod (Ex. 35). Vicky Sue Elrod was the individual defendant allegedly made statements to. These depositions were set eight months after defendant's arrest.

In a four day period between January 4, 1982 and January 8, 1982 counsel took twenty-one depositions, many of which were not transcribed or available for trial (Ex. 35 & 37). As Mr. Ingles stated two days before trial, "I have not had an opportunity to

review any of the depositions. Only today Mr. Greene asked my secretary to take the file up to him to review it. He is less familiar, in my opinion, with the case than I am" (R. 287).

Worse than the tardiness of the deposition taking is the fact that depositions of many critical witnesses were never taken.

I. The Trial

Notwithstanding an absolute failure to take important depositions, investigate facts, interview witnesses, review statements given to the police, reports of physical evidence, view the physical evidence and other material made available by the state, and acquire discovery not yet supplied by the state, and only two days after Mr. Ingles had told the court that counsel was totally unprepared, defense counsel, beyond all propriety, notified the court that it was prepared to go forward with the trial (R. 466). The announcement was made by Mr. Greene, who had requested the continuance only two days before trial.

Counsel, totally unprepared to undertake a trial, and fully incompetent to try any capital case also exhibited disloyalty toward their client. According to the family, the defendant's counsel, the night before trial, instead of preparing for the case told them that Mr. Card was "guilty as sin" and doubted whether they could do anything for him. (Ex. 28). Counsel told defendant's sister "that Jimmy was guilty and going to fry so there was no sense in checking into any witnesses" (Ex. 27).

At trial, Counsel demonstrated ample proof supporting their admission of a total lack of preparedness and competence in trying a capital case.

Counsel knew nothing about the case. Having conducted no investigation or preparation, and having failed to even look at the state's discovery, they forfeited the opportunity to find and subpoena witnesses absolutely crucial to the defense's case. The failure to attempt to find these witnesses, other individuals unknown to Mr. Card, who planned to rob the Western Union office, resulted in the hearsay exclusion of testimony concerning their plot. The jury never heard that others had planned to commit the robbery, or that one of the conspirators carried a knife. As will be shown shortly, this Court dealt squarely with the issue on direct appeal.

Counsel's failure to look at and analyze documents, laboratory tests, statements of witnesses and others involved in the investigation, and physical evidence made available through discovery resulted in a failure to recognize and present a wealth of exculpatory evidence sufficient to have resulted in the exoneration of Mr. Card.

Had defense counsel examined the material it received from the state in August it could have proved, among many other things to be discussed, that the clothes Mr. Card wore that day never had blood on them, much less the victim's, that the blood found in his car <u>was not</u> the victims, but his own son's, that much of the state's other physical evidence, such as hair found on the

victim's chest, not the defendant's was exculpatory, and that the state's key witness was engaged in criminal activity having had every reason to commit perjury.

a. Failure to Subpoena Witnesses

The most significant evidence of defense counsels' prejudicial misconduct is that they failed to subpoena crucial witnesses for trial. Rather than issuing subpoenas for the correct witnesses counsel attempted to put on the testimony of one Camille Cardwell, an individual who had provided police in June with information she had heard close friends of hers planning to rob what appeared to be the Western Union office.

This witness was not contacted until January 17, 1982, one day before trial, although her statement had been given to police in June, 1981 and delivered to defense counsel in August. This witness was not ordered to court until the very day of trial, January 18, 1982, when counsel made an oral motion to have her brought to court. This is clear proof that counsel did not discover her statement until the day before trial.

Any competent counsel who would have seen Cardwell's statement would have known immediately that he had to find and subpoena the Wilmots and John Green, the individuals Cardwell said planned the robbery (or if they could not be found be able demonstrate their unavailability to satisfy the hearsay rule exception). Defense counsel did not, because they did not review the discovery, did not see this report, and did not know of these individuals until the day before trial. Their failure to

subpoena the Wilmots and Green presented defense counsel with a hearsay problem concerning Cardwell's testimony. Because of their negligence counsel now had to find another way to introduce this critical evidence and their ploy was to attempt to shift their negligence to the police. It was their position that this was not a hearsay issue, that the testimony was only being offered to prove that the police did not do their job in investigating all leads. Instead of confessing to their negligence, indeed, reminding the judge they had admitted to being UTTERLY unprepared just two days earlier, defense counsel attempted the theory that it was the police who hadn't done their job.

This Court, in Card v. State 453 So.2d 17 (Fla. 1984) unaware of counsels' failure to prepare, underscored the damage done to Mr. Card's defense by affirming the trial court's exclusion of this evidence.

> The appellant also contends that the testimony was admissible to impeach the credibility of the police investigations. We are unable to find merit in that contention. The investigators have not denied receiving the information from Camille Cardwell. The appellant has offered no plausible demonstration of a failure to investigate the crime.
>
> In the alternative, the appellant argues that if the proffered testimony is hearsay, it should have been admitted as a declaration against penal interest. Section 90.804(2)(c), Florida Statutes (1981), requires that in order to utilize this exception to the hearsay rule, the appellant must demonstrate that the declarant is unavailable to testify as a witness. He has

not done so in this case.

Appellant cannot demonstrate in this pleading the unavailability of the witnesses because appellants' lawyers failed to try. Defense counsel did not subpoena the declarants because defense counsel did not know of the declarants' existence until the day before trial. Defense counsels' "theory" was not based on strategy or defense tactics. Their "legal theory" was in actuality a cover-up for an outrageous lack of preparedness of this case. Counsels' ineffectiveness in failing to issue subpoenas a direct result of their callous disregard for preparation, caused irreparable prejudice to the defendant.

b. Failure to obtain exculpatory evidence

The prejudice to the defendant from counsels' failure to review the state's discovery and prepare a defense was compounded because counsel never utilized the wealth of exculpatory and impeaching evidence that existed in this case.

Counsel proved they made no attempt to view any physical evidence or read any laboratory reports before trial by demonstrating that they had discovered, by accident, during trial, that some of the state's evidence happened to be exculpatory. They discovered the exculpatory nature of the evidence when they learned the state was not going to introduce it. Defense counsel, having never looked at the laboratory test results had no idea and still do not, that indeed, most of the state's evidence was exculpatory. Exculpatory evidence not sufficient to warrant exoneration, was never presented to the

jury.

1. Mr. Card's clothes - lack of any trace of blood

The clothes Mr. Card wore on June 3, 1981 were extraordinarily important pieces of physical evidence. The blue jeans and blue tee shirt he wore on June 3, 1981, were supposedly blood stained, presumably by the victim's blood. Footprints found at the scene of the robbery and at the scene of the killing were presumably made by Mr. Card's shoes while he allegedly committed the crimes. The clothes Mr. Card was wearing June 3, 1981 were seized by police, under warrant, on June 8, 1981. The FDLE special mobile lab technicians made plaster casts of the footprints found at the scene of the killing, took pictures of the footprints at the office, and tested Mr. Card's clothes for the presence of the victim's blood. This evidence was to have formed the state's case in identifying Mr. Card, placing him at the scenes, and proving Mr. Card had killed the victim by showing the victim's blood on Mr. Card's clothing.

