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IN THE SUPREME COURT
OF FLORIDA

CASE NO. 86,837

GARY ELDON ALVORD,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

On Appeal from the Circuit Court
Hillsborough County, Florida

REPLY BRIEF OF APPELLANT

Wm. J. Sheppard, Esquire
Florida Bar No.: 109154
Elizabeth L. White, Esquire
Florida Bar No.: 314560
Adam B. Allen, Esquire
Florida Bar No.: 998184
SHEPPARD AND WHITE, P.A.
215 Washington Street
Jacksonville, Florida 32202
(904) 356-9661

COUNSEL FOR APPELLANT

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ARGUMENT

I.

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT SUA SPONTE FOUND THAT MR. ALVORD'S HITCHCOCK CLAIM WAS PROCEDURALLY BARRED THUS DENYING HIM AN EVIDENTIARY HEARING IN ORDER TO PRESENT NON-RECORD, NON-STATUTORY MITIGATING CIRCUMSTANCES

A.

MR. ALVORD'S HITCHCOCK CLAIM IS NOT PROCEDURALLY BARRED[1]

The State is correct when it asserts that it is Mr. Alvord's position on appeal that his United States Constitution Eighth Amendment rights were violated when his trial counsel was improperly restricted from presenting non-statutory, mitigating circumstances at the time of his sentencing in violation of the United States Supreme Court's opinion in Hitchcock v. Dugger, 481 U.S. 393 (1987). However, the State is categorically incorrect when it alleges that Mr. Alvord's non-record Hitchcock claim is procedurally barred as a result of this Court's opinion in Alvord v. Dugger, 541 So.2d 598 (Fla. 1989). [Appellee's Answer Brief, 8].

Acknowledging that this Court in Hall v. State, 541 So.2d 1125 (Fla. 1989) (Hall VII) has established that a second Hitchcock claim brought pursuant to Fla. R. Crim. P. 3.850 is not procedurally barred by this Court's findings of harmless record Hitchcock error in a prior habeas corpus proceeding, the State

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[1] As a preliminary matter, in its Answer Brief the State makes note of the fact that after the trial court granted Mr. Alvord's request for an evidentiary hearing to present non-record, non-statutory mitigating circumstances, several continuances were requested by Mr. Alvord inferring that the number of continuances requested in this cause should somehow effect the merits of Mr. Alvord's appeal. [Appellee's Answer Brief, 3]. However, the State fails to note that the trial court in its order specifically found that all continuances requested by Mr. Alvord were granted "for good cause." [R. 170-71]. As such, the fact that Mr. Alvord requested good faith continuances has absolutely no bearing on the merits of this appeal.

unsuccessfully attempts to distinguish Hall VII, from the present case. [Appellee's Answer Brief, 11-12]. In its attempts to distinguish Hall VII, the State incorrectly asserts that Hall VII is limited to only "extraordinary circumstances." [Appellee's Answer Brief, 14]. Contrary to the State's unsupported assertions, no where in this Court's opinion in Hall VII does this Court limit its application only to "extraordinary circumstances." Id.

Instead, in Hall VII this Court found that its prior ruling in Hall VI did not constitute a procedural bar under the law of the case and res judicata because Hall VII "involv[ed] significant additional non-record facts which were not considered in Hall VI because that was a habeas corpus proceeding with no further development of evidence beyond the record." Hall, 541 So.2d at 1126. In reaching its decision, this Court noted that it was aided in its decision by the trial court's findings of fact at the Rule 3.850 hearing and by the non-statutory, mitigating evidence proffered by Hall in his Rule 3.850 hearing below. Id.

