IN THE SUPREME COURT OF FLORIDA

NO. 71947

DOUGLAS RAY MEEKS,

Petitioner,

v.

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

Respondent.

AMENDED PETITION FOR A WRIT OF HABEAS CORPUS
AND FOR EXTRAORDINARY RELIEF

LARRY HELM SPALDING
Capital Collateral Representative

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I. PRELIMINARY STATEMENT

Douglas Ray Meeks' petition involves two capital convictions and sentences of death. A series of death warrants signed against Mr. Meeks forced him to litigate both cases simultaneously, and he does so again herein. Because this petition involves two separate prosecutions, citations will include a case number, e.g., "ROA, Case ___, p. ___." References to the state court post-conviction record are cited "PC-(page #)." The Consolidated Appendix and Record Excerpts filed with this petition will be cited "App. ___." All other references and citations are self-explanatory, or are otherwise explained.

II. INTRODUCTION

Douglas Ray Meeks' sentences of death were among the first imposed in Florida after the issuance of Furman v. Georgia. The instant habeas corpus action is predicated on Hitchcock v. Dugger, and the issues raised present the same type of preclusive consideration of nonstatutory mitigating evidence which was condemned in Hitchcock v. Dugger. As in Hitchcock, the record of the proceedings "actually conducted" in this case demonstrates that the sentencing judge believed himself to be constrained to consider only the statutory mitigating factors, and that he instructed the jurors that they also should be so constrained. The trial prosecutor urged the same preclusive construction in his arguments. Defense counsel was also restricted by the then-prevailing statutory interpretation -- as a result, he failed to investigate, develop, and present a wealth of available nonstatutory mitigation regarding Douglas Ray Meeks, his character, his background, his emotional, intellectual, and psychological deficiencies, and the relationship between those nonstatutory factors and the offenses at issue. Mr. Meeks presented his claims to this Court pre-Hitchcock; then, the Court

denied relief. Now, post-Hitchcock, this Court has made it abundantly clear that capital sentencing proceedings such as those resulting in Mr. Meeks' sentences of death cannot be allowed to stand. The proceedings "actually conducted" show that the sentencing judge and jury, and defense counsel, failed to provide any serious and meaningful consideration to mitigating evidence which did not "fit" within specifically enumerated statutory categories. The opinions of the United States Supreme Court and this Court now teach that proceedings such as those resulting in Mr. Meeks' death sentences cannot be deemed individualized or reliable, and thus wholly fail to comport with the eighth amendment. Now, post-Hitchcock, it is clear that Mr. Meeks' death sentences should not be allowed to stand.

Mr. Meeks was in the process of presenting his case to the United States Court of Appeals for the Eleventh Circuit when Hitchcock v. Dugger was issued. Thereafter, this Court issued numerous opinions making clear that Mr. Meeks' claim was subject to full merits consideration in the state courts. Undersigned counsel believed that it would be appropriate for Mr. Meeks' claim to be initially passed on, post-Hitchcock, by this Court, and filed a motion to that effect with the federal court of appeals (see App. 1). Supporting its procedural default contentions, the State asserted before the federal appellate court that "[i]f appellant really believes the Florida Supreme Court is no longer barring claims such as his . . . he should go to state court and file a petition with the Florida Supreme Court." By this petition, Mr. Meeks unhesitantly meets the State's challenge. This Court has made clear that it will consider the merits, and that it will grant relief when capital sentencing proceedings violate the eight amendment as interpreted in Hitchcock v. Dugger. Post-Hitchcock, it is this Court that should initially pass on Mr. Meeks' case. Permission was therefore sought of the federal court, and the federal court

granted Mr. Meeks leave to present his case to this Court (see App. 2). Mr. Meeks' Eleventh Circuit motion seeking leave explained:

> A. INTRODUCTION: MR. MEEKS' CLAIM IS SUBJECT TO NO PROCEDURAL BAR IN THE FLORIDA COURTS.
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> On April 22, 1987, a unanimous United States Supreme Court struck down a Florida sentence of death and ordered that the application for a writ of habeas corpus be granted in Hitchcock v. Dugger, 107 U.S. 1821 (1987). Specifically, the Court held that the proceedings resulting in Hitchcock's death sentence did not comport with the Eighth Amendment's requirement that the sentencer may neither refuse to consider nor be precluded from considering any relevant mitigating evidence. In the words of the unanimous Court:
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> > We think it could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, and that the proceeding therefore did not comport with the requirements of Skipper v. South Carolina, 467 U.S. ___ (1986), Eddings v. Oklahoma, 455 U.S. 104 (1982), and Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion).
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> Hitchcock v. Dugger, 107 U.S. at 1824.
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> Douglas Ray Meeks' sentences of death resulted from pre-Lockett Florida sentencing proceedings which were in every sense as unconstitutional as those in Hitchcock v. Dugger . . . The proceedings resulting in Mr. Meeks' death sentences involved instructions as preclusive as those given to Hitchcock's jury, judicial consideration as restrictive as that provided at Hitchcock's trial, prosecutorial comments restricting the jury's consideration that went far beyond what the prosecutor said in Hitchcock, and a defense attorney who was precluded from developing nonstatutory mitigating evidence because of the restrictive Florida capital sentencing statute. Generally, these issues involve evidentiary matters and, at a minimum, Mr. Meeks should be permitted to prove his claim at a hearing. See Cooper v. Wainwright, 807 F.2d 881, 889 (11th Cir. 1986). Even on the record as it now exists, however, Mr. Meeks is entitled to habeas corpus relief. Hitchcock, supra; see also Downs v. Dugger, 12 FLW 473 (Fla. 1987); Magill v. Dugger, 824 F.2d 879, 890-91, 892-95 (11th Cir. 1987).

The Respondents have presented only one defense: procedural default. Brief of Respondent/Appellee, pp. 21-24. They have provided no other reason why Mr. Meeks should not be granted the habeas corpus relief he seeks. However, no procedural bar exists precluding this federal court's consideration of Mr. Meeks' claim: the Florida Supreme Court has now expressly held that Hitchcock v. Dugger is a substantial change in law fitting squarely within the Witt v. State, 387 So. 2d 922 (Fla. 1980), analysis, and therefore that claims such as Mr. Meeks' are now fully cognizable on the merits in the Florida state courts. Accordingly, Mr. Meeks respectfully urges that the Court hold the proceedings in this case in abeyance pending resubmission of his Hitchcock/Lockett claim to the Florida state courts. See Moore v. Kemp, 809 F.2d 702, 731 (11th Cir. 1987) (en banc) (Holding habeas corpus appellate proceedings in abeyance to allow petitioner to resubmit claim of sentencing error to state courts on basis of recent, pertinent state Supreme Court decision).

As Mr. Meeks explained in his Reply Brief (pp. 1-5), the fact that no procedural bar now exists is absolutely confirmed by the Florida Supreme Court's recent pronouncements: Martin v. Dugger, ___ So. 2d ___ (Nos. 71,346 and 71,362, Fla. Oct. 28, 1987), slip op. at 3 ("[B]ecause Hitchcock is a substantial change in the law, we reconsider [the issue on the merits]"); Downs v. Dugger, ___ So. 2d ___, 12 F.L.W. 473 (Fla. Sept. 9, 1987), slip op. at 2 ("We now find that a substantial change in law has occurred that requires us to reconsider [a Hitchcock issue]"); Thompson v. Dugger, ___ So. 2d ___, 12 F.L.W. 469 (Fla. Sept. 9, 1987), slip op. at 3 (granting relief and rejecting State's procedural default contentions because Hitchcock is "change in law" mandating merits review under Witt v. State); Delap v. Dugger, ___ So. 2d ___ (No. 71,194, Fla. Oct. 8, 1987), slip op. at 2 ("Hitchcock represents a substantial change in the law ... [mandating post-conviction merits review]"); Morgan v. State, ___ So. 2d ___, 12 F.L.W. 433 (Fla., Aug. 27, 1987)(same); Riley v. Wainwright, ___ So. 2d ___, 12 F.L.W. 457 (Fla., Sept. 3, 1987), slip op. at 7(same); see also McCrae v. State, 510 So. 2d 874, 12 F.L.W. 310 (Fla. 1987).

Because the merits of Mr. Meeks' Hitchcock claim are not foreclosed from review in the state courts, the procedural bar that the Respondents have asserted before this Court simply does not pass constitutional muster. See Spencer v. Kemp, 781 F.2d 1458 (11th Cir. 1986)(en banc); Adams v. Dugger, 816 F.2d 1493, 1496-1501 (11th Cir. 1987)(on rehearing); Wheat v.

Thigpen, 793 F.2d 621, 624-27 (5th Cir. 1986)(en banc); see also James v. Kentucky, 466 U.S. 341 (1984)(only "firmly established and regularly followed state practice can prevent implementation of federal constitutional rights" [emphasis supplied].) Obviously, the very inconsistency of applying a procedural bar against Mr. Meeks which the Florida courts do not apply against other litigants defeats any adequacy and independence which may be ascribed to such a rule. See Spencer, supra; Wheat, supra. The inconsistency is even demonstrated by the Respondents' own procedural default arguments. See Brief of Respondent/Appellee, p. 23 n.6 ("[T]he [Florida] court reversed itself and held Hitchcock was a 'change in law'.") Consequently, because the Florida Supreme Court's post-Hitchcock opinions show that Mr. Meeks' claim is now fully cognizable on the merits in the Florida state courts, no procedural bar applies, and none can be imposed by this Court. James, supra; Spencer, supra.

B. ALLOWING STATE COURT REVIEW

As discussed above, Mr. Meeks' claim is now fully cognizable on the merits in the Florida courts, and no adequate and independent state procedural rule precludes this federal court's review. In this regard, the Respondents' answer brief asserted:

> If appellant really believes the Florida Supreme Court is no longer barring claims such as his based on its opinions in McCrae v. State, 12 F.L.W. 310 (Fla. June 26, 1987) and Riley v. State, 12 F.L.W. ___ (Fla. September 4, 1987), rehearing pending, he should go to state court and file a petition with the Florida Supreme Court.

Brief of Respondent/Appellee, p. 23 (emphasis in original). Given the Florida courts' recent rulings, the Respondents' proposal is not unreasonable. Therefore, as Mr. Meeks' Reply Brief explained, he is filing the instant motion in order to permit post-Hitchcock state court review. The instant motion is authorized by this Circuit's precedents, see Moore v. Kemp, 809 F.2d at 731 (discussed below), and would further significant interests in federalism and comity. It would be perfectly appropriate, given the special circumstances discussed herein, that this proceeding be held in abeyance pending resubmission.

In Moore v. Kemp, 809 F.2d 702, 731 (11th Cir. 1987)(en banc), after the state courts and after a Court of Appeals panel had rejected the petitioner's claim, the Georgia Supreme Court announced an opinion (Stynchcombe v. Floyd, 252 Ga. 113 (1984))

which indicated that the petitioner might be entitled to relief. The en banc Court then "held [the] case in abeyance so that [the] petitioner could present to the Georgia [state] courts any claims he might have arising out of Stynchcombe v. Floyd." Moore, supra, 809 F.2d at 731. As the en banc Court explained:

> Following the panel's decision and before the initial argument to the en banc court, the Supreme Court of Georgia decided Stynchcombe v. Floyd, 252 Ga. 113, 114, 311 S.E.2d 828, 830 (1984), which held that a jury instruction very similar to the one in this case [was error]. . . We held this case in abeyance so that petitioner could present to the Georgia courts [claims arising] out of Stynchcombe v. Floyd.

Moore, 809 F.2d at 731.

The Moore procedure should be permitted by the Court in Mr. Meeks' case. The reasons for resubmission presented in this case are, in fact, even more compelling than those cited by the en banc Court in Moore: (i) the new precedents (Hitchcock v. Dugger, McCrae, Downs, Thompson, Riley, Morgan, Delap, Martin) announced by the United States and Florida Supreme Courts are fundamental in nature and drastically alter the constitutional analysis previously given to similar claims; (ii) the new precedents are retroactive; (iii) the claim is now fully cognizable on the merits in the state courts; (iv) the new precedents unequivocally establish that the petitioner is entitled to relief; and (v) the state courts have not addressed this petitioner's claims in light of the new precedents.

The procedure would also be in keeping with the

> [c]onsiderations of federalism and comity [which] counsel respect for the ability of the state courts to carry out their role as the primary protectors of the rights of criminal defendants.

Younger v. Harris, 401 U.S. 37 (1971), quoted in Cabana v. Bullock, 106 S. Ct. 689, 699 (1986). Hitchcock did not exist when Mr. Meeks presented his claim to the Florida courts. Now, post-Hitchcock, it is Florida's courts which should initially provide Mr. Meeks "with that which he has not yet had and to which he is constitutionally entitled," i.e., a determination of his Hitchcock claim. See Bullock, 106 S. Ct. at 700, relying on Jackson v. Denno, 378 U.S. 368, 393-94 (1964); see also Rogers v. Richmond, 365 U.S. 534, 548 (1961)(State has "weighty interest in having valid federal constitutional

> criteria applied in the administration of its criminal law by its own courts.") These reasons are even more compelling where, as here, the state supreme court is actively considering similar issues. As in Giles v. Maryland, 386 U.S. 66, 81-82 (1967), this Court should permit Mr. Meeks to seek reconsideration of his claim by the state courts since "the result may avoid unnecessary constitutional adjudication and minimize federal-state tensions." See also id. at 80, citing Ex parte Royall, 117 U.S. 241, at 251 (State courts "bound" to protect rights secured by the federal Constitution). Finally, the procedure urged herein would further this Court's interests in avoiding piecemeal habeas litigation -- should relief be granted by the Florida courts (see, e.g., Downs; Thompson; McCrae; Riley; Morgan [cases almost identical to Mr. Meeks' in which relief was granted]), this Court would not have to pass on the claim; should relief be denied by the Florida courts, this Court would have that ruling before it, and would be able to provide federal habeas review in this [Mr. Meeks' original] federal habeas proceeding.
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> The procedure followed in Moore is perfectly appropriate in this case. Mr. Meeks therefore urges the Court to hold the instant proceedings in abeyance to allow him the opportunity to resubmit his Hitchcock/Lockett claim to the Florida Supreme Court.
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> WHEREFORE, for all of the reasons discussed in this motion and in Mr. Meeks' initial and reply briefs, we respectfully request that the relief sought herein be granted and that this Court enter an Order directing that the proceedings be held in abeyance pending resubmission to the Florida state courts, and granting all other relief which the Court may deem just and proper.

(Appellant's Motion to Hold Proceedings in Abeyance, Meeks v. Dugger, 11th Cir. Case No. 87-3281)(footnotes omitted)(reproduced in its entirety in Appendix 1 to this habeas corpus petition). As stated, the Eleventh Circuit agreed and granted Mr. Meeks' motion (App. 2).

Mr. Meeks' case is now before this Court. As the petition shows, relief is proper. In this regard, Mr. Meeks has prepared consolidated appendices and record excerpts containing pertinent portions of the record and other factual matters which the Court should review and consider in conjunction with this petition.

The appendices and record excerpts, like the full record contained in the Court's files, support the petitioner's allegations and amply demonstrate why habeas corpus relief is proper in this case. Finally, given this Court's jurisdictional rules relating to habeas corpus actions, Mr. Meeks has included certain other claims in his petition. These claims urge the Court to correct fundamental constitutional errors which went uncorrected during prior appellate proceedings in this case. These claims, like Mr. Meeks' Hitchcock claim, also demonstrate his entitlement to habeas corpus relief.

In sum, by his petition for a writ of habeas corpus Mr. Meeks requests that this Court review the proceedings resulting in his capital convictions and sentences of death, and that on the basis of the reasons discussed in the body of this petition this Court grant him the habeas corpus relief to which he is entitled.

III. JURISDICTION

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 during the appellate process in Mr. Meeks' initial direct appeals. See Meeks v. State, 336 So. 2d 1142 (Fla. 1976); Meeks v. State, 339 So. 2d 186 (Fla. 1976); Meeks v. State, 364 So. 2d 461 (Fla. 1978)(appeal after remand), and on Mr. Meeks' subsequent appeals of the denial of his requests for post-conviction relief. Meeks v. State, 382 So. 2d 673 (Fla. 1980); Meeks v. State, 418 So. 2d 987 (Fla. 1982)(appeal after remand). 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 challenged herein involved 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. Meeks to raise the claims presented in this petition. See, e.g., Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwright, 12 F.L.W. 457 (Fla. 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. 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. Meeks' petition presents substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. Meeks' capital convictions and sentences of death, and of this Court's appellate review. Mr. Meeks' claims are therefore of the type classically considered by this Court pursuant to its habeas corpus jurisdiction. The claims also 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; see also Mikenas v. Dugger, ___ So. 2d ___ (No. 71,129, Fla. Jan. 21, 1988); Waterhouse v. State, ___ So. 2d ___ (Nos. 69,557 and 70,459, Fla. Feb. 11, 1988) (consolidated proceeding); Morgan v. State, 515 So. 2d 975 (Fla. 1987).

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. Meeks will demonstrate that the inadequate performance of his appellate counsel was so significant, fundamental, and prejudicial as to require the issuance of the writ.

Mr. Meeks' claims are presented below. They demonstrate that habeas corpus relief is proper in this case.

IV. PROCEDURAL HISTORY AND INTRODUCTORY FACTS1/

Douglas Ray Meeks' 1975 sentences of death resulted from "one of the first death cases tried under the newly approved [Florida] death sentence procedures." Meeks v. State, 418 So. 2d 987 (Fla. 1982). At those 1975 proceedings, Mr. Meeks was charged with two counts of first degree murder, arising from two separate transactions, in separate indictments. Both indictments were dated November 19, 1974. The indictments charged Mr. Meeks, inter alia, with "killing" while "unlawfully engaged in the perpetration of a crime." The State elected to try the charges

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1. Petitioner herein summarizes the procedural history involved in this proceeding and presents certain record facts by way of introduction. The facts attendant to the claims are more fully detailed in the body of the petition.

separately (in case numbers 74-299-CF [hereinafter "299"] and 74-300-CF [hereinafter "300"]). Mr. Meeks was represented by the same defense counsel (John Howard, Esq.) at both trials, on direct appeal in both cases (336 So. 2d 1142; 339 So. 2d 186), at a "Gardner [v. Florida, 430 U.S. 349 (1977)] hearing" subsequently ordered sua sponte by the Florida Supreme Court, and on appeal after the Gardner remand.

In case number 299, Mr. Meeks was also charged with robbery, assault with intent to commit murder, and the use of a firearm. The State contended that Mr. Meeks and a co-defendant entered a convenience store in Perry, Florida on November 6, 1974, and after robbing the clerk at gunpoint, shot both the clerk and a young male customer, the latter fatally. The co-defendant, Homer Hardwick, tried separately, was charged with the same counts and convicted, but was sentenced to life imprisonment (See Hardwick v. State, 335 So. 2d 307 (Fla. 1st DCA 1976) (affirming judgment)).

