IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

FRANK ELIJAH SMITH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT FOR
THE SECOND JUDICIAL CIRCUIT, IN AND
FOR WAKULLA COUNTY, FLORIDA

SUMMARY BRIEF OF APPELLANT ON APPEAL OF THE DENIAL OF MOTION FOR FLA. R. CRIM. P. **3.850** RELIEF, CONSOLIDATED APPLICATION FOR STAY OF EXECUTION, AND IF NECESSARY, MOTION FOR STAY OF EXECUTION PENDING THE FILING AND DISPOSITION OF PETITION FOR WRIT OF CERTIORARI IN THE UNITED STATES SUPREME COURT

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PRELIMINARY STATEMENT

Mr. Smith's case is before the Court on the appeal of the denial of his motion for Fla. R. Crim. P. ***3.850*** relief. The motion presented, inter alia, a significant claim for relief predicated upon Hitchcock v. Duaaer and its progeny, including the opinions of this Court in precedents such as Downs v. Duaaer, Riley v. Wainwright, Hall v. State, and Meeks v. Duaaer, of the Eleventh Circuit Court of Appeals in precedents such as Delap v. Dugger, Knight v. Dugger, Messer v. Florida, and Jones v. Duaaer, and of Federal District Courts in Florida in precedents such as Booker v. Duaaer and Gore v. Dugger. Mr. Smith provided the Rule ***3.850*** trial court with Exhibits in support of the Hitchcock/Hall issue, as well as with a packet containing relevant case law. As a convenience to the Court, Mr. Smith has reproduced and filed on this appeal a record appendix, which includes items from the Rule ***3.850*** record on appeal which should be relevant for the Court's consideration. See Fla. R. App. P. 9.220. For example, the record appendix includes the motion to vacate, the Exhibits and Case Law packets submitted below, the State's proposed order, Mr. Smith's objections to the proposed order, the trial court's signed order, etc.

Citations in this brief shall be either to the Rule ***3.850*** record on appeal, which shall be cited as **"PC-R._,"** or to the record appendix. The transcript of the January 26, 1990, hearing before the trial court shall be cited as "Tr. ____." The record

on direct appeal shall be cited as "ROA. _" with the appropriate page number following thereafter. Other citations shall be self-explanatory or otherwise explained.

Due to the difficult time constraints faced by Appellant's counsel, there has been no opportunity to properly edit this brief. Appellant accordingly apologizes to the Court in advance for any structural shortcomings in this presentation.

APPLICATION FOR STAY OF EXECUTION

Given the gravity of the issues at stake and the substantiality of Mr. Smith's claims for relief, Mr. Smith respectfully urges that the Court enter a stay of execution in order to allow for the judicious, reasoned, full, and fair review which the claims herein discussed deserve.

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PROCEEDINGS BELOW

Mr. Smith timely filed a motion for Rule 3.850 relief presenting, inter alia, claims predicated upon Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), and its progeny. Prior to that filing, shortly after the issuance of the Hitchcock opinion, and while an appeal from the denial of habeas corpus relief was pending before the Eleventh Circuit Court of Appeals, Mr. Smith requested that the Eleventh Circuit allow him leave to present the Hitchcock/Lockett claims to the Florida courts, and that the Court hold the federal preceedings in abeyance pending that presentation. The request was not granted. However, on October 5, 1989, the Eleventh Circuit issued an Order on Mr. Smith's then-pending petition for rehearing which explained that, "The petition is denied without prejudice to the petitioner's properly presenting the [Hitchcock/Lockett] claims to the Florida state courts, a procedure that is required by the exhaustion rule prior to the submission of the issue to the Federal court . . . . This Order clarifies that the unexhausted claim based on these later cases [Hitchcock and its progeny] is not foreclosed by this decision." Smith v. Dugger, F.2d (11th Cir. Oct. 9, 1989).

The State filed a response to Mr. Smith's Rule 3.850 motion. Mr. Smith was in the process of preparing a reply for the trial court's consideration when, without any warning to Appellant or his counsel, the Governor of Florida issued a death warrant. Mr. Smith's execution was (and is) scheduled for February 9, 1990. Appellant immediately set the case for hearing on January 26, 1990, a date on which the trial judge below indicated he would be

available.

Extensive argument was conducted before the trial court on January 26. The lower court thereafter denied the motion to vacate without an evidentiary hearing, and denied Mr. Smith's application for stay of execution.[1] Timely notice of appeal and directions to the clerk were filed. This action is now before this Court.

APPELLANT'S ENTITLEMENT TO RELIEF

CLAIM I

MR. SMITH'S SENTENCE OF DEATH STANDS IN VIOLATION OF HITCHCOCK V. DUGGER AND ITS PROGENY BECAUSE THE JURY WAS CONSTRAINED IN ITS CONSIDERATION OF NONSTATUTORY MITIGATING EVIDENCE, THE SENTENCING JUDGE APPLIED A SIMILAR RESTRICTIVE CONSTRUCTION, AND DEFENSE COUNSEL'S PRESENTATION OF NONSTATUTORY MITIGATING EVIDENCE WAS INHIBITED BY THE LAW THEN IN EFFECT.

Before the lower court, the State conceded error under Hitchcock v. Dugger, 107 S. Ct. 1821 (1987):

> That takes me to the only question, the only question for the Court to decide. I argued that there was no Hitchcock error in my Answer -- response. I said there was no error and, if there was, it was harmless.
>
> On the advice of counsel who argued many of these in the Eleventh Circuit, I wish to recede from that position that there is no Hitchcock error because Mr. Nolas is correct, our standard jury instruction puts it into a mode of was it harmless error beyond a reasonable doubt under the totality of the circumstances. So, that is the question that the Court has to make a decision on.

(Tr. 149-50).

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[1] As shall be discussed in subsequent portions of this brief, the lower court's signing of the State's proposed order denying relief was permeated with error. A discussion of these errors is omitted at this juncture in the interests of brevity, since it shall be presented later.

> I conceded that the instruction was the same instruction in Hitchcock. I mean, it's the same standard jury instruction . . . .

(PC-R. 210-11).[2] The State's concession of error below was perfectly appropriate -- the "proceedings actually conducted", see Hitchcock, 107 S. Ct. at 1823, in Mr. Smith's case violated the eighth amendment's requirement of an individualized and reliable capital sentencing determination in the very same way as the proceedings at issue in Hitchcock itself were found to be constitutionally flawed: the jury was never instructed that it could consider anything about the offender or the offense which did not fall within the strict statutory criteria, and the sentencing judge applied that same restrictive standard of review. This case, however, like Hall v. State, 541 So. 2d 1125 (Fla. 1989), and Meeks v. Dugger, 548 So. 2d 184 (Fla. 1989), goes further. Here the efforts of defense counsel (now Circuit Judge Philip J. Padovano) were also adversely affected by the statute, the jury instructions, and the trial court's initial rulings. Judge Padovano, under oath, has detailed as much in his affidavit (see PC-R. 3881; Record Appendix A(1)), an affidavit in conformity with what the record of this case reflects about the proceedings "actually conducted." An evidentiary hearing should have been conducted on this aspect of Mr. Smith's Hitchcock claim, see Cooper v. Wainwright, 808 F.2d 881, 889 (11th Cir.

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[2] That there is some ambiguity in the lower court's order about this concession is not surprising. As shall be discussed later, the order was prepared by the State on the day before the hearing -- although it was not served on defense counsel until the end of the hearing. It therefore did not reflect what actually happened at the hearing. The trial court, however, over Appellant's strenuous objections signed it verbatim.

1986), and the lower court erred in accepting the State's invitation to render findings of fact without allowing one. See Agan v. Dugger, 835 F.2d 1337 (11th Cir. 1987); Lemon v. State, 498 So. 2d 923 (Fla. 1986).

Appellant initially shall discuss the eighth amendment errors resulting from the constraining jury instructions and limited judicial consideration. Thereafter, Appellant shall discuss the eighth amendment errors arising from the constraints under which defense counsel operated at the time of Mr. Smith's capital sentencing proceedings, and the lower court's error in declining to allow full and fair evidentiary resolution of this aspect of Mr. Smith's claim. One matter, however, should be noted at the outset, in anticipation of the position that the State may take in its response.

Before the Eleventh Circuit Court of Appeals issued the October 5, 1989, Order directing that Mr. Smith exhaust the Hitchcock/Lockett claims in the Florida courts, the parties represented briefs on the Hitchcock issue to the Court of Appeals during the litigation of Mr. Smith's petition for rehearing. The State Respondent then suggested that the fact that Mr. Smith was sentenced in 1979, after Lockett v. Ohio, 438 U.S. 586 (1978), was somehow significant to the question of procedural default. Although the State did not take that position below, it is again worth noting that the question of whether Hitchcock has been violated does not turn on when the capital sentencing proceeding occurred, but on what happened at the sentencing proceeding, i.e., on what instructions were given to the jury, what the judge meaningfully considered, what effects the pre-Hitchcock

construction of the Florida capital sentencing statute had on defense counsel's presentation. **See** Hitchcock, 107 S. Ct at 1823 (eighth amendment analysis turns on the "proceedings actually conducted"); Knight v. Dugger, 863 F.2d 705, 708 (11th Cir. 1988)(judicial review of Hitchcock claims requires consideration of jury instructions and "post-trial affidavits or testimony of trial counsel and other witnesses and proffers of nonstatutory mitigating evidence claimed to have been available at the time of sentencing.") Accordingly, for example, this Court granted relief in Thompson v. Duaser, 515 So. 2d 173, 175 (Fla. 1987), in the case of a defendant sentenced after Lockett, because the proceedings violated Hitchcock; this Court granted relief pursuant to Hitchcock to a defendant tried in April, 1980, in Combs v. State, 525 So. 2d 853, 854-855 (Fla. 1988); this Court granted relief in Waterhouse v. State, 522 So. 2d 341, 344 (Fla. 1988), a case involving a 1980-81 trial and sentencing proceeding and a 1983 direct appeal, because Hitchcock had been violated; the Eleventh Circuit directed that habeas corpus relief be granted in Delap v. Dusser, ___ F.2d ___ (11th Cir., Nov. 20, 1989)(Record Appendix H(1)), and United States District Courts granted habeas corpus relief in Gore v. Dusser, No. 89-203 CIV-T-10(C) (M.D. Fla., August 17, 1989)(Hodges, J.), Woods v. Dugger, 711 F.Supp. 586 (M.D. Fla. 1989)(Black, J.), and Booker v. Dusser, TCA 88-40228-MMP (N.D. Fla. Sept. 16, 1988)(Paul, J.), all in cases involving trial court proceedings occurring well after Mr. Smith's sentencing, and all in cases in which the constraints placed on the jury were far less restrictive than

those placed on Mr. Smith's jurors. As this Court has recognized, Hitchcock error is Hitchcock error, whether or not the preceedings took place before or after Lockett. And it cannot be disputed that Hitchcock error occurred during the proceedings resulting in Mr. Smith's death sentence, as the State properly conceded below.

A. THE EIGHTH AMENDMENT VIOLATION BEFORE THE SENTENCING JURY

The precedents of this Court and the Eleventh Circuit Court of Appeals make it plain that a constitutionally valid resentencing is required if Hitchcock error occurs either before the sentencing jury or the sentencing judge:

> It is well established that a sentencing body must not be limited in its consideration of mitigating circumstances. Hitchcock v. Dusser, --- U.S. ---, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987); Eddings v. Oklahoma, 455 U.S. 104, 113-14, 102 S.Ct. 869, 876-77, 71 L.Ed.2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Sonser v. Wainwrisht, 769 F.2d 1488, 1489 (11th Cir.1985)(en banc). This principle applies both to the Florida sentencing jury and the sentencing judge. Riley v. Wainwrisht, 517 So.2d 656 (Fla. 1987); see also Magill V. Dugger, 824 F.2d 879 (11th Cir.1987).

Messer v. Florida, 834 F.2d 890, 892 (11th Cir. 1987).

> [T]he standards imposed by Lockett bind both the judge and the jury under our law . . . If the jury's recommendation, upon which the iudse must rely, results from an unconstitutional lsrocedure, then the entire sentencing process necessarily is tainted by that procedure.

Riley v. Wainwrisht, 517 So. 2d 656, 659 (Fla. 1987)(emphasis supplied).

> [T]he trial judge's failure to adequately instruct the jury on [non-statutory] mitigating circumstances requires resentencing . . . Althoush there was evidence lsresented from which the jury could have found nonstatutorv mitigating circumstances, the trial judge failed to give any instructions on what could be

considered in mitigation. . . .

> Under our capital sentencing statute, a defendant has the right to an advisory opinion from a jury. See Section 921.141(2), Fla. Stat.(1985); Richardson v. State, 437 So.2d 1091, 1095 (Fla. 1983); Lamadline v. State, 303 So.2d 17, 20 (Fla.1974). In determining an advisory sentence, the jury must consider and weigh all aggravating and mitigating circumstances. See Section 921.141(2). The aggravating factors to be considered are limited to those enumerated in section 921.141(5). Drake v. State, 441 So.2d 1079, 1082 (Fla.1983), cert. denied, 466 U.S. 978, 104 S.Ct. 2361, 80 L.Ed.2d 832 (1984); Purdy v. State, 343 So.2d 4, 6 (Fla.), cert. denied, 434 U.S. 847, 98 S.Ct. 153, 54 L.Ed.2d 114 (1977). The mitigating factors, however, are not so limited. King v. State, 390 So.2d 315, 321 (Fla.1980), cert. denied, 441 U.S. 956, 99 S.Ct. 2185, 6 L.Ed.2d 1060 (1979). The United States Supreme Court has held that a sentencer must not be precluded from considering any aspect of a defendant's character or record or any of the circumstances of the offense. See Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). See also Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). The jury must be instructed either by the applicable standard jury instructions or by specially formulated instructions, that their role is to make a recommendation based on the circumstances of the offense and the character and background of the defendant. Cf. Herring v. State, 446 So.2d 1049, 1056 (Fla.), cert. denied, 469 U.S. 989, 105 S.Ct. 396, 83 L.Ed.2d 330 (1984).

Flovd v. State, 497 So. 2d 1211, 1215-16 (Fla. 1986)(emphasis supplied).

> [W]whether or not the trial court believed it could consider non-statutory mitigating circumstances, [the death] sentence must be vacated because the jury was so limited.

Magill v. Dugger, 824 F.2d 879, 893 (11th Cir. 1987)(emphasis in original).

> Because the trial judge considered Jones' nonstatutory mitigating evidence in reaching his sentencing decision, the State next argues that this "curative action" rendered the erroneous instruction harmless. We do not agree. This case is nearly identical to Magill v. Dugger, 824 F.2d 879, 894 (11th Cir.1987), also involving Florida's capital sentencing scheme, in which we held that a trial court cannot, by specifically considering nonstatutory mitigating

> evidence, cleanse a jury recommendation which is tainted by Lockett error. Because of the importance of the advisory jury in the Florida capital sentencing scheme, we held that Lockett "error can be cured only by a sentencing proceeding before a new advisory jury." Id. at 894.
>
> We applied this same reasoning to jury recommendations which were tainted by Caldwell error in our decision in Mann v. Dugger, 844 F.2d 1446 (11th Cir.1988) (en banc). We observed in Mann that "the Supreme Court of Florida has recognized that a jury recommendation of death has a sui generis impact on the trial judge, an impact so powerful as to nullify the general presumption that a trial judge is capable of putting aside error." Id. at 1454. Here, as in Magill and Mann, we conclude that, because the jury recommendation resulted from an unconstitutional procedure, the entire sentencing process has necessarily been tainted. The trial judge's consideration of nonstatutory mitigating evidence, therefore, did not render harmless the Lockett error.

Jones v. Dugger, 867 F.2d 1277, 1280 (11th Cir. 1989) (footnotes omitted). See also Waterhouse v. State, 522 So. 2d 341, 344 (Fla. 1988) ("[W]hat is important is what the jury was permitted to consider in making its recommendation to the court."); Ruffin v. Dugger, 848 F.2d 1512, 1518 n.8 (11th Cir. 1988) ("Although the jury is not the sentencer in Florida's capital sentencing scheme, it is treated as such for eighth and fourteenth amendment purposes."); Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989) ("It is of no significance that the trial judge stated that he would have imposed the death penalty in any event.")

If Hitchcock error occurs before the jury (because of the instructions) or the judge, resentencing is proper. In Mr. Smith's case, both the judge and jury were constrained in their consideration of non-statutory mitigation. Frank Smith was thus denied an individualized and reliable capital sentencing determination. His entitlement to relief is plain: there can be

no doubt that the proceedings resulting in his sentence of death violated the mandate of Hitchcock V. Dugger. See also Lockett v. Ohio, 438 U.S. 104 (1978); Skipper V. South Carolina, 106 S. Ct. 1669 (1986); Eddings v. Oklahoma, 455 U.S. 104 (1982). And, as shall be discussed below, the State has yet to even discuss the substantial nonstatutory mitigation reflected by the original trial and sentencing record, and has much less so even tried to demonstrate that the jury's failure to consider that evidence -- evidence relating to the offender and, particularly in this case, to the circumstances of the offense -- can be said to be harmless beyond a reasonable doubt. Here, 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 statutory list. The sentencing court itself then constrained its review of such nonstatutory factors. Mr. Smith's resulting sentence of death was neither individualized nor reliable, as Hitchcock V. Dusser manifestly demonstrates. The limiting jury instructions provided to Mr. Smith's jury were the equivalent of those condemned in Hitchcock. In Hitchcock, the unanimous Court held that the eighth amendment error "could not be clearer." 107 S. Ct. at 1824. Frank Smith's sentence of death resulted from proceedings which were in every sense as unconstitutional as those in Hitchcock. The unanimous Hitchcock Court struck down that sentence of death. Mr. Smith was and is entitled to the same relief.

The trial court in Mr. Smith's case informed the jury at the beginning of the penalty phase that it would instruct them "on the factors in aggravation and mitigation that you my consider"

(ROA. 2721). The same instruction was given to the jury in Hitchcock v. Duaser. See 107 S. Ct. at 1824 (Trial court instructs jury initially that it would later instruct "on the factors in aggravation and mitigation that you may consider under our law.").

The trial court, at the conclusion of the penalty phase, then instructed the jury:

> The mitigating circumstances which you may consider, if established by the evidence, are these: A, that the defendant has no significant history of prior criminal activity; B, that the crime for which the defendant is to be sentenced was committed while the defendant was under the influence of extreme mental or emotional disturbance; C, that the victim was a participant in the defendant's conduct or consented to the act; D, that the defendant was an accomplice in the offense for which he is to be sentenced, but the offense was committed by another person and the defendant's participation was relatively minor; E, that the defendant acted under extreme duress or under the substantial domination of another person; F, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; G, the age of the defendant at the time of the crime.

(ROA. 2767)(emphasis supplied).

Again, virtually the same instruction was given to the Hitchcock jury. See 107 S. Ct. at 1824 ("[t]he mitigating circumstances which you may consider shall be the following . . ."). As in Hitchcock, the jurors in Mr. Smith's case were told that they were to consider only the listed statutory mitigating circumstances -- nothing else was even mentioned. As in Hitchcock, Mr. Smith's jury was directed onlv to consider statutory mitigation and to weigh those statutorv factors against any evidence of aggravating circumstances. As in Hitchcock, the eighth amendment was violated by the trial court's instructions

-- the instructions were the same. This jury like the one in Hitchcock, was constrained.[3] The restrictive construction resulted in an unconstitutional sentencing determination.

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[3]Although, early in his argument at sentencing, the prosecutor made a one sentence reference to "anything else you wish to consider," he discussed only the statute's factors in his presentation, asking that those factors be placed "side-by-side" against the aggravating factors and, in discussing mitigating factors stated:

> These, ladies and gentlemen, are the six aggravating factors that apply in this case. There are a number of enumerated mitigating factors. I'd like to review those briefly ... The first of those is that the defendant has no significant history of prior criminal activity ... The second mitigating factor [discussing extreme emotional disturbance] ... The third mitigating factor [discussing victim as participant] ... The fourth [relatively minor participation] ... [and so on until] The final mitigation factor that they [the legislature] suggests that you consider -- and this one may apply: the age of the defendant at the time of the crime.