During the examination of Jan Showalter, an FDLE crime laboratory analyst, it was revealed that tests run by the FDLE disclosed that there had been no blood on Mr. Card's clothes. (R. 864). Indeed, there had never been blood on the clothes according to the lab test. (Appendix 19). Defense counsel, discovering that the state did not intend to introduce the clothes (obviously) (and other pieces of evidence which were also to have shown the presence of the victim's blood), hastily asked the court for time to garner the evidence. It was only then,

after witnesses had already testified to blood on the defendant's clothes, that defense counsel realized the exculpatory nature of the clothes. . .too late to use it effectively.

2. The Interior of Mr. Card's automobile - Lack of presence of victim's blood

Counsel also discovered the victim's blood had not been found in the defendant's car either and that the state was not going to introduce parts of the interior of the car (seats, floorboards, dashboard, seat belts) it had seized under warrant into evidence either. For counsel to have known this evidence to be exculpatory, they only had to read the laboratory test reports which were in their file. Had they read the reports they would have been ready to put into evidence the clothes, the various parts of the auto, and most certainly, the reports as well, for these reports show that the defendant's clothes never had any blood on them (blood can be detected even if the item is washed), and that there was absolutely no trace of the victim's blood in the interior of the automobile. Counsel was not prepared to present any of this evidence. Counsel even conceded in open court that he had no idea how to get these items into evidence. (R 876).

3. Mr. Card's clothes - The issue of Identification

More than just the absence of blood on the clothes, the clothes went to the identification of the defendant the heart of the state's case. If Mr. Card was wearing those clothes and those clothes had the victim's blood them, then the state had

strong evidence of the defendant's guilt.

Counsels' ignorance of the significance of the defendant's clothes is revealed by their response, in the beginning of the trial, to the state's attempt to establish the presence of Mr. Card at the Western Union office at 3:00 p.m. through identification of the clothes he was wearing that day.

The state's main identification witness, Christopher Thomas, testified that he recognized Mr. Card as the person he saw in the Western Union Office because of his beard and his hair. (R. 705). Mr. Thomas says he "can't be sure" if the man he saw was Mr. Card but that Mr. Card "looks like" the man he saw at the Western Union office. (R. 705). The state did not ask the witness to describe the person's clothing. Defense counsel, in a one minute cross examination, (questions) (R. 707) did not ask the witness what the person at the Western Union office was wearing; whether he had on the blue tee shirt and jeans Mr. Card was wearing that day. Nor did not question him about the length of Mr. Card's beard. Counsel was unprepared to cross examine this witness. Counsel had not taken Mr. Thomas' deposition. And because counsel had not read the statements given to police by the various witnesses, the statement given by Mr. Thomas on June 3, 1981 which included a description of the person he had seen the day the crime was committed, was not used to cross examine Mr. Thomas. (Appendix 36).

Mr. Thomas in his statement, described the man he saw as 5'10"-11", 160-170, with a "couple days growth of beard" and

wearing green pants, red tee shirt, and dark brown over the ankle lace up workboots. Mr. Card does not match that description. Furthermore, on June 3, 1981 Mr. Card had a full beard. More important, the Mr. Card that was to have been in the Western Union office, the Mr. Card who supposedly killed the victim, wore a blue tee shirt and blue jeans. Is there an attorney, if armed with the Thomas statement, who could not have conclusively proved that the person Mr. Thomas saw at the Western Union office was not Mr. Card? The statement was given to the police within hours after Mr. Thomas saw the individual he then described. Counsel located the statement after Mr. Thomas had been excused and had to have Mr. Thomas brought back from North Carolina. (R. 943). Indeed, Mr. Thomas then became the entire case for the defense. The whole defense case was based (belatedly) on this one statement and on the testimony of Miss Cardwell. And of course, as noted, her testimony was excluded.

The state put on another witness, Mr. Albert Powell, who it was claimed also saw Mr. Card at the Western Union office. Mr. Albert Powell, however, testified that the person he saw was in the office at 2:30 (R. 648) not 3:00. He, like Mr. Thomas says he's pretty sure the man he saw was Mr. Card but "wouldn't swear to it." (R. 645). He was not cross examined as to any details, beard, shoes, hair color, weight, etc. Here again, counsel was without the aid of Mr. Powell's statement also given to police on June 3, 1981, only hours after he viewed the person in the Western Union office. If counsel had been prepared, and had the

statement, he could have shown that Mr. Powell described the individual as 6' tall, which Mr. Card is not, having black hair, which he does not have, and being somewhere in his late teens or twenty-one. Mr. Card is a middle aged truck driver. Failure to read the discovery affected the issue of identity even more. The jury was deprived of hearing more exculpatory evidence. There was a witness interviewed by the police on June 7, 1981 who was in the Western Union office at 3:00 p.m. the time the assailant was to have been there. Mr. Michael Belinski (Appendix 37) described the person he saw as being 5'8" or 9", 140-150, hair black and wavy, month old beard, mustache, sideburns, blue tee shirt and jeans.

The state was convinced the description was of Mr. Card and conducted a line up especially for Mr. Belinski. (The state did not conduct a line up for Mr. Thomas or Mr. Powell because the description did not match Mr. Card.) Mr. Card was in the Belinski line up. Mr. Belinski however, did not pick Mr. Card out of the line up. Mr. Belinski picked someone else. (App. 14) The state, obviously, was not going to call Mr. Belinski as a witness. Notwithstanding that Mr. Belinski's statement and the results of the line up were in defense counsel's discovery file Mr. Belinski, his statement, and the results of the line up were never brought before the jury. Defense counsel did not let the jury know that neither Mr. Thomas nor Mr. Powell were shown a line up after Belinski bombed. Defense counsel did not show that the identification witnesses for the state were mistaken. Even

the state knew that the identification testimony was suspect.

4. Mr. Card's Shoes - Fraudulent Evidence

The last piece of clothing that supposedly linked Mr. Card to the Western Union office and to the scene where the victim was found are the shoes the state put into evidence. These are the shoes the state said Mr. Card wore when he allegedly killed the victim. Because counsel had not viewed the physical evidence, and failed to read the laboratory reports, they did not know the shoes introduced into evidence by the state did not fit the casts taken by the state of the footprints at the scene. The state put the shoes in evidence, but not the footprint casts. The state did not produce the casts so that the shoes could be placed in them to show a fit. The state put the shoes in evidence knowing they were not worn at the scene by Mr. Card because one had a speck of blood on it. (The laboratory analyst testified that the speck of blood was too small to blood type (R. 884).) With all the blood that was to have been on Mr. Card's clothing and in Mr. Card's automobile, this piece of evidence is the first to have at least the "presence" of blood on it. However, these were not the shoes Mr. Card wore that day and it was defense counsel's job to show the shoe did not fit the casts. Defense counsel never questioned the witnesses about the casts. The state was allowed to perpetrate a fraud upon the court and the jury.

C. Failure to Introduce Additional Exculpatory Evidence

Laboratory and other investigatory reports contained in

trial counsels' file reveal important exculpatory evidence not utilized by counsel.

1. The state had recovered several hair and fiber samples from the body and clothes of the victim. (Exhibit 6-5, 6-9). Indeed there were hairs found on the victim's chest and clothes that did not belong to her or her husband. There was evidence that the victim had been raped and the hair found on her chest therefore should match that of the assailant. Samples of the defendant's hair, and fibers from his home and automobile were taken by the state for comparison. (R. 31-32). The state did not put the hair, or the results of the hair comparison tests into evidence because the tests proved the hair was not from the defendant. (Exhibit 7-17,8-12). Likewise, the state did not put into evidence fibers or fiber tests because this tended to exonerate the defendant.