Mr. Meeks' jury trial in Case 299 took place on April 11 and 12, 1974. The brief voir dire revealed that the entire venire, but for a single member, had knowledge of the case, either through the newspapers, the radio, from conversations with witnesses and relatives of the victim, or through "street talk." (See, e.g., ROA, Case 299, pp. 14, 28, 35, 48, 56, 67, 68, 69 70, 71, 72, 74, 83, 98, 99). No physical evidence connecting Meeks to the offense was introduced. Three local citizens testified for the State that they had seen two "black boys" in the area of the convenience store near the time the crime was alleged to have occurred (see ROA, Case 299, pp. 174, 189, 210). However, these witnesses could not identify either of the men they saw as Douglas Ray Meeks. According to their testimony, the attention of at least two of the three witnesses was directed toward the men because "black boys" were rarely, if ever, seen in that area of Perry, Florida (ROA, Case 299, pp. 174, 191). One witness

identified one of the "black boys" as Homer Hardwick (ROA, Case 299, p. 190).

The State also introduced the testimony of Diane Allen, a clerk in the convenience store, who was shot by one of the assailants. Although she could not identify Mr. Meeks nor describe the assailants on the day after the offense, she testified that she was able to identify Mr. Meeks at a lineup conducted a month or so later (ROA, Case 299, pp. 141-42). She stated that the identification was based "mainly" on the man's eyes, which she saw over the gun which had been pointed at her (ROA, Case 299, pp. 151, 153). She also testified that after the offense and prior to trial she had had difficulty describing the man when she spoke to the police. A witness explained that Allen was "hysterical" immediately after the robbery (ROA, Case 299, p. 177), and that she stated at the time that someone had been shot or stabbed (ROA, Case 299, pp. 177, 182). This Court's description of her trial testimony concerning the events was that "[s]he was unable to say that appellant Meeks actually fired the shots, although she identified him as the man with gun at the time the cash register was emptied." Meeks v. State, 339 So. 2d at 187.

Much of the trial testimony introduced by the State had to do with the identification of Homer Hardwick, Mr. Meeks' alleged accomplice. The testimony of the three local citizens in this regard was discussed above. Diane Allen testified that Hardwick was one of the assailants, that she knew Hardwick from high school, and that she had identified his picture in a high school annual shortly after the incident (ROA, Case 299, pp. 137-38, 224). A mutual friend of both Hardwick and Mr. Meeks testified that he had seen Mr. Meeks and Hardwick together at a football game on the day of the offense (ROA, Case 299, p. 216). Testimony regarding a fingerprint which was found at the convenience store and identified as Hardwick's was then admitted

(ROA, Case 299, pp. 246, 251-54). (The same evidence was successfully suppressed on defense motion at Hardwick's separate trial.)

The jury was concerned about Hardwick's involvement. They interrupted their deliberations to ask the Court why he had not appeared to testify (ROA, Case 299, p. 391), and the Court informed them that Hardwick was under indictment for the same offense and therefore could not be compelled to testify (ROA, Case 299, p. 395).

Defense counsel presented no evidence and the jury returned a verdict convicting Mr. Meeks of all four counts charged in the indictment (ROA, Case 299, p. 397). The sentencing phase of the trial commenced immediately after the verdict was rendered (ROA, Case 299, p. 402). Defense counsel requested a few "minutes" to confer with his client (ROA, Case 299, p. 403). The sentencing proceeding then commenced after a ten minute recess (ROA, Case 299, p. 414). As more fully detailed in Claim I of this petition, defense counsel labored under the common pre-Lockett "reasonable" but unconstitutionally preclusive view of the Florida capital sentencing statute -- a view which led counsel to completely limit his consideration (and consequently, his investigation, preparation, and presentation) of mitigating evidence solely to those factors listed in the statute. (See App. 3 (affidavit of defense counsel)).2/ His argument consisted of two record pages.

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2. The substantial nonstatutory mitigation which would have been developed had counsel not operated under that pre-Lockett understanding is also discussed in Claim I and reflected in the appendices to this pleading.

At sentencing, the jurors were instructed to consider only those mitigating circumstances enumerated in Fla. Stat. section 921.141. They then returned a recommendation of death (ROA, Case 299, p. 442). The court's subsequently-filed sentencing order referred only to the statutorily enumerated mitigating circumstances. (See App. 11 (sentencing order, Case 74-299)). As reflected in the order, the court also used extensively and relied upon purportedly confidential psychiatric reports compiled prior to trial, reports which detailed Mr. Meeks' statements to the examiners. (Defense counsel had neither introduced the reports, nor asserted a mental health defense.) Since the court constrained itself to statutory mitigating factors, it provided no serious consideration to the nonstatutory mitigation which the reports reflected.

The jury trial in Case 300 commenced on June 4, 1975. Mr. Meeks was again charged with killing "unlawfully and while engaged in the perpetration of a felony" (ROA, Case 300, p. 6), although there were no other charges in the indictment. As in the previous trial, almost the entire venire was acquainted with the case (See, e.g., ROA, Case 300, pp. 8, 13, 21, 25, 27, 30, 32, 34, 38, 41, 42, 43, 46, 48, 49, 51, 53, 54, 62, 66). Pretrial publicity and public knowledge of the case by now reflected Mr. Meeks' prior conviction and sentence and his testimony at Hardwick's intervening trial. (At Hardwick's trial, Mr. Meeks testified after being called as a witness for the State. Prior to trial, he provided testimony at a State-initiated deposition.)

The State, in Case 300, introduced the testimony of eleven witnesses in its case-in-chief in an effort to prove its theory that Mr. Meeks entered a convenience store in Perry, Florida, on October 24, 1974, fatally stabbed the clerk, and left without taking any money or merchandise (See ROA Case 300, pp. 77-80). Among those witnesses were three male white high school students

who had seen a black man coming out of the store as they pulled up, after which they went in and discovered the clerk bleeding on the floor (ROA, Case 300, pp. 84-87, 104-106, 124-125). Two of the boys had participated in a lineup several weeks after the incident, but could not identify anyone as the man they saw leaving the store (ROA, Case 300, pp. 92, 109). (Mr. Meeks was in that lineup.) They were nevertheless allowed to view a photograph of the lineup while on the witness stand and identify participant number three -- Mr. Meeks (ROA, Case 300, pp. 100, 110).

Also introduced was the testimony of Ohio Tensley, an acquaintance of Mr. Meeks, who testified variously that Mr. Meeks told him, in response to "teasing," that he had committed the offense, and that he did not commit the offense (ROA, Case 300, pp. 186). Specifically, Tensley's testimony was that Mr. Meeks never said that he "did it," that after being teased he said that "he don't do things like that," and that "I [Tensley] be teasing with him sometimes, lots of times, and [he would] . . . say he did it and then again he'd say he didn't do it" (ROA, Case 300, p. 189).

Homer Hardwick, Mr. Meeks' co-defendant in Case 299, took the stand as a State's witness and testified that Mr. Meeks had told him that he had been trying to get something out of the store, and stabbed the clerk when she picked up the phone to call the police (ROA, Case 300, p. 192). Two of the boys who discovered the decedent testified that there was no telephone in the store (ROA, Case 300, pp. 88, 107), no other witness was able to testify that there was a phone, and the prosecutor conceded that the evidence showed that there was no telephone in the store (ROA, Case 300, p. 250). When asked if he had ever been convicted of a crime, Hardwick responded, "Just this one" (ROA, Case 300, p. 194). As indicated above, Hardwick's motive for testifying was questionable at best: Mr. Meeks had testified as

a State's witness against Hardwick in Hardwick's own capital murder trial. Finally, the State presented the testimony of an FDLE officer who testified that in his opinion two fingerprints found in the store matched Mr. Meeks'. According to the officer the number of specific points of comparison necessary to "match" fingerprints were "basically just what [he] feels is enough for a positive i.d." (ROA, Case 300, p. 165).

The defense presented four witnesses in support of an alibi defense. Mr. Meeks testified that he had not been present at the store on the date of the incident (ROA, Case 300, pp. 199-205), and three additional witnesses also offered testimony supporting the alibi defense theory (ROA, Case 300, pp. 211-22). The jury convicted Mr. Meeks of capital felony-murder although no instructions were provided on the underlying attempted robbery charge on which the felony-murder prosecution was based (see, e.g., ROA, Case 300, p. 274).

The sentencing phase in Case 300 began immediately after the jury returned its guilty verdict (ROA, Case 300, p. 292). At the sentencing hearing, the State introduced the indictment in case number 299 (ROA, Case 300, p. 303), and argued that since "one jury ha[d] sentenced him to death, that is a circumstance you should consider." Id. at 309. Defense counsel presented no live-witness testimony (ROA, Case 300, p. 304). Counsel's argument in this case also encompassed but two record pages. Again, at this hearing, counsel operated under the prevailing unconstitutionally preclusive view of Florida's then-existing capital sentencing statute (See App. 3 (affidavit of former counsel)). After being instructed by the court that they could only consider those mitigating circumstances listed in the capital sentencing statute, the jury returned a recommendation of death (ROA, Case 300, pp. 320, 322). The Court imposed that sentence on the basis of a sentencing order which, as in Case 299, reflected that its consideration was restricted only to the

mitigating factors listed in the statute. In addition, the court again used and relied on the purportedly confidential psychiatric reports (which had not been introduced by the defense) to sentence Mr. Meeks to death. (See App. 12 (sentencing order, Case 300)).

The sentencing orders in both cases were classic examples of the impermissible "doubling" of aggravating circumstances. The prosecutor gave a similar construction to the statute in his arguments as to why the jury should impose death. These matters are discussed in the body of this petition.

The Court appointed Mr. Meeks' trial attorney for purposes of appeal in both cases. Counsel filed a 10 page brief with 6 pages of legal argument in case number 299, and a 9 page brief with 4 pages of legal argument in case number 300. The Florida Supreme Court affirmed the conviction and sentence in Case 300 on July 21, 1976, Meeks v. State, 336 So. 2d 1142 (Fla. 1976), and in Case 299 on October 28, 1976. Meeks v. State, 339 So. 2d 186 (Fla. 1976).

On May 6, 1977, the Florida Supreme Court issued a sua sponte "Gardner [v. Florida, 430 U.S. 349 (1977)] inquiry" to the sentencing court with respect to Case 299. See Meeks v. State, 364 So. 2d 461, 462 (Fla. 1978). The sentencing judge responded that the sentence of death had been based in part on a psychiatric report which had not been disclosed to the defense. Case 299 was remanded for a "Gardner hearing." Thereafter, the trial court, and then the Florida Supreme Court, reaffirmed the sentence of death. Meeks v. State, 364 So. 2d 461 (Fla. 1978). A Gardner hearing was not held in Case 300, although the same psychiatric reports were considered in both cases.

Thereafter, Mr. Meeks filed motions for post-conviction relief (see Fla. R. Crim. P. 3.850), challenging the convictions and sentences in Case 299 and Case 300. The original trial judge denied both motions without a hearing on February 8, 1980, and an

emergency appeal was filed in the Florida Supreme Court. The Supreme Court entered a stay of Mr. Meeks' then-scheduled execution and then remanded the case for an evidentiary hearing. See Meeks v. State, 382 So. 2d 673 (Fla. 1980). The Court, however, limited the scope of that hearing solely to Mr. Meeks' claim that he had been deprived of the effective assistance of counsel. Id. at 676.

After a hearing at which the trial court excluded proffered testimony relating to trial counsel's failure to investigate, develop, and present mitigating evidence at sentencing in both cases (P.C. ROA pp. 355-79), the trial court again denied relief on October 22, 1980 (P.C. ROA, pp. 37-39). Appeal was timely taken, and the Florida Supreme Court affirmed the denial of relief. Meeks v. State, 418 So. 2d 987 (Fla. 1982). Mr. Meeks thereafter initiated federal habeas corpus proceedings in the United States District Court for the Northern District of Florida. The federal district court denied relief and the case then proceeded to the United States Court of Appeals for the Eleventh Circuit. While Mr. Meeks was preparing his initial brief for the federal court of appeals, the United States Supreme Court rendered its decision in Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). As discussed in the introduction to this petition, undersigned counsel then requested that the federal court of appeals hold the proceedings in abeyance so as to allow Mr. Meeks the opportunity to present his case to the Florida Supreme Court in light of the opinion in Hitchcock v. Dugger. That motion was granted, and Mr. Meeks now files this, his initial state habeas corpus petition, in this Court.

V. GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Meeks asserts that his capital convictions and sentences of death were obtained in violation of his rights under the fifth, sixth,

eighth, and fourteenth amendments to the United States Constitution for each of the reasons set forth herein.

VI. CLAIMS FOR RELIEF

CLAIM I

DURING THE 1975 PROCEEDINGS RESULTING IN DOUGLAS RAY MEEKS' SENTENCES OF DEATH THE JURY WAS TOLD BY THE PROSECUTOR AND SPECIFICALLY INSTRUCTED BY THE COURT THAT IT SHOULD ONLY CONSIDER THE MITIGATING CIRCUMSTANCES SET FORTH IN FLORIDA'S NARROW STATUTORY LIST, THE SENTENCING JUDGE CONSTRAINED HIS OWN CONSIDERATION TO STATUTORY FACTORS, AND DEFENSE COUNSEL FAILED TO INVESTIGATE, DEVELOP AND PRESENT SIGNIFICANT NONSTATUTORY MITIGATION BECAUSE HIS EFFORTS WERE ALSO CONSTRAINED BY THE THEN-PREVAILING VIEW THAT THE PRESENTATION OF MITIGATING EVIDENCE WAS LIMITED TO THE STATUTORY LIST; AS A RESULT, MR. MEEKS' SENTENCES OF DEATH WERE OBTAINED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The issue in this case, and Douglas Ray Meeks' entitlement to relief, is obvious: there can be no doubt that the 1975 proceedings resulting in these sentences of death violate the constitutional mandates of Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). See also Lockett v. Ohio, 438 U.S. 104 (1978); Skipper v. South Carolina, 106 S. Ct. 1669 (1986).3/ Mr. Meeks' 1975 sentences of death resulted from "one of the first death cases tried under the newly approved [Florida] death sentence procedures." Meeks v. State, 418 So. 2d 987 (Fla. 1982). At those proceedings the sentencing court's instructions precluded jury consideration of matters which mitigated against a sentence of death but which were not "enumerated" in the restrictive

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3. Neither can there by any dispute that Mr. Meeks' claim is properly before the Court on the merits. On this issue this Court's opinions are also crystal clear. See Waterhouse v. State, ___ So. 2d ___ (Nos. 69,557 and 70,459, Fla. Feb. 11, 1988), slip op. pp. 5-6; Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); McCrae v. State, 510 So. 2d 874 (Fla. 1987); Morgan v. State, 515 So. 2d 975 (Fla. 1987); Riley v. Wainwright, 12 F.L.W. 457 (Fla., Sept. 3, 1987); Foster v. State, 12 F.L.W. 598 (Fla. 1987).

statutory list (see Fla. Stat. sec. 921.141 (1973)). The sentencing court itself then constrained its review of such nonstatutory factors. Defense counsel's efforts were also constrained by the then-prevailing and officially sanctioned restrictive statutory interpretation -- as a consequence, counsel, like the jury and judge, was restricted, and a wealth of available nonstatutory mitigation (see infra) was again ignored. Mr. Meeks' resulting sentences of death were neither individualized nor reliable, as Hitchcock v. Dugger manifestly demonstrates. The [limiting] jury instructions provided to Mr. Meeks' juries were, in fact, even worse than those condemned in Hitchcock, as was the sentencing court's own [limited] consideration of nonstatutory mitigation. In Hitchcock, the unanimous Court held that:

> ...it could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, and that the proceeding therefore did not comport with the requirements of Skipper v. South Carolina, 467 U.S. ___ (1986), Eddings v. Oklahoma, 455 U.S. 104 (1982), and Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion).

107 S. Ct. at 1824.

Douglas Ray Meeks' sentences of death resulted from proceedings which were in every sense as unconstitutional as those in Hitchcock. The unanimous Hitchcock Court struck down the sentence of death and ordered that the Writ be granted. Mr. Meeks is entitled to the same relief.

Various courts have now recognized the restrictive view of Florida law concerning consideration of nonstatutory mitigation which existed at the time Mr. Meeks was sentenced to death. See Hitchcock v. Wainwright, 770 F.2d 1514, 1516 (11th Cir. 1985) (en banc), rev'd sub nom., Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). See also, Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985) (en banc); Harvard v. State, 486 So. 2d 537 (Fla. 1986); Lucas v. State, 490 So. 2d 943 (Fla. 1986); McCrae v. State, 510

So. 2d 874 (Fla. 1987). The restriction was reflected in the proceedings "actually conducted," Hitchcock, 107 S. Ct. at 1823-24, in Mr. Meeks' case.

A. THE JURY WAS CONSTRAINED

During the penalty phase proceedings in each case (299 and 300), the jurors first received the prosecutor's restrictive interpretation. That interpretation was then officially sanctioned by the trial court's instructions. Thus, in Case 299, the prosecutor told the jury that they were only to look at the statutory mitigating factors (ROA, Case 299, p. 422; App. 9). He then specifically went through the statutory list, presented his views as to why each of those factors should not be found, and concluded by telling the jurors:

> Those [referring to the statutory factors] are the mitigating factors you can consider . . . None of them should be considered by any of us.

(ROA, Case 299, p. 426 [emphasis supplied]; App. 9).

The prosecutor presented the same restrictive view -- a view again officially sanctioned by the sentencing court's preclusive instructions -- in Case 300. There, he opened his discussion of mitigation by stating: "Now, as to mitigating circumstances . . ." (ROA, Case 300, p. 313; App. 10). He then discussed -- and argued against each of "the" statutory "mitigating circumstances." Id. at 313-15. The prosecutor concluded his remarks by telling the jurors that "the last one [mitigating circumstance] is age." Id. at 315. Again, as in Case 299, no reference to nonstatutory mitigation was made. Again, as in Case 299, the jurors were told to consider only those factors reflected on the statutory list.

The court's instructions not only informed the jurors that the prosecutor was right, they took the restrictive interpretation further. In Case 299, the sentencing court

instructed the jury that their task at the penalty phase was to:

> deliberate and render an advisory sentence to the Court based upon the following matters: A, whether sufficient aggravating circumstances exist as enumerated in sub-Section 6, and, B, whether sufficient mitigating circumstances exist as enumerated in sub-Section 7 which outweigh aggravating circumstances found to exist and, C, based on those considerations whether the Defendant should be sentenced to life or death.

