70093

CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

TIMOTHY C. HUDSON,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

JAMES MARION MOORMAN
PUBLIC DEFENDER
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ATTORNEYS FOR PETITIONER

(Member of the Bar of this Court)

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CITATION TO OPINION BELOW

The opinion of the Supreme Court of Florida, Hudson v. State, 538 So.2d 829 (Fla. 1989), is set forth as Appendix A. The motion for rehearing and denial thereof are set forth in Appendix B and C.

JURISDICTION

Review is sought pursuant to 28 U.S.C. 1257(3). The judgment below was entered on January 19, 1989, and petitioner's timely motion for rehearing was denied on March 23, 1989.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the constitutionality of a death sentence imposed pursuant to Section 921.141, Florida Statutes (1973), and involves the Eighth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Petitioner, TIMOTHY C. HUDSON, was charged by indictment returned June 25, 1986 with first degree murder of Mollie Ewings, armed burglary, and theft of an automobile. The case proceeded to trial on January 26-28, 1987, and resulted in guilty verdicts. The evidence (as summarized in the Florida Supreme Court's opinion) established the following facts:

> Two months after breaking up with his girlfriend, Hudson entered her home during the night, armed with a knife. The former girlfriend, having received threats from Hudson, spent the night elsewhere. Her roommate [Mollie Ewings], however, was at home. When she began screaming at him to leave, Hudson stabbed her. He then put the body in the trunk of the victim's car, drove away, and left the body in a drainage ditch at a tomato field. He abandoned the victim's car the following morning. The former girlfriend reported her roommate missing and indicated that she had been having problems with Hudson. The police interviewed Hudson, who was under a sentence of community control for a prior conviction of sexual battery. After he admitted having violated the terms of that control, the police arrested

> him. After being readvised of his Miranda rights, in response to later questioning Hudson told the police several stories about the murder and his involvement in it. ... Briefly, these commenced with a story by Hudson that he had been with a person named Peabody and told of events with and about him. Hudson was told by the police that these stories were disbelieved. After further discussion with police officers, he advised that he would take them to the deceased's car and body. They searched Hudson's described area to no avail. A further talk with an officer resulted in Hudson's new agreement to show them where the body was. Hudson led them to the deceased's car, after which he led the police to another area where a green army blanket lay. At this time the defendant said that this was where "Peabody" had put the body and somebody had taken it. After a further discussion questioning this story, Hudson finally led them to another area where this time the body was found. Hudson was crying at this time. The police took Hudson back to the police station. He was reminded of his Miranda rights. Hudson said "I don't want to say this but once, so get it right the first time." Hudson calmed down and then gave a statement fully implicating himself.

Hudson v. State, supra, 538 So.2d at 829-30 [Appendix A1-2].

In the penalty phase of the trial, the defense recalled Dr. Robert Berland, a forensic psychologist, who had previously testified in the guilt phase that petitioner (while not legally insane) suffers from paranoid schizophrenia and also from organic brain impairment, and was psychotic at the time of the offense. In the penalty phase, Dr. Berland restated his opinion that petitioner suffers from both a genetically-based disorder, i.e. paranoid schizophrenia, and also from organic brain tissue damage which contributes to his psychotic thinking and inability to control his impulses. Paranoid schizophrenia, being genetic in origin, "operates pretty much on a preprogrammed time table":

> People will become psychotic, basically, regardless of what their circumstances are. If they are under some stress in their life or living in very bad conditions, it might propel them into an active psychotic disturbance a little earlier. But probably not much more than six

> months difference. They are going to become psychotic if they have this disorder.

Petitioner also suffers from organic brain damage. Dr. Berland testified concerning the effect of the brain tissue impairment in connection with the paranoid schizophrenia:

> When you combine that with a psychotic disturbance, in this case, paranoid schizophrenia, what you end up with is someone who has disturbed impulses, disturbed ideas about what to do and how to react to things coming form his psychosis, his schizophrenic disorder. Then you have a reduced ability to control those impulses and a greater likelihood he is going to act on them, in part, because of the brain damage.
>
> What it does, really, is simply make it more likely that he is going to act on these impulses, be they disturbed or aggressive.

