IN THE

SUPREME COURT OF FLORIDA

CASE NO.: 82,435

JAMES ARMANDO CARD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE FOURTEENTH
JUDICIAL CIRCUIT COURT, IN AND
FOR BAY COUNTY, STATE OF FLORIDA

AMENDED
INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This brief addresses Mr. Card's claims and the Circuit Court's summary denial of Mr. Card's motion for post-conviction relief, filed pursuant to Fla. R. Crim. P. 3.850. No evidentiary hearing was allowed below.

The citation method employed in this brief is as follows: The record on direct appeal is referred to as "R___." The record on appeal in the current Rule 3.850 proceedings is referred to as "PC-R___." All other references are self-explanatory or otherwise explained.

REQUEST FOR ORAL ARGUMENT

Mr. Card has been sentenced to death. The resolution of the issues involved in this action will determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument is appropriate in this case and Mr. Card accordingly urges that the Court permit oral argument.

STATEMENT REGARDING THE APPENDIX TO THIS BRIEF

As a convenience to the Court, Appellant has appended to this brief three documents which the Court should review during this appeal. The first two are the Affidavit of Judge Turner (Att. A), the trial and sentencing judge in this case, and the Affidavit of Appellant's former trial counsel, H. Guy Green (Att. B). The affidavits are relevant to the issues discussed in section I of this brief. They were proffered below and are included in the record at PC-R 68-69 and 191-92. The affidavits and the other

facts discussed in section I, infra, demonstrate that an evidentiary hearing is necessary.

Also appended as Att. C is a copy of this Court's recent opinion in Spencer v. State, 615 So. 2d 688 (Fla. 1993). The Spencer decision, in conjunction with the other cases cited in the body of this brief, demonstrates that relief is warranted on the claim presented in section I, infra.

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STATEMENT OF THE CASE

a. Statement of the Facts

The facts relevant to this appeal are closely intertwined with the issues presented. For ease of review, they are therefore discussed in the body of this brief in conjunction with a discussion of the issues to which they relate.

b. Course of Proceedings

The trial was conducted in January, 1982. Mr. Card was convicted. Statutory and non-statutory mitigating evidence was presented at sentencing. The death sentence was imposed on January 28, 1982. On direct appeal, this Court was unable to consider the matters which have come to light during these Rule 3.850 proceedings -- that the trial judge abdicated to the prosecution the responsibility of sentencing Mr. Card, without disclosure or notice to the defense. The facts discussed in this brief were neither disclosed by the record, nor otherwise made known to Mr. Card, his trial counsel or his appellate counsel. This Court affirmed the conviction and death sentence. Card v. State, 453 So. 2d 17 (Fla. 1984).

The issues involved in these proceedings were also not previously disclosed to post-conviction counsel, and therefore were not known to this Court or the federal court during prior post-conviction proceedings. See Card v. State, 497 So. 2d 1169 (Fla. 1986); Card v. Dugger, 512 So. 2d 829 (Fla. 1987); Card v. Dugger, 911 F.2d 1494 (11th Cir. 1990); Card v. Singletary, 963 F.2d 1440 (11th Cir. 1992).

After Mr. Card's case had proceeded to the federal courts, the facts establishing the claim discussed in the first section of this brief came to light. In addition, the United States Supreme Court then issued opinions demonstrating that relief was warranted on the claims presented in the latter sections of this brief.

Accordingly, in March, 1992, Mr. Card filed a motion for relief and for an evidentiary hearing pursuant to Fla. R. Crim. P. 3.850 (PC-R 1). Shortly thereafter, Mr. Card filed an additional submission addressing the claims in the 3.850 motion, requesting summary relief and again requesting an evidentiary hearing (PC-R 33). In addition to the specific factual proffers pled by his pleadings, Mr. Card proffered affidavits and other documents in support of his claims, including the affidavit of Judge Turner, the Judge who sentenced Mr. Card and whose actions are at issue (PC-R 68). Mr. Card's counsel also requested the opportunity to appear in court -- in order to address the claims and explain why an evidentiary hearing and relief were appropriate.

Without allowing an evidentiary hearing or scheduling an in-court conference, the trial court, on April 10, 1993, issued an order summarily denying relief (PC-R 134). The trial court's order tracked the State's response and attached the same "exhibits" which had been attached to the State's response (PC-R 137).

Appellant moved for rehearing (PC-R 186), explaining, inter alia, that the summary denial of relief was improper, that an evidentiary hearing was appropriate and requesting "some opportunity to be heard" on the case in open court. Mr. Card also

filed a pro se memorandum reiterating that the claims were valid ones (PC-R 197). The trial court did not allow an in-court conference and summarily denied rehearing (PC-R 206).

Notice of Appeal was timely filed (PC-R 207). This appeal follows.

SUMMARY OF ARGUMENT

Each section of this brief addresses a separate claim for relief and each section begins with an Introduction outlining the nature of the claim. The claims and the facts, law and procedural issues relating to each claim are then discussed in the body of each section of the brief. In lieu of repetition herein, Appellant respectfully refers the Court to the Introduction included in each section of this brief as his summary of argument.

ARGUMENT

(I)

THE SENTENCING JUDGE ABDICATED HIS SENTENCING RESPONSIBILITY TO THE PROSECUTION, WITHOUT NOTICE TO DEFENSE COUNSEL, RENDERING APPELLANT'S DEATH SENTENCE FUNDAMENTALLY UNFAIR

A. Introduction: Appellant's Claim

> 1. My name is W. Fred Turner.... I was the Judge who presided over the case of State v. James A. Card.
>
> 2. I was asked by Circuit Judge Costello to testify in a hearing in the State v. Kayle Bates case as to the customary practice in my division for the issuance of capital sentencing orders. I testified in that hearing that it was customary for me to receive sentencing orders in capital cases from the State Attorney; that this customary practice was followed in the capital cases assigned to me; that I did not dictate findings to or request that the State Attorney submit the orders before the orders were prepared and given to me; that the prosecutors in my division provided the orders to me as a matter of course; and that I have never had a problem with this procedure. As I said when testifying, I adhered to an old saying which explained that the State Attorney is the "eyes and ears" of the Court.
>
> 3. As I testified at the hearing, I did not engage in off-the-record discussions with defense attorneys concerning the sentencing orders drafted by the State Attorney or the findings therein. As my previous testimony indicated, the results of any discussions with counsel about my views of the orders would be included in the record. The orders would then have been issued as provided to me. The orders were customarily provided to me prior to the sentencing hearing under Fla. Stat. § 921.141.
>
> 4. This was the customary practice and the process in Card....

(Att. A, PC-R 68-69) (Affidavit of Judge Turner) (emphasis added).

The affidavit of Mr. Card's former trial counsel, H. Guy Green, explains:

1. My name is Guy Green. I served as trial counsel in the case of the State vs. James A. Card. My co-counsel was Tom Ingles. Mr. Ingles is deceased.

2. I have reviewed the affidavit of Judge W. Fred Turner regarding James Card's case, over which he presided. In his affidavit, Judge Turner states that sentencing findings imposing the death penalty were prepared for him by the prosecution, that this was Judge Turner's usual practice and that this practice was followed in the Card case.

3. I was not aware in James Card's case that this was the procedure Judge Turner followed in this case, nor was I aware that this was the Judge's common practice in capital cases. Had I been made aware of this procedure, I would have raised objections, including objections because sentencing findings as to aggravating and mitigating circumstances in capital cases must be made independently by the Court.

4. We presented mitigating evidence in the Card case (for example, through the testimony of Dr. Hord) and wanted that evidence to be considered by the Judge independently of the prosecution's view of the evidence, as was our client's right.

5. I recall that all communication between the Court and the Defense Counsel is as on the record. I do not recall being advised that the State Attorney would prepare the Court's finding and sentence. We were not provided with a copy of the Findings Sentence before Judge Turner signed them, nor do I recall being told about the procedure Judge Turner followed, nor were we allowed the opportunity to object. We received the sentencing order in this case after it was signed and filed by the Judge. Had we known about the procedure Judge Turner and the prosecution followed, we would have raised the appropriate objections as was our responsibility as Mr. Card's counsel. We received no notice concerning this procedure and thus could not object to the content and findings of the order drafted by the prosecution before it was signed and filed by the Judge.

(Att. B, PC-R 191-92) (Affidavit of former trial counsel H. Guy Green) (emphasis added).

Judge Turner's disclosures about Mr. Card's case only recently became available. As the affidavit expressly relates, the judge

allowed the prosecution to usurp his sentencing function in James Card's case and did not himself independently sentence or meaningfully weigh aggravating and mitigating evidence. The judge has now disclosed that he in essence allowed the prosecution to sentence Mr. Card and to make the sentencing findings; that this procedure was undertaken before the sentencing hearing had even occurred; that he simply signed-off on the findings as provided to him by the prosecution; and that, in all meaningful respects, he allowed the prosecution to usurp his sentencing responsibility. During prior proceedings, neither Mr. Card nor his trial counsel, direct appeal counsel or collateral counsel were aware of the agreement between the judge and prosecutor now disclosed by the trial judge's affidavit.

This Court was also unaware of the agreement. Neither the judge nor the prosecutor said anything about it on the record, and appellate counsel and this Court knew nothing about it. On direct appeal this Court did not itself weigh aggravating and mitigating factors but allowed the death sentence to stand on the basis of what the Court believed were the findings of the trial judge. See Card v. State, 453 So. 2d 17, 23 (Fla. 1984) ("It is the province of the [trial] court to determine the weight to be given the testimony in the sentencing phase."); see also id. at 24 ("The trial judge stated the following in his sentencing report..." [quoting what we now know was the prosecution's order]); id. at 21-23 (also quoting the "report," which we now know was the prosecution's order); id at 24 ("We will not overturn" the

"judgment of the trial judge."). As the evidence now disclosed demonstrates, the sentencing order relied upon by this Court on appeal was not the trial judge's -- it was the order of the prosecution. The "reasoned judgment" of the trial judge upon which this Court relies in capital cases never occurred in James Card's case. The fundamental constitutional flaw in James Card's sentencing thus infected not only the original imposition of sentence, but also the appellate review process.

The issues presented in this case warrant an evidentiary hearing. Neither the judge nor the prosecutors disclosed the unconstitutional procedure they followed during prior proceedings in this case. Judge Turner did not previously agree to be interviewed. Trial defense counsel knew nothing about the unlawful procedure followed (See Att. B, PC-R 191-92, Affidavit of H. Guy Green). The record did not disclose anything about this procedure. And the prosecutors did not disclose it, although Mr. Card's case appeared in court on several occasions and although requests for the prosecution's records were made by collateral counsel pursuant to the Public Records Act, Fla. Stat. section 119.[1] Judge Turner then, recently, agreed to discuss his sentencing of Mr. Card in a conference with attorneys from the Volunteer Lawyers' Resource Center of Florida. And it was then that he made the disclosures presented in his affidavit.

