IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

JESSE JOSEPH TAFERO,

Petitioner

vs.

STATE OF FLORIDA,

Respondent

ON APPEAL FROM THE CIRCUIT COURT FOR
THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

APPELLANT'S SUMMARY BRIEF ON DENIAL OF MOTION FOR RELIEF PURSUANT TO RULE 3.850, DENIAL OF REHEARING, AND DENIAL OF AMENDED RULE 3.850 MOTION, AND MOTION FOR STAY OF EXECUTION, AND, IF NECESSARY, MOTION FOR STAY OF EXECUTION PENDING THE FILING AND DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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This case involved three co-defendants, Petitioner, his lover Sonia Jacobs, and Walter Rhodes. Rhodes testified against the other two pursuant to a plea bargain and "most of the . . . facts were revealed by Rhodes' testimony." Jacobs v. State, 396 So.2d 713, 716 (1981); see also Tafero v. State, 403 So.2d 355, 358-59 (Fla. 1981). Mr. Tafero received a death sentence. Id. Ms. Jacobs' death sentence was reversed, because, inter alia, her (and Petitioner's) sentencing judge "held the mistaken belief that he could not consider nonstatutory mitigating circumstances." Jacobs, supra, 396 So.2d at 718. Rhodes went to prison, where he promptly recanted the testimony he had given at Petitioner's trial.[1] Mr. Rhodes provided the only evidence that

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[1] While the importance of this recantation is inestimable, this Court concluded in 1983 that the recantation would not "conclusively preclude" the conviction, and denied error coram nobis relief. However, this Court's "conclusiveness" test for error coram nobis relief based upon newly discovered evidence is overly strict, its application in capital cases is especially harsh, and critics of the test are growing in number. See O'Callaghan v. State, 461 So.2d 1354, 1356-57 (Fla. 1989) (Overton, J., dissenting).

> I find that where a death sentence has been imposed and a material witness has changed his testimony, the court should not be reluctant to at least provide an evidentiary hearing to ascertain the truth . . . . I dissented in Hallman v. State, 871 So.2d 482, 486 (Fla. 1979) because I found the rigid application of the "conclusiveness test" overly harsh in death penalty cases . . . . I adhere to my dissent in Hallman because I believe it provides a procedure [i.e., a "probability test"] that will serve to protect this state from executing an individual when conviction was based in part on false testimony.

It appears that at least three members of this Court are now

Petitioner was responsible for the crime; the independent eyewitness testimony of two citizens demonstrated plainly that Petitioner took no part in the shootings. See Initial Brief of Appellant, Tafero v. State, No. 49,535, at 17.

The state offered three 1967 convictions of Petitioner, arising from a single transaction, as its only capital sentencing evidence, convictions of crimes for which Petitioner may be innocent.[2] Then counsel for Petitioner "acted totally contrary to

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prepared to reject the conclusiveness test in error coram nobis proceedings. See id.; Preston v. State, 531 So.2d 154, 160 (Fla. 1900) (Overton, J., and Kogan, J., concurring); Darden v. State, 521 So.2d 1103, 1106 (Fla. 1988) ("I agree with Justice Overton's dissents . . . which reject the conclusiveness test in the review of petitions for writ of error coram nobis.")

Former Justice Boyd joined with Justice Overton in this case in 1983, dissenting from denial of a petition for writ of error coram nobis respecting Rhodes' recantation. Tafero v. State, 440 So.2d 350 (Fla. 1983). Justice Boyd also separately dissented: "Such a recantation raises the question of whether an innocent person has been sentenced to prison or the electric chair on the basis of perjured testimony." Id. Noting that the facts pled raised a "substantial question of . . . a miscarriage of justice," Justice Boyd believed that "the state, society, and the courts should be sufficiently concerned to require further inquiry." Id.

[2] Mr. Tafero's guilt of the 1967 offenses is, in fact, "a jury question." Tafero v. State, 406 So.2d 89, 94 (Fla. App. 1981). On May 14, 1979, a Mr. Sheley testified in a proceeding to set aside Petitioner's 1967 conviction. He testified that he learned that Mr. Tafero had been convicted of the crime which he, Mr. Sheley, in fact had committed. He knew neither Mr. Tafero, nor his mother. Because he began to feel guilty, he wrote to Petitioner's mother on December 15, 1975, two months before the offense herein even occurred. The letter stated:

> Dear Mrs. Tafero:
>
> Please get in touch with your son Jesse. My name is Robert P. Sheley and I committed the crime your son was sentenced for in 1967. I'd like to straighten it out.

his client's interests" by dressing "totally in black -- black suit, black shirt, black boots -- to symbolize that justice had died, and declaring to the jury [at sentencing] that his client had not received a fair trial . . . ." Tafero v. Duaaer, 520 So.2d 287, 291, n.2 (Fla. 1988) (Barkett, J., dissenting).[3] The

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Please get in touch.
Thank you

/s/ Robert P. Sheley

Afterwards, and still without knowing Mr. Tafero or his mother, Mr. Sheley executed an affidavit regarding the 1967 case. In his 1979 testimony, he recounted how he had committed the 1967 offense, giving express details about the evidence of the crime, and the incidents vis-a-vis the victims. Petitioner also presented the testimony of a lie detector expert, establishing the truthfulness of Sheley's testimony. This evidence showed that Mr. Tafero was innocent of the offense.

The 1967 convictions were not set aside, as the court of appeals treated the proceeding in which they were attacked as an error coram nobis proceeding, and concluded, under the "conclusiveness" test, see footnote 1, supra, that the testimony would "raise a jury question as to the identity of the perpetrator" and a jury question "would not [by very definition] have conclusively prevented the entry of the 1967 convictions." Tafero v. State, 406 So.2d 89, 94 (Fla. App. 1981) The Court noted that the evidence of those convictions "was critical, if not essential, in affirming Tafero's death sentences." Id. at 95, n. 12.

[3] This lawyer, during the time of his representation of Petitioner, was deeply involved in criminal activity, which ultimately led to his convictions for a variety of offenses. He was known by law enforcement authorities for his participation in illegal drug activities, and he acted as an undercover agent for police. After Petitioner's trial, this lawyer was charged with "running a marijuana smuggling ring [from Columbia1 in 1976 and 1977," see Attachment 3, Petition to Rehear, which was during Petitioner's trial, and is an offense which these days justifies military action. He was also charged with bribing witnesses. He was convicted in federal court of giving $25,000.00 to one witness to influence the witness's testimony, and of "conspiracy to . . . promise and give money to persons with the intent to influence testimony . . . before a United States District Court," and drug offenses. Id. He was addicted to cocaine and alcohol,

sentencing judge and the sentencing jury were restricted in their consideration of non-statutory mitigating evidence.

It is apparent that Petitioner's 1976 trial and capital sentencing proceedings suffered from significant and troubling shortcomings. This Court addressed the "record-bound Hitchcock" shortcoming in 1988, and concluded that the error was harmless. Tafero v. Dugger, 520 So.2d 287 (Fla. 1988); but see id. at 290 ("I cannot in good conscience say the Hitchcock/Lockett error in this case was harmless beyond a reasonable doubt.") (Barkett, J., dissenting). In this action, Petitioner presents a "non-record Hitchcock" challenge, see Hall v. State, 541 So.2d 1125 (Fla. 1989), upon which resentencing should be granted. Petitioner and his counsel knew in 1976, two years before Lockett v. Ohio, 438 U.S. 586 (1978), that, under Florida law, "the sole issue in a sentencing hearing under Section 921.141, Florida Statutes (1975), is to examine in each case the itemized . . . mitigating circumstances," Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976), (discussing what "[w]e held in State v. Dixon," 283 So.2d 1 (Fla. 1973)), and their decisions necessarily were a function of this reality. Any decision about what to present was tethered to the knowledge of what would be considered, and that unconstitutional linkage fatally soiled this 1976 proceeding. See

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was fencing stolen automobiles, he was dealing drugs, and he was a confidential informant against his own clients during the pendency of Petitioner's case. Inasmuch as Petitioner was charged with the murder of law enforcement officers, this lawyer's confidential informant status is troubling. Ultimately he was disbarred.

Riley v. Wainwright, 517 So.2d 656, 660 (Fla. 1987) (issue is not what one may present, but what sentencers may consider). Sentencing counsel has sworn that he knew that there would be no consideration of non-statutory mitigation circumstances, and that the preparation for sentencing would have been dramatically different without the confinement of the statute.