After giving a detailed explanation of the MMPI, Dr.Berland stated that the test results portrayed petitioner as "somebody who is trying to keep a lid on his psychosis but [who is] a very disturbed individual." Dr. Berland testified that while petitioner has both a psychotic disturbance and an anti-social personality disorder, it is the psychotic disturbance which is pre-eminent and which is the most controlling. According to Dr. Berland, petitioner's mental condition is not curable, but it is treatable with proper medication. Asked whether there was a strong likelihood that this crime would not have occurred had petitioner's disorder been diagnosed and treated at an earlier age[1], Dr. Berland replied that, while response to medication varies with the individual, the greatest number of people respond favorably to some degree, "and in my opinion, a reduction in the severity of his psychosis would have probably made it a lot less likely that he would have committed an act like this particularly under these circumstances."

Petitioner's reaction to Becky Collins' breaking of their engagement was, in Dr. Berland's opinion, stereotypical of paranoid

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[1] Appellant was 22 years old at the time of the offense.

individuals. The "irrational or unrealistic or delusional jealousy is part of the paranoid syndrome."

Asked whether, in his opinion, petitioner was under the influence of extreme mental or emotional disturbance at the time the act was committed, Dr. Berland answered, "Taking that to mean a serious psychotic disturbance, yes, it appears that he was." Dr. Berland further expressed the opinion that, while petitioner was able to appreciate the criminality of his conduct, he did not have the capacity to conform his conduct to the requirements of law.

The defense presented several other witnesses, who testified in regard to petitioner's character in various contexts of his life. His mother and father, Maggie Hudson and Daniel Hudson, each testified that they have had a close relationship with petitioner, and he has been a good son. The parents were divorced when petitioner was nine or ten years old. Petitioner lived with his mother, and would visit his father nearly every day after school. He was always wanting to help his father with his work around the house, such as painting or repairing, and he always tried his best. Mr. Hudson stated "Of course, in any kid you have got problems. But he would always try to do what I asked him to do."

Littleton Long was petitioner's teacher in high school equivalency classes at Hillsborough Correctional Institution. Petitioner's reading ability was at a 10th or 11th grade level, but Long found him to be a very eager learner with a positive and cooperative attitude. After petitioner's release, he stayed in touch with Long, as their relationship had evolved from one of teacher-student to almost father-son. Petitioner had promised Long that he would go back and get the few remaining credits he needed for a GED. In their conversations, petitioner told Long that he was abstaining from drugs, but in later conversation he related that he had somehow gotten himself involved back with drugs, but that he wasn't going to do that any more.

Mitchell Walker, general manager for Bennigan's Restaurant in Tampa, where petitioner worked as a cook for six

months in 1985, testified that petitioner was a hard worker who, at one point, was named "employee of the month." Walker stated that petitioner's "pride and quality of work was outstanding."

Charles Bedford has been active working with young people in youth baseball leagues; he was the first black manager in the South Palomino League, he became president of the league, and he has been honored by the mayor and city council of Tampa for his work with youngsters by having a newly constructed baseball field named after him. Bedford first met petitioner when he was about eight or nine years old. "Timmy, to me, appeared to be a boy struggling to make the best of a bad situation." The South Palomino League was predominantly white and upper class, but it encompassed the black areas of Port Tampa and Rembrandt; petitioner was one of the relatively few blacks on the team. Also, unlike most of the other boys, petitioner's parents were rarely able to come to the ball park, so petitioner usually came by himself. "Most of the managers didn't want to pick Timmy because they felt he would be a problem. He didn't know much about baseball".

