CASE NO. 22-6252

IN THE UNITED STATES SUPREME COURT

IN RE: JAMES E. HITCHCOCK,

Petitioner,

APPENDIX

ASHLEY MOODY
Attorney General
Tallahassee, Florida

CAROLYN M. SNURKOWSKI*
Associate Deputy Attorney General
***Counsel of Record**

DORIS MEACHAM
Senior Assistant Attorney General
Office of the Attorney General
PL-01, The Capitol
Tallahassee, FL 32399
Telephone: (850) 414-3300
CapApp@myfloridalegal.com
Carolyn.Snurkowski@myfloridalegal.com
Doris.Meacham@myfloridalegal.com

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APPENDIX A

PETITION FOR WRIT OF HABEAS CORPUS

UNDER 28 U.S.C. §2254

Prisoner's Name: JAMES ERNEST HITCHCOCK

Prisoner's Number: 058293

Place of Confinement: Florida State Prison, Starke, Florida

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF FLORIDA

ORLANDO DIVISION

JAMES ERNEST HITCHCOCK,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary, Florida Department of Corrections,

Respondent.

CIVIL ACTION NO. _____

PETITION FOR WRIT OF HABEAS CORPUS
BY PERSON IN STATE CUSTODY

To the Honorable _____,

Judge of the District Court for the Middle District of Florida, Orlando Division:

1. The Circuit Court of the Ninth Judicial Circuit, in and for Orange County, entered the judgment of conviction and sentence under attack. That court is located in Orlando, Florida.

2. Petitioner entered a plea of not guilty, and a judgment of conviction was thereafter entered on January 21, 1977 (T. 998).[1]

[1] In referring to the trial and appellate record, petitioner will use the following abbreviations: "T" (guilt-innocence trial transcript), "TAS" (penalty trial transcript), "TS" (sentence-imposition proceeding transcript), and "R" (record on appeal).

An advisory sentence of death was returned on February 4, 1977 (TAS. 63), and the trial judge imposed death on February 11, 1977 (TS. 7-8).

3. Petitioner was sentenced to death by electrocution (TS. 7-8).

4. Petitioner was indicted for first degree murder of Cynthia Ann Driggers (R. 1).

5. Petitioner entered a plea of not guilty.

6. Petitioner guilt-innocence trial was before a jury and his sentencing trial included an advisory jury.

7. Petitioner testified at his guilt-innocence trial.

8. Petitioner appealed his conviction and sentence.

9. Petitioner conviction and sentence were affirmed by the Florida Supreme Court, and rehearing was denied, on May 27, 1982. Hitchcock v. State, 413 So.2d 741 (Fla. 1982).

10. In addition to the above-mentioned direct appeal, petitioner has filed three petitions with respect to his judgment of conviction and sentence in other courts, and has been an applicant in executive clemency proceedings.

11. (a) Petitioner filed, in the Supreme Court of the United States, a petition for writ of certiorari to the Supreme Court of Florida on direct appeal. Certiorari was denied on October 18, 1982. Hitchcock v. Florida, ___U.S. ____, 103 S.Ct. 274, 74 L.Ed.2d 213 (1982).

(b) During the pendency of his direct appeal to the Supreme Court of Florida, petitioner joined 122 other death-sentenced persons in an original habeas corpus proceeding in the Supreme Court of Florida challenging that court's practice of reviewing ex parte, non-record information concerning petitioner's and other capital

appellants' mental health status and personal backgrounds. The Supreme Court of Florida denied relief, Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), and the Supreme Court of the United States declined to review that decision by writ of certiorari, Brown v. Wainwright, 455 U.S. 1000 (1981).

(c) On February 22, 1983, petitioner appeared before the Board of Executive Clemency. On April 21, 1983, the Governor denied clemeny and signed a death warrant effective from noon on May 13, 1983 to noon on May 20, 1983. Petitioner's execution is currently scheduled for Wednesday, May 18, 1983, at 7:00 A.M.

(d) On Tuesday, May 3, 1983, petitioner filed a Motion to Vacate Judgment and Sentence, pursuant to Fla.R.Crim.P. 3.850, in the Circuit Court of the Ninth Judicial Circuit, in and for Orange County [the trial court]. In connection with this motion, petitioner also filed pleadings seeking a stay of execution, as well as discovery, fees and expenses of expert witnesses, and expenses of lay witnesses in connection with an evidentiary hearing on petitioner's Rule 3.850 motion. On May 10, 1983, the circuit court denied the application for a stay of execution and denied the motion to vacate, without an evidentiary hearing. A notice of appeal was filed immediately. At this writing, oral argument in the Florida Supreme Court is scheduled for 9:00 A. M. on May 17, 1983.

STATEMENT OF THE FACTS

12. This case involves the death of thirteen-year-old Cynthia Ann Driggers on July 31, 1976, in Winter Garden, Florida. Ms. Driggers' body was found in a shaded area behind her family's home between 3:00 and 3:30 P.M. on July 31, 1976 (T. 299). She had gone to bed at approximately the same time as the rest of her

family the night before (T. 276), but when her mother had awakened at 6:00 A.M. on July 31, Ms. Driggers was not in her room (T. 251-252). She was not again seen until her body was discovered by her stepfather between 3:00 and 3:30 that afternoon. An autopsy revealed that the cause of death was asphyxiation as a result of strangulation (T. 496). The only other injuries revealed in the autopsy were facial lacerations and bruises in the vicinity of Ms. Driggers' eyes, apparently caused by a blunt object such as a fist (T. 499-501).[2] Finally, the autopsy revealed the presence of sperm in Ms. Driggers' vaginal cavity (T. 509).

13. The guilt-innocence phase of the trial centered upon whether Ernie Hitchcock (the petitioner) or his brother (also Ms. Driggers' stepfather), Richard, had committed the homicide. The state attempted to prove that Ernie had committed the homicide through the introduction of his confession. In his confession to the police on August 4, 1976 -- which was given at a time when, according to a psychiatrist appointed to evaluate Ernie's sanity and competence, Ernie was suffering a "moderately severe depression" (R. 27) -- Ernie admitted killing Ms. Driggers. He said that he returned to the Hitchcock's home (where he had been temporarily living as well) at approximately 2:30 A.M. on July 31, 1976, entered the house through a dining room window, and went to Ms. Driggers' bedroom. (T. 691) He and Ms. Driggers had sex, after which she said she had been hurt and was going to tell her mother. (T. 691) He told her she couldn't but she persisted, and when he tried to stop her from leaving the room, she began to scream. (T. 691)

[2]The medical examinaer also testified that Ms. Driggers' hymen had been lacerated (T. 507-508), but further indicated that this was a normal occurrence for a young woman engaging in her initial experience of sexual intercourse (T. 518).

He then covered her mouth, picked her up, and took her outside, where she still said she would tell her mother and again started to scream. (T. 691) He then started choking her and hit her several times and then continued choking her without knowing what was happening. (T. 692) When he realized that she was dead, he carried her body to some nearby bushes. (T. 692)

14. In the defense case at trial, Ernie Hitchcock testified and repudiated much of this confession. He explained that he had given a false confession because he was deeply depressed, and because he wanted to cover up his brother Richard's role in killing Ms. Driggers. (T. 772-773, 777) Richard had been like a father to him, and he wanted to be sure Richard stayed with his family. (T. 777) However, after he had given the false confession, his mother and sister came to see him frequently, restoring some hope for his life, and he decided to tell the truth about the homicide. (T. 776-777) The truth was, he testified, the following. On the night of the homicide he was at home until about 10:30 P.M. (T. 757) He returned home about 2:30 A.M. after drinking beer heavily and smoking some marijuana. (T. 760-763) After he came home, he and Cynthia had consensual sexual relations, but were discovered by Richard. (T. 762-763) He then saw Richard take Cynthia out of the house and choke her. (T. 765) Ernie finally kicked Richard off her (T. 765), but she was already dead. (T. 766) Richard cried and asked Ernie what he could do. (T. 766) Ernie said he would help him take care of it. (T. 766) He then helped Richard hide the body (T. 766), and thereafter, went to the dining room window and pushed the screen off to make it look like some one had broken in. (T. 767) Ernie denied sexually assaulting Ms. Driggers (T. 783), and indeed in its case, the state presented no evidence that any violence or force had been exerted against Ms. Driggers prior to or during the

sexual intercourse.[3]

15. At the close of the guilt-innocence trial, the jury was charged on both premediated and felony murder in connection with murder in the first degree (T. 965-969).[4] The felony underlying the felony murder theory was "involuntary sexual battery," (T. 998), and was defined in the instructions as follows:

> "It is a crime to commit sexual battery upon a person over the age of 11 years without that person's consent, and in the process use actual physical force likely to cause serious physical injury."

(T. 968) Despite instruction on both theories of first degree murder, however, the jury returned only a general verdict of "guilty of Murder in the First Degree." (T. 998)

16. In the sentencing trial which followed thereafter, the State presented no additional testimony (TAS. 6), and the defense presented only one witness, James Harold Hitchcock, another brother of the defendant. Mr. Hitchcock testified that Ernie had a habit of "sucking on gas" from automobiles when he was five or six years old, which caused him to "pass out" once; after that his "mind wandered." (TAS. 7-8) Mr. Hitchcock further testified that Ernie had come from a family with seven children, which earned its livelihood by hoeing and picking cotton. (TAS. 9-10) Their father had died of cancer after having been bedridden for eight months. (TAS. 8-9) Finally, Mr. Hitchcock testified that Ernie had been close to his (James Harold's) children and had cared for them as a sitter. (TAS. 10)

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[3] Except for the confession, the remainder of the state's case had gone to prove that Ernie Hitchcock had engaged in sex with Ms. Driggers and that her blood was on his pants. Neither of these facts was disputed, however, for Mr. Hitchcock conceded that he had engaged in sex with the victim and that he had gotten her blood on his pants in moving her body after Richard had killed her (T. 787).

[4] At the close of the state's case, the defense had moved for a judgment of acquittal, claiming insufficiency of the evidence to show either premeditation or felony murder (T. 711-712). The trial judge denied the motion as to premeditation but reserved ruling "until the close of all the testimony by both sides," as to felony murder (T. 712). At the close of the evidence, the [illegible]

17. Thereafter, the jury recommended that the judge impose a death sentence (TAS. 63), and he did (TS. 7-8). In support of the sentence, the judge entered findings of fact in which he found three aggravating circumstances[5] and one mitigating circumstance.[6]

GROUNDS FOR HABEAS CORPUS RELIEF

Grounds for Relief from the Conviction

18. Petitioner's conviction was obtained in violation of his rights guaranteed by the Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States for each of the reasons more fully set forth below.

A. Petitioner's conviction could have been based upon both premeditated and felony murder, but because the evidence of felony murder was constitutionally insufficient to sustain a conviction, and the jury's general verdict did not exclude reliance upon felony murder, petitioner's conviction violates the due process requirements of Stromberg v. California, 283 U.S. 359 (1931).

(1) Petitioner's jury was instructed that they could find petitioner guilty of murder in the first degree if the homicide was committed with "a premeditated design to effect the death of the person killed," or "by a person engaged in the perpetration of or in the attempt to perpetrate any of the following crimes: ...." (T. 965)

(2) With respect to the felony murder theory, the court instructed the jury only on the underlying felony of "involuntary sexual battery":

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[5] "The murder of Cynthia Ann Driggers was committed while the defendant was engaged in the commission of an involuntary sexual battery .... [T]he defendant killed Cynthia Ann Driggers for one purpose only, to avoid being arrested after commission of the involuntary sexual battery .... The murder was especially heinous, wicked, or cruel." (R. 196-197)

[6] "At the time of the murder, defendant was 20 years of age. [This] [c]ircumstance... is applicable." (R. 197)

> "The crime of involuntary sexual battery is defined as follows:
> It is a crime to commit sexual battery upon a person over the age of 11 years, without that person's consent, and in the process use or threaten to use a deadly weapon, or use actual physical force likely to cause serious personal injury."

(T. 968)

(3) The jury returned a general verdict which did not specify reliance upon either theory to the exclusion of the other. The verdict was simply,

> "We, the Jury, find the Defendant, James Ernest Hitchcock, guilty of Murder in the First Degree, as to Indictment Number 76-1942."

(T. 998)

(4) To the extent that the verdict was based exclusively on the felony murder theory, or on both the felony murder and premeditated murder theories, the verdict violated petitioner's right to due process of law, for it was based upon constitutionally insufficient evidence of felony murder.

(a) If, "after viewing the evidence in the light most favorable to the prosecution, [no] rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," the evidence is constitutionally insufficient to sustain a conviction. Jackson v. Virginia, 443 U.S. 307, 319 (1979).

(b) One of the essential elements which the State had to establish to prevail upon the theory of felony murder was that petitioner "use[d] actual physical force likely to cause serious personal injury" during the course of the sexual battery. However, the evidence viewed in the light most favorable to the state

at most supported the view that the sexual battery was non-consensual. Even the Florida Supreme Court's view of the evidence in this fashion supported only this conclusion, despite its attempt to stretch the evidence to demonstrating some vague notion of "force" as well:

> "[T]he total circumstances including the time of night, entry through a window, the victim's tender years, and medical testimony that the child was of previously chaste character ... could be a basis to find that the sexual battery was committed by force and against her will ...."

Hitchcock v. State, supra, 413 So.2d at 745.

On this evidence there is absoulutely no basis to find that petitioner used "actual physical force" of the sort "likely to cause serious personal injury," even if there is some basis for finding a "forceful" (i.e., nonconsensual) sexual battery. The state simply failed to prove this essential element to the satisfaction of any reasonable trier of fact.

(5) The verdict unquestionably could have been based, therefore, at least in part, upon a theory of felony murder which the jury could not constitutionally have relied on. Because of the general verdict, it is impossible to determine whether the jury actually did rely on felony murder. The theory of premeditated murder was based upon sharply conflicting evidence, which tended to show an impulsive, unplanned, "I-don't-know-what-happened" kind of killing more than a premeditated killing (T. 691-692). But even if the theory of premeditated murder had been more strongly supported in the evidence, the trial court nonetheless permitted the jury to consider both theories of murder. Under these circumstances, when "a guilty verdict ensues without elucidation, there is an unacceptable danger that the trier of the fact will have regarded the two [theories]

as 'intertwined' and have rested the conviction on both together." Street v. New York, 394 U.S. 576, 588 (1969). Due process requires a conviction imposed under these circumstances to be set aside. Stromberg v. California, supra; Street v. New York, supra.

B. The trial court's reservation of ruling on the felony murder aspect of petitioner's motion for a judgment of acquittal made at the close of the state's case-in-chief unconstitutionally shifted the burden of proof to petitioner and denied petitioner the assistance of counsel at a critical stage of the proceedings.

(1) At the close of the state's case-in-chief, petitioner moved for a judgment of acquittal on the basis that the state had failed to establish a prima facie case of premeditated murder or felony murder. (T. 711-714). The trial judge denied the motion as to premeditated murder but reserved ruling until "the close of all testimony by both sides" as to felony murder (T. 719). Thereafter, at the close of all the evidence, the judge denied the motion as to felony murder as well (T. 841).

(2) This sequence of events shifted the burden of proof to petitioner in violation of the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975).

(a) As alleged in ¶18A, supra, the evidence in support of the felony murder theory was constitutionally insufficient to support a conviction for murder in the first degree.

(b) By reserving ruling on the motion for a judgment of acquittal as to the felony murder theory, however, the trial judge required petitioner to produce evidence to rebut the theory of felony murder as if the state had satisfied its burden to establish a prima facie case. But because the state had not satisfied

that burden, ¶18 A, supra, the evidence produced by petitioner could have been used against petitioner and toward satisfaction of the state's burden to prove every element of the crime beyond a reasonable doubt.

(c) This process, which permits the state to attempt to carry its burden of proof by utilizing the evidence presented by a defendant, violates the due process principles of Mullaney v. Wilbur, supra.

(3) The trial judge's reservation of ruling on petitioner's motion for a judgment of acquittal also deprived petitioner of the assistance of counsel guaranteed by the Sixth and Fourteenth Amendments.

(a) Regardless of whether the trial judge should have granted or denied the motion with respect to felony murder, his reservation of ruling prevented counsel from providing effective assistance in the planning of the defense case, in much the same manner as the statutory requirement concerning the timing of a defendant's testimony interfered with the effective assistance of counsel in Brooks v. Tennessee, 406 U.S. 605 (1972).

(b) Because of the circumstances of this case, counsel and petitioner faced very different strategic choices depending on whether the case went to the jury on the premeditated murder theory only, or on both premeditated murder and felony murder theories.

(i) If the case were to be decided only on the basis of premeditated murder, the case would have focused sharply on petitioner's mental state at the time of the homicide, since the confession established prima facie petitioner's commission of the homicide. The defense case could have largely ignored the sexual liaison betweeen petitioner and the deceased, except insofar as this perfectly lawful

(or at least, less criminally culpable) liaison had given rise to factors clouding petitioner's mental state and impairing his capacity to premediate the homicide. The defense clearly would not have had to defend against a serious criminal sexual battery and the tendency of that criminal behavior to inform his intent to kill the deceased.

(ii) On the other hand, if the case were to be decided on the basis of both premeditated murder and felony murder theories, the case would have focused equally on premeditation and the underlying felony. Under these circumstances, the defense case would necessarily have met the charge of involuntary sexual battery head on. No evidence tending to show the consensual, non-violent character of the sexual liaison could have been left out.

(c) The trial judge's reservation of ruling on the motion for judgment of acquittal prevented petitioner and his counsel from deciding upon and exercising either of these strategies. Because felony murder might still have been in the case, the defense had to address the sexual liaison as a serious criminal offense in order to blunt its carryover into the murder charge. However, the defense could not risk making a full-blown defense against the sexual liaison as a crime. If that were done, and felony murder was thereafter taken out of the case (by the judge's subsequently granting the motion for a judgmental of acquittal with respect to felony murder), the defense would then face the cloud of felony murder still hanging over the case. The vigorousness of the defense against an act which the court thereafter declared lawful could have led the jury nonetheless to consider that petitioner had "done something wrong" in connection with the sexual liaison. That inference could have carried over to the jury's assessment of premeditation, with devasting consequences. Accordingly, petitioner's counsel had to downplay his defense.

against the felony -- as he did.[7] But when the court thereafter ruled felony murder in, petitioner's counsel consequently found himself in the position of not having provided the defense of choice to petitioner -- a defense he undoubtedly would have chosen had he known in advance of the defense case that the felony murder theory would go to the jury.

(d) Accordingly, the trial court's reservation of ruling on the motion for a judgment of acquittal significantly interfered with the planning and presentation of the defense case, thereby depriving petitioner of the "guiding hand of counsel," Powell v. Alabama, 287 U.S. 45, 69 (1932), at a critical stage of the proceedings against petitioner.

C. The trial court's rulings which kept out nearly all of the evidence proffered by petitioner in support of his defense that his brother, rather than he, had killed the deceased, deprived petitioner of the right to present a defense, in violation of the Sixth and Fourteenth Amendments.

(1) Petitioner's theory of defense was that his brother, Richard Hitchcock, had killed Cynthia Ann Driggers after Richard discovered petitioner's and Ms. Driggers' sexual liaison during the night of July 31, 1976 (T. 760-792).

(2) To corroborate his own eyewitness testimony

[7] Had counsel been presenting a full-blown defense to the felony murder theory, he could have, for example, corroborated various critical aspects of petitioner's trial testimony which tended to show that the sexual liaison was fully consensual. Potentially, he could have corroborated petitioner's testimony that he and the deceased had engaged in mutually consented-to sexual relations on two previous occasions (T.762-763); that Detective Nazarchuk did not believe petitioner had entered the house on the night of the murder through the window (confirming petitioner's testimony that he was admitted by the deceased) (T. 780-781); and that the sexual liaison caused the deceased no anguish, by calling the deceased's brothers who slept in the next room (T. 307) to corroborate that they were not awakened by any commotion.

that this is what occurred, petitioner sought to prove three additional matters. First, he attempted to show that he had a reputation for treating younger children well. Second, he attempted to show, in contrast, that Richard had a reputation for being violent. Third, he attempted to show why he would have initially confessed to killing the deceased, despite his innocence, because of his lifelong pattern of devaluing himself, particularly in relation to Richard, who became a father-figure to him when their father died.

(3) The Florida Supreme Court held that evidence tendered in support of these matters was properly excluded, because the propositions themselves were irrelevant to whether the petitioner or Richard committed the murder, or to any other material issue in the case. Hitchcock v. State, supra, 403 So.2d at 744.

(4) The Florida Supreme Court's holding foreclosed petitioner's right to present these propositions as a matter of law. Under the circumstances of petitioner's case, the propositions which petitioner sought to establish, however, were indisputably relevant to the central issue in the case: whether petitioner or Richard Hitchcock committed the homicide. If the jury believed that petitioner had a reputation for treating younger children well, that Richard had a reputation for violent treatment of people, and that petitioner's explanation for initially "taking the rap" for Richard was plausible, there may have been a reasonable doubt about the guilt where there was none without proof of these propositions. The character traits of the two men were more in keeping with petitioner's trial testimony. And if other evidence corroborated petitioner's explanation for his confession, the balance may have shifted in petitioner's favor. That the balance could have shifted because of these propositions shows that they were not irrelevant. Since "[f]ew rights are more fun-

damental than that of an accused to present witnesses in his own defense," Chambers v. Mississippi, 410 U.S. 284, 302 (1973), the abridgement of that right under the circumstances of petitioner's case requires a new trial.