Similar to Hall VII, Mr. Alvord proffered in his motions and attached affidavit a small portion of the non-statutory, non-record mitigating circumstances which could have been presented at his original sentencing hearing if it were not for the trial court's expressed order limiting the jury's consideration and the trial court's own consideration to the statutory enumerated mitigating circumstances.[2]

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[2] Because the trial court denied Mr. Alvord his right to an evidentiary hearing on his 3.850 motion, Mr. Alvord has yet been provided an opportunity to present all of the non-record, non-

Notwithstanding the fact that Mr. Alvord has not been given an evidentiary hearing in which to develop non-record, non-statutory mitigating circumstances, similar to Hall VII, Mr. Alvord in his motions and affidavit did proffer non-statutory, non-record mitigating circumstances similar to those which were presented in Hall VII. For example, as was the case with Hall, Mr. Alvord proffered evidence that he too suffered from a long history of drug and alcohol abuse, child abuse, extreme mental and emotional disturbance, and suffered from a schizophrenic disorder.[3] [R.16-18, 28-30, 33-37]. Hall, 541 So.2d at 1127. This Court found in Hall VII that such evidence "could weigh very heavily in Hall's favor at a properly conducted sentencing hearing." Id. Additionally, as evident by Mr. Alvord's request for a subpoena duces tecum to obtain his mother's psychiatric records, Mr. Alvord was preparing to present additional non-record, non-statutory mitigating circumstances not proffered in his motions and attached affidavit. [R. 139].

Similar to the State's failed attempt to distinguish Hall VII from the present case, the State inappropriately relies on Clark v. Dugger, 559 So.2d 192 (Fla. 1990), in its Answer Brief to support its argument that Mr. Alvord's non-record, non-statutory Hitchcock claim is procedurally barred. [Appellee's Brief at 14]. However,

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statutory mitigating circumstances which should have been presented at his initial sentencing.

[3] In addition, Mr. Alvord proffered non-record, non-statutory mitigating circumstances including Mr. Alvord's potential for rehabilitation [R. 31]. See Skipper v. South Carolina, 476 U.S. 1 (1986).

this Court's opinion in Clark provides absolutely no support for the State's position because in Clark the habeas corpus petitioner was not asserting his right to present non-statutory, non-record Hitchcock materials but was for the first time in his habeas corpus petition only raising a record Hitchcock error claim. Clark, 559 So.2d at 194.

Equally as flawed as the State's reliance on Clark, the State attempts to further distinguish Mr. Alvord's request for an evidentiary hearing to present non-record, non-statutory mitigating circumstances form Hall VII by incorrectly arguing that Mr. Alvord's case is distinguishable because Hall presented his Hitchcock claim to the court shortly after Hitchcock was decided and Mr. Alvord's claim was two years after Hitchcock. [Appellee's Answer Brief, 14]. Although the State is correct that this Court rendered its opinion in Alvord v. Dugger, 541 So.2d 598 (Fla. 1989), on February 9, 1989, Mr. Alvord filed his initial habeas corpus petition raising the Hitchcock issue on September 25, 1987, less than six months after the United States Supreme Court rendered its opinion in Hitchcock on April 22, 1987. Hitchcock, 481 U.S. at 393; Alvord, 541 So.2d at 590.

As such, the State is incorrect when it alleges that "there was plenty of time for the law to develop and for counsel to ascertain that an evidentiary hearing was needed in order to develop non-record facts ...." [Appellee's Answer Brief, 14]. To the contrary, it was not until this Court rendered its opinion in Hall VII on March 9, 1989, (rehearing denied on May 11, 1989), that

this Court mandated that all Hitchcock claims should be brought by way of a Rule 3.850 motion instead of through a habeas corpus petition in order for there to be a proper development of non-record, non-statutory mitigating circumstances. Hall, 541 So.2d at 1228.[4]

Similarly, the State is incorrect when it argues that Mr. Alvord waived his right to an evidentiary hearing to present non-record, non-statutory mitigating circumstances as a result of Mr. Alvord's Petition for Extraordinary Relief, For Writ of Habeas Corpus; and Request for Stay of Mental Examination. [See Appellee's Answer Brief, 14-15]. In Mr. Alvord's habeas petition under the heading of "Jurisdiction" it reads as follows:

> The application for relief requested in this case is based on this Court's jurisdiction over its own judgments as well as its authority to issue all writs necessary for the complete exercise of its jurisdiction and to issue writs of habeas corpus. It has sound and reasonable precedent. The application for relief procedure was previously utilized by this Court to correct a significant change of the law emanating from the Supreme Court's decision in Gardner v. Florida, 430 U.S. 349 (1977). The procedure has the practical benefit of judicial economy permitting expedited and narrowly focused review of a single issue that likely will control or moot any other sentencing issues. For example, when Gardner was announced this Court deemed it more efficient to correct the error itself by application for relief rather than relegate the cases to future post-conviction challenges. The same is true for the Hitchcock issue presented here, for it is a 'record issue' (i.e. needs no further evidentiary development) and can be decided as a matter of law. C.f. Dallas v. Wainwright, 175 So.2d 785 (Fla. 1965).

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[4] As noted in Appellant's Initial Brief, Hall VII was finalized by this Court on May 11, 1989, the same day this Court denied Mr. Alvord's request for a rehearing on his habeas corpus record Hitchcock error claim. Id.; Alvord, 541 So.2d at 598.

In no way can appellant's above-referenced remarks be viewed as a waiver of his request for an evidentiary hearing in order to present and develop non-record, non-statutory mitigating circumstances which were not before this Court when it ruled on Mr. Alvord's petition. In Mr. Alvord's petition he was merely pointing out to the court, that this Court had jurisdiction to hear Mr. Alvord's petition and that Hitchcock error is error which can be determined from the record. In fact, in Alvord v. Dugger, this Court found Hitchcock error on the face of the record and further noted that "the State concede[d] a Hitchcock violation because all participants - the prosecutor, the defense counsel, and the trial judge - explained to the jury that it should limit consideration of mitigating circumstances to those enumerated in the statutes." Alvord, 541 So.2d at 599.

Additionally, it should be kept in mind that Mr. Alvord in his petition in addition to raising a Hitchcock claim was also seeking a stay of a "competency to be executed" examination which was set to occur on September 29, 1987, just four days after the filing of Mr. Alvord's petition. Certainly, Mr. Alvord's request for such a stay did not require an evidentiary hearing nor would there have been time for such a hearing to take place.[5]

As such, contrary to the State's assertions, in no way did Mr. Alvord's Petition for Extraordinary Relief, For Writ of Habeas

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[5] See Hall, 541 So.2d 1228 ("[d]ue to the number of death row inmates who have raised Hitchcock claims, many under the time constraints of a pending warrant, we have been lenient in entertaining the claim, whether made through habeas corpus or Rule 3.850 post conviction proceedings").

Corpus; and Request for Stay of Mental Examination waive his right to an evidentiary hearing to present non-record, non-statutory mitigating circumstances, especially in light of the fact that the need for such a hearing was not apparent until after this Court's opinion in Hall VII which was rendered shortly after this Court's ruling denying Mr. Alvord's habeas corpus petition. Therefore, this Court must find that the trial court committed reversible error when it found that Mr. Alvord's Second Motion for Post-Conviction Relief was procedurally barred and should remand this cause to the trial court with directions that an evidentiary hearing be conducted to provide Mr. Alvord an opportunity to present and develop non-record, non-statutory mitigating circumstances.

B.

MR. ALVORD PROFFERED SIGNIFICANT NON-RECORD, NON-STATUTORY EVIDENCE WARRANTING AN EVIDENTIARY HEARING

Finally, the State incorrectly argues that Mr. Alvord is not entitled to an evidentiary hearing to present non-record, non-statutory mitigating circumstances because Mr. Alvord has not presented substantial non-statutory mitigating evidence and because the evidence Mr. Alvord is claiming should have been presented to the jury at his trial was in fact already presented to the jury. [Appellee's Answer Brief, 15]. In support of this flawed argument the State amazingly contends that its own witness, Dr. Ames Robey, adequately presented all mitigating evidence which Mr. Alvord now seeks to adduce at a 3.850 evidentiary hearing. [Appellee's Answer Brief, 16-18].