At first, petitioner was very distant with the other players until Bedford encouraged him to reach out and become more involved. To his own surprise, he then found that he fit in very well with the other boys on the team. Once he saw that he was accepted and part of the team, petitioner's attitude completely changed; he worked hard and was very productive. Bedford testified, "He used to work after practice with me. He was very eager to learn all he could about baseball. That is what impressed me most about him. When he felt things, he was hard on himself, I think, at any point, more than any other players because he felt he had to be good in order to please me or his teammates to accept him as part of our team." When the team lost, petitioner had a tendency to blame himself, and Bedford would have to console him and work it out with him, in order for him to realize that his coach thought as much of him after the game as he did before. Bedford testified:

> I coached Tim up to, I think, [age] twelve or thirteen. I think given

> the skills he had when he came to me and how hard he worked, I think he showed me more effort and dedication than any kid I have coached in the league which I was in. And I have coached a team that won the world championship.

Bedford testified that, while he does not condone petitioner's crimes, he believes that petitioner has some redeeming qualities and is a worthwhile person. He further stated:

> I think listening to the psychiatrist's testimony a few minutes ago, I feel he was right on the line when he said that Timmy would take rejection or would feel inadequate if he felt that someone he cared about or someone important to him was about to be taken away or deprived. Handling it rationally was hard to him as a young man that would carry over, not with the proper mother or father that would be able to work him through disappointments.

The jury, by a 9-3 vote, returned an advisory recommendation of death. On February 6, 1987, the trial judge imposed the death penalty on petitioner, and made the following findings:

> AGGRAVATING CIRCUMSTANCES
>
> 1. "THE DEFENDANT WAS PREVIOUSLY CONVICTED OF ANOTHER CAPITAL FELONY OR OF A FELONY INVOLVING THE USE OR THREAT OF VIOLENCE TO THE PERSON." Section 922.141(5)(b), Fla. Stat.
>
> The record reflects that the defendant, TIMOTHY C. HUDSON, was previously convicted of the sexual battery of Linda Benjamin on August 30, 1982.
>
> 2. "THE CAPITAL FELONY WAS COMMITTED WHILE THE DEFENDANT WAS ENGAGED IN THE COMMISSION OF AN ARMED BURGLARY." Section 921.141(5)(d), Fla. Stat.
>
> In the instant case, the defendant, TIMOTHY CURTIS HUDSON, was charged with Armed Burglary, Murder in First Degree and Grand Theft Second Degree. The jury convicted the defendant, TIMOTHY CURTIS HUDSON, of Armed Burglary, as well as the other charges in the Indictment.
>
> MITIGATING CIRCUMSTANCES
>
> 1. "THE CRIME FOR WHICH THE DEFENDANT (TIMOTHY CURTIS HUDSON) IS TO BE SENTENCED WAS COMMITTED WHILE HE WAS UNDER THE INFLUENCE OF EXTREME

MENTAL OR EMOTIONAL DISTURBANCE." Section 921.141(6)(b), Fla. Stat.

The facts of the case, as produced by the evidence, indicate that the defendant, TIMOTHY CURTIS HUDSON, was apparently surprised by the victim during the defendant's burglarizing of the home owned by the victim and shared with the defendant's ex-girlfriend. Although the Court allowed the jury to consider this mitigating circumstance in arriving at its decision, the evidence does not support the fact that any emotional or mental disturbance that the defendant may have been suffering from at the time of the commission of the crime of Murder, was in any way of an extreme nature. The facts show that he entered the home in a planned manner and after the killing, he attempted to dispose of the body and soiled bed clothes in a planned and devious manner.

The Court gives this mitigating circumstance little or no weight.

2. "THE CAPACITY OF THE DEFENDANT . . . TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED." Section 921.141(6)(f), Fla. Stat.

Dr. Robert Berland, admitted by the Court as an expert forensic psychologist, testified that although the defendant had the capacity to appreciate the criminality of his conduct at the time of the commission of the killing, that he could not conform his conduct to the requirements of law, or that that conformance was substantially impaired. The extensive testing done by Dr. Berland on the defendant, together with the circumstances of the surprise of the defendant during the burglary when confronted by the victim, convinces the Court that at the time of the killing and for at least a short period thereafter, the defendant was unable, to a certain extent, to conform his conduct to the requirements of law. This is no way is to be construed to mean that the defendant, in the Court's opinion, did not know exactly what he was doing, but that in his mental state of panic, he temporarily took what he conceived to be an immediate solution to a very bad problem he was facing.