(ROA, Case 299, 437-38) (emphasis supplied). The court read the statutory aggravating circumstances. Thereafter it instructed the jurors that:

> Mitigating circumstances shall be the following (and read the statutory list).

(ROA, Case 299, 439-41) (emphasis supplied). The preclusive instructions provided to the jury in Hitchcock v. Dugger, 107 S. Ct. at 1824 ("[t]he mitigating circumstances which you may consider shall be the following"), were, in fact, less egregious.

In Case 300, the penalty phase instructions informed the jury that:

> [a]fter hearing all the evidence, the Jury shall deliberate and render an advisory opinion to the Court based upon the following matters: (A) Whether sufficient aggravating circumstances exist as enumerated in Subsection six, and (B) Whether sufficient mitigating circumstances exist as enumerated in Subsection seven which outweigh the aggravating circumstances found to exist, and (C) Based on these considerations, whether the Defendant should be sentenced to life imprisonment or death.

(ROA, Case 300, 320-21) (emphasis supplied). The court then read the list of statutory aggravating factors. Thereafter, as in Case 299, and as in Hitchcock, the sentencing court instructed the jury that "[m]itigating circumstances shall be the following," and read the statutory list. (ROA, Case 300, 321-22) (emphasis supplied). Again, the instructions provided to the jurors in Hitchcock v. Dugger were, if anything, less egregious.

In both of Mr. Meeks' cases the court concluded by informing the jurors that "[t]hese are your instructions with respect to your deliberations concerning your recommendation to the Court as

to whether the Court should impose a sentence of life imprisonment or a sentence of death upon the Defendant, Douglas Ray Meeks." (See, ROA, Case 300, p. 322; ROA, Case 299, pp. 440-41). As in Hitchcock, the jurors in Mr. Meeks' case were told that they were to consider only the listed statutory mitigating circumstances -- nothing else was even mentioned. As in Hitchcock, Mr. Meeks' jurors were directed only to consider statutory mitigation and to weigh those statutory factors against statutory aggravating circumstances. And, as in Hitchcock, the Eighth Amendment was abrogated by the trial court's limiting instructions. Those instructions, and the prosecutor's earlier declarations, demonstrate that the constitutional errors in this case are more than obvious. See Hitchcock, 107 S. Ct. at 1824; Riley v. Wainwright, supra, 12 F.L.W. 457; Thompson v. Dugger, supra, 515 So. 2d 173; cf. Caldwell v. Mississippi, 105 S.Ct. 2633 (1985) (judicial instructions sanctioned constitutional flaw in prosecutor's argument).

B. THE SENTENCING COURT'S OWN RESTRICTIVE VIEW

The advisory juries, like the one in Hitchcock, recommended death. After those recommendations, the trial judge imposed death sentences. As reflected in his jury instructions, and as shown by his sentencing orders, the sentencing judge in Mr. Meeks' cases also "assumed . . . a prohibition [against nonstatutory mitigation]," instructed the jury accordingly, and then foreclosed his own review. Hitchcock, 107 S. Ct. at 1823. See also, Songer v. Wainwright, supra, 769 F.2d at 1489; Harvard v. State, supra, 486 So. 2d 537; McCrae v. State, supra, 510 So. 2d 874; Morgan v. State, supra, 515 So. 2d 975.

The judge "assumed a prohibition":

> The Court[] instructed the jury as to the provisions of Fla. Stat. 921.141 and the jury retired for deliberations. It rendered an advisory sentence of death.

(ROA, Case 299, p. 10) (App. 11) (Sentencing Order) (emphasis supplied). The court discussed the statutory aggravating factors it deemed applicable. Then, "turning to mitigating circumstances" (Sentencing Order, ROA, Case 299, p. 10), the court looked at, reviewed, and considered, only the statute's factors:

> Turning to mitigating circumstances, the Court finds that the defendant has no prior significant history of criminal activity, Fla. Stat. 921.141(7)(a) and therefore this fact has been considered as a mitigating circumstance.
>
> Under Fla. Stat. 921.141(7) subsections (b) and (f), the Court finds that the defendant was suffering from no extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not substantially impaired.

(Sentencing Order, ROA, Case 299, pp. 11-12) (App. 11).

> Further the Court finds that the victim certainly was not a participant in nor consented to the criminal conduct, Fla. Stat. 921.141(c)(e) and that the defendant, even if found to be an accomplice, did play a major part in the capital felony. Fla. Stat. 921.141(7)(d). No mitigation exists under either of these subsections.

(Id. at p. 13). The order discussed the psychiatric reports of Dr. Barnard and Dr. Carrera in the context of the statutory factors. It found that the reports did not support any such factors, with one exception:

> Finally, the age of the defendant has been considered as required by Fla. Stat. 921.141(7)(g). The defendant is 21. The report of Doctor Barnard contained his medical judgment that the defendant was of dull-normal intelligence.
>
> The Court finds the combination of the defendant's youthful age and his intelligence to be a mitigating factor.

(Sentencing Order, ROA, Case 299, p. 13). As the above excerpt makes obvious, the sentencing court believed itself bound by a limitation on consideration of nonstatutory circumstances. Ample [nonstatutory] mitigation was contained in the reports (see

infra). But that evidence was ignored. Even Mr. Meeks' "dull-normal intelligence" (a factor which concerned the court) was given no independent weight or "serious consideration." McCrae, supra. Only "age" (a statutory factor) was "considered." Thus, in its summary of the factors considered appearing at the conclusion of the order, the Court referred only to the "young age" factor, making no mention of "dull-normal intelligence" (ROA, Case 299, p. 14) (App. 11). "Dull-normal intelligence," like the other nonstatutory mitigation reflected in the record and in the doctors' reports, did not fit the statute: it could be given no independent weight. Mr. Meeks' limited intellectual functioning, however, was entitled to independent consideration, as were the other [nonstatutory] factors contained in the reports and in the record. However, because such factors could not be "fit" into the statute, they could not be, in the court's restrictive view, considered. See, e.g., McCrae v. State, supra ("It is true that [nonstatutory mitigation] testimony was presented. We are not convinced, however, that it was given serious consideration by the court." [emphasis supplied]) The sentencing court simply gave no consideration, much less serious consideration, to anything that fell outside the statute.

Towards the end of the order the court explained that it "considered the pronouncement of the Supreme Court of Florida in Dixon v. State . . . Mindful of the language on page eight (8) of that opinion by Chief Justice Adkins, this trial judge attempted to give thoughtful consideration to the evidence in this case as to the aggravating or mitigating circumstances." (Sentencing Order, ROA, Case 299, pp. 13-14) (App. 11). In State v. Dixon, 283 So. 2d 1 (Fla. 1973), the Florida Supreme Court first construed the newly enacted capital statute. The view of the Dixon Court was that "the" statutory mitigating circumstances were exclusive. See id. at 9 ("when one or more of the aggravating circumstances is found, death is presumed to be the

proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided in Fla. Stat. 921.141(7), F.S.A." (emphasis supplied)). That was the view relied upon and acted on by the court in Mr. Meeks' cases. The sentencing judge's "consideration" was limited; the substantial nonstatutory mitigation which was before the Court was therefore ignored.

In Case 300, the same preclusive consideration was given.4/ Again, the court first discussed the statutory aggravating factors (Sentencing Order, ROA, Case 300, pp. 9-10) (App. 12). Then, the order's discussion of mitigating factors was as follows:

> Turning to mitigating circumstances, the Court finds that the defendant does have a prior significant history of criminal activity. Fla. Stat. 921.141(7)(a). This fact has been considered as not being a mitigating circumstance.
>
> Under Fla. Stat. 921.141(7) subsections (b) and (f), the Court finds that the defendant was suffering from no extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not substantially impaired.
>
> . . .
>
> Further, the Court finds that the victim certainly was not a participant in nor consented to the criminal conduct. Fla. Stat. 921.141(c)(e). No mitigation exists under either of these subsections.

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4. The sentence in Case 300 would be unconstitutional even if the court had considered nonstatutory mitigation. The unconstitutional death sentence obtained in Case 299 spilled over into and infected the penalty phase in Case 300. There, the prosecutor presented the death sentence already imposed [Case 299] as a centerpiece of his argument (ROA, Case 300, pp. 307, 309, 313-17). The sentencing court then also relied on the [unconstitutional] death sentence it had previously imposed (see, App. 12). However, the harm is not shown by this alone. The penalty phase proceeding in Case 300 was itself as unconstitutional as that in Case 299, and as that in Hitchcock.

> Finally, the age of the defendant has been considered as required by Fla. Stat. 921.141(7)(g). The defendant is 21. The report of Doctor Barnard contained his medical judgment that the defendant was of dull-normal intelligence.
>
> The Court finds the combination of the defendant's youthful age and his intelligence to be a mitigating factor.

(Sentencing Order, ROA, Case 300, pp. 10-11) (App. 12).

The order makes it unmistakably clear that in Case 300 the sentencing court also considered the two psychiatric reports only in the context of the statutory mitigating factors. Thus, Mr. Meeks' "dull-normal intelligence" was again referred to only in the context of "age," i.e., in the context in which it "fit" Fla. Stat. 921.141(7)(g). Again, as in Case 299, no mention is made of "dull-normal intelligence" when the factors considered were summarized at the end of the order. (See App. 12). There, the court referred only to the "young age" statutory factor it found. Not fitting in the statute, Mr. Meeks' diminished mental capacity was given no independent weight or consideration. In neither case was Mr. Meeks' diminished mental capacity, nor any other aspect of Mr. Meeks' background (discussed in the doctors' reports or present in the record), considered for its own, independent, [nonstatutory] mitigating weight or value. The sentencing court again gave no consideration, much less serious consideration, to anything that fell outside the statute. Cf. McCrae v. State, supra; Morgan v. State, supra; Foster v. Dugger, supra.

Again, in Case 300, [nonstatutory] mitigation was ignored. Thus, again, the court concluded that the statutory mitigating circumstance of the "young age of the defendant" was insufficient to outweigh the five aggravating circumstances found. (Sentencing Order, ROA, Case 300, p. 11) (App. 12). Again, consideration was not given to nonstatutory mitigating factors.

In both cases, therefore, only the preclusive judicial

consideration condemned in Hitchcock v. Dugger was afforded to Mr. Meeks.

C. DEFENSE COUNSEL WAS PRECLUDED

Mr. Meeks' counsel presented two record pages of argument at the penalty phase of each of these capital cases. Although a wealth of nonstatutory mitigation was available (see, e.g., Apps. 4, 5, 6, 7, 8), counsel never investigated, developed, or presented it. Counsel was also restricted by the statute, by the sentencing judge's views, cf. McCrae, supra, and by the statute's official interpretation:

> 1. I, JOHN F. HOWARD, am an attorney practicing law in Sebring, Florida. I represented Douglas Ray Meeks on two counts of first-degree murder in separate trials in Taylor County, Florida, in 1975. Mr. Meeks was convicted and sentenced to death for both murders.
>
> 2. Mr. Meeks' trials and sentencing proceedings took place during April and June, 1975. At that time, I believed that the Florida death penalty statute restricted the introduction of evidence in mitigation of sentence to only that which directly related to the mitigating factors set out in the statute. It was apparent to me that the prosecutor and the judge followed the same basic interpretation. Florida's capital sentencing statute was relatively new at the time, but it was clear on its face that there were definite points of mitigation. The statute's mandatory language left no doubt that the only mitigating factors, which could be considered by the judge and jury, were those that were explicitly set forth in the statute. At that time, the case of Dixon v. State, 283 So. 2d 1 (1973), interpreted the statute with regard to the mitigating factors set forth therein.
>
> 3. Judge Agner's own interpretation was reflected in his sentencing order. It was apparent to me that he considered the evidence before him only as it related to the mitigating circumstances listed in the statute. The fact that the sentencing proceeding was done immediately after the rendition of the verdict, prevented me from presenting anything in mitigation that was not listed in the statute as mitigating circumstances. At that particular time, my hands were tied by the statute and the interpretation by the Supreme Court. There was no time whatsoever to develop and

> introduce evidence which did not directly relate to the specific mitigating circumstances that were set forth in the statute at either one of Mr. Meeks' sentencing proceedings. Since this took place approximately 13 years ago, I do not have total recall of all of the meetings with the prosecutor and Judge Agner prior to the sentencing hearing. However, to the best of my recollection, it was understood that the mitigating circumstances in the statute were to be the only things considered at the sentencing portion of the proceeding.
>
> 4. Had the law been similar in the sentencing procedures as to what I understand it is today, there is no question that the approach to the sentencing proceedings would have been considerably different. After the appeal, the matter was taken before the Clemency Board for consideration and at that time I did investigate more into Mr. Meeks' background and the history of his life. Of course, the guidelines for the clemency hearing were considerably different and some of these factors could be present[ed]. Had the mitigating circumstances set forth in the statute been interpreted on a more lenient scale, I would have had a more extensive investigation of Mr. Meeks' background. However, this was not allowed at that time.
>
> 5. I am not aware of what, if any, mitigating evidence has been developed during the post-conviction litigation in Mr. Meeks' case. However, had the interpretation of the death penalty statute at that time allowed other mitigating evidence and such could have been developed, I would have presented this to the jury for their consideration. It is my opinion that very possibly such mitigating evidence could have greatly affected the jury's final decision on the death penalty and I am certain, because Judge Agner was an extremely fair judge, that he would have given it as much weight as possible to consider a life sentence.

(App. 3 (affidavit of former defense counsel) (emphasis supplied)). Of course, the type of substantial mitigating which was then available has now been developed (see, e.g., Apps. 4, 5, 6, 7, 8) and is discussed infra.

Former counsel's affidavit makes it unmistakably clear that he was restrained by the then-official preclusive interpretation of the statute. The affidavit, provided by an individual with first-hand knowledge of the views of Mr. Meeks' trial judge and trial prosecutor, and who was involved in pretrial discussions

with those individuals concerning the type of mitigating evidence which was to be admitted at the sentencing phase, also confirms what the judge's and prosecutor's on-the-record pronouncements show -- that they too considered the statute to be restricted, and operated accordingly.

Counsel's efforts were restricted by the operation of the then-existing law, cf. United States v. Cronic, 466 U.S. 648 (1984), and it was the then-existing law that rendered his efforts ineffectual and denied Mr. Meeks his rights to an individualized capital sentencing determination. Id.; see also Brown v. Allen, 344 U.S. 443, 486 (1953) (state interference with criminal defendant's efforts to vindicate federal constitutional rights), cited in Murray v. Carrier, 106 S. Ct. 2639, 2646 (1986). As this Court has recognized in numerous cases, see, inter alia, Lucas; Morgan; McCrae; Riley; Thompson; Foster, and as the United States Supreme Court acknowledged in Hitchcock, pre-Lockett, the Florida capital statute could reasonably have been interpreted as limiting mitigating evidence solely to the statutory list. Florida sentencing judges, see Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985); Harvard v. State, 486 So. 2d 537 (Fla. 1986), governed themselves by that "reasonable" preclusive view of the statute, see McCrae, supra; Foster, supra; Morgan, supra, as did Florida capital trial attorneys. See Muhammad v. State, 426 So. 2d 533 (Fla. 1983)(trial counsel could not be held unreasonable for failing to predict decision in Lockett); Jackson v. State, 438 So. 2d 4 (Fla. 1983)(same).

Mr. Meeks' counsel labored under that same unconstitutionally preclusive officially-approved interpretation (App. 3). He was "precluded," as were the sentencing jury and judge. Significant mitigating evidence (see infra) again was ignored. It would have made a difference.

D. THE RECORD NONSTATUTORY FACTORS WHICH WERE IGNORED

The 1975 penalty phase proceedings resulting in Mr. Meeks'

death sentences, like those in Hitchcock, violated the Eighth Amendment. The same preclusive instructions were given to the jury. The same preclusive "consideration" was provided by the judge. Thus, in Mr. Meeks' case also

> [I]t could not be clearer. . . that the proceeding[s]. . . did not comport with the requirements of Skipper [], Eddings [], and Lockett [].

Hitchcock, 107 S. Ct. at 1824.

Neither judge, jury, nor defense counsel "considered", in any true and constitutional sense, the [nonstatutory] mitigating factors present in these cases. See Hitchcock, supra; McCrae, supra.

> The key aspect of the penalty trial is that the sentence be individualized, focusing on the characteristics of the individual. Gregg v. Georgia, 428 U.S. 153 (1976). Here the jurors were [not permitted to] mak[e] such an individualized determination.

Thomas v. Kemp, 796 F.2d 1322, 1325 (11th Cir. 1986). No one took note of anything concerning the character of the offender and circumstances of the offense, Gregg v. Georgia, which mitigated against death but which was not in the statute. The instructions barred the jury's consideration. The sentencing judge foreclosed his own review. Defense counsel followed the same restriction. However, [nonstatutory] mitigation was available and should have been considered. A nonexhaustive catalogue includes the following.

Before the sentencing court in both cases were the psychiatric reports of Dr. Barnard and Dr. Carrera. See Meeks v. State, 339 So. 2d 186, 190-91 (Fla. 1976) (Case 300) (referring to reports); Meeks v. State, 336 So. 2d 1142, 1143-44 (Fla. 1976) (Case 299) (same). (See also Apps. 13 and 14 [Reports]). Defense counsel had requested only that Mr. Meeks be evaluated on the issue of insanity -- a defense that was later abandoned. However, even on the basis of the limited evaluation reflected in the reports, ample nonstatutory mitigation was before the court.

The sentencing orders (later adopted by the Florida Supreme Court's opinions on direct appeal, 339 So. 2d 186; 336 So. 2d 1142) show that the court "considered" those reports only to the extent that they:

> i) established aggravating circumstances;
>
> ii) related to statutory mitigating circumstances; and,
>
> iii) rebutted statutory mitigating circumstances.

Nothing from either report was considered which supported and established nonstatutory mitigation. Such factors, however, appeared in the reports, and should have been considered. They included, inter alia, the following:

Mr. Meeks had previously been hospitalized at a "mental hospital" in Jackson, Mississippi (Carrera Report pp. 3, 4; Barnard Report, p. 2 [Jackson State Mental Hospital]). There, Mr. Meeks "was treated with medications (sic) . . . and was given a recommendation to undergo outpatient therapy as well as taking some medication" (Carrera Report, p. 4). See Apps. 13 and 14 (reproducing reports).

Mr. Meeks had a history of alcohol and drug abuse. He "began drinking alcohol when he was 14 years old. He would usually drink beer and get drunk every Saturday night. From beer he switched to wine and then finally whiskey. He remembered that drinking made him fight . . . Concerning illegal drug use he said he started smoking marijuana at age 15 or 16 years (sic). He went from marijuana to THC and acid . . . His pattern is to take one THC (sic) for stretches of time and then go off of them completely. He says that THC 'makes me high . . . feel good . . . head swimming . . . can't hardly stand up . . . makes you laugh all the time'." (Carrera Report, p. 4). (See also Barnard Report, p. 2: "He began the use of alcohol when he was 14 . . . He began the use of drugs at age 15 [marijuana, THC, acid].")