(ROA. 2745-47)(emphasis supplied). Defense counsel's presentation was similarly limited to a discussion of only the statutorily "enumerated" factors -- in his affidavit (Record Appendix A(1)) Judge Padovano explains why: this was a direct result of the jury instructions then in effect. The prosecutor and defense counsel both told the jury not to be "fooled" by the lawyers, and to follow only the judge's instructions concerning how they were to decide the question of sentence. As the prosecutor put it: "And don't be fooled by the lawyers. Listen to the judge. You're going to get the sheets again, and look at them" (ROA. 2741). The "sheets" were the jury verdict and instruction forms, which contained no reference to anything outside the statute, and which were in accord with the judge's restrictive instructions. Such admonishments were made more than once, by the prosecution, the defense, and the court. As is plain, even if a prosecutor's argument can undo an improper jury instruction (a proposition with no precedential support), the one early passing reference here is far from enough to cure the Hitchcock error, given the instructions actually given by the judge (which were the same as those in Hitchcock) and the bulk of everything else that the jury heard from the lawyers and the judge at sentencing. As in Delap V. Dugger, ___ F.2d (11th

(footnote continued on following page)

B. THE NONSTATUTORY MITIGATION CONTAINED IN THE ORIGINAL RECORD ITSELF DEMONSTRATES THAT THE ERROR IS BY NO MEANS HARMLESS BEYOND A REASONABLE DOUBT

The State has yet to even refer to the nonstatutory mitigating circumstances contained in the record of the original proceedings, and has much less so attempted to show that the jury's failure to consider that mitigation can be deemed harmless beyond a reasonable doubt, either in its written response or oral presentation below. The record mitigating factors are reflected by the original trial and sentencing transcripts, as is the jury's obvious reservations about Mr. Smith's complicity. As this Court held in Harvard v. State, 486 So. 2d 537, 539 (Fla. 1986), an opinion in conformity with the Eleventh Circuit's opinion in Sonser v. Wainwright, 769 F.2d 1488 (11th Cir. 1985) (in banc), nonstatutory mitigating factors are not limited solely to evidence affirmatively "presented" by the defense at the penalty phase, but may arise from all of the evidence before the

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(footnote continued from previous page)

Cir. 1989)(Record Appendix H(1)), the prosecutor's one passing reference falls far short in Mr. Smith's case:

> Later in his argument, the prosecutor discussed mitigation solely in terms of the statutory factors ... The prosecutor in Delap's sentencing proceeding "discussed, one by one, the statutory mitigating circumstances, clearly implying to the jury that the statutory test was exclusive." Messer v. Florida, 834 F.2d 890, 894 (11th Cir. 1987) ... As the dissenting Justice in the Supreme Court of Florida's opinion noted, "the prosecutor's argument reinforced what the jury already had been told by the judge and defense counsel -- listen to and follow the judge's instruction."

Delap, supra, slip op. at 1053 (Record Appendix H(1)). The Hitchcock error is plain in Mr. Smith's case.

jury and judge at the trial and sentencing. See also Downs v. Dusser, 514 So. 2d 1069, 1072 (Fla. 1987)(relying on evidence presented by the State at the guilt-innocence phase to find Hitchcock error harmful).[4] Here, there was ample nonstatutory mitigation, from both the trial and penalty phases, that the jury should have been allowed to consider; the evidence was cited in Mr. Smith's motion to vacate (Record Appendix E, pp. 20-24); much of it related directly to the circumstances of the offense; and the State has yet to attempt to show that the jury's failure to consider it was harmless beyond a reasonable doubt. Appellant's oral presentation on this evidence before the Rule 3.850 trial court is excerpted and attached to the back of this brief for the Court's review (Tr. 173-85). There was no effort by the State below to show harmlessness beyond a reasonable doubt, other than conclusory assertions that the error is "harmless". Indeed, the only allusion to a harmless error analysis presented by the State below was an argument that the Hitchcock error should be deemed harmless because of the aggravating factors. Such an argument is plainly not enough to prove harmlessness beyond a reasonable doubt, as the Eleventh Circuit Court of Appeals has made clear:

> The State argues that the Lockett error was harmless in this case because so many aggravating factors were found (four) that no amount of non-statutory mitigating evidence could change the result

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[4] If, as in this case, a capital defendant's case can be "aggravated" on the basis of evidence heard at guilt-innocence, certainly a capital case can also be **"mitigated"** on the basis of such evidence. Indeed, it is from the guilt-innocence phase that any mitigation relating to the "circumstances of the offense" will normally arise.

> in this case. No authority has been furnished for this proposition and it seems doubtful that any exists. **The** State's theory, in practice, would do away with the reauirement of an individualized sentencing determination in cases where there are **many** aggravating circumstances. It is this requirement, of course, that is at the heart of Lockett and its progency. **See** Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) ("in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense ...," quoting Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976)).
>
> While we are not prepared to definitively state what might constitute harmless error in the Lockett context, it is clear that harmless error cannot be made out simply because multiple aggravating circumstances exist in a given case. Since the State offers no other arguments to support its contention that the violation of Lockett in this case is harmless, relief must be granted.

Knight V. Duaser, 863 F.2d 805, 810 (11th Cir. 1989)(emphasis supplied).

Mitigation existed in this case which related to the offender and, significantly, to the circumstances of the offense.

> 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). Here the jury was not allowed to consider anything concerning the character of the offender and/or circumstances of the offense, Gress v. Georgia, which mitigated against death but which was **not** in the statute. The instructions barred the jury's consideration. However, ample [nonstatutory] mitigation was available and should have been considered. It would have made a difference. A nonexhaustive catalogue includes the following.

i. Ample evidence was elicited at trial that Mr. Smith never intended to kill Sheila Porter (ROA. **2299-2300, 2266-68, 2272-73, 2314,** 2318-19), and that he did not kill Sheila Porter -- Johnny Copeland did while Mr. Smith was trying to stop him (ROA. **2272-73, 2266-68, 2300, 2318-19, 2313-14).** Substantial evidence was also adduced that Mr. Smith renounced his participation in the criminal transaction and communicated his withdrawal to Copeland expressly for the purpose of persuading Copeland that he should not kill the decedent (ROA. **2266-68, 2272-73, 2300, 2313-14, 2318-20).** At the scene of the homicide Copeland had the pistol (ROA. **2268).**[5] Mr. Smith sought to convince Copeland not to kill the girl (ROA. **2313-14,** passim), telling him **"just** to give [her] the money back" (ROA. **2268,** 2313-14), and to leave her alone (ROA. 2313-14), and to "take the girl back" (ROA. **2314).** Mr. Smith's jury, a jury which could only have convicted on the basis of felony murder or accomplice liability, as this Court found on direct appeal, Smith v. State, **424** So. 2d **726, 731-32** (1982), a jury which deliberated a great length, which had obvious reservations about Mr. Smith's

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[5] **Records** of a K-Mart store established that twenty-five caliber ammunition of the same brand that was used in the homicide was purchased shortly before the offense by Johnny Copeland (ROA. **2326).** Copeland's girlfriend, Florence Smith, testified that when the police came to arrest Copeland, she concealed a small black pistol under the front seat of his car (ROA. **2505).** Copeland had given her the pistol. Following the arrest, she gave the pistol to Copeland's mother. Daniel King testified that about a week before the offense, Johnny Copeland pawned a twenty-five caliber pistol to him for **$20.00** (ROA. **2510).** He came to repay the loan the Friday before the offense, secured the pistol, and, at the time, test fired it in Mr. King's yard (ROA. **2544).**

participation in the murder and which did not believe that Mr. Smith was the triggerman (see ROA. 2711-13 [jury questions to court during deliberations]), was precluded from considering, at sentencing, Mr. Smith's efforts to convince Johnny Copeland not to kill the victim, his withdrawal from the offense, his lack of intent to kill, his abandonment of participation. All this mitigated the offense. See, e.g., Hawkins v. State, 436 So. 2d 44, 47 (Fla. 1983)(override of jury recommendation of life improper where nonstatutory mitigating circumstances present included the facts that the defendant was convicted of felony murder and the defendant testified that co-defendant committed the murders while the defendant was present). Here, as in Downs v. Dusser,

> . . .the jury. . . clearly was troubled by potential mitigating evidence, as reflected in a [guilt-innocence phase] question posed to the judge regarding a firearms charge of which Downs stood accused:
>
> > In regard to the question as to whether the defendant did or did not use a firearm, must the defendant be guilty of actually pulling the trigger, or is he guilty of using the firearm through association of being an accomplice in a murder of which a firearm was used.

Id., 514 So. 2d at 1072 (emphasis added). The question posed by Mr. Smith's jurors was almost identical. See also Cooper v. Dugger, 526 So. 2d 900 (Fla. 1988)(some evidence reflecting greater culpability on codefendant's part, and jury should have been allowed to consider the nonstatutory mitigating effects of such factors in determining proper sentence). Mr. Smith's withdrawal from the homicide and efforts to convince Copeland

that he should not kill[6] were central in this case. The jury should have been allowed to consider these "circumstances of the offense" at sentencing.

ii. The very fact that this was conceded (even by the State at trial and sentencing) **not** to be a premeditated murder case (as noted, this Court also held as much on direct appeal), but that the evidence showed, at best, felony-murder/accomplice liability, is also a fact that mitigated (**See** Tr. **173-85**, attached hereto). It is the status of the offender to which Lockett and Hitchcock speak. The status of this offender is that he did not commit a premeditated murder. The jury was not allowed to consider, as mitigation, that Mr. Smith's culpability was founded on the codefendant's acts and on the underlying felonies. This too mitigated, **see** Hawkins, supra, as did the fact that Mr. Smith did not pull the trigger. Such evidence, aside from Mr. Smith's efforts to stop Copeland and his own withdrawal, also was significant mitigation. It would have been quite significant in this case, as the jury's questions to the judge show. The jury, however, was not allowed to consider it in determining whether to sentence Mr. Smith to death. Cf. Hawkins, supra; Downs, supra.

iii. The only evidence which contradicted Mr. Smith's account of the events was the bargained-for accomplice testimony

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[6]As the evidence submitted below (e.g., Judge Padovano's affidavit; Department of Corrections records) reflects, and as the jury observed, at the time Mr. Smith was an undernourished **19** year old who looked like a child who had not yet reached puberty. Copeland was muscular and had a formidable appearance. Copeland also had the gun. Under such circumstances Mr. Smith, at the scene, did all that could be expected in his efforts to stop Copeland.

of codefendant Victor Hall. Hall's testimony was directly contradicted by Mr. Smith's account and was not corroborated by other evidence elicited at trial. Hall's status was that of an accomplice whose testimony was provided in exchange for a lesser sentence -- i.e., as Hall himself admitted on the stand, he was testifying to avoid the electric chair **(ROA. 2317, et seq.; 2337-38, 2344, 2354-79, 2397,** passim). In fact, Hall was impeached with written notes he and Copeland had passed to each other while in the jail pretrial which detailed their plan to have Hall give fabricated testimony against Mr. Smith **(ROA. 2380-86, 2388, 2424-29, 2463, 2470).** (Hall did not testify at Copeland's trial.) Hall had also given numerous inconsistent statements in the past **(ROA. 2401-02, 2413, 2418-22, 2429-30, 2431-50, 2469).**

All this also mitigated the offense. The jury should have been allowed to consider the mitigating effect of the fact that the only evidence implicating Mr. Smith in the capital offense came from an accomplice who had "every reason to lie" **(ROA. 2665),** to save himself, as counsel argued to the jury (See also ROA. **2666-68, 2757).** Nothing in any instruction allowed the jury to consider as mitigation, at sentencing, the fact that questions remained to be answered, because the prosecution was essentially based on bargained-for 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 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. Find, 322 N.W.2d 826 (N.D. 1982); Oreaon 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).

The jury heard the State's extensive felony-murder arguments, and the trial court's detailed felony-murder instructions. As the Florida Supreme Court recognized, the jury could only have returned a **"guilty"** verdict on the basis of the prosecution's felony-murder or accomplice liability theories. Smith v. State, 424 So. 2d at 731-32. Yet, at sentencing, the jury was precluded from considering Mr. Smith's individual culpability. It was precluded from considering the fact that Mr. Smith's account was that he withdrew from the offense, while the only person who contradicted this version was an accomplice testifying out of fear of the electric chair, an accomplice who admitted that he planned on providing fabricated testimony against Mr. Smith with codefendant Copeland. At the very least, jurors should be allowed to deliberate over such important questions when deciding whether a man should live or die. **See**, e.g., Kina v. Strickland, 748 F.2d 1462, 1464 (11th Cir.

1984)(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).[7]

iv. Evidence was elicited that Mr. Smith's capacity may well have been diminished due to the consumption of alcohol on the evening at issue (See, e.g., ROA. 2255 [Mr. Smith, Hall, and Copeland "rode around, drinking Southern Comfort and gin"]). Hall testified to this, Mr. Smith's statements to law enforcement related this, and although not heard by the jury (but heard by the judge in Copeland's trial, which took place prior to this one), Copeland also stated this. There was also evidence that Mr. Smith had smoked marijuana on that evening. Defense counsel tried to present this issue to the jury under the statutory criteria, but as he almost acknowledged, the stringent statutory criteria could not be met (ROA. 2761). Nothing in the instructions permitted the jury to deliberate over these factors. As counsel acknowledged, this evidence of diminished capacity may not have risen to the stringent level required under Fla. Stat. sec. 921.141(6)(f), but it was entitled to consideration. No

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[7]Aside from the [mitigating] issues arising from Mr. Smith's withdrawal from the offense and Hall's [lack of] credibility, it simply cannot be said that the failure to permit consideration of evidence concerning Mr. Smith's lack of participation in the actual killing (ROA 2267-68, 2318-20, 2273), even though that evidence may not have met the stringent, technical requirements of Fla. Stat. sec. 921.141(6)(d) or (e), "comport[ed] with [the Eighth Amendment]." Hitchcock, 107 S. Ct. at 1824-25.

consideration was allowed independent of the statute's stringent factors. Doubtless, the possibility of inebriation at the time of an offense is a mitigating factor. This [nonstatutory] mitigation was, at the very least, entitled to some consideration. Waterhouse v. Dugger, 522 So. 2d 341, 344 (Fla. 1988)("Waterhouse proffered evidence that [inter alia] he . . . was under the influence of alcohol [on] the night of the murder. . . . The jurors should have been allowed to consider these factors in mitigation"); Fead v. State, 512 So. 2d 178 (Fla. 1987)(Florida Supreme Court has "held improper an override" where, among other mitigating factors, there was some "inconclusive evidence that [defendant] had taken drugs on the night of the murder"); Babera v. State, 505 So. 2d 413, 414 (Fla. 1987)(intoxication and drug use may mitigate recommended sentence); Foster v. State, 518 So. 2d 9001, 902 n.2 (Fla. 1988) ("some" evidence of alcohol use at time of offense; Hitchcock error not harmless).

V. 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 a cooperating accomplice in exchange for testimony. Id. at 142-43; accord McCampbell v. State, 421 So. 2d 1072 (Fla. 1982). The Court held that the disparate treatment given to a cooperating 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.

Frank Smith was prosecuted to the utmost. Victor Hall, as the jury heard, in exchange for his testimony, was given special treatment: no death penalty, concurrent sentences on the felonies, and the possibility of parole in "eight to ten years" (ROA. 2393 [Testimony of Victor Hall: "Well, if I, you know, go to prison, you know, and keep a clean record, you know, I could be out, maybe, in eight to ten years or something like that."]). Victor Hall's status as a cooperating accomplice and, in turn, the disparate treatment given to him and Mr. Smith, should have been considered as a [nonstatutory] mitigating factor. Brookings; Hitchcock. Both men were similarly situated: the State acknowledged that there was no proof of Mr. Smith's premeditation, Copeland pulled the trigger, and Mr. Smith and Mr. Hall were similarly-situated codefendants liable for felony-murder/accomplice liability on the basis of their participation in the felonies. The jury should have been allowed to consider the mitigating value of such evidence at sentencing. Brookinas, 194 So. 2d at 142-43; see also Downs v. Duauer, supra, 514 So. 2d at 1172 (lesser sentence given to accomplice is a recognized nonstatutory mitigating factor demonstrating that the Hitchcock error was not harmless). But consideration was constrained.

vi. According to the State's case at trial, Mr. Smith, from the moment of his arrest, provided law enforcement officers with statements detailing his participation in the events leading to the decedent's death (E.g., ROA. 2161-68). He voluntarily submitted to a search of his person and vehicle, he voluntarily stayed at the police stationhouse, he voluntarily provided

statements admitting his complicity in the felonies. Although Mr. Smith explained that he was innocent of the murder -- Johnny Copeland killed the decedent while Mr. Smith tried to stop him -- he admitted his complicity in the underlying offenses (E.g., ROA. 2318-19, 2273, 2261-68). In fact, it was Frank Smith who helped law enforcement find the decedent's body: he went with the police and directed them to the area where Johnny Copeland killed the girl, and aided the officers in discovering her body (See, e.g., ROA. 2162-63, 2513-40). All this also mitigated against a sentence of death. Mr. Smith's willingness to cooperate -- i.e., voluntarily providing statements to law enforcement which acknowledged guilt, directing law enforcement to the decedent's body -- as well as his consistent assertions (from the time of his arrest and throughout the proceedings) that he was innocent of the killing but guilty of the underlying felonies of robbery and kidnapping, and thus of felony murder should have been considered. Jordan v. State, 478 So. 2d 512, 513 (Fla. 1st DCA 1985)("defendant's cooperation with law enforcement officers can be grounds for reducing or suspending a sentence"); Banzo v. State, 464 So. 2d 620, 622 (Fla. 2nd DCA 1984) ("cooperation can be grounds for reducing or suspending a sentence. . . ."); Caruthers v. State, 465 So. 2d 469, 499 (Fla. 1985)(death sentence not appropriate where there were several nonstatutory mitigating circumstances, including voluntary confession). Moreover, such evidence (helping the police find the victim) reflects remorse, another recognized nonstatutory mitigating circumstances, as is an admission of culpablity. See Mikenas V. Dugger, 519 So. 2d 601, 602 (Fla. 1988). None of this

[nonstatutory] mitigation was considered.

vii. At the penalty phase the State introduced a 1974 robbery conviction (ROA. 2721-31) as an aggravating circumstance. See Fla. stat. sec. 921.141 (5)(b). Mr. Smith had pled guilty to a two-count robbery indictment. He received a state prison sentence. As the jury learned, at the time of that previous conviction Mr. Smith was fifteen (15) years old (ROA. 2753, 2757). Mr. Smith was sent to a state prison for adults. This horrific scenario also mitigated against a sentence of death. It related to the character and background of the defendant, Gregg; Thomas, supra, and should have been considered by the jury. See Burch v. State, 522 So. 2d 810 (Fla. 1988)(the fact that the defendant had been incarcerated as a youth is a valid nonstatutory mitigating factor demonstrating that override of jury's life recommendation was not reasonable). Consideration was again constrained.

The United States Supreme Court has cautioned against speculating "on the effect of errors in capital sentencing proceedings, especially in light of the discretion given to the sentencer." Booker v. Duaaer, slip op. at 3 (M.D. Fla. 1988) (Paul, J.)(Order granting resentencing)(Record Appendix H (20)), citing, Satterwhite v. Texas, 108 S. Ct. 1792, 1797-98 (1988). The Eleventh Circuit Court of Appeals has consistently held that harmless error inquiry in Hitchcock cases does not turn on the number of aggravating factors which may exist or on an appellate court's reweighing of aggravating and mitigating factors. Knight v. Duaaer, supra; Jones v. Duaaer, supra. The Eleventh Circuit

has applied harmless error analysis only to those cases which are found to be completely devoid of any record or non-record mitigation. See Knight, supra; Clark V. Dusaer, 834 F.2d 1561, 1569 (11th Cir. 1987)("Here, however, there simply were no statutory mitigating circumstances to consider"). In Jones V. Dugger, for example, the Court of Appeals found that harmlessness beyond a reasonable doubt could not be established in a case of Hitchcock error involving:

> the testimony of petitioner's sister, ... [who] testified that prior to Jones' recent scrapes with the law, he was "a very nice person (who) got along well with people (and) was never no trouble." ... [and] her testimony that [a jailer] reported to her that Jones was a model prisoner who "got along well with him (and) never had any trouble."