The Motion filed below reveals what could have been considered, had Petitioner been told that sentencers could consider non-statutory mitigating circumstances. The mitigation proffered is the type of mitigation upon which reasonable jurors could base a life recommendation. See Carter v. State, No. 73,089 (Fla. April 26, 1990). Petitioner presents evidence "of an abusive, chaotic, and disturbed" adolescence and childhood, App. B; see id.; Brookinss v. State, 495 So.2d 135 (Fla. 1986); Herrins v. State, 446 So.2d 1049 (Fla. 1982), torture from his mentally ill father, App. B, see Carter, supra, extensive drug abuse, including substantial intoxication at the time of the offenses, App. B; see Carter, supra; Songer v. State, 544 So.2d 1010 (Fla. 1989) (law enforcement officer victim); Fead v. State, 512 So.2d 176 (Fla. 1987); good inmate behavior, App. B; see Sonser; Delap v. State, 440 So.2d 1242 (Fla. 1983), organic mental disorder, App. B; Roman v. State, 475 So.2d 1228 (Fla. 1985); Johnson v. State, 442 So.2d 185 (Fla. 1983), and paranoid delusions, App. B; Ferry v. State, 507 So.2d 1373 (Fla. 1976); Mines v. State, 390 So.2d 332, 337 (Fla. 1980); this evidence could have provided a reasonable basis for a life sentence, but

because of the atmosphere in 1976, no consideration of such evidence was possible.[4]

The pleadings in this case were filed last August. The petition had been pending nine months without resolution in the trial court when the Governor changed the litigation schedule by signing a death warrant for Mr. Tafero. The Governor provided an unusually short period of time for the substantial issues to be resolved -- fourteen days. The trial court denied relief, and, as to the Hall/Hitchcock issue, the Court ruled on the merits, and mentioned a procedural bar that plainly does not apply, in light of Hall. Thus, Petitioner is before this Court on at least one substantial and non-frivolous issue of fundamental eighth amendment violation. The issue need not, and should not, be injudiciously rushed to resolution just because the Governor is eager.

I. PROCEDURAL HISTORY

On August 1, 1989, Petitioner filed a Motion to Vacate Sentence in the lower court. That pleading presented, inter alia, a claim for relief based upon Hitchcock v. Duaaer, 107 S.Ct. 1321

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[4] The record on direct appeal contained evidence of non-statutory mitigating circumstances (i.e., disparate co-defendant treatment and uncertainty as to relative roles of offenders, see Cooper v. Dusaer, 526 So.2d 900 (Fla. 1988) (co-defendant relative culpability); Brookinss v. State, 495 So.2d 135 (Fla. 1986) (life sentence to co-defendant); McCampbell v. State, 421 So.2d 1072 (Fla. 1902) (disparate treatment of co-defendants)) which, while insufficient (according to this Court) to show harmfulness in and of itself, should be added to the non-record facts now presented when this Court again addresses harmfulness.

(1987) and Hall v. State, 541 So.2d 1125 (Fla. 1989), and was filed because of the August 1, 1989, time constraints imposed in Adams v. Dugger, 543 So.2d 1244 (Fla. 1989).

Respondent filed a Response on October 13, 1989. Petitioner did not receive the Response, and attorney Bruce Rogow did not advise Petitioner or anyone else that a Response had been filed.[5] The Circuit Court took no action on the Motion to Vacate Sentence for nine (9) months. The state set an execution date.[6] After setting the execution date, Respondent filed a Supplemental Response to the Motion to Vacate. Petitioner did receive the Supplemental pleading, but before he could respond the Court entered an order denying the Motion to Vacate. On April 26, 1990, Petitioner filed a Petition for Rehearing, and provided copies of that pleading to this Court. That petition was denied April 27, 1990, and a Notice of Appeal was filed immediately. The Court

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[5] Bruce Rogow is not now representing Petitioner. Mark Olive, Esq., upon learning that Mr. Rogow would take no further action in this Court, agreed to represent Petitioner in this Court. See first attachment to Petition for Rehearing, filed below, and provided to this Court April 26, 1990.

[6] Petitioner filed his Motion to Vacate because of the Adams time limitation, and notwithstanding that his appeal of denial of federal habeas corpus relief was pending in the Eleventh Circuit. Ultimately, Petitioner lost in the Eleventh Circuit, but the mandate was stayed, pending the disposition of a writ of certiorari. That writ was denied last Monday, April 16, 1990.

The state -- fully aware that a legitimate motion pursuant to Hall had been pending in the circuit court for nine months -- scheduled petitioner for execution two weeks away. If the steps that follow from that action -- including this pleading -- are not a model for post-conviction litigation, Respondent is to blame.

requested that briefs be filed by noon on April 27, 1990, and scheduled oral argument for Monday, April 30, 1990.

11. PROPRIETY OF STAY OF EXECUTION

This case should not be litigated under warrant. Petitioner has litigated his "Hitchcock" claim since his trial in 1976. He raised the claim for the first time on direct appeal in 1979, and it was denied on the merits. After the decision in Hitchcock v. Dugger, 481 U.S. 393 (1987), petitioner presented the Hitchcock issue to this Court in a petition for writ of habeas corpus. The claim was denied. Tafero v. Dugger, 520 So.2d 287 (Fla. 1988). After that decision, the Court decided Hall v. Dugger, 531 So.2d 76 (Fla. 1988), in which the Court denied Mr. Hall's Hitchcock claim, in a habeas corpus proceeding. Mr. Hall then filed a successor Rule 3.850 motion raising a Hitchcock issue, supplemented with non-record mitigating evidence. This Court, on appeal from Rule 3.850 denial, granted relief, notwithstanding the Court's previous Hall state habeas corpus Hitchcock denial. Hall v. State, 541 So.2d 1125 (Fla. 1989) (referred to hereinafter as Hall VII, for reasons that will be explained in section III, Argument I, infra.

Petitioner's claim is legitimate, non-frivolous, and substantial. It should not, and need not, be addressed under execution conditions. Many individuals have sought Hall VII relief, and rightfully so, and there is no reason to allow the state to decide which of these cases will be decided in two

weeks, two months, or two years.[7] In addition, other claims are available to Petitioner, which, because of the Governor's order, cannot be fully and fairly prosecuted. A stay is proper.

111. CLAIMS FOR RELIEF

ARGUMENT I

THE 1976 CAPITAL SENTENCING PROCEEDING PROVIDED NO OPPORTUNITY FOR A SENTENCER'S REASONED MORAL RESPONSE TO THE PETITIONER AND THE OFFENSE

The most basic tenet of Eighth Amendment jurisprudence is that a person shall not be condemned to death without at least having the opportunity to have the sentencer "consider and give

[7] After Hall VII, many Florida death-sentenced inmates rightfully filed "non-record" Hitchcock claims in state circuit courts, notwithstanding having had Hitchcock-type claims previously denied. For example, in (Frank Elijah) Smith v. Florida, No. 75,450 (Fla. Feb. 8, 1990), petitioner raised, and received merits consideration on a Hall/Hitchcock issue, notwithstanding having previously raised the issue in Smith v. Dugger, 888 F.2d 94 (11th Cir. 1989). See also Smith v. Dugger, 846 F.2d 707 (11th Cir. 1989); Smith v. State, 457 So.2d 1380 (Fla. 1984); Smith v. State, 424 So.2d 726 (Fla. 1982). Mr. Smith raised his Hall/Hitchcock claim before a warrant was signed, but, as here, there was no ruling upon the Rule 3.850 Motion until the Governor signed a warrant. The Florida Supreme Court ruled on the merits of the claim and denied relief. Execution was stayed by Judge William Stafford, United States District Court for the Northern District of Florida. Similarly, Jimmy Lee Smith presented a Hall/Hitchcock claim in a habeas corpus proceeding and the Florida Supreme Court denied relief. (Jimmy Lee) Smith v. Dugger, 529 So.2d 679 (Fla. 1988). Jimmy Lee Smith, after Hall VII, filed a non-record Hall/Hitchcock, Motion to Vacate Judgment in circuit court on April 20, 1989. Gary Alvord, after having a state habeas Hitchcock claim denied, see Alvord v. State, 538 So.2d 838 (Fla. 1989), on rehearing, 541 So.2d 598 (Fla. 1989), filed a Motion to Vacate Sentence, based upon Hall VII. These are only examples; many inmates have filed Hall VII pleadings in circuit courts.

effect" to "factors which may call for a less severe penalty" so as to "express[] its 'reasoned moral response" to the crime and the offender. Penry v. Lynaugh, 1095 S.Ct. 2934, 2952 (1989) (quoting Lockett). The 1976 proceeding conducted here violated this basic tenet.

A. The Hall/Hitchcock Claim Is Not Barred

The lower Court denied the Hall VII claim "as a matter of law on its merits" because "any alleged error committed with regard thereto was harmless." The Court also suggested that the claim was procedurally barred.[8] In this subsection, petitioner will demonstrate that the procedural bar language was not correct, in light of Hall VII. In subsection B, infra, Petitioner will show why harmless error analysis is not proper under the facts of this case, but that the error was not harmless, in any event.