Defense counsel should have put these hair and fiber tests into evidence to show that someone else committed the crime. Those tests would have tended to prove that someone else had attacked the victim. Clothes that have no blood on them, misidentification of the defendant, shoes that don't fit footprint casts, and hairs that belong to someone else. This is exculpatory evidence that would have exonerated the defendant. Instead, the jury was treated to specious and suspect evidence and testimony. Mr. Card would have been better off without a lawyer.

2. There was hearsay testimony by the daughter of the

victim that her mother would write down the name of any individual on a blue sheet of paper who was in the office acting suspiciously. (R. 933). The defense did not object to this damaging hearsay testimony. The state presented a witness who produced a worksheet that had the name "Card" on it. This witness was Detective David Slusser (R. 766). He claimed he "retrieved" the worksheet from the Western Union office. This testimony and the piece of evidence is as suspect as the rest of the state's evidence. Nobody testified it was ever written in the victim's handwriting.

There is a report, found in defense counsels' file, that specifically states that after a search for names on these sheets, specifically looking for suspicious individuals, the name Card never appeared anywhere. (App. 33, p. 5). What did appear was the name of another individual "Willie". Slusser, although he wrote the report was never cross examined by counsel on the report. This report was never introduced into evidence. It would have totally discredited Slusser's testimony, and called into credibility the document with the name "Card" on it. This falsified evidence would have helped exonerate Mr. Card. Defense counsel did not even know the report existed.

At trial the state introduced into evidence the paper that had the notation "Card" on it.

Defense counsel was unable to counter this very damaging evidence, because he failed to read the police reports and review the state's discovery. Had he done so he could have neutralized

that piece of evidence and proved police misconduct. Detective Slusser studied all of the papers that might have contained the names written down by the victim. After this thorough search he came up with the name, "Willie". He did not find the name Card anywhere. In his report he stated:

> Mr. Edward Franklin said that his wife, Janice Franklin, would frequently jot notes down on this particular pad if she observed any type of suspicious activity within the office. One phone number which had appeared on this particular piece of paper was 769-6882. The name "Willie" was written above this phone number. This number was then found to belong to a family by the last name of Johnson who reside at 2206 W. 21st Street in Panama City. Persons at the residence had no knowledge of any person there having contact with the Western Union office any time in the recent past. Subjects there did not know any person by the name of "Willie". This writer then telephoned a second phone number which was found on the same sheet of paper which was listed as 234-2171. This number was found to be issued to the Plaza Motel, located on Panama City Beach. This writer then spoke with a Terry Luckie who stated that she did not know of anyone who had contacted the Western Union office on June 3, 1981. Ms. Luckie did state, however, that it was possible that a guest at the motel was anticipating receiving money through Western Union and she would contact this writer if she located anyone who might have any knowledge of the Western Union office and had made contact with it. It was noted that it was a frequent occurrence for one of the motel guest to be anticipating money coming through the Western Union office.

(App. 33, p. 5).

How the name "Card" now appeared on a document at trial is a mystery. What is not a mystery is why defense counsel did not cross examine Mr. Slusser on this point. It is because counsel

did not know of the report even though it was in his possession.

3. There was more exculpatory evidence not discovered or pursued by defense counsel.

In addition to the report by Camille Cardwell that people she knew were planning a robbery of a Western Union office there was another report that an individual told police that he had personally discussed robbing the Western Union office with three cell mates on May 5, 1981. (App. 31).

> THE FOLLOWING INVESTIGATION WAS CONDUCTED BY INVESTIGATOR RALPH DYER OF THE BAY COUNTY SHERIFF'S OFFICE:
>
> On June 6, 1981, at approximately 10:00 a.m., this writer conducted an interview with Kenny Hewatt, an inmate at the Bay County Jail, in reference to a possible lead into the Robbery/Kidnapping/Murder of Mrs. Janice Franklin.
>
> Mr. Hewatt stated that approximately two months ago, just prior to his arrest, he was in the Western Union Office to pick up a money order. Hewatt stated that when Mrs. Franklin opened the cash drawer, he observed a large amount of money and noticed how easy it would have been to rob the business.
>
> Hewatt went on to state that after his arrest, while in cell pod 3-A, he discussed the possibility of robbing the Western Union Office with his fellow cell mates James Bennett, Mickey Hoody, and Ricky Hewatt, who is also his brother.
>
> In addition to the four persons previously mentioned who discussed the possibility of robbing the Western Union Office, Hewatt stated that a fifth person, Stan Stevens, who was a close friend of Moody's, might be aware of how easy it would be to commit this robbery. It should be noted that this information could have been supplied to Stevens by Moody while the two were housed on

> the sixth floor. Hewatt stated that Moody was in cell block 6-C and Stevens was in cell block 6-B and that they often passed notes back and forth to each other by trustees.

(App. 31)

Again, since counsel never reviewed the police reports they failed to investigate this report or subpoena the witnesses. This report and the individuals involved in the planned robbery of the Western Union office was never brought to the attention of the jury. Counsel still does not know of the existence of this report. Like the Cardwell matter counsel's recklessness and ineffectiveness deprived the defendant of a fair trial.

4. Failure to obtain exculpatory and impeaching testimony concerning the state's key witness.

Counsel's ignorance regarding the state's case and their total lack of preparation was further demonstrated when they cross-examined the state's key witness, Vicky Sue Elrod, the individual Mr. Card allegedly made incriminating statements to. Had counsel investigated Miss Elrod, read her statements given to the police (indeed two statements are missing from counsels' files) and reviewed the documents supplied by the state they could have demonstrated that her testimony was perjured. At the very least they would have discovered additional exculpatory evidence.

Had counsel examined the statements and material it received in August from the state it could have proved that Vicky Sue Elrod, the state's key witness, was committing perjury. It could have proved that she had been the subject of a criminal

investigation. It could have proved that her house had been searched for stolen goods in connection with a burglary ring. It could have proved she was a dealer in narcotics. Most of all it could have shown her statement concerning defendants alleged confession to her was fabricated sometime after June 6, 1981. They could have proved that there was no discussion of a robbery-murder at the meeting on June 3. This will be shown below, and at an evidentiary hearing if provided the chance.

What defense counsel could have shown was that the meeting of June 3, 1981 between Mr. Card and Ms. Elrod was for the purpose of Miss Elrod selling Mr. Card marijuana.

Vicky Sue Elrod testified the defendant made statements to her on June 3, 1981, implicating himself in the murder of Mrs. Franklin. Miss Elrod had been the subject of a criminal investigation concerning burglaries and receiving stolen goods along with the defendant prior to the murder investigation (R. 823).

Miss Elrod did not immediately contact the police on June 3, 1981 or even June 4, 1981. She waited five days until June 8, 1981 to contact the police with her story. It just so happens that the officer she contacted was the officer who was investigating her criminal activities.

According to the defendant Elrod sold him pound quantities of marijuana (R. 792-824). This drug purchasing arrangement was the basis for the two year relationship between defendant and Elrod.

Miss Elrod told the police, and testified, that defendant called her three times on June 3, 1981; at 6:30 a.m., 5:30 p.m. and approximately 9:30 p.m. (R. 792; App. 45; App. 46). According to Elrod two phone calls, the one at 6:30 a.m., and the one at 5:30 p.m. were made from the phone of Mr. Card's neighbor Joe Newington (App. 44; R. 794).

