IN THE SUPREME COURT OF FLORIDA

JAMES ARMANDO CARD,

Appellant,

vs. Case No. SC06-1383
L. C. No. 81-518-CF

STATE OF FLORIDA,

Appellee.
_____/

INITIAL BRIEF OF APPELLANT

On direct appeal from a Final Order of the Circuit Court of the Fourteenth Judicial Circuit, in and for Bay County, Florida, that denied Card's amended motion to vacate and set aside his judgments of guilt and sentences, including a death sentence, filed per the provisions of Florida Rule of Criminal Procedure 3.851.

CLYDE M. TAYLOR, JR., ESQ.
119 East Park Avenue
Tallahassee, FL 32301
Tel: 850.224.1191
Fax: 850.224.0584
FBN 0129747
Court Appointed Counsel for
Appellant, James Armando Card

TABLE OF CONTENTS

TABLE OF CITATIONS

PRELIMINARY STATEMENT REGARDING RECORD REFERENCES

This is a direct appeal of a final order denying Card post conviction relief from a death sentence. James Armando Card, the appellant, was the defendant in the trial court. He will be referred to as "Card" or "the defendant." The State of Florida was the plaintiff in the trial court and is the appellate here. It will be referred to as "the state."

The post conviction record on appeal is in nine volumes plus three extra volumes of exhibits introduced in evidence at the evidentiary hearing held on April 21, 2006. The Clerk of Circuit Court for Bay County, Florida, placed a volume number on the front cover of each volume and a page number in the lower right-hand corner of each page in that volume. Volumes I-III contain the pleadings filed by the parties (along with attachments thereto), and orders of the trial court, from the June 30, 2003 complete motion to vacate Card's death sentence through the June 9, 2006 final order denying post conviction relief. Volumes IV-VIII contain transcripts of pre-evidentiary hearing proceedings (mostly status conferences). Volume IX is the transcript of the April 21, 2006 evidentiary hearing regarding Claims V and IX of the amended motion for post conviction relief. Reference to these volumes will be by volume and page

Number or, for example, "Vol. I, R. 4."

As noted above, there are three volumes of exhibits that were introduced in evidence during the April 21, 2006 evidentiary hearing. The volumes containing the exhibits have the word "Exhibits" written on the front page of each volume and will be identified as such. For example, Volume I of the exhibits which includes page 23 will be "Ex. Vol. I, R. 23."

The parties have agreed that the record regarding the retrial of the penalty phase of Card's state court trial should be a part of the record. A motion to supplement the record was filed, and this Court has allowed the parties to reference the record on appeal in Card v. State, Florida Supreme Court Case No. SC00-182 is this appeal. Reference to that record will be by the letters "OR," for original record, followed by an appropriate page number.

STATEMENT OF THE CASE AND OF THE FACTS

Nature of the Case:

This is a direct appeal to the Supreme Court of Florida from a June 8, 2006 final order (Vol. III, R. 417-26) of the Circuit Court of the Fourteenth Judicial Circuit, in and for Bay County, Florida, denying Card's amended motion to vacate his judgments of conviction and sentences, including a death sentence, for the first-degree murder of Janis Franklin allegedly committed on June 3, 1981. (Vol. 1, R. 175)

Jurisdiction:

The Supreme Court of Florida has jurisdiction to review the June 8, 2006 final order appealed from per the provisions of Article V, Section (4)(b), Florida Constitution, Florida Rule of Appellate Procedure 9.030(a)(1)(A)(I) and Florida Rules of Criminal Procedure 3.850(g) and 3.851.

Course of the Proceedings:

In 1981, Card was indicted by a Bay County, Florida, grand jury and charged with first-degree murder, robbery and kidnapping. (Vol. I, R. 1) After a jury trial, Card was found guilty on all counts as charged. On

January 28, 1982, at the conclusion of the penalty phase, the jury recommended death by a vote of 7-5, and the trial court sentenced Card to death. (Vol. I, R. 1, 2) Card appealed raising four issues: (1) The trial court erred by holding that certain statements by persons not connected to Card were inadmissible hearsay, (2) testimony from Card's mental health expert, Dr. James Hord, refuted the bases for the trial court's finding that the CCP aggravator was proven by the state, (3) the trial court gave improper, double consideration to facts regarding the state's contention that the homicide was committed for pecuniary gain and to avoid lawful arrest, and (4) the trial court failed to properly weigh the evidence of mitigation presented by Card's mental health expert. On direct appeal, the Supreme Court of Florida affirmed. *Card v. State*, 453 So. 2d 17 (1984). In June of 1986, Card filed a petition for writ of habeas corpus in state court claiming that (1) the trial judge assigned to try Card was not authorized to do so[1] and (2) the trial judge erred in denying Card a pretrial competency evaluation. The petition was denied. *Card v. State*, 497 So. 2d 1169 (Fla. 1986).

[1] This Court determined that the proper procedures for the assignment of the trial judge were not followed, but that the error was harmless and not timely raised.

Thereafter, Card filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Florida claiming, among other things, that he was denied the right not to undergo criminal proceedings while incompetent. The petition was denied. On appeal, the Eleventh United States Circuit Court of Appeals affirmed in part and reversed in part, remanding for further proceedings.[2] *Card v. Dugger*, 911 F.2d 1494 (11th Cir. 1990). Upon remand, the District Court again denied Card habeas corpus relief. On appeal, the Eleventh Circuit affirmed, finding that the District Court was justified in denying Card an evidentiary hearing on the competency issue. *Card v. Singletary*, 963 F.2d 1440 (11th Cir. 1992). Card's petition for writ of certiorari to the Supreme Court of the United States was denied. *Card v. Singletary*, 114 S.Ct. 121 (1993).

On March 9, 1992, Card filed a successor Rule 3.851 motion for post conviction relief in the lower tribunal. (Vol. I, R. 2) The trial court, Hon. Deeded S. Costello, denied the motion and Card appealed to this Court. The trial court order was affirmed in part, denied in part and remanded for an

---

[2] The Eleventh Circuit remanded the cause to the District Court to let it "review the post-trial evidence presented by Card in support of his claim of incompetence, and to state the grounds, if any, for its denial of an evidentiary hearing on Card's competency to stand trial." *Card v. Singletary*, 963 F.2d at 1443.

evidentiary hearing. *Card v. State*, 652 So. 2d 344 (Fla. 1995). The remand related to the fact that the original sentencing judge allowed the prosecutor to prepare his sentencing order. The trial court vacated the defendant's death sentence and ordered a new penalty phase trial. (Vol. I, R. 3)

At the conclusion of the retrial of the penalty phase, the jury recommended the death penalty by a vote of eleven to one. In imposing the death penalty, the trail court found five aggravating factors: (1) The murder was committed while the defendant was engaged in the commission of a kidnapping; (2) the murder was committed for the purpose of avoiding or preventing a lawful arrest; (3) the murder was committed for pecuniary gain; (4) the murder was especially heinous, atrocious, or cruel ("HAC"); and (5) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification ("CCP"). The trial court found no statutory mitigating factors, but did find seven nonstatutory mitigators: (1) Card's upbringing was "harsh and brutal" and his family background included an abusive stepfather (some weight); (2) Card has a good prison record (slight weight); (3) Card is a practicing Catholic and made efforts for other inmates to obtain religious services (some weight); (4)

Card was abused as a child (some weight); (5) Card served in the Army National Guard and received an honorable discharge (some weight); (6) Card has artistic ability (little weight); and (7) Card has corresponded with school children to deter them from being involved in crime (some weight). The trial court found that the aggravating circumstances outweighted the mitigating circumstances, and imposed the death sentence.