Mr. Meeks had been drinking and taking drugs since 9:00 a.m. on the date in question: "[H]e met Homer Lee Hardwick and Larry Taylor at approximately 9:00 a.m. The three then walked to the Ninety-Eight Bar where Taylor bought beer and wine for all and they sat at one of the tables to drink. Mr. Meeks said that at the time he took one tablet of THC, drank 3 cups of wine and had 2 cups of beer." (Carrera Report, p. 1). "On the day of the alleged crime . . . [h]e went to the pool room about 9:00 a.m. and met Homer and Larry and they went then to the Ninety-Eight Bar where Larry bought some been and wine for all of them. Mr. Meeks had several cups of wine and two cups of beer plus one tab of THC." (Barnard Report, p. 1).

The reports also reflected that the robbery in Case 74-299 was Hardwick's idea (Barnard Report, p. 1). Hardwick first shot the decedent (Carrera Report, p. 2). Shooting the decedent was also Hardwick's idea.

With regard to Case 300, Mr. Meeks "asserted repeatedly that he had nothing to do with this second crime." (Carrera Report, p. 2; see also Barnard Report, p. 1). During that day, also, Mr. Meeks had consumed alcohol (Carrera Report, p. 2). Mr. Meeks' steadfast assertion of innocence was also heard by the court at the trial of Case 300.

Mr. Meeks' childhood was dismal and resulted in emotional and mental impairments which were apparent even on the basis of the limited reports before the court. Mr. Meeks "was born in Darling, Mississippi on June 28, 1953. His mother [was, in 1975] 55 years old. His father died when Mr. Meeks was 3 to 4 years old. His mother has never told him the cause of his father's death" (Carrera Report, p. 3). He was "the sixth of seven children" (id.) raised by a single mother who "worked as a domestic in order to support the family." (Id.) Mr. Meeks' troubled childhood had its effects: it resulted in his alcohol and drug abuse, in a "history of fighting a lot (sic) since he

was age 10 years (sic)," (Carrera Report, p. 3), in difficulties at school (Carrera Report, p. 3; Barnard Report, p. 2), in reclusive behavior (Carrera Report, p. 3: "He said that he did not belong to any clubs in school and did not participate in athletics"), in difficulty holding down a job (Carrera Report, p. 3; Barnard Report, p. 2). Eventually, Mr. Meeks' background caught up with him -- he dropped out of school. (Carrera Report, p. 3; Barnard Report, p. 2).

Notwithstanding his difficult background and his emotional and mental deficiencies, Mr. Meeks tried to be gainfully employed: "After quitting school he worked in plumbing for about 2 months and then quit and stayed around the house to help his mother. He said he has had several jobs including working at a cotton gin, making concrete pipes and working in a fruit plant." (Carrera Report, p. 3). "After he quit school he worked as a plumber's helper for several months. Later he worked in a cotton gin and in a concrete pipe factory." (Barnard Report, p. 2). (Mr. Meeks' affection for and efforts to help his mother were also referred to in the reports. This also mitigated.) The trial testimony in Case 300 also reflected Mr. Meeks' efforts to seek employment.

Mr. Meeks' difficult upbringing resulted in his troubles at school and substance abuse. However, his background showed his efforts to seek, obtain, and maintain gainful employment. (Carrera Report, p. 3; Barnard Report, p. 2). Notwithstanding his difficulties, Mr. Meeks had never been "fired" from any job. (Id.)

Mr. Meeks' intellectual functioning has always been limited, and as even the reports showed, was questionable, at best. (Carrera Report, p. 4; Barnard Report, p. 2). As with all the other factors detailed above, Mr. Meeks' impaired level of intellectual functioning and his diminished mental faculties received no independent consideration -- they did not fit the

statute. (Mr. Meeks' limited intellectual functioning was entitled to independent consideration even if it did not meet the strict statutory requirements of Fla. Stat. 921.141(7)(b) and (f). But no such independent consideration was given.)

All of this mitigated the offense. But none of this "fit" in the statute. Consequently, none of this evidence was "considered." See Hitchcock, supra; see also, Cooper v. Wainwright, 807 F.2d 881, 888-89 (11th Cir. 1986); Harvard v. State, supra; Morgan, supra; Riley, supra; Thompson, supra; Foster, supra.

The reports were not the only mitigation before the Court. There was more. See Harvard, 486 So. 2d at 539 (nonstatutory mitigating factors are not limited solely to evidence "presented" by defense at penalty phase, but may arise from all matters before the court.) These additional factors were known to the court and the jury:

When arrested, Mr. Meeks offered no resistance whatsoever. He fully cooperated with law enforcement at his arrest, at the subsequent line-ups, and as his case was being processed. This was not in the statute. This was not considered by judge or jury.

Mr. Meeks' cooperation did not stop there. At the trial of co-defendant Homer Hardwick Mr. Meeks testified as a State's witness. He again fully cooperated with the authorities, providing the State Attorney's office with evidence implicating Hardwick and implicating himself. He provided such evidence at depositions and on the stand at the Hardwick trial. (Later, his testimony would be used against him.) These efforts to "come forward" and aid the State also mitigated. But this also was not in the statute, and therefore was not considered by jury or judge.

Similarly, matters which were reflected in the doctors' reports had been included in the evidence heard by both juries.

Evidence respecting Mr. Meeks' consumption of THC and alcohol (both cases), his cooperation with the authorities (both cases), and his steadfast assertion of innocence (Case 300), inter alia, had been heard. This also should have been considered. See Harvard, supra, 486 So. 2d at 539. None of this was in either Case 299 or 300.

In Brookings v. State, 495 So. 2d 135 (Fla. 1986), the Florida Supreme Court reversed a judge's override of a jury's "life recommendation" because that recommendation could well have rested on the independent nonstatutory mitigating effect of the life sentence given to an accomplice. Id. at 142-43; accord McCampbell v. State, 421 So. 2d 1072 (Fla. 1982). The Court held that the disparate treatment given to an accomplice, as opposed to the treatment given the capital defendant, were "reasonable" mitigating factors to be considered by the jury and the court at the penalty phase. Brookings, 495 So. 2d at 142-43.

Douglas Ray Meeks was sentenced to death. Homer Hardwick, Mr. Meeks' alleged accomplice, was given a life sentence. The mitigating effects of this disparate treatment should have been considered. Yet, it was not: the court restricted review. That the jurors were concerned about Hardwick's involvement is not disputable: in Case 299 they posed questions to the court in that regard; in case 300, Hardwick testified as a witness for the State. However, in neither case did the sentencing court or jur consider Hardwick's disparate treatment as a factor which mitigated the offense. See Brookings, supra.

In Case 300, the State relied on the testimony of co-defendant Hardwick to "connect" Mr. Meeks to the offense. Hardwick's testimony was directly contradicted by Mr. Meeks' account, and by the account of the defense's alibi witnesses. The fact that the State's case was based, in large part, on the testimony of a cooperating accomplice also mitigated against a sentence of death. Yet this was not considered by jury or judge.

Nothing in any instruction allowed the jury to consider as mitigation, at sentencing, the fact that the defense's version of the events was disputed by, and the prosecution was largely based on, accomplice testimony. The jury, at the penalty phase, was not allowed to deliberate and reflect with regard to what numerous courts have considered even in non-capital cases: the fact that accomplice testimony is inherently unreliable. See, e.g., Phelps v. United States, 252 F.2d 49 (5th Cir. 1958); United States v. Curry, 471 F.2d 419 (5th Cir. 1973); Turner v. State, 452 A.2d 416 (Md. 1982); Thompson v. State, 374 So. 2d 338 (Ala. 1979); Bendle v. State, 583 P.2d 840 (Alaska 1978); State v. Howard, 400 P.2d 332 (Ariz. 1965); Redman v. State, 668 S.W.2d 541 (Ark. 1984); Castell v. State, 301 S.E.2d 234 (Ga. 1983); State v. Evans, 631 P.2d 1220 (Idaho 1981); State v. Hutchison, 341 N.W.2d 33 (Iowa 1983); State v. Harmons, 664 P.2d 922 (Mont. 1983); State v. Morse, 318 N.W.2d 889 (Neb. 1982); Sheriff, Clark County, Nevada v. Hamilton, 646 P.2d 122 (Nev. 1982); People v. Lipsky, 443 N.E.2d 925 (N.Y. 1982); State v. Lind, 322 N.W.2d 826 (N.D. 1982); Oregon v. Hall, 595 P.2d 1240 (Or. 1979); Mathis v. State, 590 S.W. 449 (Tenn. 1979); Paulus v. State, 633 S.W.2d 827 (Tex. App. 1981). Neither did the court consider the mitigating value of any of this.

In Case 300, Mr. Meeks' jury heard the State's impassioned arguments for guilt and death. They also heard the alibi evidence presented by the testimony of defense witnesses and Mr. Meeks. The facts were in dispute and uncertainties remained. The State sought to clear up the uncertainties by using a cooperating accomplice as a witness. The accomplice's status, Brookings, the value of his testimony, and the remaining doubts were all matters that the jury should have been allowed to consider and that the court should also have taken account of. Cf. King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984); Green v. Georgia, 442 U.S. 95 (1979). But no such account was taken.

In both cases, the mitigation available from the evidence at guilt-innocence went even further. In Case 299, the State's evidence boiled down to the cross-racial identification of one witness who was "not sure" if she had seen Mr. Meeks before the offense (ROA 157, Case 299), who could not provide law enforcement with a description of Mr. Meeks as an assailant after the offense, whose opportunity to observe the assailant was fleeting and occurred during an extremely volatile situation, whose identification was based on "the man's eyes" (ROA 151, 153), who did not know and could not say which of the two assailants had the gun when the shooting occurred (ROA 157), who could not describe the assailant the night after the incident (ROA 159), who could not accurately describe the assailant's clothing even at trial (ROA 160), who did not know which of the two assailants followed her and the decedent to the back of the store (ROA 162), who did not know whether the man holding the gun had a moustache (ROA 159), who thought she heard what "seemed like" three shots (ROA 161), and who did not know which of the two assailants led the decedent to the back of the store because she "did not look back" (ROA 160). The witness, however, did recognize co-defendant Homer Hardwick because she "knew him from school" (ROA 137). The State presented a wealth of evidence connecting Homer Hardwick to the offense. Other than the questionable "identification" testimony of one witness, there was slim direct evidence connecting Mr. Meeks to the offense. Defense counsel sought to present such arguments to the jury at sentencing, but nothing in the courts' sentencing instructions allowed the jury to consider these issues.

In Case 300, the State's case was based on the testimony of a fingerprint analyst who testified that two fingerprint found in the store were Mr. Meeks', but that he could provide no number of "points" of comparison that would be needed before a "match" was to be made, on the testimony of accomplice Homer Hardwick (see

supra), and on the "identification" testimony of three witnesses who stated that they "saw" a black man coming out of the store as they drove up (two of these witnesses could not identify Mr. Meeks at a lineup). The defense presented alibi witnesses and Mr. Meeks' testimony -- all denying that Mr. Meeks was at the convenience store on the day at issue. The State's case was that Mr. Meeks, who did not know the decedent, entered the store and killed the clerk during an alleged robbery. However, no money or merchandise was taken. The defense was that Mr. Meeks was never there, and Mr. Meeks asserted his innocence from the outset.

In both cases questions remained to be answered. But, these matters were not considered: the court's instructions restricted the jurors' consideration solely to the mitigation that was statutorily "enumerated." See King v. Strickland, supra, 748 F.2d at 1464 (doubts may rise "to a sufficient level that . . . [they] might convince a jury and a court that the ultimate penalty should not be exacted, lest a mistake may have been made"); see also Smith v. Wainwright, 741 F.2d 1248, 1255 (11th Cir. 1984) (same); Smith v. Balkcom, 660 F.2d 573, 580-81 (same) (5th Cir. Unit B 1981).

Additionally, the evidence in Case 299 indicated that the robbery was thought up, planned, and directed by Homer Hardwick. It was his idea -- he led, Ray Meeks followed. Such evidence was also included in the reports of Dr. Carrera and Dr. Barnard which related Mr. Meeks' account of the events. The sentencing court rejected the statutory mitigating circumstance that Mr. Meeks "acted under extreme duress or under the substantial domination of another person." Even if the evidence before the jury that Hardwick was the leader, evidence which was supported by the psychiatric reports later reviewed by the court, did not rise to the stringent statutory requirements, this evidence was entitled to some consideration. In fact, this version of the events was supported by the reports' references to Mr. Meeks' personality,

i.e., his diminished intellectual functioning, the ease with which he could be led, and his other mental/emotional difficulties. Obviously, none of this was considered. The instructions never even hinted that the jury could look at matters that did not fall within the stringent statutory requirements, and the prosecutor's arguments presented this same restrictive interpretation.

Moreover, the jurors in both cases were informed time and again by the prosecutor that neither case involved a charge of premeditation. The State rested on felony-murder theories. That these were felony-murders, and not prosecuted as premeditated offenses, were also factors deserving of some consideration. Again, none was provided by jury or judge.

In short, none of this [nonstatutory] mitigation was considered by court or jury at the penalty phase of Mr. Meeks' trials. Nothing in the instructions even suggested that the jurors could consider nonstatutory mitigation; the sentencing court considered only what "fit" the statute. The proceedings "actually conducted" show that these various nonstatutory mitigating factors received no independent consideration. See Hitchcock v. Dugger. At the heart of the Hitchcock opinion is the essential eighth amendment principle that a capital defendant is entitled to an individualized and reliable capital sentencing proceeding. Any aspect of the character and background of the offender and the circumstances of the offense, Gregg, which mitigates against a sentence of death must be considered. A judge cannot foreclose his or her own consideration, and the jury cannot be given preclusive instructions. Hitchcock; Skipper. The Florida sentencing court in Hitchcock did just that, and the eighth amendment was violated. The Florida sentencing court and jury in Mr. Meeks' cases, cases which mirror Hitchcock in every pertinent detail, also did just that, and the eighth amendment was again violated.

The preclusive "consideration" condemned by the unanimous Hitchcock Court was all that was provided to Mr. Meeks.

E. THE SUBSTANTIAL NONSTATUTORY MITIGATION WHICH WENT UNDEVELOPED BECAUSE DEFENSE COUNSEL WAS CONSTRAINED.

The official constraints under which Mr. Meeks' former defense counsel operated at the time of these trials have been discussed in preceding portions of this pleading, and are reflected in counsel's affidavit. (See App. 3). It is obvious that counsel's representation at the penalty phase of the proceedings was limited by those constraints; the limited nature of his closing arguments (two record pages in each case) speak for themselves. Mr. Meeks' entitlement to relief becomes irrefutable when the sentencing record in Case 299 and Case 300 is compared to the substantial, critical mitigating evidence which was available, which could have been developed, and which would have been presented but for the restrictive statute.

For example, mental health nonstatutory mitigation was available in Mr. Meeks' case, and Mr. Meeks should have had professional mental health assistance with regard to sentencing issues at the time of his sentencing -- in this case, an individualized and reliable capital sentencing determination required presentation of such evidence, for Mr. Meeks' background reflected psychological, mental, and emotional deficiencies. Cf. O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984). Since counsel operated under the statute's constraints, the two experts provided by the court were asked only to consider the very limited issue of Mr. Meeks' "sanity" at the time of the alleged offenses. No one asked the experts to consider mitigation. Had counsel (or anyone) asked, a wealth of nonstatutory mitigating factors would have been apparent.

An eminently qualified mental health professional was recently asked to evaluate Mr. Meeks with regard to what mitigation would have been available at the time of his 1975

trials. Her conclusions are significant, and her professional report speaks for itself. It reflects what a professionally qualified expert's evaluation, testing, and review of available collateral sources of information would have provided Mr. Meeks' sentencing juries and judge had such assistance been sought, i.e., had counsel and the court not been constrained:

> As you requested I have examined Mr. Meeks in order to determine what, if any, mental health related evidence in mitigation of sentence was available for presentation at the time of his 1975 capital trial. . . .
>
> The report that follows is based on the testing, my interview with Mr. Meeks and an examination of the extensive records available on Mr. Meeks. The report is also based upon my training and practice in psychological assessment and general experience as a clinical psychologist. I have conducted numerous assessments involving the use of psychological tests and teach graduate level courses in the administration, scoring, and interpretation of personality tests. I have been consulted on competency evaluations, insanity evaluations, and have served as an expert witness in civil and criminal proceedings. I have served as a consultant for the Office of Disability Determination in the State of Florida and am currently a consultant for the Georgia Department of Human Resources at a state hospital in Thomasville. I am a tenured associate professor of clinical psychology at Florida State University. Additionally, I am licensed as a psychologist in the states of Florida and Georgia and am certified as an instructor by the Florida Commission on Criminal Justice Standards and Training.
>
> <u>Interview and Background Information</u>
>
> Mr. Meeks is a 34-year-old black male who reports that he has been incarcerated on death row for "about 11 years." He was cooperative during the interview, but displayed obviously strange mannerisms and behaviors. For example, he displayed physical signs normally equated with anxiety (constant leg twitching) but displayed no anxious affect. In fact, Mr. Meeks' affect was flat throughout both interviews and consisted only of brief laughs upon being asked questions. He answered all questions, but made few, if any, spontaneous verbalizations. This behavior is consistent with other reports of his behavior. His DOC records, for example, indicate that it was "difficult to elicit spontaneous conversation from Meeks and most of his answers were extremely short." He is generally passive,

and was described by family members as a loner without friends. His DOC records also note that he is "very inadequate and easily led" and "it seems as though he lacks the ability to appropriately assess alternatives in a normal manner." His passivity, cognitive difficulties and mental health problems were obvious during the interview and testing.

Mr. Meeks was born in Darling, Mississippi, on June 28, 1953, one of six children raised mostly by their mother, as the father died when Mr. Meeks was approximately three years old. By all reports the family was poverty stricken. Their sole support in Mr. Meeks' early years was money earned by picking cotton. Because the work was seasonal, winters were particularly difficult. The family frequently lacked food and the children did not attend school in the winter because they could not afford warm clothes. Mr. Meeks worked picking cotton at an early age, but as he grew older he developed asthma rendering him unable to work. Mr. Meeks had severe asthma as a child, a condition which has continued into adulthood.

Additionally, the family reports he suffered an apparent closed head injury while being cared for by his siblings. He suffered an additional closed head injury while incarcerated. Current records indicate that Mr. Meeks has difficulty sleeping, headaches, and has a history of frequent medical complaints. At various times during his incarceration, he has been on Sinequan, Vistaril, Phenergan and Triavil, a combination antidepressant, antipsychotic. Additionally, he has also been given antibiotics and asthma medication.