D. The trial court's communication to the jury in the absence of counsel and petitioner deprived petitioner of due process.

(1) At the close of the guilt phase of petitioner's trial, the trial transcript reflects the following:

> "THE COURT: Any objections to the instructions as read?
>
> MR. MICETICH: State has none, Your Honor.
>
> MR. TABSCOTT: No, Your Honor.
>
> THE COURT: All right. We will be in recess waiting the call of the Jury.
>
> (Whereupon the trial recessed at 5:15 o'clock p.m. pending return of the Jury.)
> (Whereupon the trial resumed at 6:45 o'clock p.m. and the following was had in the presence of the Court and the Jury:)
>
> VERDICT
>
> THE COURT: Ladies and gentlemen have you arrived at a verdict?
>
> FOREMAN: Yes, sir, we have."

(T. 997-998) The transcript conclusively shows that no proceedings were had in open court, with the parties and counsel present, between the recess at the commencement of jury deliberations and the resumption of proceedings at the rendering of the verdict.

(2) Nonetheless, the record on appeal reflects that there was communication between the jury and the trial judge during this recess. The jury sent a note to the judge which asked, "Is it

required for us to recommend Death Penalty or Life at this time?" (R. 165) The judge responded, "You should not consider any penalty at this time--only guilt or innocence." (Ibid.)

(3) This communication, which the trial transcript shows was conducted out of the presence of counsel and petitioner, violated petitioner's Sixth and Fourteenth Amendment right to be present at an essential part of the trial [i.e., a proceeding at which petitioner's presence "has a relation, reasonably substantial, to the fulness [sic] of his opportunity to defend against the charge," Snyder v. Massachusetts, 291 U.S. 97, 105-106 (1934)]. See Proffitt v. Wainwright, 685 F.2d 1227, 1256-1261 (11th Cir. 1982).

(a) Petitioner should have had the opportunity to comment upon the form of the response to this question, for the form of the response given by the trial judge could have misled the jury in two critical respects.

(i) First, the court's response implied, by informing the jury that it "should not consider any penalty at this time," (emphasis supplied), that there would be an appropriate time to consider the penalty in Mr. Hitchcock's case, thus also implying that the jury would, or even should, decide petitioner was guilty. The court's response, therefore, failed to adhere to the neutral statement concerning this matter initially provided to the jury in the court's charge: "You are not to be concerned at this point with the imposition of any penalty in the event you reach a verdict of guilty." (T. 988) Thus, without petitioner having any opportunity to object, the court responded in such a way that could have pushed a reasonable juror toward a determination of guilt.

(ii) Second, the court's response implied

as well that the possible penalties faced by petitioner should be totally ignored in connection with the determination of guilt or innocence: "You should not consider any penalty at this time ...." Again, the court's ad hoc, ex parte response missed a subtle, but critical distrinction made in the original charge concerning the jury's "consideration" of possible penalties during guilt phase deliberations. The petitioner had a right to have the jury "consider," in the sense of "be aware of," possible penalties in guilt phase deliberations. See Tascano v. State, 393 So.2d 540 (Fla. 1980). The court's original charge permitted this when the jury was instructed "not to be concerned at this point with the imposition of any penalty in the event you reach a verdict of guilty," (T. 988) (emphasis supplied), and then wenton to describe the penalty options and procedures, (T. 988-989). While the jury was thus told that it should not be concerned about the penalty consequences of a guilty verdict, they were not told to disregard possible penalties altogether. To the extent that the possible penalties were properly allowed to be in the background by this instruction, however, the penalties were taken out of the background altogether by the judge's response to the jury's question. Petitioner's right to a guilt determination by a jury openly cognizant of the penalty consequences of a guilty verdict was thus diminished if not lost altogether.

(b) Accordingly, there was "'[a] reasonable possibility of prejudice from the [petitioner's] absence at [this] stage of the proceedings,'" Proffitt v. Wainwright, supra, and the conviction must be set aside.

Grounds for Relief From the Sentence

19. The petitioner's death sentence was obtained in violation

of his rights guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States, for each of the reasons more fully set forth below.

A. Petitioner's death sentence was imposed arbitrarily and capriciously, for the aggravating circumstances considered by the jury in recommending death and relied on by the judge in imposing death, failed to channel sentencing discretion as required by the Eighth and Fourteenth Amendments.

(1) The jury's and judge's sentencing discretion was not suitably directed by the consideration of the felony murder aggravating circumstance.

(a) The trial court instructed the jury to consider whether "the capital felony was committed while the Defendant was engaged ... in the commission of ... involuntary sexual battery ...." (TAS. 54) The court thereafter found this circumstance in support of its decision to impose death:

> "The murder of Cynthia Ann Driggers was committed while the defendant was engaged in the commission of an involuntary sexual battery. Defendant's assertion that Cynthia Ann Driggers was a willing participant in the sexual intercourse is not substantiated by the record. Rather, it is evident that she was murdered to prevent her from telling her mother what the defendant had done to her. Circumstance (d) [Fla. Stat. §921.141 (5) (d)] is applicable.

(R. 196)

(b) For the same reasons that the felony murder theory should not have gone to the jury in the guilt phase, the felony murder aggravating circumstance should not have been considered or relied upon in the penalty phase: the evidence was constitutionally insufficient to establish the circumstance. See ¶18A, supra.

(i) Aggravating circumstances, similar to the elements of a crime, must be established beyond a reasonable doubt. State v. Dixon, 283 So.2d 1, 9 (Fla. 1973).

(ii) As defined in the guilt phase, involuntary sexual battery included the use of "actual physical force likely to cause serious personal injury." (T. 968-969) On the basis of the evidence, viewed in the light most favorable to the state, no reasonable juror or judge could have found this element beyond a reasonable doubt. See ¶18A (4). Accordingly, neither the judge nor the jury could constitutionally have found that "[t]he murder of Cynthia Ann Driggers was committed while the defendant [petitioner] was engaged in the commission of an involuntary sexual battery."

(iii) The jury's consideration of and the judge's reliance upon this circumstance failed to guide their exercise of sentencing discretion, for a non-existent circumstance cannot properly "channel" discretion.

(c) Moreover, as construed in this case and in the predecessor to this case on this issue, Adams v. State, 412 So.2d 850 (Fla. 1982), this aggravating circumstance was given such a broad and vague construction by the Florida Supreme Court as to make it incapable of properly guiding sentencing discretion. See Godfrey v. Georgia, 446 U.S. 420 (1980).

(i) Since the adoption of the current death penalty statute in 1972, the commission of a murder during the course of the commission of "rape" has been a statutory aggravating circumstance. Fla. Stat. §921.141 (5) (d).

(ii) However, the statute making "rape" a crime, Fla. Stat. §794.01, was repealed by Ch. 74-121, Laws of Florida. Thereafter acts which would have constituted rape constituted some form of "sexual battery," by virtue of Fla. Stat. §794.011. At the time of petitioner's trial, and even through the present, the reference to "rape" in the aggravating circumstance in the death penalty statute has not been replaced by "sexual battery."

(iii) in both Hitchcock and Adams, supra, the Florida Supreme Court held that this did not render the "rape"-murder aggravating circumstance unconstitutionally vague, since the "former definition of rape ... was substantially included" in the definition of sexual battery. Hitchcock v. State, supra, 413 So.2d at 747; Adams v. State, 412 So.2d at 856.

(iv) Nonetheless, the Florida Supreme Court's substitution of "sexual battery" has made this circumstance unconstitutionally vague. The current sexual battery statute, §794.011, encompasses several different degrees and also includes several types of offenses that were not previously included within the former "rape" statute [Fla. Stat. §794.01 (2) (1973)]. For example included within sexual battery is §794.011 (4) (f) involving a victim who is "mentally defective"; that situation was not covered by "rape" but was proscribed by a separate statute [Fla. Stat. §794.06 (1973)]. Likewise the sexual battery encompassed in §794.011 (4) (a), (c), and (e), was not included within the former rape. Left in doubt by the Florida Supreme Court's judicial adoption of sexual battery into §921.141 (5) (d) is whether every degree of sexual battery encompassed by §794.011 was intended to form the basis of an underlying felony for § (5) (d); that is, is a sexual battery with slight force the type of serious felony designed or intended to fall within the serious felonies listed in

(v) Because the judicial adoption of sexual battery may lead some courts to apply the circumstance to sexual battery cases involving the use of slight force, yet permit other courts to apply the circumstance only to cases involving the use of physical force likely to cause serious personal injury, the circumstance is so broad and vague that it cannot provide the specific, consistent guidance required by the Eighth and Fourteenth Amendments

(d) Finally, the consideration of and reliance on this circumstance in petitioner's case failed to guide sentencing discretion because of the substantial possibility that petitioner's conviction was based, at least in part, upon the felony murder theory. See ¶18A, supra. Even if the felony murder theory had been supported by constitutionally sufficient evidence, the consideration and "finding" of the felony murder aggravating circumstance could not have provided any guidance for sentencing discretion. Under these circumstances, the "finding" of the aggravating circumstance that the homicide was committed during the course of the commission of a felony, is automatic, having been established indisputably by the conviction (to the extent that the conviction could have rested at least in part upon a felony murder theory). Because of this, the aggravating circumstance, in such a case, fails to provide any guidance concerning the propriety of imposing the death penalty. But because the death penalty can be imposed solely on the basis of this aggravating circumstance, in such a case sentencing discretion is exercised without the restraint and guidance demanded by the Eighth Amendment. Moreover, because the conviction alone makes such a defendant death-eligible, the burden of proof on the issue of punishment is effectively shifted to the defendant, in violation of due process.

(e) Accordingly, the jury's and judge's sentencing discretion was not suitably directed by the consideration of or reliance

on the felony murder aggravating circumstance.

(2) Nor was sentencing discretion suitably directed by the consideration of the "murder to avoid arrest" aggravating circumstance.

(a) The trial court instructed the jury to consider whether "the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody." (TAS. 54) In support of his decision to impose a death sentence, the judge thereafter found this aggravating circumstance:

> "As referred to in the foregoing paragraph [comcerning the felony murder aggravating circumstance], the evidence affirmatively establishes that the defendant killed Cynthia Ann Driggers for one purpose, and one purpose only, to avoid being being arrested after commission of the involuntary sexual battery. The murder was accomplished to eliminate the only witness to his crime. Circumstance (e) [Fla. Stat. §921.141 (5) (e)] is applicable."

(R. 196)

(b) The application of the circumstance fails to satisfy the limited construction of the circumstance necessarily provided by the Florida Supreme Court.

(i) Recognizing that this circumstance could apply to every murder, the Florida Supreme Court has limited its application to cases in which "[p]roof of the requisite intent to avoid arrest and detection [is] very strong," Riley v. State, 366 So.2d 19 (Fla. 1979), so strong that "it is clearly shown that the dominant or only motive for the murder was the elimination of witnesses." Menendez v. State, 368 So.2d 1278, 1282 (Fla. 1979).

(ii) The facts of record clearly do not meet this limited construction, tending to show that the "motive" for the homicide was a wholly impulsive, irrational reaction to a

stressful situation which could precipitate terrible intra-family conflict, rather than a calculated effort to eliminate a witness to a crime. At the very least, since there was no proof of involuntary sexual battery, the proof was at least as susceptible of this interpretation as the "intent to avoid arrest" interpretation. Thus, the proof did not "clearly" support a finding that "the dominant or only motive ..."was the elimination of Ms. Driggers as a witness.

(c) Moreover, this aggravating circumstance provided no guidance in petitioner's case, because it duplicated entirely the felony murder aggravating circumstance -- it aggravated the murder solely because the murder was committed to prevent Ms. Driggers from reporting the sexual battery (assuming there was a sexual battery). Cf. R. 196, ¶¶ (d) and (e) therein. Accordingly, either under the Eighth Amendment's requirement that an aggravating circumstance provide specific, detailed guidance, or under its requirement that state law principles limiting the application of aggravating circumstances be consistently followed by the state courts from case to case [the state law principle here being the rule that no aggravating circumstance which is duplicative of another should be considered or relied upon, Provence v. State, 337 So.2d 783 (Fla. 1976)], the jury's consideration of and the judge's reliance on this duplicative aggravating circumstance failed to guide sentencing discretion.

(d) Therefore, sentencing discretion in petitioner's case was not suitably directed by the consideration of or reliance on the "murder to avoid arrest" aggravating circumstance.

(3) Nor was sentencing discretion suitably directed by the consideration of the third (and only other) aggravating circumstance found by the judge -- the "heinous, atrocious, or cruel" (hereafter, "hac") circumstance.

(a) The trial court instructed the jury to consider whether

> "the capital felony was especially heinous, atrocious or cruel. As used in this last meaning circumstance; heinous means, extremely wicked or shockingly evil. Atrocious means; outrageously wicked and evil. And cruel means, designed to inflict a high degree of pain, utter indifference to or enjoyment of the suffering of others, pitiless."

(TAS. 55) In support of his decision thereafter to imposed a death sentence, the judge thereafter found this aggravating circumstance: "[t]he murder was especially heinous, wicked, or cruel. Without further elaboration, [this] circumstance ... is applicable." (R. 196-197) On appeal, the Florida Supreme Court simply held that this circumstance was "supported by the facts of this case." Hitchcock v. State, supra, 413 So.2d at 747.

(b) Despite nearly eleven years of reviewing the application of this circumstance to the facts of hundreds of cases, neither in petitioner's case nor in any other case has the Florida Supreme Court been able to settle upon a sufficiently clear, limiting construction of this circumstance so as to provide a principled way of distinguishing the cases in which it is imposed from the cases in which it is not imposed -- as must be done to guide sentencing discretion sufficiently to satisfy the Eighth Amendment. Godfrey v. Georgia, supra.

(c) The Florida Supreme Court's primary attempt to limit the application of this circumstance sufficiently to make it a meaningful guide to sentencing discretion was in State v. Dixon, supra, 283 So.2d at 9:

> "The aggravating circumstance which has been most frequently attacked is the provision that commission of an especially heinous, atrocious or cruel capital felony constitutes an aggravated

> capital felony. Fla.Stat. §921.141 (6) (h). F.S.A. Again, we feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended. It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim."

(Emphasis supplied.)

(d) Despite Dixon's attempt to provide limitations upon, and consistency in, the application of this circumstance, questions have persisted concerning what evidence establishes this circumstance. An examination of the sub-group of cases relevant to petitioner's case, in which "hac" has been found on the basis of murders committed by strangulation, reveals these persistent, troublesome questions.

(i) Some case have held that the method of killing alone -- e.g., strangulation -- can establish the "hac" circumstance. E.g., Alvord v. State, 322 So.2d 533 (Fla. 1975).

(ii) Others have held that strangulation alone is not enough to establish "hac," but among these cases, there is no consistent theory as to what additional facts must be shown.

Some have held that additional injurious acts committed against the victim prior to the strangulation murder are enough. E.g., Stewart v. State, 420 So.2d 862 (Fla. 1982); Quince v. State, 414 So.2d 185 (Fla. 1982). Others have held that the victim's "fear and emotional strain preceding an almost instantaneous death" by strangulation is enough. E.g., Adams v. State, 412 So.2d 850 (Fla. 1982). Still others have indicated that "hac" requires proof of subjective "terror and pain" suffered by the victim before death, along with additional pre-murder, injurious acts. E.g., Stevens v. State, 419 So.2d 1058 (Fla. 1982). Finally, some cases regard the defendant's perception of the pain caused to the victim -- and his enjoyment of that pain or at least his continuation of the infliction of that pain after having perceived it -- as the critical fact in establishing "hac." E.g., Smith v. State, 407 So.2d 894 (Fla. 1982).

(iii) Accordingly, there is no consistent framework for the application of "hac." Does the sentencer look only at the method of the killing, or at a combination of the method of the killing and whether pre-homicide injuries were also inflicted? How does the subjective suffering of the victim fit in? How does the defendant's mental state, vis a vis the victim's mental state, fit in? The Supreme Court did not answer these questions by affirming the finding of "hac" in petitioner's case, for the court said nothing about why it was a proper finding.

(e) Faced with these questions in a recent case -- in which the defendant claimed that "hac" had been so inconsistently applied as between cases with similar facts that the circumstance was unconstitutional on its face -- the Florida Supreme Court attempted to resolve some of these questions with the following analysis.

> "Appellant's argument ignores that there are discernable distinctions in the facts of the cases which he cites. It is not merely the specific and narrow method in which a victim is killed which makes a murder heinous, atrocious, and cruel; rather, it is the entire set of circumstances surrounding the killing. Thus while both officers in Raulerson v. State, 358 So.2d 826 (Fla.), cert. denied, 439 U.S. 959 (1978), and Fleming v. State, 374 So.2d 954 (Fla. 1979), were killed by one gunshot, the situations in which the killings occurred were distinguishable. The surrounding circumstances in Raulerson warranted finding section 921.141 (5) (h) applicable, while those in Fleming did not.
>
> There can be no mechanical, litmus test established for determining whether this or any aggravating factor is applicable. Instead, the facts must be considered in light of prior cases addressing the issue and must be compared and contrasted therewith and weighed in light thereof. Then, if the killing and its attendant circumstances do not warrant the finding of heinousness, atrociousness, and cruelty, it will be stricken. Otherwise, assuming that it is warranted in light of earlier cases and that the trial judge used the reasoned judgment which is so necessary, the finding will not be disturbed."

Magill v. State, ___ So.2d___, 1983 F.L.W., S.C.O. 105 (March 10, 1983).

(f) Through its effort in Magill to show how "hac" has been applied consistently as between cases -- on the basis of the "entire set of circumstances surrounding the killing[s]" -- the Florida Supreme Court has demonstrated precisely the opposite proposition, however. The court has shown that even it cannot apply the "entire set of circumstances" analysis with any consistency. The evidence of this is striking. To demonstrate its analysis, the court explained how, despite the same method of killing, the total circumstances in Raulerson v. State, 358 So.2d 826 (Fla. 1978) and

Fleming v. State, 374 So.2d 954 (Fla. 1979) were sufficiently different to warrant the finding of "hac" in Raulerson but not in Fleming. Magill v. State, supra. A reading of the two cases might support such an analysis, were it not for the fact that just eight months before Magill, the Florida Supreme Court had held that the finding of "hac" in Raulerson was not warranted! After the Florida Supreme Court's first opinion in Raulerson, cited above, a federal court set aside the death sentence on the basis of Gardner v. Florida, 430 U.S. 349 (1977). Following re-imposition of the death sentence and the finding of "hac" again by the trial judge, the Florida Supreme Court again reviewed the death sentence. This time -- through Justice Adkins, who had also authored the first Raulerson opinion, supra, and who was later to author Magill, supra -- the Florida Supreme Court held that "hac" was not applicable:

> "There is merit, however, to appellant's argument regarding the finding that the killing was heinous, atrocious, and cruel. See section 921.141 (5) (h). Applicable here is the observation made in Williams v. State, 386 So.2d 538, 543 (Fla. 1980), quoting State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1951, 40 L.Ed.2d 295 (1974): "The murder, while utterly reprehensible, was not 'accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim.'" We have held that killings similar to this one were not heinous, atrocious, and cruel. See Williams v. State; Fleming v. State, 374 So.2d 954 (Fla. 1979); and Cooper v. State, 336 So.2d 1133 (Fla. 1976), cert. denied, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977)."

Raulerson v. State, 420 So.2d 567 (Fla. 1982). Even if the Florida Supreme Court's reliance on the first Raulerson opinion in Magill

was simply an oversight, the point of Magill is the same. If the Florida Supreme Court can look at the facts of the very same case (Raulerson) on two occasions -- only eight months apart -- and on one occasion decide "hac" was improperly found and on the other, decide "hac" was properly found, how can any juror or sentencing judge in the State of Florida be expected to gain rational guidance from the consideration of this aggravating circumstance? The rhetorical answer is that they cannot -- and the consequence must be the declaration of this circumstance as unconstitutional on its face and as applied.

B. Petitioner's death sentence was imposed in proceedings which precluded, by operation of law, the consideration of relevant mitigating circumstances, in violation of the Eighth Amendment requirement that there be no bar to the presentation and consideration of relevant mitigating evidence.

(1) The trial judge refused as a matter of law to consider numerous mitigating circumstances, in direct violation of Eddings v. Oklahoma, 455 U.S. 104 (1982).

(a) The judge refused to consider as mitigating, uncontroverted credible evidence that petitioner suffered from mental and emotional problems which influenced his behavior at the time of the homicide.

(i) The evidence of relevant mental and emotional problems consisted of the following:

(aa) Petitioner's brother testified that when petitioner was young, he had a habit of inhaling gas from the gas tanks of automobiles (TAS. 7-8). He stated that he had seen petitioner pass out from this activity (TAS. 8), and that this affected petitioner's mind by making it wander (TAS. 8).

(bb) This early damage to petitioner's mind was compounded by his problems later in life. Petitioner's father died of cancer when he was six or seven (R. 194). His mother then had to work and take care of a family with several children (T. 775). Petitioner thereafter had continuing problems with his stepfather, who was always cursing his mother and occasionally hit her (T. 773). Because of this, petitioner left home at thirteen and was on his own, drifting from place to place, thereafter (R. 194, T. 773).