On appeal, Card raises twelve issues with regard to his death sentence: (1) The state's penalty phase closing argument was fundamentally unfair; (2) the trial judge erred in not recusing herself; (3) the trial judge erred in finding and instructing the jury on four of the five aggravating circumstances; (4) the trial judge erred in failing to find proposed mitigating evidence and in failing to explain her weighing process; (5) the death penalty is disproportionate; (6) the trial court erred in deny the defense's motion to require a unanimous jury verdict; (7) the trial court erred in denying Card's request to give jurors an alternative instruction pertaining to CCP; (8) the trial court erred in using the standard jury instructions that referred to the jury as advisory and referred to their verdict as a recommendation; (9) the trial court erred in not allowing defense counsel to

question Card's family members about the effect Card's execution would have on their lives; (10) the CCP, HAC, murder committed-during-the course-of-a-felony, avoiding arrest, and pecuniary gain aggravators are unconstitutionally overbroad and vague, (11) the use of victim impact evidence violated Card's due process rights; and (12) the trial court erroneously precluded Card from introducing evidence that Card received life sentences for the robbery and kidnapping convictions. This Court rejected the appeal on the merits and affirmed the death sentence. *Card v. State*, 803 So. 2d 613 (2001).

A petition for writ of certiorari raising an *Apprendi v. New Jersey*, 530 U.S. 466 (2000) issue only was denied by the Supreme Court of the United States. On June 27, 2003, Card filed a motion to vacate and set aside the June 21, 1999 death sentence with attachments per the provisions of Florida Rule of Criminal Procedure 3.851. (Vol. I, R. 1-53, 176) On April 1 or 2, 2003, Card filed an amended motion to vacate his death sentence with attachments. (Vol. I, R. 92-152, 176) Card raised nine issues in the amended Rule 3.851 motion. (Vol. I, R. 92-170, 178-195) They are referenced below.

On May 24, 2004, the state filed a response to the amended Rule 3.851 motion. (Vol. I, R. 175-196) [3]

After a *Huff* hearing conducted on December 14, 2005, an evidentiary hearing regarding Claims V and IX was held on April 21, 2006 before Judge Costello in Panama City. (Vol. III, R. 418)

Disposition in the Lower Tribunal:

On June 9, 2006, the trial court rendered a final order (Vol. III, R. 417-426) denying post conviction relief. In so doing, the trial court reached the following conclusions[4] as to each claim raised in the amended Rule 3.851 motion:

Claim I: Florida's death penalty statute is unconstitutional based upon *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 466 (2002). Claim denied because *Apprendi* and *Ring* are not to be applied retroactively. (Vol. III, R. 418)

---

[3] On or about May 21, 2004, Card filed a second supplemental motion for post conviction relief raising the claim that his death sentence was unconstitutional under *Ring v. Arizona*, 122 S.Ct. 2428 (2002). The state filed a response to this second supplement on or about December 8, 2005, citing *Schriro v. Summerlin*, 124 S.Ct. 2519 (2004) which held that Ring is not to be applied retroactively. *See* Vol. II, R. 317-18.

[4] Card merely summarizes the claims raised and the gist of the trial court's findings as to each claim.

Claim II: In light of *Apprendi* and *Ring*, Card was entitled to resentencing only by the original jury that sat regarding his first jury trial. Claim denied because, as noted in ruling on Claim I, *Apprendi* and *Ring* are not to be applied retroactively. Furthermore, Florida law provides for a new jury in a retrial of a penalty phase, and this procedure has not been declared unconstitutional by any court. (Vol. III, R. 418-19)

Claim III: Counsel was ineffective for not seeking a mistrial based upon allegedly improper closing argument of the prosecutor. Claim denied because it was previously rejected by the Supreme Court of Florida in *Card v. State*, 803 So. 2d at 622-23. (Vol. III, R. 419)

Claim IV: Counsel was ineffective for failing to enumerate statutory mitigators during closing argument and *Spencer* hearing. Claim denied because issue should have been but was not raised on direct appeal, citing *Buford v. State*, 403 So. 2d 943 (Fla. 1981). Furthermore, Florida law has a "catch-all" provision, Section 921.141(6)(h), Florida Statutes, which allows for the presentation of any relevant mitigating evidence to the jury and judge, which is what counsel did. (Vol. III, R. 419-20)

Claim V: Counsel was ineffective for recommending that Card not testify during the penalty phase retrial. Claim rejected after evidentiary

hearing. The Court found that Card was afforded an opportunity to attend the evidentiary hearing and testify, but specifically declined to do so. Thus, there was no evidence from him to support the claim. Card's trial counsel testified that he discussed the issue (of whether Card should testify) with him, recommending that he not do so due to what counsel perceived as impulsiveness and other problems. There was evidence in the record to support trial counsel's strategy. Under these circumstances, according to the trial court, no ineffectiveness or prejudice was established. (Vol. III, R. 420)

Claim VI: Counsel was ineffective for not raising an actual innocence claim and requesting DNA testing. Claim denied because defense counsel did file a motion for DNA testing per the provisions of Florida Rule of Criminal Procedure 3.853, which was denied on November 17, 2005. The court found that Card could not relitigate the issue in a post conviction motion. (Vol. III, R. 421)

Claim VII: Counsel was ineffective during *Spencer* hearing for failing to determine the views of the victim's daughter as to imposition of the death penalty. Claim rejected because there was no proof offered that the victim's daughter would have testified in Card's favor. Furthermore, the

daughter's testimony would not be relevant to the issue of whether to impose the death penalty, citing *Zant v. Stephens*, 462 U.S. 862 (1983). (Vol. III, R. 421, 422)

Claim VIII: Previously undisclosed (allegedly newly discovered) autopsy evidence pointing to Card's innocence but was not presented by defense counsel. The trial court found this claim to be conclusory and speculative. There was no showing that the alleged new evidence was in fact newly discovered. Claim rejected as facially deficient. (Vol. III, R. 422)

Claim IX: Counsel did not fully investigate Card's mental health situation at the time of the alleged homicide, and failed to present available, extant mental health mitigating evidence to the judge and jury during the penalty phase retrial. Furthermore, trial counsel used an unlicensed psychologist, Craig Haney, Ph. D., a California psychologist, who did not diagnose and was not qualified to review Card's mental health records and report on all mental health mitigation. The trial court rejected this claim finding that counsel had access to and studied "voluminous evidence" regarding Card's mental status including but not limited to Card's school, medical and military records. There was no proof of a failure to fully

investigate these matters by trial counsel. Furthermore, the claim that Dr. Haney was not qualified was procedurally barred since it was not raised on direct appeal, citing *Rodriguez v. State*, 919 So. 2d 1252 (Fla. 2005). There was no requirement that Dr. Haney be licensed in Florida in order to provide his opinion as an expert. Nor was there sufficient evidence to support Card's claim, through the testimony of Bill Mosman, Ph. D. (Card's retained mental health expert), that Card was mentally retarded at the time of the homicide or that he (Card) suffered from extreme mental disturbance in the context of Section 921.141(6)(b), Florida Statutes, at that time. If anything, the mental health records that Dr. Haney allegedly overlooked (or did not testify about) revealed that Card did not suffer from any brain damage but did reveal that he had an anti-social personality disorder, a fact that would not have helped him in the eyes of the jury and sentencing judge. Dr. Mosman's contention that Card had an emotional age that was less than his chronological age was refuted by the evidence that included the fact that Card had received a GED degree and completed three and one-half years of college. Finally, even if there had been some evidence of ineffectiveness (and there was no finding that there was), it would not have changed the outcome since the state proved beyond a reasonable doubt the existence of

five statutory aggravators under Section 921.141(5), Florida Statutes.