Mr. Meeks attended school in Darling, Mississippi from 1959 until 1967. He repeated the first grade apparently because of poor grades. He had difficulty in school and was a slow learner. In 1971, he was sent to the Oakley School for Boys. It is unclear what offense he had committed as it is reported by different sources as a forgery, alternately as a robbery and also as an act of vandalism. Mr. Meeks has trouble with remote memory and could not recall the year in which he went to Oakley nor what crime caused his incarceration. Other than for a single incarceration at age seventeen, Mr. Meeks had no adult criminal record until the current offense.

Because of his early incarceration, Mr. Meeks' formal education ended in the seventh grade. According to Mr. Meeks, he received schooling while in Oakley, but the records do not indicate any schooling taking place. His records from his local high school indicate

that he attended the seventh grade, did not attend the eighth or ninth grades and was dropped from the roles in the 10th grade. DOC records indicate education until the eleventh grade, but this is in error, and may be a function of reliance on Mr. Meeks' self report.

During his teenage years, Mr. Meeks reports that he began to use drugs and increased his use of alcohol. He reports that he drank, smoked marijuana, took acid and took THC. He states that he did not use any other drugs, but noted that during the time period surrounding his offenses he was both drinking and taking THC.

In 1973, Mr. Meeks was sent to the Mississippi State Hospital in Whitfield, Mississippi. There is no indication in the records concerning why he was sent to the state hospital and Mr. Meeks is unable to clarify this.

Sometime after his incarceration and release from the state hospital Mr. Meeks returned to Darling, but eventually went to Florida in search of work. He reports that he held numerous jobs but eventually became an orange picker in Umatilla. Although he held many jobs, he reports that he was not fired, but would simply move on. After his job in Umatilla, he began to drive north and stayed in Perry when his car broke down. It was in Perry that Mr. Meeks met Homer Hardwick and eventually became involved in a capital offense. According to Mr. Meeks, he simply did what Homer wanted. Consistent with his history, he followed rather than led.

Test Data

Intelligence testing (WAIS-R) reveals Mr. Meeks to be functioning in the borderline range of intellectual functioning. He received a Full Scale I.Q. of 79, a Verbal I.Q. (VIQ) of 78 and a Performance I.Q. (PIQ) of 88. This is consistent with DOC records indicating an I.Q. between 71 and 79. Earlier records from the state hospital in Mississippi indicate that Mr. Meeks was believed to be mildly mentally retarded or to be of low average to mild deficiency.

Achievement levels are low as could be expected given Mr. Meeks' I.Q. level and education. They are consistent with past records and with Mr. Meeks level of education. His scores may also be lowered as a function of his other problems. On current testing, Mr. Meeks scored at the fourth grade level on spelling, the fifth grade level on arithmetic, and below third grade on a test of reading recognition. Reading comprehension scores, according to his DOC

records are at the 5.9 grade level. Earlier testing (1971) indicates lower scores, but the examiner at that time noted that he had very poor rapport with Mr. Meeks which may have affected the scores. The results of the achievement tests are not inconsistent with his history.

On tests designed to assess brain damage or organicity, Mr. Meeks' scores fell into the brain damaged range. Although many such tests are sensitive to I.Q. levels, Mr. Meeks performs poorly on tests of brain damage not sensitive to I.Q. levels. On the Canter Bender, for example, Mr. Meeks scores in the brain damaged range. This test is not susceptible to the effects of I.Q. It is also consistent with his performance on subtests of the WAIS-R, in which he performed poorly on tests requiring visual motor coordination. On the Booklet Categories test, a test of abstraction and concept formation, Mr. Meeks fell well below the cutoff for brain damage. Even when his I.Q. is considered, Mr. Meeks' performance is still well below what is expected for his I.Q. level indicating that he has a greater degree of cognitive deficit than would have been predicted from his performance I.Q.

Mr. Meeks also performs poorly on other tests designed to evaluate brain damage. On Trails A and B, Mr. Meeks performs at the 50th percentile when compared to others in his age group.

Overall, Mr. Meeks appears to have diffuse brain damage and particular difficulty with visual motor tasks. This is consistent with a history of closed head injury which Mr. Meeks has. As a child, he received a blow to the head and incarceration records from Mississippi also indicate that he was struck in the head with a pipe, although there were no lacerations. Other mental health reports indicate that he was knocked unconscious with a board.

On the WMS-R, Mr. Meeks demonstrated adequate memory for his I.Q. level, but had more difficulty with visual memory than verbal memory. This is consistent with other testing. Unfortunately, such tests cannot test for remote memory, which is the area of memory in which Mr. Meeks has difficulty.

Personality testing is congruent with Mr. Meeks' presentation during interview and consistent with reports in DOC records and from his family.

The MMPI configuration is indicative of individuals who have long standing problems to which they have become adjusted. It is a valid indicator of Mr. Meeks' current level of adjustment. People with similar profiles

feel isolated or alienated, lack trust in other people, and may have a poor work history and nomadic lifestyle. The most common diagnosis for such a profile is schizophrenia, although diagnoses of schizoid personality or anxiety disorder may also be given. Such people display flat affect and frequent somatic complaints. They are socially inept and inadequate.

Mr. Meeks' responses to the Rorschach are similarly indicative of poor social relations and impoverished affect. He was unable to provide an adequate number of responses and failed to see commonly perceived percepts. Overall, the test protocol was marked mostly by his withdrawal from the stimuli.

Personality test results are consistent with Mr. Meeks' behavior and reports of his behavior throughout his life. He has always been described as a loner, and has never been described as having any affect. He is described as easily led and inadequate, statements which his history supports. DOC records indicate that he makes frequent trips to the infirmary and has numerous somatic complaints.

Summary of Test Results

Mr. Meeks was administered a wide variety of psychological tests to assess his intellectual functioning, achievement levels, organic brain damage and personality functioning. The results are consistent with his history and current observation. He functions in the borderline range of intelligence, has low levels of achievement, shows signs of organic brain dysfunction and mental illness. All of these problems are longstanding in nature.

Mitigating Circumstances

As you requested, I examined Mr. Meeks in regard to possible mitigating circumstances in the mental health area. My understanding is that mitigating factors involve such matters as an extreme mental or emotional disturbance at the time of the offense, that the defendant acted under the substantial domination of another person or under duress, and that the defendant could not appreciate the criminality of his conduct or that his ability to conform his conduct to the requirements of law was substantially impaired. It is also my understanding that the court will consider any aspect or factor regarding the defendant or the offense which may serve to mitigate the sentence or to demonstrate to the judge and jury that a sentence of life imprisonment would be more appropriate.

Clearly, Mr. Meeks suffers from an extreme mental or emotional disturbance. He has a plethora of problems. He is of borderline intellectual functioning and his cognitive functioning is further impaired by his organic brain damage. He has a low level of achievement on achievement tests and a history of poor school performance. Additionally, he has behaviors that are symptomatic of serious mental illness. His responses to personality tests are similar to those of schizophrenics. He has a life-long history of behavior indicative of alienation, social isolation and inadequate functioning. He is easily led. He has difficulty with abstraction and concept formation. His affect is flat and therefore, at times, inappropriate. He was not only slow in school, but different from other children, so much so that he was the object of their derision. His family describes his isolation even from them, noting that he would stare at the floor without moving for hours at a time, rarely playing with other children. Even his DOC records describe him as a person who is easily led and whose activities will be determined by those around him: "Meeks is the type of individual [who] can be easily led into practically any type of activity. . . ."

Clearly, his inadequate functioning and life-long history as a follower are related to the offense. Mr. Meeks reports that he did what his co-defendant wanted, that he did not think about it, and that it was not his idea. His report of the events is in fact consistent with a victim's report. Mr. Meeks does not particularly know why the offenses were committed. He is in fact so flattened in his affect and isolated from others that he appears to do what others suggest with no involvement on his part. In addition, Mr. Meeks' mental defects precluded him from appreciating the criminality of his conduct. His functioning is such that he has difficulty forming concepts and cannot assess alternatives to his behavior, as was noted in his DOC report.

While the above information relates to the statutory mitigating factors, it also speaks to other mitigation not specifically defined by the statute. The information provided relates to Mr. Meeks' background as well as to the offense.

There are additional non-statutory mitigating factors that are and were worthy of consideration. Most obviously, he is mentally ill. His records indicate that he has been medicated with various psychotropics. Psychological testing indicates that he is similar to those diagnosed as schizophrenic, that he is isolated and has difficulty with

interpersonal relations. He has always withdrawn from others and kept to himself. He has difficulty with concept formation and difficulty abstracting.

Mr. Meeks has organic brain damage. He scores below what could be expected given his I.Q. level. He has a history of closed head injury that supports this. This combines with his mental illness to further handicap him.

Mr. Meeks functions in the borderline range of intellectual functioning. He has poor verbal skills and low achievement levels, handicapped further by a lack of education. His functioning is low enough that upon initial impression he has been presumed to be mentally retarded. Previous competency evaluations have noted that Mr. Meeks suffers from low intelligence but failed to consider this factor in relationship to Mr. Meeks' background, his schooling, his offenses, his mental illness or his organic brain syndrome. While his low level of intelligence in and of itself is a mitigating factor, combined with the other factors the effect is multiplicative not additive. His combination of problems is more explanatory than any problem taken alone. However, since earlier mental health professionals apparently were not asked to consider mitigation, the relationship of Mr. Meeks' intellectual defects to his conduct and history were not assessed.

In addition to his mental and emotional problems, Mr. Meeks comes from a background of poverty and deprivation. His father died while he was a toddler, depriving him of a role model and forcing the family into poverty. Mr. Meeks and six other children were raised solely by his mother who worked in the cotton fields to support the family. As the children became old enough, they too began to work in the fields. Mr. Meeks, crippled by asthma, was unable to work for prolonged periods of time, thus further isolating himself from others. In spite of the labor provided by his mother and the other children, the Meeks family frequently went hungry, especially in the winter.

Although Ray obviously had problems of a mental and emotional nature, no help was ever forthcoming. In spite of his educational difficulties no help was provided; most likely it was not available and Mr. Meeks was promoted in school in spite of a lack of progress. Additionally, Mr. Meeks began to use alcohol at an early age and began to use drugs as a teenager. This clearly had an impact on his current offenses as he reports he was under the influence of both alcohol and drugs at the time of his offense.

Overall, Mr. Meeks' background served only to exacerbate the conditions by which he was hampered. In spite of this, he was reported to be a non-aggressive child who got into trouble only because others led him there. He worked in the fields to help support his family and took care of his younger sister. He attempted to help them in school, but soon it became obvious that even his younger sister had surpassed his meager intellectual skills.

Because he was so different than other children, he was picked on by other children. Not only were they abusive verbally but they were physically abusive as well.

Overall, Mr. Meeks' background was poverty stricken, lacking in supervision, and marked by his emotional and intellectual problems which set him apart from others.

It is apparent that mental health evaluations conducted prior to Mr. Meeks' 1975 trial were not concerned with mitigating factors but focused narrowly on the issues of competency and sanity.

Had these professionals been asked to provide evidence of mitigation they would have no doubt pointed to Mr. Meeks' low intelligence as it relates to mitigation. His low intelligence, his lack of education and his lack of a male role model would have been related to his offenses. By their own report his remote memory was judged to be deficient. It was also noted that he was in the Mississippi State Mental Hospital, that he had a history of drug and alcohol abuse and that at one point he had been knocked unconscious by a blow to the head. Once again, these are all factors that speak to mitigation and could be related to the offense.

Had professionals been asked about mitigation they would no doubt have obtained collateral data regarding Mr. Meeks' upbringing, his incarceration and his hospitalization. They would have evaluated Mr. Meeks' poverty-stricken background, and would have provided a detailed evaluation concerning his mental illness, intellectual deficits, and emotional deficiencies as related to Mr. Meeks' behavior and the offenses. Such professionals would have investigated further the possibility of mental illness and done psychological testing to validate or rule out various hypotheses. Given his history of head injury they would have examined him for evidence of organicity. The factors detailed in the present report are those that could have been readily discovered by a mental health professional who had been requested to evaluate Mr. Meeks in regard to statutory and non-statutory mitigating circumstances.

> In summary, it is my opinion that substantial mental health mitigation did exist in Mr. Meeks' case. Had a competent mental health professional been asked to evaluate Mr. Meeks for such factors, they would have found them to be readily available.

(App. 4)(Report of Dr. Carbonell). Mental health-related mitigation was not the only evidence available. Counsel, constrained, failed to conduct any investigation into Mr. Meeks' background -- investigation which was critical to a reliable and individualized capital sentencing determination. No witnesses who knew who Douglas Ray Meeks was were ever contacted. Had they been, a picture of Mr. Meeks quite different from that presented by the State would have come to light:

> My name is Geneva Meeks, and I live in Darling, Mississippi. I am the mother of Douglas Ray Meeks. Ray was born in Darling, at our home, and grew up there.
>
> Ray's father was a minister. He died when he was 59 years old. Ray wasn't much more than a baby when his father died. My husband's death left me on my own to raise Ray and my six other children. I had four boys and three girls, and Ray was the second youngest. I had to feed them, clothe them, and take care of them without any help. I had to work, as did my children, because we were poor and needed the money. Things were real hard, and I did the best I could trying to raise my children. Most people in Darling were poor, and we were poorer than most.
>
> Ray's father took sick with chest pains while he was working on the schoolhouse. He was carried home, and died there a week later. Ray wasn't but four years old at the time. I never remarried, and as I said, I raised Ray, as well as my other six children, by myself, as best as I could.
>
> In Darling, the only work available to black people was working the cotton fields during the season. Like all my children, Ray would have to go with us to the fields starting when he was just a little boy. All my children had to start working at a very early age, and Ray was no exception-- we started bringing him to the fields with us when he was about three. We would take turns watching him until he was old enough to start helping out. When he was about six or seven, he helped out by dragging the cotton sacks down the rows for us while we'd fill them up. The work was backbreaking and lasted from

sunup to sundown. Myself and my three oldest children would get paid according to how much we could pick in a day, and the youngest children had to help us. We were paid almost nothing, and sometimes we'd go hungry even when we had work.

During the off season, we could not work. There was just no work to be found in Darling. Some days, my children were lucky to get one meal. Times would be hard and we would get by on what we could. The children would go hungry, and even though I did the best I could for them, I knew they were hurting.

As he got older, Ray got asthma real bad and I made him quit picking cotton. The doctor told him that the cotton dust would just keep getting him sick, so I tried to keep him at home as much as I could. There was plenty of things to be done at home, things I couldn't do when I was working, and Ray would do all those chores without ever complaining. He'd watch after his baby sister, and would take her just about everywhere with him. Even though it made him real sick, Ray kept going out to the fields as much as he could until he was about 13 or 14. He knew how bad we needed the money, and all the money he made he'd give to me to use to support the rest of the family. He'd work as much and as hard as he could, and never complained a bit.

When Ray was about 15 he got a job picking fruit. He had always been a hard worker and he was happy that he was finally able to find work besides picking cotton, work that didn't make him sick. Ray always helped out with money, for as long as he lived with us in Darling. I never had to ask him to help-- whenever he had a job, he would always give me money to help make ends meet.

Ray fell and hurt himself when he was just a little boy. When he was 1 or 2 years old, I told his older brother and sister, Robert, Jr., and Dora, that one of them had to baby sit him so that I could go to the store. Dora and Robert were angry about having to stay around and watch him, and they threw Ray back and forth between them arguing over who should mind him. Dora threw Ray to Robert, and he missed him. Ray fell on his head and got knocked right out. When he came to and started crying, I heard him and came running out of the house. Ray didn't usually cry much when he was a baby, and when he just kept on crying and crying, I got real scared and took him to a doctor. The doctor just took a quick look at him, said he was okay, and just sent us home. Ray kept crying the whole time we were at the doctor's, and kept it up after we got him home. It took me a while to quiet him down and get him to sleep.

When he woke up the next day, he started crying again, and I couldn't get him to stop. For a while, I couldn't even get him to eat or drink anything. He eventually stopped crying and started eating again, but I was real worried for a while.

Trying to raise seven children by myself, I was never able to buy things for them. Winters were always hardest because they wouldn't have warm clothes to wear. They never ate real well, and things were even worse in the winter when the cotton season was over and there was no work to be had.

Ray was different from my other three boys. He was different from all my children. He was so quiet. The other children would talk and play with their friends, but Ray would just keep to himself. You never knew what was going on inside him because he was so quiet. He would go off by himself and sit and just stare off into the sky. At home, he would just sit by himself all the time and stare at the floor without moving or saying anything. He'd be like this for hours at a time. Sometimes you could talk to him and he wouldn't even hear you. I never even saw him play much at all with other children, or even with his brothers and sisters. While his brothers and sisters would laugh and cry and chatter with each other, Ray would hardly make a sound, or show any emotions. Sometime after he had left home, I learned that he was sent to a mental hospital because he had problems. I loved Ray very much, and I love him now. He is my son. But he was a different child.

When Ray was in school, he was slow. All my children, like most children in Darling, missed a lot of school because they had to work during the cotton season. Ray was already pretty much behind children his own age, and missing all that school made it even worse. It took him a long time to learn things, and he didn't do very good in school. Because he was so slow, and so quiet on the outside, the other children his age would pick on him. They would call him names and make him feel bad, and even beat on him sometimes. Because he was they way he was, the other boys could get Ray to do things. They could get him to go along with just about anything they wanted him to do. Ray would just follow along and do what they told him to. He would do what I told him or what his brothers told him or what other folks would tell him to do. Sometimes I thought that Ray would jump in the river if somebody told him to. When people weren't telling him what to do, he'd just sit there by himself and stare. The only person he was real close to was his sister Catherine. No one else really knew him at all, and even Catherine

couldn't really talk to him about what he knew or felt.

Ray left Darling when he was a young man. Because there was so little work in Darling, he went off to find a place where he could get a steady job. He eventually ended up in Florida, where he got work picking oranges. No one called me to tell me that he got in bad trouble down there in Florida. No lawyer or nobody else ever contacted me about Ray or told me that I could have told the judge about him. I heard about Ray being on death row when he wrote and told me himself, long after his trials were all over. A lawyer did call me sometime later and told me about clemency and asked me to help. I tried to tell that lawyer everything I knew, and I would have told Ray's first lawyer the same thing if he would have called me and asked. Nobody even told me that Ray was in trouble until after he was already put on death row.

(App. 7) (Affidavit of Geneva Meeks).

My name is Dora Presley. I am the sister of Ray Meeks, and the second oldest of the seven children born to our mother, Geneva Meeks.