867 F.2d at 1280. This mitigation, albeit important to Mr. Jones, pales in comparison to the mitigation concerning the offender and the circumstances of the offense which Mr. Smith's jurors were not allowed to consider.

Florida Supreme Court has written in a post-Hitchcock opinion issued in a case involving the same limiting jury instructions as Mr. Smith's:

> All of the aggravating circumstances were directly related to the murder itself except one . . . [W]e cannot say beyond a reasonable doubt that had the jury known that nonstatutory mitigating evidence could be considered, it would not have recommended life rather than death.

Mikenas, supra, 519 So. 2d at 602. The same analysis applied here: all but one of the aggravating factors related to the offense, one statutory mitigating factor was found (age), and substantial nonstatutory mitigating evidence was reflected in the record but was never properly considered.

In this case, it by no means can be "confident[ly] conclude[ed]" that the errors discussed herein and presented below had "no effect" on the sentencers' deliberations, Skipper v. South Carolina, 106 S. Ct. 1669 (1986), or that the errors were harmless beyond a reasonable doubt. Riley, supra, 517 So. 2d at 659; Cooper, supra, 526 So. 2d at 903; Armstrona v. Dugger, 833 F.2d 1430, 1436 (11th Cir. 1987). Resentencing is proper.

C. HITCHCOCK ERROR BEFORE THE JUDGE

Early on in the proceedings, Judge Cooksey denied defense counsel's challenge under Lockett to the standard statutory construction then in effect (See Record Appendix B (2)). Thereafter, the judge said nothing to ever indicate that he seriously, McCrae v. State, 510 So. 2d 874, 880 (Fla. 1987), or meaningfully, Penry v. Lynaugh, 109 S. Ct. 2934 (1989), considered anything in mitigation that did not fall within the instructions given to the jury (i.e., within the statute).

The advisory jury, as in Hitchcock, recommended death. (A recommendation which, again as in Hitchcock, could not but have been derived from jury instructions which failed to provide "guidance to the jury for considering circumstances which might mitigate against death." Flovd v. State, supra, 497 So. 2d at 1216.) After that recommendation, the sentencing court found that the statutory mitigating circumstances did not outweigh the statutory aggravating circumstances. The judge is presumed to follow his jury instructions. As reflected in Judge Cooksey's instructions, see Zeigler v. Dugger, 524 So. 2d 419, 420 (Fla. 1988)(If the record does not reflect an affirmative statement to contrary, "it may be presumed that the judge's perception of the

law coincided with the manner in which the jury was instructed"), and as shown by his sentencing order, the sentencing judge in Mr. Smith's case applied a restrictive view to the value of nonstatutory mitigation, and instructed the jury accordingly. Hitchcock, 107 S. Ct. at 1823; see also McCrae v. State, supra, 510 So. 2d at 880; Combs v. State, 525 So. 2d 853, 855 (Fla. 1988)(relief granted pursuant to Hitchcock on the basis of a sentencing order which in all pertinent respects mirrored the order issued in Mr. Smith's case); Zeigler, supra, 524 So. 2d at 420-21 (After instructing the jury without reference to nonstatutory mitigation, "the judge issued written findings of fact supporting the death sentence in which there was no reference to nonstatutory mitigating circumstances," the two factors demonstrating that the sentencing judge believed himself to be constrained). Mirroring Hitchcock, the sentencing court restricted itself only to those mitigating factors listed in the statute:

> MITIGATING CIRCUMSTANCES (F.S. 921.141(6))
>
> The Court finds that the mitigating circumstances enumerated in F.S. 921.141(6) (a)(b)(c)(d)(e) and (f) do not apply in that: [The sentencing court then listed and rejected the statutory mitigating circumstances included in Florida Statute Section 921.141(6)(a) through (f).]

(ROA. 552). The wording is identical to that in Hitchcock, and reflects that only that which fell within the statute was seriously considered.

As in Hitchcock, only the defendant's "age" was found as a [statutory] mitigating factor (See ROA 552, Sentencing Order, finding the [statutory] mitigating circumstance listed in Fla.

Stat. Section 921.141(6)(g) applicable). The court then found the [statutory] mitigating factors insufficient to outweigh the aggravating factors and sentenced Mr. Smith to death (ROA 552). There were no on-the-record pronouncements indicating that Judge Cooksey would meaningfully consider anything other than that which fell within the statute.

In sum, the record demonstrates that the court considered only "the mitigating circumstances enumerated" in Fla. Stat. sec. 921.141(6)(ROA. 552)(emphasis supplied). Cf. Hitchcock V. Dugger, 107 S. Ct. at 1823-25 (considering mitigating circumstances **"as enumerated in Florida Statute 921.141(6)"** insufficient "to outweigh the aggravating circumstances" [emphasis in original]). In fact, the very heading of the "Mitigating Circumstances" section of the sentencing order shows that only **"F.S. 921.141(6),"** -- i.e., statutory mitigating -- circumstances were considered (ROA. 552). In short, not only did the sentencing judge's actions in this case mirror those in Hitchcock, they were, in every real sense, identical.

The mitigation which was not considered by the judge was substantial, and was discussed above (section B) in the context of the jury instructions. In the interests of brevity it shall not be repeated here. One additional factor which the judge learned of, although the jury did not hear it, is worthy of note: Judge Cooksey presided over the Copeland trial and heard the State's vehement arguments there that Copeland was the shooter and ringleader. Mr. Smith was prosecuted on felony-murder/ accomplice theories. The record reflects that these factors,

known to the judge, were not given any serious, meaningful, or independent (of the statutory criteria) consideration, see Messer v. Florida, supra; Penry v. Lynaugh, supra, as was the case with the factors discussed in section B, supra.

This is a case of jury and judge Hitchcock error. The errors are not harmless beyond a reasonable doubt. Cooper; Skipper; Knight; Jones.

D. DEFENSE COUNSEL WAS CONSTRAINED

Defense counsel for Mr. Smith was Philip J. Padovano (now a Circuit Judge in the Second Judicial Circuit). At the time of Mr. Smith's capital proceedings, Judge Padavano's efforts to develop and present mitigation on Mr. Smith's behalf were constrained by the capital sentencing statute then in operation, particularly by the jury instructions which resulted from that statute, instructions which we now know restricted consideration solely to the mitigating factors set forth in the statute. This statutory construction was challenged by Judge Padovano early on in the proceedings, but the challenge was denied by the trial judge.

As discussed above, the standard jury instructions at that time did not instruct Mr. Smith's jurors to consider anything in mitigation other than those factors enumerated in the statute. Although Judge Padovano attempted to explain to Mr. Smith's trial judge that the then-recent decision in Lockett v. Ohio, 438 U.S. 586 (1978), required capital sentencers to consider nonstatutory mitigating circumstances, at the same time Judge Padovano was aware, and pointed out to the trial court, that this Court's then-recent decision in Sonaer v. State, 365 So. 2d 969 (Fla.

1978), had held that the Florida capital sentencing statute -- and thus the jury instructions which gave effect to that statute -- satisfied Lockett. Thus, Judge Padovano's hands were tied: the jury was to be instructed only on the statutorily enumerated factors and, of course, his development and presentation of mitigating evidence had to be relevant to those factors in order to be meaningful to the jury. As a result of these constraints, powerful and compelling nonstatutory mitigating evidence was not presented to Mr. Smith's capital sentencing jury, and Mr. Smith was sentenced to death in violation of the eighth and fourteenth amendments.

Before the trial court, Appellant filed a sworn affidavit from Judge Padovano which explained his understanding of the capital sentencing statute at the time of Mr. Smith's trial and how that statute affected his efforts on Mr. Smith's behalf:

> 1. My name is Philip J. Padovano and I am a Circuit Judge in Florida's Second Judicial Circuit. In 1978-79, I was in private practice and was court appointed trial counsel for Frank Elijah Smith when he faced charges of first-degree murder, sexual battery, kidnapping and armed robbery.
>
> 2. At the time I represented Mr. Smith, I was aware that the State was going to actively seek the death penalty. I knew that if Mr. Smith was convicted that there would be a penalty phase at which the jury would consider aggravating and mitigating circumstances. The instructions to the jury and law at the time limited the mitigating circumstances to those specifically listed in Fla. Stat. sec. 921.141 (before it was amended to inform juries that they could consider other mitigating circumstances). I was aware of that limitation and prepared Mr. Smith's case accordingly. As I testified in an evidentiary hearing held in Frank Smith's case in October, 1984, when asked questions concerning why I did not develop and present nonstatutory mitigating factors or to seek jury instructions on such evidence:

> [A]t the time [of Smith's trial and sentencing], we were operating under a court decision in Florida which said you had to stick to statutory mitigating circumstances. Since then -- and withdrawal was not one of them. . . . Since then, the United States Supreme Court has held that that's unconstitutional. Then the Supreme Court of Florida wrote an opinion which said: Well, that's not what we really said anyway. But at the time I was following the law that was in existence then. I wasn't going to present another -- I guess I could have done it and had Judge Cooksey tell me: No, that's the law. You can't do it.

I in fact challenged the constitutionality of the statute, because the law and instructions limited the jury to the statutory factors, but that motion was denied early in my investigation, and subsequently during the proceedings. I have again reflected on the trial and sentencing proceedings in Frank Smith's case and state that the statute and instructions then in effect tied my hands, and because of that statute, the standard instructions to capital sentencing juries then in effect, and Judge Cooksey's interpretation of that statute, I never developed, investigated, or presented nonstatutory mitigating evidence regarding Frank Smith, and did not -- could not -- seek instructions on such evidence. Since then, Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), established that that interpretation of the Florida capital punishment statute was not constitutional. But that was the statute and instructions that I labored under at the time, and that statute, the instructions based on that statute, and its interpretation had a direct, adverse effect on my efforts on Frank Smith's behalf at the time.

3. Mr. Smith's capital trial and sentencing proceedings took place at a time when Florida criminal defense attorneys, prosecutors, and judges knew that the mitigating evidence on which the jury would be instructed at a capital sentencing proceeding were restricted to the statutory list of section 921.141. Florida capital sentencing juries were limited strictly to the consideration of mitigating factors enumerated especially in Fla. Stat. sec. 921.141. Mr. Smith's jury was so instructed. I have always endeavored to operate in accordance with the applicable law. The irony of the situation is that the applicable law at the time tied my hands in Frank Smith's case. The restrictive instructions were in operation and were imposed upon and understood by practitioners and judges in Florida, and in particular, in the Second Judicial Circuit. Mr. Murry, my co-counsel during some of the proceedings in Mr. Smith's case, shared this view. Our investigation, preparation, and presentation was

restricted by these statutory constraints.

4. As a court appointed attorney with limited time and resources, I understood expending time and energy on an attempt to develop and prove evidence that would not be considered to be a waste of resources. I investigated, but my penalty phase investigation was limited by an effort to produce evidence that fit within the jury instructions and statute. It was mitigating evidence that fit within the statute that I attempted to develop, with regard to the statutory mental health factors, as well as with regard to other issues (for example, Mr. Smith's history of deprivation and poverty did not fit within the statute; neither did his withdrawal from the offense before the decedent was killed; neither did his history of alcohol and substance abuse). My focus was on uncovering evidence of those statutorily enumerated mitigating circumstances which were at the time the only ones on which the capital sentencing jury would be instructed. I did not pursue or develop nonstatutory mitigation because to do so would have been fruitless (the jury would not be instructed to consider such nonstatutory mitigating circumstances under the statute and thus such factors would not have been considered by the jurors, under the instructions then in effect, nor by Judge Cooksey, the sentencing judge). It would have been a waste of time to seek out and present such evidence, particularly when there was so much other work to do in preparing for Frank Smith's trial. My strategy as to the development of mitigating circumstances was quite simply what the law then mandated: I looked for evidence of the statutory circumstances because the law at the time precluded the consideration of any nonstatutory mitigating circumstances. No instructions on nonstatutory mitigating evidence were allowed.

5. My access to the assistance of a court-appointed mental health expert was also limited because there was no provision at the time for a confidential evaluation. Rather than share any information provided by an expert with the State, I obtained an advisory opinion from a local expert. I asked this expert to look at the issues of competency and sanity, and at the statutory mitigators, but never requested that he evaluate and assess Mr. Smith's background, character, or mental impairments in an effort to develop nonstatutory mental health mitigation for presentation to the court and jury. This was a direct result of the statutory constraints and jury instructions then in effect. If the trial were today, or if the law then had allowed for consideration of nonstatutory mitigating evidence such as was recently addressed in Hitchcock V. Dugger, 107 S. Ct. 1821 (1987), I

certainly would have made the required showing of need of such confidential assistance and obtained the expert's help in developing the mitigation circumstances present in Mr. Smith's case, particularly those nonstatutory mitigating circumstances which I could not be considered under the instructions and statute in **1978-79**. A mental health professional would have provided great assistance in developing nonstatutory mitigating circumstances regarding Mr. Smith and his mental health impairments, particularly his brain dysfunction and history of epilepsy, and the effects of his childhood deprivation on his later functioning. I did not pursue such evidence then with the psychologist because of the statute's restraints. I also understand that Frank Smith's current counsel have retained Dr. Joyce Carbonell, who has evaluated Mr. Smith and tested whether he has mental impairments. I certainly would have used such nonstatutory psychological/psychiatric mitigating evidence at the time of the **1978-79** proceedings if the statute, instructions, and law had then allowed it. Indeed, I consider Dr. Carbonell to be a qualified and highly professional mental health practitioner, and have retained her services and requested that she provide me with an opinion on nonstatutory mitigating mental health evidence since the time of Frank Smith's trial. I would have asked for expert opinions on these issues in Mr. Smith's case in **1978-79,** and would have provided the evidence to the jury and judge. The statute, however, strapped my efforts.

6. If the proceedings were today, I certainly would have presented as a nonstatutory mitigating circumstance the disparate treatment afforded Mr. Smith's co-defendant, Victor Hall. Hall stated that he was going to receive a sentence of years, and would be eligible for parole in eight to ten years. The jury may have convicted Mr. Smith on the felony murder theory presented by the State, because of the co-defendant's testimony. Certainly any doubts the jury had about the respective roles the co-defendants (Copeland, Smith, and Hall) played in the crime could have been used to compellingly argue that this death penalty was inappropriate for Mr. Smith when one co-defendant under his plea agreement would be receiving so much less, and the other co-defendant (Copeland) was shown by the evidence to be the more culpable party. The then-prevalent law, however, strapped my efforts.

7. The jurors in fact asked questions of the judge at the end of the trial indicating that they were uncertain of Frank Smith's level of complicity. The defense at trial was that Frank Smith withdrew from the offense before the homicide occurred. At the trial on guilt-innocence, the judge denied a requested

instruction concerning the withdrawal defense -- that Mr. Smith attempted to dissuade Copeland from killing the victim and communicated his withdrawal to Copeland. As I testified at the **1984** evidentiary hearing noted above, I never requested an instruction on Mr. Smith's withdrawal to be provided to the jury at the sentencing phase because the law did not allow it then. I would have requested such an instruction, and would have strenuously argued Mr. Smith's withdrawal even under the standard nonstatutory mitigating evidence instruction put in effect after Mr. Smith's trial, if the law had then allowed the jury to consider such factors.

8. Another area that I certainly would have explored in an effort to uncover nonstatutory mitigation would have been the relationship between Mr. Smith and Mr. Copeland. At the time, there was evidence that Mr. Copeland was the more dominant personality. Domination could have been further developed and argued as nonstatutory mitigation justifying the imposition of a sentence of less than death. There was obvious evidence of this. For example, Mr. Smith was small in stature; Mr. Copeland was well-developed and had a threatening stature and demeanor. However, because I was aware that the law in effect at the time did not permit the consideration of nonstatutory mitigation, I did not pursue such evidence and instead focused my attention on the development of statutory mitigating circumstances. My argument was presented in terms of the statute and jury instructions. Mitigation concerning the fact that Frank Smith was the follower (for example, background and historical evidence that Copeland had always been the leader and Smith the follower, from their younger days, and even in a prior offense) did not rise to the statutory level, and thus was not developed because it would not have been considered. Other information concerning Mr. Smith's character and background also could have been developed and presented had the statute not tied my hands -- Mr. Smith grew up in stark poverty, an epileptic child, was malnurished and diminutive, and was incarcerated in adult prison facilities at the age of 15 with grown men. These and other factors of nonstatutory mitigation were not developed or presented because of the statute's constraints. My argument focused exclusively on the statutory aggravating and mitigating factors. This affidavit reflects some of the matters that I would have attempted to develop but for the statute then in effect. In short, I can state that if the proceedings were conducted under the post-Hitchcock understanding of lawyers and judges, and under the post-Hitchcock instructions, my approach and presentation at the sentencing phase would have been considerably

different.

> 9. In sum, the statute, the standard jury instructions, the trial court's construction, and the then-prevalent law and standards of practice in Florida and particularly in the Second Judicial Circuit strapped me and inhibited my efforts, and detrimentally affected what I was able to develop, investigate, and present on Frank Smith's behalf.

(See Record App. A **(1))**.

Judge Padovano's affidavit is consistent with the record of Mr. Smith's trial and with the record of prior post-conviction proceedings in this case. As Judge Padovano's affidavit explains, shortly after he assumed Mr. Smith's representation, he filed a motion challenging the constitutionality of the Florida capital sentencing statute in light of Lockett. At the hearing on that motion, Judge Padovano argued:

> There are three new death penalty arguments that we are making, that to my knowledge have not been previously made in trial courts, challenging the death penalty. The first of which I will give you very quickly because the Supreme Court of Florida ruled on it last week. It's the argument that the Florida statute is unconstitutional as a violation of the eighth amendment because it does not permit consideration by the trial judge of non-statutory mitigating circumstances. Now, our supreme court held in State vs. Cooper, at **336** Southern Second, **1133**, that the mitigation circumstances set forth in the capital sentencing statute are exclusive; that is to say that the Court can not consider any others. Several months ago the United States Supreme Court in the case of Lockett vs. Ohio, which is cited in my memorandum, held that an Ohio statute which precluded consideration of non-statutory mitigating circumstances is invalid as a violation of the eighth amendment. I would submit that for the reasons that the Ohio statute was declared unconstitutional by the United States Supreme court, that the Florida statute is likewise unconstitutional. Unfortunately for my arsument, Your Honor. and I will tell you this in all candor, the Florida Supreme court ruled about two weeks ago in the case of Sansar vs. State, that they realy didn't say that in the previous case of State vs. Cooper. and that the Florida statute doesn't preclude consideration of non-statutory mitisatins circumstances. So again I would submit that

> argument. I wanted to let you know what it is, but I also want to let you know in all candor that several weeks ago the Supreme Court ruled against our position on that arsument. I don't intend to stop with it there, but I do feel it is my obligation to present it to the Court. I certainly do not think that this Court has the power to overrule the Florida Supreme Court in Sangar vs. State [sic].

(Record Appendix B(2), pp. 137-38)(emphasis added). Judge Padovano argued to the trial court that although Lockett required consideration of nonstatutory mitigating factors, this Court's decision in Sonser had held that the Florida statute -- and the jury instructions emanating from it -- complied with Lockett. Thus, he conceded that under Florida law ("Unfortunately for my argument"), binding upon the trial court ("I certainly do not think that this court has the power to overrule the Florida Supreme Court"), the statute and jury instructions as written did not provide for the constitutionally required consideration of nonstatutory mitigating factors. Of course, post-Hitchcock we now know that that is not true, and we know that Judge Padovano was right, but that was the construction under which Judge Padovano operated at the time of Mr. Smith's trial.