---

[1]The prosecution's files were purged of evidence about this procedure.

This Court's precedents uniformly condemn as unlawful sentencing procedures such as those the trial judge undertook in James Card's case (See infra, discussing this Court's rulings). Most recently, this Court reiterated that:

> It is the circuit judge who has the principal responsibility for determining whether a death sentence should be imposed. Capital proceedings are sensitive and emotional proceedings in which the trial judge plays an extremely critical role. This Court has stated that there is nothing "more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant."

Spencer v. State, 615 So.2d 688, 691 (Fla. 1993) (appended hereto as Att. C), quoting Rose v. State, 601 So. 2d 1181, 1183 (Fla. 1992), and citing Code of Judicial Conduct, Canon 3A(4). This Court explained that the long-established and constitutionally and statutorily required procedure in Florida capital cases requires that:

> First, the trial judge should hold a hearing to: a) give the defendant, his counsel, and the State, an opportunity to be heard; b) afford, if appropriate, both the State and the defendant an opportunity to present additional evidence; c) allow both sides to comment on or rebut information in any presentence or medical report; and d) afford the defendant an opportunity to be heard in person. Second, after hearing the evidence and argument, the trial judge should then recess the proceeding to consider the appropriate sentence. If the judge determines that the death sentence should be imposed, then, in accordance with section 921.141, Florida Statutes (1983), the judge must set forth in writing the reasons for imposing the death sentence. Third, the trial judge should set a hearing to impose the sentence and contemporaneously file the sentencing order.

Spencer, 615 So. 2d at 690-91. Just as the "process was clearly not followed" during the proceedings in Spencer -- and resentencing

was therefore required, Spencer, 615 So. 2d at 690 -- the process was "clearly not followed" in James Card's case.

As Appellant's proffers demonstrate, the facts establishing this claim were not previously available to Mr. Card, his trial and appellate counsel, or his post-conviction counsel. This Court has held that claims founded on newly discovered evidence are cognizable in post-conviction proceedings under Fla. R. Crim. P. 3.850. See Harich v. State, 542 So. 2d 980, 981 (Fla. 1989); Scott v. Dugger, 604 So. 2d 465, 468 (Fla. 1992); Jones v. State, 591 So. 2d 911, 916 (Fla. 1992).

In Harich, the defendant alleged that his trial counsel had also served as a deputy sheriff. The facts proffered in support of the claim showed that the trial judge and trial prosecutor were aware of the potential conflict but that neither they nor the trial defense attorney disclosed it to the defendant or his post-conviction counsel. This Court held that an evidentiary hearing was appropriate in light of the facts alleged. Harich, 542 So. 2d at 981. In Scott, after the defendant had been sentenced to death and the death sentence was affirmed on direct appeal, the trial judge disclosed that she would not have sentenced the defendant to death had she known about the codefendant's life sentence. This Court granted relief. Scott, 604 So. 2d at 468-69. And in Jones, the defendant proffered evidence which he had not previously uncovered which showed that he may not have been the person who shot the decedent. This Court granted an evidentiary hearing. Jones, 591 So. 2d at 916.

As in those cases, the evidence about the Card sentencing procedures disclosed by the trial judge's affidavit was not available during previous litigation at trial, sentencing, on direct appeal or in post-conviction proceedings. The newly disclosed evidence demonstrates that Mr. Card's death sentence is constitutionally infirm. Because such evidence was previously unavailable to Mr. Card, the claim is cognizable in proceedings under Fla.R.Crim.P. 3.850. See Harich, 542 So.2d at 981; Scott, supra; Jones, supra. Harich and Jones hold that an evidentiary hearing is appropriate in Rule 3.850 cases when newly discovered facts come to light. The evidence now before the Court in this 3.850 action establishes Mr. Card's entitlement to relief. See Att. A, Affidavit of Judge Turner; Att. B, Affidavit of former trial counsel H. Guy Green. An evidentiary hearing is necessary and appropriate.

B. The Disclosures

The Judge who presided over Mr. Card's trial and sentencing (W. Fred Turner), recently provided an affidavit which specifically discussed the procedures he followed in the death sentence at issue in this case (Att. A). As the affidavit discloses, the sentence imposed on Mr. Card is fundamentally flawed: the sentencing judge has disclosed that he in essence allowed the prosecution to sentence Mr. Card; that he allowed the prosecution to make the actual sentencing findings, before any sentencing hearing had even occurred; that he issued those findings as provided to him by the prosecution; and that, in all meaningful respects, he allowed the

prosecution to usurp his sentencing function. Judge Turner has also related that he made this arrangement with the prosecution because, in his view, the prosecutor is the "eyes and ears" of the court (Att. A, PC-R 69, emphasis supplied). The procedure Judge Turner employed was not disclosed to trial or direct appeal counsel, nor was any statement about it made on the record, nor was it disclosed by any judicial or other record in Mr. Card's case, nor was it disclosed to Mr. Card's collateral counsel during prior post-conviction proceedings.

The agreement between the Judge and the prosecution -- described by the Judge's affidavit as his "customary practice" -- came to light only recently. Judge Turner then agreed to discuss Mr. Card's case during a conference with attorneys from the Volunteer Lawyers' Resource Center of Florida and provided the affidavit quoted above.

Because nothing in the record of Mr. Card's case previously shed light on the agreement between the Judge and the prosecution, this Court believed that it was reviewing the trial judge's findings on direct appeal. This Court did not independently weigh aggravating and mitigating factors on appeal in this case but allowed the death sentence to stand on the basis of what it believed were the independent findings of the trial judge. See Card v. State, 453 So. 2d 17, 23 (Fla. 1984)("It is the province of the [trial] court to determine the weight to be given the testimony in the sentencing phase."). The evidence now disclosed, however, demonstrates that the sentencing order was not the trial judge's,

but that it was the order of the prosecution. The "reasoned judgment" of the trial judge upon which this Court thought it was relying to uphold the sentence did not occur in Mr. Card's case. The fundamental constitutional flaw in James Card's sentencing disclosed by the sentencing judge's affidavit thus infected not only the original imposition of sentence, but also the appellate review process.

The infirmity in this death sentence is especially troubling because of the substantial mitigating evidence which Mr. Card submitted. As Judge Turner's affidavit discloses, none of this evidence was afforded meaningful or even actual consideration by the trial judge. This Court did not know on direct appeal that the "no mitigation" finding it was reviewing was the prosecutor's not the trial judge's finding. And this court did not know that the factual findings as to aggravation which it was reviewing on appeal were the prosecutor's, not the findings of the trial judge. Neither the aggravating nor the mitigating circumstances were ever validly considered by the trial judge in this case.

Statutory and non-statutory mitigating evidence was presented by Mr. Card at sentencing. We now know that the evidence was not given any meaningful consideration by the judge -- the judge merely signed-off on the prosecutor's order. The mitigating evidence which the judge ignored included the following.

At sentencing, Mr. Card presented evidence about his abused and difficult background and childhood; his mental health impairments; his psychological deficiencies; and his impaired

functioning at the time of the offense. Dr. James Hord testified, without rebuttal from the State, that Mr. Card, given his impairments, suffered from an extreme mental and emotional disturbance at the time of the offense and that his capacity to conform his conduct to the requirements of the law was substantially impaired at the time of the offense. Although the prosecution presented no mental health or other evidence to rebut these findings, the order the prosecutor drafted found no mitigating circumstances. As the evidence proffered in these Rule 3.850 proceedings shows (See Att. A), the order was drafted before the sentencing hearing had even occurred and thus before any of the mitigating (or, for that matter, aggravating) factors had been presented. Judge Turner, without disclosure to defense counsel, then simply signed-off on the order given to him by the prosecutor.

Dr. Hord explained that at the time of the offense Mr. Card was in a state of panic; that Mr. Card was "acting under extreme mental or emotional disturbance" and that Mr. Card's "capacity to conform his conduct to the requirements of law was substantially impaired." See Card v. Dugger, 911 F.2d 1494, 1508 (11th Cir. 1990). Dr. Hord testified that due to his psychological disabilities Mr. Card has poor judgment; lacks awareness; has an inability to plan and understand consequences; has "little forethought" and has great difficulties when under stressful circumstances. Id. Dr. Hord also discussed Mr. Card's difficult and abusive background. After discussing Mr. Card's impaired "emotional and psychological state at the time of the offense," Dr.

Hord described the interruptions Mr. Card suffered "in the childhood years in the natural identification between an individual and his parents." Id. at 1508. "Dr. Hord outlined Card's harsh treatment by his natural father and step-father during his early childhood and related specific instances of cruelty." Id. at 1508.

Dr. Hord described how "Card's mother put Card into psychiatric care" when Mr. Card was five or six years old. Id. at 1508. He related how Mr. Card's abusive and difficult background left him scarred. Dr. Hord also noted that Mr. Card needed a structured environment because of his psychological impairments, and explained that Mr. Card would do well in a structured prison environment and would not pose a threat to others in such a setting. See Card, 911 F.2d at 1508; cf. Skipper v. South Carolina, 476 U.S. 1 (1986).

None of this evidence was rebutted or controverted by the prosecution. None of it, however, was fairly considered by the judge. Cf. Knowles v. State, 18 Fla. L. Weekly S646, S648 (Fla. Dec. 16, 1993) (It is error for the trial court to decline to find uncontroverted mental health and other mitigating evidence); Maxwell v. State, 603 So. 2d 490, 492 (Fla. 1992) ("the [trial] court must find and weigh any mitigating evidence" which is reasonably established by the defendant and "uncontroverted" by the State) (emphasis in original), citing and quoting Nibert v. State, 574 So. 2d 1059, 1062 (Fla. 1990).

In his affidavit, Judge Turner now explains that it was his "customary" practice to allow the prosecution to prepare his

capital sentencing order, before the actual sentencing hearing, and that this is the procedure he followed in Mr. Card's case. Mr. Card's trial counsel were obviously not provided with notice of this procedure nor the opportunity to object. Indeed, the record reflects that the defense was led to believe that the State's sentencing order was Judge Turner's. As former trial counsel relates:

> I have reviewed the affidavit of Judge W. Fred Turner ....
>
> * * *
>
> We presented mitigating evidence in the Card case (for example, through the testimony of Dr. Hord) and wanted that evidence to be considered by the Judge independently of the prosecution's view of the evidence, as was our client's right.
>
> * * *
>
> We received the sentencing order in this case after it was signed and filed by the Judge. Had we known about the procedure Judge Turner and the prosecution followed, we would have raised the appropriate objections as was our responsibility as Mr. Card's counsel. We received no notice concerning this procedure and thus could not object to the content and findings of the order drafted by the prosecution before it was signed and filed by the Judge.

