IN THE SUPREME COURT OF FLORIDA

NO. _____

JAMES ARMANDO CARD,

Petitioner,

vs.

RICHARD L. DUGGER, Secretary,
Department of Corrections, State of Florida,

Respondent.

PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF HABEAS CORPUS, REQUEST FOR STAY OF EXECUTION, AND APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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I. INTRODUCTION

This case presents the same type of preclusive judicial consideration of nonstatutory mitigating evidence which was condemned in Hitchcock v. Dugger. Mr. Card presented his claim to this Court on direct appeal; then, pre-Hitchcock, the Court denied relief. Now, post-Hitchcock, this Court has made it abundantly clear that a capital sentencing proceeding such as the one resulting in Mr. Card's sentence of death cannot be allowed to stand. The proceedings "actually conducted" in Mr. Card's case show that the sentencing judge failed to provide any serious and meaningful consideration to mitigting evidence which did not "fit" within two specifically enumerated statutory factors. Mr. Card's sentence was not individualized and wholly failed to comport with the eighth amendment. It should not be allowed to stand.

II. JURISDICTION TO ENTERTAIN PETITION, ENTER A STAY OF EXECUTION, AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents issues which directly concern the judgment of this Court on Mr. Card's initial direct appeal, Card v. State, 453 So. 2d 17 (Fla. 1984), and on Mr. Card's subsequent appeal of the denial of his motion for post-conviction relief. Card v. State, 497 So. 2d 1169 (Fla. 1986). Consequently, jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the constitutional errors presented herein occurred during the appellate review process. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); see also, Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Card to raise the claims presented in this petition. See, e.g., Downs v. Dugger,

___ So. 2d ___ (No. 71,100, Fla. Sept. 9, 1987); Riley v. Wainwright, ___ So. 2d ___ (No. 69,563, Fla., Sept. 3, 1987).

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review. See Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977); Wilson v. Wainwright, 474 So. 2d at 1165; Brown v. Wainwright, supra, 392 So. 2d 1327. This Court has not hesitated in exercising its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings. Wilson; Downs; Riley. Mr. Card's petition presents substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. Card's capital conviction and sentence of death, and of this Court's appellate review. Moreover, the claims presented herein involve fundamental error. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965). This Court has the inherent power to do justice. As shown below, the ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. See, e.g., Riley; Downs; Wilson.

The petition also involves claims of ineffective assistance of counsel on appeal. Because the challenged acts and omissions of counsel occurred before this Court, this Court has jurisdiction. Knight v. State, 394 So. 2d 997, 999 (Fla. 1981). This and other Florida courts have consistently recognized that the writ must issue where the constitutional right of appeal is thwarted on crucial and dispositive points due to the omissions or ineffectiveness of appointed counsel. See, e.g., Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); McCrae v. Wainwright, 439 So. 2d 768 (Fla. 1983); State v. Wooden, 246 So. 2d 755, 756 (Fla. 1971); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); Ross v. State, 287 So. 2d 372, 374-75 (Fla. 2d DCA 1973); Davis v. State, 276 So. 2d 846, 849 (Fla. 2d DCA 1973), aff'd, 290 So. 2d 30 (Fla. 1974). The proper means of securing a

hearing on such issues in this Court is a petition for writ of habeas corpus. Baggett, supra, 287 So. 2d at 374-75; Powe v. State, 216 So. 2d 446, 448 (Fla. 1968). With respect to the ineffective assistance claims, Mr. Card will demonstrate that the inadequate performance of his appellate counsel was so significant, fundamental, and prejudicial as to require the issuance of the writ.

Finally, Mr. Card's petition includes a request that the Court stay his execution (presently scheduled for September 17, 1987). As will be shown, the issues presented are substantial and warrant a stay. This Court has not hesitated to stay executions when warranted to ensure judicious consideration of the issues presented by petitioners litigating during the pendency of a death warrant. See Riley v. Wainwright (No. 69, 563, Fla. Nov. 3, 1986); Groover v. State (No. 68,845, Fla. June 3, 1986); Copeland v. State (Nos. 69,429 and 69,482, Fla., Oct. 16, 1986); Jones v. State, (No. 67,835, Fla., Nov. 4, 1985); Bush v. State (Nos. 68,617 and 68,619, Fla., April 21, 1986); Spaziano v. State (No. 67,929, Fla., May 22, 1986); Mason v. State (No. 67,101, Fla., June 12, 1986). See also, Downs v. Dugger, ___ So. 2d ___ (No. 71,100, Fla., Sept. 8, 1987)(granting stay of execution and habeas corpus relief). Cf. State v. Sireci, 502 So. 2d 1221 Fla. 1987).

The issues Mr. Card presents are no less substantial than those involved in the cases cited above. He therefore respectfully urges that the Court enter an order staying his scheduled execution, and, thereafter, that the Court grant him habeas corpus relief.

III. CONSTITUTIONAL BASIS FOR RELIEF

By his petition for a writ of habeas corpus, Mr. Card alleges that his convictions and sentence of death were obtained, and affirmed during the Court's appellate review process (see 453

So. 2d 17 [1984]; 497 So. 2d 1169 [1986]), in violation of the Fifth, Sixth, Eighth, and Fourteenth amendments to the United States Constitution and the corresponding provisions of the Florida Constitution.

IV. MR. CARD'S CLAIMS

Mr. Card's claims are presented below under separate headings. Each claim presents first a brief introduction, then the factual basis for relief, and thereafter the legal analysis attendant to the claim. The record on direct appeal before this Court is cited as "R. ____." All other citations are self-explanatory or are otherwise explained.

1. MR. CARD WAS DEPRIVED OF AN INDIVIDUALIZED SENTENCING DETERMINATION, AND WAS DENIED HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS, BECAUSE THE SENTENCING COURT FAILED TO PROVIDE CONSTITUTIONALLY REQUIRED CONSIDERATION TO NONSTATUTORY MITIGATING FACTORS.

A. Introduction

The Eighth Amendment forbids a sentence of death resulting from proceedings in which unfettered and meaningful consideration of all mitigating factors has not been provided by the sentencer. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). A sentence of death therefore cannot stand when it appears that the sentencing court limited its consideration of nonstatutory mitigating factors, Harvard v. State, 486 So. 2d 537 (Fla. 1986), when the record reflects that the sentencing court failed to give "serious consideration" to such nonstatutory factors, McCrae v. State, 12 F.L.W. 310, 314 (Fla. June 26, 1987), when the sentencing order fails to take into account, for its own independent weight, nonstatutory mitigating evidence, Hitchcock; McCrae, or when the sentencing court, "in imposing sentence, expressly weigh[s] only those mitigating factors enumerated in the death penalty

statute." Downs v. Dugger, No. 71,100 (Fla., Sept. 9, 1987), slip op. at p. 4, citing Hitchcock v. Dugger.

The record of the proceedings resulting in Mr. Card's sentence of death was rife with such fundamental eighth amendment errors. The issue was urged on direct appeal. (See Initial Brief of Appellant, pp. 55-60, citing, inter alia, Eddings v. Oklahoma and Lockett v. Ohio.) However, the Court, pre-Hitchcock, denied relief. See Card v. State, 453 So. 2d 17 (Fla. 1984). Now, post-Hitchcock,[1] Mr. Card properly urges reconsideration of his claim by his petition for a writ of habeas corpus. Downs v. Dugger, supra; Riley v. Wainwright, No. 69, 563 (Fla. Sept. 3, 1987).

B. Factual Basis For Relief

During the course of Mr. Card's pretrial, trial, and penalty phase proceedings[2] a number of classically recognized, albeit nonstatutory, mitigating factors were elicited. The court, however, restricted its consideration to only those factors which were included in the statute. As reflected in the court's sentencing order and in its pronouncements prior to the imposition of sentence, the court provided far less than "serious" consideration, see, McCrae, supra, 12 F.L.W. at 314, to

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[1] Hitchcock v. Dugger was also decided well after this Court issued its opinion in Mr. Card's initial post-conviction action. 497 So. 2d 169 (Fla. 1986). Therefore Mr. Card can only now properly invoke this Court's jurisdiction to consider the claim. See Downs v. Dugger, No. 71,100 (Fla. Sept. 9, 1987) slip op. at 2 (Hitchcock issue properly presented, and relief granted, in second habeas corpus [and third state-court post-conviction action] because it involves "a substantial change in the law [requiring reconsideration of] issues first raised on direct appeal . . ."); see also, Riley v. Wainwright, supra (same); cf. Morgan v. State, No. 69, 104 (Fla. Aug. 27, 1987).

