IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

FRANK ELIJAH SMITH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

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. ____." Mr. Smith apologizes for an erroneous citation concerning the quote appearing at the top of page 3 of his initial brief -- what is there cited as "PC-R. **210-11"** should be "Tr. **210-11"** as the reference was to the January **26, 1990,** evidentiary hearing. 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. This reply brief shall not reargue what was presented in the initial brief, but will address, by way of reply, the contentions in the State's answer brief.

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CLAIM I

THE HITCHCOCK V. DUGGER ISSUE

The State concedes, as it did in the court below, that error under Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), occurred during the proceedings resulting in Mr. Smith's sentence of death, but argues that the error was harmless. The State's argument is confusing and self-contradictory at best, sometimes appearing to assert that the error was harmless because no error occurred and sometimes arguing that the error was harmless because of the numerous nonstatutory mitigating factors which were before the jury and argued by defense counsel. The problem with the former argument is that this case is plainly one of Hitchcock error -- the instructions to the jury were the same as the instructions found by this Court and the Eleventh Circuit Court of Appeals to violate Hitchcock in Delap v. Dugger, __ F.2d (11th Cir. 1989), Jones v. Dugger, 867 F.2d 1277 (11th Cir. 1989), Ruffin v. Dugger, 848 F.2d 1512 (11th Cir. 1988), Waterhouse v. State, 522 So. 2d 341 (Fla. 1988), Combs v. State, 525 So. 2d 853 (Fla. 1988), Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987), Hall v. State, 541 So. 2d 1125 (Fla. 1989), Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987), Armstrong v. Dugger, 833 F.2d 1430 (11th Cir. 1987), and a number of other cases, and were no better than the instructions in Hitchcock itself. The problem with the latter argument is that defense counsel's efforts to provide the mitigation to the jury (albeit inhibited by the law then in effect) proves the harmfulness, rather than the harmlessness of the error: as in Hitchcock itself, there was nonstatutory mitigation which the jury could and should have been

allowed to consider, but the jurors received no instructions which would allow them to "give effect" to the mitigation. See Penry V. Lynaugh, 109 S. Ct. 2934, 2951 (1989). Simply put, the State has said nothing to rebut Mr. Smith's entitlement to relief.

A. THE EIGHTH AMENDMENT VIOLATION BEFORE THE SENTENCING JURY AND JUDGE

While conceding that Mr. Smith's jury was not instructed in compliance with Hitchcock and the eighth amendment, the State argues that the error was harmless because:

> The record reflects that Phil Padovano argued to the jury in the penalty phase that the defendant did not personally kill Sheila Porter (TR 2749); that the defendant was fifteen years old when he committed his prior robberies (TR 2754); that he was only nineteen years old when the instant crime was committed (TR 2758); that he had been drinking and smoking pot at the time which impaired his ability to conform his conduct to the requirements of law (TR 2760-2761); that although Frank Smith committed the robbery and kidnapping and rape, he was a minor participant in the murder (TR 2760); and he further argued:
>
> > Now, the final one that applies -- well this mitigating factor, that the defendant acted under the extreme duress or under the substantial domination of another person, could apply. I dispute Mr. McGee's analysis that it could not possibly apply. You consider the evidence.
> >
> > Now, I don't know whether they're talking in there about duress. I doubt that it's the kind of thing that -- that -- I doubt that is that strong. But I don't forcefully argue that mitigating circumstance. I leave it to Your consideration. Let me just say that I won't totally rule it out.
> >
> > The next one is the capacity of the defendant to appreciate the criminality of his conduct and to conform his conduct to the requirements of law was substantially impaired. Well, this is another one of that sort of comes in, I think, a marginal -- in a marainal respect. I won't sit here and say that it's absolutely applies.

> But, there was some testimony, and it conflicted, that they had quite a bit to drink the night that this occurred; some testimony concerning some smoking of marijuana. Now, I don't know to what extent you consider that. Probably in -- probably with regard to the substantive defense you didn't consider it at all.
>
> But, it may have a bearing on the question of ultimate responsibility. A person who is a cold-blooded murderer, who does that for deliberate gain, the hit man who gets paid to kill somebody, is certainly not -- when you're talking about the death penalty, it's certainly not in the same class as a delinquent youth who gets drunk and robs a store. I'm not saying that's right.
>
> But what I am saying is that when you're talking about the death penalty, you can't classify those people the same way. So what we have are the application of at least one known aggravating factor. But I submit to you the mitigating factors, applied to this case, far outweish the aggravating factors, both numerically and both from the standpoint of the qualitative application of those factors.