On July 28, 2006, Card timely filed a notice of appeal of the June 8, 2006 order that denied his post conviction motion to vacate his death sentence. (Vol. III, R. 436)

E. Statement of the Facts:

Basic Facts of the Homicide

The basic facts of the homicide are described by the Supreme Court of Florida in its original opinion that affirmed Card's judgments of conviction for first-degree murder, kidnapping and robbery:

> On the afternoon of June 3, 1981, the Panama City Western Union office was robbed of approximately $1,100. Blood was found in the office and the clerk, Janis Franklin, was missing. The following day, Mrs. Franklin's body was discovered beside a dirt road in a secluded area approximately eight miles from the Western Union office. Her blouse was torn, her fingers severely cut to the point of being almost severed and her throat had been cut.
>
> As early as 6:30 on the morning of June 3, 1981, (Card) telephoned an acquaintance, Vicky Elrod, in Pensacola, Florida, and told her that he might be coming to see her to repay the $50 or $60 he owed her. At approximately 9:30 that night Vicky Elrod met with (Card). He took out a stack of twenty and one-hundred dollar bills and she asked if he had robbed a 7-Eleven store. He told her that he had robbed a Western Union station and killed the lady who worked there. He described scuffling with the victim, tearing her blouse and cutting her with his knife. He said he then took her in his car to a wooded area and

> cut her throat saying, "Die, die, die." Several days after their meeting, Vicky Elrod went to the police with this information. (Card) was then arrested.

Card v. State, 453 So. 2d 18 (Fla. 1984); see also *Card v. State*, 803 So. 2d 613, 617 (Fla. 2001).

Mental Health Mitigation Testimony Presented at the First Penalty Phase Trial

Dr. James Hord, a clinical psychologist, testified at Card's first penalty phase trial. (Vol. IV, R. 1170) He saw Card three times in 1981 prior to the original trial in an effort to assist defense counsel. (Vol. IV, R. 1173, 1174) He obtained a life history from Card, administered the Rorschach ink blot test and an MMPI, among other psychological tests. (Vol. IV, R. 1175-1178) He found that Card was not insane when the crime occurred, that he was not psychotic or incompetent, but that he evidenced "a sociopathic personality adjustment pattern." (Vol. IV, R. 1179) He said that it was characterized by a great deal of insecurity and "discord with the usual acceptable social mores." (Vol. IV, R. 1179) People like Card are focused on ego-enhancing activities. (Vol. IV, R. 1180) He noted that Card would not react like a normal person to stress -- that he would be impulsive with

less ability to appreciate a concern for others. (Vol. IV, R. 1181, 1182)

Defense counsel then presented Dr. Hord with a hypothetical question based upon the facts of the case as presented by the prosecution. (Vol. IV, R. 1183-1186) Dr. Hord said that Card's mental condition at the time of the homicide would be ". . . something very much like panic." (Vol. IV, R. 1187) The doctor did not think that Card went into the Western Union office with the intention of killing the lady inside. (Vol. IV, R. 1189) Dr. Hord opined further that ". . . the actual decision to end her life or to kill her, I think, would have been a response to a feeling of panic, of not knowing how to get out of the situation that he now realized is a terrible situation to be in." (Vol. IV, R. 1192)

On cross-examination, Dr. Hord acknowledged that sociopaths "rarely" recognize that they have a personality problem and want to change. (Vol. IV, R. 1205) He said that Card could possibly have committed the crimes for money. (Vol. IV, R. 1207) He admitted that a large part of the people (sociopaths) he was discussing could be termed a "criminal element" of our society. (Vol. IV, R. 1208) In this case, there may well have been some planning involved. (Vol. IV, R. 1209) At some point in time, Card

knew that he had to kill the victim in order to avoid detection. (Vol. IV, R. 1210) When in prison in the future, he could react again as he reacted on June 3, 1981. (Vol. IV, R. 1213)

Synopsis of Evidence Presented and Findings Made at the Retrial of the Penalty Phase

Card has described the claims raised in the amended Rule 3.851 motion for post conviction relief and the bases used by the trial court to reject them at the conclusion of the retrial of the penalty phase on pages 15-20 of this brief. What follows here are the findings of this Court regarding the evidence presented during that retrial.

This Court first noted that the basic facts of the case as set forth in *Card v. State*, 453 So. 2d 17, 18-19 (Fla. 1984) and as quoted on page 20, 21 of this brief, supra, were presented (more than likely by the state) at the retrial of the penalty phase. *Card v. State*, 803 So. 2d at 618. In addition:

> At the resentencing proceeding, the prior testimony of the medical examiner, Dr. Edmund Kielman, who had performed the autopsy of Franklin, was read to the jury. According to Dr. Kielman's prior testimony, the victim suffered several defensive wounds and had a "very deep cut over her throat." The medical examiner stated that the wound to the victim's throat was approximately six or seven inches in length. The wound was also approximately two-and-one-half inches deep and almost went to the spinal cord. He opined that the perpetrator must have used a considerable amount of force in

inflicting the wound to the victim's throat and that the instrument utilized by the perpetrator had to be fairly sharp to go that deep. The medical examiner also observed that the victim had suffered extensive wounds to her hands. The medical expert testified that these were classic defense wounds caused by the person protecting him or herself from an attack.

In Card's defense, Card's attorney presented the testimony of several members of Card's family, including his mother, brother-in-law ex-wife, daughter, niece, and brother. They testified about, among other things, Card's difficult childhood, his unstable family environment, his military service, and his achievements in prison. Defense counsel also presented the testimony of a Catholic priest, the director of a Catholic charity, and a Catholic sister. They testified about Card's religious beliefs, his commitment to Catholicism, his artwork, and how Card began writing to school children while in prison in an effort to deter young children from crime.

Defense counsel also presented the testimony of a professor of psychology at the University of Santa Cruz, Dr. Craig Haney, who testified about how he analyzed and evaluated Card's social history in an effort to understand or explain Card's criminal behavior. Doctor Haney opined that given Card's background, which included growing up in poverty, being abandoned by his father prior to birth, and suffering physical and emotional abuse and parental neglect, it was predictable that Card would use drugs and alcohol and engage in behavior that would lead him to prison. Doctor Haney also testified that Card had a good prison record and that, despite Card's past, he had adjusted well to prison life.

At the conclusion of the resentencing proceedings, the jury recommended the death penalty by a vote of eleven to one. In imposing the death penalty, the trail court found five aggravating factors: (1) the murder was committed while the defendant was engaged in the commission of a kidnapping; (2)

> the murder was committed for the purpose of avoiding or preventing a lawful arrest; (3) the murder was committed for pecuniary gain; (4) the murder was especially heinous, atrocious, or cruel ("HAC"); and (5) the murder was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification ("CCP"). The trial court found no statutory mitigating factors, but did find seven nonstatutory mitigators: (1) Card's upbringing was "harsh and brutal" and his family background included an abusive stepfather (some weight); (2) Card has a good prison record (slight weight); (3) Card is a practicing Catholic and made efforts for other inmates to obtain religious services (some weight); (4) card was abused as a child (some weight); (5) Card served in the Army National Guard and received an honorable discharge (some weight); (6) Card has artistic ability (little weight); and (7) Card has corresponded with school children to deter them from being involved in crime (some weight). The trial court found that the aggravating circumstances outweighed the mitigating circumstances and imposed a death sentence.

Card v. State, 803 So. 2d at 617-19.

Testimony presented during the April 21, 2006 Post Conviction Evidentiary Hearing

The following testimony was presented during the April 21, 2006 evidentiary hearing held on Card's amended motion to vacate his death sentence, and related to Claims V and IX in his post conviction motion.