(Att. B, PC-R 191-92).

As Judge Turner's affidavit discloses, this procedure did not involve the Judge's first dictating or disclosing his findings, which were later memorialized. The findings themselves were prepared by the State. And they were prepared before the sentencing hearing had taken place:

> [I]t was customary for me to receive sentencing orders in capital cases from the State Attorney; ... this customary practice was followed in the capital cases assigned to me; ... I did not dictate findings to or request that the State Attorney submit the orders before the orders were prepared and given to me; ... the prosecutors in my division provided the orders to me as a matter of course;

> ... I have never had a problem with this procedure. ...I adhered to an old saying which explained that the State Attorney is the "eyes and ears" of the Court.
>
> ...I did not engage in off-the-record discussions with defense attorneys concerning the sentencing orders drafted by the State Attorney or the findings therein. As my previous testimony indicated, the results of any discussions with counsel about my views of the orders would be included in the record. The orders would then have been issued as provided to me. The orders were customarily provided to me prior to the sentencing hearing under Fla. Stat. § 921.141.
>
> This was the customary practice and the process in Card.

(Att. A, PC-R 68-69) (emphasis added). There is no record disclosure here, by the judge or the prosecutor, about the procedure followed and, as the judge and former defense attorney relate in their affidavits, there was no non-record disclosure.

The procedure resulting in this death sentence violated Fla. Stat. 921.141, the sixth, eighth, and fourteenth amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution. See also Fla. Stat. 3.850 (f).

No one informed trial defense counsel about the practice which Judge Turner has now disclosed. This practice establishes that there is fundamental constitutional invalidity in Mr. Card's sentence of death: the trial court failed to perform its statutorily and constitutionally mandated function of rendering independent findings when imposing sentence.

Florida's death penalty statute outlines the sentencing procedures that must be followed in cases where the death penalty is sought. See Fla. Stat. section 921.141. The trial court is

required to conduct an independent and meaningful assessment. The statute provides:

> (3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.-- Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence is based as to the facts:
>
> (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
> (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.
>
> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with S. 775.082.

(Fla. Stat. 921.141) (emphasis added).

At the sentencing of Mr. Card the requisite procedures were abrogated. The court expressly signed-off on the sentence and findings prepared by the State Attorney before the sentencing hearing even took place, without first telling the prosecutor what findings the court believed to be appropriate, and without providing defense counsel with notice, the opportunity to object, the opportunity to be heard or the opportunity to seek modification.

As this Court reiterated in Spencer v. State, 615 So. 2d 688 (Fla. 1993), procedures such as the one Judge Turner employed to sentence Mr. Card to death have been consistently found by this Court to be unlawful and fundamentally unfair. In Spencer, this

Court noted that there was "a draft of a sentencing order and that defense counsel had not been given notice of the process employed by the prosecutor and the judge." Spencer, 615 So. 2d at 690. The judge then made statements on the record attempting to refute that an unlawful procedure had been employed. Id. This Court vacated the death sentence after discussing the fundamental importance of allowing the defendant a fair opportunity to be heard, id. at 690-91, and reiterating what the law requires in order for a death sentence to stand:

> First, the trial judge should hold a hearing to: a) give the defendant, his counsel, and the State, an opportunity to be heard; b) afford, if appropriate, both the State and the defendant an opportunity to present additional evidence; c) allow both sides to comment on or rebut information in any presentence or medical report; and d) afford the defendant an opportunity to be heard in person. Second, after hearing the evidence and argument, the trial judge should then recess the proceeding to consider the appropriate sentence. If the judge determines that the death sentence should be imposed, then, in accordance with section 921.141, Florida Statutes (1983), the judge must set forth in writing the reasons for imposing the death sentence. Third, the trial judge should set a hearing to impose the sentence and contemporaneously file the sentencing order.

Spencer, 615 So. 2d at 690-91. This Court granted relief because "[s]uch a process was clearly not followed during these proceedings." Id. at 691. Such a process was also "clearly not followed" during the sentencing proceedings in Mr. Card's case -- this death sentence is as fundamentally flawed and invalid as the one in Spencer. An evidentiary hearing is manifestly appropriate.

After all, as this Court held in Spencer:

> It is the circuit judge who has the principal responsibility for determining whether a death sentence should be imposed. Capital proceedings are sensitive and

> emotional proceedings in which the trial judge plays an extremely critical role. This Court has stated that there is nothing "more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant." Rose v. State, 601 So.2d 1181, 1183 (Fla.1992). This statement was made in recognition of the purpose of canon 3A(4), Code of Judicial Conduct, which states:
>
> > A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding.

Spencer, 615 So. 2d at 691 (emphasis supplied). (The Spencer opinion is appended hereto at Att. C). Spencer controls the resolution of this case.

It is now apparent that this case lacks the requisite reliable indicia which "demonstrate the weighing of facts and the independent exercising of reasoned judgment [by the judge] needed to support a death sentence." Bouie v. State, 559 So. 2d 1113, 1116 (Fla. 1990). In Bouie, this Court vacated the death sentence because the record failed to demonstrate that the trial judge conducted an independent and meaningful weighing of aggravating and mitigating circumstances. The safeguards of an "independent weighing" and a "reasoned judgment required by the statute and caselaw" were also not afforded to Mr. Card. See Bouie, 559 So. 2d at 1116.

The fundamental precept of the United States Supreme Court's modern capital punishment jurisprudence is that the capital sentencer must afford the defendant an individualized, reliable and independent decision. It is for this reason that the Florida

Supreme Court has mandated that capital sentencing judges conduct reasoned and independent sentencing determinations. Indeed, this Court has consistently held that the trial judge must engage in an independent and reasoned process of weighing aggravating and mitigating factors and of determining the appropriateness of the death penalty in capital cases:

> Explaining the trial judge's serious responsibility, we emphasized, in State v. Dixon, 283 So.2d 1, 8 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed 2d 295 (1974):
>
> > [T]he trial judge actually determines the sentence to be imposed -- guided by, but not bound by, the findings of the jury. To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die. ... The fourth step required by Fla. Stat. sec. 921.141, F.S.A., is that the trial judge justifies his sentence of death in writing, to provide the opportunity for meaningful review by this Court. Discrimination or capriciousness cannot stand where reason is required, and this is an important element added for the protection of the convicted defendant.

Patterson v. State, 513 So. 2d 1257, 1261 (Fla. 1987).

In this case, however, the trial judge, without first independently dictating findings, simply signed-off on the findings made by the State and the sentence the prosecution wanted imposed. The Judge allowed the prosecution to usurp his sentencing responsibility. This case is also one involving no notice provided to the defense that such a procedure would be followed.

The newly disclosed facts demonstrate that Mr. Card was not afforded an independent and meaningful capital sentencing determination. The findings here were the State's. They were provided to the judge and were agreed to by the judge before the sentencing had even happened, and thus before any evidence as to mitigation, or, for that matter, aggravation had even been presented and heard. See Att. A (Affidavit of Judge Turner).

The statutory and nonstatutory mitigating evidence submitted by the defense here, although uncontroverted and not rebutted by the prosecution (the State neither called a mental health expert nor other witnesses to rebut the actual mitigation presented by Mr. Card), was never considered meaningfully by this trial judge. Cf. Eddings v. Oklahoma, 455 U.S. 104 (1992) (trial court must consider mitigation); see also Knowles v. State, 18 Fla. L. Weekly S646, S648 (Fla. Dec. 16, 1993) (the trial court errs when it declines to find uncontroverted mitigating evidence presented by the defendant as to mental health and other mitigating factors); Maxwell v. State, 603 So. 2d 490, 492 (Fla. 1992) (the trial "court must find and weigh any mitigating circumstance" which the defendant supports with evidence and which is "uncontroverted" by the prosecution).

On several occasions, this Court has addressed issues relating to a trial judge's failure to engage in a meaningful independent weighing of aggravating and mitigating circumstances before imposing a death sentence. See Spencer, supra. In each case, the Court condemned procedures such as the one employed by the trial judge in James Card's case. See, e.g., Van Royal v. State, 497 So.

2d 625 (Fla. 1986). In Van Royal, the Court set aside the death sentence because the record did not support a finding that the imposition of that sentence was based on a reasoned judgment by the trial court. Then-Chief Justice Ehrlich's concurring opinion explained:

> The statutory mandate is clear. This Court speaking through Mr. Justice Adkins in the seminal case of State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied sub nom. Hunter v. Florida, 416 U.S. 943, 94 S.Ct 1950, 40 L.Ed.2d 295 (1974), said with respect to the weighing process:
>
> > It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.
>
> 283 So. 2d at 10. (emphasis supplied).
>
> How can this Court know that the trial court's imposition of the death sentence was based on a "reasoned judgment" after weighing the aggravating and mitigating circumstances when the trial judge waited almost six months after sentencing defendant to death before filing his written findings as to aggravating and mitigating circumstances in support of the death penalty? The answer to the rhetorical question is obvious and in the negative.

Van Royal, 497 So. 2d at 629-30. Re-phrasing that question, how can this Court know that a death sentence is based on a trial judge's "reasoned judgment" when the trial judge does no more than sign-off on a sentencing order written by the prosecution before the sentencing proceeding has even taken place?

In Patterson v. State, 513 So. 2d 1257 (Fla. 1987), the Court was presented with a similar issue. The Court there emphasized the

importance of the trial judge's meaningful and independent weighing of aggravating and mitigating circumstances. In Patterson, the trial judge failed to engage in an independent weighing process. There, as here, the responsibility was delegated to the state attorney:

> [W]e find that the trial judge improperly delegated to the state attorney the responsibility to prepare the sentencing order, because the judge did not, before directing preparation of the order, independently determine the specific aggravating and mitigating circumstances that applied in the case. Section 921.141, Florida Statutes (1985), requires a trial judge to independently weigh the aggravating and mitigating circumstances to determine whether the death penalty or a sentence of life imprisonment should be imposed upon a defendant.

Patterson, 513 So. 2d at 1261 (emphasis added).

The record in Patterson demonstrated that the trial judge "delegat[ed] to the state attorney the responsibility to identify and explain the appropriate aggravating and mitigating factors" -- the death sentence was therefore found invalid. Id., 513 So.2d at 1262. The same is true in Mr. Card's case. Indeed, the few oral comments made by the Judge at sentencing were a reiteration of the order drafted by the State, an order drafted and provided before any sentencing hearing had taken place, and an order which the Judge had already received and would sign in accord with his "customary" practice.