In Hall v. State, 541 So.2d 1125 (Fla. 1989), the Florida Supreme Court explained why a Circuit Court judge should not invoke procedural bars to and should instead consider the merits of non-record Hitchcock claims made in a Rule 3.850 Motion, despite the fact that the movant had earlier raised a Hitchcock claim in a state habeas corpus proceeding. The Court in Hall **VII**

[8] The State urged denial of the Hall claim based upon abuse of the writ. The lower Court did find abuse of the writ as to two other claims in the Motion to Vacate, but rejected abuse of the writ vis-a-vis **the** Hall VII claim.

wrote:[9]

> We do not agree with the trial court's ruling that our denial of relief in Hall VI, constitutes a bar under the law of the case and res judicata. This case involves significant additional non-record facts which were not considered in Hall VI because that was a habeas corpus proceeding with no further development of evidence beyond the record.

Hall VII, 541 So.2d at 1126. Mr. Tafero is in the exact same situation. In 1988, Mr. Tafero filed a petition for writ of habeas corpus in the Florida Supreme Court, raising a record-bound Hitchcock claim.[10] It was denied. ~~Tafero v. Dusser~~, 520 So.2d 287 (Fla. 1988). The instant rule 3.850 motion is in response to Hall VII, and the Florida Supreme Court's direction to defendants to file ~~Hitchcock~~ claims with the trial courts in

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[9] Mr. Hall had appeared many times before state and federal courts before receiving relief, as is true of most still living inmates who experienced unconstitutional pre-1978 Florida sentencing proceedings. In Hall v. State, 541 So.2d **1125** (Fla. 1989), the Court recited the procedural history of Mr. Hall's case, and designated Mr. Hall's last previous appearance before the Court -- the state habeas corpus proceeding -- as "Hall VI." Petitioner here has designated the subsequent Florida Supreme Court grant of relief on appeal of the Rule 3.850 Motion as ~~Hall~~ VII.

[10] It should be noted that the Florida Supreme Court has indicated its displeasure at litigants who plead the same claims in both habeas corpus and Rule 3.850 pleadings. See ~~Blanco v.~~ Wainwright, 507 So.2d 1377 (Fla. 1987) ("By raising the issue in the petition for writ of habeas corpus, in addition to the rule 3.850 petition, collateral counsel has accomplished nothing except to unnecessarily burden this Court with redundant material.") Hence, no rule 3.850 ~~Hitchcock~~ claim was raised after Hitchcock, because the claim was raised in a habeas corpus proceeding. After Hall VII, Petitioner raised a non-record Hitchcock claim in his Rule 3.850 motion, and this Court, unlike in Petitioner's habeas corpus action, now has "development of evidence beyond the record." Hall VII, supra, 542 So.2d at 1126.

the form of Rule 3.850 motions to permit the development of facts. Id. at **1128**. ("Appellate courts are reviewing, not factfinding, courts").

B. The Hall/Hitchcock Error in This Case is Not Harmless And, Given the Unique Circumstances of this Case, Is Not Subject to a Harmless Error Analysis

There is no dispute about the Hitchcock error in this flawed 1976 capital sentencing proceeding. The state concedes it, and this Court has recognized it. Tafero, supra, **520** So.2d at 288-89. The issue is whether this fundamental eighth amendment error will require that petitioner be afforded the opportunity to have sentencers decide his sentence in a proper manner. As will be shown, 1.) all decisions by counsel and Mr. Tafero at the time of the trial/sentencing proceedings were predicated upon and inextricably linked to the unconstitutional capital sentencing scheme in force in Florida in 1976, any "strategy" or "waivers" on their parts were a function of the statute, and if waivers there were in 1976, they may not be used to bar review of this claim. Petitioner will also show that it cannot be said the evidence proffered to the state trial court in the Rule 3.850 Motion would have had no effect on the sentencing jury and the court, had it been developed, presented, and considered in 1976.

1. Neither Counsel Nor Mr. Tafero Waived Sentencer Consideration of Non-Statutory Mitigating Circumstances at the 1976 Sentencing Proceeding

The capital sentencing proceeding took place in this case on May 11, 1976. It takes up eighteen (18) pages of argument and jury instructions. The Supreme Court decided Lockett v. Ohio, 438 U.S. 586 (1978), over two (2) years later. Because Mr. Tafero's case was not yet final on direct appeal when Lockett was decided, he is entitled to the benefit of Lockett. Griffith v. Kentucky, 107 S.Ct. 708 (1987).[11]

Petitioner's sentencing proceedings cannot be divorced from this pre-Lockett preclusive atmosphere. Lockett was an eye opener, and the actors who operated in pre-Lockett days cannot be penalized for their inability to see what even the Florida Supreme Court failed to see for years. Actors in that era made decisions based upon what were fundamentally flawed, but axiomatic (then) assumptions.

Thus, when the Florida Supreme Court previously wrote that counsel "deliberately did not argue mitigating circumstances," that this was "based on tactical decisions" Tafero, supra, 520 So.2d at 289, and that petitioner "waived" the presentation of

[11] It is ironic that petitioner was raising his Hitchcock claim well ahead of most litigants, and now courts are writing that he is barred. The late Craig Barnard, Chief Assistant Public Defender in the 19th Judicial Circuit of Florida, raised the Hitchcock issue for Mr. Tafero in 1979. Mr. Barnard was not successful on the claim until 1987, in Hitchcock.

mitigating evidence, id., "deliberate," "waiver," and "mitigating circumstances" must be defined as being a function of the fundamental understandings of the times. Those understandings were wrong, that is not petitioner's fault, and he must not be penalized for acting a certain way based upon the reality that confronted him.

a. Sentencing Counsel Would Have Acted Differently Had He Operated Within a Constitutional Environment in 1976

We need not "speculat[e]," id. at 289, regarding what defense counsel would have done in 1976 had the environment within which he worked not been Lockett-impure. He has told us, in an affidavit, which must be considered to be true for the purposes of this appeal:

1. In 1976, I knew that **I** should try to present any mitigating factors during the penalty phase proceeding whether they were enumerated in the statute or not.

2. **I** also knew that the jury instructions limited the juror's and judge's consideration of mitigating factors to those enumerated in the Florida Statute.

3. **I**, therefore, knew that neither the jury nor the judge would consider anv non-statutorv mitigating factors.

4. Had I known that the jury could consider non-statutorv mitisatins factors and that they would have been instructed to do so, I and my investisator would have performed a complete investigation into Mr. Tafero's backsround and life historv and my stratesv at the penalty phase would have been dramatically different.

(Appendix S). Mr. McCain knew that "mere presentation," without sentencer "consideration," of mitigating circumstances was an exercise in futility. See Thompson v. Dugger, 515 So.2d 173 (Fla.

1987); Riley v. Wainwright, 517 So.2d 656 (Fla. 1987); Downs v. Dusaer, 514 So.2d 1069 (Fla. 1987); see also Armstrons v. Dugger, 833 F.2d 1430 (11th Cir. 1987). He operated within this environment, but, had he not, his preparation and "strategy at the penalty stage would have been dramatically different."

b. Petitioner Did Not Waive the Right to Sentencer Consideration of Non-statutory Mitigating Circumstances

Petitioner did not waive the right to have sentencer consideration of non-statutory mitigating circumstances in 1976 in Florida. It was not Something he could waive, because it was not an option.[12] He had no right, in Florida, to sentencer consideration of non-statutory mitigation. When the Florida Supreme Court wrote that Petitioner "waived" non-statutory mitigation, that waiver related only.to "present[ation]," Id. at 289, and is only a waiver to the extent that one "waives" doing something that is of no moment. **If** Petitioner "waived," he "waived" the right to present, and have no consideration of, evidence.