(cc) On the night of the homicide, petitioner's mental and emotional vulnerabilities combined with an extremely stressful situation to create a set of circumstances he could not handle. Petitioner had consumed a large amount of marijuana (two cigarettes) and a large quantity of alcohol (two six packs of beer) before retruning home that night. While suffering from various vulnerabilites to mental and emotional distrubance and while highly intoxicated, he was then faced with a pressure-packed situation. According to petitioner's "confession" he and the decedent engaged in sexual relations, and then she threatened to tell her mother (T. 691). Petitioner then completely lost control and did not know what to do and didn't know what happened (T. 691).

(ii) The judge refused to consider these facts as mitigating, because he found the facts insufficient to establish the mitigating circumstances in the death penalty statute which were concerned with mental or emotional disturbance or duress or with impaired mental capacity. (R. 197) See Fla. Stat. §§921.141 (6) (b), (e), (f).

(b) The judge also refused to consider as mitigating the following facts in evidence or inferences from facts in

evidence: (i) petitioner's voluntary presentation of himself to the police (T. 726-727) at a time when he had an unrestricted opportunity to flee; (ii) petitioner's non-violent character and background, demonstrated by his lack of any violent criminal history (T. 790-791) and by his reputation for not resorting to violence (T. 733, 737, 739, 744, 747, 749); (iii) doubt about whether petitioner actually intended to kill the decedent, demonstrated as a matter of law by the judge's submission of the case to the jury on the felony murder theory as well as on the premeditated murder theory, and demonstrated as a matter of fact by petitioner's wholly irrational, out-of-control mental and emotional state at the time of the homicide [see ¶19 B (1) (a) (i), supra]; (iv) doubt, which was less than reasonable doubt, about guilt, demonstrated by petitioner's unwavering trial testimony denying the commission of the homicide; and (v) the prior offer of a plea of nolo contendere and life imprisonment by the state, with the court's approval (TS. 5-6). The judge clearly refused to consider these mitigating factors, for he made absolutely no mention of them -- despite their having been established by the evidence -- in his findings of fact in support of the death sentence (R. 194-198).

(c) The judge refused to consider the mitigating factors in ¶¶19B (1) (a) and (b), supra -- even though they were all relevant to petitioner's character and record or to the circumstances of the offense and were thus "relevant" mitigating circumstances under the Eighth Amendment, see Lockett v. Ohio, 438 U.S. 586, 604-605 (1978) -- because he believed that the only factors he could consider in mitigation were those listed in sub-section (6) of the Florida death penalty statute, Fla. Stat. §921.141. This is demonstrated by the following statements in the judge's sentencing order and findings of fact in support thereof:

(i) The sentencing order reflects that the judge considered only statutorily-enumerated mitigating circumstances in concluding to impose death;

> "[a]fter weighing the aggravating and mitigating circumstances, this Court finds that sufficient aggravating circumstances exist as enumerated in Fla.Stat. 921.141 (5) to require imposition of the death penalty, and there are insufficient mitigating circumstances as enumerated in Fla. Stat. 921.141 (6), to outweigh the aggravating circumstances."

(R. 192) (emphasis supplied).

(ii) The findings of fact reflect the same limitation in the consideration of mitigating circumstances.

> "In determining whether the defendant should be sentenced to death or life imprisonment, this Court is mandated to apply the facts to certain enumerated 'aggravating' and 'mitigating' circumstances."

(R. 195) Immediately after this statement, the judge evaluated the statutory aggravating circumstances and only the mitigating circumstances enumerated in the statute (R. 195-197). He made no mention of other mitigating factors established by the record, because these factors did not establish any of the statutory mitigating circumstances. As a matter of state law, such findings, confined only to a discussion of the statutory mitigating circumstances in evidence, demonstrate that nonstatutory mitigating circumstances were not considered. See Moody v. State, 418 So.2d 989, 995 (Fla. 1982).

(2) The trial judge's instructions to the jury likewise reflected his view that the death penalty statute limited the consideration of mitigating circumstances to those enumerated in the statute. Accordingly, the jury's consideration of mitigating circumstances was similarly restricted in violation of Lockett v. Ohio, supra, and Eddings v. Oklahoma, supra. These instructions, which could have been

construed by a reasonable juror to exclude any consideration of nonstatutory mitigating circumstances were the following:

(a) In his pre-penalty-trial charge to the jury, the judge instructed the jurors that after the close of evidence and argument by counsel, "I will then instruct you on the factors in aggravation and mitigation that you may consider under our law." (TAS. 5)

(b) At the end of the trial, the trial judge instructed the jury that "[t]he aggravating circumstances which you may consider shall be limited to the following: [whereupon the eight statutory aggravating circumstances were read]." (TAS. 54) Thereafter, in strikingly parallel words, the trial judge instructed the jury that "[t]he mitigating circumstnces which you may consider shall be the following: [whereupon the seven statutory mitigating circumstances were read]." (TAS. 56)

(c) At no time in his instructions to the jury did the trial judge inform the jury that they could consider any mitigating circumstances supported by the evidence in addition to the statutory mitigating circumstances specified in the instructions.

(d) Because of the repeated parallel references to "the" aggravating and mitigating circumstances and the parallel language limiting consideration of aggravating and mitigating circumstances to enumerated circumstances, these instructions could well have led a reasonable juror to believe that he or she could not consider the mitigating circumstances which were in evidence but were unrelated to the seven enumerated mitigating circumstances.[8]

[8]Moreover, the argument of the prosecutor treating the consideration of aggravating and mitigating circumstances as equally limited (TAS. 27-44) only served to reinforce such a reasonable view.

(e) Petitioner was severely prejudiced by the exclusion of nonstatutory mitigating circumstances from the consideration of the jury, for much of the mitigating evidence he presented fell into the category of nonstatutory mitigating circumstances. See ¶¶19 B (1) (a) and (b), supra

(3) The trial judge excluded evidence of a relevant mitigating factor, and the Florida Supreme Court approved the exclusion of that evidence as a matter of law all in violation of Lockett v. Ohio, supra.

(a) Petitioner's theory of defense was that his brother, Richard Hitchcock, had killed Cynthia Ann Driggers after Richard discovered petitioner's and Ms. Driggers' sexual liaison during the night of July 31, 1976 (T. 760-792).

(b) To corroborate his own eyewitness testimony that this is what occurred, petitioner sought to prove three additional matters, including his brother Richard's reputation for being violent. See ¶18 C, supra. This evidence was excluded, however. (T. 737, 739-741, 744, 745)

(c) The Florida Supreme Court held the evidence tendered in support of these matters was properly excluded, because the propositions themselves were irrelevant to whether the petitioner or Richard committed the murder, or to any other material issue in the case. Hitchcock v. State, supra, 403 So.2d at 744.

(d) Petitioner submits that these propositions indisputably tended to establish the relevant mitigating circumstance concerning doubt (less than "reasonable doubt") about guilt. See ¶18 C (4), supra.

(e) The Supreme Court's approval of the exclusion

of this evidence with respect to sentencing issues, as well as guilt issues, Hitchcock v. State, supra, was not only constitutionally erroneous for approving the exclusion of relevant mitigating evidence, however. It was also erroneous because it was based in part upon the notion that, in any event, the evidence related to a nonstatutory mitigating factor (doubt about guilt) which was excluded from consideration by exclusion from the statutory list of mitigating circumstances. See Cooper v. State, 336 So.2d 1133, 1139 (Fla. 1976) (approving the exclusion of similar evidence because, in part, it related to a nonstatutory mitigating circumstance).

(4) Petitioner suffered prejudice sufficient to require his death sentence to be vacated as a result of the exclusion (from evidence) and non-consideration of relevant mitigating factors, described in ¶¶ 19 B (1) - (3), supra.

(a) The mitigating factors described in the preceding paragaraphs were "relevant" mitigating factors under Lockett v. Ohio, supra.

(b) Eddings v. Oklahoma, supra, requires the state courts "to consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances." 455 U.S. at 117. No further showing of prejudice -- than the showing that the state courts did not consider "all relevant mitigating evidence" -- is necessary to require a death sentence to be set aside. Id.

(c) Pursuant to Eddings and Lockett, therefore, the failure of the sentencer to consider the relevant mitigating factors alleged herein, for the reasons alleged herein, requires the death sentence to be vacated.

C. Petitioner's Eighth Amendment right to be punished in proportion to his crime, and his Fourteenth Amendment right to due process, were violated by the trial court's approval of the state's offer to petitioner of a plea of nolo contendere and life imprisonment, followed by the court's imposition of the death sentence after petitioner rejected the plea offer and proceeded to trial.

(1) The issue presented here is whether in a capital case a court may approve an offer to a defendant of a life sentence in return for a plea prior to trial, and then after trial, sentence the defendant to death without any stated justification as to why the harsher penalty is necessary. The controlling legal fact for this issue is that the trial court approved such an offer, regardless of whether a plea was actually entered by the petitioner.

(2) Although the portion of the Florida Supreme Court's opinion concerning this matter is susceptible of contrary interpretations, one reading is that the Supreme Court found the facts of record insufficient to demonstrate that the trial court had approved the offer, based on the following:

> "Hitchcock's version of the facts surrounding this point, however, is not supported. Rather, it appears from the record, as supplemented, that the judge agreed only to consider such an agreement if Hitchcock were to plead guilty. Because Hitchcock refused to consider a plea, the court never had to consider whether to accept the plea bargain."

Hitchcock v. State, supra, 413 So.2d at 746.

(3) This finding of fact is erroneous and should not be presumed correct pursuant to 28 U.S.C. §2254 (d) for the following reasons:

(a) Such a finding is not supported by the record viewed as a whole. While the issue in the present context concerns a plea offer by the trial judge to sentence petitioner to life, the transcript of the plea conference where that offer was made is not available and was thus not before the Supreme Court. The record that was before the Court consisted only of remarks made at the later sentencing proceeding, which in their entirety, were the following:

> "MR. TABSCOTT [defense counsel] : ...I would also remind the Court that prior to trial, the Court did agree to a plea of nolo contendere giving the defendant a life sentence upon that plea. I have nothing further.
>
> THE COURT: I think the record ought to show that the matters we discussed, there was never any understanding, because your client didn't want to consider any plea.
>
> MR. TABSCOTT: That plea was offered to him by the State and the Court, however, And, it is true he declined to enter that plea.
>
> THE COURT: Any other matters?
>
> MR. TABSCOTT: No, sir."

(TAS. 5-6) (Emphasis supplied).

(b) Petitioner argued that this colloquy sufficiently established the factual basis of his claim. Quoting only a portion of the foregoing colloquy, however, the Florida Supreme Court held that "the [trial] court never had to consider whether to accept the plea bargain," because petitioner did not enter the plea. Hitchcock v. State, supra, 413 So.2d at 746. The entire colloquy, viewed as a whole, however, does not fairly support such a finding of fact. The entire colloquy indicates that the court did "consider" the life sentence in return for the plea because it was the court which

approved the offer to petitioner. Thus, the trial court's comment that there was "never any understanding" refers only to the fact that petitioner chose not to enter the plea, and did not indicate that the court did not approve such an offer. While the judge's comment that there "was never any understanding" is subject to ambiguity when taken out of context, when the record is viewed as a whole, it plainly shows that the trial court did approve the offer of a life sentence if petitioner would plead nolo contendere. Accordingly, the trial judge's remark that there was "never any understanding" does not support the Supreme Court's finding that the court "never had to consider" the plea offer.

(c) To the extent that the Florida Supreme Court made a finding of fact, that finding was also the product of a factfinding procedure inadequate to afford a full and fair hearing. When respondents argued before the Florida Supreme Court that the record did not support the factual basis of petitioner's claim, petitioner supplemented the record with the contemporaneous affidavit of trial counsel. This affidavit stated that the trial judge agreed to sentence petitioner to life imprisonment if he would enter a plea of nolo contendere as charged. Respondents thereafter filed an affidavit from the assistant state's attorney who tried the case, stating that the judge had not approved the plea offer prior to its presentation, but had only agreed to consider such a plea bargain if petitioner accepted it. Petitioner continued to press his claim that the record established the factual basis of his claim, but argued alternatively that if the court found the record insufficient and the affidavits contradictory, the court should remand for a hearing in this regard. Instead of remanding, however, the Florida

Supreme Court found that the record "as supplemented" demonstrated no prior approval of the plea, but only an agreement by the judge "to consider such an agreement if Hitchcock were to plead guilty." 413 So.2d at 746. Thus, the court resolved clearly contradictory affidavits in favor of the state without any hearing to resolve the factual dispute. Such a factfinding procedure entitles the facts found to no deference in federal court. See 28 U.S.C. §2254 (d) (2).

(4) Accordingly,this Court should treat the claim as factually established. Alternatively, upon a determination that the record leaves the factual basis in doubt, the Court should permit petitioner to establish the factual basis of his claim in an evidentiary hearing.

(5) Upon the determination that there is a factual basis for this claim, petitioner submits that his sentence must be reversed for any or all of three reasons.

(a) The imposition of the death sentence after petitioner refused the plea offer approved by the court amounted to the court's punishing petitioner for exercising his right to a trial on the charges against him. Without an affirmative statement by the Court, disclaiming the petitioner's exercise of his right to a trial as a basis for the death sentence, the sentence must be set aside. See North Carolina v. Pearce, 395 U.S. 711, 726 (1969). There was no such affirmative statement here.

(b) The offer of a life sentence under these circumstances violated the due process principles of United States v. Jackson, 390 U.S. 570 (1968) and Corbitt v. New Jersey, 439 U.S. 212 (1978). The coercion to waive constitutional rights in order to save one's life condemned in Jackson and distinguished from the circumstances

in Corbitt is enhanced by the practice followed here -- where a court determines before trial that a life sentence is appropriate but after trial imposes the death sentence with no pretense of justification for the courts' reversal of position on the appropriate punishment.

(c) Finally, the court's reversal of position on the appropriate sentence -- where none of the factors in aggravation were unknown to the judge at the time of the plea offer -- represents the imposition of a sentence disproportionate to the severity of the offense. Gregg v. Georgia, 428 U.S. 153, 173 (1976).

D. The Florida death penalty statute, as applied, deprives death-sentenced individuals, whose sentences are based upon erroneously found aggravating circumstances, of critical Eighth and Fourteenth Amendment rights, because the Florida Supreme Court consistently sustains such death sentences so long as there is at least one valid aggravating circumstance, and no substantial mitigating circumstances, present.

(1) Since its decision in Elledge v. State, 346 So.2d 998 (Fla. 1977), the Supreme Court of Florida has systematically sustained death sentences which are supported, in part, by erroneously found aggravating circumstances when at least one other aggravating circumstance has been properly found and no substantial mitigating circumstances are present.

(2) Petitioner has alleged, in paragraph 19 A, supra, that all of the aggravating circumstances found to support the death sentence in his case were improperly found. If this Court agrees that one, but less than all, of these circumstances was improper, the prejudice resulting therefrom must be addressed. If the Court also finds that there were also additional mitigating circumstances which

should have been found, then the Elledge rule would clearly require reversal as a matter of state law. If the finding of one mitigating circumstance is held to be proper, however, the federal validity of the Elledge rule must be assessed, for that rule could dictate a finding that the error in assessing aggravating circumstances was harmless (if the one mitigating circumstance were deemed "insubstantial"). Thus, the constitutional invalidity of the Elledge rule is asserted herein.

(3) This practice of the Supreme Court of Florida has deprived persons, whose death sentences are based, in part, upon erroneously found aggravating circumstances, of their rights guaranteed by the Eighth and Fourteenth Amendments, in the following ways:

(a) These persons have been deprived of the individualized sentence determination required by the Eighth and Fourteenth Amendments, because the death sentences are upheld mechanically, without regard to the quality of the aggravating circumstances erroneously found or of the aggravating circumstances properly found, and whether the reduction in aggravating circumstances has any effect on the propriety of the death penalty in a particular case. The Florida Supreme Court is thus abandoning its role, treated as essential to the constitutionality of the Florida death penalty statute in Proffitt v. Florida, 428 U.S. 242, 253 (1976), of reweighing the evidence to determine independently if the death penalty is warranted.

(b) These persons have been deprived of their Eighth and Fourteenth Amendment right to a proceeding in which the imposition of the death sentence is rationally reviewable. When the Florida Supreme Court upholds a death sentence under the circumstances alleged herein, the Court assumes that if the aggravating circumstances were properly assessed, the results would be the same. This assumption

is not rational, however, for even in the absence of mitigating circumstances, the sentencer must determine whether the aggravating circumstances present are sufficient to warrant the death penalty. The Florida Supreme Court's inability to rationally determine, with the certainty required in capital cases, that the sentencer would still find that the aggravating circumstances were sufficient to warrant the death penalty under these circumstances, renders the original sentence imposition rationally unreviewable, for speculation supplants review of objectively detailed decision-making.

(c) Finally, the Elledge rule vitiates the Eighth and Fourteenth Amendment right to the appellate review uniquely required in capital prosecutions.

(i) When the Supreme Court of Florida affirms a death sentence under the Elledge rule, it is engaged in sentencing, rather than in reviewing a sentence, for it is determining de facto that the remaining, proper aggravating circumstances are sufficient for the imposition of the death penalty. Since the trial court's sentencing determination was based upon a different set of facts, the Supreme Court's "affirmance" is not a review of the propriety of the death sentence on the basis of those facts, but is rather a re-determination of the sentence itself. It is genuinely a de novo determination.

(ii) This process inherently prevents the Florida Supreme Court from fulfilling its review function. The review function required by the Eighth Amendment in capital cases "serves as a check against the random or arbitrary imposition of the death penalty," Gregg v. Georgia, supra, 428 U.S. at 258. In fulfilling this unique review function, the Florida Supreme Court reviews and reweighs "the evidence of the aggravating and mitigating cirumstances ...

[in each case] ... 'to determine independently whether the imposition of the ultimate penalty is warranted.'" Id. at 253. If the Supreme Court has itself sentenced an individual defendant, as Mr. Hitchcock argues the Court does each time it applies the Elledge rule, the Court can hardly review that sentence as required. In sentencing the individual, the Court has determined that death is warranted solely in reference to the facts of the case. Having determined that death is warranted in that context, the Court can hardly be expected to reach a different result when it shifts the context and reviews the facts of the case in reference to the facts of other cases, to determine whether death is still warranted. Yet the Eighth Amendment clearly requires the capacity to reach a different result in the "review" context, or the appellate review requirement of the Eighth Amendment would be a nullity. Because the harmless error rule thus destroys the Florida Supreme Court's ability to conduct appellate review as required by the Eighth Amendment, the rule is invalid.

E. The Florida Supreme Court's cursory, incomplete review of the aggravating and mitigating circumstances in petitioner's case vitiated the court's unique responsibilities in the review of capital prosecutions.

(1) The review conducted by the Florida Supreme Court in petitioner's case did not meet the constitutional requirements for appellate review enunciated in Proffitt v. Florida, 428 U.S. 242 (1976).

(a) In upholding the constitutionality of Florida's capital sentencing scheme, the United States Supreme Court relied upon the Florida Supreme Court's "[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in

integral part of the task of a capital sentencing scheme: to remove arbitrariness from the imposition of the death sentence. In the Supreme Court's view, review by the Florida Supreme Court served as a final check against the arbitrary imposition of death sentences, for it was a system "under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida 'to determine independently whether the imposition of the ultimate penalty is warranted.'" Id. at 253.

(b) The United States Supreme Court believed that the Florida Supreme Court would undertake "responsibly to perform its function of death sentence review with a maximum of rationality and consistency." Id. at 258. And that each case would be "conscientiously reviewed... to assure consistency, fairness, and rationality in the evenhanded operation of state law." Id. at 259-60. Upon this basis, Florida's form of review was thus deemed to be equivalent to the "specific form of review" provided by the Georgia statute and, accordingly, was of crucial importance to the constitutionality of Florida's capital sentencing scheme. Absent this independent, conscientious, and reliable method of review, the Florida capital sentencing statute would be subject to the arbitrariness and capriciousness condemned in Furman v. Georgia, 408 U.S. 238 (1972).

(c) In Mr. Hitchcock's case, the Florida Supreme Court failed to undertake the "conscientious review" necessary to assure "consistency, fairness, and rationality" between Mr. Hitchcock's case and other death penalty cases.

(i) The Florida Supreme Court failed to review the aggravating circumstances found in Mr. Hitchcock's case to be certain that these circumstances were applied in accordance with

the established limits upon the application of such circumstances. See ¶19A, supra.

(ii) The Florida Supreme Court failed to review expressly many of the errors asserted by Mr. Hitchcock in connection with the trial court's finding that there was only one mitigating circumstance. This omission was particularly egregious in Mr. Hitchcock's case, for in other death penalty cases in which the trial judge has failed to find mitigating circumstances upon factual records similar to the record in his case, the Florida Supreme Court has reversed death sentences. The unreviewed errors include failure to find the nonstatutory mitigating circumstance of Mr. Hitchcock's potential for rehabilitation, as argued by counsel in connection with the age of petitioner (TAS. 23-25; TS. 5), see Simmons v. State, 419 So.2d 316 (Fla. 1982); the failure to find the nonstatutory mitigating circumstance of mental or emotional problems (which are demonstrated but may not meet the criteria of a statutory mitigating circumstance), as alleged in paragraphs 19 B (1) (a) and (b) supra, see Moody v. State, 418 So.2d 989 (Fla. 1982); and the failure to find doubt about guilt, as alleged in paragraph 19 B (1) (b), supra see Taylor v. State, 294 So.2d 648, 652 (Fla. 1974).