Elrod was very specific that the phone call made to her on the morning of June 3, was at 6:30 a.m. and that Mr. Card did not call her again until 5:30 p.m (R. 792; App. 23, p. 42; 45; 46). She said the 6:30 a.m. call was very brief. She told him, according to testimony that she did not want to talk to him or see him because of their trouble with the law (App. 46). "It was not a long conversation" (R. 793).

The time of the calls are crucial. The state's theory is that Mr. Card planned to rob the Western Union office as early as 6:30 a.m. on June 3, 1981, thought he would have money, and wanted to see Elrod to pay her money he owed her ($50.00). Although the state sought to prove the calls were made to Elrod only at 6:30 a.m. and 5:30 p.m. and from Newington's phone it did not put Newington's phone records into evidence. The state had a very good reason for keeping the records out of evidence. The telephone record shows that no phone call was made to Elrod at 6:30 in the morning as Elrod had so many times stated. More damaging to Elrod's testimony that Mr. Card did not call her until 5:30 p.m. is the fact that the telephone record reflects that a phone call had been made to Elrod that morning, not 6:30

a.m. but at 11:24 a.m..

Even more important their conversation was very far from brief as Elrod also testified (App. 23, p. 44): the call lasted twenty-two minutes (App. 44, phone record). According to Mr. Card this call was made to consummate arrangements to purchase marijuana from Elrod.

Elrod further testified that no other calls were made to her by Mr. Card after June 3. She said she did not talk to him again after that night (App. 23, p. 43). Ms. Elrod's testimony was total perjury. Her testimony that she received no phone calls from Mr. Card after June 3, was totally false. On June 6, 1981, a phone call was made from Mr. Card to Elrod that lasted seventeen minutes. Defense counsel could have demonstrated to the jury that Elrod was lying. The state had delivered the phone records of Newington to defense counsel in August (R. 24), but since counsel never prepared the case they never utilized the phone record to impeach Elrod, even though the phone record was in their own files. Elrod was committing perjury and with the assistance of the state was hiding her own illegal activity.

Elrod testified that she was very concerned about contacting the police after the defendant allegedly told her he committed the crime on June 3, 1981 It was her testimony that she was afraid he would kill her if she called the police. Had counsel utilized the phone record they could have shown that instead of the police she was talking to Mr. Card on June 6, 1981. And the policeman she finally contacted, Dan Collins, as noted was the

very same officer who was investigating Elrod. Indeed, her premises had been searched by this officer. Elrod had several different reasons and motives for fabricating the story about Mr. Card, none of which were pursued by defense counsel.

At the very least counsel should have cross-examined Elrod on the phone conversations. Mr. Card had at all times told his counsel that his only relationship with Elrod was that of buying quantities of marijuana which he then sold. Mr. Card told his attorney that he had gone to see Elrod on the evening of June 3, 1982 specifically to purchase a pound of marijuana that evening. That morning he and his wife withdrew hundreds of dollars from the bank. He was going to use that money for the purchase. This cash accounts for the money Elrod says Mr. Card had. The twenty-two minute conversation at 11:24 a.m. was specifically related to arranging that marijuana transaction. Counsel never interviewed one witness in order to corroborate defendant's version of the events. Counsel admitted they never interviewed any of the witnesses defendant requested.

Elrod's personal motives for making a deal with the police and committing perjury regarding the phone conversations are clear; but there is more. The discrepancies in the story she told the police, establish her perjury on a broader scale.

Elrod testified that Mr. Card told her he got the money from the Western Union out of the safe (R. 814). Miss Franklin, the victim's daughter, testified the money was never kept in the safe, but rather in a cash drawer (R. 934). Indeed, the evidence

showed the cash was always kept in the cash drawer.

Elrod also testified that Mr. Card told her he parked his car in front of the Western Union (R. 802). The police had a list of all automobiles seen at the Western Union office (Ex. 15). Counsel did not put into evidence the fact that the defendant's car was not one of those cars. All witnesses said they never saw a car fitting the description of Mr. Card's car by the Western Union. Counsel did not put into evidence the report that showed Mr. Card's car was not by the Western Union office when the crime occurred, because counsel did not know the report was in the files (Ex. 15).

Elrod says that Mr. Card told her he found the victim's wallet in his car and did not know how it got there (R. 804).

The state did not put the victim's purse into evidence. Vicky Elrod made a great point out of telling the police that the defendant told her he discovered the victim's wallet in the car "and was surprised" and had to get rid of it. It would have been quite a feat for the victim to have brought along her wallet. It would have been impossible for the victim to have taken her wallet out of the purse (victim's family said she always kept her wallet in her purse), without leaving blood on it, yet defense counsel did not attempt to put the purse into evidence to show this. The victim had both hands cut to the extent that her fingers were almost severed. It would have been impossible for her to have held anything in her hands. She had no pockets in her clothes. Is there any way to imagine why she would want to

take her wallet after having just had most of her fingers severely cut fighting off the perpetrator? And how is it possible for her to have carried her wallet without the assailant seeing it? Yet, according to Elrod Mr. Card said he saw the wallet in his car and didn't know how it got there.

According to the victim's husband, Edward Franklin, a gold plated perfectly kept silver dollar was taken during the robbery (R. 691). According to Miss Elrod Mr. Card showed her a silver dollar that was not gold plated and was not in very good condition (R. 814). Indeed, she says it was "worn" (R. 813), "looked like an old silver dollar" (App. 45, p. 48) and "it didn't look gold". "It was not a gold coin" (App. 45, p. 48). Indeed, the testimony concerning the "gold" silver coin is highly suspect. During the deposition the following questioning occurred. Q: "Okay, and then the officers are the ones that suggested it to you, then, the coin could have been gold, did they say well could it have been gold?" A: "Uh huh (yes) they may have phrased it like that. To me it didn't look gold" (App. 45, p. 48).

There are more contradictions, none of which were brought to the jury's attention.

According to Elrod, Mr. Card told her that he had torn the victim's blouse (R. 802). Defense counsel demonstrated that the blouse was not torn (R. 845).

According to an Elrod statement when she saw Mr. Card on June 3 there was still "a large amount of blood on the floorboard and dash of his car." (Ex. 35). At her deposition she said she

never saw any blood in Mr. Card's automobile (Ex. 23).

The state put into evidence seventy-two one dollar bills contending that this money came from the Western Union office. The state knew that this money actually came from the sale of two bags of marijuana to Larry Lanton. The marijuana had originally come from Vicky Sue Elrod. Defense counsel refused to investigate this and admitted they made no effort to interview any alibi witnesses to establish that Elrod was a dope dealer. Mr. Card had admitted to the police that he had sold two bags of marijuana for eighty dollars in one dollar bills to Larry Lanton. Mr. Card pointed out the marijuana at his house during the police search for his clothes and explained the sale to Lanton to officer McKeithen (App. 47). The police left the marijuana at the house (not wanting this aspect of Elrod's business brought out) and defense counsel failed to subpoena Lanton to verify the sale of marijuana. Counsel failed to further investigate officer McKeithen, W.E. Muller, Jan Showeller and Dan Collins on this point. All of these officers saw the marijuana (a large bag) and heard Mr. Card tell them that the money came from the sale of marijuana. The seventy-two dollars in evidence did not come from the Western Union office. The state knew this, and defense counsel made no attempt to show its origin or that the state in fact knew it did not come from the Western Union office.