3. "THE AGE OF THE DEFENDANT AT THE TIME OF THE CRIME." Section 921.141(6)(g), Fla. Stat.

At the time of the commission of the

> felony of First Degree Murder, the defendant, TIMOTHY CURTIS HUDSON, was twenty-two (22) years of age.
>
> The Court gives slight weight to the matter of the defendant's age.
>
> 4. "ANY OTHER ASPECT OF THE DEFENDANT'S CHARACTER OR RECORD, AND ANY OTHER CIRCUMSTANCE OF THE OFFENSE."
>
> The Court finds that there are no other aspects of the defendant's character or record, and no other circumstances of the offense which could be used in mitigation of the Sentence to be pronounced by the Court.

[Appendix D1-2]

On January 19, 1989, the Florida Supreme Court affirmed petitioner's convictions and (by a 4-3 vote) death sentence. Dissenting Justices Barkett and Kogan would have reduced petitioner's sentence to life imprisonment on proportionality grounds, while Justice Shaw dissented as to penalty without a written opinion. Petitioner's timely motion for rehearing [Appendix B] was filed on February 2, 1989, and was denied on March 23, 1989 [Appendix C].

HOW THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

The main issues raised on appeal were (1) that appellant's inculpatory statements (and the evidentiary fruits thereof) should have been suppressed as involuntarily made, since they were procured by the interrogating officers' use of the "Christian burial technique" to overcome petitioner's will; (2) that the death penalty was disproportionate under the totality of the circumstances of the case; and (3) that the trial court violated the Eighth and Fourteenth Amendment standards for capital sentencing (as established in Lockett v. Ohio, 438 U.S. 586 (1978) and its progeny) in his failure to properly consider statutory and non-statutory mitigating circumstances. [The Lockett issue, which is the only one being raised in this petition for certiorari (divided into two questions presented), is set forth at Appendix F1-10]. The Florida Supreme Court rejected each of petitioner's

contentions on the merits. Hudson v. State, supra, 538 So.2d at 830-32 [Appendix A2-4].

REASONS FOR GRANTING THE WRIT

QUESTION I

WHETHER THE FAILURE OF THE TRIAL COURT AND THE FLORIDA SUPREME COURT TO CONSIDER THE NON-STATUTORY MITIGATING EVIDENCE PRESENTED BY PETITIONER VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENT PRINCIPLES OF LOCKETT V. OHIO, 438 U.S. 586 (1978) AND ITS PROGENY.

In such decisions as Lockett; Eddings v. Oklahoma, 455 U.S. 104 (1982); Skipper v. South Carolina, 476 U.S. 1 (1986); Hitchcock v. Dugger, 481 U.S. ___, 107 S.Ct. ___, 95 L.Ed.2d 347 (1987), and Sumner v. Shuman, 483 U.S. ___, 107 S.Ct. ___, 97 L.Ed.2d 56 (1987), this Court has solidly established the constitutional principle that any mitigating evidence, statutory or non-statutory, offered by a capital defendant, which is relevant to either the character of the offender or the circumstances of the offense, must be considered by the sentencer before a sentence of death can be imposed. As stated in the opinion of the Court in Sumner v. Shuman, supra, (quoting the plurality opinion in Woodson v. North Carolina, 428 U.S. 280, 304 (1976):

> While the prevailing practice of individualized sentencing determinations generally reflects simply enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensible part of the process of inflicting the penalty of death.

(97 L.Ed.2d at 65)

As further stated in Sumner v. Shuman, supra, 97 L.Ed.2d at 66, not only does the Eighth Amendment permit the defendant to present any relevant mitigating evidence, but "Lockett requires the sentencer to listen." See Eddings v. Oklahoma, supra, 455 U.S. at 115, n. 10.