Bill Mosman is a licensed forensic psychologist (Vol. IX, R. 519) and a member of the Florida Bar. (Vol. IX, R. 515). His bachelor's degree is in

Psychology from San Jose State University. (Vol. IX, R. 516) He has a doctorate in psychology from the University of Nebraska. (Vol. IX, R. 516) He had a lengthy internship, residency and work history with the California Departments of Corrections, Health and Parole and Probation, which included testing and examining persons at risk with mental health problems. (Vol. IX, R. 517, 518) After moving to Florida, he completed law school at the University of Miami in about 1993 and was thereafter admitted to the Florida Bar. (Vol. IX, R. 517-18; *see* also Dr. Mosman's curriculum vitae in evidence as Defense Ex. 1A, Ex. Vol. III, R. 639-45.)

Dr. Mosman described a forensic psychologist as one who "specializes in providing psychological information and materials to legal decision makers." (Vol. IX, R. 520) He had testified in court as an expert witness regarding forensic issues in death penalty cases dealing with mental health issues scores of times in California, Colorado, Virginia, Georgia, Washington D.C., and Florida,. (Vol. IX, R. 520-21) In Florida, he has testified in many criminal cases in Hillsborough, Pasco, Dade, Pinellas and Duval Counties, among others. (Vol. IX, R. 521-22) All his post conviction testimony (about 30-35 times) in capital cases has been on behalf of the

defense. (Vol. IX, R. 522-23)

After *voir dire* by the state, the trial court allowed Dr. Mosman to testify as an expert. (Vol. IX, R. 524)

Dr. Mosman noted that he traveled to Union Correctional Institution near Raiford in an attempt to examine and test the defendant, but Card declined to meet with him. (Vol. IX, R. 526) The doctor testified that, even so, he was able to access the mental health records extant at the time of Card's penalty phase retrial and to assess the extent to which that information was evaluated and made known to the judge and jury. (Vol. IX, R. 526-27) This included review of some 31 separate documents in addition to pleadings and transcripts developed in earlier court proceedings, including the prior sentencing hearings, as described by the doctor and contained in a "data base" that was admitted in evidence as Defense Ex. 1B. (Vol. IX, R. 528-31; Ex. Vol. I, R. 646-48)

In his capacity as a forensic psychologist (not a lawyer), Dr. Mosman identified certain statutory and non-statutory mitigators that were supported by the data he had studied and extant at the time of the penalty phase retrial. They included the fact that, at the time of the homicide, Card suffered from "extreme mental or emotional disturbance." (Vol. IX, R. 535-36, 555-56)

This finding was based in part upon a review by the doctor of Card's military record, psychiatric evaluations, Veterans Administration reports and affidavits provided by Card's mentors and by members of his family. (Vol. IX, R. 540-42) According to Dr. Mosman, the records indicated that, when under stress, Card "decompensates, and becomes a danger to self, danger to others . . ." (Vol. IX, R. 543) Dr. Mosman was of the view that this data suggested brain damage and that Card was mentally retarded at the time of the homicide. (Vol. IX, R. 548-49, 515)

Dr. Mosman also found (again as a psychologist, not as an attorney) that Card qualified for the age mitigator under the provisions of Section 921.141(6)(g), Florida Statutes. (Vol. IX, R. 556, 561-62) This finding was based in part upon the affidavit of one of Card's juvenile officers. (Vol. IX, R. 562)

Dr. Mosman spoke with Dr. Haney, the mental health expert who testified for Card at the penalty phase retrial. (Vol. IX, R. 552) Dr. Haney told him that ". . . he cannot diagnose, he cannot treat, he cannot test, he knows nothing about these things." (Vol. IX, R. 553)

Dr. Mosman found that there were a host of non-statutory mitigators

that the jury should have been advised of at the retrial. They included good prison behavior, a deprived childhood, emotional impairment that may not have been extreme, Card's mother was a "drunk," medical problems, a history of charitable deeds, remorse and excessive use of alcohol and drugs. (Vol. IX, R. 565-67)

On cross-examination, Dr. Mosman acknowledged that it was not uncommon for inmates to refuse to meet with him, and, when that happened, he had to look for other sources of information, such as mental health records about the inmate. (Vol. IX, R. 569, 570.) He said that he did not have access to Dr. Joyce Carbonell's raw data although he tried to speak with her and get that data. (Vol. IX, R. 570-71) He therefore had to rely on her report as written. (Vol. IX, R. 571) He knows Dr. McClaren, who felt that Card should be examined for possible brain damage, to be a "straight shooter" and qualified to test persons regarding their psychological situations. (Vol. III, R. 572) He noted that Dr. Haney considered many of the same documents and records he did, but testified about them only in "reference of a risk analysis. He never discussed them from a reference point of mitigation." (Vol. IX, R. 573-74) He read Card's army medical record (Defense Ex. 20, Ex. Vol. II, R. 797-858) which indicated that he was free

from mental disease or defect, able to distinguish right from wrong and capable of participating in court proceedings. (Vol. IX, R. 575) He agreed that Dr. Morelli's report regarding possible left temporal lobe damage was based, at least in part, on a history provided by Card. (Vol. IX, R. 576-77) With regard to Dr. Cartwright's finding of "sociopathy, (Defense Ex. 11)" Dr. Mosman explained that this is not a valid diagnosis among mental health professionals. (Vol. IX, R. 579) He acknowledged Dr. Ray's report indicating that Card did not suffer from "looseness of association, delusions or any indications of paranoid schizophrenia . . ." (Vol. IX, R. 579) Dr. Mosman took issue with the prosecutor who asserted through his questioning that he was merely interpreting the data differently than Dr. Haney. He felt that Dr. Haney was not qualified to analyze this information. (Vol. IX, R. 580-81) He said that Dr. Haney's approach of looking at risk factors was essentially worthless since some of the people in Card's family dealt with them one way, and others, another. (Vol. IX, R. 581, 582.) Dr. Mosman said that it was not enough to simply present data to the jury, it had to be interpreted and explained by an expert. (Vol. IX, R. 583-84)

The state called attorney Jeff Whitton, Esq., Card's penalty phase retrial counsel, to the stand. John O'Brian, Esq., sat with him on a *pro bono*

basis during the retrial. (Vol. IV, R. 589) Whitton said that there were lengthy discussions with Card as to whether he should testify, and Card followed his counsels' recommendation that he not do so. (Vol. IX, R. 590)

Dr. Haney was referred to Whitton by his (Whitton's) mitigation investigator, Pam Rogers. (Vol. IX, R. 591) Whitton's strategy was to "humanize" Card in the penalty phase proceedings -- to show that he was not some kind of "monster." (Vol. IX, R. 591, 592) A thorough background check of the client was conducted in this regard. (Vol. IX, R. 592) This included obtaining records related to his military service (at Fort Ord and other places), Card's mental health and his treatment at the Veterans Administration. (Vol. IX, R . 592-93)

Card denied his guilt of the offenses of conviction. (Vol. IX, R. 592)

Whitton and Dr. Haney met personally with Dr. Joyce Carbonell in Tallahassee, interviewing her for several hours. (Vol. IX, R. 594-95) He and Dr. Haney felt that she "displayed all sorts of nervous habits," would change the subject during their discussions and that she would not be a good witness who could hold up under cross-examination. (Vol. IX, R. 595) Thus, they decided not to use her. Nor did they decide to use Dr. McClaren who had examined Card regarding possible brain damage. Whitton felt that

Dr. McClaren's findings were not conclusive and did not fit in with his desire to humanize the defendant. (Vol. IX, R. 596, 597) Dr. Elzahary, a neurologist, was not called as a witness either because his findings (after an MRI and EEG), after testing Card, were normal. (Vol. IX, R. 599) Dr. Hord (who testified for Card in his first penalty phase trial) was somewhat offended when Whitton did not use him at the retrial. Whitton felt that Dr. Hord had been "making up facts." (Vol. IX, R. 599) He also felt that Dr. Hord had a poor grasp of the facts of the case. (Vol. IX, R. 500)