(d) Accordingly, the Florida Supreme Court's "[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case," Proffitt v. Florida, supra, 428 U.S. at 251, was revoked in Ernie Hitchcock's case.

F. The Supreme Court of Florida's practice, unauthorized and unannounced by statute or rule, of requesting and receiving ex parte information concerning appellants in pending capital appeals, without notice to these appellant or their attorneys, denied death-sentenced appellants, including Mr. Hitchcock, due process of law, the effective assistance of counsel, and the right of confrontation and subjected

them to cruel and unusual punishment and to compulsory self-incrimination, in violation of the Fourteenth Amendment and its incorporated guarantees.

(1) The Supreme Court of Florida, since at least as early as 1975, has engaged in the continuing practice of requesting and receiving information concerning capital appellants which was not presented at trial and not a part of the trial record or record on appeal. The information includes, but is not limited to: pre-sentence investigation reports concerning the capital offense under review or prior convictions unrelated to the capital offense; psychiatric evaluations or contact notes; psychological screening reports; recitations of a capital defendant's refusal to submit to a psychiatric examination from which a report could be prepared; post-sentence investigation reports; probation or parole violation reports; and state prison classification and admissions summaries. Except as to some of the pre-sentence investigations pertaining to the offense on appeal, the above information was requested and received without notice to the capital appellants or their attorneys. Upon information and belief a quantity of the information received by the Court, and of records reflecting the practice of requesting and receiving it, has, at the Court's direction been destroyed or purged from the Court's files. As a result, it is no longer possible to identify all of the cases in which such information was requested or received.

(2) Based upon the foregoing practice, an original action was filed in the Supreme Court of Florida, on September 29, 1980, on behalf of petitioner and one hundred twenty-two (122) other death-sentenced appellants. Copies of the Application for Extraordinary Relief and Petition for Writ of Habeas Corpus and its Appendices are included in a separate appendix filed herewith. By a motion

accompanying that petition, petitioners requested that, if any of their allegations were materially controverted, a special master be appointed and other procedures instituted for resolving the resulting issues of fact. Petitioner's allegations were, however, not controverted. The Court issued an order to show cause and the respondent replied by filing a motion to dismiss which neither disputed the facts alleged in the petition nor alleged any contrary facts. After hearing oral argument, the Supreme Court of Florida denied that petition on the merits. It held that:

> "Even if petitioners' most serious charges were accepted as true, as a matter of law our view of the non-record information petitioners have identified is totally irrelevant either to our appellate function in capital cases as it bears on the operation of the statute, or to the validity of any individual death sentence."

Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1982). Drawing a distinction between sentence "'review'" and sentence "'imposition'" (ibid.; see also id. at 1333), the Court concluded that "[s]ince we do not 'impose' sentences in capital cases, Gardner presents no impediment to the advertent or inadvertent receipt of some non-record information." "[N]on-record information we may have seen, even though never presented to or considered by the judge, the jury, or to counsel, plays no role in capital sentence 'review.'" Id. at 1332-1333. Accordingly:

> As we view the case, ... appellate review can never be compromised in the constitutional sense required by Proffitt [v. Florida, 428 U.S. 242 (1976], by the receipt of any quantity of non-record information."

Id. at 1333, n. 16. "The upshot ... is that petitioners' claims' are untenable." Id. at 1333. All relief was denied to each and

every petitioner, and the court ordered that "[n]o petitions for rehearing will be entertained." Id. at 1334.

(3) Petitioner's original appeal was pending in the Supreme Court of Florida from February 11, 1977 (the date the Notice of Appeal was filed) until May 27, 1982 (the date the Petition for Rehearing was denied). Petitioner's case was pending in the Supreme Court of Florida during the time the practice of the Court described above was on-going.

(4) This practice of the Florida Supreme Court violated, or at least presented the appearance of violating Mr. Hitchcock's rights as enumerated in paragraph 19 F, supra.

G. As applied, the Florida death penalty statute violates the Eighth and Fourteenth Amendments because it fails to channel jury discretion and permits the interjection of irrelevant factors into the sentencing process by the jury and the judge.

(1) Because of an inherent ambiguity in the Florida death penalty statute concerning the scope of mitigating circumstances which could be considered in sentencing, persons tried under the statute prior to July 3, 1978 were deprived of their right to a fully individualized sentence determination under the Eighth and Fourteenth Amendments.

(a) Since the revisions of the Florida death penalty statute effective on December 8, 1972, the statute has contained the following delimiting language concerning the aggravating and mitigating circumstances which may be considered by the jury and judge in determining the sentence in a capital trial:

> "Aggravating circumstances shall be limited to the following: ...." §921.141 (5).

"Mitigating circumstances shall be the following: ..." §921.141 (6).

(b) Because of the slight difference in the wording of these phrases, the statute was ambiguous as to whether mitigating circumstances not enumerated in the statute could be considered. In 1976, the Supreme Court of Florida held expressly that non-enumerated mitigating circumstances could not be considered in Cooper v. State, 336 So.2d 1133, 1139 n. 7 (Fla. 1976). However, just two years thereafter, the Court held that the statute had always permitted the consideration of non-enumerated mitigating circumstances in Songer v. State, 365 So.2d 696, 700 (Fla. 1978). At the very least, therefore, this provision of the Florida death penalty was ambiguous. Further, the Supreme Court of Florida has agreed that it was ambiguous, at least by implication. By recognizing that the trial courts, in refusing to consider non-statutory mitigating circumstances prior to Songer, were following the law as they believed it to have been interpreted at the time, the Court has conceded the ambiguity inherent in this provision of the statute. See Jacobs v. State, 396 So.2d 717, 718 (Fla. 1981); Perry v. State, 395 So.2d 170, 174 (Fla. 1981).

(c) This ambiguity in the statute led to the consistent practice by defense counsel of limiting their investigation of mitigating circumstances to those enumerated in the statute, and to the equally consistent practice by Circuit Court judges of refusing to consider non-statutory mitigating circumstances. Not until Lockett v. Ohio, 438 U.S. 586 (1978) was decided on July 3, 1978 was there a clear constitutional mandate overriding the ambiguity in the statute and requiring defense counsel to investigate and Circuit Court judges to consider, evidence of non-statutory mitigating circumstances.

(d) Accordingly, capital defendants tried between December 8, 1972 and July 3, 1978, including Mr. Hitchcock, were systematically deprived of the fully individualized consideration of their character and record and of the circumstances of their offense, to the extent that evidence of these matters fell outside the enumerated mitigating circumstances. During this period, therefore, as applied, the Florida death penalty statute deprived capital defendants of their Eighth and Fourteenth Amendment rights articulated in Lockett v. Ohio, supra.

(2) The standard instructions to the jury in the penalty phase do not require the state to establish the preponderance of the aggravating circumstances beyond a reasonable doubt, impermissibly diminishing the reliability of capital sentencing proceedings.

(a) The standard instruction with respect to the weighing of aggravating and mitigating circumstances includes the following:

> "Should you find sufficient of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances found to exist."

(R. 180)

(b) In no way, explicitly or implicitly do these instructions inform the jury as to which party bears the burden with respect to the weighing issue, nor do they prescribe any standard of proof by which the jury must determing whether mitigating circumstances outweigh aggravating circumstances.

(c) Either because the determination respecting the preponderance of aggravating circumstances is sufficiently like the determination of an element of capital murder in Florida, or because

(c) A wrong judgment about which aggravating circumstances are at issue can put the defense in a position of inability to defend against those circumstances.

(d) Accordingly, the very reason that notice must be given as a matter of due process requires notice of the specific aggravating circumstances at issue. Because the Florida capital sentencing procedure does not require such notice, it cannot stand.

(4) While the Florida death penalty statute, on its face, overcomes the risk of arbitrary imposition of the death penalty, Proffitt v. Florida, supra, as applied it fails to provide sufficient guidance, through proper instruction and delimination of aggravating circumstances, to channel sentencing discretion. See, e.g. ¶19 A, supra.

Other Required Information

20. Each of the grounds listed in paragraphs 18 and 19 has been previously presented to the Supreme Court of Florida, and each has been rejected.

21. There are no appeals pending in any state or federal courts relating to the judgment and sentence under attack, except as noted in paragraph 11, supra.

22. Petitioner has been represented by the following counsel:

(a) at trial and sentencing, by Charles A. Tabscott, of Orlando, Florida;

(b) on appeal to the Supreme Court of Florida, by Richard L. Jorandby, Esquire, et. al. of West Palm Beach, Florida;

(c) in Florida 3.850 and other collateral proceedings, by the undersigned counsel; and

(d) in 3.850 appeal to the Supreme Court of Florida by the undersigned counsel.

23. Petitioner was sentenced on the only count of the Indictment.

24. Petitioner has no other sentence of imprisonment to serve other than the sentence which is challenged herein.

WHEREFORE, Petitioner Hitchcock prays:

1. That this Court forthwith issue an order staying his execution pending final disposition of this matter and further order of this Court;

2. That a writ of habeas corpus be directed to Respondents;

3. That the State of Florida be required to appear and answer the allegations of this petition;

4. That, after full hearing, Petitioner be discharged from his unconstitutional confinement and restraint and/or relieved of his unconstitutional sentence of death;

5. That Petitioner be granted the authority to proceed in forma pauperis.

6. That Petitioner be allowed a period of sixty days, which shall commence after the completion of any hearing this Court determines to conduct, in which to brief the issues of law raised by this petition;

7. That Petitioner be allowed to amend this petition up to and including the commencement of the hearing requested herein; and

8. That Petitioner be allowed other, further and alternative relief as may seem just, equitable, and proper under the circumstances.

Respectfully submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

BY Richard B. Greene
RICHARD B. GREENE
Assistant Public Defender

Richard H. Burr, III
RICHARD H. BURR, III
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for a Writ of Habeas Corpus has been furnished by mail/delivery, this 12th day of May, 1983, to RICHARD PROSPECT, Assistant Attorney General, at 125 N. Ridgewood Avenue, Daytona Beach, Florida.

Richard H. Burr, III
Of Counsel.

RECEIVED
SEP 26 1983
ATTORNEY GENERAL
DAYTONA BEACH, FLA.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JAMES ERNEST HITCHCOCK,

Petitioner,

vs.

No. 83-357-Civ-Orl-11

LOUIE L. WAINWRIGHT, etc.

_____/

O R D E R

For the reasons set forth in the Memorandum of Decision filed on even date herewith the court finds that an evidentiary hearing and further oral argument are unnecessary. Pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, the Amended Petition for Writ of Habeas Corpus filed herein on 9 June 1983 is hereby dismissed.

FURTHER ORDERED that the stay of execution ordered by this court on 17 May 1983 shall terminate at 12:00 o'clock noon on 17 October 1983.

The Clerk of this court shall mail by certified mail a copy of this order and the Memorandum of Decision to the Petitioner, his attorneys, and the attorneys for Respondent. The Clerk of this Court shall also provide

telephone notice of this order to the Clerk of the United States Court of Appeals for the Eleventh Circuit and shall thereafter mail to said Clerk by certified mail a copy of this order and the Memorandum of Decision.

DONE AND ORDERED in Chambers at Orlando, Florida, this 22nd day of September, 1983.

JOHN A. REED, JR.
United States District Judge

Copies mailed to:

Richard B. Greene, Esquire
Richard H. Burr, III, Esquire
Assistant Public Defenders
15th Judicial Circuit of Florida
224 Datura Street - 13th Floor
West Palm Beach, Florida 33401

Richard B. Martell, Esquire
Assistant Attorney General
125 North Ridgewood Avenue
Daytona Beach, Florida 32014

Mr. James Ernest Hitchcock
Florida State Prison
Box 747
Starke, Florida 32091

Clerk
United States Court of Appeals
for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JAMES ERNEST HITCHCOCK,

Petitioner,

vs. No. 83-357-Civ-Orl-11

LOUIE L. WAINWRIGHT, etc.,

Respondent.
_____/

MEMORANDUM OF DECISION

James Ernest Hitchcock filed a Petition for a Writ of Habeas Corpus on 13 May 1983 and thereafter filed an Amended Petition for a Writ of Habeas Corpus on 9 June 1983. On 31 May 1983, Respondent filed a Motion to Dismiss. On 17 June 1983, the Motion to Dismiss was argued and treated by the court and the parties as having been directed to the Amended Petition. The court has reviewed the Amended Petition against the Motion to Dismiss and, as contemplated by Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts, has independently reviewed the Amended Petition for arguable merit. The court has included in its review of the Amended Petition the entire state court trial record. The record was filed by the Respondent and is referred to at length in the Amended

Petition. On the basis of its review, the court has concluded that the Amended Petition for habeas corpus relief lacks arguable merit.

The first ground asserted by the Petitioner is that the evidence was insufficient to support the felony murder theory. The pertinent homicide statute is § 782.04(1)(a), Fla. Stat. (1975). It provided: "The unlawful killing of a human being . . . when committed by a person engaged in the perpetration of . . . any . . . involuntary sexual battery . . . shall be murder in the first degree and shall constitute a capital felony . . .". The pertinent statute defining sexual battery is § 794.011, Fla. Stat. (1975). It provided:

> A person who commits sexual battery upon a person over the age of eleven years, without that person's consent, and in the process thereof . . . uses actual physical force likely to cause serious personal injury shall be guilty of a life felony . . .

The statute defines the phrase "serious personal injury" as "great bodily harm or pain, permanent disability, or permanent disfigurement." (Emphasis added).

The relationship which must exist between the homicide and the underlying felony has been established by opinions in Jefferson v. State, 128 So.2d 132 (Fla. 1961), and Campbell v. State, 227 So.2d 873 (Fla. 1969). In those cases, the court held that even if the underlying felony had been technically completed when the murder occurred, the felony murder statute would still apply, if the homicide was closely associated in point of time with the underlying felony and was committed as a means of escaping detection.

For purposes of a habeas challenge to the sufficiency of the evidence, the test is whether or not on the evidence adduced any rational trier of fact could have found beyond reasonable doubt the establishment of guilt. Jackson v. Virginia, 443 U.S. 307, 324 (1979). The Petitioner claims that the evidence was insufficient to support the finding of guilt on the theory of felony murder because the evidence was insufficient to establish the Petitioner utilized physical force likely to cause serious personal injury.

The Petitioner's confession which was introduced in evidence as a part of the state's case in chief contains an admission by the Petitioner that early in the morning of 31 July 1976 he entered the bedroom of his brother's thirteen year old stepdaughter and had sexual intercourse with her. Following this, according to the Petitioner's own confession, she stated that she was hurt and desired to tell her mother. The Petitioner admitted in his confession that he struck her and carried her from the house, choked her to death and hid her body. Testimony presented also in the state's case in chief by Guillermo Ruiz, the medical examiner for Orange County, established that the victim had abrasions on her neck and also had evidence of trauma to her left eye and laceration around her left eye. Dr. Ruiz also testified that the girl's hymen had been lacerated within twenty-four hours before her death and that hair and sperm were found in her vagina.

The age of the victim, the fact that she was of previously chaste character, her insistence on telling her mother and the Petitioner's admission as to the time of the occurrence could have led a reasonable jury to the conclusion that the sexual relationship was not consensual. The same evidence also suggests that physical force likely

to cause great bodily harm was utilized. It was the victim's specific statement that she was hurt and desired to tell her mother that led to the violence within the house and the choking which occurred outside. The evidence established through the medical examiner and through the confession of the Petitioner could have convinced a rational jury that "serious personal injury", as defined in Florida law, was inflicted on the victim.

The second ground for habeas relief relates to a reservation of ruling by the trial judge on the motion for judgment of acquittal made at the close of the state's case in chief. At that time, the trial judge denied the motion for judgment of acquittal on the state's theory of premeditated murder, but reserved ruling on the motion as it related to the felony murder theory (T. 719). The Petitioner asserts that this shifted the burden of proof and denied effective assistance of counsel.

It was error for the trial court to have reserved ruling on any aspect of the motion for judgment of acquittal. Hitchcock v. State, 413 So.2d 741 (Fla. 1982), cert. denied, ____U.S. ____, 74 L.Ed.2d 213 (1982). The Florida Supreme

Court, however, in the direct appeal in this case concluded that the error was harmless. This court's review of the record leads it to the same conclusion. As mentioned above, there was adequate evidence to take the case to the jury on the felony murder theory. The Petitioner's defense counsel anticipated the possibility that the motion would be denied and presented testimony dealing with the consensual nature of the sexual relations between the Petitioner and the victim. Furthermore, there is nothing in the record to suggest that the defense counsel's strategy was adversely affected by the court's ruling.

The third ground asserts that the trial court kept out nearly all of the evidence proffered by the Petitioner in support of his defense. Petitioner's defense was that his brother Richard had killed the victim. To support his theory, the Petitioner tried to show that his brother Richard had a reputation for violence whereas he, the Petitioner, treated young children well. The Petitioner also argues with respect to this ground that he was denied an opportunity "to show why he would have initially confessed . . . despite his innocence . . .".

The transcript of the testimony negates the validity of the third ground. Evidence of the Petitioner's character for nonviolence was repeatedly admitted through his own witnesses and to some extent through the testimony of his brother Richard and his sister-in-law (Richard's wife) Judy, both of whom were called as witnesses for the state.

Judy Hitchcock testified that in July 1976 the Petitioner was living in her home with her children and Richard. She testified she never saw the Petitioner hit or discipline any of the children (T. 267). Richard Hitchcock testified for the state that the Petitioner got along "all right" with the children.

Roy Carpenter, Sgt. Rick Dawes, Archie Sooter, Martha Hitchcock, James Hitchcock, Fay Hitchcock and Brenda Reed were witnesses called by the Petitioner. Carpenter testified that on the day after the "incident" (meaning the day on which the victim's body was found) when he saw the Petitioner in Winter Garden, the Petitioner said he wanted to organize a search party to look for his niece. Carpenter

testified he never knew the defendant to commit "violence" (T. 725). Sgt. Rick Dawes of the Winter Garden Police Department testified that the Petitioner came into the Winter Garden Police Department on 31 July 1976 and surrendered peacefully (T.227). Sooter testified he was a former roommate of the Petitioner (T. 731). He described the Petitioner's character as "calm and jovial" (T. 732) and testified the Petitioner had a girlfriend to whom he never saw the Petitioner direct any violence (T. 733).

Martha Hitchcock, the Petitioner's sister, testified that she lived with the Petitioner for over thirteen years and never knew him to be a violent person T. 737). James Hitchcock, one of the Petitioner's older brothers, gave similar testimony (T. 739). James Hitchcock also testified the Petitioner stayed for an unspecified period with him and his three children (T. 741-742). Fay Hitchcock, the wife of James Hitchcock, testified she had known the Petitioner for nine years and had never known him to exhibit violence (T. 744). Brenda Reed, another sister of the Petitioner, testified she had never known him to exhibit violence (T. 747).

The testimony reveals that when the Petitioner was taken into custody he did not, contrary to the allegation in the Amended Petition, initially confess to the killing of Cynthia Driggers. The Petitioner testified that on the day of his arrest, he denied any involvement. It was not until four days later that he confessed (T. 771-772). At trial, the Petitioner explained in detail why he confessed. His first reason was that he had been in isolation for a period of four days and wanted to die (T. 772). His second reason was that his girlfriend had left him (T. 772). Then the Petitioner explained that he had been on his own since age thirteen and was then age twenty. He further testified his father died when he was only six (T. 773-774). The final reason which he advanced for changing his testimony was that his brother Richard had been like a father to him and because of Richard's arthritic condition he "couldn't see him (Richard) doing this time" (T. 777). After that statement, the Petitioner said, "But from what my parents have stated to me and shown to me, I've took a crime for him before . . ." At this point an objection to the testimony was voiced by the state's attorney and the objection was sustained. Although there was no order from the court

striking any portion of the testimony, the objection could only have been understood as having gone to the hearsay statement attributable to the Petitioner's parents. Hence, the record does not reflect that the Petitioner was prevented from developing his character for nonviolence or explaining why he made a confession totally inconsistent with his trial testimony. The transcript does indicate, however, that the Petitioner's attempts to introduce evidence related to Richard's character or reputation for violence were routinely rebuffed (T. 737, 740, 744, 777-778, 750-751, 794-795).

Normally rulings on the admission of evidence are not a basis for habeas corpus relief. Nettles v. Wainwright, 677 F.2d 410, 414 (5th Cir. Unit B, 1982). Where, however, such rulings preclude a defendant from adducing highly relevant testimony in support of his defense, they may of course constitute a denial of the Fourteenth Amendment's guarantee of a fair trial. Green v. Georgia, 442 U.S. 95 (1979); Wilkerson v. Turner, 693 F.2d 121, 123 (11th Cir. 1982). The issue then becomes whether or not the exclusion of the proffered testimony dealing with Richard's violent character and Petitioner's having

previously taken some blame (i.e. "took a crime") for Richard was so relevant to the defense that its exclusion denied the Petitioner a fair trial.