This Court has previously held that the evidence referred to in the State's Answer Brief was presented by Dr. Robey specifically to rebut any evidence of mitigating factors presented by the defendant. See State v. Alvord, 396 So.2d at 191. Additionally, an analysis of Dr. Robey's testimony and of the State's penalty phase argument clearly reveals that Dr. Robey's testimony was in no way a presentation of mitigating evidence but rather was the damning evidence which resulted in Mr. Alvord's sentence of death. As such, contrary to the State's assertions, Dr. Robey did not present all of the mitigating circumstances Mr. Alvord seeks to present at an evidentiary hearing but instead was used as a tool of the State to rebut any mitigating circumstances Mr. Alvord may have used at the time of his sentencing.

For example, Dr. Robey initially disclosed and detailed an earlier rape which Mr. Alvord had committed. [Tr. 1154-55].[6] Dr. Robey then stated it was his opinion that Mr. Alvord was not insane at the time he committed the rape, even though the court had found Mr. Alvord not guilty of that offense by reason of insanity. [Tr. 1160]. Thus, although Dr. Robey testified that Mr. Alvord had been found not guilty by reason of insanity and committed to a state hospital for the rape, he did so for the purpose of telling the jury that Mr. Alvord was not insane. [Tr. 1162].

Similarly, Dr. Robey further testified that Mr. Alvord escaped from Ionia State Hospital in Michigan three times during his

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[6] References to Mr. Alvord's trial and sentencing hearing will be referenced by a "Tr." followed by the pages of the trial transcript in brackets.

commitment and that Mr. Alvord had prior convictions for malicious destruction of property, reckless driving and possession of a firearm used in a robbery. [Tr. 1163-64, 1167]. At the time of Mr. Alvord's sentencing the prosecutor used this testimony in arguing that Mr. Alvord should be put to death and not as mitigation.

Furthermore, contrary to the State's assertions, Dr. Robey's testimony regarding Mr. Alvord's mental status is in conflict with the non-record, non-statutory mitigating evidence Mr. Alvord intends to adduce at an evidentiary hearing. Specifically, Dr. Robey testified that Mr. Alvord had no history of hallucinating or having delusions, even though medical records establish that Mr. Alvord suffered from a history of both severe hallucinations and delusions. [Tr. 1173]. He further testified, contrary to the non-record evidence which Mr. Alvord intended to introduce at an evidentiary hearing that Mr. Alvord is not schizophrenic, again contrary to medical records pertaining to Mr. Alvord. [Tr. 1173-78].

Similarly, Dr. Robey did testify that in June 1973, that Mr. Alvord was under a great deal of emotional stress and that his capacity to conform his behavior was impaired. [Tr. 1178]. However, Dr. Robey further testified that Mr. Alvord "clearly did know that what he was doing was criminal or was wrong." [Tr. 1179]. Similarly, Dr. Robey testified, on cross-examination regarding Mr. Alvord's mother as follows:

> Yes, his mother was, well, <u>I believe she got</u>, first began to show real overt signs of psychosis or mental illness

> when Gary was, oh, about twelve. I am not sure because it's hard to pin together, but I have a suspicion, that this began to bring out some of the problems that finally got him into a hospital. And she was in and out of mental hospitals, for, oh, three or four years or longer. I'm not really sure how long. I don't have her whole history. But she would go from sometimes very loving and close to suddenly just totally rejecting and unpredictably so. In another case she would sometimes not be home or sometimes she would.

[Tr. 1181] (emphasis added). Thus, contrary to the State's assertions, Dr. Robey did not present all of the mitigating circumstances surrounding Mr. Alvord's childhood but merely presented a brief reference to Mr. Alvord's upbringing, with absolutely no mention of the abusive atmosphere under which Mr. Alvord was raised.

When asked whether Mr. Alvord's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired as a result of mental disease, Dr. Robey stated:

> I do feel there is mental illness. I don't feel that because of this mental condition he couldn't understand the criminality of his act. But I do feel that his capacity to conform his behavior was impaired. It wasn't as good as it would have been had he not been in this state.