Lastly, Miss Elrod stated that Mr. Card admitted killing the victim from behind by cutting her throat with his right hand. The medical examiner testified that the evidence showed the wound

would have to have been inflicted by a left handed person. It was the doctor's opinion that the wound started on the right hand side (R. 787). The medical examiner said her throat was cut from right to left (R. 787).

Defense counsel presented no expert witnesses to show that a right handed person could not have killed the victim. These lawyers did not even establish through evidence that the defendant is right handed. They did not demonstrate through the medical examiner that the victim could not have been killed the way Mr. Card supposedly admitted to Elrod (R. 812). Neither the medical examiner nor Elrod were ever questioned on this point. The killing could not have occurred the way Mr. Card allegedly described it according to Elrod.

Time and resource constraints preclude present counsel from enumerating and analyzing the numerous other acts of negligence committed by Mr. Card's trial counsel and the prejudicial effect of that misconduct. Upon a review of the case one cannot help but wonder whether Mr. Card would have been better off without a lawyer.

Mr. Card may very well have made statements concerning the death of Mrs. Franklin. It would hardly be the first time he has attempted to take credit for the commission of a notorious act or violent episode. He is the type of individual who has an extreme need to be recognized as a brave tough man.

Mr. Card is known as a pathological liar who often claims to have committed numerous crimes and murders to impress people. He

has done this alal of his life. His wife stated: "He's just saying he did it, but he didn't. He just wants to be a big man. That's the kind of person Jim is. He says a lot of things that's not true, if you know what I mean. He's a liar." (App. 42, p. 5). Vicky Elrod also admitted he is a chronic liar (R. 801-815). Very few people ever believed his boasting. Dr. Jim Hord succinctly defined Mr. Card's character. "Sociopaths are incredible liars. They base their macho attitude on the fact that these stories are obvious evidence of masculinity" (R. 1185). "Exaggerations are complete fantasies of not necessarily positive things but things that are designed to get the attention and be impressive and describe some experience that is very much in nature, if I can use that term." (R. 1186). The stories Mr. Card began telling Elrod and Mrs. Card after the news of the murder began to be published and broadcasted, were totally contradictory to the actual facts of the case. Indeed, the state chose not to call Debbie King, even though the court ruled she could testify against Mr. Card, simply because the statements made to her by Mr. Card contradicted statements he supposedly made to Elrod. Mr. Card is a pathological liar who enjoyed bragging about crimes he never committed, especially homicides. He has claimed to have killed people in Viet Nam (R. 801-815) although he was never there, and he claims to have killed several police officers. There was no foundation to these claims as far as the authorities were concerned. As shown in Claim II of this pleading Mr. Card's thoughts are deeply distorted and there was a

serious doubt about competency. Defense counsel, as noted there, made no effort to have an evidentiary hearing on Mr. Card's competency, rather submitting the issue based on incomplete and totally useless reports. Counsel in this regard has again demonstrated their total ineffectiveness in representing Mr. Card.

Mr. Card has alleged with supporting affidavits, statements, documents, record citations and non record information the specific errors of counsel and the resulting prejudice to the extent possible in the short amount of time his attorney has had to prepare this pleading. These allegations unquestionably meet the standards set forth in Strickland v. Washington, 104 S.Ct. 2052 (1984), and Knight v. State, 394 So.2d 997 (Fla. 1981), and require an evidentiary hearing for their resolution. O'Callahan v. State, 461 So.2d 1354 (Fla. 1984); Vaught v. State, 442 So.2d 217 (Fla. 1983). We are entitled to an evidentiary hearing to prove our claims; they can not be refuted by the record.

No constitutional guarantee is more central to our system of criminal justice than the requirement that a person accused of a crime receive the effective assistance of counsel. "Of all the rights that an accused person has, the right to be represented by counsel is by far the most precious, for it affects his ability to assert any other right he may have." United States v. Cronic, 104 S.Ct. 2039, 2044 (1984). Counsel for the accused "are necessities, not luxuries," Gideon v. Wainwright, 372 U.S. 335 (1963), necessities not only for the accused, but for the proper

functioning of the criminal justice system itself. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." Herring v. New York, 422 U.S. 853, 862 (1975). There is grave doubt the "very premise" of our system, an accurate determination of guilt and punishment, was served in this case.

In Strickland, the Court held that counsel has "a duty to bring such skill and knowledge as will render the trial a reliable adversarial testing process." 80 L.Ed.2d at 694. A person convicted of a crime is entitled to relief where his counsel "made errors so serious that counsel is not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment", and counsel's deficiency resulted in "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would be different." 80 L.Ed.2d at 693,698. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 698.

The lack of thorough investigation and preparation resulted in the failure to use exculpatory evidence proving at the very least, reasonable doubt and evidence tending to prove that someone else committed the crime. The courts have repeatedly pronounced that "[A]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214,1217 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980);

Goodwin v. Balkcom, 684 F.2d 794,805 (11th Cir. 1982) ("[A]t the heart of effective representation is the independent duty to investigate"). The last minute preparation for trial deprived Mr. Card of powerful evidence proving innocence.

ISSUE III - B

THE FAILURE OF TRIAL COUNSEL TO PRESENT, AT THE PENALTY PHASE, TESTIMONY AND OTHER EVIDENCE WOULD HAVE RAISED CONSIDERABLE DOUBT IN THE MINDS OF THE SENTENCING JURORS AND JUDGE AS TO THE GUILT OF THE DEFENDANT, BY ESTABLISHING THAT SOMEONE ELSE MAY HAVE COMMITTED THE CRIMES WITH WHICH THE DEFENDANT WAS CHARGED.

At the guilt phase of the trial, the defense counsel sought to introduce the testimony of Camille Cardwell to establish that the perpetrator of the crimes for which Mr. Card has been convicted and sentenced to death was someone other than Mr. Card. Ms. Cardwell would have testified to a conversation, two or three weeks before the robbery and murder, in which she heard John Green and Tom Wilmot planning a robbery which was remarkably similar to the robbery of the Western Union station. The testimony of Miss Cardwell was excluded on the grounds that it constituted hearsay.

After having been denied the opportunity to present this testimony at the guilt phase of the trial, defense counsel then inexplicable failed to introduce the testimony at the penalty phase as evidence in mitigation of the sentence to be imposed on Mr. Card. Tom Ingles, who served as defense counsel for Mr. Card at his trial, was contacted by present counsel for Mr. Card and indicated that there was no strategic or tactical reason for his

failure to introduce evidence as to doubt about guilt at the penalty phase. This omission constituted a deficiency measurably below the performance of reasonably competent counsel, and resulted in extreme prejudice to Mr. Card at the sentencing phase of his trial.

Lockett v. Ohio, 438 U.S. 586, ___ S.Ct. ___, ___ L.Ed.2d ___ (1978), stands for the proposition that the sentencer in a capital case may not be precluded from considering "any aspect of a defendant's character or record and any of the circumstances of the particular offense that the defendant proffers as a basis for a sentence less than death." Lockett, 438 U.S. 586, 602. The right to present evidence in mitigation, therefore, is limited only by evidentiary notions of relevance. Lockett, 438 U.S. 586, 604 n.12; Stanley v. Zant, 697 F.2d 955, 960 (11th Cir. 1983), cert. denied 104 S.Ct. 2667 (1984).