(Answer Brief at 34-35, quoting ROA. 2760-61)(emphasis **in** original). From this the State concludes:

> Clearly from the tone of the closing arguments presented while "within the outline" of the statutory mitigating, Phil Padovano intended those jurors to consider the minuteness of evidence in relationship to those mitigating factors.

(Answer Brief at 34-35)(emphasis in original). The State's argument that these facts demonstrate harmlessness is difficult to fathom, for these very facts demonstrate that the Hitchcock error in Mr. Smith's case was far from harmless: as the State accurately relates, defense counsel wanted the jury to consider the nonstatutory mitigating evidence which came out during the proceedings in making the penalty decision, but was required to present his argument "within the outline" of the statutory mitigating factors. Obviously, if the jury concluded that this

evidence did not rise to a level sufficient to meet the stringent statutory criteria, the jury could not consider the mitigating "effect", Penry, 109 S. Ct. at 2951, of the evidence because the jury was instructed only on the statutory mitigating factors. See, e.g., Messer v. Florida, 834 F.2d 890, 894-95 (11th Cir. 1987) (Hitchcock violated because, inter alia, although defense argued mental health evidence as mitigating, jury instructed only on statutory mitigating factors and judge "considered the psychological evidence only for the purpose of determining whether it rose to the statutory level").

The situation in Mr. Smith's case is virtually identical to that upon which relief was granted in Penry v. Lynaugh, 109 S. Ct. 2934 (1989), which reaffirmed the principles of Lockett v. Ohio, 438 U.S. 586 (1978), Eddings v. Oklahoma, 455 U.S. 104 (1982), and Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). In Penry, the jury was instructed in accordance with the Texas death penalty statute that it was to determine the sentence on the basis of its answers to three special issues: whether the defendant acted deliberately in committing the murder; whether there was a probability that he would be dangerous in the future; and whether he acted unreasonably in response to provocation. Penry, 109 S. Ct. at 2947. Before the Supreme Court, the petitioner argued that the failure to provide the jury with additional instructions precluded the jury from considering the evidence in mitigation. Although, as in Mr. Smith's case, the State Respondent in Penry argued that the petitioner was able to argue the significance of his mitigation to the jury, id. at 2950, the Supreme Court concluded:

> In this case, in the absence of instructions informins the iurv that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its "reasoned moral response" to that evidence in rendering its sentencina decision. Our reasoning in Lockett and Eddings thus compels a remand for resentencing so that we do not "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett, **438** U.S., at **605, 98** S.Ct., at **2965;** Eddings, **455 U.S.,** at **119,** 102 S.Ct., at **879** (concurring opinion). When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth **Amendments."** Lockett, **438** U.S., at **605, 98** S.Ct., at **2965.**

Penrv, **109** S. Ct. at **2952** (emphasis added). The same analysis applies here.

In Penrv, relief was granted because the evidence argued in mitigation could not be fit into the special issues upon which the jury was instructed. Thus, the jury was provided no **"vehicle"** by which it could **"full[y]** consider[ ]**"** and "give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense." Penrv, **109 S.** Ct. at **2951.** The same is true in Mr. Smith's case. Although defense counsel argued mitigating evidence, attempting to fit that evidence into the statutory mitigating factors, if the jury concluded that the evidence did not meet the stringent statutory criteria -- as defense counsel's argument virtually conceded ("I don't forcefully argue that mitigating circumstance"; "this . . . sort of comes in . . . in a marginal respect") -- the jury had no **"vehicle"** for **"full[y]** consider[ing]**"** and **"giv[ing]** effect **to"** the mitigating evidence.

The State's argument here is foreclosed by Penrv, as it is

by Hitchcock itself. After all, in Hitchcock, defense counsel also tried to provide the mitigation to the jury, albeit squeezing it into the statute's factors ("Although petitioner's' counsel stressed the first two considerations, which related to mitigating circumstances specifically enumerated in the statute . . .," 107 S. Ct. at 1824), and also told the jury that it should "look at the overall picture . . . consider everything together . . . consider the whole picture, the whole ball of wax." Hitchcock, 107 S. Ct. at 1824. In Hitchcock, as here and as in Penrv, the State argued that counsel's presentation sufficiently placed the mitigation before the jury. In Hitchcock, a unanimous Supreme Court rejected this argument concluding that the error "could not be clearer." Id. at 1824. This Court and the Eleventh Circuit Court of Appeals have done the same, holding in every case decided post-Hitchcock that "mere presentation" is not enough to undo the error. See, e.g., Thompson v. Duaaer, 515 So. 2d 173 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Downs v. Duaaer, 514 So. 2d 1069 (Fla. 1987); Moraan v. State, 515 So. 2d 975 (Fla. 1987); McCrae v. State, 510 So. 2d 874 (Fla. 1987); Waterhouse v. State, 522 So. 2d 341 (Fla. 1988); Mikenas v. Dugger, 519 So. 2d 601 (Fla. 1988); Armstrona v. Dugger, 833 F.2d 1430 (11th Cir. 1987); Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987); Messer v. Florida, 834 F.2d 890 (11th Cir. 1987). To the contrary, the fact that the defense, as here, wants the evidence to be considered when the jurors are given no vehicle (i.e., no instructions, Penrv; Hitchcock) by which they can give the

evidence **"effect"**, Penry, supra, is what shows the harm.