[2] Mitigating factors are not limited to evidence "presented" by the defense at the penalty phase, but may arise from all matters before the court. See Harvard v. State, 486 So. 2d at 539.

the substantial nonstatutory mitigating evidence included in the record. Statutory factors were discussed, but nonstatutory mitigation was not even mentioned. See Hitchcock v. Dugger, supra. The court took account only of what "fit" in the statute. Cf. McCrae, supra. It weighed nothing else. Cf. Downs, supra. It evaluated nothing else. Cf. Hitchcock, supra. It did not meaningfully consider anything else. Id.

i) The Sentencing Order

The trial court's sentencing order reflects what mitigating evidence was considered in imposing sentence[3] . The order spoke only to the statutory factors:

> The Court has taken into account the testimony of Dr. Hord and finds that the defendant is apparently a sociopathic personality. It is contended that this testimony establishes that the defendant was under extreme mental or emotional disturbance at the time of the commission of the offense and that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. The Court finds, however, that the testimony of Dr. Hord does not establish any particular mitigating circumstance.

(R. 172, 459 [emphasis supplied]). It analyzed the penalty phase testimony of the mental health expert only in the statutory terms of Fla. Stat. section 921.141(6)(b) and (f)(1982). It "considered" that testimony as presented solely for the purpose of establishing those two statutory factors, even though that testimony was presented to establish -- and did establish -- a great deal more. (See generally, R. 1159-1205; See also, section (ii), infra, [discussion of nonstatutory mitigating evidence].) However, the nonstatutory mitigating aspects of Dr. Hord's testimony were never "seriously" considered. McCrae, supra.

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[3]As the record reflects, the entirety of the court's pronouncement prior to the imposition of sentence was a verbatim reading of the sentencing order into the record. (Compare, R. 459 [oral pronouncement], with R. 172 [sentencing order].)

That evidence did not "fit" within subsections b and f of the statute. It was therefore never "weighed" or meaningfully accounted for.

Similarly, other substantial nonstatutory mitigating evidence which was included in the record was also ignored. See Harvard, supra (mitigating evidence not limited to evidence adduced at penalty phase; all mitigation included in the record should be considered by judge at sentencing). These factors, which the court never spoke to, are also discussed below.

What the court did say was that Dr. Hord's testimony did not establish "any particular mitigating circumstance" (R. 459, 172). That was the court's statutory analysis. It is manifest that the court's statement ("particular mitigating circumstance") did not concern the specific nonstatutory factors presented by Dr. Hord's testimony (as well as by the other evidence in the record). Those factors, involving classic nonstatutory mitigation, were never discussed by the court. See section (ii), infra (discussing nonstatutory factors).

When viewed in the context in which it was made -- an analysis of the Fla. Stat. 921.141(6)(b) and (f) statutory factors -- it is beyond cavil that "particular" meant "statutory". In this regard, it is noteworthy that the sentencing order included a specific analysis of the 921.141(6)(b) and (f) factors but failed to include even a passing reference to the then-existing "catch-all" factor ("any other aspect of the defendant's background . . ."[4]) No mitigating evidence which did not "fit" within the two

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[4]The court did read to the jury a one-line instruction regarding the "catch-all" mitigating circumstance. But the fact that it was read to the jury does not mean that the court considered it. The sentencing order never mentions it, and the court never hinted that it was providing the required consideration.

statutorily enumerated circumstances discussed in the sentencing order (921.141(6)(b) and (f)) was ever mentioned. The court failed to make even a passing reference that it rejected such "other" factors. The evidence which did not fit within subsections b and f was simply not accounted for, much less given "serious" consideration. McCrae v. State, supra.5/

Assuming arguendo that the trial court correctly rejected the evidence presented by Dr. Hord (and the other related mental health evidence which had been before the court, see infra,) as insufficient to rise to the stringent statutory requirements of Fla. Stat. 921.141(6)(b) and (f), the substantial evidence of Mr. Card's mental/emotional/psychological problems still warranted consideration as nonstatutory mitigation. None was given, for the court construed the evidence only under the rubric of the two statutory factors discussed above. Accordingly, the court's order concluded with the same restrictive focus on the two statutorily enumerated factors, and held that "each mitigating factor raised," if established, would not outweigh the aggravating circumstances (R. 172, 459). Again, read in context, there can be little doubt that the court was referring to the statutory factors (subsections b and f). A plethora of nonstatutory mitigation, however, was available and deserved consideration. Even if the two statutory factors would not have

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[5]Unfettered sentencer consideration of all mitigating evidence is at the heart of the eighth amendment's mandate that a capital sentence be individualized. Hitchcock; Lockett v. Ohio, 438 U.S. 586 (1978). Therefore, even if the court's sentencing order were viewed as ambiguous, Mr. Card's sentence would still be flatly unconstitutional. A man simply cannot be sent to his execution when there is uncertainty as to whether his sentence was individualized -- i.e., when we do not know whether the mitigating factors in his background were fairly considered. Cf. Lucas v. State, 490 So. 2d 943 (Fla. 1986); see generally, Woodson v. North Carolina, 428 U.S. 280 (1976).

outweighed the aggravating circumstances,6/ the court's failure to refer to, account for, and seriously consider the various nonstatutory factors which this record disclosed cannot be deemed harmless beyond a reasonable doubt. See Hitchcock v. Dugger; Downs v. Dugger, supra. As this court has explained, the failure to consider nonstatutory mitigation "affects the sentence in such a way as to render the trial fundamentally unfair." Riley v. Wainwright, supra, slip op. at p. 7 n.2, citing Harvard v. State. See also, Morgan v. State, supra.

ii) The Record Nonstatutory Factors Which Were Ignored

At the penalty phase only one witness testified -- Dr. James E. Hord. This testimony was unrebutted, and presented a number of nonstatutory mitigating factors:

a. Mental/emotional difficulties:

> Q When persons such as Mr. Card are placed in positions of stress, do they react as normal people?
>
> A I don't think they react as average people.
>
> Q How would Mr. Card or someone like Mr. Card react in a position of stress?
>
> A In general he would react with poorer judgment, poorer long-range judgment, poorer forethought for his activities. The emphasis would be on reaction, not on solutions to whatever the problem situation was.
>
> Q You indicated, if I'm correct, less able to consider long-term results of their actions?
>
> A That is true.
>
> Q More of an impulsive type reaction than you would expect from an average person?

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[6]This "balancing" itself was constitutionally inadequate for it placed on Mr. Card the burden of proving that he should not be executed, while relieving the state of its burden of proof. See Mullaney v. Wilbur, 421 U.S. 684 (1975); Arango v. State, 411 So. 2d 172 (Fla. 1982).

A Yes, he would be more likely to grab hold of any immediate solution that he was aware of, even if that was not a good solution, and even if he knew that it wasn't a good solution.

Q The consequences of their actions, how are they considered by Mr. Card?

A They would be attended to with much less importance than would be true for the average person, I believe.

Q Would they, in conditions of stress, be less likely to reflect upon the consequences of their acts?

A I think they would be less likely to reflect on the long-range consequences of their acts in favor of looking for an immediate solution that represented some form of retaining control over the situation that he was in.

(R. 1170-71).

* * *

Q . . . do you have an opinion as to what Mr. Card's mental condition was at the time that Mrs. Franklin's death was caused?

A I think his mental condition at the time of the death in that scenario would be one of something very much like panic. I think there are a number of significant steps in getting there in that description.

Q Please relate to the jury why you have that opinion.

A This is a man who has a very sensitive grasp of how he is viewed by other people. He has that sensitive grasp because he has many ambivalent feelings about himself as a person, and he has many ambivalent feelings about his relationships with women and his relationships with people in general . . . .

(R. 1175-76).

* * *

b. A tortured childhood and its permanent emotional scars:

A . . . When Card was born, his father at that time did not stay with the family. There is a difference there. Mr. Card remembers that his father left when he was six months old. The family tells me that he left a month before Card was actually born, but nevertheless, he left. The father, when told of the boy's birth, was very negative, did not want to see him, did not want to express any claim to the boy. That's important, not at that point in time, because

we're talking about an infant, but over the years when Card finally met his father when he was approximately ten years old, the rejection was still there, and even though the father did have some time that he spent with Mr. Card and the other kids, he was almost, to me, unbelievably negative in his statements about the children or about his responsibility or even about his parentage.