The United States Supreme Court has recognized that lingering doubt as to guilt is relevant to the process of capital sentencing, and in Green v. Georgia, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979), vacated the death sentence of a capital defendant who was denied the opportunity to present, at the penalty phase of his trial, evidence to prove that he was not present when the victim was killed and that he had not participated in her murder. That the state has an important interest in permitting juries to consider "residual" or "whimsical" doubt as to guilt in sentencing was recognized in Lockhart v. McCree, 54 U.S.L.W. 4449 (May 6, 1986).

The notion that doubt about guilt is a relevant factor to be considered in mitigation at the penalty phase of a capital trial is not novel. One of the most fearsome and awesome aspects of the death penalty is its finality. There is simply no possibility of correcting a mistake. The belief that such an ultimate and final penalty is inappropriate where there are doubts as to guilt, even if they do not rise to the level necessary for acquittal, is a belief that stems from common sense and long-standing fundamental notions of justice. Justice Marshall, dissenting from the denial of certiorari in a Florida capital case, has reasoned:

> Implicit in the Florida Supreme Court's decision is an assumption about the equation of finality and truth that trangresses law and intuition alike. For our legal system is no pretender to absolute truth. In two important ways, the factfinding process falls short of that ideal. First, the beacon of the truth-seeking process in criminal cases is not absolute certainty, but the "reasonable doubt" standard, which has eluded definition by the courts for centuries. See 9 J. Wigmore, Evidence Sec. 2497 (Chadbourn rev. 1981). Attempts at such a definition typically, and often erroneously, include phrases such as "significant doubt, not trivial doubt," Holland v. United States, 209 F.2d 516, 522 (CA10), aff'd, 348 U.S. 121, 75 S.Ct. 127, 99 L.Ed. 150 (1954), and "substantial real doubt," Taylor v. Kentucky, 436 U.S. 478, 488, 98 S.Ct. 1930, 1936, 56 L.Ed.2d 468 (1978). Although a uniform definition of the term has never evolved, it is clear that juries are not instructed to return a verdict only when all doubt has been eliminated. Rather, the "reasonable doubt" standard merely attempts "to exclude as nearly as possible the likelihood of erroneous judgment." Addington v. Texas, 441 U.S. 418, 423, 99 S.Ct. 1804, 1808, 60 L.Ed.2d 323

(1979). Hence, "beyond a reasonable doubt" cannot ensure that a jury will not convict a defendant without foreclosing all possibility of innocence in the jurors' own minds.

Moreover, no instruction can prevent the possibility of human error. "[I]n a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened." In re Winship, 397 U.s. 358, 370, 90 S.Ct. 1608, 1075, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring). Accordingly, the institutions of criminal justice have been adjusted in recognition that a jury's verdict and truth are not unerringly synonymous. Every jurisdiction provides some mechanism for awarding a convicted defendant a new trial on the basis of newly discovered evidence. If a convicted defendant can produce sufficient indication that the jury's finding of guilt beyond a reasonable doubt was wrong, the institutional need for finality yields to the more compelling concerns of truth and fairness. Thus, the "reasonable doubt" foundation of the adversary method attains neither certainty o the part of the factfinders nor infallibility; and accommodations to that failing are well established in our society. See also Jackson v. Virginia, 443 U.S. 307, 317-18, 99 S.Ct. 2781, 2788, 61 L.Ed.2d 560 (1979) (reversal of jury verdict supported by insufficient evidence). In the capital sentencing context, the consideration of possible innocence as a mitigating factor is just such an essential accommodation.

* * *

I have written before to describe the subjective personal horror that must face a juror who contemplates sentencing a man to die without being sure of his guilt. Heiney v. Florida, supra, ___ U.S., at ___, 105 S.Ct. at 306, ___. But there is an additional point to be made: that permitting the consideration of lingering doubt at sentencing is objectively a rational and consistent element of our system of criminal justice. Like post-conviction remedies in

> light of new evidence, the conscience of the jury serves to protect against irremediable errors arising in that grey area known as "reasonable doubt". And when the stakes are life and death, the Constitution forbids the closure of that safety valve, as surely as it forbids the preclusion of other considerations suggesting that a convicted defendant should not die. See Eddings v. Oklahoma, supra.
>
> The defendant who has been condemned to die will not reap the benefits of post-conviction remedies designed to compensate for jury fallibility when the basis for such relief arises long after conviction. His only protection lies in the consciences of the jurors, for only they know the degree of certainty with which they voted the defendant guilty. The state of Florida would wrest from the jurors their only way of expressing their lingering doubts about their verdict, and from the defendant his only hope of vindication.

Burr v. Florida, 106 S.Ct. 201, 202-03 (1985) (Marshall, J., dissenting from denial of certiorari).

Several federal courts of appeal, including the Eleventh Circuit, have recognized doubt about guilt as relevant and a valid mitigating factor. In Smith (John E.) v. Balkcom, 660 F.2d 573 (5th Cir. Unit B 1981), the court reasoned that:

> The fact that jurors have determined guilt beyond a reasonable doubt does not necessarily mean that no juror entertained any doubt whatsoever. There may be no reasonable doubt -- doubt based upon reason -- and yet some genuine doubt exists. It may reflect a mere possibility; it may be but the whimsy of one juror or several. Yet this whimsical doubt -- this absence of absolute certainty -- can be real.

660 F.2d at 580 (emphasis in original). Again, in Smith (Dennis) v. Wainwright, 741 F.2d 1248, 1255 (11th Cir. 1984), the court

reiterated that "jurors may well vote against the imposition of the death penalty due to the existence of 'whimsical doubt.'"

Similarly, in Chaney v. Brown, 730 F.2d 1334 (10th Cir.), cert. denied, 105 S.Ct. 601 (1984), the court concluded that the prosecutor's withholding of evidence in a capital case was a violation of Brady v. Maryland, 373 U.S. 83 (1963), because such evidence could have affected the jury's imposition of the death penalty insofar as

> the evidence withheld here is mitigating evidence because it relates to the circumstances of the offense as a whole, and tends to support inferences . . . that Chaney may not have personally killed the victims.

Several state courts of last resort have also recognized doubt about guilt to be a relevant and valid mitigating factor. For example, in Blankenship v. State, 308 S.E.2d 369 (Ga. 1983), the issue before the Georgia Supreme Court was the scope of evidence admissible in mitigation and whether limitations that the trial court had placed on mitigating evidence were permissible. The court dealt only with the exclusion of evidence of doubt about guilt at the sentencing phase, finding this dispositive of the case. The defense attorney had attempted to introduce doubt about guilt evidence: blood under the rape-murder victim's fingernails that was neither her's nor the defendant's, and Negroid hair in the victim's pubic hair -- the defendant was white. The Georgia Supreme Court decided first that as a matter of state law the evidence of doubt about guilt had to be admitted, and then noted that "[i]ndeed, a reading of

the pronouncements of the United States Supreme Court appears to impart to [this result] a Constitutional tenure." Id. at 371. See also Alderman v. State, 327 S.E.2d 169 (Ga. 1985).