It is now apparent that Mr. Card was denied his right to an individualized and reliable sentencing determination. The trial court here did not exercise the requisite independent judgment, but allowed the State Attorney to take on this responsibility. This

violated this Court's standards, the sentencing statute, and the eighth and fourteenth amendments. See e.g., Magwood v. Smith, 791 F.2d 1438, 1449 (11th Cir. 1986). In Magwood, the Court found that it was error for the trial court to fail to independently consider evidence in mitigation. Similarly, the trial court here acted in an arbitrary and capricious manner in totally failing to afford independent and meaningful consideration to the defendant. Cf. Knowles, supra (trial court errs in failing to find uncontroverted mitigating evidence).

The error which has now been disclosed in Mr. Card's case is also similar to the error at issue in Ross v. State, 388 So.2d 1191, 1197 (Fla. 1980). There, this Court vacated a death sentence where the trial judge did not make an "independent judgment of whether or not the death penalty should be imposed." The Court found that the judge's failure to conduct an independent weighing violated the dictates of State v. Dixon, 283 So. 2d 1 (Fla. 1973), and Tedder v. State, 322 So. 2d 908 (Fla. 1975), stating:

> Since it appears that the trial court did not make an independent judgment whether the death sentence should be imposed, we remand to the trial court to reconsider its sentence in light of this opinion.

Ross v. State, 386 So. 2d 1197-98.

In addition to the eighth and fourteenth amendment concerns for reliable, individualized, and fundamentally fair sentencing proceedings, the error in this case also implicates the constitutional imperative of a neutral and detached judiciary. See Spencer, quoted supra. The due process requirement of a neutral, detached judiciary mandates that the result of proceedings

implicating even the appearance of impropriety on the issue of the neutrality of the magistrate not be allowed to stand. See e.g., Marshall v. Jerico, Inc., 446 U.S. 238, 242 (1980)(and cases cited therein); Carey v. Piphus, 425 U.S. 247, 262 (1978); Taylor v. Hayes, 418 U.S. 488, 501 (1974); Tumey v. Ohio, 273 U.S. 510 (1927). The Florida Supreme Court has consistently found error in cases where this requirement is violated. See e.g., Rose v. Dugger, 601 So. 2d 1181 (Fla 1992); Spencer, supra. This requirement of a neutral and detached judiciary is doubly important in cases involving the capital sentencing authority.

This claim involves constitutional error which goes to the heart of the fundamental fairness of Mr. Card's death sentence. It also involves facts which were unknown during prior proceedings in this case, and therefore is an issue which is proper for review in proceedings under Rule 3.850, Fla. R. Crim. P. See Harich v. State, 542 So. 2d 980, 981 (Fla. 1989); Scott v. Dugger, 604 So. 2d 465, 468-69 (Fla. 1992); Jones v. State, 591 So. 2d 911, 916 (Fla. 1992). The facts now disclosed demonstrate that Mr. Card's sentence of death is constitutionally infirm and violates the eighth and fourteenth amendments.

C. The 3.850 Court's Erroneous Ruling And The Need For An Evidentiary Hearing

The 3.850 court neither ruled that Mr. Card's claim was invalid, nor that it did not warrant relief, nor that the sentencing proceedings at issue were fair (See PC-R 134-35, Rule 3.850 court's order). Rather, the 3.850 court denied relief on the basis of a reference to a passing comment made by this Court in its

opinion in Bates v. Dugger, 604 So. 2d 457 (Fla. 1992). The 3.850 court read Bates to hold that "this type of claim is not cognizable under Rule 3.850" (PC-R 135).

Neither logic nor this Court's opinion in Bates support the trial court's ruling. The claim is a valid one and it is supported by substantial factual proffers demonstrating that relief is appropriate and that the facts establishing the claim were not made available during earlier proceedings.

In Bates, this Court affirmed the trial court's grant of a resentencing because defense counsel had rendered ineffective assistance in the capital sentencing proceedings. Since it was affirming the grant of a resentencing on this claim, this Court devoted the bulk of its opinion to a discussion of the ineffective assistance of counsel issue and made only general references to the other sentencing claims involved. One of the issues the defendant presented in Bates related to Judge Turner's allowing the prosecution to prepare his sentencing order.

Indeed, Mr. Bates' counsel first learned of the issue because the prosecutor there, unlike the prosecutor in Mr. Card's case, disclosed that he had prepared the sentencing order and testified at the 3.850 hearing about the procedure he and Judge Turner followed in the Bates case. (The prosecutor in Bates was not the prosecutor in Mr. Card's case.) The Bates 3.850 Judge, Judge Costello, was concerned about the sentencing procedures and had Judge Turner testify about them in the Bates 3.850 proceeding.

(Judge Turner's testimony at the Bates 3.850 hearing is quoted in section D, infra.)

It was because of the disclosures by Judge Turner and the prosecutor in the Bates 3.850 proceedings that Mr. Card's counsel attempted to interview Judge Turner again about the sentencing in Mr. Card's case. No disclosures had been made by the judge or prosecutor during the litigation of the prior Rule 3.850 motion in Mr. Card's case, a motion over which Judge Turner himself presided and which he summarily denied. It was shortly after the disclosures in Bates that Mr. Card's counsel filed the instant Rule 3.850 motion. And it was because he had already made the disclosure in the Bates case that Judge Turner finally agreed to meet with lawyers from the Volunteer Lawyers' Resource Center of Florida and to provide his affidavit (Att. A).

The history of this case unequivocally demonstrates that the facts were withheld from Mr. Card and his trial, appellate and post-conviction counsel. The facts first came to light because the prosecutor involved in Bates, unlike the prosecutor in Card, was honest enough to disclose them. Thereafter, Judge Turner himself agreed to be interviewed and make the disclosure. When he became aware of the newly discovered facts, Mr. Card filed his 3.850 motion.

Contrary to the 3.850 court's ruling in Mr. Card's case, this Court never held in Bates that "this type of claim is not cognizable under Rule 3.850" (PC-R 135). Rather, in Bates this Court focussed on the ineffective assistance of counsel claim,

ruled that resentencing was appropriate because counsel rendered ineffective assistance in the capital sentencing proceedings and, as to the issues relating to the sentencing hearing, made a brief, general statement that it had "reviewed ... the sentencing on direct appeal...." Bates, 604 So. 2d at 459.

Nowhere in the Bates opinion does this Court hold that "this type of claim is not cognizable under Rule 3.850" (Cf. PC-R 135, 3.850 trial court's order in Card). Rather, this Court believed that it had already reviewed the issue and did not discuss it further in the context of an opinion in which the Court was already affording the defendant a resentencing on a separate claim.

Whether or not the Court misunderstood what the claim involved in Bates -- i.e., whether or not the Court actually had reviewed the claim on direct appeal, as the Court wrote in its opinion -- there is no question that the Court did not review this claim in the direct appeal in Mr. Card's case. The procedure Judge Turner followed was not disclosed by the record and thus could not have been reviewed previously by this Court. Nor were Mr. Card or his trial, appellate or post-conviction counsel informed of the unlawful procedure Judge Turner employed until the recently disclosed facts brought it to light.

If anything, the holding in Bates suggests that the claim should be reviewed in Rule 3.850 proceedings where, as here, it has not been previously considered on appeal. The Bates opinion, if anything, thus supports Mr. Card's claim.

To read Bates to hold that such a claim is not cognizable in these proceedings, as the 3.850 judge did in this case, is to read Bates to hold that the hidden, unlawful procedures employed to sentence Mr. Card to death can never be reviewed. Such a view is not only illogical -- how can a defendant raise on appeal something that is hidden by the prosecutor and trial judge? -- it is also manifestly unfair -- it would reward the very people who withheld from the record and defense counsel information about the unlawful procedures they were following.

Indeed, such a reading of Bates would overrule this Court's rulings in Harich, 542 So. 2d at 981 (where a 3.850 hearing was ordered on a claim relating to a potential conflict of interest where the prosecutor, defense counsel and trial judge knew about it but failed to disclose it to the defendant or his post-conviction counsel), Scott, 604 So. 2d at 468-69 (where 3.850 relief was found to be appropriate where the facts establishing the claim were unavailable to the defendant or his counsel at the time of the capital sentencing proceedings or direct appeal), and Jones, 591 So. 2d at 916 (where a 3.850 hearing was ordered because the defendant and his counsel did not know the relevant facts until the proceedings on the defendant's second Rule 3.850 motion).

There can be no serious question that the facts relating to the claim are "newly discovered" in Mr. Card's case. There can also be no question that they were withheld from Mr. Card and his counsel during earlier proceedings. This Court could not have intended Bates to sweep away precedents such as Jones, Scott and

Harich, as well as the very wording of Rule 3.850 itself -- which allows claims founded upon newly discovered facts to be heard. This Court never ruled in Bates that claims such as the instant are not cognizable in Rule 3.850 proceedings -- where else could they be heard? This Court could not have intended to reward those who hid the facts from the record, Mr. Card, his counsel and, therefore, from this Court itself.

The 3.850 trial court erred in its ruling. The claim is a valid one, it is supported by substantial facts and factual proffers, and it warrants an evidentiary hearing.

The express provisions of Rule 3.850 hold that claims such as the instant are cognizable in these proceedings. See Fla. R. Crim. P. 3.850 ("the facts upon which the claim is predicated were unknown to the movant or his attorney ....") See Fla. R. Crim. P. 3.850; see also Jones v. State, supra (discussing newly discovered facts exception to two-year provision of Rule 3.850). The newly discovered facts disclose that there is fundamental constitutional infirmity in the proceedings resulting in Mr. Card's death sentence and therefore also show that the ends of justice counsel that the claim be heard.

The prior "files and records" of this case by no means demonstrate that Mr. Card is not entitled to relief. See Lemon v. State, 498 So. 2d 923 (Fla. 1986) (evidentiary hearings appropriate in Rule 3.850 proceedings in capital cases where trial and sentencing records do not "conclusively" show that the defendant is not entitled to relief); Hoffman v State, 571 So. 2d 449 (Fla.

1990) (evidentiary hearings required in capital Rule 3.850 proceedings where the trial and sentencing record does not "conclusively" rebut the claim). Mr. Card has stated a valid claim, a claim which is by no means rebutted by the trial and sentencing record and a claim which therefore warrants an evidentiary hearing. Lemon; Hoffman. An evidentiary hearing, as this Court held in Harich, is also appropriate as to any procedural questions relating to the claim and any procedural allegations which may be raised by the State. Harich v. State, 542 So.2d at 981.