On cross-examination, Whitton acknowledged that Card's penalty phase retrial was the first capital case he ever handled, and that he had participated in just one CLE course in conjunction with capital cases prior thereto. (Vol. IX, R. 601-3) He read the transcript of the first trial and the discovery material as well. (Vol. IX, R. 604-5) He recalled reading some material about Card saving his sister's life. (Vol. IX, R. 606) He said that he had difficulty getting Card's family members to cooperate with him due to their brittle personalities. (Vol. IX, R. 607-9) He reiterated that he reviewed Card's VA and military mental health records, among others, including the Sacramento Medical Center records. (Vol. IX, R. 609-10)

Whitton reviewed records showing that Card had a miserable childhood, had sustained several physical injuries and had a low IQ. (Vol. IX, R. 610) But he added that Dr. McClaren put him in a mid-range IQ of about 100. (Vol. IX, R. 611) When asked why he did not put Card on the stand, Whitton said that Card has "impulsivity" problems and that, under skillful cross-examination, he would "explode." (Vol. IX, R. 611) He said that Card changed his mind about testifying many times but eventually accepted his (Whitton's) and co-counsel's recommendations that he not do so. (Vol. IX, R. 611-12)

Whitton could not recall what documents Dr. McClaren was given to study when evaluating the defendant, but he had Card's DOC medical records and documents from the VA. (Vol. IX, R. 612-13)

Whitton considered the statutory mitigators for the penalty phase. As far as the statutory mitigator of extreme emotional disturbance was concerned, he did not think that he could do much with it given the fact that Card protested his innocence. (Vol. IX, R. 614) Also, the information that came back from Dr. McClaren in this regard was inconclusive. (Vol. IX, R. 615) Whitton admitted that Dr. Haney acknowledged that he was not a clinician. (Vol. IX, R. 616, 624) He restated that Dr. Haney's role was to

explain Card background and show the risk factors that led him to the trouble that he found himself in. (Vol. IX, R. 616) He acknowledged that he did not know what the age mitigator as set forth in Section 921.141(g), Florida Statutes, meant. (Vol. IX, R. 619-21) He did not want Dr. Hord as a witness in the retrial. (Vol. IX, R. 619) In his closing argument, he cited to Card's military service, devotion to the Catholic Church, good prison record and his family history as non-statutory mitigation. (Vol. IX, R. 625)

On redirect examination, Whitton said that he had all the files and records regarding Card that were contained in the original files and records. (Vol. IX, R. 625-26) He pointed out that he could not use some of Card's mental health records since there was negative information in them. (Vol. IX, R. 628)

SUMMARY OF THE ARGUMENT

Card submitted a claim of ineffective assistance of penalty phase retrial counsel in Claim IX of his amended Rule 3.851 motion for post conviction relief. (Vol. I, R. 145-l50) He asserts that the trial court erred in denying this claim.

For reasons that cannot be justified as tactical or strategic, defense counsel mishandled the presentation of extant mental health mitigating evidence at Card's penalty phase retrial by offering the testimony of an unlicensed California psychologist, Craig Haney, Ph. D., who, by his own admission, lacked the skills to test for and diagnose mental illness. The psychologist limited his testimony to a suggestion that Card's criminal history and conduct leading up to the death of the victim in this case was not surprising given his chaotic, abusive upbringing. Dr. Haney offered little if any testimony regarding the existence of mental health mitigation as referenced in Section 921.141(6), Florida Statutes.

Dr. Bill Mosman, a forensic psychologist, on the other hand, carefully researched Card's mental health history and found that there was substantial record evidence extant at the time of the penalty phase retrial that supported the conclusion that the defendant suffered from extreme mental or

emotional disturbance at the time of the homicide, as referenced in Section 921.141(6)(b), Florida Statutes. Furthermore, due to the nature and extent of Card's mental problems, Dr. Mosman found that the age mitigator as provided for in Section 921.141(6)(g) also applied. In addition, Dr. Mosman found that there were many non-statutory mitigators that the jury and judge should have been presented with at the retrial but that were not presented.

Card suffered prejudice as a result of his counsel's ineffectiveness in not presenting this extant mental health mitigation in that the outcome of the proceedings was detrimentally affected. Had it been presented, there is a distinct likelihood that the jury would have recommended life and the trial court would have had no choice but to sentence Card to life, not death. This is so in part because the mental problems that Card had would refute the HAC and CCP aggravators.

The trial court erred in not crediting Dr. Mosman's testimony, finding that Card was not denied effective assistance of counsel, not vacating the death sentence and not granting Card a new penalty phase trial.

ARGUMENT

I: The trial court erred in denying Card's Rule 3.851 motion to vacate his death sentence after the retrial of the penalty phase based upon the Claim (IX) of constitutionally ineffective assistance of counsel because counsel failed to investigate and properly present all extant evidence of mental health mitigation.

Standard of Appellate Review

This is a post conviction capital case involving mixed questions of fact and law. As such, the final order of the circuit court denying Card's Florida Rule of Criminal Procedure 3.851 motion for post conviction relief, as amended, is entitled to plenary, *de novo* review, except that findings of fact by the trial court are entitled to deference so long as there is competent and substantial evidence in the record to support them. *Johnson v. State*, 789 So. 2d 262 (Fla. 2001); *Rose v. State*, 675 So. 2d 567 (Fla. 1996). As this Court stated in *State v. Lewis*, 838 So. 2d 1102, 1112 (Fla. 2002):

> The standard of review we apply in reviewing the trial court's ruling on this issue (of alleged ineffective assistance of counsel in a post conviction capital case) is two-pronged: "The appellate court must defer to the trial court's findings on factual issues but must review the court's ultimate conclusions on the deficiency and prejudice prongs de novo." *Bruno v. State*, 807 So. 2d 55, 62 (Fla. 2001).

Merits

"Ineffective assistance (of counsel in a state capital case) is deficient performance by counsel resulting in prejudice." *Rompilla v. Beard*, 545 U.S. 374, 375 (2005), quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

Card concedes that a defendant in a capital case in Florida bears a heavy burden when seeking to set aside a death sentence claiming ineffective assistance of trial counsel for the alleged failure to properly locate and present available mitigating evidence during the penalty phase. In *Rivera v. State*, 859 So. 2d 495 (Fla. 2003) this Court, citing language from *Middleton v. Dugger*, 849 F.2d 491, 493 (11th Cir. 1988), stated:

> First, it must be determined whether a reasonable investigation should have uncovered such mitigating evidence. If so, then a determination must be made whether the failure to put this evidence before the jury was a tactical choice by trial counsel. If so, such a choice must be given a strong presumption of correctness, and the inquiry is generally at an end. If, however, the failure to present the mitigating evidence was an oversight, and not a tactical decision, then a harmlessness review must be made to determine if there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Thus, it must be determined that defendant suffered actual prejudice due to the ineffectiveness of his trial counsel before relief will be granted.