Q Could you give some examples of that? Why do you say he was unbelievably negative?

A Verbal statements in the form of, "You're not my kid. I'm not your father. I don't want to see you, or I don't want to be around you." Verbal statements that overt are very unusual. Rejecting behavior from parents is usually a much more subtle process than that. It's difficult to understand the necessity on an individual's part to be that rejecting of anybody, but nevertheless, that is a consistent description from his mother, his sister, and from Mr. Card.

Q Please continue, Doctor.

A The mother remarried shortly after that to a man who was described during this period of time as not particularly negative in behavior but not accepting of the children. That marriage lasted for about three years. They divorced. Mother then remarried another individual who apparently was an extremely accepting, good father figure. Mr. Card remembered this stepfather that way, sister remembers him that way, and mother describes him that way. The term that sticks in my mind in describing him was salt of the earth which was spontaneously injected into the description by the sister. This man had an asthma condition which he suffered from apparently for some time, and he died three or four years after the marriage.

Q How old would Mr. Card have been at this time?

A He, at that time, was probably five or six years old, I would estimate.

Q Please continue.

A Jim Card and his brother, his older brother, had very strong reactions to that, and the mother tells me that she put both of them in psychiatric care. She also tells me that the feedback she got from the psychiatrist was that the boys hated their stepfather, and at that point the entire family decided the psychiatrist didn't know what he was talking about, so that ended the psychiatric care. I have no argument with him not knowing what he was talking about. I'm not passing judgment there anyway. The

mother then remarried the first stepfather, and on this occasion the stepfather was, in terms that I wrote in my notes, were horrible and cruel. He apparently was very unnecessarily negative and hostile toward the children already in the home and eventually also toward his wife. Now, unnecessarily cruel involves things like this. One of the descriptions given to me was a time when Mr. Card had raised a calf, and it was to be displayed in the fair for the 4-H program, [the calf] was shot by the stepfather apparently without any reason. A cow that was raised by the sister was also shot, and at least on that occasion the stepfather insisted that the girl watch as he shoots the cow. On another occasion Mr. Card was found to have a growth in his knee that was investigated medically. He was told to not put stress on his knee, to not aggravate the growth. Upon hearing about that, the stepfather reportedly required Mr. Card to go out in the backyard and get down on his knees and dig a post hold using a teaspoon. That is obvious, intentional cruelty.

Q What was his age at that point, Doctor?

A He would have been approaching ten.

(R. 1186-89).

* * *

A . . . The family obviously had very bad financial strains during this period of time. The boy with polio [Mr. Card's brother] required warm baths and other similar treatment for his polio. He obviously had to be taken care of to a greater extent than Jim Card, and Card had expressed to his mother during his growing up years that she did not love him as much as she did the older brother, and that's a natural assumption that comes out of a situation in a family where one child has an infirmity of some sort, and also a natural response that the mother attempted to explain that away to her boy, but nevertheless, it's a very understandable feature in a child in such situations to indeed feel that they are second best in some way. My point in that is simply that the rejection that would have been experienced with the events of the stepfathers already would be compounded somewhat, in that the one positive mother figure who had a total of eight kids all together is in some way tarnished by having one child that must be given special attention, more attention, and in interpreting that on the child's part, more love than would the others. I think that's significant.

Q The point of all this being that

these, unfortunately, are at least some of the contributing factors which cause Mr. Card to be different than average in his thinking?

A It predictably produces significant disturbance in his ability to form relationships, to form feelings of trust in relationships, to feel isolated, to be on guard.

(R. 1190-91).

* * *

c. Prospects for rehabilitation; adjustment to prison life; no future dangerousness

Q . . . What steps or what course of treatment is given to these kinds of people other than the state prison?

A On those rare occasions when someone with this adjustment pattern comes in and says, "Look, I really want help, I really want to change myself", then individual and sometimes family therapy approaches can be very successful, but that's inferring that the motivation to make changes in the adjustment pattern are there. It's very, very difficult for sociopathic personalities to take that step, and the more experience, the more life experience they have in developing that model, the less likely it becomes. In a prison situation, unfortunately, in my opinion, a prison situation sometimes offers the best shaping process to improve this condition, because it, by its very nature, interrupts the efficiency of operating out of the sociopathic model and the general population.

A . . . [m]any of the success stories that we hear about coming out of prisons involve people that go in very sociopathic and are there for a while with no improvements happening, but eventually take off on some other track. Some of them go into law, some of them go into other educational endeavors, but they take advantage of vocational programs that are offered to them there, and they'll take advantage where they never would have gotten to the point to take advantage of them elsewhere, in my opinion.

(R. 1191-93).

* * *

Q These things that you've related, and we may have touched on this, and I'm jumping around, about his personality and the way he thinks, his reaction to put-downs, and I would like to use the term normal also. Doesn't that make him extremely more dangerous than a normal person, more

dangerous?

A Usually not, because most people who operate on such a level simply don't get into situations that have the kind of import to them that this one apparently did,. . . .

(R. 1200 [Cross-examination]).

* * *

Q What about him specifically, is he dangerous when in a situation where there is a put-down or he feels inadequate or whatever terminology you want to use?

A Most situations in which he feels some put-down would not result in him being dangerous . . .

(R. 1201 [Cross-examination]).

* * *

Q You don't think he's likely [to be violent]?

A I don't think the probabilities would suggest that . . .

(R. 1204).

* * *

Evidence respecting Mr. Card's mental/emotional deficiencies was not limited to Dr. Hord's testimony. The court also had Dr. Cartwright's report which reflected that Mr. Card: 1) had "problems with impulse control"; 2) was self-destructive; 3) feared his own aggressive tendencies; 4) had "poor insight and planning ability"; 5) had difficulty considering the consequences of his conduct; and noted 6) "throughout the evaluative process, Mr. Card's verbalized thought and responses indicate a strong identification with punishment, death, and dying." (R. 76).

Dr. Wray's report (also before the court) noted, inter alia, a "possibility of insanity" and "paranoid schizophrenia" (R. 95-96).

These reports, like most of Dr. Hord's testimony, were also given no consideration -- the information did not "fit" into the two stringent statutory factors which the court considered (b and f). However, the information was [nonstatutory] mitigating evidence -- evidence which, at a minimum, corroborated Dr. Hord's

account: "that there was no plan when he [Mr. Card] walked into the Western Union . . . I don't think we're talking about [an] individual who works very often on thought out plans" (R. 1177).

Finally, the court was aware that Mr. Card had a wife and children, that the jury was concerned with the weaknesses in the state's case (deliberating for hours at trial, and returning a 7-5 vote at sentencing), that the State's case was entirely founded on the testimony of one witness (Elrod) while there existed exculpatory testimony from another witness (Camille Cardwell). These factors also mitigated,[7] but also were not considered.

C. The Legal Analysis Attendant To Mr. Card's Claim

Today, "[t]here is no disputing," Skipper v. South Carolina, 106 S. Ct. 1669, 1670 (1986), the force of the Lockett v. Ohio, 438 U.S. 104 (1978), constitutional mandate: a sentence of death cannot stand when the defendant has been denied an individualized sentencing determination by the sentencer's failure to consider mitigating evidence. See Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Skipper, supra. In Mr. Card's case, the sentencing court's words (i.e., its sentencing order and on-the-record pronouncements) show that it constrained its review only to statutory mitigation -- the court here, as in Hitchcock, said nothing indicating that it seriously considered, McCrae, 12 F.L.W. 310, 314 (Fla. June 26, 1987), any nonstatutory mitigation. The sentencing court provided Mr. Card with an unconstitutionally restricted sentencing proceeding. Cf. Harvard, 486 So. 2d 537; Songer v. Wainwright, 769 F.2d 1488, 1489 (11th Cir. 1985)(en banc).

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[7] See generally, King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984); Green v. Georgia, 442 U.S. 95 (1979); Smith v. Balkcom, 660 F.2d 573, 580-81 (5th Cir. Unit B, 1981).

Mr. Card's claim falls squarely within Hitchcock and this Court's recent applications of the Hitchcock standard. McCrae; Thompson; Downs; Morgan; Riley. The claim is not defeated by the fact that nonstatutory mitigating evidence was "presented":

> The United States Supreme Court clearly rejected [the] "mere presentation" standard . . .