My family grew up in Darling, Mississippi, in the middle of cotton country. Picking cotton was about the only way to make a living around Darling, and that wasn't much of a living. When the work was available, our whole family would pick or chop cotton from sun up till sun down trying to make a living. Even during the season, when we could all work seven days a week, we barely made enough money to get by.

My Father died when Ray was just a baby, maybe 3 or 4 years old. Things had been tough before, but it really got hard after he passed away. All of us children had to go work to help our mother support the family. As I said before, the only work available was in the cotton fields, and all of my brothers and sisters started working there at a very early age. When Ray was a baby, we'd bring him to the fields with us and take turns watching him. When we would chop cotton, we would put Ray at one end of the field under a little tent made of rags, and when we'd stop for water we'd give Ray some too. When it came time to pick the cotton, he would sit on our sacks and we'd just pull him up and down the rows with us all day.

When Ray was about five, he started working in the fields all day just like the rest of the family. We would all work, even the youngest, and all together make about three dollars a day. That was barely enough to make a living, and when the cotton season was over, we just didn't have anything.

Winters would be real hard, because it was just about impossible to find work then. My mother would have a hard time putting even one meal a day on the table for us during the winter, and we would never know from day to day when that next meal would be coming from, or if it would be coming at all. We didn't have any real winter clothes, and when the weather would get cold, we'd have to stay home from school and sit by the stove all day.

Sometimes when we were real bad off, I'd go down to the white section of town to beg for food. Since Ray was the baby of the family, I'd take him around with me. We'd go to the back doors of white people's houses, and I'd show them my baby brother and tell them how hungry he was. We'd usually get something, even if it was just some cornbread, and we'd take whatever we got back home to share with the rest of the family.

Most families in Darling when I was growing up were poor, but ours was poorer than most. I remember at Christmas we never had a tree to decorate, nor any money for presents. We would each get an apple and an orange from a white family that lived in town, and we were lucky to get that. Ray wanted a bicycle as long as I could remember, but of course he never got one. Ray couldn't understand why he couldn't have a bicycle, or why we often didn't have enough to eat, or enough clothes, or a nice place to live like other people. We all tried to explain to him that we worked as hard and long as we could, but we just couldn't earn enough money. It took Ray a long time to understand this.

Ray was always been a little bit different from other people, even when he was just a little boy. When he was real young, he would just sit for hours and stare into the sky, never making a sound. If we didn't keep a good eye on him, he'd wander off somewhere and get lost. I remember one time when he did this, and after spending hours looking for him, we found him in a patch of sunflowers, just staring into one of the flowers. When we finally found him, I called out to him, but he wouldn't answer. I had to go up to him and grab him and shake him to get him to hear me.

Ray hardly ever made a sound when he was a boy. The only time I can really remember him crying is when me and my oldest brother, Robert, dropped him one day when we were fighting over who would have to stay home and watch him. Ray was just a baby at the time, and when he fell he landed right on his head. When he came to his senses, he started howling and just wouldn't stop. It was pretty unusual for Ray to cry at all, so we were really scared. My mother took him to

the doctor, but the doctor just sent him right home, even though he never stopped crying the whole time he was at the doctor's office.

Ray stayed just as quiet as he'd been as a baby when he grew up. Even when he got up in his teens, he'd just stay by himself most of the time. My brothers and sisters and I would always play and laugh together, and fight sometimes, but Ray would always keep to himself. He was easy enough to get along with, it was just hard to reach him. He'd do anything we told him to, but he never seemed to do anything on his own. I hardly ever saw him play with any of the other kids in the neighborhood.

Ray also seemed to have problems with his school work. It took him a long time to understand his school lessons, a lot longer than it took any of the rest of us or any of the other kids his own age. Other kids use to pick on him because he was so slow, and because he was so easy to push around. It always seemed like he preferred to be by himself, but when he would hang out with a group, he would just let them push him around and tell him what to do. It was easy for people to lead Ray along by the nose.

My Mother never had a bit of problem with Ray when he was growing up. He'd work just as hard as the rest of us, and he'd give any money that he earned to our mother. Ray developed a real bad case of asthma when he was a boy, and couldn't work in the cotton fields as much as the rest of us because the cotton dust would aggravate his asthma. He'd still try to find other jobs he could do-- cutting lawns, picking fruit, whatever was available-- and would bring all his money home to help support the family.

I didn't know anything about the trouble Ray got into down there in Florida until after they had already put him in prison for it. Nobody ever told me about his trial, or that I could come down there and help him. The first time I ever heard from any lawyer of Ray's was sometime in the late 70's when a lawyer called me and told me that he was going to ask the Governor of Florida to give Ray clemency. I wrote a letter telling the Governor about Ray, and about how we all grew up, but I never heard anything more about it. I love my brother, and would gladly have come to his trial and done what I could to help him.

(App. 5) (Affidavit of Dora Presley).

My name is Catherine Meeks McCray, and I live in Darling, Mississippi. I am the youngest sister of Douglas Ray Meeks. There are seven children in our family, and I am

the youngest of the seven. Ray was the next up from me.

We all grew up in Darling, Mississippi, out in the country. My Father died when I was just a baby, and my Mother raised the family by herself. About the only thing to do for a living in Darling is farm work, mostly cotton, and that's about the only work my family could ever get. During the season, we'd all have to work picking cotton, from the youngest on up. As soon as we were old enough to drag a cotton sack, we'd have to work. Even with all of us working, we rarely could make enough money to get by. During the winter, when there was no work to do in the fields, it was all we could do just to keep food on the table. There were a lot of times when we had only one meal a day, and not very much of one.

Ray had asthma real bad, and the dust from the cotton would get him sick. He couldn't work as much of the rest of us, so he'd have to stay home and do the chores that my Mother would have done if she hadn't been working in the fields all day. He would babysit me before I was old enough to work, and always took real good care of me.

Ray was always very good to me, and would take me with him everywhere he went. The boys his age would always give him a hard time about dragging me along everywhere, but he would never say anything back to them. I could tell that it bothered him when the other boys would tease him, but Ray would never say a word. Ray was like that: he was as quiet as could be, and it was often hard to get any kind of reaction out of him. The boys in the neighborhood knew how different Ray was, and would pick on him all the time. Ray would usually just stand there and let them do what they wanted to him. The only time I'd ever see him get mad at any of them was when they would do something to or say something to me or one of my sisters. Ray was always real protective of us, and would look out for us.

Ray was a loner when I was growing up. He didn't have many friends that I knew of, and didn't seem to want or need any. The boys in the neighborhood could pull him into their games and their trouble-making, but he never really joined in anything unless somebody pushed him. He spent more time with me than with anybody else, but he spent most of his time alone. Even when he was at home with all of us, he would spend most of his time off in a corner by himself somewhere. He could be real hard to reach sometimes, like he was living in a different world than the rest of us.

Ray and I both went to school at the

same time, although he was grades ahead of me. When I first started school, I used to ask Ray to help me with my homework. He'd try to help me, but he would get real confused and most of the times and couldn't figure things out. Before too long, it was me who would help him with schoolwork, although he never did seem to catch on real good. With the kind of school we went to in Darling, it didn't take much to get passed on up to the next grade. I knew kids there who could barely read, but they'd just keep getting promoted.

Education wasn't real important in Darling-- during the heavy part of the cotton season, in the early spring and late fall when there was a lot of work to do, our school would just close up. The farmers needed the help and we needed the work, and most kids couldn't have come to school during that time even if it had stayed open. I know we couldn't have. Our family needed the money too badly, and we could not have afforded to miss the best parts of the season, the only time of the year when we could make any money at all. Not only did we miss school during those times, but we often had to stay home in the winter as well. Our family could never afford any winter clothes, and when it got very cold we'd just have to stay home next to the stove.

All of us were shocked when we heard what happened to Ray down there in Florida. I still can't believe that Ray would have been involved in something like that. Nobody ever called me and asked me about Ray or asked me to come and help him at his trials. I would have done anything I could have to help Ray, but I didn't even know that he had even been arrested until long after it all happened. I don't know exactly what happened, as I didn't find out about it until after Ray's trials, but I understand that there was another boy involved in the shootings, and that that boy is not on death row like Ray. I just cannot understand how this could be. I know Ray, and I know that he could never have gotten into anything like this on his own. I would have told this to anybody, including Ray's lawyer, judge, or jury, but I was never given the chance to.

(App. 6) (Affidavit of Catherine Meeks McCray).

These are but a few examples. A great deal more was then available (see also App. 8).

Significant nonstatutory mitigation which could have been developed at the time of Mr. Meeks' 1975 capital sentencing proceedings is also apparent from the prior state court post-

conviction record in this case. For example, the evidence which Mr. Meeks attempted to present to the Rule 3.850 trial court (but which the court declined to consider) would have shown, inter alia, that:

i. Douglas Ray Meeks was the sixth of seven children, born and raised in a rural agricultural community in Mississippi. The family's father died when Mr. Meeks was four, and his mother raised the family alone from that point. (See P.C. 366-67).

ii. Mr. Meeks' family supported themselves through agricultural work, primarily picking cotton, with all members of the family working as soon as they were old enough to drag a cotton sack. As a baby, Mr. Meeks was brought to fields with the family and left under a makeshift shelter while the family worked. Mr. Meeks began working along side the family, out of economic necessity, at the age of five. (See P.C. 367-68).

iii. Cotton picking is necessarily a seasonal occupation, and in the off-months the family simply did not, could not, work. During the off seasons, the children were fortunate to get one meal a day. No state assistance was available at the time, and the children were forced to roam the community's white neighborhoods and beg food in order to eat. Mr. Meeks' older siblings would often take him along on these forays when he was a baby, in order to invoke the sympathy of the white townspeople whose charity they sought. (See P.C. 369-70).

iv. The economic predicament in which the Meeks' family existed resulted in severe material deprivation. The children, particularly the younger ones, had few clothes and never enough food. As a result, malnutrition and related disabilities took their toll. The children would go to school when there was no work available in the cotton fields, mainly to avail themselves of the free lunch that was provided there. This was generally the only daily meal the children received. When the weather became too cold, the children had to stay home because they had

no warm clothes to wear. (P.C. 370-72).

v. Mr. Meeks from an early age displayed episodes of bizarre and disassociative behavior, often withdrawing into a noncommunicative, almost catatonic, state for periods of time. It is reported that as a toddler he would often wander off by himself, and be found later staring off into the sky, unaware of his surroundings until someone would shake or shout at him. His increasingly bizarre behavior ultimately led to his commitment to a mental hospital for observation as a teenager. That facility recommended private psychiatric treatment upon his release, but the family could of course not afford such treatment. (See P.C. 371-73, 378-80, 385).

Counsel, constrained by the statute, failed to consider these matters, failed to look, and failed to independently develop any of the available nonstatutory mitigating evidence. Again, Mr. Meeks was denied an individualized and reliable capital sentencing determination.

F. MR. MEEKS IS ENTITLED TO THE RELIEF HE SEEKS

The eighth amendment violation in Mr. Meeks' cases is more obvious, and more blatant than that in Hitchcock. Hitchcock, and this Court's recent precedents make it clear that Douglas Ray Meeks is undeniably entitled to the relief he seeks. At the very least, he is entitled to a full and fair evidentiary hearing on his claims. See, e.g., Cooper v. Wainwright, 807 F.2d 881, 889 (11th Cir. 1986)(evidentiary hearings generally required in cases raising Lockett claims).

This Court has not hesitated in applying Hitchcock's dictates and Mr. Meeks, through counsel, requested that the federal court allow him to present his claim to this Court. The federal court agreed. The sixth, eighth, and fourteenth amendments make Mr. Meeks' entitlement to relief plain. He therefore respectfully urges that the Court grant him the habeas corpus relief he seeks.

CLAIM II

MR. MEEKS WAS DENIED HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS BECAUSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE ON APPEAL

A. COUNSEL'S NON-ASSISTANCE ON APPEAL

The appellate level right to counsel also comprehends the sixth amendment right to effective assistance of counsel. Evitts v. Lucey, 105 S. Ct. 830 (1985). Appellate counsel must function as "an active advocate," Anders v. California, 386 U.S. 738, 744, 745 (1967), providing his client the "expert professional. . . assistance. . . necessary in a system governed by complex laws and rules and procedures. . . ." Lucey, 105 S. Ct. at 835 n.6.

Even a single, isolated error on the part of counsel may be sufficient to establish that the defendant was denied effective assistance, Kimmelman v. Morrison, supra, 106 S. Ct. at 2588; United States v. Cronic, 466 U.S. 648, 657 n.20 (1984), see also Johnson (Paul) v. Wainwright, 498 So. 2d 938 (Fla. 1987), notwithstanding the fact that in other aspects counsel's performance may have been "effective". Washington v. Watkins, 655 F.2d 1346, 1355 (5th Cir.), reh. denied with opinion, 662 F.2d 1116 (1981).

Moreover, as this Court has explained, the Court's "independent review" of the record in capital cases neither can cure nor undo the harm caused by an appellate attorney's deficiencies:

> 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 it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an

> art, not a science. We cannot, in hindsight, precisely measure the impact of counsel's failure to urge his client's best claims. Nor can we predict the outcome of a new appeal at which petitioner will receive adequate representation. We are convinced, as a final result of examination of the original record and appeal and of petitioner's present prayer for relief, that our confidence in the correctness and fairness of the result has been undermined.

Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985). "The basic requirement of due process" therefore, "is that a defendant be represented in court, at every level, by an advocate who represents his client zealously within the bounds of the law." Id. at 1164 (emphasis supplied).

Appellate counsel here completely failed to act as an advocate for his client. In fact, it is no overstatement to say that Mr. Meeks was provided with no "advocacy", in any true sense, on the direct appeals of his capital convictions and sentences of death (Case 299 and Case 300). The direct appeals in each case were a farce. The "adversarial testing process" simply did not work in Mr. Meeks' direct appeals. See Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987), citing Strickland v. Washington, 466 U.S. 668, 690 (1984). See also Johnson v. Wainwright, supra, 498 So. 2d 938; Wilson v. Wainwright, supra.

To prevail on his claim of ineffective assistance of appellate counsel Mr. Meeks must show: 1) deficient performance, and 2) prejudice. Matire v. Wainwright, 811 F.2d at 1435. Mr. Meeks can.

B. DEFICIENT PERFORMANCE

The deficiencies in counsel's performance during Mr. Meeks' direct appeals are staggering. Counsel's [non] performance in these capital appeals simply boggles the imagination.

In Case 299, counsel filed a ten page brief. See App. 15 (Brief filed by counsel on direct appeal). Only six pages were devoted to legal argument. Counsel purported to present seven

(7) "points" in those six pages. The "brief" was essentially incomprehensible. The "points" raised were essentially farcical: three of the four "points" counsel presented as challenges to the capital conviction were deemed by this Court not to even "merit any discussion," Meeks v. State, 339 So. 2d at 188, while the frivolous nature of the fourth "point" (a barely understandable challenge to the State's purported failure to prove "corpus delicti") was made apparent by this Court's explanation that "the existence of corpus delicti [was proven] beyond all reasonable doubt." Id. at 188 (emphasis supplied); important challenges to the death sentence were similarly ignored -- in their place counsel presented issues such as the sentencing judge's failure to poll the jury, a claim he himself had waived below. See Meeks v. State, 339 So. 2d at 189.

In Case 300, counsel filed a nine (9) page brief. See App. 16 (Brief filed by counsel on direct appeal). The brief contained four-and-one-half (4 1/2) pages of legal argument. Two (2) "points" were raised: 1) a strange challenge to the State's purported failure to prove "corpus delicti" (four of the seven "points" raised in Case 299 involved this same type of "point"); 2) the frivolous "jury poll" issue (also previously raised in Case 299). See Meeks v. State, 336 So. 2d 1142. This brief was also barely, if at all, comprehensible.

That counsel's performance was deficient becomes simply irrefutable when the frivolous "points" contained in the nineteen pages he submitted in these two capital appeals are compared to the substantial issues that counsel ineffectively ignored -- issues involving per se reversible error, and substantial claims for relief. Cf. Matire v. Wainwright, supra; Johnson v. Wainwright, supra; Wilson v. Wainwright, supra.

C. PREJUDICE

What counsel ineffectively failed to discuss would have provided his client with relief. The non-raised issues (presented infra in the body of this petition) "leaped out upon even a casual reading of transcript." Matire, 811 F.2d at 1438. The claims involved clear, per se reversible error. See Johnson v. Wainwright, 498 So. 2d 939; Matire, 811 F.2d at 1438. All were fully cognizable: no trial-level contemporaneous objection bar applied for most involved challenges to the trial court's sentencing orders. Such penalty phase claims (involving a sentencing court's orders) are always subject to the Florida Supreme Court's review on direct appeal.

The claims required no elaborate presentation. Counsel only had to direct the Court to the errors. See Johnson, supra, 498 So. 2d at 939; Wilson, supra, 474 So. 2d at 1165. The Court would have done the rest, pursuant to clear legal requirements which were and are open to no dispute (see infra). Mr. Meeks' sentences would have been reversed but for counsel's non-advocacy. See, Wilson v. Wainwright, supra; Johnson v. Wainwright, supra; Matire v. Wainwright, supra.

Two clear examples of claims which "leaped out upon even a casual reading of transcript," Matire, supra, 811 F.2d at 1438, but which were ineffectively ignored by counsel are summarized immediately below. The issues are more fully detailed as Claims III and IV of this petition. They are summarized here because they amply demonstrate how counsel's nonperformance abrogated Mr. Meeks' right to the effective assistance of counsel on appeal:

1. The "Doubling Up" Of Aggravating Factors And Use Of Identical Factual Predicates To Establish Multiple Aggravating Factors

These issues (discussed as Claim III of this petition) involved per se reversible error, as this Court has made irrefutably clear. See Provence v. State, 337 So. 2d 783, 786

(Fla. 1976); Clark v. State, 379 So. 2d 97, 104 (Fla. 1980); Welty v. State, 402 So. 2d 1139 (Fla. 1981). The trial court's sentencing orders in each case (299 and 300) reflected classic, impermissible "doubling" of aggravating factors (robbery/pecuniary gain; preventing arrest/hindering enforcement of law). No contemporaneous objection procedural bar was applicable to these sentencing-order-based claims. Moreover, since the sentencing court found [statutory] mitigating circumstances, these aggravating circumstances misapplication errors would have mandated reversal. See Elledge v. State, 346 So. 2d 998 (Fla. 1977). However, Mr. Meeks never received the reversal to which he was clearly entitled. Counsel failed his client.