Just as counsel would have acted differently had he known differently, Petitioner would have acted differently. But that is not the test. Petitioner had an absolute right to have a

[12] Petitioner presents as a separate argument here that he could not, under Florida's statute, waive consideration of non-statutory mitigation in ***any*** event. See Tafero v. Dusser, 520 So.2d 287, 289-90. (Fla. 1988) (Kogan, **J.**, specially concurring). See also Hamblen v. State, 527 So.2d 800, 805 (Fla. 1988) (Ehrlich, **J.**, now C.J., dissenting).

sentencer "full[y] consider[]" and "give effect to mitigation evidence relevant to [his] character or record or the circumstances of the offense." Penry v. Lynaugh, 109 S.Ct. 2934, 2951 (1989). He "waived" that right, without knowing it existed, which is a contradiction in terms. As in the guilty plea context, reversal is mandated when the record does not reflect that a person knew of his or her options, and the consequences of waiver, without regard to what the person would have done with that information.[13] A waiver of trial (or, here, sentencing) is invalid if the Petitioner is not advised of his constitutional rights. Petitioner was not advised of "the legal options and

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[13] Petitioner need not show prejudice on this unconstitutional waiver issue. Reversal should be automatic. Under Boykin v. Alabama, 395 U.S. 238 (1969), because of "[w]hat is at stake for an accused facing death," the Supreme Court "demands the utmost solicitude of which courts are capable in canvassing the matter with the accused to make sure he has a full understanding of what the plea connotes and its consequences." Id. See Moore v. Jarvis, 885 F.2d 1565 n.4 (11th Cir. 1989) ("Boykin held that '[i]t was error, plain on the face of the record, for the trial judge to accept [Boykin's] guilty plea without an affirmative showing that it was intelligent and voluntary"); Loconte v. Dugger, 847 F.2d 745, 751 (11th Cir. 1988) (defendant must be advised of "the legal options and alternatives that are available."); Poole v. United States, 832 F.2d 501 (11th Cir. 1987); Coleman v. Alabama, 827 F.2d 1469 (11th Cir. 1987); Willett v. Georgia, 608 F.2d 538, 540 (11th Cir. 1979) ("A guilty plea is constitutionally valid only if the defendant has made a 'voluntary and intelligent choice' amons the various courses of conduct open to him or her." (citing Bovkin)); Lewellyn v. Wainwright, 593 F.2d 15, 17 (1979) ("Ignorance of the consequences of the plea is a factor that may require its rejection:) (citing Bovkin); United States v. Bobo, 586 F.2d 355, 364 (11th Cir. 1978) (defendant must have an "understanding [of] all the consequences and alternatives." (cf. signal to Boykin)). Here, if prior characterizations are correct, petitioner pled guilty to the death penalty, without knowing what the "alternatives" were.

alternatives that [were] available" to him, Loconte v. Dugger, 847 F.2d 745, 751 (11th Cir. 1988), he did not have an "understanding [of] all the consequences and alternatives," United States v. Bobo, 586 F.2d 355, 364 (11th Cir. 1978) (emphasis added), and he could not make "a 'voluntary and intelligent choice' among the various courses of conduct open to him . . . ." Willett v. Georgia, 608 F.2d 538, 540 (11th Cir. 1979). Resentencing is required. Because he did not know what capital sentencing was, it cannot be said that he waived anything regarding capital sentencing.

2. The Error Was Not Harmless

As just discussed, Petitioner's "waiver" should not be analyzed under a harmless error regimen. Invalid defendant waivers require retrial. The attorney's actions may be analyzed under a harmless error analysis, however. The types of mitigation not presented because of the statute, and which cannot be considered harmless, include[14] a history of alcohol and drug problems, see Holsworth v. State, 522 So.2d 348 (Fla. 1988) ("a history of drug and alcohol problems" properly considered by the jury in mitigation); Waterhouse v. Dugger, 522 So.2d 341 (Fla. 1988) ("Waterhouse proffered evidence that he suffered from

[14] Again, Petitioner's case is in the same posture that Mr. Hall's was in in Hall VII. In Hall VII, the circuit court judge assumed the truth of "[a]ffidavits presented by Hall's counsel from experts and nonexperts tend[ing] to prove numerous nonstatutory mitigating factors." Hall, 541 So.2d at 1126. Here, the lower court ruled, based upon all the proffer, that any error was harmless. To do that, the lower court judge had to assume the truth of the proffer.

alcoholism and 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 176, 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; along with 'stronger' evidence of a drug abuse problem."), a deprived, abused, and turbulent childhood, see Nearv v. State, 384 So.2d 881, 886-87 (Fla. 1980); Roaers v. State, 511 So.2d 526, 535 (Fla. 1987) (shock effects produced by childhood traumas may have mitigating effect); Lara v. State, 464 So.2d 1173, 1180 (Fla. 1985) (history **of** childhood abuse and difficulty of childhood considered mitigating), good adjustment to and conduct in prison, Sonaer, supra, and other matters. In Hall VII, the Court considered a "long history of drug and alcohol abuse, child abuse amounting to torture," and "a stark portrait **of** a childhood filled with abject poverty, constant violence, and unbearable brutality." Hall VII, supra, 541 So.2d at 1127. "There is substantial evidence that [petitioner's father] may have been insane." Id. **All** of this is presented by Petitioner's case. In addition, there was evidence available in 1976 that petitioner was innocent of 1967 convictions that were introduced against him at sentencing, but "innocence" of aggravating circumstances is not a non-statutory mitigating

circumstance.[15]

Petitioner will not repeat here all of the non-statutory mitigating evidence contained in the Motion. He will, however, present two "types" of evidence that were available in 1976. First, he presents the evidence from a clinical psychologist, who summarizes well what was available. Second, he presents the evidence that would have been available to prove innocence of the 1967 charges.

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[15] Indeed, Petitioner may well be innocent of this crime. The evidence in this case on direct appeal was that the independent eyewitness testimony of two citizens demonstrated plainly that Petitioner took no part in the shooting that resulted in the deaths of the two victims. The only witness to testify that Appellant took part in the shooting was Rhodes, the co-defendant, who entered a plea agreement in return for his testimony.

Rhodes recanted in September, 1982, in a letter he sent to the prosecutor. He accepted responsibility for the shootings. A petition for writ of error coram nobis was filed in the Florida Supreme Court. Justice Boyd dissented from the denial of the writ without a hearing because he "believe[d] that when a witness under penalty of perjury recants critical testimony given at the trial, there should be an evidentiary hearing." Furthermore,

> Such a recantation raises the question of whether an innocent person has been sentenced to prison or the electric chair on the basis of perjured testimony. Surely when a substantial question of such a miscarriage of justice has been raised, the state, society, and the courts should be sufficiently concerned to require further inquiry.

Tafero v. State, 440 So.2d 350 (Fla. **1983)** (dissenting opinion) Justice Overton also dissented, because "the asserted recanted testimony was a critical feature of the trial . . . ." Id.

a. Report of Dr. Brad Fisher, Ph.D. in Clinical Psychology

According to that to which Dr. Fisher would testify, there was a plethora of non-statutory mitigating evidence available to be presented in 1976, had anyone known that it could be considered:

Referral and Identifying Information

Jesse Tafero is a 43-year old white male who was convicted and sentenced to death for the murder of two law enforcement officers in May of 1976. The referral for this evaluation came from his attorney, Bruce Rogow. He was evaluated on June 21, 1989, at the Florida State Prison.

* * * *

Materials Reviewed and Tests Administered

For the current evaluation, this examiner requested pertinent legal and case history data from the office of his attorney. In response to this, the following materials were supplied, reviewed, and have a part in the opinions expressed in this report.

1. Interview notes and affidavits of family and pertinent others.
2. School records.
3. Florida State Prison medical records.
4. Excerpts from pretrial motions hearing.
5. Trial transcript excerpts.
6. Trial court order imposing death penalty.
7. Florida Supreme Court opinions, 1982-1988.
8. Affidavit of Walter Norman Rhodes.
9. Newspaper articles.
10. Sonia Jacobs Florida Supreme Court opinion, vacating death penalty.
11. Federal court excerpts.
12. Department of Corrections records.
13. Parole and probation records.
14. Excerpts from clemency file.
15. Information regarding drugs found in car, February 20, 1976.

16. Background material on Sonia Jacobs Linder.
17. Report of head laceration, February 20, 1976.
18. Hospital records of Jesse Tafero, Sr.

In addition to these materials reviewed, the following tests and questionnaires were given during the three and one-half hour session conducted at the prison.

1. Intellectual tests
   - Wechsler Adult Intelligence Scale
2. Neurological Screening Tests
   - Bender Visual Motor Gestalt Test
   - NST Neurological Screening Test
3. Projective tests
   - Sentence Completion Test
   - House-Tree-Person Test
4. Other
   - Mental Status Checklist for Adults
   - Personal History Checklist for Adults
   - Michigan Alcohol Screening Test (revision for narcotics use)

Overview of Developmental Data

Jesse Tafero was born on October 12, 1946, in Jersey City, New Jersey. He lived there or in the nearby city of Neptune, New Jersey, until the age of seven. He is an only child and was raised by his natural parents. Throughout his early childhood, and even later, he reports, and the records corroborate, having lived in many different places, primarily in large cities across Florida after moving from New Jersey. His father worked sporadically in different jobs, and it is reported that he only completed the eighth grade. He died in 1985 at the age of 85. His mother worked as a homemaker.