At that same hearing, the State agreed with that then-prevalent understanding of Sonaer:

> The Supreme Court in [Lockett] reversed the death penalty solely because the Ohio Statute do[es] not provide for the mitigating factors, as does the Flroida statute in Sangar vs. State [sic] in the construction of that statute by the Florida Supreme Court.

(Record Appendix B(2), p. 145). The trial court denied the motion (Id.).

Thus, from the outset of his representation of Mr. Smith, Judge Padovano understood that the jury would be instructed only

on the statutory mitigating factors and that the Sonaer opinion foreclosed any argument on the issue. As his affidavit explains, that understanding controlled and guided his efforts at developing and presenting mitigation.

That Judge Padovano's investigation and preparation for the penalty phase was guided by this understanding of the statute is confirmed by a Motion for Mental Examination (Record Appendix B(1)) filed pretrial. In that motion, Judge Padovano argued:

> The Defendant, FRANK SMITH, moves pursuant to Fla. R. Crim. P. **3.210** and Sec. **921. 141(6)(b,e,f)** Fla. Stat. **(1975),** for an Order of the court appointing two disinterested qualified experts to examine him with reference to his competency to stand trial, be sentenced, and also his competency at the time of the offense. As grounds for this motion the undersigned counsel for the Defendant hereby represents to the Court:
>
> 1. The Defendant, FRANK SMITH, was raised from early childhood by his Grandmother, Caldonia Smith, of Tallahassee, Florida. She has informed counsel that the Defendant has suffered from epilepsy all his life and that from time to time he has required treatment for related physical and emotional disorders. She is not sure whether the Defendant has ever received any psychiatric treatment, but she has indicated to counsel that the Defendant has from time to time exhibited bazaar and irrational behavior.
>
> **2.** Conversations with Mr. John Anderson, a close friend of the Defendant revealed that the Defendant is an excessive drinker and that he was drinking to excess on the evening of the alleged homicide. Mr. Anderson further stated to counsel that he thought the Defendant's abuse of alcohol was to the point of emotional illness.
>
> 3. The Defendant informed counsel that he had not ever been treated for any mental or emotional illness. The nature and content of these conversations, however, raised serious questions as to the Defendants competency to understand the seriousness of the charges and to assist in his defense.
>
> **4.** The Penalty Phase under Sec. 921.141 Fla. Stat. (1975) allows evidence upon a conviction of first desree murder in support of the following mitigating

factors:

a) That the capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance;

b) The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law are substantially impaired.

5. Counsel for the Defendant wishes to submit evidence and present argument relating to these mitigating factors in the event that it becomes necessary. The examination and report by a psychiatrist would be indispensable to the presentation of these arguments.

(Record Appendix B(1))(emphasis added). This motion clearly indicates that Judge Padovano believed that only mental health evidence relevant to the statutory mental health mitigating factors would be considered by the jury at the penalty phase.

This understanding is also evident from Judge Padovano's closing argument at the penalty phase of Mr. Smith's trial. That argument focused exclusively on the statutory mitigating factors, repeatedly referring to "these" mitigating circumstances (ROA. 2748, 2749, 2750, 2751, 2757), and attempting to fit the evidence into the statutory criteria. For example, Judge Padovano argued that Mr. Smith's age was a mitigating factor (ROA. 2758)(see Fla. Stat. sec. 921.141(6)(g)); he argued that "the defendant was an accomplice in the offense for which he is to be sentenced, but the offense was committed by another person, and the defendant's participation was relatively minor" (ROA. 2759)(see Fla. Stat. sec. 921.141(6)(d)); he argued that the mitigating factor "that the defendant acted under the extreme duress or under the substantial domination of another person, could apply . . . . [b]ut I don't forcefully argue that mitigating circumstance" (R.

2760)(see Fla. Stat. sec. 921.141(6)(e)); he argued that the mitigating factor "that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired . . . . is another one that sort of comes in . . . in a marginal respect" (R. 2760) because of evidence that Mr. Smith had been smoking marijuana and drinking the night of the offense (R. 2761)(see Fla. Stat. sec. 921.141(6)(f)). The argument clearly reflects that Judge Padovano understood, based on the law then in effect, that mitigating evidence had to be relevant to the statutory factors in order to be considered. This is particularly evident from Judge Padovano's remarks that the substantial domination factor "could apply" and that the capacity to conform factor "sort of comes in . . . in a marginal respect." Since the jury instructions did not include an instruction that the jury was to consider nonstatutory mitigation, Judge Padovano's penalty phase argument (as well as his penalty phase preparations) had to be tailored to the statutory mitigating factors. Under the restrictions imposed by the fact that the jury instructions listed only the statutory mitigating factors, the evidence of domination and of an impaired capacity to conform could only be considered if it was **"substantial",** that is, if it rose to the level of statutory mitigaiton. Of course, had the jury been instructed to consider nonstatutory mitigation, Judge Padovano could and would have argued that such evidence -- as well as evidence of numerous other nonstatutory mitigating facotrs -- could have been independently considered, regardless

of whether it rose to the statutory level, as his affidavit attests. Indeed, as the affidavit demonstrates, in conformity with the prior records of this case, Judge Padovano would have presented a great deal more -- he would have presented distinct mental health and other nonstatutory mitigating factors which then, based on the then-prevalent law, he knew the jury would not be allowed to "give effect." Penry v. Lynaugh, 109 S. Ct. at

Judge Padovano's testimony at the prior Rule 3.850 proceedings in Mr. Smith's case is also consistent with the view evident from the trial record and explained in his affidavit that his efforts to develop mitigation were constrained by the statute and the jury instructions resulting from that statute. At the 1984 evidentiary hearing, Judge Padovano testified, as quoted in his affidavit:

> But at the time I was following the law that was in existence then. I wasn't going to present another -- I guess I could have done it and had Judge Cooksey tell me: No, that's the law. You can't do it.

Judge Padovano's 1984 testimony clearly indicates, consistent with his affidavit, that his view of the law at the time of Mr. Smith's trial was that the list of statutory mitigating factors was what the jury would be allowed to consider. In accordance with this view, Judge Padovano also testified that he consulted a mental health expert at the time of trial because he "knew that a form of diminished capacity or emotional disturbance would have been a good mitigating circumstance. And that was what I was primarily looking for" (1984 Hearing Tr. 69). Judge Padovano's testimony also indicated that he did not even attempt to develop

a wide variety of background information regarding Mr. Smith (Id. at ***76-77, 85-87***), all of which, of course, would have established nonstatutory mitigation.

As Judge Padovano's affidavit explains, he would have developed and presented extensive nonstatutory mitigation had the jury instructions and statute allowed for the consideration of such evidence. There was substantial evidence of nonstatutory mitigation available in this case. For example, absent a purely statutory focus, Judge Padovano could have further developed and would have presented significant nonstatutory mental health evidence such as the following:

> As you requested I have examined Mr. Smith to determine what, if any, mental health related evidence in mitigation of sentence was available for presentation at the time of his capital trial. I examined Mr. Smith for approximately ***6*** hours on November 2, 1989. I interviewed Mr. Smith and administered various psychological tests. Because his history was positive for epilepsy, tests for brain damage were administered as well as tests of intellectual functioning, academic achievement and personality functioning. The tests administered were the Wechsler Adult Intelligence Scales- Revised (WAIS-R); the Wide Range Achievement Test,-Revised, Level 2 (WRAT-R2); the Stroop Color-Word Test (Stroop); Trails A and B; the Canter Background Interference Procedure for the Bender Gestalt (Canter-Bender); the Minnesota Multiphasic Personality Inventory (MMPI); and the Halstead-Reitan neuropsychological battery including the Booklet Categories Test, Speech Sounds Perception, Finger Oscillation, Seashore Rhythm Test and the Tactual Performance Test. In addition, the Reitan-Klove Aphasia Screening test was also administered. I also reviewed various materials concerning Mr. Smith's background and history, including voluminous transcripts, police reports, and other materials from the trials of Mr. Copeland and Mr. Smith.
>
> The report that follows is based on my testing and interview of Mr. Smith, and my examination of the records available on Mr. Smith. The report that follows is also based on 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 neuropsychological tests and teach graduate level courses in the administration, scoring and interpretation of psychological testing. I have been consulted on competency evaluations, insanity evaluations and have served as an expert witness in criminal and civil proceedings. I have served as a consultant for the Office of Disability Determination in the State of Florida and I am currently a consultant for the Georgia Department of Human Resources at a state hospital in Thomasville, Georgia. I am a tenured associate professor of clinical psychology at Florida State University and I am director of the Florida State University Psychology Clinic. Additionally, I am licensed as a psychologist in the States of Florida and Georgia and I am certified as an instructor by the Florida Commission on Criminal Justice Standards and Training.

Interview and Backaround Information

Mr. Smith is a 30 year old black male who has been on Death Row in Florida State Prison since he was about 19 years of age. He was born on August 5, 1959, as was verified by a copy of his birth certificate. Although he was born in Tallahassee he moved to South Florida at approximately two years of age. His mother lived at first with her parents in Tallahassee and then with her husband's parents in South Florida. Eventually his grandmother obtained custody of him and his sister, Jessie Givens and returned to Tallahassee with them.

According to his birth certificate, Frank Smith was born in Tallahassee when his mother was 18 years old. The birth was attended by a midwife and occurred at home. Mr. Smith weighed only 5 pounds at birth and had a **"dent"** in his skull. His mother describes **"spasms"** when he was an infant in which he would shake and his eyes would roll back. She reports that these spasms occurred on many occasions, but that she did not take him to a doctor, but consulted a midwife. In addition, he had a fever of 104 degrees for a week when he was 11 months old. Mr. Smith, Frank's father, who is described as an alcoholic by his wife and by his daughter was physically abusive to his wife throughout their marriage and during the pregnancy. Ms. Edwards reports that he hit her severely in the abdomen when she was pregnant and she believes that his may have caused the dent in Frank's skull. According to Ms. Edwards, Frank Smith Sr., drank on a daily basis and was drunk almost every day. Ms. Givens reports that her father lived in Tallahassee while she and Frank lived there with their grandmother. She reports that he drank "like a fish" and provided alcohol to Frank when he was eleven or twelve years old. She also notes that their

grandmother, Caldonia provided Frank with money to buy alcohol when he was about twelve years old. His drinking was encouraged by his father and by the grandmother as well at an extremely early age.

After having moved to South Florida to live with her husband's family, Ms. Edwards and Frank Smith, Sr., separated. Ms. Edwards left the children with Caldonia Smith, their paternal grandmother. She lived several houses away in a rented room and saw the children as often as she could during this time period. When she wanted to take the children to live with her, the grandmother Caldonia refused to let her have the children and won custody of them in a court proceeding. Ms. Edwards reports that she would sneak around the house to visit her children when Caldonia was out drinking on Saturdays. Eventually, Caldonia moved to Tallahassee with the children and did not tell their mother. Because she did not have any lengthy contact with Frank after he was 4 years old, she was unable to report any further history.

Ms. Given's account of the family history is consistent with that of Ms. Edwards. She also reported that when she and Frank were small, their grandmother, Caldonia, would tell them that their mother did not want them because they were too dark. Mr. Smith holds on to this belief about his mother's view of him until this day. Ms. Givens and Mr. Smith were taught to be afraid of their mother as they had been convinced that she would kidnap them or harm them. Ms. Givens reports that when their mother did come to visit, she and Frank would hide from their mother because of the things that their grandmother had told them. When Ms. Givens was a teenager she sought her mother out and began to have contact with her in the summers. Ms. Givens reported to this examiner that their grandmother at times seemed "psychotic" and was '@emotionallydisturbed". Ms. Givens eventually left her grandmother's home and went to live with other relatives.

Caldonia Smith, the children's paternal grandmother thus had custody of them when they were growing up. Their grandfather died and eventually Caldonia Smith remarried. According to Ms. Givens, Frank's sister, the step-grandfather did not like Frank and basically ignored him. This step-grandfather died while Frank was in prison for an earlier offense. The family situation is described as very poor and as woefully lacking in adequate food and shelter. It is reported that Frank had to steal packages of meat so that the family would have something to eat and that they did not have food "half the time". Ms. Givens remembers eating "pear soup" for days as the pear tree in the backyard was often the only source of food. In addition to the pears

they at times had chicken necks provided by a friend of Caldonia's who worked in a chicken parts factory. Ms. Givens reports that they were the **"junkiest"** kids in school. There was no indoor toilet and no plumbing; there was simply a pipe coming in the side of the house. They did not have adequate bedding and there was virtually no lighting in the house. When Frank came back from the Dozier school for boys he told his sister that he missed it because he had better food and a clean place to sleep while he was there. Prison records state that he lived in **"a** poor family situation".

School records indicate that Frank performed well in oral reading skills at an early age, but had trouble with writing. He is described as "quiet and a little withdrawn". Records from his first four years in school note that he had headaches, poor muscular coordination, was nervous and restless and lacked emotional control. His grades fell as he progressed in school and he dropped out of school in the seventh grade. Affidavits from neighbors indicate that he was not a problem as a child and was not known to be violent.

Although there are few medical records available on Mr. Smith, the records available indicate that he was diagnosed as suffering from grand mal epilepsy and was tested; treatment was attempted, but as his sister notes he received his medication only on a sporadic basis. When he was nine years old hospital records indicate that he was admitted to the hospital with a diagnosis of grand mal epilepsy and acute upper respiratory infection and a high fever. It is reported that he was having convulsions. The records indicate that there were previous admissions and he was described as a "known epileptic". This is consistent with the numerous **"spasms"** described by his mother that likely were seizures. Fever is one of the environmental stimuli that may precipitate a seizure in those with epilepsy. In addition, he was seen by Dr. Brickler in Tallahassee for a seizure disorder. Records from the Tallahassee neurological clinic indicate that he had taken three teaspoons of Phenobarbital a day until **1970** and then took Dilantin until **1974** when he discontinued taking it. According to his sister, Ms. Givens, who is a nurse, he was not given the medication on a regular basis, but only when his grandmother could afford to buy it for him. She also notes that Frank had petit mal seizures as well as grand mal seizures. Ms. Givens reports that Frank was very embarrassed about his seizures and did not want anyone to know about them. His grandmother reports that when he was a child his tongue would come out of his mouth and he would fall on the floor and froth at the mouth. When questioned about the seizures, Mr. Smith plays down his seizures and appears embarrassed about his epilepsy. He does,

though, remember taking medication, but could not recall how much he took, only that it was taken on a sporadic basis. Records from his prison file indicate that in **1976** the prison was informed that he had "severe seizures" and was treated by Drs. Brickler and Anderson of Tallahassee. Other medical records from his prison medical file indicate a history of severe headaches and also indicate that he was injured while boxing at Apalachee Correctional Institution (A.C.I.). It is also indicated in his record that he has other chronic medical problems. Seizure activity is most often the result of trauma to the head and can be caused by birth trauma which can damage neural tissue (such trauma was present in Mr. Smith's case) or even nutritional problems such as vitamin deficiency which can also create neural damage. This is highly likely in this case given the extreme poverty in which Mr. Smith was raised.

As a juvenile he was charged with larceny, vandalism and entering without breaking (with intent to commit a misdemeanor). His juvenile record includes charges of "profanity and indecent language," breaking and entering and violation of probation. He was twice committed to Dozier School for Boys in Marianna once for a period of six months and once for a period of seventh months. Although it is noted several times in his record that he has a juvenile history, none of his juvenile offenses were violent in nature.

His first conviction for a violent offense was a robbery in which Johnny Copeland was his co-defendant. He was sentenced to five years for that offense. Thus, in **1975** when Frank was fifteen years of age he was sentenced to Apalachee Correctional Institution, an adult institution. This may have been due to an error in recording his birthdate; there is correspondence concerning this in his records. There is also correspondence in his prison records indicating that prison officials should be made aware of the fact that he was epileptic. This was his first adult offense. Records from that incarceration reveal that he was referred for the Alcoholics Anonymous program. He admitted that he has had a drinking problem and began drinking around age eleven. Probation and parole reports prior to his incarceration also indicated that he drank very heavily. He also has disciplinary infractions in his record for having alcoholic beverages in his cell. The records from this early incarceration describe him as immature. He was described as **"immature** and very easily influenced"; this was indicated as the probable reason for his involvement in the offense which also involved Mr. Copeland. His interaction with Mr. Copeland seemed similar to that described by high school teachers in

that Mr. Copeland was described as the leader. His reading level at the time was only fifth grade which prevented him from taking an MMPI. His psychological screening report noted that he was nervous and quiet and that his "judgement was **impaired"** at the time of the incident. Another psychological screening report completed when he was **18** indicates that he considered himself an alcoholic and often felt **"miserable".** He took up boxing while he was in prison and records indicate that at least on one occasion he was hit in the head hard enough to require medical attention. In an inmate performance report filled out by his work supervisor after being transferred to the De Soto Correctional Institution he is described as "having the proper respect for authority and for institutional rules and regulations. He has no problems concerning any disciplinary matter." Another officer reported, **"** He likes to play around-will stop when told. I have never had any problems with this inmate". He did not do as well in school and made below average progress. Reports from his dormitory officer indicated that he was well adjusted and got along well with officers and inmates. There are reports from some officers that he was a problem for them just as there are reports indicating that he was no problem.

One of his main problems seemed to come in the school setting. His difficulty in adjusting in some settings may well have been due to his youth and disabilities. Records from Avon Park Correctional Institution indicate that his adjustment was better, as was his attitude, and that he had **"matured".** His earlier inconsistent behavior may well have been due to his immaturity. At **15** years of age he would have clearly been younger than most of the inmates at the adult institutions to which he was sent. He was also small in stature as is evidenced by his prison records. Even upon his re admission to prison in **1979** he was described as "youthful in appearance and just looks like a kid".

Frank believes that because of his experiences in prison, he became a homosexual. After his release from prison in **1978,** Mr. Smith returned to Tallahassee to live with his grandmother who was now widowed. His sister had left their grandmother's home when she was approximately **16** years of age. His grandmother was essentially the only relative he was in contact with as is true today and he has a great affection for her. However, his grandmother was not a good influence. He eventually moved in with a man, who supported him. His sister reports having met the man and corroborates that this man, who was older, had a homosexual relationship with Frank and for a time was his sole support. At the time of the present offense, Frank was living with and

was supported by this man, John Anderson. In addition to this, Frank also reports having homosexual encounters when he was approximately 14 years of age. He was seduced by a man whose lawn he mowed. Although little is known about this incident the man was discharged from his job at Florida Agricultural and Mechanical University under unfavorable circumstances.

Shortly after his release he was arrested again on this offense. The crime for which he is now incarcerated also involved Johnny Copeland and also involved alcohol consumption as did the 1975 offense. When involved in the previous crime with Mr. Copeland, Frank stated that he did what his friend asked and, consistent with that, the earlier prison records indicate that he was easily influenced and immature. Having spent most of his adolescence in prison, he had very few of the experiences that would have helped him mature in a reasonable way. His participation in the current offense is sadly similar to the previous offense involving Mr. Copeland. As before, Mr. Smith states that he went along with Mr. Copeland. One of his co-defendants, Victor Hall, had known Frank since childhood and described him in an affidavit as soft-spoken and nonviolent, much like he is described in his school records. But, he described Mr. Copeland as violent; it was in fact argued at Mr. Copeland's trial that he was the person who pulled the trigger causing the victim's death. The state attorney argued in his closing that Johnny Copeland murdered Sheila Porter; he stated "...it's Johnny Copeland that did it". He also stated that "Johnny Copeland is the man who kidnapped Sheila Porter. Johnny Copeland is the man who raped Sheila Porter and Johnny Copeland is the man who senselessly and brutally murdered, and 'murder' is too good a word." This is consistent with Mr. Smith's version that Mr. Copeland was the ringleader.