Here, there were nonstatutory mitigating factors present and, as the State says in its brief, defense counsel wanted that evidence to be considered. However, because of the jury instructions, counsel was forced to try to fit this evidence into the narrow, constricted statutory mitigating factors. The same thing happened in Messer, supra, as well as in Hitchcock itself. What is clear, in light of Penry and Hitchcock, is that the jury was constrained from considering the evidence and giving it **"effect"**, Penry, supra, because of the instructions.

The evidence which defense counsel attempted to argue was substantial, particularly as it related to what happened during the offense. Despite its recognition of the substantiality of this evidence (Answer Brief at **34-35**), the State further attempts to argue that the error was harmless by analogy to Tafero v. Dusser, **873** F.2d **249** (11th Cir. **1989**). There, it was argued that the sentencers were precluded from considering doubt about whether Mr. Tafero shot the victims and residual doubt about Mr. Tafero's guilt. The mitigation which the instructions did not allow the jury to consider in Mr. Smith's case is qualitatively and quantitatively distinctly different from that at issue in Tafero. Here, it was conceded by all and recognized by the jury (as reflected by its question during guilt-innocence deliberations) that Mr. Smith was **not** the shooter. This is not an issue of "residual doubt." Further, among the mitigating factors involved in this case there was mitigation showing that Mr. Smith withdrew from the offense before the murder occurred, that he attempted to dissuade codefendant Copeland from killing

the victim, that he did not want the victim to be killed, and that he had been smoking marijuana and drinking substantial quantities of alcohol at the time of the offense. These factors are much, much different than the "residual doubt" at issue in Tafero (there was little question that Mr. Tafero was the shooter in that case), and speak to the circumstances of the offense and Mr. Smith's character -- i.e., his desire that the decedent not be killed and his efforts to stop Copeland from killing her. The State's reliance on Tafero is misplaced.

Similarly misplaced is the State's reliance on Heiney v. Dugger, No. 74,099 (Fla. Feb. 1, 1990). There, one factor argued as nonstatutory mitigation was that Heiney "sometimes" used alcohol. Slip op. at 5. Here, the evidence showed that Mr. Smith was drinking alcohol and smoking marijuana at the time of the offense.[1]

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[1]The State says that Heiney is "important" because after finding the Hitchcock error harmless, this Court remanded for an evidentiary hearing on Heiney's claim that trial counsel was ineffective at the penalty phase. Apparently, this is "important" to the State because it relies on the record in Mr. Smith's prior Rule 3.850 proceedings to dispute Mr. Smith's Hitchcock claim. However, what is "important" is this Court's recognition that a Hitchcock claim and a penalty phase ineffective assistance of counsel claim are two distinct issues, requiring different analyses. If such were not the case, the petitioners in Hall v. State, 541 So. 2d 1125 (Fla. 1989), and Meeks v. Dugger, 548 So. 2d 184 (Fla. 1989), each of whom had unsuccessfully attempted to litigate ineffective assistance of counsel claims in the past, would not have been granted relief because of the constraints under which defense counsel operated. Additionally, while this Court found that evidence that "Heiney sometimes used alcohol" was insufficient to warrant relief on Hitchcock grounds in that case, the Court remanded for an evidentiary hearing based, inter alia, on an allegation that

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As discussed in Appellant's initial brief, Hitchcock error occurred before both the sentencing jury and judge in this case.[2] Under no construction can the error be deemed harmless beyond a reasonable doubt. The State's efforts to argue harmlessness are far from persuasive.