D. Judge Turner's Testimony In Bates

Judge Costello, who presided over the 3.850 proceedings in Bates, ordered that Judge Turner be called as a witness. His testimony was quoted extensively in Mr. Card's Rule 3.850 motion (PC-R 7, et seq.). Judge Turner said:

> Q Well, let me just ask Your Honor, if I may, a couple questions.... Is it normal practice for the state attorney's office to draft sentencing orders in capital cases for Your Honor?
> A It is in my division. I can't speak for the other judges, but I speak for mine and at my request.

(PC-R 7)(emphasis supplied). Judge Turner said about the procedure he followed that: "it's something that is customary and something that we would expect" (Id.).

> A Is Your Honor saying the actual sentencing order in this case was given to you with the jury instructions, with the drafted jury instructions?
> A I imagine it was. I said that's the custom....

(PC-R 7) (emphasis supplied). Judge Turner testified that the sentencing order came "to me from the state attorney's office" (PC-R 8).

> Q And Your Honor already indicated that you don't recall specifically calling the state attorney's office telling them and asking them for an order, that it was part of the normal practice.
> A No, no, I didn't call them, I didn't say will you please bring over a judgment and sentence, I want to sentence Mr. Bates to death. Nothing like that.

(PC-R 8). The judge continued, explaining that he could not testify that the order prepared by the State was provided to defense counsel before he entered it:

> Q Does Your Honor recall specifically giving that order to Mr. Bowers [Bates' defense counsel]?
> A No. I do not.
> Q Does Your Honor recall mailing that order to Mr. Bowers?
> A No, sir, I do not.
> Q Does Your Honor recall telephoning Mr. Bowers and telling him what was in the draft order?
> A No, sir, I do not.
> Q Does Your Honor recall whether the state attorney ever told you that it was given to Mr. Bowers?
> A No, sir.

(PC-R 8-9). The testimony continued:

> Q Is there a reason why Your Honor would take a sentencing order typed up by the state, why Your Honor wouldn't just say well, I'll just do it myself?
> A <u>No, there's no reason for that</u>.
> Q Okay. Why did Your Honor not jsut [sic] prepare the sentencing orders yourself?
> A Why did I not? <u>Because it's been customary for the state attorney to do that</u>.

(PC-R 9) (emphasis added).

Referring to the State Attorney's role, the Judge explained:

> Q And just so that I udnerstand [sic], Your Honor, you indicated earlier that you rely on the state attorney's office since they're there and they're hearing everything too --

A No, I didn't say I relied. I said its customary.
Q Customary.
A It's customary for them to do that and we have gone along with custom over here.

(PC-R 9).

Q Okay, but normally it's given to Your Honor by the state attorney's office.
A Custom.
Q Custom.
A Customarily they furnish it.

(PC-R 9).

Assistant State Attorney Harry Harper, the prosecutor in the State v. Bates case who first disclosed the procedure to Mr. Bates' post-conviction counsel, testified:

Q Okay. Mr. Harper, did you prepare Judge Turner's sentencing order at the 1985 re-sentencing proceeding?
A I think so, yes.

* * *

THE WITNESS: All right. At some point in time I was asked to prepare a written sentencing order in this case. It was after the re-sentencing hearing, I believe. Although I don't believe I had any part in that hearing.
What I did, I took the original sentence - the original sentencing order that Judge Turner had signed before the case had been sent back by the Supreme Court. I - using the same philosophy and copying it as much as I could and complying with the - what the Supreme Court has said in their opinion, I modified it to comply with their findings or with their ruling and submitted it to Judge Turner. And I believe he signed it in an unaltered fashion....

* * *

Q Can you tell us today as a matter of fact under oath, yes, this was provided to defense counsel?
A No.
Q Okay. Is there any notation that you recall in your file, anything along those lines indicating this was given to Mr. Davis [resentencing counsel] or Mr. Bowers [trial and original defense counsel] on such and such date?
A No.

* * *

Q Do you know - I'm sorry, do you know why it is that the state attorney's office prepared and provided the sentencing order for Judge Turner?

A No, other than he may have requested that we do it.

Q So just so I can understand it, Judge Turner requested that the state attorney's office provide the order, you were asked to do it, you corrected the original order [prior to the remand for resentencing in the Bates case], had it typed up, and then gave it to the judge. Is that --

A Maybe. I'm saying I don't remember how. As I told you, somebody asked me to do this, and I dont' [sic] remember who asked me to do it, and it could have been Judge Turner or Mr. Appleman, who is the state attorney. I just don't remember who asked me to do it.

Q Okay. Do you recall - have you had an opportunity to prepare for this post-conviction proceeding?

A Some things, yes.

Q In the course of that preparation have you had a chance to review the original transcripts and records?

A Portions.

Q Do you recall anything in those original transcripts and records where on the record Judge Turner asked the state attorney's office to prepare an order for purposes of sentencing?

A Do I remember reading that in the record? No.

Q Yes. Do you remember anything like --

A No, I did not read that.

Q Okay. Can you testify under oath that you know for a fact that Judge Turner told one of the defense attorneys that the state attorney's office was preparing the sentencing order for him?

A I don't have any idea.

Q So you can [not] say that under oath.

A Correct, I can't.

Q Is it common practice for the state attorney's office to prepare capital sentencing orders for Judge Turner?

A It has been --

Q As far as you know.

A Yes, it has been.

(PC-R 9-11)(emphasis added).

Trial defense counsel in the Bates case, Theodore Bowers, testified, as Mr. Card's former counsel would have at a hearing on this claim (see Att. B), that he did not know that the State had prepared the original sentencing order, that no one ever told him

or provided him with a copy, and that, had he known, he would have objected:

> Q Okay. Now, let me show you document marked as Defendant's Exhibit 11 and we've already had some testimony from Judge Turner on it, and that is the sentencing order that Judge Turner entered originally. Can you just look it over and tell us if you recall that document?
> A Yes.
> Q Okay. When you received that document, did you assume that that was Judge Turner's own order?
> A Of course. It was signed.
>
> * * *
>
> Q You received the signed one, from the clerk, I take it?
> A Yes.
> Q But did the state attorney ever give you the order that the state attorney's office had prepared and indicate to you this is a draft order that we're giving to the judge, anything like that?
> A No.
> Q Did Judge Turner either through writing or orally or telephonically ever tell you that the state attorney's office had prepared an order for him?
> A I don't think that even came up, no.
> Q So as far as your understanding went, the judge had issued his own order.
> A That was my opinion, my recollection.
>
> * * *
>
> Q So had you known you would have objected.
> A Yes.

(PC-R 11-12) (emphasis added).

Mr. Bates' resentencing counsel, David Davis, similarly testified that he also was not informed of this procedure, was not provided with a copy of the order before the Judge entered it, was not given an opportunity to object, and that -- had he known -- he would have objected (PC-R 12).

No one informed Mr. Card's defense counsel -- or apparently, other defense counsel practicing before Judge Turner -- about this "customary" procedure which constituted the trial judge's practice in capital cases (see Att. B, Affidavit of H. Guy Green). Mr. Card's proffers demonstrate that the trial court failed to perform its statutorily and constitutionally mandated function of rendering independent findings (as to aggravating and mitigating circumstances) and imposing an independent and reliable sentence.

E. Conclusion

Mr. Card's proffers establish that the trial judge unlawfully "delegat[ed] to the state attorney the responsibility to identify and explain the appropriate aggravating and mitigating factors." Patterson, 513 So. 2d at 1262. Mr. Card's proffers establish that the trial judge delegated his duty of sentencing Mr. Card to the prosecution, that this death sentence is not reliable or independent and that the judge never afforded meaningful consideration to the mitigation presented by the Appellant. Spencer, 615 So. 2d at 690-91 (Att. C). Mr. Card was denied his right to an individualized and reliable capital sentencing determination. The trial court here did not exercise the requisite independent judgment; rather, the trial court allowed the State Attorney to take on the sentencing responsibility. The error is especially troubling in light of the substantial and uncontroverted mitigating evidence which Mr. Card presented and in light of the fact that the prosecution prepared its order before the aggravating and mitigating factors had even been presented.

This claim involves constitutional error which goes to the core of the fundamental fairness of Mr. Card's death sentence. It also involves facts which were unknown to the defense at earlier stages of the proceedings, and therefore is an issue which is proper for review in these Rule 3.850 proceedings.

Mr. Card respectfully urges that the error be corrected. An evidentiary hearing should be afforded. The trial judge's failure to conduct an independent and meaningful weighing and to render a fair and reliable sentencing decision should not be ignored on the basis of the thin rationale provided by the 3.850 court. The independent weighing set forth in Fla. Stat. sec. 921.141 is jurisdictional to the imposition of a death sentence (Cf. Fla. R. Crim. P. 3.850(f) [jurisdictional defects proper for review in Rule 3.850 proceedings]; see also Bouie, supra). Mr. Card's death sentence should be vacated.

(II)

THE HEINOUS, ATROCIOUS OR CRUEL AND COLD, CALCULATED, PREMEDITATED AGGRAVATORS WERE OVERBROADLY APPLIED AND RELIEF PURSUANT TO ESPINOSA V. FLORIDA, AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS IS APPROPRIATE

A. Introduction

The construction afforded in the jury instructions and sentencing order applying the "heinous, atrocious, or cruel" aggravating factor in this case violated Espinosa v. Florida, 112 S.Ct. 2926 (1992), Maynard v. Cartwright, 108 S.Ct. 1853 (1988), and the sixth, eighth, and fourteenth amendments. Here, the jury received the same instruction as did the juries in Espinosa and

Cartwright, and the sentencing order followed a similarly invalid approach. This Court applied a similar overbroad review on direct appeal. In light of Espinosa, the constructions employed in Mr. Card's case were overbroad and constitutionally invalid.

Similarly, the "cold, calculated, premeditated" aggravating factor, in light of the constructions of the jury instructions (R 440), the sentencing order (R 171-172), and the Florida Supreme Court on direct appeal, was unconstitutionally and overbroadly applied in this case. In light of Espinosa v. Florida, 112 S.Ct. 2926 (1992), and Maynard v. Cartwright, 108 S.Ct. 1853 (1988), it is clear that the constructions employed were constitutionally invalid.