Evidence of a person's character or a trait of character is usually not admissible to prove that he acted in conformity therewith on a particular occasion. See Rule 404(a), Fed. R. Evid. Whatever slight relevance such evidence might have is not sufficient to overcome the policy which favors its exclusion to protect reputation and to diminish the possibility of misleading the trier of fact. The reputation of Richard for violence had such slight probative value to support the Petitioner's contention, this court cannot conclude that its exclusion denied the Petitioner a right to a fair trial. The evidence shows without question that Richard was married to the mother of the thirteen year old victim and had been living with her and her four minor children (including the victim) for a period of at least two years before the murder (T. 273-274). Under these circumstances, there is just simply no logical connection between the proferred testimony and the fact sought to be corroborated. Similarly the proffered hearsay evidence was of such minimal significance its exclusion did not violate Petitioner's right to due process.

The fourth ground for relief asserts that a communication between the trial court and the jury in the absence of defense counsel denied Petitioner a fair trial. During the course of the jury deliberations, the jury sent a note to the trial judge which asked: "Is it required for us to recommend death penalty or life at this time?" The trial judge without consulting counsel for the Petitioner or the state responded: "You should not consider any penalty at this time - only guilt or innocence." See Record, page 165. The Petitioner argues that this communication to the jury denied him due process. According to Petitioner, it implied that the trial judge viewed the Petitioner as guilty and at the same time suggested to the jury that it should not consider the seriousness of the possible penalty in arriving at a verdict as to guilt or innocence. In the opinion of this court, the argument is frivolous. The trial judge had earlier given the jury without objection an instruction virtually identical to that included in his response to the jury's note. At the close of the evidence on the guilt phase of the trial, the judge instructed the jury:

> You are not to be concerned at this point with the imposition of any penalty in the event you reach a verdict of guilty. . . . [I]f you return a verdict of guilty of Murder in the First Degree, you will then be called on, in a separate sentencing proceeding, to return an Advisory Sentence as to whether the punishment should be death or life imprisonment, which Advisory Sentence the Court is not required to follow. When you have determined the guilt, or innocence of the accused, you have completely fulfilled your solemn obligation under your oaths as Jurors.

The trial judge also instructed the jury in the following language that the decision on guilt or innocence was theirs and that no comment by him should be taken as implying his view as to guilt or innocence:

> Nothing I have said in these instructions, or at any other time during the trial, is any intimation whatever as to what verdict I think you should find.

Finally, it is obvious from the note itself that the jury was well aware that the death penalty was a possible sanction attendant upon the conviction. Nothing in the judge's response could rationally be said to have

diminished the seriousness of the offense in the jury's mind.

The fifth ground for relief is that the aggravating circumstances considered by the jury failed to channel sentencing discretion as required by the Eighth and Fourteenth Amendments. The first argument advanced in support of this ground is that the aggravating circumstance of sexual battery was not supported by adequate evidence. As noted above, the record contains adequate evidence to support the felony of sexual battery as defined in § 794.011(3), Fla. Stat. (1975).

The Petitioner also argues under this ground that the catalog of aggravating circumstance delineated in the death penalty statute refers to "rape" not sexual battery. See § 921.141(5)(d), Fla. Stat. (1975). When the Florida death penalty statute was initially adopted, the term "rape" was used in Florida to denote the well-known offense. See § 794.01, Fla. Stat. (1973). Unfortunately the term was not modified in the death penalty statute when in 1974 the Florida legislature redefined "rape" in a comprehensive statute using the terminology "sexual battery". See

§ 794.01, Fla. Stat. (1974). Rape was defined in the statutes of Florida in effect when the death penalty statute was first enacted as follows:

> **794.01 Rape and forcible carnal knowledge; penalty.-**
> (1) Whoever of the age of seventeen years or older unlawfully ravishes or carnally knows a child under the age of eleven is guilty of a capital felony, punishable as provided in § 775.082.

§ 794.01(1), Fla. Stat. (1973). The offense of rape as thus defined is for all practical purposes the same as "sexual battery" defined in the present Florida statute and included in the trial judge's charge.

The remaining contentions which the Petitioner makes in support of the ground in question simply take issue with the validity of the aggravating circumstances which may be considered under the Florida death penalty statute. The statute, however, has been held to be constitutional and the Petitioner's argument is thus foreclosed. See Proffitt v. Florida, 428 U.S. 242 (1976), and Barclay v. Florida, No. 81-6908, ____ U.S. ___ (6 July 1983).

The Petitioner's sixth ground for relief is that "(his) death sentence was imposed in proceedings which precluded by operation of law the consideration of relevant mitigating circumstances in violation of the Eighth Amendment requirement that there be no bar to the presentation and consideration of relevant mitigating evidence." With respect to this ground, the Petitioner argues that the trial judge refused to consider as mitigating the evidence relating to the Petitioner's mental and emotional problems, his voluntary surrender, the evidence as to his nonviolent character, doubt of guilt, and the fact that the state offered a life term in return for a plea of guilty. The short answer to this contention is that the trial judge was not required to consider those factors as mitigating. As pointed out in Barclay v. Florida, supra, the sentencing decision calls for the exercise of judgment. The only requirement of the Constitution is that the judgment be directed by suitable statutory guidelines. The trial judge stated before pronouncing sentence: "The court has weighed and considered the total evidence received in this case . . . " See transcript of Sentencing Proceedings 11 February 1977, at page 6.

Also under this ground, the Petitioner argues that the judge limited the jury's consideration to the list of mitigating circumstances set forth in the Florida death penalty statute. It is true that the jury was instructed on the mitigating circumstances delineated in § 921.141(6), Fla. Stat. (1977); however, the jury was not precluded from consideration of any relevant evidence offered in mitigation of punishment. The trial judge told the jury its consideration of aggravating circumstances was limited to the statutory list. In contrast, he instructed the jury with reference to mitigating circumstances:

> Should you find, however, sufficient of these aggravating circumstances to exist, it will then be your duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances which you have found to exist. The mitigating circumstances which you may consider shall be the following: . . . [the statutory mitigating circumstances] . . . If one or more aggravating circumstances are established, you should consider all of the evidence tending to establish one or more mitigating circumstances and give that evidence such weight as you feel it should receive and (sic) in arriving at your conclusion as to the sentence which should be imposed.

Transcript of Advisory Hearing at 55-58.

Furthermore, no restriction was imposed on the evidence which Petitioner offered at the sentencing trial, and, in fact, testimony was adduced of nonstatutory mitigating circumstances dealing with his family background. In his argument to the advisory jury defense counsel discussed at some length Petitioner's family history, his nonviolent character, including the fact of his voluntary surrender, and his capacity for rehabilitation if offered a life sentence (T. of Advisory Hearing p. 12-26). The Petitioner's argument is foreclosed by Ford v. Strickland, 696 F.2d 804, 811 (11th Cir. 1983) because, for the reasons mentioned, neither the jury nor the trial judge was denied the use of any relevant evidence of mitigation. See also Antone v. Strickland, 706 F.2d 1534 (11th Cir. 1983); mod. on rehr. No. 82-5120, Slip Op. 6 Sept 1983.

Finally, the Petitioner argues that available evidence in mitigation was not presented either because defense counsel was ineffective or because the Florida statute precluded evidence of nonstatutory mitigating circumstances. The Florida statute in effect at the time did not expressly limit the jury's consideration to the mitigating circumstances delineated therein. Although

dictum in Cooper v. State. 336 So.2d 1133 (Fla. 1976), cert. denied, 431 U.S. 925 (1977), suggested that the statutory mitigating circumstances were exclusive, decisions of the Florida Supreme Court published prior to the trial indicate that the statutory mitigating circumstances were not exclusive. Those cases are reviewed in Songer v. State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956 (1979). The Petitioner suggests that his counsel was ineffective at the penalty phase of the trial because he did not adduce testimony of a psychologist discussing Petitioner's character and his capacity for redemption. Petitioner embodied in his Amended Petition at page 41 an excerpt from a report by a psychologist used at his executive clemency hearing as an example of what effective counsel should have offered. This type evidence Petitioner claims would have had two purposes. One would be to show doubt of guilt - the other to show Petitioner's capacity for rehabilitation. Counsel can hardly be considered ineffective in a capital case because at the penalty phase he did not adduce evidence to raise a doubt of guilt. Obviously at that stage, doubt of guilt has been eliminated as an issue for the jury's consideration. Counsel cannot be held ineffective, unless his choice of strategy was so patently unreasonable that no

competent attorney would have chosen it and actual and substantial prejudice resulted from the choice. Adams v. Wainwright, 709 F.2d 1443 (11th Cir. 1983); Wiley v. Wainwright, 709 F.2d 1412 (11th Cir. 1983). In the present case, substantial evidence as to Petitioner's character and background was presented to develop mitigating factors, and Petitioner's attorney strongly argued to the advisory jury the possibility of rehabilitation. In light of what was done, counsel cannot under the established standard be deemed ineffective for not producing opinion evidence from a psychologist.

The seventh ground for relief is stated as follows in the petition: "Petitioner's Eighth Amendment right to be punished in proportion to his crime, and his Fourteenth Amendment right to due process, were violated by the trial court's approval of the state's offer to Petitioner of a plea of nolo contendere and life imprisonment, followed by the court's imposition of the death sentence after Petitioner rejected the plea offer and proceeded to trial." Even if Petitioner's factual assertions are true, this ground is patently without merit. The argument of the Petitioner basically is that having rejected the tendered

plea agreement, he could go to trial with immunity from the death penalty. The Petitioner cites North Carolina v. Pearce, 395 U.S. 711 (1969), United States v. Jackson, 390 U.S. 570 (1968), and Corbitt v. New Jersey, 439 U.S. 212 (1978) as supporting his contention. None of these cases supports the contention, and Bordenkircher v Hayes, 434 U.S. 357 (1978) stands clearly in opposition.

The eighth ground for relief is that, "The Florida death penalty statute, as applied, deprives death-sentenced individuals, whose sentences are based upon erroneously found aggravating circumstances, of critical Eighth and Fourteenth Amendment rights, because the Florida Supreme Court consistently sustains such death sentences so long as there is at least one valid aggravating circumstance, and no substantial mitigating circumstances, present." This ground is without merit and subject to summary dismissal on the authority of Barclay v. Florida, supra.

The ninth ground for relief is that, "The Florida Supreme Court's cursory, incomplete review of the aggravating and mitigating circumstances in petitioner's case vitiated the court's unique responsibilities in the

review of capital prosecutions." With respect to this ground the Petitioner argues that the Florida Supreme Court failed to review the aggravating circumstances, failed to review the claim that nonstatutory mitigating factors should have been found, and failed to review the trial court's failure to find as mitigating the mental or emotional problems of the Petitioner and doubt about his guilt.

With regard to the assertion that doubt about guilt should enter into the sentencing equation, the Petitioner's contention is without any support known to this court. The sentencing aspect of the trial does not commence until guilt has been established. Therefore, doubt about guilt should not enter the sentencing process. If a doubt about guilt exists, such would be a ground for a reversal of the conviction itself.

It is clear from the dissent in connection with the plenary appeal that the mental and emotional problems of the Petitioner were considered by the Florida Supreme Court. Furthermore, the opinion of the majority reflects that the case was carefully reviewed on the grounds presented.

The Petitioner's penultimate ground for relief challenges the Florida Supreme Court's former practice of reviewing psychological profiles of persons sentenced to death. This ground for relief has been foreclosed by Ford v. Strickland, supra.

The final ground for habeas relief is: "As applied, the Florida death penalty statute violates the Eighth and Fourteenth Amendments because it fails to channel jury discretion and permits the interjection of irrelevant factors into the sentencing process by the jury and judge."

Most of the argument embodied in the petition in support of this ground has been foreclosed by Proffitt v. Florida, supra, wherein the Supreme Court held the Florida death penalty statute to be constitutional. The following are the only arguments of Petitioner which warrant comment in the opinion of this court. The Petitioner claims that the instruction on aggravating and mitigating circumstances did not require the state to prove aggravating circumstances beyond reasonable doubt. This is simply inconsistent with the trial court's instructions which did

require proof of aggravating circumstances beyond reasonable doubt. The Petitioner also complains that the jury instructions did not tell the jury how to determine whether or not the mitigating circumstances outweighed the aggravating circumstances. The answer to this is that the statutory scheme obviously requires a value judgment from the jury and the trial judge. It is not for that reason invalid. Barclay v. Florida, supra, Slip Op. at 10.

Next the Petitioner asserts that the trial judge's instructions could have left the jury with the impression that the burden of proving mitigating circumstances was on the Petitioner. Aside from the fact that such does not appear to be a logical conclusion from the instructions themselves, it does not make sense to talk of burdens of proof in connection with evidence of mitigating factors. This is so because no particular quality of proof is required to permit the jury to give probative effect to evidence tending to establish mitigation. The trial judge instructed the jury:

> If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more

> mitigating circumstances and give that evidence such weight as you feel it should receive . . . (Emphasis added)

Transcript of Advisory Hearing at 57.

Finally, the contention is made that nonstatutory factors affect the imposition of the death penalty. The Petitioner asserts such factors as geography, sex of the defendant, occupation and race of the victim, as well as others may have influence on the sentencing decisions of the trial jury or trial judge, or both. This argument was rejected as a matter of law in Spenkelink v. Wainwright, 578 F.2d 582, 613 (5th Cir. 1978), where the court held:

> . . . if a state follows a properly drawn statute in imposing the death penalty, then the arbitrariness and capriciousness-and therefore the racial discrimination-condemned in Furman have been conclusively removed. Florida has such a statute and it is being followed. The petitioner's contention under the Eighth and Fourteenth Amendments is therefore without merit.

It is obviously impossible for the legislature to devise any statutory scheme that will insure completely uniform results. Where, however, a statute has adequate safeguards against capricious imposition of the death

penalty, and the statutory procedure is followed, disparate results in similar cases are not a constitutional problem in the absence of intentional discrimination on an impermissible basis. Such is not alleged here.

Conclusions

Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts contemplates that on initial review of the petition by the district court, the judge may summarily dismiss the petition in its entirety if the petition lacks arguable merit. The court has carefully reviewed the Amended Petition, all attachments thereto and the entire record from the state trial court. Based thereon, this court concludes the Amended Petition lacks arguable merit and should be summarily dismissed without an evidentiary hearing.

DATED at Orlando, Florida, this 22nd day of September, 1983.

JOHN A. REED, JR.
Judge

8/82)

Copies mailed to:

Richard B. Greene, Esquire
Richard H. Burr, III, Esquire
Assistant Public Defenders
15th Judicial Circuit of Florida
224 Datura Street - 13th Floor
West Palm Beach, Florida 33401

Richard B. Martell, Esquire
Assistant Attorney General
125 North Ridgewood Avenue
Daytona Beach, Florida 32014

Mr. James Ernest Hitchcock
Florida State Prison
Box 747
Starke, Florida 32091

Clerk
United States Court of Appeals
for the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

JAMES ERNEST HITCHCOCK, Petitioner vs. LOUIE L. WAINWRIGHT, Secretary Florida Department of Corrections Respondent.	)	CIVIL ACTION NO. 83-357-Civ-Orl-11

APPLICATION FOR CERTIFICATE OF PROBABLE CAUSE TO APPEAL

Petitioner, JAMES ERNEST HITCHCOCK, by his undersigned counsel pursuant to 28 U.S.C. §2253 and Rule 22 of the Federal Rules of Appellate Procedure, hereby requests issuance of a Certificate of Probable Cause to authorize Appeal to the United States Court of Appeals for the Eleventh Circuit from the Order of this Honorable Court entered September 22, 1983, dismissing the Petition for Writ of Habeas Corpus. In support thereof, petitioner states:

1. The United States Supreme Court has recently discussed the standard for granting certificates of probable cause. Barefoot v. Estelle ___ U.S. ___, 103 S.Ct. 3383 (1983). The Court stated that the certificate should be granted if "the issues are debatable among jurists of reason" 103 S.Ct at 3394.

4. The Court also stated:

> "In a capital case, the nature of the penalty is a proper consideration in determining whether to issue a certificate of probable cause." 103 S.Ct. at 3394.

2. It has long been held that if there is any doubt as to the issuance of a certificate of probable cause a court should "resolve its doubts in favor of the petitioner since issuance is ordinarily a jurisdictional prerequisite for appeal." Jones v. Warden, 402 F.2d 776 (5th Cir. 1968).

3. In the present case, there are numerous issues which are "debatable among jurists of reason." These issues involve both petitioner's conviction and death sentence. The issues involved in this case are clearly "debatable among jurists of reason"; in fact jurists of reason, on the Florida Supreme Court, have already disagreed on some of the issues. Hitchcock v. State, 413 So.2d 741 (Fla. 1982). Justices McDonald and Overton dissented as to the imposition of the death penalty in this case. 413 So.2d at 748-749. They specifically dissented as to the finding that this offense was "heinous, atrocious, or cruel". They felt that the evidence did not warrant this finding either under the Florida law or under the Eighth Amendment Standards laid out in Godfrey v. Georgia, 446 U.S. 420 (1980). 413 So.2d at 748. This is also an issue in this case. See Amended Petition for Writ of Habeas Corpus, Paragraph 19A (3). Justices McDonald and Overton also dissented as to the trial court's

> "failure to find that the defendant committed this crime while under the influence of extreme mental or emotional disturbance or that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." 413 So.2d at 748.

This is also an issue in his case. See Amended Petition for Writ of Habeas Corpus, Paragraph B (1) (a). Justices McDonald and Overton also felt that the death sentence was disproportionate in

the case, and that life was the required penalty. 413 So.2d at 748-749. Therefore, it is clear that several of the issues in this case has already engendered debate among jurists of reason, members of the Florida Supreme Court. There are several other substantial federal questions involved in this case. These include, but are not limited to; the sufficiency of the evidence, pursuant to Jackson v. Virginia, 443 U.S. 307 (1979), for the theory of felony murder; the constitutionality of the aggravating circumstance of sexual battery, both generally, and as applied in this case, the unconstitutionally vague and overbroad application of the aggravating circumstance of "a killing to avoid arrest" in this case, and trial counsel's failure to investigate and present available non-statutory mitigating evidence, in violation of the Eighth Amendment guarantees of Lockett v. Ohio, 438 U.S. 586 and the Sixth Amendment guarantee of effective assistance of counsel. These questions are all "debatable among jurists of reason"

WHEREFORE, for the foregoing reasons, petitioner respectfully requests this Honorable Court to issue its order granting a Certificate of Probable Cause to Authorize Appeal to the United States Court of Appeals for the Eleventh Circuit.

Respectfully Submitted,

RICHARD L. JORANDBY
Public Defender
15th Judicial Circuit of Florida
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

BY Richard B. Greene
RICHARD B. GREENE
Assistant Public Defender

(for) Richard B. Greene
RICHARD H. BURR, III
Of Counsel.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by courier/mail to Honorable Richard Prospect,, Assistant Attorney General, 125 North Ridgewood, Daytona Beach, Florida 32014, this 29th day of September, 1983.

Richard B. Greene
Of Counsel.

APPENDIX C

JAMES ERNEST HITCHCOCK,

Petitioner,

vs. No. 83-357-Civ-Orl-11

LOUIE L. WAINWRIGHT, etc.,

Respondent.
_____/

O R D E R

This cause came on for consideration without oral argument on the following motion filed by Petitioner and thereon, it is

ORDERED:

Application for Certificate of Probable Cause to Appeal.

Filing Date: 3 October 1983.

Disposition: Granted. Pursuant to 28 U.S.C. § 2253 and Fed. R. App. P. 22(b), this court certifies that probable cause exists for appeal.

FURTHER ORDERED that pursuant to 28 U.S.C. § 1915(a), Fed. R. App. P. 24(a), and Eleventh Circuit Rule 15(c), this court certifies that the appeal is taken in good

8/8.2)

faith and may proceed in forma pauperis.

DONE AND ORDERED in Chambers at Orlando, Florida, this 3rd day of October, 1983.

Judge

Copies mailed to:

Richard B. Greene, Esquire
Richard H. Burr, III, Esquire
Assistant Public Defenders
15th Judicial Circuit of Florida
224 Datura Street - 13th Floor
West Palm Beach, Florida 33401

Richard B. Martell, Esquire
Assistant Attorney General
125 North Ridgewood Avenue
Daytona Beach, Florida 32091

APPENDIX D

IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 83-3578

JAMES ERNEST HITCHCOCK,
Petitioner-Appellant,

vs.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,
Respondent-Appellee.

On Appeal from the United States District Court
for the Middle District of Florida

BRIEF FOR PETITIONER-APPELLANT

RICHARD L. JORANDBY
Public Defender
Fifteenth Judicial Circuit
224 Datura Street/13th Floor
West Palm Beach, FL 33401
(305) 837-2150

CRAIG S. BARNARD
Chief Assistant Public Defender

RICHARD H. BURR, III
Of Counsel

RICHARD B. GREENE
MICHAEL A. MELLO
Assistant Public Defenders

Counsel for Petitioner-Appellant

Preference: Habeas Corpus

STATEMENT REGARDING PREFERENCE

This is an appeal from the summary dismissal of a petition for writ of habeas corpus (sought under 28 U.S.C. §2254) by the United States District Court for the Middle District of Florida. As such, it is to be given preference in processing and disposition. Local Rule 11, Appendix One (a)(3).