Records and reports indicate that Jesse Sr. was domineering, self-centered, violent, and mentally ill. His violence was mainly directed towards Kay, his wife, whom he regularly assaulted with a nightstick and with other available household objects (i.e., a lead crystal ashtray). Neighbors report hearing Kay screaming because of abuse by Jesse Sr. and fearing for Kay's life. Reports of Jesse Sr.'s extreme paranoia and familial possessiveness were also made available to me. Records reflect one psychiatric hospitalization of him, which was of four months duration. He carried a diagnosis of acute paranoid state during this hospitalization, with physicians noting his accusations of Kay regarding her imagined illicit sexual behavior with animals. Auditory hallucinations are also noted on his admissions summary.

The overall picture is one of an abusive, chaotic and disturbed household. As a child, Mr. Tafero reacted to the assaults on his mother by attempting to place himself between his parents, and by trying to seize dangerous objects from his father's hands. These episodes often left Mr. Tafero hysterical.

The Tafero family had little money, and at one point lived in a small dwelling on the site of Jesse Sr.'s used car lot. Whatever money was available was kept by Jesse Sr. rather than being put towards the family's collective needs. Mr. Tafero continues to have a great deal of embarrassment over his impoverished background, and over his family situation in general. He wishes to present his background in the least painful manner, and information from other sources is crucial in assessing the reality of his past experience in this area.

Mr. Tafero was a premature baby, and was asthmatic almost from birth. He contracted pneumonia at about six months of age, and was constantly ill with asthma and high fevers during his infancy and childhood. The Tafero family ultimately moved to Miami because of Mr. Tafero's poor health. Mr. Tafero was sickly, thin and frail throughout his formative years.

Mr. Tafero began the first grade at a local parochial school. He received generally good grades in elementary school, and Mr. Tafero reports that in these early years he got along well with his teachers and peers. The school records reflect that his family moved a lot, making consistent schooling and attachment to a particular school environment or peer group impossible.

Mr. Tafero's grades show a dramatic decline during his junior high school years. This decline corresponds with his essentially inevitable initiation into the use of illicit drugs (documented below), and ended with his quitting school in the tenth grade in order to help support his family. After leaving school, Mr. Tafero began to work full time.

Information from other sources indicates that he continued to be rather small in stature, thin and frail. Statements of Mr. Tafero's family and peers also chronicle his drug dependence throughout the latter half of his teenage years. He began smoking marijuana at age **13**, and fell into using LSD, amphetamines, peyote, amyl nitrate and other substances shortly thereafter (see Drug Dependence Section below). This drug dependence can best be explained by his need to be

accepted by his peers, and by his need to escape a disturbed and abusive family situation.

In addition to the reports of extreme mental abuse by his father, there have been several instances in Mr. Tafero's young life in which he was sexually abused. This includes an instance during his teenage years in which he reports having been raped, as well as a later incidence of rape while incarcerated. Both of these are difficult for him to talk about, and are corroborated by statements from people who knew him well.

After his sporadic work and his first incarceration (Florida State Prison and Belle Glades Correctional Institution from 1967-1973), Mr. Tafero began living with Sonia Jacobs. He considers both of her children as his, although only one is his natural offspring. His own description of his relationship with her is that it was "mixed" during their three years together; however, this contrasts sharply from the reports from nearly all others. These other reports suggest that Ms. Jacobs was extremely domineering and that Mr. Tafero played a consistently dependent role in the relationship. In questioning him about this in some detail, it is plain that this role was indeed dependent, although he would like to portray his role as more independent and "in control." It is in the development of this relationship that extensive drug use was reinstated and expanded, ending only with his current incarceration in 1976 and death row status from that time on.

In his time with her between 1973 and 1976, he appears to have changed dramatically. There are consistent reports (see Drug Abuse section) of deterioration to daily drug abuse, including extensive use of cocaine, PCP, and LSD. It is apparent that both he and Sonia (Sunny) were dependent on these drugs, and that at least Mr. Tafero was addicted during this time.

Behavioral Observations

Jesse Tafero was cooperative, well-oriented, and outgoing during our testing session.

He was open and straightforward in discussion of many aspects of his development and of his behavior, as he remembered it, during and prior to the crime. However, it was difficult for him to speak about issues such as shortcomings that his father had, and the reports of abuse, or in the other reports relating to his sexual abuse while in a previous incarceration and during his teenage years. This reticence is typical of persons who

have suffered abuse at the hands of older authority figures.

Concerning the crime itself, Mr. Tafero expressed regret for the events and fully acknowledged his problems with addiction at that time.

Test Results

Projective test data, as well as the data from empirical personality profile testing, suggest that, while he is an outgoing person, he is not dominating. In this sense, there is nothing in the test data to contradict the information gathered from others that it is much more likely that he was under the control of Sonia Jacobs, than either the reverse or even a neutral position where they both were making independent judgments, at the time of the offense. Projective data further reveal some level of paranoia remaining after the last thirteen years of incarceration; however, it is probable that this level of paranoia does not compare with the much higher level that would have been present from 1973 until his incarceration, largely due to excessive drug intake.

Tests for screening of organic impairment did not show any of the kind of gross abnormalities that are most frequently revealed in the type of screening tests I administered. It should be noted that these tests do not give detailed findings of organic functioning, but rather provide a surface screening indicating gross abnormalities that might call for further testing. In his case, his extensive drug use in the past is the strongest indicator that neurological symptoms might be present; however, they did not appear at a gross enough level to be detected by the type of screening tests (i.e., Bender Visual Motor Gestalt Test) given by this examiner.

Jesse Tafero's overall character might be described as one of containing a high level of suspiciousness, with problems in low self-esteem and insecurity covered by a surface show of bravado. His truer character is generally deferential, and more prone to be subservient than domineering, yet the overall show to the outsider is often the veneer of an outgoing man who is in charge.

History of Drua Dependence

Mr. Tafero's drug use began at age thirteen with marijuana. In the years that followed, he used LSD,

peyote, amphetamines, PCP, barbiturates, quaaludes and various inhalant substances. Both self-report and the statements of others document this extensive substance dependence. Because of his developmental history and history of physical infirmities, Mr. Tafero's drug abuse and subsequent addiction can be attributed to his need to be accepted by his peers and by the need to escape chaotic and violent home situation. The characteristics he possessed are consistent with those found in others who move into drug abuse as a compensation mechanism.

After his release from prison in 1973, and subsequent to his meeting and staying with Sunny, Mr. Tafero's drug use and addiction elevated to the point where the ingestion of drugs was daily and relatively indiscriminant. It appears that the drugs used most often included cocaine, PCP (under various names), and hallucinogens such as **LSD**. The data appear to be relatively consistent in that by the time of this crime, his drug addiction, as well as the use of drugs by those around him, had accelerated to use at nearly toxic levels on a daily basis. For example, he describes symptoms of hallucinations, blackouts, and loss of touch with reality on a frequent basis during this time.

Criminal and Incarceration History

Jesse Tafero has been incarcerated at the Florida State Prison on death row status since 1976. During that time, he has been relatively disciplinary-free, apart from one fight reported as a disciplinary during a time when **he** was on "death watch." His own description of this incident was that he was nearly "out of his mind" with anxiety concerning the possibility of an impending death sentence, and records confirm that he had been prescribed psychotropic medication, which is given for major thought disorders. Apart from this disciplinary report, there appears to be little worthy of note concerning maladjustment during his nearly thirteen years of incarceration on death row status.

Apart from the current sentence, his prior history includes a five-year sentence at the age of 21 for an armed robbery and rape, in which he received several write-ups. He served this time at Florida State Prison and at Belle Glade Correctional Institution, between 1967-1973. It should be noted here that it is consistent with those who have not had decent structure in their early development to receive disciplinaries upon incarceration for "impulsive behaviors" which

diminish as the person matures and the structure takes hold. It should also be noted that one report concerned an incident of Mr. Tafero's "huffing" glue and requesting help for this behavior.

Various accounts of Mr. Tafero's productivity and good prison adjustment during this first incarceration were made available to me. During this period, he functioned in a liaison capacity with a community college and was instrumental in providing inmates with educational opportunities. In addition, he generally received excellent job evaluations.

Data Relevant to Time of Crime

After Mr. Tafero's release from prison and subsequent moving in with Sunny, his life and behavior (between 1973-1976) became increasingly centered on drugs due to his chronic drug dependence. Sunny had been involved with drugs to a great extent previous to living with Mr. Tafero, and several sources indicate it was her influence that moved him in the direction of greater drug use, including daily use of cocaine and other mind-altering drugs. This domination by, and susceptibility to, the direction of Sunny is reported by many sources, and is consistent with Mr. Tafero's personality profile (see Test Results Section).

Shortly before the crime, both Sunny and Mr. Tafero had been living in North Carolina. Mr. Tafero had come down to Florida alone initially, to "get himself straightened out," and to attempt to create a positive environment in which to raise and care for their baby daughter, Tina, and Sunny's son, Eric. Both self-report and the statements of others indicate that Mr. Tafero was a devoted and loving father, both to his own baby and to Eric. However, Sunny soon came down with both the children, making Mr. Tafero's goal impossible.