In People v. Terry, 61 Cal. 2d 137, 390 P.2d 381, 37 Cal. Rptr. 605 (1964), the California Supreme Court accepted the proposition that "a jury which determines both guilt and penalty may properly conclude that the prosecution has discharged its burden of proving [a] defendant's guilt beyond a reasonable doubt but that it may still demand a greater degree of certainty of guilt for the imposition of the death penalty." 390 P.2d at 387-88. And in People v. District Court, 596 P.2d 31 (Colo. 1978), the Colorado Supreme Court held that Colorado's death penalty statute was unconstitutional, in part because "if the offender maintains his innocence, he is precluded from offering any mitigating circumstances at all." Id. at 35.

The Model Penal Code regards residual doubt about guilt as a mitigating factor of such power that its presence does not simply serve to add to the balancing test of aggravating and mitigating factors, but rather serves to exclude, as a matter of law, imposition of a death sentence:

> Death Sentence Excluded: When a defendant is found guilt of murder, the court shall impose sentence for a felony of the first degree [i.e. a non-capital offense] if it is satisfied that:
>
> * * *
>
> (f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt.

ALI, Model Penal Code Sec. 210.6(1) (official draft, 1980) (emphasis added). The comments to this section say:

> This provision is an accommodation to the irrevocability of the capital sanction. Where doubt about guilt remains, the opportunity to reverse a conviction on the basis of the new evidence must be preserved, and a sentence of death is obviously inconsistent with that goal.

ALI, Model Penal Code Sec. 210.6(1), comment 5 (revised comments, 1980). It is imperative that the sentencer be permitted to give serious consideration to the fact that in some cases the doubt that lingers beyond reasonable doubt supports a genuine possibility of innocence.

The beyond-a-reasonable-doubt standard is not to the contrary; indeed, the jurisprudential foundations of the standard justify the concept of doubt about guilt as a mitigating factor. Any legal proceeding, whether a civil suit or a criminal prosecution, is essentially a search for possibilities of truth. A margin of error must be anticipated in virtually every action. Mistakes will be made, and in a civil case, a mistaken judgment for the plaintiff is no worse than a mistaken judgment for the defendant. Because the stakes in a civil suit are usually only monetary, the burden of persuasion is almost always simply "by a preponderance of the evidence." McCormick on Evidence, Sec. 339 (1977). In a limited number of civil actions, a slightly more stringent requirement of "by clear and convincing proof" is required. Id., Sec. 340. McCormick notes that this class of civil actions is distinguished by the "special danger of

deception [in the action], or by the recognition that the particular type of claim should be disfavored on policy grounds." Id.

The stakes are higher in criminal actions. Our society has judged that it is significantly worse for an innocent person to be found guilty of a crime than for a guilty person to go free. Thus, it is a fundamental precept of our theory of burdens of proof that as the stakes of an action become higher, and as the consequences of an erroneous decision become more severe, the required degree of proof becomes more stringent. It logically follows that when the stakes are the highest -- life or death -- the burden of persuasion must be as stringent as possible. See generally C. Black, Capital Punishment: The Inevitability of Caprice and Mistake (2d ed. 1981). This can only be achieved by mandating that the sentencer be allowed to consider any and all possible doubt about guilt that remains after the standard for conviction is met -- and by allowing the sentencer to choose life when doubt exists.

Doubt about guilt was the principal issue in the instant case. The theory of the defense at the guilt phase of the trial was that someone other than Mr. Card had committed the robbery and the murder. Although trial counsel for Mr. Card was ineffective in introducing exculpatory evidence through the testimony of Camille Cardwell at the guilt phase, and failed to produce other evidence in his possession tending to show others may have committed the robbery and the murder for which Mr. Card

has been sentenced to death, no attempt was made to introduce this evidence at the penalty phase. The performance of trial counsel in this regard was grossly deficient, and resulted in extreme prejudice to his client. Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

ISSUE III - C

TRIAL COUNSEL FAILED TO INVESTIGATE AND PRESENT SUBSTANTIAL MITIGATING EVIDENCE.

Defense counsel's failure to provide their psychologist with background, social history and records of Mr. Card contributed to the inadequate evaluation. The courts have "long recognized a particularly critical interrelation between expert psychiatric assistance and minimally effective assistance of counsel." United States v. Edwards, 488 F.2d 1154, 1163 (5th Cir. 1974). Counsel has a duty, concurrent with that of the defense expert, to ensure a competent mental evaluation. Black v. Kemp, 758 F.2d 523 (11th Cir. 1985). The prejudice at penalty phase - the failure to develop the available extensive mitigating evidence - is apparent.

Mr. Card is probably psychotic from organic causes, a fact which if developed would have established several strong mitigating factors, but no one at trial even knew it. Counsel completely failed to investigate Mr. Card's background, and to develop the extensive evidence available in mitigation.

The Florida Supreme Court has recently found the obligation of defense attorneys to represent their clients zealously "in a

case involving the death penalty[] is the very foundation of justice," in Wilson v. Wainwright, ___ So.2d ___ (Fla. 1985).

Other courts addressing the issue have held that defense attorneys who undertake representation of defendants in capital cases are required to perform with the very highest standard of effectiveness. This is because in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made by a jury of people who may have never made a sentencing decision." Gregg v. Georgia, 428 U.S. at 190. The court have expressly found trial counsel in capital sentencing proceedings ineffective for failing to investigate and prepare mitigating evidence, and for having made an inadequate closing argument. Tyler v. Kemp, 755 F.2d 741, 745 (11th Cir. 1985); Blake v. Kemp, 758 F.2d 523, 533-5 (11th Cir. 1985); King v. Strickland, 714 F.2d 1481, 1490-91 (11th Cir. 1983), vacated and remanded, 104S.Ct. 3575, adhered to on remand, 748 F.2d 1462, 2463-64 (11th Cir. 1984), cert. denied, 85 L.Ed.2d 301 (1985); Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), vacated and remanded, 104 S.Ct. 3575 (1984), adhered to on remand, 739 F.2d 531 (1984), cert. denied, 84 L.Ed.2d 3321 (1985); Holmes v. State, 429 So.2d 297 (Fla. 1983).

The Courts have repeatedly pronounced that "[a]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot,

446 U.S. 903 (1980). Accord, Beavers v. Balkcom, 636 F.2d 114, 116 (5thCir. 1981); Rummel v. Estelle, 590 F.2d 103, 104-05 (5th Cir. 1979); Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982) ("at the heart of effective representation is the independent duty to investigate and prepare"). Counsel did next to nothing in preparation for penalty phase. There was no adequate investigation.

In Tyler v. Kemp, the court set forth the rationale for requiring defense counsel to fully investigate and present all evidence in mitigation at the sentencing phase of the capital trial, saying:

> In Lockett v. Ohio, 438 U.S. 586 (1978) the court held that the defendant has a right to introduce virtually any evidence in mitigation at the penalty phase. The evolution of the nature of the penalty phase of a capital trial indicates the importance of the jury receiving adequate and accurate information regarding the defendant. Without that information, a jury cannot make the life/death decision in a rational and individualized manner. Here the jury was given no information to aid them in the penalty phase. The death penalty decision that was made was thus robbed of the reliability essential to assure confidence in that decision.

Tyler, 755 F.2d at 745 (emphasis supplied).

The substantial mitigating evidence and documentation of Mr. Card's mental illness, his impoverished, abused and neglected youth was available to defense counsel, had they developed it, and would have been persuasive enough to the sentencing jury and court to have affected the outcome of the sentencing proceeding

decided by one vote. It is set forth in detail in the Motion to Vacate. The Supreme Court has recognized the substantiality of such testimony as evidence of the many "compassionate and mitigating factors stemming from the diverse frailties of humankind." Woodson v. North Carolina, 428 U.S. 280, 304 (1976). The jury and sentencing court are required to consider "relevant facts of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting death." Woodson, 428 U.S. at 304. Available evidence would have established both statutory and nonstatutory mitigating circumstances, described in the motion. A stay and evidentiary hearing in this case is mandated.