Both Mr. Hall and others described Mr. Smith as the kind of person who helped elderly people in the neighborhood. Coaches and teachers at Fairview Middle School where both Frank Smith and Johnny Copeland attended school described Mr. Copeland as the ringleader; Johnny Copeland was described as taking the "leading role in all the problems observed that was so often caused by them at school". Mr. Hall has stated that on the night of the murder all three co-defendants, Mr. Smith, Mr. Copeland and he were drinking and smoking marijuana. As Mr. Hall reports and as Mr. Smith reports, Mr. Copeland knew the victim and had gone to high school with her; she did not know either of the other co-defendants. Mr. Smith's reports are basically consistent with Mr. Hall's reports of the incident; they were drinking and smoking marijauna. Mr. Smith appears to have been the follower, consistent

with his earlier history.

His current prison medical file indicates a long history of headaches, some of them lasting for days and other problems including chronic diarrhea and skin problems including lesions and a rash. Because he is a homosexual and reported that he had sex with a high risk partner he has been tested for AIDS. His most recent blood test indicates that he is positive to **"P24".** It is noted that this may represent a false negative or reactivity as a person progresses from an asymptomatic state.

Interview and Behavioral Observations

Mr. Smith was cooperative throughout the interview and put considerable effort into the testing as he was concerned that I and others not think that he was **"slow"".** He was neatly groomed and looked younger than his stated age of 30 years. Although he attempted to give a family history and background data, he was unaware of many things that had occurred in his family because his grandmother had allowed him no contact with his mother. His father eventually moved to Tallahassee, but he did not have much contact with him either until he was approximately twelve years of age. When questioned as to why he was sent to live with his grandmother, he reports that his mother had a "thing about skin color" and that he was described as looking like a "fly in clabber" because he had a darker complexion than his brothers and sisters. He reports that a half brother, Andrew, lived with his maternal grandmother. Although his sister reports that their grandmother did indeed tell them this, it appears not to have been based in reality but instead to have been a way of keeping the children away from their natural mother. Frank believes that Caldonia was the only person who ever loved him. Although he was close to his sister when they were younger she eventually left and stayed with an uncle in Pompano Beach. In the absence of any other knowledge or contact with the rest of the family, he believed whatever his grandmother told him about his mother. Frank reported that the house was not modernized and that they lived like **"sharecroppers".** He noted that before his grandfather had died they had lived a much better life and reports a comfortable existence that ended suddenly when he was a small child. As Ms. Givens pointed out, their grandmother had never supported herself and did not know what to do. The conditions under which Mr. Smith lived as a child were abysmal. He was lacking in all basic necessities and was supplied with alcohol by the people who should have been safeguarding his well being, but because of their own problems were unable to provide any semblance of guidance at home.

He wishes to appear healthy and normal. Even though epilepsy is documented in his records, he tries to minimize this history. He appears to be ashamed of having epilepsy. He is willing to admit to having convulsions and states that he had **"spells".** He reports that he dropped out of school in 7th grade, but that he received his G.E.D. in 1981. He has a long history of drinking dating back to age eleven or twelve. This is consistent with reports from his sister. He was sent to the Dozier school for boys on two occasions and at the age of 15 was sent to an adult prison, Apalachee Correctional Institution (A.C.I.) He reports that while he was there he became involved in homosexual activities. He was consistently homosexual after he was released from A.C.I. and was living with a man who provided support for him. His sister corroborates this and reports that this older man, John Anderson was her brother's lover.

When questioned about the crime for which he is now incarcerated, Mr. Smith reports that he was drinking quite heavily on the night of the offense. He reports that they had a quart of gin, some 7-UP and part of a pint of Southern Comfort. He adamantly denies having had intercourse with victim and points out that he has been exclusively homosexual for almost all of his life. He also reports that he attempted to stop Johnny Copeland from killing the woman but was unable to do so. He reported that it was Johnny Copeland's gun that was used in the shooting. His account is consistent with the arguments presented by the state attorney at Mr. Copeland's trial and with many of the transcripts of Mr. Smith's trial.

Test Data

Intelligence testing reveals Mr. Smith to be functioning in the low average range of intellectual functioning. His Full Scale I.Q. was 86, placing him in the ow average range of intelligence. This places him at approximately the 16th percentile. In other words, approximately 16% of the population functions at the same or lower classification. Of note in his test results is the difference between his verbal and performance abilities. His Verbal I.Q. was 91 (average range of intellectual functioning) while his Performance I.Q. was 85 (low average range of intellectual functioning). His lowest Performance subtest score was on the Digit Symbol subtest which is the subtest most sensitive to brain damage. He performs most poorly on tests requiring the ability to visualize spatial relations, use visual memory and use visual motor coordination. He also performs very poorly on a subtest of arithmetic skills; it is in fact his lowest

overall subtest on the WAIS-R. This subtest is also likely to be lowered in cases of brain damage. His scores remain in the normal range on those subtests least likely to be effected by brain damage. On the Performance subtests his highest score was on a test that is not likely to be effected by brain damage. The difference between his Verbal and Performance scores suggests that there may be right hemisphere damage.

On a test of achievement, the WRAT-R Level 2, Mr. Smith performed very poorly on the Arithmetic subtest, consistent with his performance on the WAIS-R subtest of arithmetic abilities. His score, which places him at the 14th percentile has a grade equivalent of approximately 6th grade. While this is not far below his education level of approximately seventh grade, it is much lower than the scores he achieved on the other subtests of achievement. It is congruent, though, with his performance on the arithmetic subtest of the WAIS-R and is consistent with his earlier prison records indicating that **"computations"** were his lowest area of academic functioning (grade level of 3.7 in **1975).** On a subtest of reading recognition he received a grade equivalent of 11th grade; this indicates only his ability to recognize words, not comprehend. His percentile rank on this test was at the 27th percentile when compared to others his age. His score on a spelling subtest was at the 68th percentile which places him above 12th grade level in terms of a grade equivalent. His reading score is clearly improved since his earlier incarceration; he obviously improved himself considerably during his years of incarceration. He takes great pride in this accomplishment and noted that he was going to look up the words he missed when he got back to his cell.

On tests designed to assess brain damage or organicity, Mr. Smith's scores fell within the brain damaged range. On the Halstead Reitan, he received an impairment index of .7. This falls into the moderate range of brain impairment. His score on the Booklet Categories test is in the brain damaged range and is lower than what would be expected given his performance I.Q. Because performance I.Q. and performance on the categories tests are correlated it is possible to compare performance. Mr. Smith makes many more errors than would be expected given his Performance I.Q.

His scores on the Finger Oscillation subtest are also indicative of brain dysfunction and are supportive of right hemisphere damage. There is more than a **10%** differential between his right and left hands, with his left hand being poorer than would be expected, thus indicating damage contralateral to the non-dominant hand.

His performance on the **TPT,** another subtest of the Halstead Reitan is also indicative of brain damage and once again points to right hemisphere damage. His non-dominant hand (left) is more impaired than is expected, thus indicating a problem with the contralateral hemisphere. His localization score, which is one of the most sensitive indicators of brain damage is also poor. His overall score is also within the brain damaged range. His overall score is poor and is suggestive of interference from his nondominant hand.

On the Canter Bender, Mr. Smith shows signs of brain damage, which is also indicative of a right hemisphere localization. His performance on the Reitan-Klove Aphasia screening test was within normal limits. Scores on both the Seashore Rhythm test and on the Speech Sounds Perception tests are within the brain damaged range, but do not offer any additional information about laterality. On the Stroop Color-Word test, Mr. Smith displays a pattern of results that are also consistent with brain damage and may be indicative of a right side or frontal lobe problem.

Overall, test results are indicative of diffuse brain damage, most likely lateralized to the right hemisphere. It appears to be long standing in nature and chronic. It is consistent with his history of alcohol abuse and with the sister's report of a head injury at birth and the subsequent seizure disorder (epilepsy) which is most likely the result of the trauma to his head that was apparent at birth. It congruent with his history of seizures and his diagnosis of grand mal epilepsy and reports that he suffered from petit mal seizures. His drinking and drug use would have exacerbated any problems occurring from his head trauma and epilepsy and would have only added to his problems. People with organic brain dysfunction and epilepsy are more susceptible to the effects of alcohol and drugs than are those without such problems. In addition, the early age at which he began drinking and the period of time over which he continued to drink in a **"heavy"** fashion would also contribute to the organic brain damage itself.

His **MMPI** configuration is indicative of an individual who has schizoid and depressive features. They generally have poor education and work histories and subtle problems in communication. They typically have come from homes with serious conflict and learned to view others as rejecting and dangerous and may have learned to strike out to protect themselves. His profile also indicates severe problems with his family. Many patients with this profile are diagnosed as schizoid or borderline personality disorders. In

addition, Mr. Smith's profile indicates that he is depressed, which is common in alcoholics, and that he may have an extreme need for affection and attention. Such individuals are emotionally labile, meaning they have fluctuating affect. When people with such profiles commit crimes they are generally poorly planned and executed. This profile is also common in alcoholics. In people with this profile their acting out behavior is often associated with the use of alcohol.

In summary, results of testing indicate that Mr. Smith suffers from diffuse brain damage, with the damage most probably lateralized to the right side of his brain. Results of a personality test indicate that he has some signs of mental illness and that these are consistent with his background and upbringing. Symptoms such as emotional lability and poor judgement that appeared on the personality test are also consistent with the diagnosis of brain damage. He functions in the low average range of intelligence but has improved his verbal skills considerably over the years.

Summary

Mr. Smith is a 30 year old man with a history of epilepsy and alcohol and drug abuse. He has a history of childhood deprivation including malnourishment, lack of adequate parenting, inadequate clothing and shelter and lack of medication for his medical needs, the appropriate medication for his epilepsy. He scores in the low average range on tests of intelligence and displays definite problems on tests designed to measure brain damage. There is a noticeable difference in his verbal and performance I.Q. scores. The results of the testing are consistent with his history of alcohol abuse. Although many alcoholics do not have decreased overall intelligence scores, many have specific deficits in problem solving, abstract thinking, psychomotor performance and concept shifting. Such deficits become apparent on neuropsychological testing. His improvement in his verbal skills is not surprising as many alcoholics show some improvement in cognitive skills after a period of abstinence, but exhibit only modest improvements in brain functioning. Given that right hemisphere functions are more susceptible to brain dysfunction, it is not surprising that his improvement came on the verbal portions of the intelligence scales rather than on the performance items. His history of epilepsy is also contributive. It appears that since infancy he suffered from epileptic seizures. He was noted to have been born with a "dent" in his skull and with an area of his head that was discolored and appeared to be the color of blood. In addition, he has a history of severe headaches and also has a history of boxing. Constant blows to the head, as

occur with boxing, also damage the brain. Repeated head trauma, alcohol abuse and a history of epilepsy are indicative of brain dysfunction. Seizure activity is most often the result of head trauma.

There is in fact some evidence that suggests that those with cognitive deficits of the sort Mr. Smith displayed in school may be more at risk for alcoholism. Mr. Smith suffered not only from the effects of a birth injury, but the later effects of alcoholism caused by the toxic effects of alcohol on the brain, the effects of poor nutrition and craniocerebral trauma suffered indirectly as a result of alcohol abuse. Minor physical anamolies present at birth have also been associated with later behavior problems; Mr. Smith is reported to have been born with a **"dent"** in his skull and a discolored area and his mother was reported to have been attacked while pregnant with Mr. Smith. This trauma may have been the cause of his epilepsy as head trauma is the most frequent cause of seizure disorders. Alcohol has causative factors of both genetics and environment and leads to psychological and behavioral problems such as depression, employment difficulties and interpersonal difficulties. As was noted earlier, his father was an alcoholic and provided alcohol to Mr. Smith while he was in his youth as did his grandmother. Chronic and excessive use of alcohol may lead to temporal lobe dysfunction which may in turn contribute to violent behavior. The combination of alcohol and marijuana used by Mr. Smith on the night of the offense would have had additive effects and would have effected his judgement, his reasoning and his ability to control his behavior. Given that people with brain damage and epilepsy are even more susceptible to the effects of alcohol, Mr. Smith's behavior would have been even more seriously impaired.

Mitigating Circumstances

As you requested, I examined Mr. Smith in regard to possible mitigating circumstances in the mental health area. Such factors exist in Mr. Smith's case, on the basis of his background and history and in regard to his level of functioning at the time of the offense.

Given Mr. Smith's brain dysfunction, epilepsy, alcoholism and other mental health problems he could easily be described as suffering from a mental disturbance at the time of the offense. He has low average intelligence and displays obvious signs of brain damage on neuropsychological testing and on the pattern of results displayed on his intelligence testing. He has epilepsy. He has a history of alcoholism from an extremely early age and blows to the head as a result of boxing. There is a family history

of alcoholism; children of alcoholics are at higher risk for alcoholism. Closed head injuries such as those that occur in boxing may lead to frontal lobe damage which in turn leads to a loss of inhibition and behavioral control. Coupled with his history of epilepsy and drinking this could only serve to compound his problems. While his intelligence remains in the low average range this is not contraindicative of brain damage as measures of global intelligence will not necessarily reflect the effects of head injuries because the head injury does not directly create intelligence deficits but causes problems in a broader range of skills such as concept formation and information processing.

Given his history of epilepsy, brain damage and alcoholism it is unlikely that he could have been a leader in the situation in which he found himself. His prison records before this incident indicate that he was easily led and had no doubt been led into the previous crime which also had Johnny Copeland as a co-defendant. In addition, Mr. Smith is very small in stature. His prison records before and after the offense describe him as small in stature and as looking just like a kid. In addition, teachers from his middle school who were familiar with both he and Johnny Copeland describe Mr. Copeland as the leader of the two. His history is such that he was always with older and/or more dominating figures.

His ability to reason, his judgement and his mental capacities would have been impaired on the evening of the offense. He had been drinking and had a history of cerebral dysfunction which makes him even more susceptible to the effects of alcohol.

In addition to his neuropsychological deficits, psychological problems, alcoholism and general immaturity due to his age (18), background and his lack of adequate experience that would have helped him mature, he was raised and lived in conditions of abject poverty. There was not adequate food or clothing and the shelter provided was minimal. There is a history of severe poverty, malnourishment and general deprivation. He was not provided with the medication he required for his epilepsy. In addition he was raised to believe that he was unwanted by his mother because he was "too dark". Conditions at home were so bad, that he told his sister that he preferred to be in the juvenile home for boys because there was better food and a bed to sleep in while he was there. While he believed that his grandmother loved him he was raised to believe that he was unwanted by his mother. Additionally, both his grandmother and his father provided him with alcohol even before he had reached adolescence and were unable

to provide him with appropriate parenting. He clearly was deprived of any normal upbringing in both a physical an emotional sense. This deprivation obviously effected his childhood and his later functioning.

(Record Appendix A (2))(Psychological Evaluation by Dr. Joyce L. Carbonell).

Judge Padovano also could and would have provided the jury compelling mental health evidence such as the following:

> My name is Robert T.M. Phillips. I am a physician specializing in psychiatry, licensed to practice medicine and surgery in the State of Connecticut. I am an Assistant Clinical Professor of Psychiatry in the Law and Psychiatry Division of the Yale University School of Medicine. I also currently serve as Director of Forensic Services for the State of Connecticut Department of Mental Health, and as the Chief Executive Officer of the Whiting Forensic Institute.
>
> I received a Bachelor of Science Degree cum laude in in Biology and Psychology from Boston College; a Master of Education, Administration, Planning and Public Psychology from Harvard University; Advanced Graduate Studies in Basic Medical Sciences from Tufts University School of Medicine; Doctor of Philosophy in Science Education from the University of Iowa; and Doctor of Medicine from the Mayo Medical School, Subinternship Training at the College of Physicians and Surgeons of Columbia University and the New York University School of Medicine. I served my Internship at the Mayo Clinic and completed a General Residency in Psychiatry at the Yale University School of Medicine, where I also served as Chief Resident in Psychiatry.
>
> I possess considerable expertise in the field of forensic psychiatry, having been responsible for numerous forensic evaluations of individuals referred for assessment of competency to stand trial, presentencing psychiatric examinations, and psychiatric evaluations on the questions of criminal responsibility and/or sanity. I have often provided both oral and written testimony in probate court, superior court, both civil and criminal, and U.S. District Court. I have been qualified as an expert witness in such court appearances. I have also been qualified as an expert witness in the State of Florida.
>
> In 1987 I was appointed by the National Institute of Mental Health to serve as a member of the Ad Hoc Forensic Advisory Panel at the request of the U.S. Department of Justice. The Panel was charged with

examining the policies and procedures of the St. Elizabeth Hospital pursuant to problems arising from the Easter pass application of Mr. John Hinckley.

Within the field of Psychiatry I am currently Chairman of the National Medical Association Section on Psychiatry and Behavioral Sciences and Vice Chairman of the State Mental Health Forensic Directors Division of the National Association of State Mental Health Program Directors. I have recently been nominated as a Counselor to the Tri-State Chapter of the American Academy of Psychiatry and the Law. A detailed list of my publications and presentations within the field of psychiatry are contained in the attached curriculum vitae.

At the request of his counsel, I examined Mr. Frank Elijah Smith, Jr., a 30-year-old, single, Black male, who currently stands before the Supreme Court of the State of Florida on appeal from a capital felony conviction for which a sentence of death was imposed. My examination of Mr. Smith was conducted at the Florida State Prison, Starke, Florida, on Friday, January 12, 1990, for a period of approximately six hours. I have also conducted a general physical and neurological examination of Mr. Smith. Additionally, I have reviewed Mr. Smith's life history as reported in voluminous medical, social, judicial and educational documents provided to me by the Office of the Capital Collateral Representative. Included among these documents are:

1) Florida Supreme Court Opinion #57,743, Frank Smith v the State of Florida, dated 10/28/82.

2) Statement of Frank E. Smith to the Wakulla County Sheriffs Department, dated 12/15/78.

3) Statement of Frank E. Smith to the Wakulla County Sheriffs Department, dated 12/18/78.

4) Transcript of Suppression Proceedings before the Honorable Cooksey Circuit Judge, held at the Wakulla County Courthouse, Crawfordville, Florida, on April 16 and 17, 1979, in re: State of Florida v Johnny Copeland, Victor Hall, Frank Smith, Jr., defendants.

5 Trial testimony of Victor O'Hara Hall (co-defendant).

6) Transcript of penalty phase of trial in re: State of Florida v Frank Smith, 9/10/79.

7) Judgment and sentence rendered by the Honorable

Kenneth E. Cooksey in re: State of Florida v Frank Smith, rendered September 10, 1979.

8) Florida State Prison inmate records.

9) Motion to vacate judgment and sentence dated 10/8/84.

10) Appendix to motion to vacate judgment and sentence.

11) Motion to vacate judgment and sentence with special request for leave to amend, dated 7/31/89.

12) Sentencing order, State of Florida v Johnny Copeland, dated September 10, 1979.

13) Florida Supreme Court opinion, Copeland v State, rendered 11/15/84.

14) Hearing on motion for post-conviction relief and a stay pending decision and other motions in re: State of Florida v Frank Smith, dated 10/8/84; hearing on motions dated 10/9/84.

15) Affidavit of Ollie Edwards signed and notarized January 17, 1990.

In addition to the above-referenced materials, I have consulted with Joyce Lynn Carbonell, Ph.D., a clinical psychologist licensed to practice in the State of Florida, and considered the results of Dr. Carbonell's psychological and neuropsychological testing regarding Mr. Smith. Subsequently I have had an opportunity to review in detail Dr. Carbonell's comprehensive psychological evaluation of January 17, 1990.

Based upon my examination, my interview with Billie H. Nolas and Julie Naylor, attorneys for Mr. Smith, Investigator Donna Harris, and my detailed review of the documented life history and reports provided to me as described, it is my professional opinion that Mr. Frank Elijah Smith, Jr., is a man of average to low-average general intellectual functioning, who possesses concurrent deficits in adaptive functioning that render him less effective in meeting the standards expected for his age range in areas such as social skills and responsibility, daily living skills, personal independence and self sufficiency. Today, Mr. Smith is able to rather remarkably overcompensate for his intellectual deficits by his engaging communicative style. This is, however, little more than a veneer, beneath which lie profound deficits in intellectual functioning consistent with those found in individuals who are diagnosed as having brain damage. Supportive

clinical evidence of Mr. Smith's brain dysfunction is a longstanding documented history of epilepsy. In addition, in my professional medical judgment, Mr. Smith has a history of childhood deprivation with poor parental relationships which have substantively contributed to a personality organization which renders him quite in effective in meeting the standards expected for his age.