Riley v. Wainwright, slip op. at 7, citing Hitchcock v. Dugger, 107 S. Ct. at 1824. Apparently, this Court relied on its former "mere presentation" analysis to reject Mr. Card's claim on direct appeal. 453 So. 2d at 24. Today, post-Hitchcock, "the mere opportunity to present nonstatutory mitigating evidence does not meet constitutional requirements if the judge believes . . . that some of that evidence may not be weighed . . . during sentencing." Downs v. Dugger, supra, slip op. at 4 (emphasis supplied). Neither is Mr. Card's claim defeated by the fact that he was sentenced after Lockett. Hitchcock mandates review of the proceedings "actually conducted" and makes the claim cognizable. See Thompson v. State, supra; Downs, supra. Moreover, here, as in Riley and Thompson, a pre-Hitchcock denial of relief on direct appeal does not preclude post-Hitchcock collateral review (and relief).

The eighth amendment errors discussed herein resulted in the sentencing court's failure to consider the key evidence adduced in mitigation. They rendered Mr. Card's sentencing proceeding fundamentally unfair, Harvard, 496 So. 2d 537, supra, and deprived him of an individualized sentencing determination. Mr. Card submits that the sentencing court violated the eighth amendment in failing to find the two statutory mitigating factors it did consider. However, even if the court's rejection of those factors was justified, the failure to provide any meaningful consideration to the numerous nonstatutory mitigating factors apparent from this record simply cannot be deemed harmless beyond a reasonable doubt. Riley; McCrae; Morgan; Downs.

This record shows that the sentencing judge provided only limited consideration. Hitchcock; Harvard. Mr. Card is entitled to habeas corpus relief.

2. APPELLATE COUNSEL WAS PREJUDICIALLY INEFFECTIVE FOR FAILING TO CHALLENGE ON DIRECT APPEAL THE TRIAL COURT'S FAILURE TO CONDUCT A RICHARDSON HEARING, PER SE REVERSIBLE ERROR, IN VIOLATION OF MR. CARD'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

A. Introduction

Mr. Card was literally ambushed at his trial when critical evidence linking him to the scene of the crime which was not disclosed prior to trial was introduced by the state. As a result of the state's failure to comply with discovery rules, see Fla. R. Crim. P. 3.220, Mr. Card was unable to rebut or explain this evidence, although it could have been easily rebutted had defense counsel been given the opportunity to do so. Consequently, Mr. Card was denied his right to effectively cross-examine witnesses against him. The trial court, without any appropriate hearing and deliberation, much less the mandated Richardson inquiry, simply overruled defense counsel's objection to the discovery violation and to the admission of the evidence.

The purpose of discovery rules is to help the accused prepare his case. Ivester v. State, 398 So. 2d 926 (Fla. 1 DCA 1981). The rules were designed to avail the defense of evidence known to the state so that convictions will not be obtained by surprise tactics in the courtroom. Cooper v. State, 336 So. 2d 1133 (Fla. 1976); see also, Cuciak v. State, 394 So. 2d 916 (Fla. 1982). If either party fails to comply with a discovery rule, the trial court must conduct an inquiry into the circumstances of the violation before exercising its discretion to determine whether the noncompliance resulted in harm to the other party and thus whether and what sanctions are appropriate. See Richardson v. State, 246 So. 2d 771, 775 (Fla. 1971). As will be discussed

below, a discovery violation undeniably occurred here, but the required Richardson hearing was not held.

B. Factual and Legal Basis For Relief

i) The State's Discovery Violation

Frank McKeithen, lead investigator for the Bay County Sheriff's Office, took the stand during the State's case in chief and testified as to the results of his investigation. While testifying about conditions and evidence at the scene where the victim's body was found, McKeithen described a "wet spot" he found on the road near some tire tracks, which he "determined" had been made by power-steering fluid (735-36). The relevance of this evidence became immediately clear when he then began to describe efforts he later undertook to determine whether or not Mr. Card's automobile was leaking power-steering fluid (736).

Defense counsel immediately objected to this line of testimony (736), before McKeithen could reveal the results of his examination of Mr. Card's car. The basis of the objection was that although reciprocal discovery had been invoked early on in the case, the witness deposed, and all reports compiled by the witness purportedly disclosed nothing concerning the power-steering fluid found at the scene had been produced.

The state had produced plaster casts that had been made of tire tracks found at the scene, and had informed the defense of the opinion of an expert witness that those tracks were "similar" to the tires on Mr. Card's car at the time of his arrest. Nothing was provided, however, regarding the "power-steering fluid" found at the scene and subsequent examinations of Mr. Card's car to determine whether it was indeed leaking power-steering fluid.

The state readily admitted that it knew about the power-steering fluid evidence and the subsequent comparisons but nevertheless did not disclose it (748). Although the witness

thought, but could not remember for sure, that he had discussed this evidence in one of his reports, and had directed the crime scene investigators to collect it (745, 761), nothing in the discovery materials provided by the state reflected the existence of this evidence. The state's position was in effect that because the investigating officers had either inexcusably failed to preserve this physical evidence or deliberately destroyed it, the state was under no obligation to disclose its existence through the discovery process (737-38, 748). According to the state, it was the defense's obligation to discover the existence of this physical evidence by deposing the witness (749).

The Court apparently agreed with the state that simply providing the name of the witness who would testify as to the existence of the now-missing physical evidence and the examinations and comparisons he performed with regard to that evidence was sufficient compliance with the discovery rules (750-51). It overruled the defense objection without any inquiry into the circumstances surrounding the state's failure to disclose it. (Id.)

McKeithen then continued, and testified to the jury that he had examined Mr. Card's car while it was in the Sheriff's Office impoundment facility, and determined that it was leaking power-steering fluid from the same area as the car that had been at the scene of the murder (741).

This evidence was critical -- along with the tire tracks which were purportedly "similar" to the tires on Mr. Card's car, it was the only physical evidence to corroborate the testimony of Vickie Elrod regarding statements allegedly made to her by Mr. Card. No fingerprint, fiber, hair, blood, nor any other physical evidence placed Mr. Card anywhere near the scene. This evidence was crucial to the state's case, and the state's failure to provide it during discovery crippled the defense in its ability to rebut, explain, or challenge it.

To hold, as did the trial court, that the defense's opportunity to depose the witness who testified as to the existence of the physical evidence was tantamount to disclosure of the evidence itself violates the spirit and the letter of the discovery rules. Such an approach would allow the state to hide from discovery any physical evidence it chose by simply ensuring that the evidence itself is unavailable and that the witness who will testify as to its existence never makes any tangible record of its existence prior to his or her testimony. Such a system would be incompatible with the fundamental principles of fairness underlying modern discovery rules and would encourage "surprise tactics in the courtroom." See Cooper, 336 So. 2d at 1138.

In Haversham v. State, 427 So. 2d 400 (4th DCA 1983), the Fourth District Court of Appeal addressed a discovery violation substantially similar to the one that occurred here. There, the victim of a burglary allegedly committed by the defendant testified at trial to the existence of a footprint on the back porch of his house, a footprint similar in design and size to the defendant's shoes. Id. at 401. The defense objected to this testimony on the grounds that the existence of the footprint had not been disclosed during discovery. After the prosecutor explained to the court that he himself had been unaware of the footprint, as the witness had returned to Florida only that morning, and that he had given defense counsel the opportunity to talk to the witness prior to trial, the trial court overruled the defense objection and allowed the testimony to continue. Id. On appeal, the Court reversed because the trial court had failed to conduct the required Richardson hearing upon learning of the discovery violation:

> The protection of Richardson requires more than the mere disclosure of the identity of a witness. It requires the State fully to comply with the rules of discovery. Cumbie v. State, 345 So. 2d 1061 (Fla. 1977). Admission of undisclosed evidence without conducting a Richardson inquiry renders a conviction reversible as a matter of law.

Brey v. State, 382 So. 2d 395 (Fla. 4th DCA 1980).

Haversham, 427 So. 2d at 402. Because the trial court had conducted "only a cursory inquiry into the facts leading up to the testimony," the conviction was reversible as a matter of law. Id.

Here, as in Haversham, merely disclosing the identity of the witness who will testify as to the existence and relevance of physical evidence was insufficient; the state must "fully comply with the rules of discovery," Haversham, 427 So. 2d at 402, by informing the defense of the existence of the evidence itself. In contrast to Haversham, where the state was unaware prior to trial of the existence of the physical evidence and thus of the consequent discovery violation, the state here knew of the existence of the power-steering fluid, yet refused to disclose it. In either case, merely providing the identity to the witness is insufficient because the defense would not have the tools to elicit testimony regarding the undisclosed evidence.