Reports from several sources note that Mr. Tafero's overall behavior and contact with reality had deteriorated significantly in the month prior to this crime. These reports cover him at several points during this month and note such symptoms as paranoid ideation, overall paranoia about being constantly followed and watched, inability to carry on a conversation, limited contact with reality, hyperalertness, and other symptomatology consistent with later stages of addiction. In addition, Mr. Tafero was both sleep and nutrition deprived during this time, and was extremely thin, ragged and disheveled.

It was with this backdrop, i.e., having taken drugs indiscriminantly on a daily basis from morning until night for several months prior to the crime, and having behavior noted by others as being extremely bizarre and delusional, that Mr. Tafero and others became involved in this crime.

In addition to self-report and the observations of others, court and investigative documents list the narcotics found in the car in which **Mr**. Tafero and the others had been traveling. Cocaine, in quantity and of powerful strength, was present as were the following: marijuana laced with PCP, hashish, amphetamines, thorazine, talwin, and quaaludes.

It is significant to note that in addition to cocaine and PCP ingested by Mr. Tafero before the crime occurred, there is a report that an acquaintance had put **LSD** in Mr. Tafero's drink the previous evening. Mr. Tafero also reports ingesting PCP ("angel dust") on numerous occasions in the previous month and constantly taking cocaine. This history is consistent with the diagnosis of organic mental syndrome manifesting as delirium and delusions, with cocaine psychosis, and with symptoms related to extended use of PCP. It is my professional opinion that Mr. Tafero was suffering from two related organic mental syndromes in the early morning of February 20, 1976. These syndromes manifest themselves in the form of delirium and delusional thinking. The combined symptoms of these mental states necessarily compromised Mr. Tafero's ability to reason normally and perceive reality. Perceptual disturbances, misinterpretations, illusions, hallucinations, and persecutory delusions all may manifest themselves in one suffering from these organic syndromes. Paranoia is perhaps the most common feature of these syndromes, and it may be present to such a high degree that it is indistinguishable from the action phase of schizophrenia.

In addition to Mr. Tafero's drug-induced inability to think, reason, assess or recognize reality, his functioning was further compromised by the deprivation of both sleep and nutrition. The combined effects of poly drug-induced mental disorders, deprivations in food and sleep and the particular unfolding of events of that early morning rendered Mr. Tafero severely limited in his capacity to tell the difference between right and wrong. Hyper vigilance and reflex responses would be normal in this situation and would be further exacerbated by being startled awake by a law enforcement officer. Mr. Tafero could not think

rationally that morning; he could not appropriately assess reality or plan a course of action. He could not ponder the consequences of any particular action. He could do nothing but respond to his paranoid perception of danger.

Mr. Tafero's particular personality profile is one of generally how self-esteem and bad self-concept. These traits were relieved somewhat by his status as a father and member of a "family." In his delusional state, the perception that his family, including his infant daughter, were in danger would have augmented his paranoia, and brought forth a primitive protective response.

Competency to Stand Trial

I am familiar with the legal test for incompetency expressed in cases such as Dusky v. United States, and Drope v. Missouri, and with the criteria in Florida in effect at the time of Jesse Tafero's trial which are helpful in assessing the competency issue. (Rules 3.210 and 3.211, Florida Rules of Criminal Procedure.)

Jesse Tafero was arrested on February 20th and went to trial on May 10, 1976. During much of his pretrial detention, his reasoning and perception would still have been impaired. Profound thought disorders do not disappear immediately, and in case of the cocaine-induced and PCP-induced delusional disorders, the condition may persist for up to one year. In addition, withdrawal from these drugs can alter judgment, reasoning, perception and cognitive ability for several months following the cessation of their use.

There is a report of a laceration to Mr. Tafero's temple following the car crash which immediately proceeded his arrest. Head trauma continued due to beatings he suffered in the Broward County Jail, and in fact, a neurological evaluation was deemed to be in order. That evaluation apparently did not take place. The combination of these factors affected Mr. Tafero's ability to recall and relay information to his attorney, and compromised his capacity to realistically assess his situation and act appropriately and in his best interest.

Mitigating and Aggravating Factors

Because of Mr. Tafero's cognitive, social judgment, affective control and related mental and emotional impairments, it is my professional opinion that he was

suffering from an extreme emotional disturbance at the time of this crime. The interplay of poly-drug ingestion and the resulting organic mental disorders, Mr. Tafero's personality traits and deficits, and the specifics of the situation rendered him unable to think, reason and assess reality in anything other than a paranoid and delusional manner. He was likewise unable to conform his conduct to the requirements of law or to appreciate the criminality of his conduct. In addition, the results of his projective test data and data from empirical personality'profiletesting suggest that he is not a dominating person. Background material strongly indicates that Sunny is a dominating person, and that the pattern of her domination of Mr. Tafero was of long standing.

This crime was the result of drug ingestion, deprivation in sleep and nutrition, and concomitant paranoid delusions and the misperception of danger. It was not the result of rational thinking or of any formulated plan. As such, it is my professional opinion that aggravating factors based upon the avoidance of arrest or hinderance of law enforcement could not be justified in Mr. Tafero's case. No logical thought processes were occurring in his mind because they were not within his capabilities at that time.

Summary and Conclusions

Jesse Tafero is a 43-year-old white male with a history of poly-drug abuse and drug addiction. At times surrounding and including the date of the crime for which he is presently on death row, he was ingesting cocaine, PCP, LSD and marijuana, and was experiencing organic mental syndromes which rendered him delusional, paranoid, psychotic, and created perceptual disturbances and hallucinations. The effects of cocaine, PCP, LSD and other narcotics on the human brain and human behavior were well known in 1976 when Mr. Tafero's trial occurred. Sleep deprivation and the lack of proper nutrition exacerbated these profound mental disturbances.

Projective test data as well as the data from empirical personality profile testing indicate that Mr. Tafero is not a dominating person, and suffers from low self-esteem and bad self-concept. He is susceptible to domination and many reports document his domination by Sonia Jacobs, who is described as excessively domineering. This combination makes it highly unlikely that he was the person playing any kind of leadership role during the events of this crime. I simply can find

no data in my own testing, or in the information provided in the materials **I** reviewed, to suggest that he could have played a dominant role.

Mr. Tafero's childhood and adolescence were spent in the presence of a violent and mentally ill father. As a child, Mr. Tafero many times tried to protect his mother from the father's assaults, and would be left hysterical because of harm done to his mother and his own inability to shield her. His young life was also made difficult because of his chronic asthma and frail physique. He was sexually assaulted both in his teenage years and as a young adult. Mr. Tafero fell into drug use as a result of these background events.

Finally, it is clear that Mr. Tafero is quite capable of adapting well to a prison environment. This can be demonstrated through the lack of violence in disciplinaries obtained over the last thirteen years of his incarceration on death row. The few disciplinaries worthy of note appear to be in his earlier (1967-1973) incarceration, and can be more readily attributed to the impulsiveness of youth and for the need that he had to be given structure (i.e., such as was not given by his family or his home environment). Despite a transitional period of prison adjustment, Mr. Tafero went on to serve as liaison between the inmates and a local community college and thereby was instrumental in providing educational opportunities to the prison population. There is no reason to doubt that his adjustment during future incarceration will mimic his adjustment over the last thirteen years (i.e., be excellent), and this prediction could certainly have been made at the time of his initial trial in 1976.

(Appendix **B.**)

b. Non-statutory Mitigating Evidence Regarding Innocence of 1967 Conviction, Used in Aggravation of Punishment

The state introduced evidence of Petitioner's prior 1967 convictions during his 1976 capital sentencing proceeding. Mr. McCain knew that Robert Sheley had written to Petitioner's mother and confessed to the 1967 crime after Mr. Tafero was convicted. However, "innocence" of a prior offense is <u>not</u> a statutory

mitigating circumstance. No investigation of Mr. Sheley occurred.[16]

On May **14,** 1979, Mr. Sheley testified in a proceeding to set aside Petitioner's 1967 conviction. He testified that he learned that Mr. Tafero had been convicted of the crime he had committed. He knew neither Mr. Tafero, nor his mother. Because he began to feel guilty, he wrote to Petitioner's mother on December 15, 1975, two months before the offense herein even occurred. The letter stated:

> Dear Mrs. Tafero:
>
> Please get in touch with your son Jesse. My name is Robert P. Sheley and I committed the crime your son was sentenced for in 1967. I'd like to straighten it out.
>
> Please get in touch.
>
> Thank you
>
> /s/ Robert P. Sheley

Afterwards, and still without knowing Mr. Tafero or his mother, Mr. Sheley executed an affidavit regarding the 1967 case. In his 1979 testimony, he recounted how he had committed the 1967 offense, giving express details about the evidence of the crime, and the incidents vis-a-vis the victims. Petitioner also presented the testimony of a lie detector expert, establishing the truthfulness of Sheley's testimony. This evidence showed that **Mr.** Tafero was innocent of the offense.