As a result of my examination and review of the aforementioned material, I am of the opinion, within a reasonable degree of medical certainty, that Mr. Frank Elijah Smith, Jr., has a diminished mental and emotional capacity which would be considered a significant deviation from the capacity held by a person of normal average mental ability and character organization. Additionally, I am of the opinion, within a reasonable degree of medical certainty, that at the time of the offense Mr. Smith's actions and behaviors were effected by the mental health impairments discussed in this report.

The findings upon which I base these conclusions are the following:

Identifying Data: Mr. Frank Elijah Smith, Jr., is a 30-year-old, single, Black male who has been tried, convicted and found guilty of the charges of murder in the first degree, robbery with a firearm, kidnapping, and sexual battery, for which on September 10, 1979, he was sentenced to death, on the first count with life sentences pronounced in counts two through four, to run consecutive to the sentence pronounced on count one.

Mr. Smith presented for examination in a maximum security area of the Florida State Prison where he has been a resident on Death Row since the age of 19. Mr. Smith was well groomed and dressed neatly in state-issued clothing, and was cooperative throughout the examination.

Personal and Family History: The personal and family history of Mr. Smith is well detailed in other documents which have been filed with the court. I will, for the purpose of brevity, review only the pertinent highlights of that history which are relevant to my opinion.

Mr. Smith was born on August 5, 1959, to Frank Smith, Sr., and Ollie May Edwards. Ms. Edwards was approximately 17 years of age when she became pregnant with Frank Elijah Smith, Jr. She describes a difficult pregnancy, during which she was regularly physically abused by her husband who frequently hit her about the face and body, using his hands, sticks, shoes and belt

buckles. Their arguments appeared to be habitual, generally centered around his unemployment and financial difficulty. At birth he is noted to have had an area of discoloration on his skull, possibly a cranial depression, and had a birth weight of approximately five pounds. During Mr. Smith's first year of life he is described as having several episodes of **"spasms"** in which he would shake profusely, his eyes would roll back and he would subsequently go limp. He was not brought to the attention of medical professionals at the time, other than a midwife, who informed the mother that he would be alright. Frank Elijah is the second of two siblings born of this union, his older sister, Jessie, is one year his senior. In addition to his natural sibling, an older stepbrother, Andrew (born to Ollie May from a prior marriage), two years Frank's senior, also resided in the household. Due to continuing physical abuse and nonsupport of the family by Mr. Smith's father, when Frank was four years of age Mrs. Smith apparently left her children with the paternal grandparents and sought employment in the Tallahassee area. When she became financially established she returned for her family; the paternal grandmother, Caledonia Smith, refused to let her have the children and subsequently was awarded custody of the children by the Florida courts, apparently because the mother was found not fit to have custody of the children.

Frank Elijah Smith, Jr., subsequently had little contact with his natural mother. He describes being raised by his grandparents with fond recollections until the death of his grandfather in the mid 1960's. It should be noted that Mr. Smith's presentation of his family history greatly understates the level of neglect, abuse, and deprivation reflected by other records and by the accounts of other family members. Even today, Mr. Smith has a great deal of affect on his family. Subsequent to the death of the grandfather, Mr. Smith's grandmother was unable to maintain the standard of living to which they had become accustomed, necessitating a move to the "other side of town." Mr. Smith describes that period of life as having been a devastating shock to him. The family circumstance was very poor and there was frequently a lack of food in the home, in response to which Frank would frequently steal packages of meat and other foodstuffs so that "there would be dinner on the table." He recalls being poorly dressed for school, often going hungry, and even at that early age, "feeling depressed."

Mr. Smith attended the Bond Elementary School and the Fairview and Oakridge Middle Schools, in the Tallahassee area. His self report is that of being an **"A"** student until approximately the fifth grade, when

school atmosphere changed by his description and a modular, open school system was employed. School records are much less complimentary than Mr. Smith's self report. Although he seemed to perform well in oral reading skills in the early school years, as he progressed academically he had a more demonstrable difficulty with written language. His school records document "headaches, poor muscle coordination," and describe him as "nervous and restless and lacking emotional control." At some time during the repeat of the seventh grade Mr. Smith dropped out of school. Additionally, former school teachers and a coach who had Mr. Smith and Mr. Johnny Copeland under their supervision reported that Mr. Smith was behaviorally a follower and Mr. Copeland was the leader.

Mr. Smith's father subsequently returned to the Tallahassee area and took up residence with his mother, who had remarried. Although Frank, Jr., has a rather idealized memory of his father and grandmother, it is important to note that other family members indicate that his father would supply him with wine to drink, and his grandmother would give him money to purchase alcohol. By his own report, he began alcohol use at the age of eleven and the smoking of marijuana by age twelve. Now out of school, he began to spend the majority of his time in the street. His alcohol and drug intake became quite persistent and considerable.

Criminal History: Mr. Smith's first offense was in **1972** at the age of eleven, when he received six months probation for stealing a jack from the dumpster of a gasoline station. He was with a group of boys, one of whom took the jack. All the boys involved were placed on probation. The remainder of his juvenile record is reflective of larceny, vandalism, entering without breaking, profanity and indecent language, breaking and entering with intent to commit a felony, and violation of probation. He also reports that on a dare he "stole a dump truck to impress the guys." He has a history of two commitments to Dozier School for Boys in Marianna, Florida, for six and seven month periods, respectively, related on his account to breaking and entry. In **1975**, at the age of **15**, he pled nolo contendere to the robbery of a convenience store in which Johnny Copeland, a co-defendant in the current matter before the court, was also involved. By Mr. Smith's description, it was Mr. Copeland who perpetrated the robbery. As a result of his conviction he was erroneously sent to the Apalachee Correctional Institution (an adult facility), as opposed to a juvenile facility. At the time Mr. Smith was 15 years of age. In September **1976**, Mr. Smith was transferred to the Desoto Correctional Institution and placed in confinement and transferred to Avon Park. On September

1, 1978 he was released, having served four years and eight days on a five-year sentence.

During his incarceration Mr. Smith took up boxing. This is confirmed by records. Approximately two months after his parole he asked his probation officer if he could be relocated to Tampa, in order to secure a license to box and attempt to earn a livelihood in the sport. Mr. Smith reports he was denied that request. Approximately one month later, on the night of Tuesday, December 12, 1978, Mr. Smith was implicated in the activities which ultimately led to his conviction for the capital felony of first degree murder.

Past Medical History: Mr. Smith has a history of seizures which appear to have had the initial onset within the first year of life and were recurrent throughout his childhood. Records reflect that Mr. Smith was taken for treatment during his youth because of his seizures. He was treated and tested for epilepsy and brain dysfunction. At the age of nine he was admitted to a hospital amidst convulsions, at which point he was formally diagnosed as having grand mal epilepsy. Records indicate that treatment recommendations included pediatric Phenobarbitel Suspension, 1 tsp t.i.d., until approximately 1970 when he was switched to Dilantin. Throughout the course of his medication regimen, his compliance was significantly impaired by the inability of his grandmother to purchase and provide him with his medication. His sister reports that because of the family's poverty, the grandmother could not afford to purchase prescribed medication, and therefore Mr. Smith did not regularly receive the medication. Ultimately, he discontinued taking his Dilantin in 1974. There is an additional reported history by family of recurrent seizures which would be consistent with a diagnosis of petit mal epilepsy, in addition to his grand mal episodes. It is noteworthy that Mr. Smith seems particularly embarrassed about his epilepsy and greatly minimizes his condition. In his words, "I didn't have seizures, I just used to get upset and shake a lot." He also has a prior history of syphilis which was treated with Penicillin in 1979. He also gives a history of having gonorrhea in 1976, subsequent to his first homosexual experience. In March 1989 Mr. Smith underwent serologic laboratory evaluation which raised serious clinical questions about the presence of A.I.D.S. Although his HTLV III and Western Blot results were negative, his P 24 banding studies were positive. Positive P 24 banding studies in the presence of negative HTLV III and Western Blot studies may be indicative of HIV infection. The former studies may lag fourteen months behind actual HIV infection. There is a direct correlation between P 24 antigenemia

and the severity of clinical complications of developing HIV infection. As the disease progresses, persons with A.I.D.S. lose the antibodies represented in the P 24 assay, therefore, proper evaluation and monitoring of HIV status in Mr. Smith is essential in confirming a diagnosis of A.I.D.S. Further testing a the appropriate clinical intervals and consultation with a physician specializing in infectious disease is therefore indicated.

Sexual History: Mr. Smith describes himself as being bisexual, with strong homosexual preferences. His first sexual experience was at age eleven and was heterosexual. His first homosexual experience occurred at approximately age twelve, subsequent to his seduction by a university professor whose lawn he moved. Mr. Smith relates a scenario of three encounters with this individual in which he was the subject of nude photograph taking and ultimately the filming of his performing sexual acts with a female. Mr. Smith has had a number of homosexual encounters during the early years of his incarceration, at which time he contracted venereal disease.

Alcohol and Drug History: As noted, Mr. Smith began abusing alcohol at age eleven and at the height of his abuse consumed an average of a pint to a fifth of alcohol per day. In addition to alcohol, Mr. Smith began abusing marijuana regularly in large amounts, in combination with his alcohol abuse. Probation and parole reports prior to his incarceration corroborate his heavy alcohol consumption. His prison record reflects disciplinary infractions for having alcoholic beverages in his cell. Mr. Smith denies prescription drug abuse beyond an early period of experimentation and frankly denies cocaine or heroin abuse.

Physical Examination: Mr. Smith stands 5'10" tall and weighs approximately 130 pounds. Right brachial blood pressure read 120/80, pulse 70, respirations 18 per minute.

HEENT:	Mr. Smith is normocephalic. His pupils are equal and reactive to light stimuli. Auditory canals are clear and the tympanic membranes are visible and intact. His nasal passages are clear bilaterally. His throat is supple and without noteable masses present.
Respiratory:	Lungs are clear anterior to posterior, breath sounds are

	essentially normal throughout lung fields, however, there is some faint emphysematous change which can be auscultated posteriorally. Mr. Smith does have a history of cigarette and marijuana smoking, heavy in the past but now he estimates his cigarette smoking to be approximately one pack every other day.
Cardiovascular:	Pulses are equal and palpable throughout the vascular system. No murmurs or bruits are audible. Heart sounds are audible throughout the precordium and PMI is in the fifth intracostal space, without noteable abnormality. Normal sinus rhythm is noted.
Abdomen:	Supple and without tenderness. No masses noted.
Genitorectal:	Deferred.
Musculoskeletal:	Musculature is well developed and within normal limits. There is no evidence of atrophy or skeletal malformation. Full range of motion of limbs, joints and spine.
Neurological:	Cranial nerves II through XII are intact. Visual acuity not tested by refraction but otherwise intact by gross vision and ability to read printed matter. Reflexes are equal and reactive bilaterally. Negative Babinski. Negative Romberg. Gait normal as tested. Sensorium intact.
Mental Status:	(1) Amearance-Mr. Smith looks younger than his chronological age of 30. As stated previously, he is neat and well groomed, clad in state issued clothing at examination.

(2) Behavior-Mr. Smith was appropriate to circumstance throughout the interview. He maintained excellent eye contact throughout the examination. His posture was erect and emitted an aura of wanting to appear "in control" which I believe to be illustrative of his idiosyncratic mannerism and character.

(3) Speech-Mr. Smith demonstrated a very mild degree of retardation in the rate of his speech, suggestive of a mild underlying depressive process, but also consistent with an individual who is extremely cautious and reflective about the selection of his words, using vocabulary appropriately but clearly in an attempt to impress the examiner with his knowledge, which is consistent with his presentation at interview.

(4) Thousht Process-Mr. Smith's thought process appeared appropriate.

(5) Thousht Content-Mr. Smith was without any delusions, ideas of reference, suicidal or homicidal thoughts at the time of interview.

(6) Perception-Mr. Smith was without any hallucinatory experiences, i.e. false perceptions without any sensory stimuli, either historically or at the time of interview. Mr. Smith had no misperceptions with regard to his current legal status and what potential outcomes were, given the stage of his sentence appeal. He labors under misconceptions about his upbringing and family, believing for example, that his mother did not want him

because he was "too dark" and minimizing the extent of his epilepsy.

(7) Emotional Expression-Mr. Smith's mood, that is the feeling and tone experienced internally, appeared to be subdued and somewhat depressed. This is in part, I believe, a reflection both of his current life circumstance and situation, in addition to a dampening of mood secondary to his personality organization.

Mr. Smith's affect, that is his outward manifestation of feelings, appeared constricted. A constricted affect is consistent with an individual who has difficulty expressing himself openly toward others. Such affect can be easily misinterpreted on one extreme as disinterest, or on the other end of the spectrum, understood in the context of emotion expressions consistent with a degree of organic brain dysfunction.

(8) Sensorium and Cosnitive Functioning-These assessments are useful in differentiating functional (psychiatric disturbances) from organic (medical) illness.

Orientation-Mr. Smith was oriented to person, place and time.

Memory-Mr. Smith had a solid recall of recent and remote events. He could repeat four of four objects at one, three and five minutes of testing. He has a reasonable fund of general information, such as his home address, names of children and their ages in his family, as well as significant events, both personal and more

global in nature. More careful probing of his memory revealed an ability to retain and process factual information consistent with someone of low to low- average intelligence. This finding must be placed in the context of his formal education ceasing in the seventh grade and subsequently receiving a G.E.D. while incarcerated, suggesting a remarkable ability to overcompensate for underlying intellectual and academic deficits. It is important to note that his ability to verbalize in all likelihood is masking a subnormal intellectual capacity.

Attention and Concentration- Mr. Smith had difficulty in performing simple addition, subtraction, multiplication and division. It is in these areas where his verbal skills are unable to mask his intellectual impairment. His attention and concentration, however, on gross testing, do not appear impaired.

Abstration Test-This part of the examination attempts to determine how well the individual's brain can assess similarities between two items and the meaning of proverbs. Mr. Smith's ability to abstract on testing was intact. His responses to proverbs were appropriate.

Judgment-In the psychiatric context, judgment is the awareness of the consequences of intended behavior. An ability to maintain good judgment is dependent on an intact consciousness, orientation, memory, attention, and concentration. During my examination Mr.

Smith was able to remain conscious, oriented, and show acceptable levels of memory, attention and concentration. His judgment at interview could be characterized as good. The extent to which his judgment was predisposed by impairment secondary to both character organization, brain dysfunction, and the concurrent influence of alcohol and drugs, in this individual I believe it is significant and will be addressed further in my psychodynamic formulation.

Insight-Psychiatrically, insight is a reflection of an individual's awareness of his or her usual state of effective functioning. The evidence from my examination of Mr. Smith indicates that he is generally aware of the extent to which he is impaired, either intellectually or in his character organization. He is only marginally aware of the extent to which his developmental history has significantly contributed to his social dysfunction. He is, however, reasonably in touch with those feelings, attitudes and perceptions which explain the more superficial aspect of his existence. As such, I would diagnostically characterize his insight as fair to poor.

Psychodynamic Formulation: In my professional medical judgment, based on my diagnostic interview and review of the aforementioned materials, I believe that Mr. Frank Elijah Smith, Jr., is a man of normal to low-normal intellectual functioning who possesses concurrent deficits in adaptive functioning that frequently render him less effective in meeting the standards expected for his age in areas such as social skills and responsibilities. In my professional medical judgment, the etiology of this severe social dysfunction is in large part attributable to a chaotic

and disruptive childhood in which there was an absence of consistent and appropriate nurturance from his biological parents, ineffective parenting by his grandmother and his biological father who enabled the development of his childhood alcoholism, encouragement by his elders to steal as a means of providing food for the family, and personal frustration for failure to perform in an academic environment. The consequences of his unfortunate developmental history are clinically manifested on examination by a personality organization that is inflexible and maladaptive to stress, disabling in his capacity to work productively; conflicted in his homosexuality and constrained by the absence of parental love or its surrogate; exacerbated by interpersonal conflict and predisposing to immature, regressive behavior with emotional lability. In addition, one examination Mr. Smith presents, both psychological and educational evidence of cognitive dysfunction that may profoundly impact and contribute to his history of aberrant behavior. Further, I believe there is substantial historical evidence and findings at the time of my examination which supports the diagnosis of an organic brain syndrome secondary to significant alcohol and drug abuse beginning at an extraordinarily young age. The effects of such longstanding alcohol and drug abuse on the developing nervous system can only be characterized as devastating. Concurrently, Mr. Smith has further evidence of brain damage as documented by prenatal trauma secondary to physical abuse of his mother by his father while Mr. Smith was in utero, a difficult vaginal delivery resulting in substantial cranial trauma at delivery; and the longstanding history of a seizure disorder with a diagnosis of grand mal epilepsy and family reports of descriptive seizures consistent with an additional diagnosis of petit mal epilepsy. Treatment was attempted during childhood and early adolescence with anticonvulsant therapies. My clinical impressions of Mr. Smith's brain damage are further substantiated by the results of psychometric testing which indicate unequivocally the presence of diffuse brain dysfunction which is most probably lateralized to the right hemisphere. Finally, Mr. Smith clearly suffers from the additional severe complicating disability of grave and unfortunate life circumstances, having been raised in a socio-cultural environment that was economically and emotionally impoverished, disruptive and chaotic, and encouraging of his social dysfunction in ways that further compounded and detracted from his impaired mental capacity.

When an individual has serious mental impairment such as brain damage as a result of head trauma or congenital malformation, seizure disorder as a result of brain damage, organic brain syndrome as a result of

longstanding alcohol and drug abuse further contributed to by childhood history of nutritional deficiency, epileptic disorders, and a personality disorder as a result of significant developmental deprivation, expectations of normative behavior vis-a-vis the general population pales as a result of a diminished mental capacity. Any of these clinical conditions, in and of themselves, are enough to raise the question of diminished mental capacity. Their appearance in concert with the life of Mr. Smith is an orchestration of clinical evidence of extraordinary magnitude.

Diagnoses: Axis I Adjustment Disorder with depressed mood secondary to life circumstance (pending imposition of the death penalty).

Psychoactive Substance Induced Organic Mental Disorder secondary to alcohol and cannabis abuse.

Axis II Personality Disorder, NOS, with Immature and Schizoid Features.

Axis III Grand Mal Epilepsy Possible Petit Mal Epilepsy by history.

Axis IV Psychosocial Stressors legal proceedings resulting in imposition of the death penalty. Severity: Extreme.

Axis V Current Global Assessment of Functioning Mildly impaired due to life circumstances.

Forensic Psychiatric Opinion: Based upon my examination of Mr. Frank Elijah Smith, Jr., my review of all pertinent aforementioned documents, and my experience from practice in the field of forensic psychiatry, I offer the following clinical opinion regarding specific forensic questions raised central to matters currently before the court:

Mitigating Circumstances Germane to Considerations Regarding Sentencing Proceedings.

In my professional medical opinion as a physician licensed to practice medicine and specializing in the field of forensic psychiatry, I believe that Mr. Frank Elijah Smith, Jr., is a brain damaged, epileptic individual who suffers from an organic brain syndrome, epilepsy, and a personality disorder with immature and schizoid features that cause significant impairment in social, occupational functioning, and create an aura of

subjective distress. Such mental illness, in the context of the incident offense, diminished his mental capacity in such a way as to be considered a significant deviation from the capacity held by a person of normal-average mental ability and character organization. Additionally, I am of the opinion, within a reasonable degree of medical certainty, that Mr. Smith's diminished and impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law effected his involvement in and actions during the instant offense. Although he apparently attempted to dissuade Johnny Copeland from killing the victim, the factors discussed herein speak to his inability to properly cope with the circumstances. He is mentally and emotionally impaired. His capacity was more substantially impaired as a result of excessive alcohol consumption and marijuana in the hours just prior to the incident. Further, I believe as a result of his mental disturbance and his alcohol and drug use at the time of the crime, that his ability to make judgments is less than that of a person of normal mental ability, unencumbered by mental or emotional disturbance, or the substantive effect of alcohol consumption.