[Tr. 1190] (emphasis added). Dr. Robey thus down-played any role Mr. Alvord's mental illness may have had in the crimes of which he was convicted. Furthermore, when asked whether Mr. Alvord's capacity to appreciate the criminality of his conduct was impaired at the time of the offense, Dr. Robey replied:

> I think this is a little hard to tell, Mr. Meyers. I heard an indication on, this afternoon, on reading some of the testimony that he had some alcohol, and I just can't tell whether the amount at that time this is

> alleged to have happened could have impaired it through intoxication. I don't get the feeling from examination that it was impaired otherwise.

[Tr. 1190] (emphasis added). Dr. Robey thus again down played the role Mr. Alvord's drug and alcohol abuse may have played in the crimes at issue. [Tr. 1194] (emphasis added).

Despite the fact that the State argued at Mr. Alvord's sentencing that the jury was required to follow only the statutory mitigating circumstances, the State now on appeal amazingly contends that Dr. Robey's testimony was in mitigation. Throughout the State's penalty phase argument the State repeatedly referred to Dr. Robey's testimony to rebut the statutory mitigating evidence which the jury was allowed to consider. For instance, discussing the mitigating circumstances of no significant history of prior criminal activity the prosecutor stated:

> You have heard the doctor testify as to his prior background. He has been in and out of the hospital. He has escaped. He has violated the law on minor crimes, three misdemeanors, that he was convicted on. He raped and kidnapped a ten year old girl. I think it's quite clear to you that that mitigating circumstance is not present. In other words, he does have a significant history of prior criminal activity.

[Tr. 1206] (emphasis added).

Discussing the statutory mitigating circumstances of whether the capital felony was committed under the influence of extreme mental or emotional disturbance, the prosecutor stated:

> I will not complain or argue with that. You heard the doctor's testimony. The defendant has mental problems. There is no question about that. Anybody that would commit a crime like this has to have some mental problem.

[Tr. 1206]. Thus, the prosecutor in effect told the jury that they should disregard the defendant's mental condition.

In discussing the mitigating circumstances of acting under extreme duress, the prosecutor again actively and affirmatively utilized the testimony of Dr. Robey to discount this mitigating factor. The prosecutor stated:

> This is his own volitional act. You heard the doctor's testimony. He knew what he was doing. He knew what he was doing was wrong. No one was forcing him. No one was threatening him to do this. He did this of his volition.

[Tr. 1207] (emphasis added).

Similarly, when discussing the mitigating factor of whether the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, the prosecutor likewise again affirmatively used Dr. Robey's testimony. After framing the substantial impairment factor in terms of "mental disease or intoxication," the prosecutor stated:

> You have heard the doctor's testimony regarding his ability to appreciate what he was doing. He knew he was doing something wrong. So, that is not present. However, the second part of that particular mitigating circumstance, according to the testimony of Dr. Robey, is present. In other words, he did have a diminished capacity or there was an impairment in some way to his ability to conform his conduct to the requirements of the law.

[Tr. 1208] (emphasis added). Thus, the prosecutor utilized the testimony of Dr. Robey to make this mitigating factor a "wash" by stating Dr. Robey found the capacity to appreciate his conduct was present though Dr. Robey also found his capacity to control his conduct was impaired to some degree.

stressing that the doctor had testified that Mr. Alvord had acted pursuant to his volitional act. [Tr. 1210-22]. In summation, the prosecutor stated:

> You're going to hear the defense get up here and he is going to say, 'give the man another chance.' You've heard Dr. Robey. He can be rehabilitated, maybe, maybe not. I can't give you any promise. Ten years, maybe rehabilitated.
>
> * * *
>
> He has had every protection. He has an attorney, an investigator, he has had a doctor flown down from Michigan. He has had examinations by a doctor and other doctors to determine his competency. He has had every protection all the way through his life. Raped a ten year old girl and they gave him another chance. Now it's up to you people to decide. Do you give him another chance? Do you give him another chance to walk out of the [prison] system, to kill somebody else?

[Tr. 1210-22] (emphasis added). Given Dr. Robey's full testimony, and the State's use of this testimony, it is now ludicrous for the State to contend that Dr. Robey's testimony served to inform the jury of non-statutory mitigating circumstances when in fact his testimony served only to insure that Mr. Alvord would receive a sentence of death.