On the other hand, this Court has not hesitated to grant a death-sentenced inmate post conviction relief where the evidence demonstrates that defense counsel presented no mitigating evidence, presented some but not all that was available, or did not present what was available in a skillful manner. This is especially true where the evidence of mitigation was readily accessible to defense counsel. The reason is obvious and grounded in fundamental fairness. In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court stated that "the Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland*, supra, 446 U.S. at 685. Counsel's obligation includes the vigorous and complete investigation and effective presentation during the penalty phase of all available mitigating evidence, especially mental health mitigation in the context of Sections 921.141(6)(b), Florida Statutes. Failure to meet this obligation can have fatal and terribly unfair results given the stakes, especially where the investigation would have produced the kind of mental health mitigating evidence that lay just beneath the surface in the

case at bar. In *Heiney v. State*, 620 So. 2d 171 (Fla. 1993), the defendant was convicted of first-degree murder and robbery. The trial court overrode the jury's life recommendation and sentenced Heiney to death. The conviction and sentence were affirmed on direct appeal. After this Court ordered that an evidentiary hearing be held regarding Heiney's motion to vacate the death sentence on ineffective assistance of counsel grounds, the trial court found that counsel was deficient but the deficient performance did not prejudice Heiney. The defendant again appealed. This Court vacated Heiney's death sentence and remanded, finding that the trial court erred in determining that he did not suffer prejudice. In so doing, this Court determined that if Heiney's counsel had conducted a proper background investigation in preparing for the penalty phase, he would have discovered several mitigating circumstances. Furthermore, if these mitigating circumstances had been discovered and effectively presented, the jury override might have been improper or the trial judge may have had a reasonable basis to uphold the jury's life recommendation. *Heiney*, supra, 620 So. 2d at 173-74.

Likewise in the case at bar, Card's defense counsel, according to Dr. Mosman, failed to discover and present a host of available mitigating

evidence especially related to Card's severely compromised mental condition at the time of the homicide. (Vol. IX, R. 535-36, 555-56)

Trial counsel had a duty to present that mitigating evidence to the jury, and the failure to do so cannot be sanitized by labeling it "strategic." As this Court stated in *Heiney*, *supra*, at 173:

> The State argues that the defense lawyer decided not to present any mitigation at Heiney's sentencing for "strategic" reasons and, therefore, his actions are not subject to review under Strickland. We disagree. Heiney's lawyer in this case did not make decisions regarding mitigation for tactical reasons. Heiney's lawyer did not even know that mitigating evidence existed.

In *Hildwin v. Dugger*, 654 So. 2d 107 (Fla. 1995), this Court vacated the defendant's death sentence and remanded because trial counsel's errors deprived Hildwin of a reliable penalty phase proceeding. In *Hildwin,* just as in the instant case, "(t)rial counsel's sentencing investigation was woefully inadequate. As a consequence, trial counsel failed to unearth a large amount of mitigating evidence which could have been presented at sentencing." *Hildwin*, *supr*a, 654 So. 2d at 109. Furthermore, again as in the instant case, several lay witnesses were called to testify that Hildwin was, generally speaking, a nice person and had experienced a difficult childhood. *Hildwin, supra*, 654 So. 2d at 110. This Court recognized that the presentation of this

testimony was insufficient to fulfill counsel's obligation to his client, stating on page 110 (footnote 7) of its opinion that:

> We recognize that Hildwin's trial counsel did present some evidence in mitigation at sentencing. The defense called five lay witnesses--including Hildwin's father, a couple who periodically cared for Hildwin when he was abandoned by his father, a friend of Hildwin, and Hildwin himself. The testimony of these witnesses was quite limited. In short, they revealed that Hildwin's mother died before he was three, that his father abandoned him on several occasions, that Hildwin had a substance abuse problem, and that Hildwin was a pleasant child and is a nice person.

In *State v. Lewis*, 838 So. 2d 1102 (Fla. 2002), this Court again found trial counsel ineffective. Specifically, counsel failed to contact important family members regarding available mitigating information. As the Court stated at 1109: "Counsel never contacted any of Lewis' other family members in an attempt to discover potential mitigation, nor did counsel attempt to obtain mitigating evidence that was contained in Lewis' background records, including Lewis' hospitalization records, school records, and foster care information." In this case, while Whitton did contact some of Card's family members, they were not sufficiently pressed for mental health mitigation evidence like that unearthed by Dr. Mosman.

There is ample precedent for this Court to take appropriate action where defense counsel is proven to be ineffective for failure to properly present all available mitigating evidence during the penalty phase of a capital case. In *Rose v. State*, 675 So. 2d 567 (Fla. 1996), testimony at the post conviction evidentiary hearing by a forensic psychologist, Dr. Toomer, established mitigating factors that had not been brought out by Rose's trial counsel. In this regard:

> Dr. Toomer's opinion was based on a psychosocial evaluation of Rose in which he administered a battery of psychological tests and reviewed Rose's school, hospital, medical and prison records. His testimony was essentially uncontested.

Rose, supra, 675 So. 2d at 571. (Likewise, in the case at bar, Dr. Mosman's opinions were essentially uncontested.) This Court reversed the imposition of the death penalty in *Rose* and remanded for another penalty phase trial. *See* also *State v. Riechmann*, 777 So. 2d 342 (Fla. 2000) in which this Court upheld the trial court's decision ordering a new sentencing proceeding where, just as in Card's case, defense counsel failed to properly investigate existing mitigating evidence. This Court stated in *Riechmann*: "It seems apparent that there would be few cases, if any, where defense counsel would be justified in failing to investigate and present a case for the defendant in the penalty phase of a capital case." *Id*., at 351. What was true in

Riechmann is true here. There is no basis upon which to excuse retrial counsel's failure to present the mental health mitigation that Dr. Mosman uncovered.

By his own admission, Card's was the first capital case that Mr. Whitton had handled. (Vol. IX, R. 601-03) He must not have understood the statutory scheme that the Florida Legislature had established within which a decision as to whether to impose a death or life sentence is to be litigated. No real effort to establish any of the statutory mitigators as set forth in Section 921.141(6), Florida Statutes was made. Instead, he effectively treated the proceeding as if it were a sentencing in a non-capital case by merely trying to "humanize" his client. (Vol. IX, R. 591-92) As far as the use of expert testimony to establish mental health mitigation is concerned, he appeared to get side-tracked by having Dr. Haney confine his investigation and testimony to the presentation of "risk factors" that could explain why Card spent much of his life in prison for the commission of various crimes. (Vol. IX, R. 616) This "risk factor" analysis is not included in the statutory mitigators referenced in Section 921.141(6). The trial court did not even mention it among the non-statutory mitigation she considered in resentencing Card. *See Card v. State*, 803 So. 2d at 618.

The statutory mitigator of suffering from extreme emotional disturbance at the time of the homicide.

Section 921.141(6)(b), Florida Statutes, provides that a mitigating circumstance shall be: "The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance." This is a critical mitigator in this particular case because without it, the jury had no basis upon which to understand and vote to mitigate what admittedly was a vicious homicidal act. Clearly, the Florida Legislature understood that mental disturbance should be a part of the overall consideration by the jury and judge in the penalty phase of a capital case. It was up to trial counsel to gather and present this evidence. Dr. Mosman testified that such a statutory mitigator could have been presented by defense counsel based upon existing medical and mental health records and reports. (Vol. IX, R. 535-36, 555-56) The forensic psychologist pinpointed these records during his testimony referring, among other things, to Defense Ex. 26, the Oregon Adult Parole and Probation records (Ex. Vol.