Additionally, as detailed by Dr. Carbonell in her psychological evaluation, "The crime for which he (Mr. Smith) is now incarcerated also involved Johnny Copeland and also involved alcohol abuse, as did the 1975 offense. When involved in the previous crime with Mr. Copeland, Frank stated that he did what his friend asked, and, consistent with that, prison records indicate he was easily influenced and **immature."** Mr. Smith was a diminutive individual who appeared and acted much younger than his chronological age. Mr. Copeland was welldeveloped.

This is an individual who psychologically has spent his life trying to please others in order to gain acceptance. Abandoned by his parents, he sought to establish a parenting identity with his grandmother, who is herself characterized as being **"emotionally** disturbed." His juvenile history is replete with episodes of behaviors that could be characterized as his attempt to gain acceptance. Unfortunately, both for society and for Mr. Smith, he sought acceptance by impressing the wrong individuals. His most formative adolescent years were spent, for unclear reasons, sentenced to an adult correctional institution where he exhibited immature behavior that was consistent with his age. At the age of 19 he was released from incarceration only to be returned there in less than three months time, where he remains to date.

Mr. Smith has spent the better part of one-half of his

life incarcerated and he is a mere 30 years of age. Given his personality organization and its propensity to cause significant impairment in social and occupational functioning in such a way that render him less effective in meeting the standards expected for him in areas such as social skills and responsibilities, daily living skills, personal independence and self-sufficiency, it is my opinion, within a reasonable degree of medical certainty, was predisposed to act under the domination of another person.

Summary

In my professional medical judgment Frank Elijah Smith, Jr., by virtue of the psychiatric diagnoses and clinical opinions, suffers from a diminished judgmental capacity that could, at the discretion of the court, be considered as mitigating in the imposition of the ultimate penalty. Further, his mental condition may be relevant in a determination by the court that Mr. Smith was significantly influenced by companions or others in a way which reduces culpability.

(Record Appendix A(3)(Psychiatric Evaluation by Dr. Robert T.M. Phillips).

Additional nonstatutory mitigating evidence was also available from Mr. Smith's family members and friends. Mr. Smith's mother could have provided a moving account of Mr. Smith's earliest years:

1. I am Ollie Edwards, the mother of Frank Elijah Smith. I am also known as Ollie Branton Myers.

2. I was 17 or 18 when I became pregnant with Frank Elijah. My husband and my son's father, Frank Elijah Smith, Sr., would not work, no matter how much I begged and pleaded with him. We were living with my parents, who were helping me because I was so young and had no way to support myself. Several times my mother threatened to put Frank, Sr. out because he was so lazy, but she didn't because of me. We already had two children to raise -- Jessie Mae Smith and Andrew Miller, who was not my husband's child. I had no one to depend upon, except my husband. As time passed, I found out I could never rely on Frank, Sr., who was an alcoholic and a wife beater.

3. Frank Sr., started beating me soon after we married in 1957. By the time, I was pregnant with

Frank Elijah, he was beating me all of the time and with anything he could get his hands on, including sticks, shoes and belt buckles. Usually, the beatings followed our daily arguments about him not working. He hit me all over my body, including my stomach. One day, Frank hit me in the stomach so hard that I fell backwards. I was six months pregnant with Frank Elijah. When my son was born, one side of his head was dark. That area of his head was the color of blood. I know that Frank Elijah's head was like that because his daddy hit me in the stomach. I took my baby home and hoped that his life would end up better than it started.

4. Although Frank Elijah was a happy baby, he was sickly almost from birth. When Frank Elijah was about six months old, his body began to shake all over and his eyes rolled back in his head and he suddenly went limp. I thought my baby might die. Someone ran for the midwife, who said Frank Elijah had spasms. He had these spasms on many occasions. When he would have these spasms and go limp, I was very worried. I did not take Frank Elijah to the doctor, because the midwife said he was alright.

5. When Frank Elijah was 11 months old, he had a 104° fever for a week. The doctor gave me some medicine, but he stayed sick for almost one month. Later on, the doctor told me Frank Elijah had pneumonia. While my son was sick, he lost his appetite and stopped eating. He lost weight and became real skinny and puny. Frank Elijah never regained the weight he lost when he was sick with pneumonia. During this time, I was trying to work a little and take care of the kids, without any help from Frank, Sr. He continued to beat me and even worse, my husband was an alcoholic.

6. Frank, Sr. drank everyday, a habit he started when he was 9 or 10 years old. He drank whatever he could get, but his favorites were gin and moonshine. Frank, Sr. came home drunk three days after we were married and he continued to drink until we separated. I was 17 years old and Frank, Sr. was 38 when we married and I had no idea how to deal with his problems. So I left Frank, Dr. and tried to start a life of my own with my kids.

7. I asked Caldonia Smith, Frank, Sr.'s mother, to keep my children -- Andrew, Jessie and Frank, Jr. -- until I could find a job, save some money and find us a place to stay. I rented a room three doors down from Caldonia's house. I saw the children everyday. After about two years had passed, I told Caldonia I wanted the children back. She refused and went to court to

get custody of Jessie and Frank, Jr., which was granted. Andrew Miller, my oldest son, went to live with my parents in Tallahassee.

8. After the court hearing in 1960 or 1961, Caldonia refused to allow me to see Frank, Jr. and Jessie. The only time I saw the children was when Caldonia was away from the house on Saturday mornings. Every Saturday, as soon as Caldonia left the house, I would go over and talk to the children through a window in the house. Caldonia liked to drink gin in the bars in Ibo City and usually stayed away from home all day.

9. Caldonia and the children moved to Tallahassee without telling me around 1967 or 1968. I never saw Frank, Jr. again. Caldonia did not tell me or Frank, Sr. that she was moving away from Tampa. Although Frank, Sr. rarely went to see the kids and took no interest in them, Caldonia knew I loved and wanted my children.

10. I hope this information about Frank Elijah's early life will be helpful to the courts. I was denied the right to raise Frank Elijah, but I never stopped loving him.

(Record Appendix A(6)).

Mr. Smith's sister, Jessie Smith-Givens, also could have explained Mr. Smith's miserable childhood and youth:

1. I am the older sister of Frank Elijah Smith.

2. I presently live at 94-1077 Leomana Place, Waipahu, Hawaii 96797.

3. I am a licensed practical nurse. I received my traning at the University of Hawaii. For the past year I have been employed as a private duty nurse at Kahu Malana Nursing Agency. I have lived in Hawaii for the past three years.

4. My parents, Frank Elijah Smith and Allie Myers, abandoned both Frank and me as infants. My paternal grandmother, Caldonia Smith, of Tallahassee, Florida, kept us as children.

5. My grandmother's first husband died when I was two. She remarried a minister who died when I was seventeen.

6. When my mother was pregnant with Frank, she was physically assaulted by her brother with a bottle. He hit her in her abdomen. When Frank was born he had

a dent in his skull. You can still see the indentation in his skull now when his hair is shaved.

7. I didn't see my real mother until I was thirteen. She didn't want to have anything to do with Frank and me.

8. We were very poor when we lived with my grandmother. We often did not have enough to eat. I remember eating pear soup for days because there was a pear tree in the yard and we didn't have anything else to eat.

9. My grandmother got some welfare money for us and some food commodities, but it wasn't enough to live on. We didn't have food half the time. I remember once Frank had to steal a package of meat so we would have something to eat.

10. I remember that Frank had seizures as a child. My grandmother took him to Dr. Brickler in Tallahassee who said he would have to take medicine the rest of his life to control the seizures.

11. The first time I remember Frank having a seizure was when he was ten or eleven. We were at a summer program and he had a seizure. We had to put something in his mouth so he wouldn't bite his tongue.

12. Frank was admitted to the Florida A&M University Hospital one time for his seizures. The doctor prescribed phenobarbital for Frank. Beacause my grandmother could not always afford to buy him the medicine, he could not take it regularly. My grandmother is pretty old-fashioned. She doesn't really believe in counseling or doctors. Often when we were sick she would just go into the woods and pull up some root and make something to give us.

13. I know from my nurse's training that Frank had both petitmal and grande mal seizures. Sometimes I don't even think Frank was aware that he was having a petit mal seizure -- he would just sort of space out for a few minutes and then seem confused about what was going on around him.

14. Frank was very embaressed about having seizures; he never wanted anyone to know about them. In fact, my grandmother met with some prison representatives once to let them know about the seizures so he could get medical help.

15. When Frank was about twelve or thirteen he started running with the wrong crowd -- older boys in the neighborhood. Johnny Copeland was one of those

boys. I think Frank started running with these boys just to have someone. During this time my grandmother had remarried and our step-grandfather didn't like Frank. He ignored Frank and acted disgusted that he was running around.

16. Frank was well-liked by the older people in our neighborhood. He would often do things for them, like work in their yard. He wouldn't take money for working because he knew they were as poor as we were. But, he would accept a meal or food if they offered it.

17. When Frank went away to reform school (Dozier Training School), things got much worse financially at home.

18. Frank was very religious when he got back from reform school. He really wanted to stay out of trouble but my grtandmother had even less money, Frank had nothing -- he really had to almost steal to survive.

19. I knew that I would never make it unless I somehow got away. I ran away to Flort Lauderdale and went to electronic assembly training. Then I came back and joined the Army. After I got out of the Army I went to schoool to be a licensed practical nurse. I know if I had stayed here I wouldn't have made it; we didn't have anything.

20. Grandmother also really believed in physically disciplining us. When we did something she didn't approve of she would use an ironing cord or broomhandle on us. I know now that that kind of discipline is really physical abuse but I know that my grandmother didn't know any other way of dealing with children. My grandmother was elderly when she was raising us and didn't know about any other kind of disciplining.

21. A horrible thing happened to Frank when he was only fifteen. He got into trouble with the police because of Johnny Copeland. When the case went to court, the judge sent Frank to an adult prison by mistake. The courts made an error and incorrectly listed Frank's age as nineteen. The attorney did not notice the mistake and did nothing to prevent Frank from getting sent to an adult prison instead of a juvenile facility. My grandmother tried to intervene and correct the problem but no one would listen to her.

(Record Appendix A(10)).

Friends also would have testified that despite his abused

and deprived upbringing, Mr. Smith was a well-liked member of the community:

> 1. I live at 602 Putnam Drive in Tallahassee, Florida. My house is right in front of the house where Frank Smith grew up.
>
> 2. When Frank was very young, he and his sister would stay at my home quite a bit. Frank never gave me a minute's trouble.
>
> 3. As Frank grew older, he would do chores for me just about as soon I would ask him to help. Frank would never ask for or take a penny for his helping me.
>
> 4. I miss Frank now that he's been sent away. He was good company.

(Record Appendix A(15)(Affidavit of Cora Eason).

> 1. I was born in Tallahassee, Florida and have lived here all of my life. I am now twenty seven years old and work as a roofer here in town. I live at 1401 Distance Street, Tallahassee, Florida.
>
> 2. I grew up in the same area of town as Frank Smith and Victor Hall. I remember them well. I went to school with them and we played together as kids. We would often play basketball or football after school or on weekends.
>
> 3. Frank Smith was always well liked in the community. He often spent time with kids whose parents were busy or at work. He would teach the kids to play basketball or other sports.
>
> 4. Frank would also take time to run errands for the older people in the neighborhood or would help them with yard work or other chores.
>
> 5. In the whole time that I've known Frank Smith, I have never known him to be a violent person.

(Record Appendix A(16)(Affidavit of Luther J. Peterson).

Others could have testified regarding Mr. Smith's non-violence, the effects on him of incarceration at a young age, and Johnny Copeland's reputation for violence:

> 1. My name is Lottie Danzy and I am a resident of Tallahassee, Florida, my home for all of my life. I am 29 years old.

2. I grew up in Tallahassee and lived on Putnam Drive. Frank Smith lived on a road off of Putnam, right across the street from my house. We played together when we were little and attended the same schools. Frank and his grandmother and sister moved to Tallahassee from somewhere in South Florida when he was a little boy. I knew Frank, who we called Junior, from the time he moved to Tallahassee until 1978, when he went to prison. I saw him almost every day during those years.

3. Frank was a good kid, not the kind of child who liked to start fights or make trouble for anybody. During the years we were growing up, I never knew or heard anyone say that Frank was mean to anyone. I never knew him to hurt any of our playmates. Almost everyday after school and on weekends, my sisters and I, and Frank and his sister, Jessie Mae, would play in the street in front of his house. Most people knew that Frank was a good boy.

4. I know Frank spent a lot of time in a boys' home and even went to prison. When he came back from prison, Frank had changed. He was different and doing things that I had never known him to do. For example, he would be with older men.

5. On occasion, Frank left his grandmother's house and stayed for a time with a man. Frank and the man lived on Blairstone Road, here in Tallahassee. 1 met this man when he came to our neighborhood. This man was tall and light-skinned, and much older than all of us. People in our neighborhood said Frank and the man were gay.

6. Another troubling thing that Frank did when he came home from prison was spending time with Johnny Copeland. Johnny grew up in our neighborhood, too. He moved to our South City community when he was a teenager. I got to know Johnny soon after he and his family moved to a house on Golf Terrace. He tried to date my older sister and would come by the house everyday until the end of the school term. My sister did not like Johnny because of his behavior. Most people knew that Johnny was a thug and a troublemaker. He liked to cause trouble and get people in trouble. In most things, Johnny was the ringleader.

7. I saw Frank and Johnny together several times the few months before they were arrested. When I heard about the incident, I knew that if Frank had not been hanging around with Johnny Copeland, he would not have been involved in that crime. Frank never bothered or hurt anybody, unlike Johnny who was known to be a

> violent person. Johnny was the kind of person who would influence people to do bad things.

(Record Appendix A(9)).

Documentary evidencce regarding Mr. Smith's character and history was also available and could have been presented to establish nonstatutory mitigation. For example, court records regarding Mr. Smith's parents' divorce proceedings document his father's brutality to his mother and his father's abandonment of and failure to support the family (Record Appendix A(7)). Medical records establish that Mr. Smith suffered from grand mal epilepsy (Record Appendix A(4)). Other records establish that at school, Mr. Smith and Johnny Copeland "were always in some sort of trouble. . . . Copeland was the leader in this regard" and that "Copeland took the leading role in all the problems observed that was so often caused by them at school" (Record Appendix A(5), p. 3). These former school teachers who had both Mr. Smith and Mr. Copeland in their supervision would have testified about Copeland's history of being the ringleader (**see** Record Appendix A(5))(Mrs. Roberts [teacher]: "Copeland took the leading role in all the problems observed that was so often caused by them at school"; Coach Wes Carter: "Copeland was the leader . . ."). Of course, important evidence concerning Mr. Smith's history and background (epilepsy, abuse, malnurishment, etc.) would have been critical to a fair and individualized sentencing determination by the jury. Mr. Smith was an alcoholic, whose drinking was encouraged by his father and grandmother. As a youth, he had been taken advantage of by older homosexual men in the community. As a youth, and at 19, Mr. Smith was little more than that at

the time of the offense, he was encouraged by his family to steal meat so the family would have something to eat. Indeed, Mr. Smith lived in abject poverty: half the time there was nothing to eat, the family often lived on "pear soup," Mr. Smith did not receive the medication needed to treat his epilepsy and resulting cerebral dysfunction because the family could not afford it. Such evidence is indeed substantial.

As Judge Padavona testified in 1984: "I didn't believe it would have had any bearing or I would have presented it" (January 26, 1990, Tr. at 199, quoting 1984 transcript). It did not have any bearing, as Judge Padovano's affidavit makes clear, because it did not fit within any of the statutory mitigators that the jury would be instructed to consider. (A number of the nonstatutory mitigators which Judge Padovano did not present because of the construction then in effect were summarized below at Tr. 115-31. For the Court's convenience, that summary is appended to the back of this brief.) In light of all this, an evidentiary hearing was necessary in order to properly resolve this claim.

The circuit court, however, summarily denied relief without allowing an evidentiary hearing. Mr. Smith proffered evidence in support of his claim, including former counsel's sworn affidavit and a panoply of documentary evidence, but the circuit court refused to hear that evidence. To the contrary, it accepted the State's invitation to make findings of fact without hearing the evidence. (Judge McClure did not preside over the 1984 hearing or any other prior proceedings in this case. He should have heard Judge Padovano's account first-hand, as well as the other

evidence, before rendering findings of fact.) An evidentiary hearing was and is required in this case, for the files and records by no means "conclusively show[ed] th t [Mr. Smith was entitled to no relief." Lemon v. State, 498 So. 2d 923 (Fla. 1986)(emphasis added), citing, inter alia, Fla. R. Crim. P. 3.850. In fact, the files and records in this case substantiate Mr. Smith's claim for relief. The Eleventh Circuit has held that an evidentiary hearing is "preferred" in order to resolve claims of Lockett error. Cooper v. Wainwright, 807 F.2d 881, 889 (11th Cir. 1989), citing, Hitchcock v. Wainwright, 770 F.2d 1514, 1517 (11th Cir. 1985). Such a hearing was and is required in Mr. Smith's case. The lower court erred in not allowing one.

CLAIM II

THE APPELLANT'S RIGHTS TO AN INDEPENDENT FACT FINDING, REASONED JUDGMENT BY THE COURT, AN EVIDENTIARY HEARING, AND FULL AND FAIR POST-CONVICTION RELIEF PROCEEDINGS WERE DENIED, CONTRARY TO THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Towards the end of the January 26, 1990, hearing conducted before the lower court, after numerous rulings had been made by the court on the record, the State presented Appellant's counsel with a proposed order. The order had been prepared the day before (January 26, 1990, Tr. 214-15), but was not provided until the end of the hearing. Appellant strenuously objected to such a procedure (Tr. 206-08). The State cited an interest in "expediting" the case, and Appellant's counsel indicated that if that were the case, Appellant would be willing to rely on the record rulings in lieu of an order. The State did not agree to this procedure. The trial court gave Appellant an opportunity to

file objections, and Appellant did, stating forcefully his position that such a procedure is simply not proper. The Objection is included in the Record Appendix (section F).

The improprieties noted therein included the fact that the proposed order purported to make findings of fact, in a case involving contested issues of fact (**see** Claim I, section D, supra) although the petitioner was not afforded an evidentiary hearing. Appellant also noted his objection to the State's order's obvious attempts to shape and alter the lower court's rulings in a manner favorable solely to the State, and far removed from what the relevant facts and law at issue in this case were all about. The Objection discussed in detail why this whole procedure was wrong.

The lower court signed the State's order, verbatim. This is simply not the way that judicial proceedings should be handled, especially when a man's life is on the line. The applicable legal analysis was provided in the Objection. The process by which relief was denied in this case denied Mr. Smith the right to a full, fair, and independent determination by the trial court.