B. THE EIGHTH AMENDMENT VIOLATION RESULTING FROM THE CONSTRAINTS ON DEFENSE COUNSEL

Significantly, the State fails to recognize that this is an issue which requires an evidentiary hearing for proper resolution. See Lemon v. State, 498 So. 2d 923 (Fla. 1986); Cooper v. Wainwriaht, 807 F.2d 881, 889 (11th Cir. 1986). Rather, the State argues that parts of trial counsel's testimony in the prior Rule 3.850 proceedings somehow refute the claim, while other parts of the same testimony are the result of "faulty memory":

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"immediately prior to the present murder [Heiney] was abusing heroin, marijuana, and alcohol." Slip op. at 6. Clearly, the Court recognized that the possibility of intoxication at a time approximate to the offense, as occurred in Mr. Smith's case, is more significant mitigation than evidence that the defendant "sometimes used alcohol." It was quite significant in Mr. Smith's case. The jurors, however, were not provided with any vehicle by which they could consider it.

[2]The Appellee's reference to the "memo" filed by the State between jury and judge sentencing is of as little moment here as the similar "memo" filed in Booker v. Duaaer, TCA 88-40228-MMP (N.D. Fla. Sept. 16, 1988)(Paul, J.), in which relief was granted because of the error before the jury and judge. There, as here, the judge said absolutely nothing (anywhere in the record) to indicate that he would be taking any view other than that embodied in his jury instructions. See Zeigler v. Duaaer, 524 So. 2d 419, 420 (Fla. 1988)(Unless the record reflects an affirmative statement to the contrary, the judge is presumed to follow his jury instructions).

> While Phil Padovano was able to recall his strategy and tactics for calling and not calling certain witnesses, the record bears out that Phil Padovano's memory in **1984** was flawed as to what he actually knew or did at Smith's trial in **1979.**

(Answer Brief at 27). Thus, according to the State, trial counsel's **1984** testimony is in certain respects (those the State seems to like) reliable, and in other respects (those the State dislikes) is unreliable. The State also argues that at the time of trial, "**[Judge]** Padovano (contrary to his recent affidavit) did not believe he was restricted" (Answer Brief at 30)(emphasis added).[3]

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[3]**At** the January 26, **1990,** hearing, the following transpired during one of the instances at which Judge Padovano's affidavit was discussed:

> [MR. NOLAS][PETITIONER'S COUNSEL]: The best evidence of what Judge Padovano thought at the time of the original proceedings is the affidavit from Judge Padovano that Your Honor has, an affidavit that is in conformity with the original record and with the **1984** testimony.
>
> The one thing we did not hear and the one thing that I don't think anybody would say here is that Judge Padovano lied in his affidavit, that the affidavit --
>
> [MR. MARKY][ASSISTANT STATE ATTORNEY]: Your Honor, I object. Now, I object to any characterization that I have said Judge Padovano lied.
>
> MR. NOLAS: That's what I'm saying. Nobody has said that.
>
> MR. MARKY: Oh, I'm sorry.
>
> MR. NOLAS: No. That's what I'm saying. None of us would stand up here and say Judge Padovano did not honestly give his thoughts in his affidavit.
>
> So, what you have is -- the question here is do you take Judge Padovano's view of what happened originally, do you take my interpretation of what his

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As explained in Mr. Smith's initial brief, Judge Padovano provided a sworn affidavit explaining that at the time of trial,

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> thoughts were originally, or do you take Mr. Marky's interpretation of what his thoughts were originally. Obviously, the best evidence is Judge Padovano's affidavit, which ties all of this together.
>
> Let me go to that 1984 hearing. I won't go through everything about it, but let me just quickly, in a nutshell, summarize what that hearing was all about.
>
> You heard Mr. Marky go through the sister being called to testify and Judge Padovano asking Dr. Kennedy about McNaughton and all that. The point being, remember what Judge Padovano's mind set was, remember what he was talking about. Yes, he fully investigated. Yes, he knew about all this evidence. Yes, he would have presented it all. But, he had no vehicle upon which to get the jury to consider it.
>
> That is why Judge Padovano says in that hearing and confirms in the affidavit -- when Mr. Marky was quoting the question, I asked whether this would have had any bearing and he said, "I didn't at the time, or I would have presented it." I didn't think at the time that all of this evidence that we were asking him about would have had any bearing, or I would have presented it.
>
> Of course he didn't think at the time it would have had any bearing. It didn't fit anywhere in the statute. It didn't have anything to do with the statutory mitigating factors. And from his mind set at the time, it, therefore, had no bearing. That is absolutely correct.
>
> * * *
>
> His big plan that he came into the penalty phase with that Mr. Marky quoted you about, about you don't then change the big plan and present all of this other mitigation that he hadn't investigated and prepared, there was a reason for that. There was a reason for that big plan. And the reason was the statute and the instructions that the jury was to receive.