III, R. 1002-1007)[5] which reference Card's "schizophrenic personality that was identified at the California Youth Authority . . ." (Vol. IX, R. 539-40) Dr. Mosman also referenced Defense Ex. 22 (Ex. Vol. II, R. 901-20), the Veterans Administration records, which revealed the fact that Card had "two in-patient psychiatric hospitalizations at the Veterans Administration . . . " and that it was determined that he needed treatment. (Vol. IX, R. 541) In addition, Dr. Mosman referred to the September 4, 1981 MMPI that Dr. Hord administered (*see* Defense Ex. 15A and B, Ex. Vol. I, R. 754-64) revealing high level indicators of anxiety and hypaneuriasis on the one hand and low level indicators of anti-social personality on the other. (Vol. IX, R. 542-43) Dr. Mosman also alluded to the detailed psychological report prepared by Dr. Joyce Carbonell (Defense Ex. 10, Ex. Vol. I, R. 699-731) that confirmed the earlier findings of "Schizophrenic Type O personality . . ." and possible brain damage (Vol. IX, R. 542, 548) Dr. Mosman added that medical records (from the Washoe Medical Center, Defense Ex. 21, Ex. Vol. II, R. 859-900) revealed that Card sustained "head injuries" as a child,

---

[5] Card again notes, as set forth in the preliminary statement and record references section of this brief (pages 7-8), the Clerk of Circuit Court labeled the blue cover sheets of the portions of the record on appeal containing the exhibits introduced in evidence at the Rule 3.851 hearing, as "Exhibits" followed by a volume number. Thus, when referring to one of these exhibits, Card identifies it by "Ex." followed by a volume and page number.

some type of trauma caused by a fight that he was involved in that resulted in hospitalization, a "narrowing of vision" and other factors that fit the ". . . criteria that the National Institute of Traumatic Brain Injury uses for a closed head injury." (Vol. IX, R. 544-47) Dr. Mosman's findings were buttressed by Card's school records (Defendant's Ex. 19, Ex. Vol. I, R. 785-96) showing that Card was "mentally retarded or right at that cusp." (Vol. IX, R. 549) Dr. Mosman explained that Dr. Haney could not be expected to understand these things since he ". . . cannot diagnose, he cannot treat, he cannot test, he knows nothing about these things. He would not know how to interpret the tests or it's not his field." (Vol. IX, R. 553) Dr. Mosman concluded his comments on direct examination by stating:

> Q. Do you have an opinion, based upon a reasonable degree of professional, psychological certainty or probability, as to whether or not at the time that this crime was committed Mr. Card was under the influence of extreme mental or emotional disturbance.
>
> A. I do.
>
> Q. And what is your opinion?
>
> A. He was under the influence of both, while they're independent, they're synergistic. If you have intellectual cognitive problems to begin with and then you add emotional problems on top, that's not an additive, that's an expedientia.

> The National Institute of Mental Health indicates that an individual with a low IQ has a 500 percent increase risk factor, increased probability of having a major mental illness or emotional problems. That's the interactive effects of these two, how the two play and interplay.

The state did not rebut Mosman's testimony, thus it should have been accepted as true. *Rose v. State*, 675 So. 2d 567 (Fla. 1996) If Whitton had used the testimony of an expert such as Dr. Mosman, he would have established the fact that Card was emotionally disturbed at the time of the homicides. As Dr. Mosman put it, Card "decompensates and becomes a danger to self, danger to others . . ." (Vol. IX, R. 543)

Dr. Mosman's findings that Card was not the sociopathic killer that the prosecution portrayed at trial, but instead was a profoundly mentally ill person at the time of the homicide, was shared by other competent mental health professionals. For example, Dr. Harold Smith, a clinical psychologist who examined Card's mental health records and rebutted some of the earlier misdiagnoses, stated:

> Dr. Hord testified (during Card's first state court trial) essentially that Mr. Card had a "sociopathic personality." This testimony was belied by his raw psychological test data, which I have recently reviewed. The data actually provided to Mr. Hord by his own psychological testing does not indicate sociopothy and in fact indicates Mr. Card suffers from more severely disturbed thought processes such as schizotypal

personality or schizophrenia, and other problems.

(Defense Ex. 14, Report of Dr. Smith, Ex. Vol. II, R. 753)

The failure to present the statutory age mitigator.

Section 921.141(6)(g), Florida Statutes, provides that a mitigating circumstance shall be: "The age of the defendant at the time of the crime." Mr. Whitton acknowledged that he did not know what this statutory mitigator meant, and he made no effort to assert this mitigator. (Vol. IX, R. 619-21) The trial court was under the impression that this mitigator applied only to Card's chronological age. Thus, during the Rule 3.851 evidentiary hearing, as Dr. Mosman attempted to explain that the age mitigator applied to the defendant' mental age at the time of the offense as well as to his chronological age, the trial judge stated, "*Yes sir, but it's chronological as I am aware of*. I haven't seen any cases that allow it to be emotional age." (Vol. IX, R. 558, emphasis added.) The attorney general was of the same mistaken view. As counsel for the state argued when this issue came up: "I respectfully disagree. I don't believe that the Florida Supreme Court has said that you ever look at emotional age and it's my understanding that that is what Mr. Mosman is testifying to." (Vol. IX, R. 559)

On the contrary, this Court has recognized that the age mitigator

authorized by Section 921.141(6)(g) is meaningless without being tied to the emotional or social age of the individual concerned. *Hurst v. State*, 819 So. 2d 689 (Fla. 2002). In *Foster v. State*, 778 So. 2d 906 (Fla. 2000), this Court stated, at 920 (with emphasis added):

> Section 921.141(6)(g), Florida Statutes (1996), expressly includes the age of the defendant at the time of the crime as a mitigating circumstance. We have recognized, however, that there is no bright-line rule for applying this provision. See Campbell v. State, 679 So. 2d 720, 726 (1996). *The appropriate application of this mitigator goes well beyond the mere consideration of the defendant's chronological age. See id. Rather, it entails an analysis of factors which, when placed against the chronological age of the defendant, might reveal a much more immature individual than the age might have initially indicated*.

Dr. Mosman pointed out that there were ample indicators that could have been presented to the effect that Card's mental and emotional age were substantially below his chronological age. (Vol. IX, R. 556-61) This included information, culled from the records, to the effect that Card "could not handle rejection," was diagnosed as an "Immature Personality," and lacked the "social building blocks" that the mature person has. (Vol. IX, R. 561) Dr. Mosman added that Card's juvenile officer found that his behavior was "a cry for help," and that he "was so damaged by the lack of even minimally love, guidance and support that he never had a fair chance."

(Vol. IX, R. 562) The records also reflected Card's "emotional and social deficits that were extreme impairments . . ." (Vol. IX, R. 562) Documents introduced in evidence during the post conviction hearing supported Dr. Mosman's assertion. *See* for example Defense Exhibits 2, the Gloria Chenoweth affidavit, Ex. Vol. I, R. 653-60, describing Card's abusive father and the traumatic effect it had on his maturation; Defense Ex. 4, the John Card affidavit, Ex. Vol. I, R. 674-84, describing Card's juvenile delinquency experiences in reform school and inability to mature properly; Defense Ex. 10, Dr. Joyce Carbonell's affidavit, Ex. Vol. I, R. 699-721, noting Card's failure to develop intellectually in school settings and difficulties learning; Defense Ex. 14, Psychologist Harold Smith's report of June 1, 1986, Ex. Vol. I, R. 753, noting that "Mr. Card was diagnosed as a youth as having a schizophrenic personality . . .; " Defense Ex. 23, the Nevada Probation and Parole report of March 11, 1982, Vol. II, R. 921-22, noting that Card was a school drop-out, after discharge from the military he was unable to adjust to civilian life, and he used drugs and alcohol to excess as a young person; and Defense Ex. 25, the records from Superior Court of California, Vol. III, R. 985-1001, showing Card's extensive juvenile criminal record while he was living in California. The state did not rebut this.

The importance of the age mitigator is highlighted, albeit indirectly, in *Roper v. Simmons*, 543 U.S. 551 (2005) Roper held that the Eighth and Fourteenth Amendments forbid imposition of the death penalty upon offenders who were under the age of 18 years when their crimes were committed.[6] In explaining the rationale behind the decision, the Court found, at 568 :

> The death penalty may not be imposed on certain classes of offenders, such as juveniles under 16, the insane, and the mentally retarded, no matter how heinous the crime. *Thompson* v. *Oklahoma*, *supra; Ford* v. *Wainwright*, 477 U.S. 399 (1986); *Atkins, supra.* These rules vindicate the underlying principle that the death penalty is reserved for a narrow category of crimes and offenders.