Even if the trial court's ruling in Mr. Card's case that providing the name of the witness and thus the opportunity to depose him negated any discovery violation was or could ever be correct, there is still a discovery violation here to the extent that Investigator McKeithen did not fully and truthfully answer questions propounded by the defense at his deposition. As even the most cursory of inquiries into the circumstances of the nondisclosure would have revealed, contrary to the assertions of the prosecutor at trial (see 740), defense counsel did ask questions during the deposition which were reasonably calculated to and which should have led to the disclosure of the existence of the power-steering fluid evidence. While deposing McKeithen, defense counsel asked him to discuss all evidence, real and circumstantial, which supported the state's case against Mr. Card. (See Deposition of Frank McKeithen, pp. 85-87). McKeithen

did not, obviously, mention the power-steering fluid.[8]

The state's failure to disclose the existence of the power-steering fluid evidence clearly violated the discovery rules. There was simply no way the defense could have determined the existence of this critical evidence. The discovery rules were designed precisely to avoid this type of dilemma. To hold that the State can avoid both disclosure and a discovery violation by deliberately suppressing critical physical evidence frustrates the purpose of the rules and makes a mockery of the criminal justice system.

ii) The Trial Court's Failure To Hold a Richardson Hearing Was Per Se Reversible Error.

A trial court has broad discretion in the determination of whether a party's failure to comply with the rules of discovery has resulted in prejudice to the opposing party and in determining whether and what sanctions and remedies are appropriate, but the court's discretion can be properly exercised only after the court has made an adequate inquiry into all the surrounding circumstances. See Richardson v. State, 246 So. 2d 771 (Fla. 1971); Zeigler v. State, 402 So. 2d 365 (Fla. 1981); Poe v. State, 431 So. 2d 266 (Fla. 5 DCA 1983); Wright v. State, 428 So. 2d 746 (Fla. 1 DCA 1983); Coffey v. State, 421 So. 2d 49 (Fla. 2 DCA 1982).

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[8] This is not the case of a prior inconsistent statement in a discovery deposition, which has been held not to rise to the level of a discovery violation which would require a Richardson hearing. See Bush v. State, 461 So. 2d 936 (Fla. 1985) (inconsistent statement in discovery deposition regarding identification of defendant not a discovery violation because defense could discredit the witness by impeaching the witness with his inconsistent testimony). Here, by contrast, there was no inconsistent statement in the deposition, but rather a deliberate attempt to hide physical evidence, as the deponent's failure to recall an item of evidence was not inconsistent with his trial testimony, and hence had no impeachment value.

If no Richardson inquiry is held after a discovery violation has been brought to the court's attention, reversal is mandated. See Smith v. State, 500 So. 2d 125 (Fla. 1986). The failure to hold a Richardson hearing when required is per se reversible error. Id; see also, State v. R.R., 502 So. 2d 1244 (Fla. 1987); State v. Ward, 502 So. 2d 1245 (Fla. 1987). Harmless error analysis does not apply, because

> [t]he very purpose of a Richardson hearing ... is to determine if a violation is, in fact, harmless. One cannot determine whether the State's transgressions of the discovery rules has prejudiced the defendant (or has been harmless) without giving the defendant the opportunity to speak on the question.

Smith, 500 So. 2d at 126. Thus, it is the failure to hold a Richardson hearing itself which controls, not the nature and extent of the discovery violation.

The inquiry which must occur when a discovery violation is brought to the attention of the trial court must, at a minimum, determine whether the violation was substantial or trivial, inadvertant or willful, and the extent of the prejudice caused the opposing party. See Richardson, supra; Wilcox v. State, 367 So. 2d 1020 (Fla. 1979). No such inquiry occurred in Mr. Card's case.

Merely determining the admissibility of the undisclosed evidence is not sufficient to meet the requirement of Richardson. See Cumbie v. State, 345 So. 2d 1061 (Fla. 1977). In Brey v. State, 382 So.2d 395 (Fla. 4th DCA 1980), the court held that the trial court had not conducted an adequate Richardson hearing because

> [t]he inquiry here focused on the legal admissibility of the evidence and the fact that the name of the police officer [who testified regarding the defendant's undisclosed statements] had been contained in the state's list of witnesses ... there was no inquiry as to the prejudicial effect of the violation on defendant's preparation for trial.

Brey, 382 So. 2d 398.

The key question in any discovery violation is prejudice. See Holman v. State, 347 So. 2d 832 (Fla. 3 DCA 1977). In determining whether prejudice exists in a given case, the trial judge must first determine whether the discovery violation prevented the defendant from properly preparing for trial. Wilcox, supra, 367 So. 2d at 1023. Had the proper Richardson inquiry been conducted here, the prejudice caused by the state's failure to disclose would have become manifestly obvious. As it was, the defense was taken totally by surprise, and was thus wholly unable to rebut, challenge, or explain the evidence.

Admission of this evidence also violated Mr. Card's sixth amendment right to confront adverse witnesses. This right is fundamental and made obligatory on the states by the fourteenth amendment. Smith v. Illinois, 390 U.S. 129 (1968). The right of confrontation embodies the right to cross-examine the witnesses. Pointer v. Texas, 380 U.S. 400 (1965). That right would be an empty one were a defendant not afforded the opportunity to meaningfully cross-examine. Because defense counsel was never informed of the existence of the power-steering fluid, or the examinations and comparisons performed with respect thereto, and had no way to know of such evidence, the defense was precluded from meaningfully cross examining McKeithen.

iii) Appellate Counsel Was Prejudicially Ineffective for Failing To Raise This Claim On Direct Appeal

This Court is especially vigilant in its policing of counsel's performance on appeal. When this Court learns of unreasonable attorney omissions, it does not hesitate to act:

> It is true that we have imposed upon ourselves the duty to independently examine each death penalty case. However, we will be the first to agree that our judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to

> present ti to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged derivations from due process.

Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985) (emphasis supplied).

Wilson places this Court in the forefront of appellate court scrutiny of attorney advocacy. Undeniably, the appellate level right to counsel also comprehends the sixth amendment right to effective assistance of counsel. Evitts v. Lucey, ___ U.S. ___, 105 S.Ct. 830 (1985). Appellate counsel must function as "an active advocate on behalf of his client," Anders v. California, 386 U.S. 738 (1967), who must receive "expert professional . . . assistance . . . [which is] necessary in a legal system governed by complex rules and procedure. . . ." Lucey, 105 S.Ct. 830, 835 n.6. An indigent, as well as "the rich man, who appeals as of right, [must] enjoy[] the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf. . . ." Douglas v. California, 372 U.S. 353, 358 (1985)(equal protection right to counsel on appeal).

The process due appellant is not simply an appeal with representation by "a person who happens to be a lawyer. . . ." Lucey, 105 S.Ct. at 835 (quoting Strickland v. Washington, 104 S.Ct. 2052 (1984).) The attorney must act as a "champion on appeal," Douglas, 372 U.S. at 356, not as "amicus curiae". Anders, 386 U.S. at 744.

These are not merely arcane jurisprudential precepts: "Lawyers in criminal cases are necessities, not luxuries." United States v. Cronic, 80 L.Ed. 657, 664 (1984). Counsel is crucial, not just to spew the legalese unavailable to the layperson, but also to "meet the adversary presentation of the prosecution." Lucey, 105 S.Ct. 830, 835 n.6. Thus, effective counsel does not leave an appellate court with "the cold record which it must review without the help of an advocate." Anders, 386 U.S. at 745. Neither may counsel play the role of "a mere

friend of the court assisting in a detached evaluation of the appellant's claim." Lucey, 105 S.Ct. at 835. Counsel must "affirmatively promote his client's position before the court ... to induce the court to pursue all the more vigorously its own review because of the ready references not only to the record, but also to the legal authorities as furnished it by counsel." Anders, 386 U.S. at 745; see also Mylar v. Alabama, 671 F.2d 1299, 1301 (11th Cir. 1982)("unquestionably a brief containing legal authority and analysis assists an appellant court in providing a more thorough deliberation of an appellant's case").

Here, the trial court's failure to conduct a Richardson hearing when defense counsel objected to the state's use of the undisclosed power-steering fluid evidence was per se reversible error, and would have entitled Mr. Card to a new trial had it been challenged on direct appeal. Appellate counsel ineffectively, unreasonably, and inexplicably failed to raise the issue, to Mr. Card's demonstrable prejudice.