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his efforts to develop, present, and argue mitigation on Mr. Smith's behalf were constrained by the capital sentencing statute, particularly by the instructions which he knew the jury was going to receive -- instructions which did not provide for the consideration of nonstatutory mitigation. As Mr. Smith's initial brief also explained, Judge Padovano's affidavit is consistent with the records of the trial and the prior Rule 3.850 proceedings. The State has contested these factual allegations ("contrary to his recent affidavit"), and has attempted to refute them. But the State fails to understand that the reason why an evidentiary hearing is required is that the facts are in dispute. The State's invitation that this Court find a "faulty memory" on Judge Padovano's part is precisely why an evidentiary hearing is required. The facts simply cannot be credited in the State's favor ("faulty memory"), as the State would like, without a factfinder hearing the witnesses (e.g., Judge Padovano), properly assessing the facts, and fairly determining which version of the contested questions of fact is accurate. **See** Aaan V. Dugger, 835 F.2d 1337 (11th Cir. 1987).

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> Judge Padovano was not about to change his theory because he had nothing to gain by changing his theory, because he had nothing to gain by giving the jury evidence that a reasonable juror would not be allowed to consider in the first instance.
>
> So, yes, he investigated fully. Yes, he had all this evidence. But, as he says in the affidavit, his full investigation was an effort to look for, investigate, develop and put before the jury evidence that fit within the statute.

(Tr. 186-89).

The State continually argues that Mr. Smith's claim should be rejected because his 1984 penalty phase ineffective assistance of counsel claim was rejected. As this Court well knows, the two issues are distinct. Mr. Smith has consistently argued that the proceedings resulting in his death sentence were unconstitutional because they did not provide for the consideration of nonstatutory mitigation. As the State's brief acknowledges, "[t]he error in this case only became error when the United States Supreme Court, in 1987, decided it was so" (Answer Brief at 30-31). Thus, as the State also recognizes, "[p]rior to that occasion, while the claim was percolating in the waters of litigation, collateral counsel, in 1984, complained about the limitations on the instructions and Phil Padovano's representation, but he did not connect the two" (Id. at 31).

Hitchcock provided the mechanism for presenting this issue, as this Court clearly recognized in Hall v. State, 541 So. 2d 1125 (Fla. 1989), and Meeks v. Dugger, 548 So. 2d 184 (Fla. 1989). Only after Hitchcock did the law recognize that which Judge Padovano and other practitioners knew all along: that the status of the law (and jury instructions) at the time of Mr. Smith's capital sentencing constrained counsel's efforts to develop, present, and argue nonstatutory mitigation. In fact, in Meeks, the defendant had previously raised a claim that defense counsel was ineffective at the penalty phase, and the claim was rejected. Meeks, 548 So. 2d at 186. In Hall, an ineffective assistance of counsel claim had been waived during prior litigation. Post-Hitchcock, however, when Mr. Meeks and Mr. Hall presented claims identical to that raised herein by Mr. Smith --

that the law inhibited counsel's efforts -- this Court granted relief. Clearly, the decision on a previous penalty phase ineffective assistance of counsel claim does not determine a Hitchcock claim such as that presented by Mr. Smith.[4]

As Judge Padovano's affidavit attests, the law and jury instructions in effect at the time of Mr. Smith's capital proceedings constrained his efforts to develop, present, and argue nonstatutory mitigation. As that affidavit also attests, Judge Padovano would have presented substantial evidence and arguments on Mr. Smith's behalf had he not been inhibited by the statute and jury instructions. Hitchcock error occurred, and it was by no means harmless beyond a reasonable doubt. A stay of execution, an evidentiary hearing, and Rule 3.850 relief are proper.

CLAIMS **II, III, IV, V** AND **VI**

The State having said nothing to rebut Mr. Smith's entitlement to relief on these issues, Mr. Smith relies on the presentation in his initial brief. He notes, with regard to Claim VI, that this claim is not "barred". As Mr. Smith acknowledged in his initial brief, since the underlying conviction is still in litigation (and thus has not yet been found valid or invalid), under this Court's settled law the

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'Moreover, the State's arguments regarding defense counsel's purported **"strategy"** fail to consider that trial counsel's strategy, of course, had to be developed with a view toward what the jury instructions would allow the jury to consider. The State has said nothing regarding the evidence and argument which Judge Padovano himself states, under oath, that he would have presented on Mr. Smith's behalf had he not been constrained by the statutory focus then in effect (See App. A(l) at *6-8*, Affidavit of Judge Padovano).

factual support for this claim does not yet exist. The claim is, however, not waived.

CONCLUSION

Mr. Smith has presented compelling claims establishing a violation of the most fundamental of constitutional rights. The State has said virtually nothing to show, beyond a reasonable doubt, that relief is not warranted. 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 5th day of February, **1990**.

_____
Attorney