The issues discussed by this brief relate to the United States Supreme Court's recent decisions in Espinosa v. Florida, 112 S.Ct. 2926 (1992), and Sochor v. Florida, 112 S.Ct. 2114 (1992). Espinosa and Sochor establish, inter alia, that the principles of Godfrey v. Georgia, 446 U.S. 420 (1980), Maynard v. Cartwright, 486 U.S. 356 (1988), and Stringer v. Black, 112 S.Ct. 1130 (1992), apply to the Florida capital sentencing scheme and to the instructions on aggravation provided to the jury in Florida capital sentencing proceedings. In the past, this Court consistently rejected claims based on Godfrey, Maynard and their progeny believing that the United States Supreme Court precedent arising from these decisions did not apply to Florida. This was this Court's law at the time of Mr. Card's sentencing and direct appeal. See e.g., Cooper v. State, 336 So. 2d 1133, 1140-41 (Fla. 1976)

(ruling as to the "heinous, atrocious or cruel" aggravator that "the trial judge read the jury the interpretation of that term which we gave in Dixon. No more was required."); Smalley v. State, 546 So.2d 720, 722 (Fla. 1989)(stating, "There are substantial differences between Florida's capital sentencing scheme and Oklahoma's ..." and on this basis rejecting a challenge to the "heinous, atrocious or cruel" aggravation instructions under Maynard v. Cartwright); see also section C, infra (collecting and discussing cases).

Espinosa and Sochor rejected this Court's analysis, finding it to be invalid under the federal Constitution. They expressly hold that the principles of Godfrey, Maynard and their progeny apply to the Florida death penalty scheme and to the instructions on aggravation provided to Florida capital sentencing juries. In Mr. Card's case, the jury received virtually the same instructions on the "heinous, atrocious or cruel" aggravator which were held to have violated the Eighth Amendment in Espinosa.

The force of the United States Supreme Court's ruling is reflected by the numerous Florida cases which that Court has now reversed and remanded on the basis of the decision in Espinosa -- eight (8) separate cases within a four-month period. See Hodges v. Florida, No. 92-5228, 1992 U.S. LEXIS 4950, 112 S.Ct. ___ (Oct. 5, 1992); Ponticelli v. Florida, No. 91-8584, 1992 U.S. LEXIS 4948, 112 S.Ct. ___ (Oct. 5, 1992); Hitchcock v. Florida, 112 S.Ct. 3020 (1992); Beltran-Lopez v. Florida, 112 S.Ct. 3021 (1992); Henry v. Florida, 112 S.Ct. 3021 (1992); Davis v. Florida, 112 S.Ct. 3021

(1992); Gaskin v. Florida, 112 S.Ct. 3022 (1992); Espinosa v. Florida, 112 S.Ct. 2926 (1992).

Finding the position previously taken by this Court to be constitutionally erroneous, the Espinosa court has now expressly held that Eighth Amendment aggravation error before a Florida sentencing jury is not cured by the judge's sentencing order. Compare Smalley, 546 So. 2d at 722 (trial judge's findings insulate errors arising from instructions on aggravation to the sentencing jury), with Espinosa v. Florida, 112 S.Ct. at 2928-29 (expressly rejecting this view). And finding this Court's related position that instructions such as those provided to the juries in Espinosa and Mr. Card's case on the "heinous, atrocious or cruel" aggravator were not unconstitutionally vague, the Espinosa Court expressly held: "We have held instructions more specific and elaborate than the one given in the instant case unconstitutionally vague." Espinosa, 112 S.Ct. at 2928.

The Espinosa decision is doubly important in Mr. Card's case. It not only affects the constitutional validity of the "heinous, atrocious or cruel" aggravator, but also demonstrates that Mr. Card's jury was provided an unconstitutionally vague instruction regarding the "cold, calculated and premeditated" aggravating circumstance (see section C, infra, discussing each aggravating factor). The instructions allowed the jury to find this aggravator based upon the definition of "simple" premeditation which the jury was provided at the guilt/innocence phase, although the Florida Supreme Court has required that for this aggravator to apply, a

"heightened" level of premeditation -- requiring a "careful plan" or "prearranged design" -- greater than that required for a conviction of premeditated murder must be established beyond a reasonable doubt. See Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987); Jent v. State, 408 So. 2d 1024, 1032 (Fla. 1982). No limiting constructions whatsoever were provided to the jury (See section C, infra). In Espinosa, the United States Supreme Court explained that "an aggravating circumstance is invalid...if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." Id. 112 S.Ct. at 2928. Such vagueness is apparent with respect to both the "heinous, atrocious or cruel," and the "cold, calculated and premeditated" instructions provided to Mr. Card's jury.

Under Espinosa, Sochor and Stringer v. Black, 112 S.Ct. 1130 (1992), consideration of invalid aggravation -- i.e., aggravation which is vaguely defined -- is Eighth Amendment error. The errors in James Card's case have now been made apparent by the United States Supreme Court's rulings. These rulings directly implicate the constitutional validity of Mr. Card's death sentence. As the Supreme Court noted in Stringer v. Black, 112 S.Ct. at 1140: "[u]se of a vague or imprecise aggravating factor in the weighing process invalidates the sentence."

The impact of these developments of law on James Card's case is further discussed in section C, infra. These developments demonstrate the propriety of relief in Mr. Card's case.

B. James Card's Claims Are Properly Before the Court and Warrant the Granting of Relief

Defense counsel objected to the instructions at issue in Mr. Card's case (see section C, infra). Trial defense counsel objected to the "heinous, atrocious, cruel" aggravator first by filing a pretrial written motion attacking the aggravator on the basis of its overbreadth and vagueness (R 65; see generally R 64-66). The defense orally renewed the objection at the instruction conference (R 1139), and then after the jury was instructed (Transcript of Sentencing Arguments and Instructions, p. 45; R 443), and then in the motion for a new trial (R 188). The trial court overruled the objections under the belief, a belief shared at the time by the Florida Supreme Court, that the terms employed in the aggravator were "common knowledge."

Defense counsel also objected to the "cold, calculated, premeditated" aggravator (see section C, infra). Defense counsel objected to this aggravator asserting that it was unconstitutionally vague and overbroad in a pretrial written motion (R 64-66), and then renewed the objections before (R 1134, 1145, 1150) and after (R 443) the jury was instructed (See also R 188 [objection again renewed in motion for new trial]). The jury did not receive any of the limiting constructions which the Florida Supreme Court has held applicable to this aggravator.

Under Espinosa, the jury in Mr. Card's case, like the juries in the cases of a number of other Florida capital petitioners, was instructed on invalid aggravation. When Hitchcock v. Dugger, 481 U.S. 393 (1987), held that Florida's standard jury instructions

regarding mitigating factors were in violation of the Eighth Amendment, this Court held that no procedural bars would be applied to preclude consideration of Hitchcock claims and that capital defendants were permitted to present such claims in post-conviction proceedings. See Hall v. State, 541 So.2d 1125, 1126 (Fla. 1989)("[A]s we have stated on several occasions, Hitchcock is a significant change in law, permitting defendants to raise a claim under that case in postconviction proceedings."), citing Cooper v. Dugger, 526 So. 2d 900 (Fla. 1988); Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); McCrae v. State, 510 So. 2d 874 (Fla. 1987); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987). This ruling was based on the fact that the decision of the United States Supreme Court involved a "change in [Florida sentencing] law" which "potentially affect[s] a class of petitioners." Thompson, 515 So.2d at 175. And given the broad effect of such United States Supreme Court decisions, the Florida Supreme Court ruled that the merits of the petitioners' claims would be considered in post-conviction proceedings even in cases where there was no previous objection. See Delap v. Dugger, 513 So. 2d 659 (Fla. 1987).

Espinosa has the same effect on Florida capital sentencing law which Hitchcock had. It establishes that aggravation has been applied unconstitutionally and invalidly in James Card's case and in the cases of a "class of petitioners." Thompson. It is as "significant" a "change in law," Hall; Thompson, as was the

decision in Hitchcock.[2] Its significance is further demonstrated by the number of Florida death penalty cases which the United States Supreme Court has reversed in light of Espinosa.

C. Espinosa v. Florida And Its Application To This Case

Relief is warranted in Mr. Card's case on the basis of the recent developments in the law arising from the United States Supreme Court's decisions in Espinosa v. Florida, 112 S.Ct. 2926 (1992), Sochor v. Florida, 112 S.Ct. 2114 (1992), and their progeny.[3] This Court has held that requests for relief based on significant changes in the law should be pursued in proceedings under Rule 3.850. See Hall v. State, 541 So.2d 1125 (Fla. 1989); see also Moreland v. State, 582 So. 2d 618 (Fla. 1991); Witt v. State, 387 So. 2d 922 (Fla. 1980) (each discussed infra). Just as Hitchcock v. Dugger was deemed a "significant change in law" establishing that consideration was appropriate in post-conviction proceedings, see Hall v. State, 541 So. 2d 1125, 1126 (Fla. 1989),

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[2]Appellant notes that Espinosa is not "new law," however, for purposes of federal court analysis under Teague v. Lane, 489 U.S. 288 (1989). Although the recent Supreme Court decisions significantly alter Florida capital sentencing law, the United States Supreme Court has also expressly held that the principles of Maynard v. Cartwright (the same principles involved in Espinosa) apply at least to capital cases which became "final" at the time of Godfrey. See Stringer v. Black, supra. Godfrey was decided in 1980. Mr. Card's direct appeal was decided in 1984. The standards of Espinosa, Godfrey, Maynard, and Stringer thus apply to Mr. Card's case.

[3] Hitchcock v. Florida, 112 S.Ct. 3020 (1992); Beltran-Lopez v. Florida, 112 S.Ct. 3021 (1992); Henry v. Florida, 112 S.Ct. 3021 (1992); Davis v. Florida, 112 S.Ct. 3021 (1992); Gaskin v. Florida, 112 S.Ct. 3022 (1992); Espinosa, supra; Hodges v. Florida, No. 92-5228, 1992 U.S. LEXIS 4950, 112 S.Ct. ___ (Oct. 5, 1992); Ponticelli v. Florida, No. 91-8584, 1992 U.S. LEXIS 4948, 112 S.Ct. ___ (Oct. 5, 1992).

so too Espinosa significantly overrules the law which the Florida Supreme Court previously applied to aggravating factors such as those involved in Mr. Card's case.

The instructions to the jury on the "heinous, atrocious, cruel" aggravator in Mr. Card's case were virtually identical to the instructions found unconstitutional by the Supreme Court in Espinosa v. Florida (See Transcript of Sentencing Arguments and Instructions, p. 41; R 439).

Addressing this aggravator, the United States Supreme Court held,

> Our cases establish that, in a State where the sentencer weighs aggravating and mitigating circumstances, the weighing of an invalid aggravating circumstance violates the Eighth Amendment.... Our cases further establish that an aggravating circumstance is invalid in this sense if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor.... We have held instructions more specific and elaborate than the one given in the instant case unconstitutionally vague....