The United States Court of Appeals for the Eleventh Circuit has found similar appellate attorney conduct to "fall below the wide range of competence required of attorneys in criminal cases," and thus to violate the appellant's sixth amendment right to the effective assistance of counsel. See Matire v. Wainwright, 811 F.2d 1430 (11th Cir. 1987). In Matire, the state trial court had allowed, over objection, the trial prosecutor to comment on the defendant's exercise of his fifth amendment right to remain silent. The Eleventh Circuit found counsel's failure to raise the issues on direct appeal prejudicially deficient, particularly "[i]n light of the then Florida rules of per se reversal," which created a "near certainty that Matire's conviction would have been reversed." 811 F.2d at 1439.

As in Wilson v. Wainwright and Matire, Mr. Card is entitled to relief.

3. DURING THE COURSE OF THE PROCEEDINGS RESULTING IN MR. CARD'S SENTENCE OF DEATH THE COURT AND PROSECUTOR MISINFORMED THE JURY AS TO THE WEIGHT TO BE ACCORDED THEIR SENTENCING VERDICT, AND DIMINISHED THE JURY'S SENSE OF RESPONSIBILITY FOR ITS SENTENCING DECISION, IN VIOLATION OF CALDWELL V. MISSISSIPPI, TEDDER V. STATE, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

This claim should have been brought on direct appeal, but was not, because counsel lacked the tools with which to raise it: Caldwell v. Mississippi had not yet been decided. This Court independently reviewed the record for error, Elledge v. State, supra; Brown v. Wainwright, supra, and apparently found that this issue was not error -- the Court affirmed.

This Court has also determined that as a matter of law, this type of claim involves no error. Copeland v. State, 505 So. 2d 425 (Fla. 1987). Mr. Card respectfully submits that this Court's Copeland opinion cannot be squared with neither Caldwell v. Mississippi, nor Tedder v. State. He urges that the Court reconsider Copeland, grant relief for the reasons discussed below.

A. Introduction

From the beginning of voir dire through its final instructions, the trial court misled the jury concerning the significance attached to its sentencing verdict. See Caldwell v. Mississippi, 472 U. S. 320, 105 S. Ct. 2633 (1985). In Florida's trifurcated capital sentencing scheme, a jury's sentencing recommendation is to be accorded great deference. However, in this case, the trial judge, prosecutor, and defense attorney all improperly and inaccurately minimized the jury's role, and its sense of responsibility, in violation of the eighth and fourteenth amendments to the United States Constitution.

B. Factual Basis For Relief

Mr. Card's jury was repeatedly informed, by both the prosecutor, defense counsel, and the trial court, that the responsibility for sentence was not theirs. The role delegated to Mr. Card's jury was an essentially meaningless one, in that they were lead to believe that the judge had the sole responsibility for determining penalty, irrespective of their own decision on the matter. As a result, the proceedings which resulted in Mr. Card's sentence of death, and the sentence of death itself, are fundamentally and unconstitutionally unreliable.

The prosecutor in Mr. Card's case informed the venire at the commencement of voir dire of his own erroneous view of the jury's role at sentencing:

> You can recommend to the Court that the death penalty be imposed or that a life sentence be imposed. I want to emphasize to you that the Court has the final say on the penalty. The judge always determines sentence in Florida. The jury determines guilt or innocence. The Court determines the sentence, but on these types of cases you give him a recommendation on that second phase. Do all of you understand that procedure then?

(ROA 502) (emphasis added). Thus, according to the prosecutor, the jury's function at sentencing would be a wholly superfluous one, as the sentencing judge "always determines sentence in Florida." This was the first information regarding their role at sentencing that the jury heard, and nothing was ever said to correct this fundamental misconception.

During defense counsel's voir dire questioning, it became obvious that the jury "underst[ood] that procedure," as it was explained by the prosecutor:

> THOMAS: I believe as a juror it would be my responsibility to weigh the evidence and determine his guilt or innocence, and as the law states, in the State of Florida it would be our duty to recommend a penalty after we did our original duty to determine his guilt, and I do believe in the death penalty. I believe this is the Judge's responsibility to

> pass judgment as to the penalty, the extent of the penalty.

(ROA 514) (emphasis added). Defense counsel's follow-up to this response further reinforced this 'belief:'

> [Defense Counsel]: Do you understand that the Judge is ultimately the one who is going to pass the sentence if he's convicted in all cases, but in a capital case the jury makes a recommendation, and the Judge may override it if he chooses to do so?

(Id.).

The prosecutor again reminded the jury of their function vis-a-vis imposition of penalty at the close of the sentencing proceeding:

> Remember, your advisory opinion to the Court is only a recommendation. This Judge has the final say as to what sentence will be in this case.

(ROA 401). Defense counsel did nothing at any point during trial to correct this erroneous view of the jury's responsibility for sentencing, and the court's final instructions to the jury reinforced the misconception that their role was a virtual nullity:

> As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge.

(ROA 439).

C. The Legal Analysis Attendant to Mr. Card's Claim

The prosecutor and the judge misinstructed the jury as to its proper role and function at sentencing. Under Florida's capital sentencing statute, the jury has the primary responsibility for sentencing. Although the jury's sentencing verdict is technically a "recommendation," which under extremely limited circumstances the sentencing judge need not follow, the jury's role at the sentencing phase of a capital trial is nevertheless an extremely crucial one. See, e.g., Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975); Brookings v. State, 495 So. 2d 135 (Fla. 1986); Garcia v. State, 492 So. 2d 360 (Fla.

1986); Wasko v. State, ___ So. 2d ___ (Fla. 1987); Duboise v. State, ___ So. 2d ___ (Fla. 1987); Ferry v. State, 507 So. 2d 1373 (Fla. 1987); Fead v. State, No. 68, 341 (Fla. September 3, 1987). Thus, any intimation that a capital sentencing judge has the ultimate or sole responsibility for the imposition of sentence, or is in any way free to impose whatever sentence he or she sees fit, irrespective of the sentencing jury's own decision, is inaccurate, and is a misstatement of the law.

Although under the capital sentencing statute the trial judge is the only sentencer that may actually impose sentence, his role is not that of the 'sole' or 'ultimate' sentencer; rather, his role is to serve as "buffer where the jury allows emotion to override the duty of a deliberate determination" of the appropriate sentence. Cooper v. State, 336 So. 2d 1133, 1140 (Fla. 1976); see also Adams v. Wainwright, 804 So. 2d 1526 (11th Cir. 1986). While Florida requires the sentencing judge to independently weigh the aggravating and mitigating circumstances and render sentence, the jury's recommendation, which represents the judgment of the community, is entitled to great weight. McCampell v. State, 421 So. 2d 1072, 1075 (Fla. 1982); Adams, 804 F.2d at 1529. The jury's sentencing verdict may be overturned by the judge only if the facts are "so clear and convincing that virtually no reasonable person could differ." Tedder, supra. Thus, if there is any "reasonable basis" for a jury's sentencing recommendation, a trial judge may not override it. Ferry, supra.

Mr. Card's jury was led to believe that its determination as to the appropriate sentence meant nothing, as the judge was the ultimate sentencer, and was free to impose whatever sentence he wished, regardless of the jury's decision. At no point were the jurors correctly instructed as to Florida law-- they were never told that their sentencing decision was entitled to great weight, to extreme deference, or that in fact judge overrides of a jury's recommendation are seldom affirmed by the Florida Supreme Court.

They were never informed that their role was indeed a critical one and that only in the most limited of circumstances could their recommendation be overridden.

In Caldwell v. Mississippi, 105 S.Ct. 2633 (1985), the Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death lies elsewhere," id at 2639, and that therefore prosecutorial argument which tended to diminish the role and responsibility of a capital sentencing jury violated the Eighth Amendment. The prosecutor in Caldwell had argued that the jury's decision would be automatically reviewable by the Mississippi Supreme Court. However, because the prosecutor failed to also point out that the jury's decision would be viewed with a presumption of correctness by the Mississippi Supreme Court, the Caldwell Court held that the jury was erroneously led to believe that the ultimate responsibility for the death sentence lied elsewhere. Because the "view of its role in the capital sentencing procedure" imparted to the jury by the improper and misleading argument was "fundamentally incompatible with the Eighth Amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case,'" the Court vacated Caldwell's death sentence. Caldwell, 105 S.Ct. at 2645, quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

The constitutional vice of the type of misinformation condemned by the Caldwell Court is not only the substantial unreliability it injects into the capital sentencing proceeding, but also the danger of bias in favor of the death penalty which such "state-induced suggestions that the sentencing jury may shift its sense of responsibility" creates. Id. at 2640. A jury which is unconvinced that death is the appropriate punishment might nevertheless vote to impose death as an expression of its

"extreme disapproval of the defendant's acts" if it holds the mistaken belief that its deliberate error will be corrected by the 'ultimate' sentencer, and is thus more likely to impose death regardless of the presence of circumstances calling for a lesser sentence. See Caldwell, 105 S.Ct. at 2641. Moreover, a jury "confronted with the truly awesome responsibility of decreeing death for a fellow human," McGautha v. California, 402 U.S. 183, 208 (1971), might find a dimunition of its role and responsibility for sentencing attractive. Caldwell, 105 S.Ct. at 2641-42. As the Caldwell Court explained:

> In evaluating the prejudicial effect of the prosecutor's argument, we must also recognize that the argument offers jurors a view of their role which might frequently be highly attractive. A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. they are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion. given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize its role. Indeed, one could easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review [or judge sentencing] could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in.