In the instant case, petitioner presented a number of witnesses - an employer, a teacher, and a coach, as well as his mother and father - whose testimony, taken collectively, establishes that he has some worthwhile and redeeming character traits. Specifically, he has demonstrated, in various contexts of his life, a willingness to work hard, eagerness to learn, and a cooperative attitude. Nevertheless, the trial court refused to find or weigh any non-statutory mitigating factors, stating in his sentencing order "The Court finds that there are no other aspects of the defendant's character or record, and no other circumstances of the offense which could be used in mitigation of the sentence to be pronounced by this Court." [see Appendix D2].

This was error as a matter of law, and, in view of the other mitigating evidence in the case (especially that concerning petitioner's mental illness and his impaired capacity to conform his conduct), it impermissibly compromised the trial court's weighing process. Not only does petitioner's death sentence violate the constitutional principle of Lockett, the Florida Supreme Court unaccountably failed to apply its own precedent interpreting Lockett. In Rogers v. State, 511 So.2d 526, 534 (Fla. 1987), the state Supreme Court wrote:

> ... [A]ny consideration of mitigation must fall within certain established guidelines. In the context of the death penalty, the concept of mitigation requires that the court
>
> > not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death ... Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in noncapital cases.
>
> Lockett v. Ohio, 438 U.S. 586, 604-05, 98 S.Ct. 2958, 2964-65, 57 L.Ed.2d 973 (1978) (emphasis in original, footnote omitted). Moreover,
>
> > [j]ust as the State may not by

> statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence ... The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.
>
> Eddings v. Oklahoma, 455 U.S. 104, 114-15, 102 S.Ct. 869, 876-77, 71 L.Ed.2d 1 (1982) (emphasis in original, footnote omitted). See also Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986).
>
> Mindful of these admonitions, we find that the trial court's first task in reaching its conclusions is to consider whether the facts alleged in mitigation are supported by the evidence. After the factual finding has been made, the court then must determine whether the established facts are of a kind capable of mitigating the defendant's punishment, i.e., factors that, in fairness or in the totality of the defendant's life or character may be considered as extenuating or reducing the degree of moral culpability of the crime committed. If such factors exist in the record at the time of sentencing, the sentencer must determine whether they are of sufficient weight to counterbalance the aggravating factors.

Rogers v. State, supra, 511 So.2d at 534.

The Rogers Court went on to hold that "being a good husband and father or having a good [military] service record are factors to be weighed in mitigation. Evidence of contribution to family, community, or society reflects on character and provides evidence of positive character traits to be weighed in mitigation. Rogers v. State, supra, 511 So.2d at 535.

On September 1, 1988, while petitioner's appeal was pending, the Florida Supreme Court decided a case - Lamb v. State, 532 So.2d 1051 (Fla. 1988) - in which the trial court's treatment of the defendant's non-statutory mitigating evidence was almost identical to the instant case.[2] The Court wrote:

> Lamb also introduced nonstatutory mitigating evidence that he would adjust well to prison life; that his family and friends feel he is a good prospect for rehabilitation; that

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[2] Petitioner promptly filed a notice of supplemental authority, calling the Court's attention to its decision in Lamb.

> before the offense he was friendly, helpful, and good with children and animals; that he had seen a psychologist and a psychiatrist concerning drug abuse and emotional problems; and that he had consumed alcohol and smoked cannabis in the hours preceding the capital felony. The trial court concluded that the record did not support the notion that his behavior was affected by alcohol or drugs. In considering the other factors, the court concluded that none rose "to the level of a mitigating circumstance to be weighed in the penalty decision."

Lamb v. State, supra, 532 So.2d at 1054.

The Florida Supreme Court, applying the constitutional principle of Lockett as interpreted in Rogers, concluded that it could not be certain that the trial court properly considered all of the mitigating evidence. Lamb v. State, supra, at 1054. Lamb's death sentence was reversed, and the case was remanded to the trial court for "reconsideration of the death sentence and resubmission of a new sentencing order if appropriate." Lamb, at 1054.