2. The Use Of Confidential And Privileged Psychiatric Reports To Sentence Mr. Meeks To Death

This issue is detailed as Claim IV of this petition. At the time of Mr. Meeks' 1975-76 direct appeals, the procedures employed in sentencing him to death had clearly been recognized as per se reversible error by the Florida Supreme Court. Parkin v. State, 238 So. 2d 817 (Fla. 1970); Jones v. State, 289 So. 2d 725 (Fla. 1974). See also Isley v. Wainwright, 792 F.2d 1516, 1518-20 (11th Cir. 1986), citing Parkin v. State. Neither was a contemporaneous objection bar applicable to these sentencing-order-based claims. However, although in each case (299 and 300) the sentencing court abrogated the standards set forth in Parkin, counsel again failed his client on appeal. There can be no doubt that, had this claim been presented, there would have been no death sentence: this Court would have reversed. Yet, not a word was heard from defense counsel.

3. Other Claims

The petition sets forth other claims which counsel ignored and which were and are sufficient to warrant relief. They are

not summarized herein but are detailed in the body of this pleading. (See Claim V, infra).

D. CONCLUSION

As in Matire v. Wainwright, the issues: 1) "leaped out" on even a casual reading of the record; 2) involved per se reversible error; 3) were incomprehensibly ignored; and 4) in their stead had weak and barely comprehensible briefs presented. 811 F.2d at 1438. As in Matire, Mr. Meeks is entitled to relief. See also, Wilson v. Wainwright, supra; Johnson v. Wainwright, supra. The "adversarial testing process" failed in Mr. Meeks' direct appeals -- because counsel failed. Matire at 1438, citing Strickland v. Washington. Mr. Meeks' allegations were and are that counsel's failings were based on his ignorance of the law. No tactical decision can be ascribed to an attorney whose omissions are based on ignorance. See, e.g., Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979). Counsel's deficiencies here leap out from the record; the prejudice to his former client is just as apparent. At a minimum, an evidentiary hearing is required with regard to Mr. Meeks' ineffective assistance claim, and we therefore urge that the Court relinquish jurisdiction to the trial court in order to permit that court to conduct the requisite hearing and make the necessary findings of fact. Even on the record now before the Court, however, ineffective assistance of counsel is apparent, as is the appropriateness of habeas corpus relief.

CLAIM III

MR. MEEKS WAS DENIED HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BECAUSE THE SENTENCING COURT USED THE IDENTICAL UNDERLYING PREDICATES TO FIND MULTIPLE AGGRAVATING CIRCUMSTANCES

A. INTRODUCTION

Although this Court has consistently reversed the

defendant's sentence of death in cases in which aggravating circumstances were "doubled" and at least one mitigating circumstance was found by the trial court, this Court allowed Mr. Meeks' capital sentences to stand while reviewing these cases on direct appeal. See Meeks v. State, 336 So. 2d 1142 (Fla. 1976); Meeks v. State, 339 So. 2d 186 (Fla. 1976). Counsel failed his client by ignoring this issue. This Court then "adopted" the analysis of the trial court's sentencing orders, thus accepting and incorporating the sentencing court's fundamental errors as its own, and committing the errors anew. See Meeks, 339 So. 2d at 190 ("We adopt as our own the analysis of the able trial judge as to aggravating and mitigating circumstances. . ."); Meeks, 336 So. 2d at 1145 ("Weighing the aggravating and mitigating circumstances, the trial judge was warranted . . . in imposing the death penalty . . . The judgment and sentence of the lower court are in accordance with the justice of the cause.")

This case, however, involved and involves the unconstitutionally classic types of doubling of aggravating circumstances ("robbery/pecuniary gain" and "preventing arrest/hindering enforcement of law"). It involves fundamental error, and this Court should now correct the clear errors that it failed to correct on direct appeal. It also involves ineffective assistance of counsel; again, the Court should now take corrective action. Relief was and is proper.

B. ROBBERY/PECUNIARY GAIN

The sentencing orders in both cases demonstrate that the Court used identical underlying predicates to establish two separate aggravating factors.5/ In Case 299, the sentencing

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5. The same construction had been provided to the jurors by the prosecutor's closing arguments in each case.

court specifically found that the murder was "part of" a robbery, and also that it was "committed for" pecuniary gain. (ROA, Case 299, p. 10 [sentencing order]; App. 11, p. 10 [same]; Meeks v. State, 339 So. 2d at 190 [adopting sentencing order].) The court then succinctly summarized its views in conducting its order: that Mr. Meeks "committed robbery at gunpoint for pecuniary gain . . . " (ROA, Case 299, p. 14 [sentencing order][emphasis supplied]; App. 11, p. 14; Meeks, 339 So. 2d at 191).

The overbroad application of aggravating circumstances did not stop at Case 299. In Case 300, the sentencing court committed the same constitutional error: the court again found that the homicide "was committed as part of" a robbery and "for pecuniary gain" (ROA, Case 300, p. 10 [sentencing order] [emphasis suspplied]; App. 12, p. 10; Meeks v. State, 336 So. 2d at 1143 [adopting sentencing order]). Again, as the court summarized at the conclusion of its order: the homicide was committed by the defendant "after having committed robbery for pecuniary gain." (ROA, Case 300, p. 11 [emphasis supplied]; App. 12, p. 11; Meeks, 336 So. 2d at 1143.)

The sentencing orders in these cases thus involved the classically condemned unconstitutional "doubling up" and overbroad application of aggravating factors. Mr. Meeks' sentences of death were and are fundamentally unreliable and unfair, and violate the Eighth and Fourteenth Amendments. See Provence v. State, 337 So. 2d 783, 786 (Fla. 1976), relying on State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973). Cf. Godfrey v. Georgia, 446 U.S. 420 (1980) (condemning overbroad application of aggravating factors). Such procedures flatly abrogate the constitutional mandate that a sentence of death not be arbitrarily imposed, and that the application of aggravating factors "genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S. 862, 876 (1983).

In Mr. Meeks' cases, the sentencing court specifically found

the existence of statutory mitigating factors. Therefore, this error cannot be characterized as harmless. See Elledge v. State, 346 So. 2d 998 (Fla. 1977). See also Menendez v. State, 368 So. 2d 1278 (Fla. 1979); Riley v. State, 366 So. 2d 19 (Fla. 1978); Mann v. State, 420 So. 2d 578, 581 (Fla. 1982). Mr. Meeks is entitled, pursuant to the Eighth and Fourteenth Amendments, to the relief he seeks.

C. PREVENTING ARREST/HINDERING ENFORCEMENT OF LAW

Similarly, the sentencing orders in both cases (299 and 300) demonstrate that identical underlying predicates were used to establish the two separate aggravating circumstances that Mr. Meeks committed the offense "with the motive of avoiding and preventing arrest" and also "to hinder the enforcement of laws." (ROA, Case 299, p. 10 [Sentencing Order]; ROA, Case 300, p. 10 [Sentencing Order]). In Case 299 the court's sentencing order read: "The Court also finds . . . that the capital felony was committed with the motive of avoiding and preventing arrest, . . . and to hinder the enforcement of the laws." (ROA, Case 299, p. 100 [Sentencing Order]; App. 11, p. 10 [same]; Meeks v. State, 339 So. 2d at 190 [adopting sentencing order]). The court then summarized its findings by stating that the homicide was committed "to prevent the lawful arrest of the defendant and thus [the homicide] was designed to hinder the enforcement of laws." (ROA, Case 299, p. 14 [emphasis supplied]; App. 11, p. 14; Meeks, 339 So. 2d at 191).

In Case 300, the court's analysis reflected the same unconstitutional construction: "The Court also finds, . . . that the capital felony was committed with the motive of avoiding and preventing arrest, . . . and to hinder the enforcement of laws." (ROA, Case 300, p. 10; App. 12, p. 10; Meeks v. State, 336 So. 2d at 1143 [adopting sentencing order].) Again, the court's summary reflected its overbroad application of aggravating factors:

"[the homicide was committed] to prevent the lawful arrest of the defendant and thus . . . was designed to hinder the enforcement of laws." (ROA, Case 300, p. 11 [emphasis supplied]; App. 12, p. 11; Meeks, 336 So. 2d at 1143-44).

This type of "doubling up" is also unconstitutional; it also renders a capital sentencing proceeding fundamentally unreliable and unfair, and violates the Eighth and Fourteenth Amendments. See Welty v. State, 402 So. 2d 1139 (Fla. 1981); Clark v. State, 379 So. 2d 97, 104 (Fla. 1980). It also results in the unconstitutionally overbroad application of aggravating circumstances, see Godfrey, supra, 446 U.S. 420, and fails to genuinely narrow the class of persons eligible for death. The result is a wholly arbitrary capital sentence. As discussed immediately below, since statutory mitigation was found in each case, these errors also are not harmless. See also Zant v. Stephens, supra, 462 U.S. at 876.

D. THE ERRORS ARE NOT HARMLESS

Two aggravating circumstances should have been struck in each case (299 and 300). Statutory mitigation was found in each case.6/ The balance which would have been reached without the improper aggravating factors would have been quite different than the balance these cases were left with because of the uncorrected errors. Resentencing would have been (and is) proper. See Elledge v. State, supra, 346 So. 2d 998; Menendez, supra, 368 So. 2d 1278; Riley, supra, 366 So. 2d 19. In this regard, this Court's precedents are clear: because the improper application of aggravating factors unconstitutionally skews the balance by which the sentencer is to determine whether life or death is the appropriate sentence, the Court has consistently reversed and

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6. In this regard, it is noteworthy that existing nonstatutory mitigation was not considered in either case.

remanded for a new sentencing proceeding in cases where aggravating circumstances are improperly or overbroadly applied and mitigation is found. See Elledge, supra; Provence, supra, 337 So. 2d at 786; Mann v. State, 420 So. 2d 578, 581 (Fla. 1982)(vacating death sentence and remanding for new sentencing proceeding where aggravating circumstances improperly applied and court was "unable to discern" whether sentencing judge found mitigating circumstances); Menendez, supra, 368 So. 2d 1278; Riley, supra, 366 So. 2d 19; Welty, supra; Clark, supra. The balance was (and is) unconstitutionally skewed in Mr. Meeks' cases; he was and is entitled to relief. The errors herein at issue cannot be deemed harmless.

CLAIM IV

MR. MEEKS' SENTENCES OF DEATH RESULTED FROM THE SENTENCING COURT'S USE OF PURPORTEDLY CONFIDENTIAL, NONRECORD, AND PRIVILEGED PSYCHIATRIC REPORTS TO ESTABLISH AGGRAVATING AND REBUT MITIGATING CIRCUMSTANCES, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

A. INTRODUCTION

> Just as the Fifth Amendment prevents a criminal defendant from being made "the deluded instrument of his own conviction," it protects him as well from being made the "deluded instrument" of his own execution.

Estelle v. Smith, 451 U.S. 454, 462-63 (1981) (citations omitted).

Douglas Ray Meeks was made the "deluded instrument" of his own death sentences. In both cases [299 and 300] he was sentenced to death on the basis of his own statements made during purportedly confidential and privileged pretrial psychiatric examinations. The violation of Mr. Meeks' fifth, sixth, eighth and fourteenth amendment rights in these cases was shockingly simple: 1) Mr. Meeks exercised his State-created right to a confidential pretrial psychiatric examination on the issue of

insanity; 2) he spoke to court-appointed psychiatrists; 3) he subsequently exercised his right not to present an insanity defense and not to introduce any evidence derived from the pretrial psychiatric evaluations; 4) the sentencing court nevertheless relied on the evaluations, and on the purportedly confidential statements Mr. Meeks had made, to find and bolster aggravating, and to rebut mitigating, circumstances.

Florida law promised that the pretrial evaluations would be privileged and confidential, see Parkin v. State, 238 So. 2d 817 (Fla. 1970); Jones v. State, 289 So. 2d 725, 727-28 (Fla. 1974); Pouncy v. State, 353 So. 2d 640, 641-42 (Fla. 3d DCA 1977); McMunn v. State, 264 So. 2d 868, 870 (Fla. 1st DCA 1972); see also Fla. R. Crim. P. 3.216, and the federal constitution promised that Mr. Meeks would not be sentenced to death "by the simple, cruel expedient of forcing it [words] from his own lips." Estelle v. Smith, 451 U.S. at 462, citing Columbe v. Connecticut, 367 U.S. 568, 581-82 (1961). See also, Parkin, supra, 238 So. 2d at 820-21; McMunn, supra, 264 So. 2d at 870. But these promises were ignored by the sentencing court. The procedures resulting in Mr. Meeks' death sentences simply cannot be squared with the Due Process Clause, the privilege against self-incrimination, the Confrontation Clause, the right to counsel, the eighth amendment, or Florida state law, and resentencing is proper.

The errors were and are substantial and fundamental in nature. On direct appeal in these cases, however, the Court "adopted" the trial court's sentencing orders -- and thus the errors -- as its own. See Meeks v. State, 339 So. 2d at 190; Meeks v. State, 336 So. 2d at 1145. The Court failed to correct the errors. Counsel failed to direct the Court's attention to the per se reversible, unconstitutional error involved in his client's sentences of death, and thus failed his client. Again, substantial errors were left uncorrected. Mr. Meeks respectfully urges that corrective action now be taken.

B. THE PROCESS BY WHICH MR. MEEKS WAS FIRST DELUDED, AND THEN SENTENCED TO DEATH

1. The Facts

The indictments in these cases were both issued on November 19, 1974. Mr. Meeks was represented by the same counsel in both cases [299 and 300]. At arraignment in each case, Mr. Meeks, through counsel, entered pleas of not guilty and not guilty by reason of insanity. On December 16, 1974, counsel moved for funds to retain psychiatric expert assistance to determine Mr. Meeks' sanity at the time of the alleged offenses. No expert assistance was sought with respect to any penalty phase mental health issue. On January 6, 1975, the trial court appointed two psychiatrists from the Gainesville area (George Barnard and Frank Carrera). The two conducted a joint interview of Mr. Meeks on January 16, 1975, and, on the basis of that interview, prepared reports. The reports were almost entirely comprised of Mr. Meeks' statements during the interview (see Apps. 13 and 14). The reports reflect that Mr. Meeks admitted to the psychiatrists complicity in Case 299, while denying involvement in Case 300. Various other statements were reported regarding Mr. Meeks' background and the offenses at issue (see Apps. 13 and 14).

The two reports were submitted to the court, and presumably to the State. Dr. Barnard's report was provided to defense counsel; Dr. Carrera's report was not provided to the defense.

On March 7, 1975, defense counsel withdrew the plea of not guilty by reason of insanity and abandoned the insanity defense. The reports were neither submitted nor mentioned by defense counsel at the guilt-innocence or penalty phases of either trial. The doctors were not called as defense witnesses at either stage of either trial. No insanity or mental health defenses were presented.

By not asserting the insanity defense, Mr. Meeks relied on

what Florida law and the federal constitution promised -- that the psychiatric reports and their contents would not be used against him (see infra Section(B)(2)). In fact, Florida law assured Mr. Meeks that even if he asserted an insanity defense the statements he made to the court-appointed psychiatrists still could not be used against him. Id. The sentencing court ignored and flouted these promises in both cases (299 and 300).

When sentencing Mr. Meeks to death in Case 299, the court used the statements Mr. Meeks had provided to the psychiatrists to support two aggravating circumstances and rebut a number of the statutory mitigating circumstances. Acknowledging that the insanity defense had been withdrawn and even that one report had not been disclosed to the defense, the court nevertheless found:

> Under Fla. Stat. 921.141(7) subsections (b) and (f), the Court finds that the defendant was suffering from no extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not substantially impaired.
>
> The defendant moved for appointment of psychiatrists to examine him "...to substantiate the insanity of the Defendant at the time of the crime and subsequently thereto...". (Prior to trial defendant's counsel moved to withdraw the motion alleging insanity). Doctors Barnard and Carrera were appointed and reported the results of their examination. Their report is devoid of any evidence of mental or emotional disturbance of the defendant. Doctor Carrera's report shows that the defendant stated that "... I just did it... after it was all over I just felt like myself... I wasn't scared or upset... no change in myself... I wasn't angry with any one that day". According to the report, the defendant had whiled away the hours of the day of the offense, attending a portion of a football game immediately prior to the offense. The psychiatrists both conclude that the defendant was sane at the time of the examination and at the time of the offense.
>
> Doctor Carrera's report has been received and read by the undersigned but has not been filed. Insofar as the Court is now aware, it has never been seen by counsel for the State or the defendant. The report recites, however, that defense counsel was present during the psychiatric examination of the defendant which forms the basis of the

> report. Doctor Carrera's report includes a history taken from the defendant. In this history, the defendant told Doctor Carrera that he and his accomplice discussed robbing the store. The accomplice told the defendant that the girl in the store knew the accomplice. The accomplice also said that, if they robbed the store, he didn't want anyone talking on him, so it would be necessary for them to shoot her. According to the report, the defendant's response was that it was all right with him and that it seemed like a good idea to shoot the store employee so that in that way nobody would recognize them and blame them for it.
>
> This fact has been considered under Fla.Stat.921.141(7)(e). The Court rejects it as a mitigating circumstance and finds that Meeks was not under the duress or domination of his accomplice at the time he committed the capital felony.
>
> On the contrary, this fact supports the finding that the capital felony was committed under the aggravating circumstances hereinabove outlined with respect to avoiding arrest and to hinder the enforcement of law.
>
> Further, the Court finds that the victim certainly was not a participant in nor consented to the criminal conduct, Fla.Stat.921.141 (c)(e) and that the defendant, even if found to be an accomplice, did play a major part in the capital felony. Fla.Stat.921.141(7)(d). No mitigation exists under either of these subsections.

(ROA, Case 299, pp. 11-13) (App. 11) (Sentencing Order) (emphasis supplied). Again, not only had the insanity defense been abandoned prior to trial, the reports were never introduced by defense counsel on any issue, and the psychiatrists were never called to the stand. Then, suddenly and without warning, after the proceedings had concluded, the sentencing court broke the promise. It used the reports, and specifically the statements Mr. Meeks had made to the psychiatrists, to aggravate sentence (ROA, Case 299, p. 13 [referring to "avoiding arrest", Fla. Stat. Section 921.141(6)(e), and "hinder[ing] the enforcement of law," Fla. Stat. Section 921.141(6)(g)].) It used the reports, and Mr. Meeks' statements, to rebut at least five statutory mitigating circumstances (ROA, Case 299, p. 11-12 [referring to Fla. Stat. Section 921.141(7)(b) and (f)]; p. 13 [referring to Fla. Stat.

Section 921.141(7)(c), (e), and (d)]. Ironically, the substantial nonstatutory mitigation contained in the reports was not considered (see Claim I, supra).