Id.

Mr. Card's jury was misinformed as to its role and responsibility in the capital sentencing process, just as in Caldwell, and the inaccurate and improper prosecutorial argument in his case was given the imprimatur of the court through its instructions. The error is thus even more egregious than that in Caldwell:

> because... the trial judge... made the misleading statements in this case, representing them to be an accurate

> description of the jury's responsibility, the jury was even more likely to have believed that its recommended sentence would would have no effect and to have minimized its role than the jury in Caldwell.

Adams v. Wainwright, 804 F.2d at 1531.

This Court has recently recognized that the concerns expressed in Caldwell are particularly applicable to Florida's capital sentencing scheme, stating that "[i]t is appropriate to stress to the jury the seriousness which it should attach to its recommendation," and that "[t]o do otherwise would be contrary to Caldwell v. Mississippi and Tedder v. State." Garcia v. State, 492 So. 2d 360, 367 (Fla. 1986) (citations omitted). The Eleventh Circuit has also recognized the critical role played by the jury in Florida capital sentencing and the applicability of Caldwell, and has granted relief in cases identical to Mr. Card's. See Adams v. Wainwright, supra.

Here, as in Adams, the jury was left "with a false impression as to the significance of their role in the sentencing process," id. at 1531 n.7, a false impression which "created a danger of bias in favor of the death penalty." Id. at 1532.

Mr. Card's jury recommended death by a margin of seven to five. One additional vote would have resulted in a life recommendation, a recommendation which the trial judge would have been obligated to follow under Florida law. Tedder; Duboise; Wasko; Ferry; Fead. Under such circumstances, it cannot be said that the mischaracterization had no effect on Mr. Card's sentence, Caldwell, supra; Adams, supra, and Mr. Card is entitled to relief in the form of a new sentencing proceeding. Because it cannot be said that the misleading argument and instruction here "had no effect on the sentencing decision," Caldwell, 105 S. Ct. at 2646, "that decision does not meet the standard of reliability that the Eighth Amendment requires," id., and Mr. Card's sentence of death cannot be allowed to stand.

4. MR. CARD WAS DENIED HIS RIGHTS TO A PRETRIAL COMPETENCY HEARING, TO A PROFESSIONALLY COMPETENT AND ADEQUATE MENTAL HEALTH EVALUATION, TO NOT UNDERGO CRIMINAL JUDICIAL PROCEEDINGS WHILE INCOMPETENT, AND TO AN INDIVIDUALIZED SENTENCING DETERMINATION, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

A. Introduction

On appeal from the denial of Mr. Card's Rule 3.850 motion, this Court denied relief on all of the mental health issues which Mr. Card had presented. See Card v. State, 497 So. 2d 1169, 1174-75, 1177 (Fla. 1986). Mr. Card respectfully submits that this Court's opinion was fundamentally flawed: in a case in which no evidentiary hearing had been held, the Court based its rulings on factual determinations which were completely at odds with the overwhelming evidence of lack of competency in the record, the Rule 3.850 motion, and the motion's appendices. Similarly, the Court applied [erroneously] only part of the constitutionally required standard of review. Mr. Card's claim therefore was never adequately determined -- he respectfully urges that the Court now provide an adequate determination. See Flowers v. State, 351 So. 2d 387, 390 (Fla. 1st DCA 1977); Dallas v. Wainwright, supra.

B. Factual Basis For Relief

The Court denied a hearing, and denied relief, by:

1) Relying on the fact that Mr. Card had been examined by two psychologists and a psychiatrist prior to trial;

2) Distinguishing Mr. Card's case from Hill v. State, 473 So. 2d 1253 (Fla. 1985) -- "the instant case does not compare to the factual predicate presented in Hill;" and,

3) By holding that, "[A] letter from a psychologist criticizing the methods used by the original experts ... coupled with a belated letter indicating that the defendant may have had a psychotic disturbance do not, standing alone, warrant a finding that the trial court erred in failing to hold a pretrial competency hearing."

Card v. State, 497 So. 2d at 1174-75.

However, as the overwhelming evidence before the Court in 1986 and the similar evidence Mr. Card submits as an appendix to this petition shows, Mr. Card's case has always presented as substantial a factual predicate as that found to warrant relief in Hill v. State, and an evidentiary hearing in Mason v. State, 489 So. 2d 734 (Fla. 1986). Mr. Card's history (discussed below) is one of severe mental illness. However, Mr. Card was the victim of unprofessional and inadequate "evaluations" of the grossest sort (See infra). Consequently, the wealth of evidence which would have unequivocally shown that he was entitled to a competency hearing and that, in fact, he was not competent to undergo criminal judicial proceedings never got to the court.[9]

i) As in Hill and Mason, substantial evidence of incompetency has always existed In Mr. Card's case.

James Card has always suffered from severe mental, emotional, and intellectual problems. His first contact with a psychiatrist occurred when he was seven years old (see Appendix A, Affidavit of Darla D'Agostino). His childhood years were notable for the abuse he suffered at the hands of abusive stepfathers. (See Appendices A, B, C). (Affidavit Gloria Chenoweth, Darla D'Agostino, John Card.)

His school records show a markedly low level of intellectual functioning -- a "California MM" administered while Mr. Card was a high school student shows an I.Q. of 78. (See Appendix I [Banning High School Records]. His grades were consistently D's and F's. (See Appendices H and I [Albertinum Catholic School and Banning High School Records]).

Youth Authority records included evaluations that Mr. Card had a "schizophrenic personality" (Appendix J [Juvenile

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[9] The harm was compounded by his attorney's failure to investigate and present the evidence at issue.

records]). Family members explained that he would act "like [he was] on another planet" (Appendix C [Affidavit of Card]).

As an adult, his diminished mental/emotional faculties became more obvious. Military records described him as "hyperemotional." (Appendix P [Army Record Excerpts]). He was hospitalized for depression and at various times medicated with Triquil, Librium, Sodium Amytal, and Valium (Appendices M, L, V [Washoe Medical Center records; Klammoth County Jail records; Bay County Jail records]). A Nevada Presentence Investigation Report stated that he was a "sick person with a long history of mental illness" (Appendices S and Z). While at the Washoe Medical Center, doctors noted that he exhibited "bizarre behavior."

Mr. Card's history is also marked by suicide attempts and self-mutilation: Mr. Card has shot himself at least five times and stabbed himself at least three times (See e.g., Appendix M [Veterans Administration Hospital, Reno, Nevada]). Similarly, throughout his life, he has suffered from several severe head injuries (See, e.g., Appendix M [Washoe Medical Center]; Appendix P [Military Records].) Closed head injuries such as those suffered by Mr. Card "produce deficits that implicate both hemispheres" -- i.e., they produce organic brain damage. See Berg, Franzen, and Wedding, Screening For Brain Impairment (1987).

The time constraints involved in "under warrant" litigation make it impossible for undersigned counsel to detail the plethora of evidence from Mr. Card's background demonstrating his history of mental illness. The evidence is overwhelming, and, at a minimum, was and is sufficient to warrant an evidentiary hearing on the competency issue. Mason; Hill.

The "experts" who saw Mr. Card prior to trial failed to consider any of this. They interviewed Mr. Card, but invested little effort into seeking out the necessary collateral data:

> Commentators have pointed out the problems involved in basing psychiatric evaluations

> exclusively, or almost exclusively, on clinical interviews with the subject involved. . .
>
> In light of the patient's inability to convey accurate information about his history, and a general tendency to mask rather than reveal symptoms, an interview should be complemented by a review of independent data. See Bonnie, R. and Slobogin, C., The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation, 66 Va.L. Rev. 427, 508-10 (1980).