The trial court's statement in Lamb that none of the non-statutory mitigating evidence rose "to the level of a mitigating circumstance to be weighed in the penalty decision" is constitutionally indistinguishable from the trial court's statement in the instant case that "there are no other aspects of the defendant's character or record, and no other circumstances of the offense which could be used in mitigation of the Sentence to be pronounced by the Court." [see Appendix D-2]. Using the Rogers analysis, in addition to the testimony of both of petitioner's parents (who were divorced when he was a child) that he was a good son, the record contains uncontested evidence to establish the good character traits which the trial court refused to consider in mitigation. Petitioner was, at one point, employee of the month at Bennigan's restaurant; and according to his general manager, "His pride and quality of work was outstanding." Petitioner was an eager learner in his GED classes, with a good attitude toward his studies. The most eloquent testimony was given by the baseball coach and community youth worker, Charles Bedford: "I think given

the skills he had when he came to me and how hard he worked, I think he showed me more effort and dedication than any kid I have coached in the league which I was in." Bedford also testified regarding petitioner's efforts to overcome his personal problems, arising from his family situation, his socioeconomic background, and his own hypersensitivity and self-doubt.

None of this, of course, means that petitioner deserves a medal, or that his very serious crime should go unpunished. It does mean, however, that petitioner deserves, under the constitutional principles of individualized sentencing, to have the good and worthwhile aspects of his character fairly considered and weighed against the aggravating factors, before a sentence of death can be imposed. Lockett; Eddings; Skipper; Hitchcock; Sumner v. Shuman. It is also of crucial importance that this was a very close case on penalty - close enough that three of the seven state Supreme Court justices concluded that death was not proportionally warranted. This Court should grant the writ of certiorari, and either accept this case for plenary review, or summarily reverse the decision of the Supreme Court of Florida with directions to remand the case to the trial court for resentencing in compliance with Lockett.

QUESTION II

WHETHER THE REJECTION BY THE TRIAL COURT AND THE FLORIDA SUPREME COURT OF THE "EXTREME MENTAL OR EMOTIONAL DISTURBANCE" MITIGATING FACTOR WAS NOT FAIRLY SUPPORTED BY THE RECORD, AND VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENT STANDARDS OF RELIABILITY IN CAPITAL SENTENCING.

Where the trial court's rejection of a mitigating circumstance is not fairly supported by the record, the capital sentencing standards required by the Eighth and Fourteenth Amendments to ensure reliability are violated. See Magwood v. Smith, 608 F.Supp. 218, 225-27 (D.C. Ala. 1985), affd, 791 F.2d 1438, 1447-50 (11th Cir. 1986) (evidence was insufficient, as a matter of federal constitutional law, to support state trial court's rejection of "extreme mental or emotional disturbance"

mitigating factor).

In the present case, the unrebutted testimony of Dr. Robert Berland established that petitioner suffers from paranoid schizophrenia, and also in all probability from organic brain damage. Petitioner's disturbed reaction to the loss of his relationship with his former fiancee was, according to Dr. Berland, typical - even stereotypical - of paranoid individuals. Notwithstanding this unrebutted evidence, the trial court either refused to find (or, at best, denigrated) the mitigating circumstance of extreme mental or emotional disturbance [see Appendix D1-2].

Interestingly, the trial court's rejection of this mitigating factor was not based on any disbelief of Dr. Berland's expert testimony. Contrast Bates v. State, 506 So.2d 1033 (Fla. 1987). Indeed, the trial court relied on "[t]he extensive testing done by Dr. Berland on the defendant" [Appendix D2], along with the circumstances of the killing, to establish the other statutory "mental mitigating circumstance" - that of petitioner's impaired capacity to conform his conduct to the requirements of law. Rather, the trial court explained his rejection of the extreme mental or emotional disturbance mitigating factor as follows:

> The facts of the case, as produced by the evidence, indicate that the defendant, TIMOTHY CURTIS HUDSON, was apparently surprised by the victim during the defendant's burglarizing of the home owned by the victim and shared with the defendant's ex-girlfriend. Although the Court allowed the jury to consider this mitigating circumstance in arriving at its decision, the evidence does not support the fact that any emotional or mental disturbance that the defendant might have been suffering from at the time of the commission of the crime of Murder, was in any way of an extreme nature. The facts show that he entered the home in a planned manner and after the killing, he attempted to dispose of the body and soiled bed clothes in a planned and devious manner.