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[16] See Motion for Post-conviction Relief, filed November 5, 1984, Case No. 76-1275-CF-A, in the Circuit Court of the 17th Judicial Circuit, and Appendix filed therewith.

The 1967 convictions were not set aside, as the court of appeals treated the proceeding in which they were attacked as an error coram nobis proceeding, and concluded, under the "conclusiveness" test, that the testimony would "raise a jury question as to the identity of the perpetrator" and a jury question "would not [by very definition] have conclusively prevented the entry of the 1967 convictions." Tafero v. State, 406 So.2d 89, 94 (Fla. App. 1981) The Court noted that the evidence of those convictions "was critical, if not essential, in affirming Tafero's death sentences." Id. at 95, n12.[17] Regardless of whether this evidence would have prevented a conviction, it could not constitutionally have been excluded at a capital sentencing proceeding.

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[17] In this claim, Petitioner is presenting this "innocence" evidence to demonstrate what was not presented at sentencing in 1976 as non-statutory mitigation. However, the "conclusively establish" test for prior convictions that are before the sentencer on the issue of punishment in capital cases may be inconsistent with Johnson v. Mississippi, 108 S.Ct. 1981 (1901), and this Court is urged to apply a more lenient test here, and grant relief on the claim that 1.) the aggravating circumstance relied upon at sentencing is unreliable because 2.) there is a jury question regarding whether petitioner committed the crimes.

ARGUMENT II

THE CAPITAL SENTENCERS WRONGLY BELIEVED THAT THEY DID NOT HAVE THE AWESOME RESPONSIBILITY FOR DETERMINING WHETHER PETITIONER SHOULD BE EXECUTED, AND TRIAL/ SENTENCING COUNSEL WAS GROSSLY INEFFECTIVE FOR ALLOWING THE INCORRECT IMPRESSION TO EXIST

Petitioner acknowledges that this Court rejects Caldwell v. Mississippi, 105 S.Ct. 2633 (1985), claims on the merits. However, the Eleventh Circuit Court of Appeals feels otherwise about the merits of Caldwell claims, see Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), and when sentencing proceedings are conducted in violation of Caldwell and counsel objects, sentencing relief is available. Because trial counsel 1.) allowed the sentencers to avoid their awesome sense of responsibility, and 2.) failed properly to object to this reduction in sentencer responsibility, he acted unreasonably and prejudicially, and resentencing is required.

The trial judge, in voir dire, told the jury:

> That is just an advisory sentence, and that is not binding upon the Court.
>
> The Court can accept your advisory sentence, if it so desires; or the Court can refuse to accept your advisory sentence, because the last word as to the sentence is right here. Do you understand that?
>
> MRS. SHAMBAUGH: Yes, sir.

(R. 293, Vol. VIII).

> [Judge] An advisory sentence is not binding upon the Court. It is an advisory

sentence, but the final decision in Florida is left up to the Judge. Do all of you understand that?

. . . .

The Court can then sentence the defendant to life imprisonment or to death; and the Court not being required to follow the advice of the jury.

That is what I was just telling you off the top of my head.

Thus, the jury does not impose the punishment, if such a verdict is rendered. The imposition of punishment is the function of the Court, rather than the function of the jury.

(R. 295), Vol. VIII).

. . . .

The State and the defendant present arguments for and against the sentence of death; and a jury renders an advisory sentence to the Court as to whether the defendant should be sentenced to life imprisonment, or to death, which may be by a majority vote of the jury.

The Court then sentences the defendant to life imprisonment or to death, the Court not being required to follow the advice of the jury. Thus, the jury does not impose punishment, if such a verdict is rendered.

The imposition of punishment is the function of the Court, rather than the function of the jury.

. . . .

(Tr. 13-14, Vol. VII).

The prosecutor told the jury the same thing:

MR. SATZ: In other words, we have a two-phase trial. If you find the defendant quilty of first degree murder -- and if you do -- then you have to render an advisory

opinion to the Court by a majority --

MRS. QUESADA: (Affirmative nod.)

MR. SATZ: -- as to life or death, and the Judge will determine what he has to do.

MRS. QUESADA: Right.

(R. 68-69, Vol. VII).

MR. SATZ: Do you understand, even if you don't believe in capital punishment, his Honor, Judge Futch, is the final determiner?

MRS. KIELBASA: I understand that.

(R. 247, Vol. VIII).

Just before the sentencing proceeding, the Court told the jury:

As I told you, the punishment for this crime is either death, or life imprisonment.

The final decision as to what punishment shall be imposed rests solely with the Judge of this Court. However, the law requires that you, the jury, render to the Court an advisory sentence as to what punishment should be imposed upon the defendant.

(R. 47, ROA Supp.).

As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge. However, it is your duty to follow the law which will now be given to you by the Court, and render to the Court an advisory sentence based upon your

(R. 47, ROA Supp.). Then the jury was charged:

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

(Id. at 54).

Thus, throughout Mr. Tafero's capital sentencing proceedings, the jury was repeatedly misled by the judge and the prosecutor regarding the critical nature of its sentencing role under Florida law, and trial counsel unreasonably failed to object. See Dugger v. Adams, 489 **U.S.** ____, 103 L.Ed.2d 435, 443 (1989) Pait v. State, 112 So.2d 380 (Fla. 1959) provided the basis for an objection and for argument that the remarks were impermissible. The failure to object was prejudicial, and hadcounsel objected, there is a reasonable probability that the sentencing determination would have been different.

ARGUMENT III

THERE IS NEWLY DISCOVERED EVIDENCE THAT TRIAL AND SENTENCING COUNSEL McCAIN WAS A DRUG ADDICT, A FENCE, AND AN UNDERCOVER AGENT AT THE TIME HE REPRESENTED PETITIONER

At the time the truncated motion was filed, counsel was investigating whether, at the time of Petitioner's trial, Petitioner's attorney was an undercover agent for law enforcement authorities. This attorney, who has been dubbed "per se ineffective," Tafero v. Dusser, 520 So.2d 287, 291 (Fla. 1988) (Barkett, **J.**, dissenting), acted "totally contrary to his client's interests **by** alienating the jury," id., at sentencing. We have discovered that this attorney actually acted as an undercover asent against his own clients, and that, at the time of his representation of Petitioner, he was doing so. The information that was developed, however, came from a federal prisoner. Because more investigation was necessary, the issue was

not fully presented earlier. Upon discovering the prisoner, counsel immediately filed FOIA requests with the F.B.I., but was advised that unless there was a death warrant the F.B.I. would not expedite its search.[18] The petition was denied before the F.B.I. providing information.

Hence, Petitioner presents the evidence that he has. The inmate, H. B. Sandini, swore that:

> I, H. B. Sandini, FCI prisoner number 02066-003, Social Security number 476-18-1092, born 7/10/25, hereby declare under penalty of perjury that I have personal knowledge of the information contained herein and that if called to testify I can competently attest to the following: My name is H. B. Sandini and I am an inmate at the Federal Correctional Institution at Terminal Island, California. In approximately fall of 1975, while I was living in the Ft. Lauderdale, Florida area, I received a call from a business associate in Chicago asking my assistance in resolving a business dispute in Ft. Lauderdale. As the situation was explained to me, a criminal attorney in Ft. Lauderdale by the name of Bob McCain, and his wife, were being threatened with physical harm by a two-bit drug dealer whom McCain had represented. The dispute involved $5,000.00 which had been paid by the drug dealer to McCain for representation. I was called to help resolve the dispute because I had done this before, and the business associate in Chicago told me McCain's wife was the daughter of a man in Cicero who was well-thought of there. I subsequently met with the McCains and agreed to assist in providing them with round-the-clock protection. I eventually spoke with the drug dealer who had threatened the McCains and persuaded him to drop the threat. After this situation was resolved, the McCains asked me to stay on and offered me the opportunity to conduct my business out of their office

[18] Included in the attachment herewith are letters and office notes reflecting communication with the F.B.I. in June, 1989. The F.B.I. refused to provide information rapidly, because there was no execution date, and said it would take "months" to provide the information. Upon the signing of the warrant, the F.B.I. expedited its search, but has advised that the records will not be available until next week.