STATEMENT REGARDING ORAL ARGUMENT

Mr. Hitchcock, pursuant to Local Rule 22(f)(4), requests oral argument of this appeal. The appeal is from the summary dismissal of a petition for writ of habeas corpus from a state court criminal conviction and death sentence. There are numerous, complex constitutional issues involved, and this Court's ruling on these claims will decide whether Mr. Hitchcock lives or dies. Therefore, Mr. Hitchcock asks for the opportunity to develop his arguments and to convince the Court of the validity of the claims he presents, through oral argument.

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AUTHORITIES CITED

STATUTES CITED

RULES CITED

OTHER AUTHORITIES CITED

STATEMENT OF THE ISSUES PRESENTED

1. Whether the district court erred in summarily dismissing Mr. Hitchcock's Sixth, Eighth, and Fourteenth Amendment claims that he had been denied a fair, individualized capital sentencing determination because of his lawyer's failure to investigate and present available nonstatutory mitigating evidence, due to his belief that Florida law precluded the presentation of such nonstatutory evidence.

2. Whether Mr. Hitchcock's conviction can be sustained under the Fourteenth Amendment where he was convicted on the basis of a general verdict which did not rule out the jury's reliance upon a theory of murder for which there was constitutionally insufficient evidence.

3. Whether Mr. Hitchcock's Eighth Amendment right to a reliable death sentence and his Fourteenth Amendment right to due process were violated by the trial judge's approval of the state's pretrial offer of a plea of nolo contendere and life imprisonment, followed by the judge's imposition of the death sentence after Mr. Hitchcock rejected the plea offer and exercised his right to trial by jury.

4. Whether the district court erred in summarily dismissing, as a matter of law, Mr. Hitchcock's claim that the death penalty is being administered in a discriminatory and arbitrary manner, on the basis of race and other impermissible factors, in violation of the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment.

5. Whether at the time of Mr. Hitchcock's trial the rape portion of the felony murder aggravating circumstance failed to meet the requirements of Furman v. Georgia, 400 U.S. 238 (1972), due to the confusion created by the repeal of the rape statute and the simultaneous failure to amend the rape aggravating circumstance to conform it to the changes in the law, thereby invalidating its use in Mr. Hitchcock's trial and, under the facts of his case, his death sentence.

6. Whether Florida's requirement that the jury be instructed on all lesser included offenses, regardless of the lack of evidence to support such instructions, made the Florida capital sentencing system violative of the Eighth and Fourteenth Amendments.

7. Whether the practices complained of in Brown v. Wainwright, 392 So.2d 1327 (Fla.1981), so vitiate the appearance of justice as to require habeas corpus relief.

STATEMENT OF THE CASE

This case is on appeal from the order of the United States District Court for the Middle District of Florida (Honorable John A. Reed, Jr., District Judge) summarily dismissing Mr. Hitchcock's application for a writ of habeas corpus (R 1168-1196).[1]

i. Course of Proceedings

Mr. Hitchcock was indicted for first degree murder on August 6, 1976 (TR 1). On August 11, 1976, he entered a plea of not guilty (TR 2). Trial by jury was held on January 18-21, 1977 (T 1-1004). Mr. Hitchcock was convicted of first degree murder (T 998). The penalty phase of the trial took place on February 4, 1977 (TAS). The jury returned an advisory sentence of death (TAS 63) and on February 11, 1977, Mr. Hitchcock was sentenced to death (R-192-193).

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[1] References to the various portions of the record before this Honorable Court will be designated as follows:

"R" The record on appeal filed in this Court. For volumes 6, 7, and 8 of the record the symbol "R" followed by the appropriate numeral (VI, VII, VIII) will be used (these volumes are transcripts of hearings in the lower court and are not consectively paginated).

"T" The transcript of the trial in the Circuit Court of the Ninth Judicial Circuit of Florida, January 18-21, 1977.

"TR" The record on direct appeal to the Supreme Court of Florida.

"TAS" The transcript of the advisory sentencing proceeding in the Circuit Court of the Ninth Judicial Circuit of Florida, February 4, 1977.

"TS" The transcript of the sentencing hearing in the Circuit Court of the Ninth Judicial Circuit of Florida, February 11, 1977.

Petitioner's conviction and sentence were affirmed by the Florida Supreme Court in Hitchcock v. State, 413 So.2d 741 (Fla. 1982) [McDonald and Overton, JJ. dissenting]. Rehearing was denied on May 27, 1982. Certiorari was denied on October 18, 1982, in Hitchcock v. Florida, ___U.S.___, 103 S.Ct. 274, 74 L.Ed.2d 213 (1982) [Brennan and Marshall, JJ. dissenting].

During the pendency of his direct appeal to the Supreme Court of Florida, petitioner joined 122 other death-sentenced persons in an original habeas corpus proceeding in the Supreme Court of Florida challenging that court's practice of reviewing ex parte, non-record information concerning capital appellant's mental health status and personal backgrounds. The Supreme Court of Florida denied relief, Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), and the Supreme Court of the United States declined to review that decision by writ of certiorari, Brown v. Wainwright, 454 U.S. 1000 (1981) [Brennan and Marshall, JJ. dissenting].

On February 22, 1983, petitioner appeared before the Board of Executive Clemency. On April 21, 1983, the Governor denied clemency and signed a death warrant. Mr. Hitchcock's execution was scheduled for Wednesday, May 18, 1983.

On Tuesday, May 3, 1983, Mr. Hitchcock filed his Motion to Vacate Judgment and Sentence, pursuant to Fla.R.Crim.P. 3.850, in the Circuit Court of the Ninth Judicial Circuit, in and for Orange County [the trial court]. In connection with this motion, he also filed pleadings seeking a stay of execution; as well as for discovery, fees and expenses of expert witnesses, and expenses of lay witnesses in connection with an evidentiary hearing on the Rule 3.850 motion. On May 10, 1983, the circuit court denied the application for a stay of execution and denied the motion to vacate, without an evidentiary hearing. Thereafter, on May 17, 1983, the Florida Supreme Court heard oral argument and affirmed the denial of the motion to vacate Hitchcock v. State, 432 So.2d 42 (Fla. 1983).

On May 13, 1983, Mr. Hitchcock filed in the district court below his petition for writ of habeas corpus, application for a stay of execution, memorandum of law in support of application for a stay of execution, and motion for

continuance (R 1-541). On May 17, 1983, a hearing was held on Mr. Hitchcock's application for stay of execution and that stay was granted (R 542-545; R VI 1-56). As requested by the court, petitioner filed an outline of his grounds for relief and index of exhaustion on May 24, 1983 (R 662-823). Respondent filed a motion to dismiss, pursuant to Rose v. Lundy, ___U.S.___, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), on May 31, 1983 (R 824-842). On June 3, 1983, Mr. Hitchcock filed motions for leave to amend petition for writ of habeas corpus; to pay expenses of witnesses, to pay fees of expert witnesses, and to take discovery, and a motion for an evidentiary hearing (R 843-898).

The district court granted the motion for leave to amend the petition on June 9, 1983, and the amended petition was filed on that date (R 899-1096). Mr. Hitchcock filed his reply to respondent's motion to dismiss on June 10, 1983 (R 1097-1107).

On June 17, 1983, a hearing was held on respondent's motion to dismiss, petitioner's motion for payment of expenses of witnesses, fees of expert witnesses, motion to take discovery and motion for an evidentiary hearing (R VIII 1-63). The Court reserved ruling on all motions; except the motion for an evidentiary hearing, which the Court indicated it would grant (R VIII 53-63). Petitioner filed a supplemental appendix in support of his motion for payment of expenses of witnesses, motion for payment of fees of witnesses, and motion for leave to take discovery on July 8, 1983 (R 1110-1165).

The District Court summarily dismissed the petition for writ of habeas corpus on September 22, 1983 (R 1168-1196). This was done pursuant to Rule 4 of the Rules Governing Section 2254 Cases in the United States District Court (R 1195-1196).

Mr. Hitchcock thereupon filed his notice of appeal and application for certificate of probable cause to appeal on October 3, 1983, (R-1197-1202). The District Court granted the certificate of probable cause to appeal (R 1203-1204).

ii. Statement of the Facts

This case involves the death of thirteen-year-old Cynthia Ann Driggers on July 31, 1976, in Winter Garden, Florida. Ms. Driggers' body was found in a shaded area behind her family's home between 3:00 and 3:30 p.m. on July 31, 1976 (T 299). She had gone to bed at approximately the same time as the rest of her family the night before (T 276) but when her mother had awakened at 6:00 a.m. on July 31, Ms. Driggers was not in her room (T 251-252). She was not again seen until her body was discovered by her stepfather that afternoon. An autopsy revealed that the cause of death was asphyxiation as a result of strangulation (T 496). The only other injuries revealed in the autopsy were facial lacerations and bruises in the vicinity of Ms. Driggers' eyes, apparently caused by a blunt object such as a fist (T 499-501).[2] Finally, the autopsy revealed the presence of sperm in Ms. Driggers' vaginal cavity (T 509).

The guilt-innocence phase of the trial centered upon whether petitioner or his brother (also Ms. Driggers' stepfather), Richard Hitchcock, had committed the homicide. The prosecution attempted to prove that petitioner had committed the homicide through the introduction of his statement. In his statement to the police on August 4, 1976 -- which was given at a time when, according to a psychiatrist appointed to evaluate petitioner's sanity and competence, petitioner was suffering a "moderately severe depression" (TR 27) — petitioner admitted killing Ms. Driggers. He said that he returned to the Hitchcocks' home (where he had been temporarily living as well) at approximately 2:30 a.m. on July 31, 1976, entered the house through a dining room window, and went to Ms. Driggers' bedroom (T 691). He and Ms. Driggers had engaged in sexual intercourse after which she said she had been hurt and was going to tell her mother (T 691). He told her she couldn't but she persisted, and when he tried to stop her from leaving the room,

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[2] The medical examiner also testified that Ms. Driggers' hymen had been lacerated (T 507-508), but further testified that this was a normal occurrence for a young woman engaging in her initial experience of sexual intercourse (T 518).

she began to scream (T 691). He then covered her mouth, picked her up, and took her outside, where she still said she would tell her mother and again started to scream (T 691). He then started choking her and hit her several times and then continued choking her without knowing what was happening (T 692). When he realized that she was dead, he carried her body to some nearby bushes (T 692).

In the defense case at trial, Mr. Hitchcock testified and repudiated much of his statement. He explained that he had given a false confession because he was deeply depressed, and because he wanted to cover up his brother Richard's role in killing Ms. Driggers (T 772-773,777). Richard had been like a father to him, and he wanted to be sure Richard stayed with his family (T 777). However, after he had given the false confession, his mother and sister had come to see him frequently, restoring some hope for his life, and he decided to tell the truth about the homicide (T 776-777). The truth was, he testified, the following. On the night of the homicide he was at home until about 10:30 p.m. (T 757). He returned home about 2:30 a.m. after drinking beer heavily and smoking some marijuana (T 760-763). After he came home, he and Cynthia had consensual sexual relations, but were discovered by Richard (T 762-763). He then saw Richard take Cynthia out of the house and choke her (T-765). Petitioner finally kicked Richard off of her (T 765), but she was already dead (T 766). Richard cried and asked petitioner what he could do (T 766). He then helped Richard hide the body (T 766), and thereafter, went to the dining room window and pushed the screen off to make it look like some one had broken in (T 767). Petitioner denied sexually assaulting Ms. Driggers (T 783) and indeed in its case, the prosecution presented no evidence that any violence or force had been exerted against Ms. Driggers prior to or during the sexual intercourse.[3]

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[3] Except for the confession, the remainder of the state's case had gone to prove that petitioner had engaged in sexual intercourse with Ms. Driggers and that her blood was on his pants. Neither of these facts was disputed, however, for petitioner conceded that he had engaged in intercourse with her and that he had gotten her blood on his pants in moving her body after Richard had killed her (T 787).

At the close of the guilt-innocence trial, the jury was charged on both premeditated and felony murder in connection with murder in the first degree (T 965-969).[4] The felony underlying the felony murder theory was "involuntary sexual battery," (T 998) and was defined in the instructions as follows:

> It is a crime to commit battery upon a person over the age of 11 years without that person's consent, and in the process use actual physical force likely to cause serious physical injury.

(T 968). After being instructed on both theories of first degree murder, the jury returned a general verdict of "guilty of Murder in the First Degree" (T 998).

In the sentencing trial, which followed thereafter, the prosecution presented no additional testimony (TAS 6), and the defense presented only one witness, James Harold Hitchcock, another brother of petitioner, who testified that petitioner had a habit of "sucking on gas" from automobiles when he was five or six years old, which caused him to "pass out" once; after that his "mind wandered" (TAS 7-8). Mr. Hitchcock further testified that petitioner had come from a family with seven children, which earned its livelihood by hoeing and picking cotton (TAS 9-10). Their father had died of cancer after having been bedridden for eight months (TAS 8-9). Finally Mr. Hitchcock testified that petitioner had been close to his (James Harold's) children and had cared for them as a sitter (TAS-10). Thereafter, the jury recommended that the judge impose a

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[4] At the close of the state's case, the defense had moved for a judgment of acquittal, claiming insufficiency of the evidence to show either premeditation or felony murder (T 711-712). The trial judge denied the motion as to premeditation but reserved ruling "until the close of all the testimony by both sides," as to felony murder (T 712). At the close of the evidence, the judge denied the motion as to felony murder as well (T 841).

death sentence (TAS 63) and he did (TS 7-8). In support of the sentence, the judge entered findings of fact in which he found three aggravating circumstances[5] and one mitigating circumstance.[6]

iii. Standard of Review

Each of Mr. Hitchcock's federal claims requires the Court to interpret or apply federal statutory provisions governing habeas corpus procedures, particularly the summary dismissal provision of Rule 4 of the Rules Governing Section 2254 Cases and the principles of Blackledge v. Allison, 431 U.S. 63 (1977), and/or to reassess independently the application of federal constitutional principles to record facts.

SUMMARY OF THE ARGUMENT

1. Mr. Hitchcock alleged in the district court that he was deprived of an individualized capital sentencing determination, by the failure of his lawyer to investigate and present relevant mitigating evidence. At the core of Mr. Hitchcock's claim is an unavoidable dilemma posed by Florida capital sentencing law at the time of his trial. This dilemma began with Cooper v. State, 336 So.2d 1122, 1139 (Fla. 1976), where the court held that mitigating circumstances were limited to the list enumerated in the capital statute. Two years later, in Lockett v. Ohio, 438 U.S. 586 (1978), the United States Supreme Court said that mitigating circumstances could not be limited to the statutory list. Mr. Hitchcock's trial occurred after Cooper but before Lockett. Mr. Hitchcock alleged, but was not provided the opportunity to prove, that his trial counsel, relying on the law as stated in Cooper, did not investigate or present nonstatutory circumstances. The dilemma is that if counsel's reliance upon Cooper as

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5 "The murder of Cynthia Ann Driggers was committed while the defendant was engaged in the commission of an involuntary sexual battery....[T]he defendant killed Cynthia Ann Driggers for one purpose only, to avoid being arrested after commission of the involuntary sexual battery....The murder was especially heinous, wicked, or cruel" (TR 196-197).

6 "At the time of the murder, defendant was 20 years of age. [This] [c]ircumstance ...is applicable" (TR 197).

limiting mitigating factors is deemed to be reasonable, then the Florida statute was unconstitutional under Lockett; if on the other hand counsel's reliance upon Cooper were deemed unreasonable, then counsel was ineffective in failing to investigate and present the significant, existing nonstatutory mitigating evidence. Under either prong of the dilemma, Mr. Hitchcock was denied the opportunity for an individualized sentencing consideration, and under either prong, Mr. Hitchcock has stated a claim for relief for which summary dismissal was improper.

2. In Mr. Hitchcock's guilt-innocence trial, the jury was instructed that it could find Mr. Hitchcock guilty of first degree murder upon alternative theories: premeditated murder or felony murder. Thereafter, the jury was instructed to return only a general verdict. Critically, however, the state failed to prove beyond a reasonable doubt the essential elements of felony murder, because the historical facts gave equal support to theories of guilt and innocence. Cosby v. Jones, 682 F.2d 1373 (11th Cir. 1982). Accordingly, because "it cannot be determined upon this record that the appellant was not convicted under" the constitutionally unsupported theory, the writ must be granted. Stromberg v. California, 283 U.S. 359 (1931).

3. Prior to Mr. Hitchcock's trial, the court approved the prosecutor's offer to a plea agreement of a life sentence. Mr. Hitchcock declined the offer. After trial, the court sentenced Mr. Hitchcock to death without any stated justification as to the why the harsher penalty was necessary. Because there is nothing in the judge's sentencing order or his findings of fact which would explain why death in the electric chair was the necessary penalty after trial, while life imprisonment was the appropriate penalty prior to trial, see North Carolina v. Pearce, 315 U.S. 711 (1969), it appears that Mr. Hitchcock may have been sentenced to die for asserting his right to jury trial. Because imposition

of death by official act mandates a greater need for reliability than any other punishment, such a possibility is constitutionally unacceptable. Gardner v. Florida, 430 U.S. 349 (1977); United States v. Jackson, 390 U.S. 570 (1968).

4. This case presents a question that is similar in many respects to that currently under consideration by the en banc Court in Spencer v. Zant, 715 F.2d 1562 (11th Cir. 1983), reh.en.banc granted, ___F.2d___ (December 13, 1983). Mr. Hitchcock, like Spencer, alleged that the discriminatory and arbitrary application of the death sentence in Florida, contravenes both the Eighth Amendment proscription against cruel and unusual punishment and the Equal Protection Clause of the Fourteenth Amendment. Like Spencer, Mr. Hitchcock also was denied any opportunity to present the facts in support of his claim -- even though he proffered all of the then available data, moved for discovery and for funds for expert assistance, and filed a specific additional motion for an evidentiary hearing. His data, proffered through several studies of the pattern of application of the death penalty in Florida, demonstrate powerful, consistent discrimination on the basis of race (of the victim and the defendant) and arbitrarines on the basis of geography (where the offense was tried). This data by its strength and the consistency of the results from independent sources, set out a prima facie case of discrimination and arbitrariness in application of the Florida capital sentencing statue and met many, and proposed to meet all, of the major concerns expressed by this Court and its predecessor regarding statistical proof of discrimination. Accordingly, Mr. Hitchcock stated a claim and was entitled to discovery, expert assistance and a hearing. Summary dismissal was, therefore, error.

5. At the time of Mr. Hitchcock's trial, one of the statutory aggravating circumstances was that

> [t]he capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit ... rape ....

Fla.Stat. §921.141(5)(d)(1975). Nearly four years earlier, however, the crime of "rape" in Florida had been repealed, and various crimes defined generally as "sexual battery" had taken its place. While the elements of rape were included within some of the crimes encompassed by sexual battery, there were also crimes of sexual battery which punished acts of sexual misconduct which would not previously have been serious enough to have been punished as rape. Despite these significant changes, the death penalty statute continued to aggravate a homicide conducted in the course of "rape". As a result, by the time of Mr. Hitchcock's trial, there was much uncertainty about whether a crime of sexual misconduct could still serve as an aggravating circumstance at all, and if so, what the elements of such a crime were. Because of this confusion, this aggravating circumstance could have been applied in a haphazard manner in cases which were very similar factually. Accordingly, this circumstance unconstitutionally failed to "genuinely narrow the class of persons eligible for the death penalty," Zant v. Stephens, ___U.S.___, 103 S.Ct., 2733, 2742-43 (1983). Moreover, because there was a statutory mitigating circumstance in Mr. Hitchcock's case, this error cannot be considered harmless; the death sentence cannot stand. Barclay v. Florida, ___U.S.___, 103 S.Ct. 3418 (1983).

6. A system of capital sentencing which includes a requirement, as did Florida's until 1981, that juries be instructed not only upon the offense charged but also upon all lesser-included offenses -- regardless of whether there is an evidentiary basis for such instructions -- interjects into that capital sentencing process constitutionally irrelevant considerations. By this process, jury discretion is unleashed from the constraints of evidence, arbitrarily convicting some defendants of lesser offenses and others of first degree murder with the attendant risk that death sentences will follow. Such a system cannot stand. Hopper v. Evans, 456 U.S. 605 (1982).

7. As reviewed by this Court in Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983), the Supreme Court of Florida, since at least as early as 1975, engaged in the continuing practice of requesting and receiving information concerning capital appellants which was not presented at trial and not a part of the trial record or record on appeal. The details of that practice were fully presented to this Court in Ford and thus will not be reiterated here by Mr. Hitchcock, except to emphasize that it was carried out in secret and involved the gathering of specific information by the court with regard to death sentenced defendants that were then before that court for review of their sentences. These actions of the Florida Supreme Court clearly raise an appearance of impropriety. The practices involved here contravened the fundamental constitutional principle that "justice must satisfy the appearance of justice," Offut v. United States, 348 U.S. 11 (1954), to such an extent that it cannot constitutionally be tolerated, regardless of whether it actually affected the appellate process.

STATEMENT OF JURISIDICTION

This appeal is taken from an order an judgment entered on September 22, 1983 in the United States District Court for the Middle District of Florida, Orlando Division. The District Court granted a certificate of probable cause on October 3, 1983. Jurisdiction of this Court lies pursuant to 28 U.S.C. §2253.