[Appendix D1-2]

Based, then, only on petitioner's manner of entry into the residence, and his attempt to dispose of the body and bed clothing, the trial court gave "little or no weight" to the evidence that petitioner suffers from a mental illness of psychotic proportions, which was the driving force behind his burglarizing his girlfriend's residence in the first place.

It is important to recognize that, under Florida's capital sentencing law, the two mental mitigating factors are directed to different aspects of the defendant's mental state, which may, but do not necessarily, overlap. Roman v. State, 475 So.2d 1228, 1231 (Fla. 1985); see also Toole v. State, 479 So.2d 731, 733-34 (Fla. 1985). Where the evidence establishes that the defendant suffers from paranoid schizophrenia, both mental mitigating circumstances must be taken into consideration before imposing a death sentence. Toole v. State, supra, at 733-34; Mines v. State, 390 So.2d 332, 337 (Fla. 1980); and in the instant case the testimony of Dr. Berland clearly and explicitly established both. As defined by the Florida Supreme Court in State v. Dixon, 283 So.2d 1, 10 (Fla. 1973):

> Extreme mental or emotional disturbance is a second mitigating consideration, pursuant to § 921.141(7)(b), Fla. Stat, F.S.A., which is easily interpreted as less than insanity but more than the emotions of an average man, however inflamed.

In this regard, consider Dr. Berland's guilt phase testimony, in which he stated that petitioner met the first criterion of insanity, in that he had a mental illness which affected his ability to reason accurately, but he did not meet the second criterion, in that he appeared to know the wrongfulness and the immediate consequences of his actions. Dr. Berland testified, "... I believe that his psychotic disturbance represents the kind of mental defect under consideration here in that it did significantly interfere with his ability to reason accurately or to understand things."

Under these circumstances, the record does not fairly support the trial court's total - or nearly total - rejection of the mitigating circumstance of extreme mental or emotional disturbance. See Magwood v. Smith, 608 F.Supp. 218, 225-27 (D.C. Ala. 1985); affd. 791 F.2d 1438, 1447-50 (11th Cir. 1986). Cf. Stano v. State, 460 So.2d 890, 894 (Fla. 1984) (trial court's rejection of a proffered mitigating circumstance should be upheld "if it is supported by competent substantial evidence"). Especially in view of the fact that the trial court clearly did not disbelieve the results of Dr. Berland's psychological testing of petitioner, the question is whether the circumstances surrounding the entry into the house and the attempted disposal of the body constitute "competent substantial evidence" to overcome the evidence of his serious psychotic disturbance. Petitioner submits that they clearly do not, and therefore the trial court's failure to accord any meaningful mitigating weight to petitioner's mental illness was error as a matter of constitutional law. Magwood.

CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, petitioner, TIMOTHY C. HUDSON, respectfully requests that this Court issue a writ of certiorari to the Supreme Court of Florida.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari has been furnished by U.S. Mail to the Honorable Joseph E. Spaniol, Jr., Clerk of the Supreme Court of the United States, First and Maryland Avenue, Northeast, Washington, D.C., 20543; Timothy C. Hudson, Inmate No. 085756, Florida State Prison, P.O. Box 747, Starke, Florida 32091; The Honorable Sid J. White, Clerk of the Supreme Court, State of Florida, Tallahassee, Florida 32301; and to the Attorney General's Office, Park Trammell Bldg., 1313 Tampa Street, 8th Floor, Tampa, Florida 33602, this 17 day of May, 1989.

Steven L Bolotin

STEVEN L. BOLOTIN

SLB/an