Espinosa v. Florida, 112 S.Ct. 2926, 2928 (1992) (emphasis added) (citations omitted). After finding the aggravator unconstitutionally vague and invalid, the Espinosa Court reversed.

Espinosa overruled a formidable body of precedent from this Court upholding Florida's "heinous, atrocious, cruel" aggravator -- the same aggravator enforced in James Card's case -- and ruling that Florida's jury instructions on this aggravator did not violate the eighth amendment. This precedent was applied by this Court

with considerable force.[4] The view espoused by this precedent, now

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[4] See Cooper v. State, 336 So.2d 1133, 1140-41 (Fla. 1976) (ruling that although the trial judge erred in finding "heinous, atrocious, or cruel," there was no error in allowing the jury to rely on the aggravator because "the trial judge read the jury the interpretation of that term which we gave in Dixon. No more was required."); Smalley v. State, 546 So.2d 720, 722 (Fla. 1989) (stating, "[T]here are substantial differences between Florida's capital sentencing scheme and Oklahoma's...," in rejecting a challenge to the "heinous, atrocious, cruel" aggravator under Maynard v. Cartwright); Occhicone v. State, 570 So. 2d 902, 906 (Fla. 1990) (ruling that the challenge to the "heinous, atrocious, or cruel" instruction was meritless, that the instruction is not vague, and that "Maynard v. Cartwright ... did not make Florida's penalty instructions on ... heinous, atrocious, or cruel unconstitutionally vague"); Espinosa v. State, 589 So.2d 887, 894 (Fla. 1991) ("We reject Espinosa's complaint with respect to the text of the jury instruction on the heinous, atrocious, or cruel aggravating factor upon the rationale of Smalley v. State..."); Brown v. State, 565 So. 2d 304, 308 (Fla. 1990) ("We have previously found Maynard inapposite to Florida's death penalty sentencing regarding this state's heinous, atrocious, and cruel aggravating factor."); Beltran-Lopez v. State, 583 So. 2d 1030, 1032 (Fla. 1991) ("[W]e reject Beltran-Lopez's complaint with respect to the text of the heinous, atrocious, or cruel instruction ..."); Mendyk v. State, 545 So. 2d 846, 849 n.3 and 850 (Fla. 1989) (ruling that the request for a limiting definition on "heinous, atrocious, cruel" was properly denied because "the standard jury instructions properly and adequately cover the matters raised by appellant"); Hitchcock v. State, 587 So. 2d 685, 688 n.2 (Fla. 1991) ("The following issues have been decided adversely to Hitchcock's contentions: unconstitutionality of the instruction on heinous, atrocious, or cruel..."); Johnson v. State, 465 So.2d 499, 507 (Fla. 1985) ("The instruction on and finding that the murder was especially heinous, atrocious, or cruel were also proper."); Smith v. Dugger, 565 So. 2d 1293, 1295 n.3 and 1297 n.7 (Fla. 1990) (challenge to "heinous, atrocious, cruel" aggravator "meritless"); Robinson v. State, 574 So. 2d 108, 112 and 113 n.6 (Fla. 1991) (trial court erred in finding "heinous, atrocious, cruel" but challenge to instruction "providing this aggravator to the jury deemed meritless"); Trotter v. State, 576 So. 2d 691, 694 (Fla. 1991) ("Appellant's argument, that the instruction regarding the aggravating circumstance as heinous, atrocious, or cruel is vague, is without merit"); Randolph v. State, 562 So.2d 331, 338-39 (Fla. 1990) (affirming trial court's finding on the aggravator and finding meritless the challenge to the jury instruction under the "state and federal constitutions"); Delap v. State, 440 So. 2d 1242, 1254, 1257 (Fla. 1983) (trial court's finding that "the capital felony was especially cruel" affirmed without comment about

(continued...)

rejected by Espinosa, was the view in effect at the time of the sentencing and appeal in James Card's case.

This view saw no error (i.e., no vagueness) in Florida's instructions on the "heinous, atrocious or cruel" aggravator and also held that no error would be found on the basis of sentencing jury instructions on this aggravator because of the statutory requirement that there be "independent" findings from the trial judge.[5] Espinosa overruled each component of the Florida Supreme Court's view.

The Espinosa court explained that "instructions more specific and elaborate" than the one provided to Mr. Card's jury have been held unconstitutionally vague. Espinosa, 112 S.Ct. at 2928, citing, inter alia, Maynard v. Cartwright and Godfrey v. Georgia. The Espinosa court also rejected the "State Supreme Court's

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[4](...continued)
the deficient jury instruction); Vaught v. State, 410 So. 2d 147, 151 (Fla. 1982) (trial court finding on "heinous, atrocious, cruel" affirmed because the offense was "cold and calculated" without analysis of erroneous jury instruction); Henry v. State, 586 So.2d 1033, 1038 (Fla. 1991) (affirming trial court finding on "heinous, atrocious, cruel" and stating, as to the jury, that the law was "adequately set out in the standard jury instructions"); Demps v. State, 395 So.2d 501, 506 (Fla. 1981) (reversing trial court finding on "heinous, atrocious, cruel" but affirming sentence without analysis of the effect of the improper aggravator on the jury); Roberts v. State, 568 So.2d 1255, 1258 (Fla. 1990) ("Maynard is not applicable under Florida's death sentencing procedure."); Porter v. Dugger, 559 So.2d 201, 203 (Fla. 1990) ("Maynard does not affect Florida's death sentencing procedures."); Clark v. Dugger, 559 So.2d 192, 194 (Fla. 1990) ("We have held that Maynard does not affect Florida's death sentencing procedures"); Shere v. State, 579 So.2d 86, 95-96 (Fla. 1991) (trial judge's finding on "heinous, atrocious, cruel" struck without analysis of effect of erroneous instruction on the jury).

[5]As we now know, there were no "independent" sentencing findings by the trial judge in this case (see section I, supra).

reasoning in Smalley v. State, 546 So.2d 720, 722 (Fla. 1989), ... [that] there was no need to instruct the jury with the specificity our cases have required where the jury was the final sentencing authority, because, in the Florida scheme, the jury is not 'the sentencer' for Eighth Amendment purposes." Espinosa, 112 S.Ct. at 2928. The Espinosa court held: "[I]f a weighing State decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances." Espinosa, 112 S.Ct. 2929.

In Sochor v. Florida, 112 S.Ct. 2114, 2119 (1992), the Supreme Court further noted:

> In a weighing State like Florida, there is Eighth Amendment error when the sentencer weighs an "invalid" aggravating circumstance in reaching the ultimate decision to impose a sentence. See Clemons v. Mississippi, 494 U.S. 738, 752 (1990). Employing an invalid aggravating factor in the weighing process "creates the possibility ... of randomness," Stringer v. Black, 503 U.S. ___, ___ (1992) (slip op. at 12), by placing a "thumb [on] death's side of the scale, " id., at ___ (slip op., at 8), thus "creat[ing] the risk [of] treat[ing] the defendant as more deserving of the death penalty," id., at ___ (slip op., at 12). Even when other valid aggravating factors exist as well, merely affirming a sentence reached by weighing an invalid aggravating factor deprives a defendant of "the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances." Clemons, supra, at 752 (citing Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982); see Parker v. Dugger, 498 U.S. ___, ___ (1991) (slip op. at 11). While federal law does not require the state appellate court to remand for resentencing, it must, short of remand, either itself reweigh without the invalid aggravating factor or determine that weighing the invalid factor was harmless error. Id., at ___ (slip op. at 10).

These recent United States Supreme Court precedents establish that the State of Florida (given the law of the Florida Supreme

Court) has failed to correctly apply Maynard v. Cartwright, 486 U.S. 356 (1988), and Godfrey v. Georgia, 446 U.S. 420 (1988), to aggravation in the Florida capital sentencing scheme. As discussed above, Espinosa represents a change in Florida law which now justifies state post-conviction consideration in Mr. Card's case. The same analysis applied by this Court in Thompson v. Dugger, 515 So. 2d 173, 175 (Fla. 1987), to post-conviction claims under Hitchcock v. Dugger, 481 U.S. 393 (1987), now applies to of Mr. Card's case and to the cases of other similarly-situated petitioners in light of Espinosa. Espinosa, like Hitchcock, is a change in Florida law which, in the words of the Thompson court, "potentially affect[s] a class of petitioners." Thompson, 515 So. 2d at 175. Because of its substantial and sweeping nature, it is a "change in law" sufficient "to defeat the claim of a procedural default." Id. See also Hall v. State, 541 So. 2d 1125, 1126 (Fla. 1989) (Because Hitchcock is a "significant change in law," defendants are permitted to present Hitchcock claims in post-conviction proceedings). And, because of the sweeping nature of such United States Supreme Court decisions -- i.e., because they affect a class of petitioners and standard instructions repeatedly approved -- this Court has often allowed consideration in post-conviction proceedings even in cases where there was no previous objection to the instruction. See Delap v. Dugger, 513 So. 2d 659 (Fla. 1987); Thompson v. Dugger; Downs v. Dugger.

In Mr. Card's case, trial defense counsel objected to the "heinous, atrocious, cruel" aggravator. The defense filed a

pretrial written motion objecting to the aggravator on the basis of its overbreadth and vagueness (R 65; see generally R 64-66). The defense orally renewed the objection at the instruction conference (R 1139), and then after the jury was instructed (Transcript of Sentencing Arguments and Instructions, p. 45; R 443), and then in the motion for a new trial (R 188). The trial court overruled the objections under the belief, a belief shared at the time by the Florida Supreme Court, that the terms employed in the aggravator were "common knowledge."

Espinosa now establishes that the view of the Florida courts was constitutionally incorrect and that Florida's "heinous, atrocious, cruel" aggravator is unconstitutionally vague. The United States Supreme Court's consistent actions in reversing Florida death cases on the basis of Espinosa also speak to the substantial nature of the Espinosa decision. As Espinosa and its progeny show, the Florida precedent upholding Florida's "heinous, atrocious, or cruel" instructions and enforcing the Florida sentencing scheme's application of this aggravator has now been overruled. See Espinosa, 112 S.Ct. at 2928. Espinosa and the Supreme Court's actions after its issuance thus attest to the need for review and relief in the cases of James Card and other similarly-situated Florida petitioners.

The need for review in this case is also especially acute in light of the aggravating factor at issue: the jury's application of the invalid and vague aggravator in Mr. Card's case presents

error which "invalidates" the death sentence. Stringer v. Black, 112 S.Ct. 1130 (1992).

> A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying on the existence of an illusory circumstance. Because the use of a vague aggravating factor in the weighing process creates the possibility not only of randomness but also of bias in favor of the death penalty, we cautioned in Zant that there might be a requirement that when the weighing process has been infected with a vague factor the death sentence must be invalidated.