ARGUMENT

I. THE DISTRICT ERRED IN SUMMARILY DISMISSING MR. HITCHCOCK'S CLAIM THAT HE HAD BEEN DENIED A FAIR AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION BY THE PRECLUSION OF EVIDENCE OF NONSTATUTUORY MITIGATING FACTORS AS A RESULT EITHER OF THE OPERATION OF STATE LAW OR THE DENIAL OF EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

A. Introduction: The Erroneous Summary Dismissal and the Dilemma in the Florida Law

Mr. Hitchcock has alleged that he was deprived of an individualized capital sentencing determination, by the failure to investigate, present, or consider relevant mitigating evidence. The cause for this deprivation was either the state

of the Florida law at the time of Mr. Hitchcock's trial which limited the consideration of mitigating factors exclusively to those set out in the statute, or alternatively that Mr. Hitchcock was denied the effective assistance of counsel. Regardless of the cause, it remains that Mr. Hitchcock did not receive what is mandated by the Eighth Amendment -- a reliable, individualized sentencing determination. Mr. Hitchcock offered to prove his claim, through the testimony of defense counsel (counsel's affidavit was proffered in the district court), through the testimony of members of Mr. Hitchcock's family, friends and the testimony of a psychologist. Mr. Hitchcock thus offered to prove a violation of perhaps the most firmly settled capital sentencing guarantee.

This Court need not decide, however, whether Mr. Hitchcock has proven his claim. It need be decided only that Mr. Hitchcock be given the opportunity to prove his claim. This is so because the district court summarily dismissed the claim under Rule 4 of the Rules Governing Section 2254 Cases (R 1183-87). Because Mr. Hitchcock has stated a claim for which relief may be granted and because proof of that claim depends in part upon facts outside the record, summary dismissal under Rule 4 was improper. Blackledge v. Allison, 431 U.S. 63 (1977). It certainly cannot be said that Mr. Hitchcock's allegations "'conclusively show that [he is] entitled to no relief'," id. at 73, or are so "'palpably incredible' ... so 'patently frivolous or false' as to warrant summary dismissal." Id. at 76. Far from it, as will be discussed in the succeeding sections, Mr. Hitchcock's allegations demonstrate strongly that his sentence of death was imposed in violation of the Constitution.

At the core of Mr. Hitchcock's claim is an unavoidable dilemma posed by Florida capital sentencing law at the time of his trial. This dilemma begins with Cooper v. State, 336 So.2d 1122, 1139 (Fla. 1976), where the court held that mitigating circumstances were limited to the list enumerated in the capital statute. Two years later, in Lockett v. Ohio, 438 U.S. 586 (1978), the United States Supreme Court said that mitigating circumstances cannot be limited to the

statutory list. Mr. Hitchcock's trial occurred after Cooper but before Lockett. His trial counsel, relying on the law as stated in Cooper, did not investigate or present nonstatutory circumstances. The dilemma is that if counsel's reliance upon Cooper as limiting mitigating factors is deemed to be reasonable, then the Florida statute was unconstitutional under Lockett; if on the other hand counsel's reliance upon Cooper were deemed unreasonable, then counsel was ineffective in failing to investigate and present the significant, existing nonstatutory mitigating evidence. Under either prong of the dilemma, Mr. Hitchcock was denied the opportunity for an individualized sentencing consideration, and under either prong, Mr. Hitchcock has stated a claim for relief for which summary dismissal was improper. As shall be discussed in the following sections, the dilemma was real and cannot be avoided. Florida cannot have it both ways, for the result is the same: Mr. Hitchcock was denied what the constitution demands.

B. The Cooper/Lockett Prong of the Dilemma

Perhaps the most firmly settled and closely enforced eighth amendment mandate applicable to capital sentencing is that the process for determining the appropriate punishment be individualized. Today it is clear that this mandate means that there can be no restriction, either expressly by statute, Lockett v. Ohio, supra, or as applied in a particular case, Eddings v. Oklahoma, 455 U.S. 104 (1982); Green v. Georgia, 442 U.S. 95 (1979), upon the consideration of mitigating factors by judge or jury. The settled nature of this mandate places its critical importance beyond question for it is at the heart of that which is required of the capital sentencing process. See Stanley v. Zant, 697 F.2d 955, 960 n. 3 (11th Cir. 1983). [7]

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[7] See generally, Hertz and Weisenberg, In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consideration of Mitigating Circumstances, 69 CALIF. L. REV. 317, 326, 332 (1981).

Mr. Hitchcock has alleged and will here show the basis for his claim that the statute in effect at the time of his trial could reasonably be read, and was being reasonably read, as precluding nonstatutory mitigating circumstances in a manner identical to that considered in Lockett, and that this unconstitutional application did actualize in his case: his counsel did in fact rely on Cooper and as a result substantial mitigating evidence was never investigated, developed or presented. Mr. Hitchcock will thus show that he has stated a claim.

1. The Florida Statute, Post-Cooper but Pre-Songer, was Capable of and was Reasonably Being Construed in a Manner Violative of Lockett

The question presented by Mr. Hitchcock requires examination of the history of Florida capital sentencing law. This history falls into three distinct periods: (1) from the enactment of the post-Furman statute until the decision in Cooper v. State, during which the Florida courts interpreted and applied the mitigating circumstances provision of the statute in a manner which was ambiguous, but which appeared to limit the sentencer to the statutory list of mitigating circumstances; (2) from the Cooper decision in 1976 to the decision in Songer v. State in 1978, when there can be no doubt but that the statutory list was deemed exclusive (Mr. Hitchcock's trial occurred during this period); (3) from the decision in Songer to the present, when the courts applied the mitigating circumstances provision in a nonexclusive manner, as required by Lockett.

The starting point is the statutory language itself. The modern Florida death penalty statute was enacted in 1972, in the wake of Furman v. Georgia. Three separate provisions of the statute appeared on their face to limit consideration of mitigating factors to only those expressly set out in the statute. Section 921.141(2), Florida Statutes (1975) directed that the jury consider:

> (a) whether sufficient aggravating circumstances exist as enumerated in subsection (6);
>
> (b) whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist; and
>
> (c) based on these considerations, whether defendant should be sentenced to life or death.

(emphasis added). The same direction was given to the judge in Section 921.141(3) to consider mitigating circumstances "as enumerated in subsection (7)" and to make written findings "based upon the circumstances in subsections (6) and (7)." Subsection 921.141(6) [referred to as subsection (7), above] states that mitigating circumstances "shall be the following: [list of specific factors]." Accordingly, from a plain reading of the statute, it appears that consideration of mitigating factors by judge and jury was limited to only those specifically set out in the statute.

In the years following the statute's enactment, the Florida Supreme Court indicated repeatedly that the mitigating circumstances provision was exclusive. At times the court's construction was implicit in its decisions, e.g., Alford v. State, 307 So.2d 433, 444 (Fla. 1975), and at other times it was explicit, approving in one case the decision of a sentencing judge who considered only the mitigating circumstances "itemized" in the statute. See Henry v. State, 328 So.2d 430, 431-32 (Fla.), cert denied, 429 U.S. 951 (1976).

In State v. Dixon, 283 So.2d 1 (Fla. 1973), for example, the landmark decision interpreting the statute, the court's emphasis was on the consideration of statutory mitigating factors. The opinion refers frequently to "the" mitigating circumstances and includes in such references only the statutorily enumerated circumstances and specifically refers to "the mitigating circumstances provided in Fla.Stat. 921.141 (7), F.S.A." in describing the weighing process. Id. at 9. In dissent Justice Ervin's opinion also specifically acknowledges the limitation on consideration of mitigating circumstances contained in the statute. Id. at 17.

In 1976, the Supreme Court in Proffitt v. Florida, 428 U.S. 242 (1976), examined the facial validity of the Florida statute and concluded that it satisfied eighth amendment requirements by guiding the discretion of the sentencing authorities through its provisions for balancing aggravating and mitiga-

ting circumstances. In the course of reviewing the statute, the Court suggested that the mitigating circumstances provision of the statute was open-ended, 428 U.S. at 250 n. 8, curiously ignoring state case law to the contrary. It may have been that the Supreme Court was sending the Florida courts a message: For your statute to be constitutional, it must be open-ended.

If that be the Proffitt Court's message, it was not received in Florida. One week after Proffitt was announced, the Florida Supreme Court, in Cooper v. State, explicitly declared that the Florida statute did indeed restrict mitigating factors to those set forth in the statute. 336 So.2d 1133, 1139 & n. 7 (Fla. 1976), cert denied 431 U.S. 925 (1977). Cooper had proffered among other factors his stable employment history as a mitigating circumstance relevant to his character. The sentencing judge, however, prohibited the introduction of such testimony into evidence at the penalty trial. The Florida Supreme Court held that the trial judge properly precluded the presentation and consideration of the proffered mitigating evidence. The opinion emphasized that the "sole issue" in a penalty trial under the statute is "to examine in each case the itemized aggravating and mitigating circumstances." Id. at 1139 (emphasis added). The court reasoned that allowing nonstatutory mitigating factors to be presented and considered would make the statute unconstitutional, as it would "threaten[] the proceeding with the undisciplined discretion condemned in Furman v. Georgia, 408 U.S. 238 (1972)" Id. The court pointed to and emphasized the statutory limit on consideration of mitigating circumstances -- those "as enumerated in subsection (7)," -- as showing the intent to avoid such arbitrariness. Id. at n. 7 (emphasis in original). The court underscored that these were words of "mandatory limitation", id., thus leaving no doubt as to its interpretation of the statute. With regard to the specific nonstatutory mitigating factor before the Court, it commented that "employment is not a guarantee that one will be law-abiding", and then expressed its specific holding:

> In any event, the Legislature chose to list the mitigating circumstances which it judged to be reliable for determining the appropriateness of a death penalty ... and we are not free to expand that list.

Id. A plain and fair reading of the opinion in Cooper was thus that consideration and presentation of mitigating factors was strictly limited to only those specifically set out in the statute.

In the two years following the Cooper decision, the Florida Supreme Court adhered to its construction of the mitigating circumstances provision as exclusive. See, e.g., Gibson v. State, 351 So.2d 948, 951 & n. 6 (Fla. 1977); Barclay v. State, 343 So.2d 1266, 1270-71 (Fla. 1977). More importantly, Cooper was the law when Mr. Hitchcock's case was tried and it was the law that guided the various actors in his case, including his defense counsel and the sentencing judge. It was not until almost two years later that the clarifying decision in Lockett was announced.

Lockett, announced in June, 1978, held that a death penalty scheme must not prevent the sentencer from "considering any aspect of the defendant's character and record or any circumstances of his offense as an independent mitigating factor", 438 U.S. at 607, even if such factor not be enumerated on the statutory list. In December, 1978, without saying that it was responding to Lockett, the Florida Supreme Court in Songer v. State, 365 So.2d 696, 700 (Fla. 1978) (opinion on rehearing) abruptly reversed its position in Cooper and repudiated its earlier construction of the statute. Songer had argued that the court's earlier decision in Cooper had stated explicitly that mitigating circumstances were limited to the factors enumerated in the statute and thus that the statute violated Lockett. However, the court explained that its earlier decision in Cooper should not be read as limiting mitigating circumstances but merely as affirming the trial judge's customary right to exclude irrelevant evidence. Id. The court then explicitly construed the mitigating circumstances provision as

nonexclusive, and explained that the language of the statute reflected a legislative intent to permit the sentencer to consider any mitigating circumstances proffered by the defendant.[8]

Thus, Florida law has evolved through three stages. From Furman to Cooper, the statutory list seemed to be exclusive but it was not clear. From Cooper to Songer, the period during which Mr. Hitchcock's trial occurred, the list clearly was exclusive. From Songer to the present, the Florida Supreme Court assures us that the statutory list was never exclusive. Though the accuracy of that Songer assurance could be subject to considerable question,[9] it

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[8] Several months after the Songer decision, the Florida legislature amended the statute and deleted the language upon which the Cooper court had relied in concluding that mitigating circumstances were restricted to the factors identified in the statute. 1979 Fla. Law ch. 79-353. The Cooper court had based its conclusions about legislative intent on the statutory language specifying that the sentencer must consider mitigating circumstances "as enumerated". Accordingly, the amendments demonstrated a then new legisltive intent to provide that mitigating circumstances were not restricted to the statutory factors.

[9] It could be argued that in Songer the Florida Supreme Court re-wrote Cooper in order to evade the mandate of Lockett. Though a state court decision resting on adequate and independent state grounds cannot be reviewed in federal court even though it also involves a federal claim, a special exception to this doctrine exists for state court decisions so lacking in "fair and substantial support" in state law as to be subterfuges or pretexts for evading a federal claim. See Mullaney v. Wilbur, 421 U.S. 684, 691 n. 11 (1975); Radio Station WOW v. Johnson, 326 U.S. 120, 129 (1945). The Songer case falls within this exception. The Songer court based its conclusions about the mitigating circumstances standard employed in earlier cases on a review of seven of its earlier decisions. Citing these decisions, the court explained that it had repeatedly approved a trial court's consideration of mitigating circumstances not included in the statutory list. 365 So.2d at 700. The district court based its disposition of this issue in part on the cases cited in Songer. (R 1186). The cases cited in Songer, however, contradict the court's conclusion. See Hertz and Weisenberg, supra. In each of the decisions cited in the Songer opinion, the mitigating circumstances that the trial judge and jury had considered were factors enumerated in the statute. The possibility of considering nonstatutory mitigating factors was never mentioned in six of the seven decisions cited in Songer. In the seventh, Washington v. State, 362 So.2d 658 (Fla. 1978) the Florida Supreme Court rejected the defendant's claim that a nonstatutory factor had not been considered and noted that "while we do not foreclose consideration of such factors in mitigation in an appropriate case, we do not believe the appellant's actions are compelling here". Id. at 67. Thus, the Washington decision did not "approve ... a trial judge's consideration of circumstances in mitigation which are not included in the statutory list". Songer, 365 So.2d at 700. At most, the Washington decision reserved the question for a future time. The "authority" cited by Songer must be compared to the very clear opinion in Cooper. Any fair reading of Cooper reveals that it construed the mitigating circumstances listed in the statute as exclusive. The language in the Cooper opinion -- "mandatory limitation", "we are not

is unnecessary to do so for present purposes, for all that is relevant to the present claim is that Florida law before Songer could be reasonably read to limit mitigating factors to only those in the statute. And that Cooper could reasonably be so read, seems beyond question.

On two occasions this Court has noted that Cooper clearly held that the mitigating circumstances were limited to those in the statute. In Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982) the court explicitly noted that Cooper held that mitigating circumstances were limited to those in the statute, id. at 1238 n. 19, and further noted that the seminal case concerning the Florida statute, State v. Dixon, 283 So.2d 1 (Fla. 1973) also lent support to an interpretation that the mitigating circumstances were limited to those in the statute, 685 F.2d at 1248 n. 30. In Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983) (en banc) this Court again stated that Cooper specifically held that the mitigating circumstances were limited to those in the statute, and that Lockett was "a direct reversal of this view...." Id. at 812. During the period of time when this trial took place (between the Cooper and Lockett decisions), therefore, there was a fatal ambiguity, at the very least, concerning the admissibility of mitigating evidence outside the statutory list. The Florida Supreme Court has itself recognized the ambiguity in the Florida statute and the widespread belief among lawyers and judges that the mitigating circumstances were limited to those in the statute. Perry v. State, 395 So.2d 170, 174 (Fla. 1981); Jacobs v. State, 396 So.2d 713, 718 (Fla. 1981). In Muhammad v. State, 426 So.2d 533 1983), the Florida Court held that counsel could not be "expected to predict the decision in

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free to expand the list [of legislatively proscribed mitigating factors]" —requires no guesswork to understand its meaning. When such a comparison is made, there can be no question that Songer is so lacking in "fair and substantial" support in state law as to be a subterfuge for evading the rules of Lockett.

Lockett v. Ohio, 438 U.S. 586 (1978)" in regard to nonstatutory mitigating circumstances. This is an implicit recognition that the Florida statute limited the consideration of mitigating circumstances prior to Lockett.

Accordingly, Mr. Hitchcock was tried during the period of time in Florida's capital sentencing law, when it was reasonable for counsel, as well as courts, to interpret that law as explicitly limiting the consideration of mitigating factors to only those set out in the statute. That this unconstitutional interpretation actually worked to Mr. Hitchcock's grave prejudice is the basis of his claim.

2. The Restriction on Mitigation in the Florida Law Actualized in Mr. Hitchcock's Case

It is evident that in the post-Cooper/pre-Lockett period during which Mr. Hitchcock was tried, the Florida law was at best ambiguous, and was quite reasonably construed by the bench and bar as narrowly restricting the evidence in mitigation that could be considered. Such a restriction is unconstitutional under Lockett. While a criminal statute that was so readily susceptible to an unconstitutional application could, by its ambiguity, be found for that reason alone to be constitutionally infirm;[10] it is unnecessary to decide that question here because that potential for unconstitutional application actualized in Mr. Hitchcock's case.

The ambiguity with which Cooper infected the statute resulted in denial to Mr. Hitchcock of the individualized sentencing required by Lockett. The statute's ambiguity prejudiced this case in two general respects. First, the Cooper

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[10] It is the general rule that any ambiguity as to whether a judgment rests upon a constitutionally unsound footing requires reversal. See, e.g., Shuttlesworth v. City of Birmingham, 382 U.S. 87, 91-92 (1965). But that rule applies with added force in death cases, because it would be manifestly intolerable for a human life to be taken if there is any ambiguity as to whether constitutional requirements for capital sentencing have been observed: "In death cases, doubts ... should be resolved in favor of the accused." Andres v. United States, 333 U.S. 740, 752 (1948). As Justice O'Connor stated in Eddings v. Oklahoma, supra:

> ...we may not speculate as to whether the [state courts] actually considered all of the mitigating factors. Woodson and Lockett require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court.

455 U.S. at 118 (emphasis supplied) (O'Connor, J., concurring).

limitation pervaded every part of this case with counsel's investigation and preparation. Secondly, the Cooper limitations resulted in dramatic nonstatutory mitigating evidence not being developed by counsel and not being presented to the sentencer.

a. Cooper as Understood by Defense Counsel

Mr. Hitchcock has alleged and seeks to prove that his trial counsel did not investigate or present nonstatutory mitigating evidence because he reasonably believed that the statute, as construed in Cooper, prevented him from doing so. In this respect, this case is strikingly similar to Fair v. Zant, 715 F.2d 1519 (11th Cir. 1983). In Fair, Georgia case law had provided that defendants had an absolute right to withdraw guilty pleas at any time prior to filing of sentence. "In accordance with these precedents, Fair's counsel advised him that Georgia law permitted him to withdraw" such a plea; the trial judge also stated that a plea could be withdrawn under such circumstances. Fair entered a plea but was subsequently not allowed to withdraw it. The Georgia Supreme Court held that its guilty plea rules did not apply to death cases. This Court affirmed the district court's grant of habeas corpus relief, finding that the trial judge's statement to Fair vitiated the voluntariness of the plea.

As in Fair, Mr. Hitchcock's counsel planned his case "in accordance with [the] precedents" in Florida, the pivotal one being Cooper. The available evidence of relevant nonstatutory mitigating circumstances was not investigated or presented at Mr. Hitchcock's sentencing trial because of defense counsel's reasonable belief that the Florida death penalty statute limited the sentencer's consideration of mitigating circumstances to those enumerated in the statute.

To prove his claim, Mr. Hitchcock sought an evidentiary hearing and proffered the affidavit of his trial counsel in which he recalls his thinking during the conduct of Mr. Hitchcock's case (R 870-871). The summary dismissal by the district court, however, precluded a development of the facts and denied him the opportunity to prove his allegations. Such a dismissal is particularly inappro-

priate where the claim depends upon facts outside the record. Blackledge v. Allison, supra. Mr. Hitchcock has shown the ambiguous nature of Florida law at the time of his trial, and that such ambiguity could lead reasonably to the belief that consideration of mitigating factors was limited strictly to the statutory factors. Mr. Hitchcock seeks now only to prove that such an unconstitutional limitation actually invaded his case to deny him a fair and individualized sentencing hearing.