ISSUE IV

MR. CARD WAS DEPRIVED OF A COMPETENT PSYCHOLOGICAL EVALUATION RELATING TO MITIGATING CIRCUMSTANCES, AND THE SENTENCERS WERE CONSEQUENTLY PROVIDED WITH MISLEADING INFORMATION RELATED TO MR. CARD'S MENTAL STATUS AT THE TIME OF THE OFFENSE, CONTRARY TO THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Ake v. Oklahoma, 105 S.Ct. 1087 (1985) holds that due process[7] requires an indigent defendant be provided with a competent and appropriate psychiatric examination when he can demonstrate to the Court his mental health is in issue. Florida law unquestionably places the mental status of the defendant at issue at penalty phase. Section 921.141 (5) (h) and (i), and (6) (b), (e), (f) and (g). See also, Lockett v. Ohio, 438 U.S. 586 (1978). Defense counsel specifically placed it in issue, in moving for a defense expert for mitigation. Mr. Card has now demonstrated his mental condition at the time of the offense and at trial, was in fact "seriously in question", Ake, 105 S.Ct. at 1090, triggering the state's obligation: "the state must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in

[7]The sixth amendment concern that a fair trial and effective counsel be provided is interwoven with the due process rights implicated by the necessity for a competent mental health evaluation. See Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985).

evaluation, preparation, and presentation of the defense." 105 S.Ct. at 1097 (emphasis supplied).

In Mason v. State, No. 67, 101 (Fla. Jun. 12, 1986), this Court recognized the right of a defendant post-conviction to challenge the adequacy of his evaluation. Though that case arose in a competency setting, the principle is no less applicable here. As in Mason, "too great a risk exists that these determinations of competency [of mental mitigation] were flawed as neglecting a history of indicative of organic brain damage." Slip. op. at 4. The defense penalty phase case, and thus the life and death decision, relied almost exclusively on mental health evidence, and requires constitutionally adequate evaluative data no less than the competency determination.

In Ake, as did this Court in Mason, the Supreme Court recognized the entitlement of an indigent defendant, not only to a "competent" psychiatrist (i.e., one who is duly qualified to practice psychiatry), but also to a psychiatrist who performs competently -- who conducts a professionally competent examination of the defendant and on this basis, provides professionally competent assistance to defense counsel. The rationale underlying the holding of Ake compels such a conclusion.

To reach this result, the Court analyzed three factors: first, the "private interests that will be affected by the action of the state," second, "the governmental interest that will be affected if the safeguard is to be provided," and third, "the

probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided." Id. at 1094. In analyzing each of these factors, the Court's primary concern was directed to the accuracy of the criminal proceeding.

Assessing the private interests and the governmental interests that would be affected if psychiatric assistance were required, the Court held that the interests coincide. The private interest is "in the accuracy of a criminal proceeding that places an individual's life or liberty at risk. . . ." Id. at 1094. And while the state has an interest in prevailing at trial, the Court recognized that this interest "is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases." Id. at 1095. Accordingly, the Court "conclude[d] that the government interest in denying Ake the assistance of a psychiatrist is not substantial, in light of the compelling interest of both the state and the individual in accurate dispositions." Id.

With the coincidence of the private interest and the state interest in accurate dispositions of criminal proceedings, the Court went on to examine whether the provision of psychiatric assistance to indigent defendants was of sufficient probable value that without it, the risk of error in criminal dispositions was too great. In analyzing this factor, the Court first recognized the "reality . . . that when the state has made the

defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense." Id. at 1095. Such assistance is deemed crucial because of the unique ability of a psychiatrist to present to the factfinder the facts that are most important for an accurate and fair determination of criminal culpability:

> In this role, psychiatrists gather facts both through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder or behavior; and they offer opinions of how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers. Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state, psychiatrists can identify the "elusive and often deceptive" symptoms of insanity, . . . and tell the jury why their observations are relevant. Further, where permitted by evidentiary rules, psychiatrists can translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand. Through this process of investigation, interpretation and testimony, psychiatrists ideally assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the mental condition of the defendant at the time of offense.

Id. at 1095-96 (citation omitted). Notwithstanding the psychiatrist's unique ability to bring the relevant facts to the factfinder, the Court recognized that

> [p]sychiatry is not, however, an exact science, and psychiatrists disagree widely and frequently on what constitutes mental illness, on the appropriate diagnosis to be attached to given behavior and symptoms, on cure and treatment, and on likelihood of future dangerousness. Perhaps because there often is no single, accurate psychiatric conclusion on legal insanity in a given case, juries remain the primary factfinders on this issue, and they must resolve differences in opinion within the psychiatric profession on the basis of the evidence offered by each party. . . . By organizing a defendant's mental history, examination results and behavior, and other information, interpreting it in light of their expertise, and then laying out their investigative and analytic process to the jury, the psychiatrists for each party enable the jury to make its most accurate determination of the truth on the issue before them.

Id. at 1096. Accordingly, because of the psychiatrists' crucial role in enhancing the accuracy of a criminal proceeding, the Court concluded that "without the assistance of a psychiatrist to conduct a professional examination on issues relevant to the defense, to help determine whether the insanity defense is viable, to present testimony, and to assist in preparing the cross-examination of a state's psychiatric witnesses, the risk of an inaccurate resolution of sanity issues is extremely high." Id.

For these reasons, "where the potential accuracy of the jury's determination is so dramatically enhanced" by providing indigent defendants with competent psychiatric assistance, id. at 1097, the Court clearly contemplated the right of "access to a competent psychiatrist who will conduct an appropriate

examination . . . ," id. (emphasis supplied), to include access to a psychiatrist who would conduct a professionally competent examination -- that is, an examination conducted in accord with the standard of care for the psychiatric profession. To suggest otherwise is unthinkable, because the provision of a duly-qualified psychiatrist who performs incompetently would wholly undermine the enhanced accuracy of factfinding that is associated with the provision of a "competent psychiatrist."

Mr. Card has detailed the inadequacies of the defense psychologist at pages 54-5 of his Motion to Vacate. Those deficiencies resulting in substantial harm to the defense case at penalty phase. Dr. Hord's analysis of Mr. Card's mental status, lacking in professionally accurate interpretation of test data, and insufficient historical information, resulted in damaging testimony from the defense expert Mr. Card was a "sociopath", or "time bomb". His serious mental impairment-schizophrenia with possible organic causes - were not brought out because of the psychologist's failings. Neither was the lingering psychological trauma of the abuse he suffered as a child. The evidence which could have been presented would have established powerful factors in mitigation. Only one juror needed to be swayed for Mr. Card's life to be spared.

This claim requires an evidentiary hearing, and ultimately, vacation of the sentence of death.

WHEREFORE, Petitioner/Appellant respectfully requests the Court grant the Petition for Writ of Habeas Corpus, reverse the trial court's denial of the 3.850 Motion, and order a new trial or evidentiary hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand to Gary Printy, Assistant Attorney General, Office of the Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32301 this 18th day of June, 1986.

_____
Counsel for Petitioner/Appellant