CLAIM III

PROSECUTORIAL ARGUMENT, PENALTY PHASE JURY INSTRUCTIONS, AND THE TRIAL COURT'S SENTENCING PROCESS SHIFTED THE BURDEN TO MR. SMITH TO PROVE THAT DEATH WAS INAPPROPRIATE, IN VIOLATION OF MULLANEY V. WILBUR, 421 U.S. **684** (1975), PENRY V. LYNAUGH, **109** S. CT. **2934** (1989), MILLS V. MARYLAND, **108** S. CT. **1860** (1988), AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Prosecutorial argument and judicial instructions informed the sentencing jury in Mr. Smith's capital trial that once an aggravating circumstance had been found, death was the proper

jury recommendation unless mitigating circumstances were established by the defense which outweighed the aggravating circumstances found. The jury was thus told that once an aggravator was found a presumption of death arose which shifted the burden to the defense to prove mitigation which warranted a life sentence. The use of such a presumption violated the due process principles of Mullanev v. Wilbur, 421 U.S. 684 (1975), and the eighth amendment. Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(in banc). In Adamson, the Ninth Circuit held that because the Arizona death penalty statute "imposes a presumption of death on the defendant," the statute deprives a capital defendant of his eighth amendment rights to an individualized and reliable sentencing determination. If a reasonable juror could have construed the instructions as requiring the jury to presume death, as the instructions here obviously could be construed, then the instructions were eighth amendment error. Mills v. Marvland, 108 S. Ct. 1860 (1988); Adamson v. Ricketts, supra. The application of this unconstitutional standard at the sentencing phase violated Mr. Smith's rights to a fundamentally fair and reliable sentencing determination, i.e., one which is not infected by arbitrary, misleading and/or capricious factors, see Adamson, supra; Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988), and plainly shifted to Mr. Smith the burden to prove that he should receive life, in violation of the eighth and fourteenth amendments, Mullanev v. Wilbur, supra, and Mills v. Marvland, supra. This unconstitutional standard also restricted the jurors' ability to

"fully consider" and "give effect to" the mitigating factors before them, Penry V. Lvnaugh, 109 S. Ct. 2934, 2951 (1989), in violation of the eighth amendment's mandate that any capital sentencing decision be individualized and reliable. The substantial mitigation in this record was discussed in Claim I, section B, supra. The instructions here directed the jury to rely upon a presumption of death, and the trial court itself employed this unconstitutional procedure in imposing death. As a result Mr. Smith's death sentence is fundamentally flawed and unreliable and should not be allowed to stand.

The United States Supreme court recently granted writs of certiorari in cases involving very similar issues. See Blystone v. Pennsylvania, 209 S. Ct. 1567 (1989); Boyde V. California, 109 S. Ct. 2447 (1989); Walton v. Arizona, 110 S. Ct. 49 (1989); cf. Hamblen v. Dugger, No. 89-4121 (1989); Kennedy V. Dugger, No. 89-5990 (1989); Tompkins V. Florida, No. 89-6166 (1989). The question presented in Blystone has obvious ramifications here. Under Pennsylvania law, the jury is instructed that where it finds an aggravating circumstance present and no mitigation is presented, it "must" impose death. However, if mitigation is found then the jury must decide whether the aggravating circumstances outweigh the mitigating.

Pennsylvania law thus places upon a capital defendant a burden of production as to evidence of mitigation and a burden of persuasion as to whether mitigation exists. However, once evidence of a mitigating circumstance is found, the State bears the burden of persuasion as to whether the aggravating circumstances outweigh the mitigating such that a death sentence

should be returned.

Under the standard employed here, once one of the statutory aggravating circumstances is found, by definition sufficient aggravation exists to impose death. The jury is then directed to consider whether mitigation has been presented which outweighs the aggravation. Thus, under Florida law, the finding of a statutorily-defined aggravating circumstance operates to impose upon the defendant the burden of production and the burden of persuasion of the existence of mitigation, and the burden of persuasion as to whether the mitigation outweighs the aggravation. Certainly, Florida law is more restrictive of the jury than the Pennsylvania statute at issue in Blystone.

In Boyde v. California, 109 S. Ct. 2477 (1989), the questions presented on which certiorari was granted were:

> Do the Eighth and Fourteenth Amendments permit a trial judge to instruct a penalty phase jury that, "if you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death," and does such instruction require reversal of the resulting capital sentence where the prosecutor repeatedly stressed to the jurors during both voir dire examination and penalty phase argument that they must impose a death sentence if aggravation preponderated by even "a slight outweigh" regardless of whether they personally found such sentence not otherwise warranted by the evidence, where there is every indication that the jury was misled by the erroneous view of its sentencing role and the scope of its discretion advanced in the prosecutor's argument.

Resolution of these questions will also impact upon the proper analysis of Mr. Smith's claim, as will the resolution of the other cases mentioned above.

In Hamblen v. Dugger, 14 F.L.W. 347 (Fla. 1989), this Court analyzed Mr. Hamblen's claim that the burden was shifted to the

defense on the issue of whether death was the proper penalty. Hamblen was a capital post-conviction action. This Court found that relief was not warranted in that case given the special circumstances involved in that action, but affirmed an approach which required consideration of litigants' burden-shifting claims on a case-by-case basis. Id. Mr. Smith herein accordingly requests that his burden-shifting claim be determined and that relief be granted. The burden-shifting standard employed in this case violated the eighth amendment: as a result of the jury's and court's application of this standard the statutory and nonstatutory mitigation present in this case was never given "full effect," Penry v. Lynaugh, 109 S. Ct. 2934 (1989), because only the mitigating circumstances which were "sufficient" to outweigh the aggravating factors were to be given "full" effect. This violated Penry, supra, Lockett v. Ohio, 438 U.S. 586 (1978), Eddings v. Oklahoma, 455 U.S. 104 (1982), Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), and the eighth and fourteenth amendments.

Mr. Smith's death sentence violates the fifth, sixth, eighth, and fourteenth amendments, and should not be allowed to stand. The instruction at issue "serve[d] to pervert the jury's deliberations concerning the ultimate question whether in fact [Frank Smith should have been sentenced to die]." Smith v. Murray, 106 S. Ct. 2661, 2668 (1968). By requiring the imposition of death unless Mr. Smith established that mitigation outweighed aggravation, the instruction "precluded the development of true facts," id., for it allowed consideration of only that mitigating evidence which was sufficient to outweigh the aggravation. In such Circumstances, the ends of justice

require consideration of the claim on its merits.

Mr. Smith's death sentence is unreliable, and is founded upon instructions which "precluded" and hindered the jury's full and proper consideration of mitigating facts. Cf. Smith v. Murray, supra. A stay of execution in order for the Court to assess this claim in conjunction with the United States Supreme Court's forthcoming decisions in Blystone, Boyde, and Walton, would be more than proper.

CLAIM IV

THE AGGRAVATING CIRCUMSTANCE OF COLD, CALCULATED, AND PREMEDITATED WAS IMPROPERLY APPLIED RETROACTIVELY IN VIOLATION OF THE EIGHTH AND FOURTEEENTH AMENDMENTS, AND THE EX POST FACTO PROVISIONS, OF THE UNITED STATES CONSTITUTION.

At the time of the offense, the Florida capital sentencing statute contained only eight (8) aggravating factors which a judge and jury were empowered to apply in determining whether aggravating factors sufficiently outweighed mitigating factors to justify the imposition of a death sentence. The statute did not contain, as a statutory aggravating circumstance, that the offense was committed in a cold, calculated, or premeditated manner without any pretense of moral or legal justification. That circumstance was added by the Florida Legislature July 1, 1979. See Fla. Stat. sec. 921.141(5)(i). However, Mr. Smith's capital sentencing jury was instructed upon and the sentencing judge applied this aggravating circumstance to this offense. This is a retroactive application, in violation of Article I, Section 10 of the United States Constitution, in violation of the eighth amendment, and in violation of due process and equal

protection of law. Since the application of this circumstance in this case was error, and since it cannot be said that this error had no effect on the ultimate sentence, resentencing is required. See Schafer v. State, 537 So. 2d 988 (Fla. 1989); Nibert v. State, 508 So. 2d 1 (Fla. 1987). Moreover, since mitigation exists in the record, as fully set out in Claim I, section B, supra, and since statutory mitigation was found (age), the error cannot be deemed harmless beyond a reasonable doubt.

The ninth (9th) aggravating factor found in section 921.141(5)(i), as enacted, states the following:

> The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner.

Sec. 921.141(5)(i), Fla. Stat. The addition of this factor to Florida's capital sentencing statute occurred when the Florida Legislature enacted Chapter 79-353, Laws of Florida. This law became effective on July 1, 1979, after the murder in this case occurred. The Senate Staff Analysis and Economic Impact Statement explains the reason that the Legislature enacted this provision:

> Senate Bill 523 amends subsection (5) of s. 921.141, Florida Statutes, by adding a new aggravating circumstance to the list of enumerated ones. The effect of the new aggravating circumstance would be to allow the jury to consider the fact that a capital felony (homicide) was committed in a cold, calculated and premeditated manner without any pretense of moral and legal justification.

The staff report explained that in two cases, Riley v. State, 366 So. 2d 19 (Fla. 1978) and Menendez v. State, 368 So. 2d 1278 (Fla. 1979), the Florida Supreme Court had clearly found that a trial court determination that a murder was committed in a cold, calculated and premeditated manner without any pretense of moral

or legal justification did **not** constitute an aggravating factor under Florida's capital sentencing statute as it then existed.

Additionally, just after the enactment of the statute, this Court revised its opinion in Magill v. State, 386 So. 2d 1188 (Fla. 1980) (revised opinion). In its revised opinion, the Court specifically deleted its prior statement that a "cold, calculated design to kill constitutes an especially heinous, atrocious, or cruel murder." The change made by the Court in response to Mr. Magill's motion for rehearing on that very point demonstrates that such evidence never supported independently the finding of any of the original eight aggravating factors, id., including "heinous, atrocious, or cruel."

Similarly, in Lewis v. State, 398 So. 2d 432, 438 (Fla. 1981), the Court, consistent with its statements in Riley and Menendez, and as demonstrated by the revision of Magill, observed that premeditation which was "cold and calculated and stealthily carried out" was not evidence relevant to any of the original eight aggravating factors in the statute and that an aggravating factor based on that finding was invalid under Florida law. Id. It is therefore clear that prior to the enactment of Chapter 79-353, Laws of Florida, an aggravating factor based solely on facts showing "a cold, calculated design to kill" would not be allowed to stand as the foundation for any of the original eight aggravating factors.

Mr. Smith challenged this retrospective application at trial, and in prior proceedings. These proceedings took place prior to Miller v. Florida. In Miller v. Florida, 107 S. Ct.

2446 (1987), the United States Supreme Court set out the test for determining whether a statute is ex post facto. In so doing, the United States Supreme Court altered the analysis previously applied to such claims in cases such as Combs v. State, infra. Under the resulting new analysis, it is now clear that sec. 921.141(5)(i) operated as an ex post facto law in Mr. Smith's case. Miller is a change in law, announced by the United States Supreme Court, which applies to Mr. Smith's case.

Under Miller, a law is deemed retrospective if it "appl[ies] to events occurring before its enactment." Id. at 2451. The relevant "event" in this instance was the crime which occurred prior to the legislatively enacted change to sec. 921.141(5) at issue in this case. As the Miller court explained, retrospectivity concerns address whether a new statutory provision changes the "legal consequences of acts completed before its effective date." Miller v. Florida, 107 S. Ct at 2451 (citations omitted). The relevant "legal consequences" include the effect of legislative changes on an individual's punishment for the crime of which he or she has been convicted. See Miller v. Florida, 107 S. Ct. at 2451.

The change in the sentencing statute in this instance did change the legal consequences at sentencing: Mr. Smith's jury and trial judge become empowered to consider and apply an additional statutory aggravating factor and to use it to justify a death sentence. As the Florida Supreme Court demonstrated in its Riley, Menendez, and Lewis decisions, and implied by the revision of its opinion in Magill, under the prior statute, facts solely demonstrating heightened premeditation would never have

supported the finding of a statutory aggravating factor. Only after enactment of Chapter 79-353 did such facts take on an independent legal consequence.

While Combs v. State, 403 So. 2d 418 (Fla. 1981), is credited with holding that the section did not implicate ex post facto concerns, the Combs court obviously did not address the retrospectivity of sec. 921.141(5)(i) in light of Miller.

Section 921.141(5)(i) is retrospective, and it substantially disadvantaged Mr. Smith. See Miller, supra. Combs v. State, 403 So. 2d 418 (Fla. 1981), held that the addition of sec. 921.141(5)(i) to the capital sentencing procedure did not constitute an ex post facto law because it did not disadvantage the defendant:

> What, then, does the paragraph add to the statute? In our view, it adds the requirement that in order to consider the elements of a premeditated murder as an assravatins circumstance, the Premeditation must have been "cold, calculated and ... without any pretense of moral or legal justification." Paragraph (i) in effect adds nothing new to the elements of the crime for which petitioner stands convicted but rather adds limitations to those elements for use in aggravation, limitations which inure to the benefit of a defendant.

Id. at 421 (emphasis added). In arriving at this decision, this Court in Combs merely observed that the new law limited the use of premeditation at the penalty phase. This Court did not, in Combs, examine the challenged provision to determine whether it operates to the disadvantage of a defendant as the Miller decision now clearly requires. See Miller v. Florida, 107 S. Ct. at 2452. In Miller, the Supreme Court examined both the purpose for the enactment of the challenged provision and the change that the challenged provision brought to the prior statute to

determine whether the new provision operated to the disadvantage of Mr. Miller. Id.; see also Stano v. Dugger, No. 88-425-CIV-ORL-19 (M.D. Fla. May 18, 1988). In applying that analysis to the challenged provision at issue here, it is clear that the new provision is "more onerous than the prior law" because it substantially disadvantages the capital defendant. Id.

When the Legislature enacted Chapter 79-353, it expressly intended to add to Florida's capital sentencing statute an additional statutory aggravating factor. Specifically, the drafters of the legislation wanted to address concerns created by the Florida Supreme Court in its decisions in Menendez and Riley. They expressly intended for the new provision to enhance the probability of imposing death on a capital defendant by adding an aggravating factor which could be found by a jury and judge based solely on facts showing that a murder was committed in a cold, calculated and premeditated manner.

As explained above, prior to enactment of this legislation, this Court had refused to allow such facts, standing alone, to justify the finding of any of the eight original aggravating factors. Thus, the purpose of the new legislation was expressly aimed at enhancing the probability of a death sentence and thereby disadvantaging a capital defendant.

Under the law in effect at the time of the offense in this case, the jury and judge would not have been empowered to increase the probability of a death sentence by relying on factors applicable to this aggravating circumstance because Florida sentencing law strictly limits consideration of

aggravating factors to those enumerated in the statute. See, e.g., sec. 921.141 (5). This Court in Combs recognized this principle, but failed to give it proper significance for purposes of ex post facto analysis. See Combs v. State, 403 So. 2d at 421. The weight given to an aggravating factor greatly affects the determination of whether a capital defendant receives life or death as does the cumulative weight accorded all aggravating factors found in imposing a death sentence (see e.g. Section 921.141), but the Combs decision did not address this issue. Under Miller, this omission is error.

If a disadvantage caused by the effect of a new law is purely speculative, it is not onerous for purposes of ex post facto analysis. But the increased exposure to a death sentence identified above is demonstrably **not** speculative under Florida's capital sentencing procedures. In Miller, the United States Supreme Court rejected the respondent's argument that a change in the sentencing statute for non-capital defendants was not disadvantageous simply because a defendant could not demonstrate **"definitively** that he would have gotten a lesser **sentence."** Miller v. Florida, 107 S. Ct. at 2452.

Similar to the Miller defendant, Mr. Smith was subjected to the probability of a more enhanced sentence because of the new law. In this instance, however, the more severe sentence was death instead of life. Mr. Smith was therefore **"substantially** disadvantaged" by a retrospective law.

The third part of the Miller analysis requires examination of the sec. 921.141(5)(i) to determine whether it alters a substantial right. Miller v. Florida, 107 S. Ct. at 2452. As

explained previously, Florida law limits the consideration of aggravating factors to those enumerated in the capital sentencing statute. This limitation affects the "quantum of punishment" that a capital defendant can receive because a jury and judge should determine whether or not statutory aggravating circumstances outweigh any mitigating circumstances before arriving at a verdict of life or death. The right to limitation was altered when the jury was asked to apply and the judge, by operation of the new law, applied an additional statutory aggravating factor.

For the foregoing reasons, the law as applied to Mr. Smith at his capital sentencing proceedings was ex post facto, and his sentence of death is therefore void. Miller v. Florida, 107 S. Ct. 2446. (1987). Given the factors discussed above it is also clear that the application of this aggravating factor to Mr. Smith's case violates due process and equal protection of law, and violates the eighth amendment's mandate of heightened scrutiny. Miller has changed the standard previously applied by the trial court and this Court to this claim, a claim that was specifically asserted at trial, and presented in Mr. Smith's earlier, pre-Miller, proceedings. Resentencing is proper.

CLAIM V

MR. SMITH'S SENTENCING JURY WAS IMPROPERLY INSTRUCTED ON THE "ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL" AND "COLD, CALCULATED AND PREMEDITATED" AGGRAVATING CIRCUMSTANCES, AND THE AGGRAVATORS WERE IMPROPERLY IMPOSED AND AFFIRMED IN VIOLATION OF MAYNARD V. CARTWRIGHT, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

The sentencing jury in Mr. Smith's capital trial was instructed on the aggravating circumstances of cold, calculated

and premeditated, and heinous, atrocious or cruel, and recommended death. The sentencing judge found both of these aggravators in his sentencing order.

The propriety of these aggravating factors was challenged and rejected on Mr. Smith's direct appeal, pre-Maynard v. Cartwrisht. It is respectfully submitted that Maynard v. Cartwright, 108 s. Ct. 1863 (1988), alters that analysis, and that therefore the propriety of the instructions on and application of these aggravators should be addressed at this juncture. Statutory mitigation was found in this case (age), and significant nonstatutory mitigation is reflected by the record, see Claim I, section B, supra, although the jury was not allowed to consider it. Relief is appropriate, in light of Cartwriaht.

In Maynard v. Cartwright, supra, the United States Supreme Court unanimously held that an instruction identical to the one given to Mr. Smith's jury on the heinous, atrocious or cruel aggravator failed to limit that jury's sentencing discretion by failing "to adequately inform juries what they must find to impose the death penalty." 108 S. Ct. at 1858. Under Florida law, a homicide is "heinous, atrocious or cruel" when it is unnecessarily torturous to the victim. The defendant must have chosen to kill the victim in a way designed to inflict gratuitous pain. Here the jury was never instructed on this straightforward guiding principle, in violation of Maynard v. Cartwriaht, 108 S. Ct. 1853 (1988), and Adamson V. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(in banc). This eighth amendment error was never cured by any subsequent application of controlling guiding principles to

the facts of Mr. Smith's case by the sentencing court or by this Court. The errors cannot be held to be harmless.

Likewise, the eighth amendment analysis of Maynard v. Cartwriaht, 108 S. Ct. 1853 (1988), applies with full force to the aggravating circumstance of cold, calculated and premeditated. This Court's construction of this aggravating circumstance has broadened in such a manner, and was applied to the facts of Mr. Smith's case in such a manner as to render its interpretation and application violative of the eigh h and fourteenth amendments. This aggravating factor has been applied in as overbroad and unprincipled a manner as the heinous, atrocious and cruel factor discussed in Cartwright, supra. **See** Roaers v. State, 511 So. 2d 526 (Fla. 1987)(effort to limit scope of the application of this aggravating factor in order to comport with eighth amendment requirements). Neither the Roaers limiting construction, nor the Cartwriaht discretion-channeling standard, were ever provided to Mr. Smith's jury or applied to Mr. Smith's case.

The cold, calculated and premeditated aggravating circumstance as well as the heinous, atrocious and cru 1 aggravating circumstance were applied in an unconstitutionally overbroad manner, in violation of the eighth and fourteenth amendments. Relief is proper.

CLAIM VI

MR. SMITH'S SENTENCE OF DEATH IS FOUNDED UPON AN UNCONSTITUTIONAL PRIOR CONVICTION, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

A Rule 3.850 motion challenging the validity of the prior (1974) conviction employed to aggravate this capital case is

currently pending before the trial court. Appellant acknowledges that under the law of this Court, he cannot prevail on this claim until that underlying conviction is found to be invalid. The issue, however, is neither waived nor abandoned, and is preserved.

CONCLUSION

Mr. Smith has presented compelling claims establishing a violation of the most fundamental of constitutional rights. The lower court erred, and this Court should now correct that error. A stay of execution should issue and relief should be granted.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been forwarded by Hand Delivery to Carolyn Snurkowski, Assistant Attorney General, Department of Legal Affairs, Magnolia Park Courtyard, 111-29 North Magnolia Drive, Tallahassee, FL 32301, this 2nd day of February, 1990.

Attorney