(McCain's law office) in Ft. Lauderdale. Over the course of the next several months I used McCain's office to conduct business which, at that time, was auto parts and sporting goods. I was in that office on a daily basis for approximately the next six months. Prior to my association with McCain, I was aware that he was a criminal defense attorney who specialized in drug-related cases. Michelle McCain, Bob's wife. told me that McCain had practiced criminal law in Ft. Wayne, Indiana, and that he had left there under a cloud. Within a couple of months after my association with McCain, **I** noticed that McCain always had an alcoholic drink in his hands, at almost any time of the day or nisht. From my own observations I had seen him "wired", which I knew to be from druss. One day, after the office was closed and McCain was gone, Michelle, who worked in the office as McCain's secretary, came to me in tears and said that Bob was snorting cocaine. uoins out with other women, and his law practice was going to hell. She said she wanted him "done in", which I took to mean that she wanted him killed. I told her she was talking to the wrong person, and suggested that she talk to her father. Things calmed down for a while, during which time I confronted McCain with the information. McCain told me he was using cocaine, but could handle it. During that same time **I** also spoke to a drug dealer client of McCain's (name not recalled) who told me that he and McCain had worked out a business arrangement whereby McCain exchansed services for cocaine. At that particular time the dealer had given McCain half a key of cocaine on account, or the value of $22,500-25,000 in cocaine on account. Michelle verbally confirmed to me that Bob had this same relationship with other drug-dealer clients whom he represented, i.e., cocaine in exchange for legal services. It was my understanding that the cocaine McCain received was for his personal use rather than dealing it out from his office or some other location. During the time I associated with McCain, I arransed with his knowledse and permission for stolen vehicles to be parked for a few days at a time in a chain-linked lot immediately to the rear of his buildins. I advised McCain the cars were stolen, and he uave permission to allow the lot to be used for this enterprise. The cars were kept in this lot, which was under McCain's control and part of his property, for brief periods before being moved. While associated with McCain I recall very well when he became associated as defense counsel for Jesse Tafero, who had been charged with two counts of murder. McCain was elated at getting involved in this case because there was a lot of publicity associated with it. At that time McCain was drinking alcohol

excessively, which I would sav was perhaps more than a fifth per day. Whenever I was around him he alwavs seemed to be wired, and on at least one occasion at the office I saw McCain with a white substance, which I presumed to be cocaine, on his nose. **I** never saw Michelle McCain use cocaine, although **I** had seen her at times drink alcohol excessively. Sometime after McCain took on Jesse Tafero's murder case, I was told in person in two separate conversations bv a Broward Countv Sheriff's officer and Ft. Lauderdale Police officer, each of whom had resisned the force, that McCain was a confidential informant working for the Florida State Attornev's office and was informing to them on his own clients. The Ft. Lauderdale officer, whose name I cannot recall, was an undercover detective and the Broward County deputy (name not recalled) was in the Organized Crime Division. Right after this I confronted McCain with this information. McCain was scared and blustery, and said the information was erroneous; that he was not an informant and the State Attorney's office was trying to get even with him. During the period of my association with McCain, from about the fall of 1975 to the middle of 1976, McCain was a heavy user of alcohol and cocaine and on many, many occasions I saw him either in court, before court, or after court so hish on cocaine and/or alcohol that he could not, in my opinion, effectively represent his clients, including Jesse Tafero. According to Michelle McCain, who told me this herself in early to mid 1976, McCain was using an ounce of cocaine every 1-1/2 - 2 days. Shortly after I terminated mv association with McCain, he informed on me and I was subsequently arrested for possession of blank title certificates. a felon in possession of a weapon, and two other minor charaes. In the prosecution of my case it was brought out in court that McCain had been a confidential informant prior to 1976 and he informed on his own clients on behalf of the Florida State Attorney's office. The rumor I later heard was that someone in the State Attorney's office found out (prior to 1976) that McCain was using drugs heavily, and that if he did not cooperate with them then he would be taken before the State Bar and be disbarred. I have read this voluntary declaration of five pages, beginning on page one and ending on page five, and I am aware that the information contained herein is provided under penalty of perjury. If called to testify in the matter at hand, the Chief Medical Officer of this facility, Dr. Lescoe, would require that I not travel such a distance that I could not be returned to Terminal Island the same day. **I**, H. B. Sandini, acknowledge under penalty of perjury, that this declaration is given voluntarily and is

executed this 31st day of July, **1989** at Terminal Island.

Attachments hereto, filed April 26, **1990**. These allegations warrant an evidentiary hearing, even in a successor setting. See Harich v. State, 542 So.2d **980** (Fla. **1989**).[19]

We know more about McCain. In shorthand, we know:

1. McCain was allowed to resign from the Indiana Bar in November, **1979**. The Florida Bar suspended him on **8/21/79**.

2. On September **8**, **1978**, McCain was intercepted via wire conspiring with one Ron Braswell. This was done pursuant to an order signed September 2, **1978** by circuit judge David L. Levy. This 30-day order was extended for periods of 30 days on October 1, October 30, November 30 and December **29**, **1978**. Similar applications and orders entered for various other phone numbers throughout this time period, extending to as late as February **14**, **1979**.

3. Circuit Judge Lenore Nesbitt found probably cause May 7, **1979**.

4. McCain was arrested by the FDLE in Miami **5/10/79** for: Conspiracy to sell, deliver, possess or possess with intent to sell or deliver cannabis. The felony complaint affidavit notes the following: "Hold for magistrate hearing per judge Nesbitt. Bond set at **$25,000**." The capias information sheet under prior record states: "bribery?"

5. This case had about 30 defendants and was known as "The

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[19] Mr. Sandini died in January.

Sting." It appears that defendants were separated out, and that McCain was tried alone. Judge James R. Jorgenson sentenced McCain (#79-7615-A) to 3 years in the State Penitentiary and 2 years probation, concurrent with a federal sentence in case 79-6030, 10/18/79. The judgment form notes that the amount of cannabis in question was over 100 lbs.

6. McCain appealed to the 3rd DCA. An opinion (JJ Hubbart, Henry and Nesbitt) issued 11/25/80, affirming. Facts: McCain and John Doe coinspired with each other and Ron Braswell in a conspiracy to sell, deliver, possess or possess with intent to sell or deliver marijuana. McCain tried w/o jury. Undisputed evidence that Braswell, acting undercover for state, established himself as pot dealer: McCain and Doe went to Braswell's office where conversation recorded--discussed purchase of large quantity of marijuana by McCain for resale.

7. On April 23, 1979, McCain and his wife were indicted in Ft. Lauderdale for: Count 1--offering $25,000 to Margaret and Herman Hernandez with the intent of influencing the testimony of Herman as a witness in FDC #78-6250-Civ-JE as well as other proceedings before FDC in South Carolina in United States v. Arruda, et al., #78-234, in violation of Title 18, US Code, Section 201(d). (This offense occurred between December 22, 1978 and January 25, 1979 in Broward County); and Count 2--endeavoring to influence Herman Hernandez to falsely testify in same cases between same dates; and Count 3--McCains knowingly and willfully combine, conspire, confederate and agree to offer, promise and

give money to persons with intent to influence testimony of witness in proceedings before a US District Court. "Overt Acts" listed: McCain offered Margaret Hernandez $10,000 on or about 12/22/78 in exchange for influencing testimony of husband concerning Alan Arruda in FDC; on or about 12/28/78, McCain and wife delivered $10,000 to Margaret; on or about 1/3/79, McCain met with Herman Hernandez; on or about 1/5/79, McCain met with Margaret: on or about 1/6/79, McCain met with Herman; on or about 1/11/79, McCain delivered R10,000 to Margaret; on or about 1/15/79, McCain and wife delivered $5,000 to Margaret; on or about 1/25/79, McCain met with Hernandez.

9. August 10, 1979, a jury found McCain guilty of counts 1-3.

10. On September 20, 1979, Judge Roettger sentenced McCain to 8 years on count 1; 2 years each on counts 2 and 3, consecutive to each other and to count one for total of 12 years. Michelle McCain was sentenced to one year.

11. Sentencing: Court reviewed PSI and supplement. Defense attorney says "even the Ft. Lauderdale Police Department verified Bob's testimony during the trial that he had gone to Columbia with the blessing of the Ft. Lauderdale Police Department as their agent....probation officer said picked him because he had recputation for being involved in illegal drug activities, but no verification of that."

A hearing should be conducted regarding these allegations.

CONCLUSION

Wherefore, Petitioner respectfully requests that this Court enter an Order 1.) staying Petitioner's execution, 2.) vacating the lower court's order denying relief, 3.) granting Petitioner relief upon the claims pled in the amended and the originally filed Motion, and 4.) granting such other relief as the justice of this case demands.

Respectfully submitted,

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Attorney for Petitioner

Certificate of Service

I hereby certify that a true and exact copy of the foreging has been forwarded by hand delivery to Carolyn Snurkowski, Office of the Attorney General, The Capitol, Tallahassee, Florida, this 27th day of April, 1990.

By hand delivery
4/27/90

Mark E. Olive