The Court added, at 568-70:

> Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, "(a) lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions." *Johnson*,

---

[6] *Roper* holds that it is unconstitutional to execute anyone who committed a crime while under the age of 18, without specifying whether this refers to the defendant's chronological age. It seems clear from that opinion, however, that the Supreme Court meant chronological age rather than social or emotional age. Card discusses it here only because of the rationale expressed in the opinion.

supra, at 367; see also *Eddings*, *supra*, at 115-116 ("Even the normal 16-year-old customarily lacks the maturity of an adult"). It has been noted that "adolescents are overrepresented statistically in virtually every category of reckless behavior." Arnett, Reckless Behavior in Adolescence: A Developmental Perspective, 12 Developmental Review 339 (1992). In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent. See Appendixes B-D, *infra*.

The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. *Eddings*, *supra*, at 115 ("[Y]outh is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage"). This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. See Steinberg & Scott, Less Guilty by Reason of Adolescence: Developmental Immaturity, Diminished Responsibility, and the Juvenile Death Penalty, 58 Am. Psychologist 1009, 1014 (2003) (hereinafter Steinberg & Scott) ("[A]s legal minors, [juveniles] lack the freedom that adults have to extricate themselves from a criminogenic setting").

The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. See generally E. Erikson, Identity: Youth and Crisis (1968).

These differences render suspect any conclusion that a juvenile

> falls among the worst offenders. The susceptibility of juveniles to immature and irresponsible behavior means "their irresponsible conduct is not as morally reprehensible as that of an adult." *Thompson*, *supra*, at 835 (plurality opinion). Their own vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment. See *Stanford*, 492 U.S., at 395 (Brennan, J., dissenting). The reality that juveniles still struggle to define their identity means it is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. Indeed, "[t]he relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." *Johnson*, *supra*, at 368; see also Steinberg & Scott 1014 ("For most teens, [risky or antisocial] behaviors are fleeting; they cease with maturity as individual identity becomes settled. Only a relatively small proportion of adolescents who experiment in risky or illegal activities develop entrenched patterns of problem behavior that persist into adulthood").

If Card had a chronological age of less than 18 years at the time of crime, then under the *Roper* decision he would not today be on death row. Clearly, the information regarding Card's emotional and social age was of critical importance in attempting to persuade the jury to recommend life in prison without parole. Yet, counsel did not present it. This was ineffective assistance of counsel.

II. Did Card suffer prejudice as a result of his trial counsel's ineffectiveness?

Standard of Judicial Review

The standard of judicial review regarding the prejudice prong of an ineffective assistance of counsel claim is the same as the standard of appellate review regarding the ineffectiveness claim itself. As this Court stated in *Lewis v. State*, 838 So. 2d 1102, 1112 (Fla. 2002), "(t)he standard of review we apply in reviewing the trial court's ruling on this issue (of alleged ineffective assistance of counsel in a post conviction capital case) is two-pronged: 'The appellate court must defer to the trial court's findings on factual issues but must review the court's ultimate conclusions *on the deficiency and prejudice prongs* de novo,'" citing its decision in *Bruno v. State*, 807 So. 2d 55, 62 (Fla. 2001).

Merits

In *Hildwin v. Dugger*, 654 So. 2d 107 (Fla. 1995), a decision cited above regarding the issue of ineffective assistance of counsel, this Court also defined the prejudice prong of the *Strickland* standard. This Court noted that in order to demonstrate ineffective assistance of counsel during the penalty phase, Hildwin had to prove that counsel's performance was

deficient and that counsel's deficient performance affected the outcome of the sentencing proceedings, citing. *Strickland (v. Washington*), 466 U.S. at 694. That is, Hildwin had to demonstrate that but for counsel's errors he probably would have received a life sentence. *Hildwin*, supra, 654 So. 2d at 109. Much like the case at bar, in the original penalty phase trial, defense counsel " . . . called five lay witnesses – including Hildwin's father, a couple who periodically cared for him when he was abandoned by his father, a friend of Hildwin, and Hildwin himself."[7] *Hildwin*, supra, 654 So. 2d at 110. These witnesses testified that Hildwin's mother died before he was three years old, his father abandoned him on several occasions, he was a pleasant person, and he had a substance abuse problem. *Id*. In Hildwin's post conviction proceedings, the testimony of two mental health experts revealed that the defendant also had a history of emotional problems similar to Card's history, including substance abuse, child neglect, and ". . . signs of organic brain damage." *Id*. This Court determined that, since trial counsel could have discovered the mental health mitigation with reasonable diligence and since the evidence was substantial and probative, failure to

[7] When one considers that Dr. Haney's penalty phase testimony was essentially limited to testifying about Card's risk factors, the facts in *Hilwin* are even more similar to the case at bar in terms of what was presented during the penalty phase and what could have been presented.

present it deprived Hildwin of a reliable penalty phase trial. Hildwin's sentence was reversed, and the case was remanded for a new sentencing proceeding.

Likewise, Card suffered prejudice as a result of his attorney's ineffectiveness at the retrial of the penalty phase. He got only one jury vote for a life sentence. In the first trial, with the presentation of very little in the way of mental health mitigation and even though his expert witness (Dr. Hord) described him as a sociopath (Vol. IV, R. 1179), five jurors voted for life. (Vol. I, R. 1, 2; see also *Card v. State*, 453 So. 2d 17 [Fla. 1984]). The trial court found that Card had established no statutory mitigators in the retrial. There would have been little choice but for the trial court to find the existence of two very strong statutory mitigators, that Card suffered from extreme mental disturbance per subsection (b) and the age mitigator as provided for in subsection (g), of Section 921.141(6), Florida Statutes, had trial counsel effectively presented the available evidence to support them. And even though the number of statutory mitigators would not have exceeded the number of statutory mitigators, a dramatic shift in the weight of the evidentiary basis for a life recommendation would have been established. In addition, and most importantly, the jury and judge would

have been presented with an alternative to a finding that Card was simply a cold-blooded murderer. That is, Card's counsel gave the jury no alternative to a death recommendation given the gruesome facts of the homicide. This is so despite the fact that the revelation of Card's long, chronic history of extreme emotional disturbance would have mitigated what he did -- and offered a reason to spare his life.

CONCLUSION

For the reasons set forth above, the Court is requested to (a) reverse the Order of the Circuit Court that denied Card's Florida Rule of Criminal Procedure 3.851 motion to vacate his death sentence, (b) remand the cause to the lower tribunal, (c) require the trial court to vacate said death sentence, (d) grant Card a new penalty phase trial, and (e) grant him such other relief as is deemed appropriate in the premises.

Respectfully Submitted,

CLYDE M. TAYLOR, JR., ESQ.
119 East Park Avenue
Tallahassee, FL 32301
Tel: 850.224.1191
Fax: 850.224.0584
FBN 0129747
Court Appointed Counsel for
Appellant, James Armando Card

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been provided counsel for appellant, the State of Florida, c/o Charmaine Millsaps, Esq., Assistant Attorney General, Office of the Attorney General of Florida, the Florida Capitol, Plaza Level One, Tallahassee, FL 32399-1050, and Joe Grammer,

Esq., Assistant State Attorney, Office of the State Attorney, Fourteenth Judicial Circuit of Florida, Post Office Box 1040, Panama City, Florida 32402, by United States mail delivery, this 5th day of February, 2007.

CERTIFICATE OF COMPLIANCE

I certify further that this initial brief of appellant has been prepared using a Times New Roman font, 14 point, not proportionally spaced, in compliance with the rules of this Court.

_____
Clyde M. Taylor, Jr., Esq.