The harm did not stop at Case 299. The conviction and death sentence obtained in that case were substantially relied upon Case 300. There, the prosecutor presented the death sentence already imposed (Case 299) as a centerpiece of his argument (see, e.g., ROA, Case 300, p. 309, ["Obviously, if one jury has sentenced him to death, that is a circumstance you should consider . . . "]; id. at 309 ["It is nothing for him to kill human beings for the purpose of avoiding detention."]; see also, id. at 307 [reference to Case 299 as aggravating circumstance], 313-14 [use of Case 299 to rebut mitigating circumstances], 315-17 [impassioned plea for death on the basis of Case 299]). The sentencing court then also relied on the unconstitutional death sentence it had previously imposed (see, e.g., ROA, Case 300, p. 9 [Sentencing Order] ["In this proceeding, the State introduced exhibits . . . including . . . [the] sentence of death in Taylor County Criminal Case #74-299-CF"]; see also id. at 10 [Use of Case 299 to establish aggravating circumstance (Fla. Stat. 921.141[6][b]), and rebut mitigating circumstance (Fla. Stat. 921.141[7][a]). Thus the unconstitutional use of the reports in Case 299 spilled over into and infected the penalty phase in Case 300.

More importantly, in Case 300, the reports, and the statements, were again directly used by the Court to sentence Mr. Meeks to death. For example:

> Turning to mitigating circumstances, the Court finds that the defendant does have a prior significant history of criminal activity. Fla. Stat. 921.141(7)(a). This fact has been considered as not being a mitigating circumstance.
>
> Under Fla. Stat. 921.141(7) subsections (b) and (f), the Court finds that the defendant was suffering from no extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his

> conduct or to conform his conduct to the requirements of law was not substantially impaired.
>
> The defendant moved for appointment of psychiatrists to examine him to substantiate the insanity of the defendant at the time of the crime. Doctors Barnard and Carrera were appointed and reported the results of their examination. Their report is devoid of any evidence of mental or emotional disturbance of the defendant. The psychiatrists both conclude that the defendant was sane at the time of the examination and at the time of the offense.

(ROA, Case 300, p. 10). Thus, again, the reports, and Mr. Meeks' statements, were used to rebut statutory mitigation (e.g., id. at p. 10, use of reports to rebut Fla. Stat. Section 921.141 [7](b) and (f) mitigating circumstances). Thus, again, the reports were used to support aggravating circumstances (e.g., ROA, Case 300, p. 10). Thus, again, the substantial nonstatutory mitigation contained in the reports was ignored. Thus, again, Mr. Meeks was unconstitutionally sentenced to death.

2. The Broken Promise

Florida law provided Mr. Meeks (an indigent criminal defendant) with the right to a court-appointed expert on the issue of insanity. See, e.g., State v. Hamilton, 448 So. 2d 1007, 1008-09 (Fla. 1984). Mr. Meeks, through counsel, asserted that right. Florida law promised and assured Mr. Meeks that such a mental health evaluation would be confidential, and that the results of such an evaluation would not be used against him unless he "opened the door" by introducing an insanity defense. Hamilton, 448 So. 2d at 1008 ("[O]nce an expert is appointed, all matters related to that expert are confidential."); Parkin v. State, 238 So. 2d at 820-21; Jones v. State, 289 So. 2d 725, 727-28 (Fla. 1974); McMunn v. State, 264 So. 2d 868, 869-70 (Fla. 1st DCA 1972); Pouncy v. State, 353 So. 2d 640, 641-42 (Fla. 3d DCA 1977); Hamilton, supra. That promise was well-established at the time Mr. Meeks was tried. Parkin (Fla. 1970); Jones (Fla. 1974);

McMunn (Fla. 1st DCA 1972).

Moreover, Florida law promised and assured that even if Mr. Meeks were to introduce an insanity defense and/or the court-appointed experts' testimony, the statements he made to the court-appointed experts respecting the offense would remain confidential and would not be used against him or disclosed unless the statements themselves were first elicited by the defense. Parkin, 238 So. 2d at 820 ("[T]he Court and the State should not in their inquiry go beyond eliciting the opinion of the expert as to sanity or insanity, and should not inquire as to information concerning the alleged offense provided by a defendant during his interview; however, if the defendant's counsel opens the inquiry to collateral issues, admissions or guilt, the State's redirect examination properly could inquire within the scope opened by the defense."); Jones, 289 So. 2d at 728 (Once defense introduces insanity defense, "the State would call the psychiatrist as a witness and elicit from him his opinion as to the sanity of the defendant, so long as the questions did not elicit from the psychiatrist what the defendant had told him about [the offense.]"); McMunn, 264 So. 2d at 870 ("An inquiry directed to court-appointed psychiatrists by the State must be limited to insanity or sanity..." Using the statements made to the psychiatrist against the defendant would be "a device for extracting a confession from a defendant . . . no less effective than the use of thumbscrews, racks and third degree," and "would transgress the defendant's constitutional guarantee against self-incrimination."); Smith v. State, 314 So. 2d 226, 229 (Fla. 4th DCA 1975). See also Isley v. Wainwright, 792 F.2d 1516, 1518-19 (11th Cir. 1986) citing, Parkin v. State.

Finally, Florida law assured and promised that the experts' evaluations, and Mr. Meeks' statements to the experts, would be privileged. Hamilton, 448 So. 2d at 1008-09; McMunn, 264 So. 2d at 870; Pouncy, 353 So. 2d at 641-42; Parkin, supra; Jones,

supra; Isley v. Wainwright, supra. Similarly, the federal constitution assured Mr. Meeks that the defense evaluations, and any statements he may have provided during such evaluations, would not be used against him. See Estelle v. Smith, 451 U.S. at 462-63; Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981); Parkin, supra, 238 So. 2d at 820 (citing privilege against self-incrimination); Jones, supra, 289 So. 2d at 728 (citing Fifth Amendment).

Mr. Meeks asserted his right to privilege and confidentiality -- he withdrew the insanity defense and introduced no expert psychiatric evidence. However, the sentencing court flouted the legal promise. It specifically relied on the [purportedly confidential] reports to sentence Mr. Meeks to death. Such procedures can be squared with neither the Due Process Clause, nor the fifth, sixth, and eighth amendments.

C. MAKING A CAPITAL DEFENDANT THE DELUDED INSTRUMENT OF HIS OWN EXECUTION VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

The constitutional errors in this case are obvious. The procedures employed in sentencing Mr. Meeks to death were flatly unconstitutional, and prohibited by the fifth, sixth, eighth, and fourteenth amendments. See, e.g., Estelle v. Smith, supra; Parkin v. State, supra; Jones v. State, supra. Simply put, due process and fundamental fairness are abrogated by such practices, as is the Fifth Amendment:

> The Fifth Amendment, made applicable to the states through the Fourteenth Amendment, commands that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." The essence of this basic constitutional principle is "the requirement that the State which proposes to convict and punish an individual produce the evidence against him by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips."

Estelle v. Smith, 451 U.S. at 462 (citations omitted) (emphasis in original).

The sentencing court undeniably used the purportedly confidential and privileged reports (and Mr. Meeks' statements) to establish aggravating circumstances. The sentencing court undeniably used the reports (and statements) to rebut numerous statutory mitigating circumstances. For either reason, Mr. Meeks' death sentences abrogate the Constitution. Therefore, as explained in Proffitt v. Wainwright, such constitutional errors would not be cured even by a sentencing judge's statement that the psychiatric reports were considered "for the limited purpose of ascertaining whether it supported . . . psychiatric mitigating circumstances." 685 F.2d 1227, 1255 (11th Cir. 1982). The errors in Mr. Meeks' cases are obviously much more egregious than those in Proffitt.

Sentencing procedures in capital cases must ensure "heightened reliability in the determination that death is the appropriate punishment." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). See also, Gardner v. Florida, 430 U.S. 360 (1977). The central purpose of these requirements is to prevent the "unacceptable risk that 'the death penalty may be meted out arbitrarily or capriciously' or through 'whim or mistake,'" Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633 (1985) (O'Connor, J., concurring), quoting California v. Ramos, 463 U.S. 992, 999 (1983). Mr. Meeks was deluded into providing statements which, without any notice, became central to his death sentences. Mr. Meeks was deluded into submitting to psychiatric evaluations which he was assured would remain privileged and confidential -- but which, without any warning, then became a key instrument used to sentence him to death. Mr. Meeks was made the "deluded instrument" of his own execution, Estelle v. Smith, 451 U.S. at 462-63, in the very sense condemned by the United States Supreme Court and by this Court. Id.; see also Parkin, supra; Jones, supra.

Finally, Mr. Meeks' death sentences involved a further cruel

irony: the reports were used to establish that Mr. Meeks should be sentenced to death, while the aspects of the reports which [nonstatutorily] mitigated against death were ignored (see Claim I, supra). These death sentences are fundamentally unfair, and wholly unreliable. Mr. Meeks is entitled to the relief he seeks.

CLAIM V

MR. MEEKS' CAPITAL CONVICTIONS AND SENTENCES OF DEATH RESULTED FROM PROCEEDINGS WHICH REFLECTED OTHER FUNDAMENTAL CONSTITUTIONAL ERRORS, ERRORS WHICH COUNSEL INEFFECTIVELY FAILED TO PRESENT ON DIRECT APPEAL, WHICH THIS COURT ACCEPTED AS ITS OWN BY ADOPTING THE VIEWS OF THE TRIAL COURT'S SENTENCING ORDER AND BY OVERLOOKING THE ERRORS DURING ITS INDEPENDENT REVIEW OF THE RECORD, AND/OR WHICH ARE NOW RIPE FOR REVIEW DUE TO SIGNIFICANT CHANGES IN THE LAW; THE COURT, THEREFORE, SHOULD NOW TAKE CORRECTIVE ACTION.

A number of other significant and fundamental constitutional errors are reflected by the record of the proceedings resulting in Douglas Ray Meeks' 1975 capital convictions and sentences of death. This Court adopted the errors as its own on direct appeal, and counsel failed his client by ignoring the issues. The errors should now be corrected. Moreover, a number of these claims should now be heard because they are based on significant changes in federal constitutional jurisprudence. Cf. Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987). These issues include:

A. BURDEN-SHIFTING

In both cases (299 and 300) the sentencing court instructed the jurors that they were to consider whether the mitigating circumstances listed in the statute outweighed the aggravating circumstances found when deciding whether to vote for life or death. The court (in both cases) then applied this constitutionally erroneous standard itself when imposing sentence (ROA, Case 299, p. 14; ROA, Case 300, p. 11). In State v. Dixon, 382 So. 2d 1 (Fla. 1983), and subsequently in Arango v. State,

411 So. 2d 172, 174 (Fla. 1982), the Florida Supreme Court made clear that such instructions to a capital sentencing jury and the application of such a standard by a sentencing court is error -- the burden cannot be shifted to the defendant on the issue of whether he should live or die. Such burden-shifting misinforms and misleads the jury, Caldwell v. Mississippi, 105 S. Ct. 2633 (1985), infects the sentencing proceeding with arbitrary and capricious factors, and is wholly incompatible with Mullaney v. Wilbur, 421 U.S. 684 (1975), and Sandstrom v. Montana, 442 U.S. 510 (1979). Pursuant to Dixon and the eighth and fourteenth amendments, Mr. Meeks was and is entitled to relief.

Moreover, the sentencing court in Case 299 and Case 300 never instructed the jury that aggravating circumstances had to be established beyond a reasonable doubt. The court itself then failed to apply the beyond-a-reasonable-doubt standard when finding aggravating factors in its sentencing orders. Such practices not only violated state law, see State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), but enhanced the errors attendant to the unconstitutional burden-shifting discussed above, and rendered the death sentences inherently flawed and fundamentally unfair.

Since the sentencing court, in both cases, found statutory mitigating factors, these errors are not harmless. Elledge v. State, supra. Mr. Meeks' sentences of death accordingly violate the eighth and fourteenth amendments. He is entitled to habeas corpus relief.

B. THE JURY VOTE

In both cases (299 and 300) Mr. Meeks' capital sentencing juries were consistently misinformed as to the required vote for a recommendation of life imprisonment. The jury form and prosecutor informed the jurors that a majority of their number was required to recommend a sentence of death, and that this same majority was needed for a life recommendation as well. As instructed, Mr. Meeks' jurors could not return a recommendation

of life imprisonment unless a majority of them so voted, an illegal restriction of their function under the law. See Rose v. State, 425 So. 2d 521 (Fla. 1982); Harich v. State, 437 So. 2d 1082 (Fla. 1983).

In this case, the instruction was prejudicial, and denied Mr. Meeks the protections afforded under the Tedder standard. The jury "represent[s] the judgment of the community as to whether the death sentence is appropriate." McCampbell v. State, 421 So. 2d 1072, 1075 (Fla. 1982). There thus may be "no denigration of the jury's role" in capital sentencing. Richardson v. State, 437 So. 2d 1091, 1095 (Fla. 1983). The role of the jury at the penalty phase of these proceedings was so "denigrated." Consequently, Mr. Meeks may well have been sentenced to die only because his jury was misinformed and misled.

Such a procedure violates the Eighth and Fourteenth Amendments, for it creates the substantial risk that the death sentence was imposed in spite of factors calling for a less severe punishment. Wrongly telling the jury that it had to reach a majority verdict "interject[ed] irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue" of whether life or death is the appropriate punishment. Beck v. Alabama, 447 U.S. 633, 642 (1980). The erroneous instruction could not but have encouraged Mr. Meeks' juries to reach a death verdict for an impermissible reason -- the incorrect belief that a majority verdict was required. The erroneous instruction thus "introduce[d] a level of uncertainty and unreliability into the [sentencing] process that cannot be tolerated in a capital case." Id. at 643.

Mr. Meeks' claim should now be heard and relief should now be granted. Recently, in Caldwell v. Mississippi, 105 S. Ct. 2633 (1985), the United States Supreme Court announced that inaccurate and misleading instructions regarding the jury's role

and function in capital sentencing proceedings violate the eighth amendment. See also id. at 2646 (O'Connor, J., concurring). Caldwell's concerns were implicated by the erroneous instructions given Mr. Meeks' jury, and the constitutionally mandated "heightened need for reliability in the determination that death is the appropriate punishment in a specific case," id. at 2645, quoting Woodson v. North Carolina, 428 U.S. at 305 (1976), was irrevocably frustrated when his jury was misinformed.

Neither Caldwell nor Beck existed at the time of Mr. Meeks' capital trials and direct appeals. Mr. Meeks urges that the claim now be heard and that relief now be granted.

C. FAILURE TO INSTRUCT ON UNDERLYING FELONY IN CAPITAL FELONY MURDER PROSECUTION

The State's sole theory (as reflected in its indictment and in the prosecutor's arguments) in Case 300 was that Mr. Meeks was guilty of capital felony murder because he committed a homicide during the course of an attempted robbery. However, the trial court failed to provide the jury with any instruction whatsoever on attempted robbery.

By omitting the critical instruction on the underlying offense to this felony murder prosecution the court committed fundamental constitutional error. Mr. Meeks never personally waived his right to such an instruction. Accordingly, his resulting capital conviction and death sentence violates Beck v. Alabama, 447 U.S. 633 (1980), and the fifth, sixth, eighth and fourteenth amendments.

D. THE GARDNER REMAND

The sentencing court relied on the identical psychiatric reports to sentence Mr. Meeks to death in each of these cases (299 and 300). One of the reports was not disclosed to defense counsel in either case. Although this Court granted a "Gardner remand" in Case 299, see Meeks v. State, 364 So. 2d 461 (Fla.

1978), it failed to direct such a hearing in Case 300. That case therefore still stands in violation of Gardner v. Florida, 430 U.S. 349 (1977), and the sixth, eighth and fourteenth amendments.

E. DIMINISHING THE JURORS' SENSE OF RESPONSIBILITY

Throughout each case (299 and 300) both the prosecutor's arguments and comments and the trial court's instructions diminished Mr. Meeks' jurors' sense of responsibility for the awesome capital sentencing task that the law would call on them to perform. (E.g., inter alia, ROA, Case 299, pp. 15, 16, 30, 43, 331, 380, 381, 421, 422, 432-34, 437; ROA, Case 300, 17, 18, 235, 237, 247, 249, 251, 264, 265, 285, 286, 305, 309, 315-17, 320-21). Mr. Meeks recognizes that this Court has held that Caldwell does not represent a significant change in law, Phillips v. Dugger, 515 So. 2d 227 (Fla. 1987), and will not therefore reproduce herein each aspect of the record which reflects that the dictates of Caldwell v. Mississippi were abrogated in this case. The record is before the Court, and the record as a whole in each proceeding (299 and 300) reflects that Caldwell was violated.

Mr. Meeks respectfully urges that the Court reconsider its prior opinions, e.g., Phillips, supra, that the Court hold that Caldwell does in fact represent a significant change in law, cf. Downs v. Dugger, supra, and that the Court thereafter grant habeas corpus relief. The proceedings resulting in these death sentences reflect a diminishment of Mr. Meeks' capital jurors' sense of responsibility, and misleading comments regarding the jurors proper role and function, of the same magnitude as the proceedings condemned in Caldwell v. Mississippi and Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), modified sub nom., Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1987). In this regard, Mr. Meeks respectfully refers the Court to its own language in Garcia v. State, 492 So. 2d 360, 367 (Fla. 1986):

> It is appropriate to stress to the jury the seriousness which it should attach to its recommendation and, when the recommendation is received, to give it weight. To do otherwise would be contrary to Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d (1985), and Tedder v. State, 322 So. 2d 908 (Fla. 1975).

See also Adams v. Wainwright, supra.

Mr. Meeks' sentences of death violate Caldwell and the eighth and fourteenth amendments. He respectfully urges that the Court grant him the relief he seeks. See also Phillips, supra, 515 So. 2d at 228 (Barkett, J., specially concurring).

CONCLUSION AND RELIEF SOUGHT

WHEREFORE, Douglas Ray Meeks, through counsel, respectfully urges that the Court issue its writ of habeas corpus and grant him the relief he seeks. Since factual issues are presented in this proceeding which cannot be determined on the trial record, Mr. Meeks respectfully requests that in that regard the Court relinquish jurisdiction for the proper resolution of contested facts. Finally, Mr. Meeks alternatively urges that the Court grant him a new appeal for all of the reasons stated herein, and that the Court grant all other and further relief which the Court may deem just, proper, and equitable.

Respectfully submitted,

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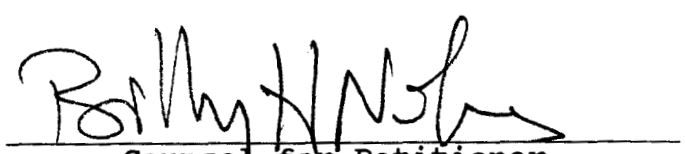

Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by U.S. Mail, first class, postage prepaid, to Richard Doran, Assistant Attorney General, Department of Legal Affairs, 111-29 Magnolia Drive, Street, Tallahassee, Florida 32301, this 17th day of February, 1988.

Attorney