Additionally, such testimony was not used as mitigation, for at Mr. Alvord's sentencing, in accordance with controlling law, Mr. Alvord's counsel did not attempt to argue any non-statutory mitigating circumstances in his penalty phase argument. [Tr. 1215-26]. However, after the jury returned its advisory recommendation of death, counsel for Mr. Alvord argued that the court should consider non-statutory mitigating circumstances in imposing sentence. [Tr. 1240-41]. However, this argument by trial counsel was for naught. The judge's sentencing order makes it abundantly

clear that the trial court imposed the death sentence based upon the balance of aggravating factors versus mitigating factors which the court found present. [Tr. 1246]. Given the fact that this Court has previously found that the prosecutor, the defense counsel, and the trial judge were all operating under the improper view that the jury and judge could consider only evidence of statutory mitigating circumstances, it is ludicrous for the State to contend that all of Mr. Alvord's evidence of non-statutory mitigating circumstances was already presented and developed at Mr. Alvord's trial. See Alvord, 541 So.2d at 599.

Furthermore, since the jury was instructed not to consider non-statutory mitigating circumstances the trial court and this Court should not speculate as to whether such non-statutory mitigating circumstances would have affected the jury's decision. See Sullivan v. Louisiana, 508 U.S. __, 1135 S.Ct. 2078, 124 L.Ed.2d 182. As the United States Supreme Court noted in addressing the effect of a jury verdict where the jury was improperly instructed as to the definition of guilt beyond a reasonable doubt:

> Harmless-error review looks...to the bases on which 'the jury actually rested its verdict.'[] The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error. That must be so, because to hypothesize a guilty verdict that has never in fact been rendered-no matter how inescapable the findings to support that verdict might be-would violate the jury trial guarantee.

124 L.Ed.2d at 189 (citations omitted) (emphasis in original).

As such, based on Sullivan, it is inappropriate for the trial court or this Court to speculate that if the jury had been properly

instructed that it could consider non-statutory mitigating evidence, that such evident proffered by Mr. Alvord would not have affected the jury's recommendation. As the Sullivan court held, "The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action ... it requires an actual jury finding of guilt." Id. Similar to Sullivan, just as it is inappropriate for a court to speculate what a jury verdict would have been when there is no verdict because of trial error, it is inappropriate to speculate what a jury's penalty phase recommendation would have been when there is no actual recommendation because of the Hitchcock error and the jury's failure to be properly instructed regarding its authority to rely on non-statutory mitigating circumstances.[7]

Accordingly, this Court should find that Mr. Alvord had proffered significant non-record mitigating evidence which necessitated a hearing to determine whether exclusion of that evidence denied Mr. Alvord a fair sentencing. As such, this Court should reverse the trial court's Order and remand this cause to the trial court with instructions to conduct an evidentiary hearing in which Mr. Alvord is provided the opportunity to present and develop non-record, non-statutory mitigating circumstances.

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[7] Also see Booker v. Singletary, __ F.3d __, __, slip op. 3127, 3130-31, 1996 W.L.40521 (11th Cir. July 17, 1996)(any "grave doubt" whether Hitchcock error had substantial injurious affect means error not harmless).

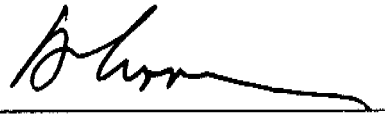
Respectfully submitted,

SHEPPARD AND WHITE, P.A.

Wm. J. Sheppard, Esquire
Fla. Bar No. 109154
Elizabeth L. White, Esquire
Fla. Bar No. 314560
Adam B. Allen, Esquire
Fla. Bar No. 998174
215 Washington Street
Jacksonville, FL 32202
Phone: (904) 356-9661
Fax: (904) 356-9667
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Candance M. Sabella, Esquire, Assistant Attorney General, Dept. of Legal Affairs/Tampa Office, 2002 No. Lois Avenue, Ste. 700, Tampa, FL 33607-2366, by United States Mail, this 11th day of August, 1996.



ATTORNEY

rw.42/ALVORD.RPY