Mason v. State, 489 So. 2d 734, 737 (Fla. 1986) (emphasis supplied).

The gross unprofessionalism of their "evaluations" did not stop there. Dr. Robert Wray's report (Appendix X) stated that Mr. Card's I.Q. was 130-35. However, as the report itself indicates, Dr. Wray gave Mr. Card no intelligence test. In fact, Dr. Wray conducted no psychological testing whatsoever. He simply guessed. See supra (I.Q. of 78 noted in school records). Similarly, Dr. Berland also failed to conduct any psychological testing.

Moreover, the limited and woefully inadequate testing which Dr. Hord and Dr. Cartwright provided fell far below professional standards. See, e.g., Olschefsky v. Fisher, 123 So. 2d 751 (Fla. 3d DCA 1960). Dr. Hord testified at the penalty phase that he could not consider the Minnesota Multiphasic Personality Inventory (MMPI) he administered to Mr. Card "valid"; nevertheless, he explained, he used the test to formulate his opinion (R. 1166). Dr. Hord administered one Draw-A-Person test, and used it to formulate his opinion. However, to be valid, the Draw-A-Person test must be administered more than once. See Groth-Marnat, Handbook of Psychological Assessment (1984). Agan, an invalid test was relied on. The other test Dr. Hord administered was a Rorschach test. This testing also was flawed -- Mr. Card provided only ten responses, an insufficient number on which to base an accurate interpretation. See id. at p. 223 (characterizing less than seventeen answers as "inaccurate" and

"misleading".)

At the time Mr. Card was evaluated, Dr. Hord and Dr. Cartwright worked together, in a partnership. (See Appendices AA, BB and Z). They shared data and test results. Thus, Dr. Cartwright relied on the same inadequate and inaccurate testing conducted by Dr. Hord (See Appendix AA, report of Dr. Cartwright, indicating that he used Dr. Hord's testing of Mr. Card).

In sum, none of the four experts sought out background information as the profession requires. They therefore never considered Mr. Card's substantial history of mental/emotional difficulties. Beyond that, the doctors failed to conduct even a semblance of professionally adequate testing. The "evaluations" in Mr. Card's case were, in fact, more inadequate than those in Mason v. State. Had the doctors properly done their job, Mr. Card would not have been denied a competency hearing and would not have been forced to trial while incompetent.

The substantial history of psychological disturbances present in Mr. Card's background, and the grossly inadequate pretrial evaluations (as proffered in Mr. Card's Rule 3.850 motion and its appendices) warranted, at a minimum, an evidentiary hearing. Mason; Hill.

Mr. Card proffers again herein, with supporting appendices, and respectfully urges that the Court grant habeas corpus relief. No other remedy is available in the State courts, for only this Court can correct its previous [erroneous] ruling. See Flowers, 351 So. 2d at 390; see also, Wilson v. Wainwright, supra; Riley v. Wainwright, supra.

C. The Legal Analysis Attendant To Mr. Card's Claim

Due to the grossly inadequate evaluations conducted in this case, Mr. Card was deprived of his rights under Hill, Pate v. Robinson, 383 U.S. 375 (1966) and Bishop v. United States, 350 U.S. 961 (1956). He urges that the Court now correct that error.

Mr. Card had a constitutional due process right to a competency hearing in the trial court during the initial trial level proceedings: "The significance of the Pate [v. Robinson, 383 U.S. 375 (1966)] 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 1257. Such evidence existed in this case, and the trial court should have conducted a competency hearing. Drope v. Missouri, 420 U.S. 162, 183 (1975).

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, supra, at 1257-58.

Moreover, when, as here, there is a reasonable probability that the defendant was incompetent at the time of trial, relief is also warranted. Hill, supra; Mason, supra; Bishop v. United States, 350 U.S. 961 (1956). Regardless of whether the trial record put the trial court on notice of a possibility of incompetency, if the defendant shows post-conviction that there is evidence that he was incompetent at the time of trial, a new trial is required. It simply violates due process to put an incompetent individual on trial.

Mr. Card has presented his proffer to this Court. He respectfully urges that the Court correct the errors discussed herein, and grant habeas corpus relief.

5. THE EXCLUSION OF CRITICAL EVIDENCE RENDERED MR. CARD'S SENTENCE OF DEATH FUNDAMENTALLY UNRELIABLE AND VIOLATED HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Card's sole defense was that he did not commit the crime. In support of this defense, trial counsel attempted to

present, during the guilt phase, the testimony of Camille Cardwell, who had heard others planning a crime identical to the one at issue in this case. This testimony was excluded by the trial judge as hearsay. (964-73). This issue was raised on direct appeal, and this Court affirmed the trial court, holding that Mr. Card was not denied a fair trial by the trial court's exclusion of the evidence. Card v. State, 453 So. 2d 17, 21 (Fla. 1984).

This Court did not, however, address the fundamental eighth amendment issues implicated by the exclusion of Cardwell's testimony, although the appellate briefs presented the claim. It is the most basic of eighth amendment principles that a capital sentencer 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 which would form the basis for a sentence less than death. Lockett v. Ohio, 438 U.S. 586, 605 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Hitchcock v. Dugger, 107 S.Ct. 1821 (1987). The evidence which would have been introduced through Camille Cardwell was highly relevant to the issue of punishment, and "[r]egardless of whether the p[roffered testimony comes within [Florida] hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment." Green v. Georgia, 442 U.S. 95, 97-98 (1979).

Mr. Card's defense throughout was that he did not commit the crime. Camille Cardwell would have testified then and would testify today that someone other than Mr. Card committed the offense. Even if the jury did not find her testimony sufficient to defeat Mr. Card's guilt beyond a reasonable doubt, it could well have been sufficient to raise some doubt in a jury's mind, a lingering doubt perhaps not "reasonable" in the sense that it would militate against conviction, but sufficient to mitigate against imposition of the death sentence. See, e.g., Smith

(Dennis) v. Wainwright, 741 F.2d 1248 (11th Cir. 1984); Smith (John E.) v. Balkcom, 660 F.2d 573 (5th Cir. Unit b 1981); Chaney v. Brown, 730 F.2d 1334 (10th Cir. 1984), cert. denied, 105 S.Ct. 601 (1984); see also Blankenship v. State, 308 S.E. 2d 369 (Ga. 1983); Alderman v. State, 327 S.E. 2d 169 (Ga. 1985); People v. Terry. 390 P.2d 381 (Cal. 1964).

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 guilty 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 Chapter 211.6(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 Chapter 210.6(1), comment 5 (revised comments, 1980.)

"Nonstatutory mitigating factors may arise not only from evidence presented in the penalty phase but also from evidence presented and observations made in the guilt phase of the proceedings." Harvard v. State, 486 So. 2d 537, 539 (Fla. 1986). The jury could well have considered Camille Cardwell's testimony as a non-statutory mitigating factor even if it did not find it sufficient to raise a reasonable doubt and prevent a conviction.

This Court's determination that the sixth amendment was not offended by exclusion of the evidence under Florida's evidence code, Card, 453 So. 2d at 21, does not affect the eighth amendment considerations involved. The eighth amendment prohibits application of local evidentiary rules to exclude Lockett-type mitigating evidence in capital cases. See Green v. Georgia, supra. In a capital case, "the hearsay rule may not be applied mechanically to defeat the ends of justice." Green, 442 U.S. at 98, quoting Chambers v. Mississippi, 410 U.S. 284 (1973).

Mr. Card respectfully urges that the Court [re]consider this claim in the eighth amendment context, and grant habeas corpus relief.

CONCLUSION

Petitioner respectfully requests that this Court enter a stay of his execution scheduled for Thursday, September 17, 1987, and issue its writ of habeas corpus directing that his convictions and sentence of death be vacated, or, alternatively, allowing a new appeal. If fact resolution is necessary for the decision of this Court, Petitioner requests that a magistrate be appointed to take evidence.

Respectfully submitted,

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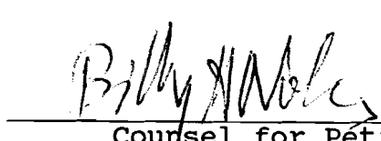

Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by hand delivery to Gary Printy, Assistant Attorney General, The Elliot Building, 401 South Monroe Street, Tallahassee, Florida 32301, this 11th day of September, 1987.

Attorney