Stringer v. Black, 112 S.Ct. at 1139 (emphasis added). See also Walton v. Arizona, 110 S.Ct. 3047, 3057 (1990) (When a jury is called on to determine whether a capital sentence is appropriate, "it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face. That is the import of our holdings in Maynard and Godfrey.").

There is now no question that the instruction provided to Mr. Card's jury was "unconstitutionally vague on its face." Walton. Espinosa so holds -- indeed, in Espinosa, the State conceded that the same instruction as the one given to Mr. Card's jury could not be squared with Maynard v. Cartwright, 486 U.S. 356 (1988). See Espinosa, 112 S.Ct. at 2928.

And there can be no question that in Mr. Card's case the "weighing process [was] infected with [the] vague factor." Stringer; Espinosa. This Court has said that the "heinous,

atrocious, or cruel" factor is quite serious. Maxwell v. State, 603 So. 2d 490, 493 (Fla. 1992); see also Thompson v. State, 389 So. 2d 197, 200 (Fla. 1980) ("special emphasis" given to "heinous, atrocious, or cruel"). Relying on the judge's instruction the prosecutor argued for death in reliance on this aggravator.

The jury was then instructed to apply this aggravator (Transcript of Sentencing Arguments and Instructions p. 41; R 439). The jury also heard evidence in mitigation (R 1159, et seq.). As the Eleventh Circuit Court of Appeals noted, "Dr. Hord describe[d] Card's difficult childhood to the jury..."; "Dr. Hord stated that in his opinion, at the moment of the killing, Card was acting under extreme mental or emotional disturbance, and that Card's capacity to conform his conduct to the requirements of law was substantially impaired"; "Dr. Hord outlined Card's harsh treatment by his natural father and step-father during his early childhood and related specific instances of cruelty. He informed the jury that Card's mother put Card into psychiatric care" when Mr. Card was five or six years old. Card v. Dugger, 911 F.2d 1494, 1508, 1510 (11th Cir. 1990). Espinosa now shows that invalid aggravation infected the jury's weighing of this evidence -- the error is particularly troubling in light of the fact that the jury voted for death by the slimmest margin possible, 7 to 5.

This Court's view that Maynard and Godfrey did not affect Florida's aggravating circumstances, see Porter v. Dugger, 559 So. 2d 201, 203 (Fla. 1990) ("Maynard does not affect Florida's death sentencing procedures"); Brown v. State, 565 So. 2d 304, 308 (Fla.

1990) ("We have previously found Maynard inapposite to Florida's death penalty sentencing"); Occhicone v. State, 570 So. 2d 902, 906 (Fla. 1990)("Maynard [citation] did not make Florida's penalty instructions on cold, calculated, and premeditated and heinous, atrocious, or cruel unconstitutionally vague"), has now been overruled by Espinosa.

This Court recognized that Hitchcock was a change in law because it declared Florida's jury instructions on mitigating circumstances to be in violation of the Eighth Amendment and reversed the view which this Court had followed. See Hall; Thompson; Downs v. Dugger, 514 So.2d 1069, 1071 (1987)(Hitchcock "clear[ly] rejected" the prior "controlling law."). So too here, Espinosa can be no clearer in its rejection of Florida's application of the "heinous, atrocious, cruel" aggravator and the view followed by the Florida Supreme Court.

This Court has held that "[f]undamental fairness" should override the interest in finality. See Moreland v. State, 582 So. 2d 618, 619 (Fla. 1991). "The doctrine of finality should be abridged when a more compelling objective appears, such as ensuring fairness." Witt v. State, 387 So. 2d 922, 925 (Fla. 1980) "Considerations of fairness and uniformity make it very difficult to justify depriving a person of his liberty or his life, under [a] process no longer considered acceptable and no longer applied to indistinguishable cases." Id. Accordingly, "major constitutional changes of law" emanating from the United States Supreme Court are cognizable in Florida post-conviction proceedings. Witt, 387 So.

2d at 929-30. Here, the precedent on which Mr. Card relies has emanated from the United States Supreme Court and involves a major constitutional change of law.

When previously faced with a standard instructional defect in Florida death sentencing law (Hitchcock), this Court ruled that finality must give way to fundamental fairness. See Hall; Thompson; Downs. The substantial change in Florida law brought about by Espinosa constitutes a change in law which defeats any procedural bars and permits consideration of claims such as the one involved in Mr. Card's case in post-conviction proceedings.

In Mr. Card's case, the jury was not only provided with invalid instructions on the "heinous, atrocious, cruel" aggravator -- the jury was also provided vague and overbroad instructions on the "cold, calculated and premeditated" aggravating circumstance (See Transcript of Sentencing Arguments and Instructions, p. 42; R 440). Defense counsel objected to this aggravator asserting that it was unconstitutionally vague and overbroad in a pretrial written motion (R 64-66), and then renewed the objections before (R 1134, 1145, 1150) and after (R 443) the jury was instructed (see also R 188 [objection again renewed in motion for new trial]). The jury did not receive any of the limiting constructions which the Florida Supreme Court has held applicable to this aggravator.

The aggravator has been discussed by this Court on several occasions. In McCray v. State, 416 So. 2d 804, 807 (Fla. 1982), the court noted:

> That aggravating circumstance [(5)(i)] ordinarily applies in those murders which are characterized as executions or contract murders,...

And the court defined the limiting constructions which should be applied to this aggravator as follows:

> We also find that the murder was not cold, calculated and premeditated, because the state has failed to prove beyond a reasonable doubt that Rogers' actions were accomplished in a "calculated" manner. In reaching this conclusion, we note that our obligation in interpreting statutory language such as that used in the capital sentencing statute, is to give ordinary words their plain and ordinary meaning. See Tatzel v. State, 356 So.2d 787, 789 (Fla. 1978). Webster's Third International Dictionary at 315 (1981) defines the word "calculate" as "[t]o plan the nature of beforehand: think out ... to design, prepare or adapt by forethought or careful plan." There is an utter absence of any evidence that Rogers in this case had [a] careful plan or prearranged design to kill anyone during the robbery. While there is ample evidence to support simple premeditation, we must conclude that there is insufficient evidence to support the heightened premeditation described in the statute, which must bear the indicia of "calculation."

Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987)(emphasis added).

This Court's decisions recognize that the cold, calculated and premeditated aggravator requires proof beyond a reasonable doubt of a "careful plan or prearranged design." See Mitchell v. State, 527 So. 2d 179, 182 (Fla. 1988) ("the cold, calculated and premeditated factor ... require[s] a careful plan or prearranged design."); see also Jackson v. State, 530 So. 2d 269, 273 (Fla. 1988).

Although this aggravating circumstance requires more than the simple level of premeditation necessary for conviction, the jury was in no way informed of such limiting constructions in Mr. Card's case. This vagueness issue is also a valid one and also warrants consideration and relief in light of Espinosa.

D. Conclusion

The decisions of the United States Supreme Court upon which these claims are predicated were not available to Mr. Card or his counsel at trial or sentencing, on appeal or in prior post-conviction proceedings. These recent United States Supreme Court decisions demonstrate that aggravation was unconstitutionally employed in this case and overrule Florida decisions which had held the aggravators constitutional and valid. Claims founded upon such substantial changes in law of a constitutional magnitude are cognizable in proceedings under Fla. R. Crim. P. 3.850. See, e.g., Hall v. State, 541 So. 2d 1125, 1126 (Fla. 1989). Mr. Card's claims warrant consideration and relief.

(III)

THE PENALTY PHASE JURY INSTRUCTIONS AND PROSECUTORIAL ARGUMENT SHIFTED THE BURDEN TO MR. CARD TO PROVE THAT DEATH WAS NOT APPROPRIATE, LIMITED FULL CONSIDERATION OF MITIGATING CIRCUMSTANCES TO THOSE WHICH OUTWEIGHED AGGRAVATING CIRCUMSTANCES, AND WERE CONTRARY TO THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

A. Introduction

The jury was instructed that death was the proper sentence once aggravation was proved, unless and until the defense presented enough in mitigation to overcome the aggravation. This standard -- one provided to the jury in the sentencing instructions and then apparently employed by the judge, see Ziegler v. Dugger, 524 So. 2d 419, 420 (Fla. 1988)("Unless there is something in the record to suggest to the contrary, it may be presumed that the judge's perception of the law coincided with the manner in which the jury

was instructed") -- shifted the burden to Mr. Card to prove that death was not appropriate, and restrained the full consideration of mitigating evidence, in violation of the sixth, eighth and fourteenth amendments.

B. Discussion

The judge's instructions appear at page 439 of the original trial/sentencing record. A presumption of death such as that employed here was never intended for presentation to a Florida capital jury at sentencing. See Jackson v. Dugger, 837 F.2d 1469, 1473 (11th Cir. 1988). The instructions shifted to the defendant the burden of proving that life was the appropriate sentence, and violated the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), the eighth and fourteenth amendments, Lockett v. Ohio, 438 U.S. 586 (1978), and Mills v. Maryland, 108 S. Ct. 1860 (1988). The burden of proof was shifted to Mr. Card on the central sentencing issue of whether he should live or die. This unconstitutional burden-shifting violated Mr. Card's due process and eighth amendment rights.

The focus of a jury instruction claim is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." Boyde v. California, 58 U.S.L.W. 4301, 4304 (March 5, 1990). Here there is more than a reasonable likelihood that based on the instructions, the jury believed that Mr. Card had the ultimate burden to prove that life was appropriate. Thus, proper consideration of mitigation was

inhibited, for only the mitigation that outweighed the aggravation could be given full consideration and "effect." Penry v. Lynaugh, 109 S.Ct. 2934 (1989). Mr. Card's resulting death sentence is fundamentally unreliable. Relief is appropriate.

CONCLUSION

On the basis of the foregoing, Appellant prays that the Court reverse the lower court's erroneous ruling, remand for an evidentiary hearing and set aside his unconstitutional sentence of death.

Respectfully submitted,

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AMENDED/CORRECTED CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by HAND DELIVERY to Richard Martell, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32399-1050 this FEBRUARY 28, 1994.

Attorney

IN THE
SUPREME COURT OF FLORIDA

CASE NO.: 82,435

JAMES ARMANDO CARD,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE FOURTEENTH
JUDICIAL CIRCUIT COURT, IN AND
FOR BAY COUNTY, STATE OF FLORIDA

INDEX TO ATTACHMENTS

Attachment A - Affidavit of W. Fred Turner

Attachment B - Affidavit of H. Guy Green

Attachment C - Spencer v. State, 615 So. 2d 688 (Fla. 1993)