There was no evidentiary hearing in the state courts and thus there has been no factual development of the claim. The material facts "were not adequately developed", and there was no "full and fair evidentiary hearing in state court." Townsend v. Sain, 372 U.S. 293 (1963). See also Thomas v. Zant, 697 F.2d 977 (11th Cir. 1983). The Florida Supreme Court's rulings are unclear on this claim. On direct appeal Mr. Hitchcock challenged the Florida statute, the jury instructions, and the judge's sentencing order as being in violation of Lockett. In rejecting this constitutional claim the Florida Supreme Court included the following statement in its opinion: "There is nothing in the record indicating that the trial judge limited the defense's presentation. Rather it appears that the defense itself chose to limit that presentation." 413 So.2d at 748. The court therefore recognized that the presentation of mitigating evidence had been limited by the defense counsel. When on post-conviction, however, Mr. Hitchcock sought to prove the reason for that restriction (through matters outside the record), and further alleged that that reason was unconstitutional, the Florida Supreme Court refused to allow him any opportunity to prove his allegations, reasoning instead that Mr. Hitchcock's claim "boils down to merely another

Lockett challenge." 432 So.2d at 43 n. 2. The court thus ruled on the question without ever having the facts before it. The question thus could not have been fairly decided in state court. See Thomas v. Zant, supra.[11]

A hearing is required precisely because there is not an adequate record upon which to decide the serious constitutional question presented. Mr. Hitchcock's claim is based on facts outside the record. Mr. Hitchcock alleges (supported by proffered affidavit) that trial counsel did believe he was restricted to the statutory mitigating factors, that he did therefore forego investigation and presentation of evidence which was available and which could have been presented had counsel not felt constrained by the statute. When, as in this case, the claim is based upon omissions of counsel, then the salient evidence will not be in the record. Proof of prejudice will be absent precisely because counsel acted as Mr. Hitchcock alleges. When the factual disputes "relate primarily to purported occurrences outside the courtroom and upon which the record could, therefore, cast little light", a hearing must be held. Machibroda v. United States, 368 U.S. 487, 494-95 (1962). When counsel fails to conduct an investigation, the record will seldom indicate which witnesses he could have called or why he did not call them. The evil is in what counsel refrains from doing. The only evidence in the record which could support a finding that counsel did not believe his presentation of mitigating evidence was limited to statutory mitigating circumstances is the fact that counsel presented some testimony (by his brother) briefly describing Mr. Hitchcock's growing up in a family with seven children, where the parents picked cotton and the father died of cancer when Mr. Hitchcock was seven years old (TAS 8-9). The remainder of the only mitigating witness' testimony concerned the statutory "psychological" mitigating circumstances (id., 7-8). Even these minute references to Mr. Hitchcock's early life, however, were

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[11] As emphasized also in Thomas, the lack of clarity -- as to either the facts or the law applied -- in the Florida Supreme Court's decision itself requires further factual development in the district court. See also Green v. Zant, 715 F.2d 551 (11th Cir. 1983).

presented very narrowly, without any of the facts about the extreme poverty experienced by the Hitchcock family or of the extraordinary emotional toll taken on Mr. Hitchcock by these two narrowly-demonstrated biographical facts. Moreover, counsel did not argue these -- or the mitigating factors concerning Mr. Hitchcock's non-violent character which had been presented as relevant to the question of guilt in the guilt phase of the trial (T 737, 739, 744, 747, 749) -- during the penalty phase arguments. Counsel simply reminded the jury of these facts for "whatever purposes you may deem appropriate." (TAS 14). Instead, counsel argued only the statutory mitigating factors as mitigating against death (id., 21-25). Thus, to the extent that the "record as a whole" addresses this issue at all, the record is wholly inconclusive. Moreover, to the extent that it supports any finding as to this issue at all, it tends to support the facts as asserted by Mr. Hitchcock -- that counsel operated under the belief that his presentation and argument of mitigating circumstances had to be confined to the statutory factors. Where the record is thus "carefully scrutinize[d]" with the "exacting" attention required by the Supreme Court, Townsend, 372 U.S. at 316, the record unquestionably does not fairly support any finding from the record on this claim. Compare, Thomas v. Estelle, 582 F.2d 993, 942 (5th Cir. 1978).

Mr. Hitchcock contends that his trial counsel's actions were predicated upon his understanding of the Cooper limitation. As the foregoing discussion demonstrates, Mr. Hitchcock did not receive a "full and fair evidentiary hearing in state court." Townsend, 372 U.S. at 312. This Court has observed:

> When legal problems are presented which are not easily resolved even on the basis of clearly established facts, an evidentiary hearing is an a fortiori proposition if the state record is deficient in critical areas. There is no need here to make the task more difficult by struggling with a self-imposed blackout of relevant matters.

Thomas v. Zant, 697 F.2d at 987, quoting, McNair v. New Jersey, 492 F.2d 1307, 1309 (3d Cir. 1974). Summary dismissal was therefore improper.

b. The Nonstatutory Mitigating Evidence Not Presented.

Trial counsel reasonably believed that he could not present evidence unrelated to the statutory mitigating circumstances. Accordingly, he did not investigate the availability of such evidence on behalf of Mr. Hitchcock. As proffered in the district court, had such investigation been undertaken, counsel would have discovered at least the following evidence of nonstatutory mitigating factors.

First, psychological testing and evaluation of Mr. Hitchcock would have supported the mitigating factor of uncertainty about guilt -- lingering, genuine doubt about guilt which may not rise to reasonable doubt but which can, nonetheless, be a critical factor in mitigation. See Green v. Georgia, 442 U.S. 95 (1979); Smith v. Balkcom, 660 F.2d 573, 580-581 (5th Cir. 1981) (Unit B). Psychological evaluation would have shown that when faced with stressful situations, throughout his life beginning with his early childhood, Mr. Hitchcock's pattern of coping was to retreat and escape. Such a strongly entrenched coping mechanism would likely have pushed him to run, upon his sexual experience with Ms. Driggers becoming stressful (either by her threat to tell her mother or by Richard's discovery of what was going on). To turn upon Ms. Driggers instead and to kill her would have been totally incongruent with his lifelong pattern of behavior. [Testimony available from Dr. Elizabeth A. McMahon, clinical psychologist.] Thus, Mr. Hitchcock's psychological history and profile would have corroborated any lingering doubt about his guilt.

Secondly, testimony concerning the extra-ordinary hardships of Mr. Hitchcock's childhood and teenage years and the character traits he developed during these years, coupled with psychological evaluation concerning his strong capacity for living a lawful, productive life despite such horrible beginnings, would have supported the mitigating factor of Mr. Hitchcock's excellent potential for rehabilitation. See Simmons v. State, 419 So.2d 316, 320 (Fla. 1982). Mr. Hitchcock's childhood and teenage years were a nightmarish reality of poverty,

grief, emotional neglect, and uprootedness. Mr. Hitchcock was a member of a nine-person family whose only source of income was derived from the four-to-five month long cotton season in Arkansas, during which as many of the family members worked in the cotton fields as possible. When Mr. Hitchcock was seven years old, his father died of cancer, and the family's meager income was diminished significantly without his labor. During the seven or eight months when cotton was out of season, the family's sole source of income after his death was the children's $75.00 per month social security survivors' income. During all of his formative years, Mr. Hitchcock's family lived in farm tenant housing which was very small and without indoor plumbing. Food was frequently in scarce supply, and only occasional rabbits and the federal surplus commodity food program kept the family from starvation. Most of the children in Mr. Hitchcock's family wore clothing made from flour sacks. The death of Mr. Hitchcock's father brought other misery as well. Mr. Hitchcock had loved his father deeply, and he had a more difficult time rebounding from the loss of his father than did the other children. The father has also played the critical role of keeping the family together and building the love relationships within the family, and with his death the family literally disintegrated. Ernie had a growing feeling that he no longer belonged and when his mother remarried five years after his father's death (when Ernie was 12 years old), he stayed only one more year. During that year, he saw his stepfather become an acute alcoholic and witnessed an increasing barrage of physical and emotional abuse heaped upon his mother by his stepfather. Finally, at 13, he left. He became a thirteen year old adult, drifting from relative to relative, unable to set roots or experience the feeling of being welcome anywhere. The meager home he had known had squeezed him out, and no one took him in. [Testimony available from Deputy Sheriff Lee Baker, Mississippi County Arkansas; Loraine Galloway (Mr. Hitchcock's mother) Betty Augustine (sister); James Harold Hitchcock (brother); Martha Galloway (sister); Carroll Galloway (brother-in-law); and Brenda Reed (sister).]

Despite the harshest of the environments in which a child could grow into adolescence, Mr. Hitchcock developed and never lost solid character traits which all who knew him witnessed and admired. He always worked hard without complaining, often working ten hour days in the cotton fields well before his tenth birthday. He tried to pick up odd jobs to earn extra money, which he then shared with his family and with siblings' families. He got along well with other children. He was respectful toward adults. He tried his best to help his mother with daily chores after his father died. He helped other family members, once spending nearly six weeks in the household of his brother James Harold, performing household and child care duties while James' wife Fay recuperated from surgery. He saved his uncle, Charles Hitchcock, from drowning. While he worked as a fruit picker in Florida, he was always willing to help others fill their bins after his was full. He was a person who won respect and affection of others because of who he was.

These traits, strengthened by surviving despite the harshness of Mr. Hitchcock's environment, make Mr. Hitchcock an excellent candidate for rehabilitation. Mr. Hitchcock proffered below the findings of psychologist Elizabeth McMahon:

> James does not, in many respects, fit the more typical picture of those who commit violent acts against other individuals.... He does not evidence the same degree of immaturity, of strong drives toward immediate gratification, of impulsive acting out of emotions, or of hostility and aggression.... If James' sentence were commuted and he were to be in 'population', there is every reason to believe that not only would he function well but he would be a positive influence.... [H]e is bright, articulate, capable of insight....

Dr. McMahon's evaluation would have been available in 1977 as well as in 1983 had counsel sought it, for the traits observed by Dr. McMahon have been a part of Mr. Hitchcock all his life.

Accordingly, significant, powerful evidence of nonstatutory mitigating circumstances was not presented and not considered in deciding whether Mr. Hitchcock should live or die. The "unacceptable risk" identified in Lockett that the death sentence was imposed "in spite of factors which may call for a less severe penalty", 438 U.S. at 605, came to pass in Mr. Hithcock's case.

3. Ineffective Assistance Imposed By the State

The Cooper limitation did more than violate Lockett. The limitation also implicated the right to effective assistance of counsel: the operation of the statute operated to restrict the consideration of mitigating factors and thus inhibited counsel's performance through state action. Denials of effective assistance of counsel due to operation of state law have been found in a variety of situations where counsel was constrained in representing his client. See, e.g. Brooks v. Tennessee, 406 U.S. 605 (1972); Geders v. United States, 425 U.S. 80 (1976) Glasser v. United States, 315 U.S. 60 (1942); cf. United States v. DeCoster, 624 F.2d 196, 201 (D.C.Cir. 1979); Valle v. State, 394 So.2d 1004 (Fla. 1981). Accordingly, though counsel may be competent, the operation of law may deny the defendant his right to the effective assistance of counsel.

Because it was the court's action, in publishing Cooper and in allowing it to remain intact for two years, that caused counsel to be ineffective, Mr. Hitchcock need not make a showing of prejudice. Specific cases of ineffective assistance and prejudice fall along a continuum based, in part, upon the degree to which the state is responsible for the resulting deficiencies of defense counsel and calibrated to the degree of prejudice which must be shown before a new sentencing is mandated. On one pole are cases where a state procedure places a disability upon counsel that pervades his entire conduct of the defense. Cases at this extreme of the spectrum include Geders v. United States, 425 U.S. 80 (1976) (defense counsel not permitted to confer with client during overnight mid-trial recess); Herring v. New York, 422 U.S. 853 (1975) (statute barred final summation by defense counsel); Glasser v. United States, 315 U.S. 60 (1942)

(defendants with conflicting interests); Powell v. Alabama, 287 U.S. 45 (1932) (counsel denied adequate opportunity to confer with defendants and to prepare for trial).

In these cases, defense counsel was appointed but prevented by agents of the state or by operation of state law from discharging functions vital to effective representation of the clients. The state-created procedures in these cases were what impaired the accused's counsel from fully assisting and representing him. Because these impediments "constitute direct state interference with the exercise of a fundamental right, and because they are susceptible to easy correction by prophylactic rules, a categorical approach is appropriate." United States v. Decoster, 624 F.2d 196, 201 (D.C. Cir. 1976) (en banc). Reversal in such cases is required, without need of showing prejudice, for the reasons discussed in Holloway v. Arkansas, 435 U.S. 475, 490-91 (1978).

The issue raised by Mr. Hitchcock is similar to a claim of ineffectiveness of counsel caused by a conflict of interest, because in both "counsel suffered under a disability... that subtly pervaded his entire conduct of the defense." Stanley v. Zant, 697 F.2d at 962. This court has observed that its "conflict of interest cases may be contrasted with the approach we take in analyzing cases such as Washington v. Strickland and Stanley v. Zant, in which criminal defendants assert on appeal that counsel's actual performance was inadequate, that specific acts or omissions of his attorney rendered his representation ineffective." United States v. Mers, 701 F.2d 1321, 1326 n. 1 (11th Cir. 1983). The Court noted the distinction between "extrinsic" pressures interfering with counsel's representation, such as impermissible external pressures exerted on counsel, and "intrinsic" ineffectiveness such as failure to present defendant's only plausible line of defense. Id.

Commentators have argued that claims involving "extrinsic" ineffectiveness, such as external pressures or conflict of interest, are more easily confronted by the courts than any other claims. Such claims "deal largely with some discern-

able fact that involves no real possibility of a conscious exercise of attorney judgment that might be labeled a tactical decision. These claims are also generally devoid of the court-feared possibility that a defendant and the defense attorney are colluding to raise such a claim." Stratzella, Ineffective Assistance of Counsel Claims: New Uses, New Problems, 19 ARIZ. L. REV. 443, 458 (1977). This is so, in part, because "the conclusion of ineffectiveness or effectiveness is easily drawn once a certain and definable fact is either established or not established ... what remains for decision is a factual determination not unlike those frequently confronted by the courts in a host of other contexts: was there a coercive atmosphere inhibiting counsel's representation?" Id.

As discussed in the preceeding sections, the denial of individualized sentencing occurred in this case. Counsel made no attempt to investigate and present nonstatutory mitigating evidence. This failure was not based upon any tactical or strategic decision upon counsel's part. It was based instead on counsel's reasonable belief that he was limited to the statutory mitigating circumstances. At the time of his trial, Cooper was the law of the state, the most recent pronouncement on the question, from the state's highest court. It cannot be questioned that Cooper could reasonably be read to prohibit presentation of nonenumerated factors. Counsel's reasonable reliance upon Cooper implicated the statute in a denial of effective assistance of counsel.

C. The Ineffective Assistance of Counsel Prong of the Dilemma.

Should the court reject Mr. Hitchcock's Cooper/Lockett claim, then it must resolve a rather difficult, though analytically more traditional, ineffective assistance issue. If the Songer court's reading of Cooper is correct, then defense counsel in Mr. Hitchcock's case either grossly miscomprehended the law or failed to present the one plausible defense to the death sentence. Therefore, if Cooper were not seen as reasonably influencing counsel's performance, then the Sixth Amendment right to effective counsel was denied. It is an alternative

question that must be reached only if it is determined that the influence of Cooper and the operation of the statute was not unconstitutional. And if it were so determined then the denial of effective assistance of counsel would be established of necessity because there would be no other reasonable explanation for failing to investigate and present the significant, existing mitigating evidence.

There are certain fundamental responsibilites that constitutionally effective counsel must fulfill. First, since "'investigation and preparation are the keys to effective representation' ... counsel have a duty to interview potential witnesses and 'make an independent examination of the facts, circumstances, pleadings and laws involved.'" Rummel v. Estelle, 590 F.2d 103, 104 (5th Cir. 1979). Without careful preparation and independent investigation, the lawyer cannot fulfill the advocate's role, since he is in no position to make an "[i]nformed evaluation of potential defenses to criminal charges" or to engage in a "meaningful discussion with one's client of the realities of his case." Gaines v. Hopper, 575 F.2d 1147, 1149-1150 (5th Cir. 1978). "Any experienced trial lawyer knows that a purported trial without adequate preparation amounts to no trial at all." Brooks v. Texas, 381 F.2d 619, 624 (5th Cir. 1967). See Baty v. Balkcom, 661 F.2d 391, 394-395 (5th Cir. 1981). Because of the critical nature of the sentencing determination "'[i]t is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and to a degree of guilt or penalty.'" Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979); vacated as moot, 446 U.S. 903 (1980)(emphasis added). See also Mempa v. Rhay, 389 U.S. 128, 135 (1967).

In the context of a capital sentencing proceeding, the need for an independent investigation derives from the unique nature and purpose of the sentencing stage in capital trials. Counsel's independent investigation of evidence in mitigation of punishment is not merely indispensable to the trial of state-law issues of life or death; it is a constitutional imperative since the "fundamental

respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as constitutionally indispensable part of the process of inflicting the penalty of death." Woodson v. North Carolina, supra, 428 U.S. at 304; accord, Eddings v. Oklahoma supra. Investigation by counsel therefore ensures that the basic function of a constitutional capital sentencing scheme -- an inquiry into the particular circumstances of the offense and the character of the individual offender -- is fulfilled and that there is a reliable, informed consideration "on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." Jurek v. Texas, 428 U.S. 262, 271 (1976). See also Proffitt v. Florida, 428 U.S. 153, 189-190 (1976). The Sixth Amendment right to counsel is "constitutionally guaranteed to protect a fair trial and the reliability of the truth determining process." Schneckloth v. Bustamonte, 412 U.S. 218, 236 (1973). And "[b]ecause of [the] qualitative difference [between death and lesser penalties], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, supra, 428 U.S. at 305. In the present case, counsel did not adequately investigate the only area of defense available to Mr. Hitchcock: the nonstatutory mitigating factors of Mr. Hitchcock's potential for rehabilitation and good character. See Washington v. Strickland, 693 F.2d 1243, 1252 (5th Cir. 1982) (en banc). Accordingly, the failure to investigate and present the significant, available evidence in mitigation, as alleged above, would deny the effective assistance of counsel either through operation of state law or through omissions of counsel. The Sixth, Eighth, and Fourteenth amendments would mandate that a full, new penalty trial be held.

D. Conclusion

The core fact of this case is that Mr. Hitchcock did not receive an individualized sentencing proceeding. The question is why. Lockett was violated either because at the time of trial the Florida death penalty statute prohibited the introduction and consideration of nonstatutory mitigating evidence or because his trial counsel ineffectively believed that the law operated in such a manner at the time of trial. In either event, trial counsel believed that the Florida death penalty statute flatly prohibited the introduction and consideration of nonstatutory mitigating circumstances, with the result that Mr. Hitchcock was denied precisely what the Constitution demands. Mr. Hitchcock has stated a claim for relief under either theory. Summary dismissal under Rule 4 was improper. This cause must be remanded to the district court.

II. MR. HITCHCOCK'S CONVICTION CANNOT BE SUSTAINED UNDER THE DUE PROCESS CLAUSE WHERE HE WAS CONVICTED ON THE BASIS OF A GENERAL VERDICT WHICH DID NOT RULE OUT THE JURY'S RELIANCE UPON A THEORY OF FELONY MURDER FOR WHICH THE EVIDENCE WAS CONSTITUTIONALLY INSUFFICIENT.

In Mr. Hitchcock's guilt-innocence trial, the jury was instructed that it could find Mr. Hitchcock guilty of first degree murder upon alternative theories: premeditated murder or felony murder. Thereafter, the jury was instructed to return only a general verdict. Critically, however, the state failed to prove beyond a reasonable doubt the essential elements of felony murder. Accordingly, because "it cannot be determined upon this record that the appellant was not convicted under" the constitutionally unsupported theory, the writ must be granted. Stromberg v. California, 283 U.S. 359 (1931).

Beginning with its decision in Stromberg, the Supreme Court has consistently held that if a defendant is convicted upon a general verdict after a jury has been instructed on several theories of guilt, one of which is held to be invalid, retrial is required. In Stromberg, the defendant was convicted under a statute

which contained three clauses, one of which was invalid. Even though the conviction could have rested solely upon one of the valid clauses, the Court reversed the defendant's conviction because

> [t]he verdict against the appellant was a general one. It did not specify the ground upon which it rested. As there were three purposes set forth in the statute, and the jury was instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses, which the state court has held to be separable, was invalid, it cannot be determined on this record that the appellant was not convicted under that clause.

283 U.S.at 367-368.

The principle of Stromberg has been consistently adhered to by the Supreme Court to the present. Williams v. North Carolina, 317 U.S. 287, 291-92 (1942); Thomas v. Collins, 323 U.S. 516, 528-29 (1945); Cramer v. United States, 325 U.S. 1, 36 n. 45 (1945); Terminiello v. Chicago, 337 U.S. 1, 5 (1949); Yates v. United States, 354 U.S. 298, 311-12 (1957); Street v. New York, 394 U.S. 576, 585-88 (1969); Bachellar v. Maryland, 397 U.S. 564, 470-71 (1970); Zant v. Stephens, ___U.S.___, 103 S.Ct. 2733, 2745 (1983). Although Stromberg involved a ground that was invalid on First Amendment grounds, there was nothing in Stromberg which limited it to First Amendment grounds. Indeed, the Stromberg rationale has been applied in a wide variety of situations. For example, Williams v. North Carolina involved a bigamy conviction and Cramer v. United States involved a conviction for treason. Neither case turned on First Amendment principles.

In Zant v. Stephens, supra, the Court described the Stromberg rule applicable here in the following terms:

> One rule derived from the Stromberg case requires that a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground. The cases in which this rule has been applied all involved general verdicts based on a record that left the reviewing court uncertain as to the actual ground on which the jury's decision rested.

103 S.Ct. at 2745 (citations omitted). The Court then distinguished the factual situation presented in Zant from the situation governed by this Stromberg rule. Id. In so doing, however, the Court reaffirmed the continuing vitality of this rule.

The district court did not disagree that Stromberg and its progeny would require habeas corpus relief if the state failed to carry its burden of proof on the felony murder theory. However, the district court concluded that the state had carried its burden. This issue turns, therefore, upon the correctness of the district court's analysis.

It is well settled that "the Constitution prohibits the criminal conviction of any person except upon proof of guilt beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 309 (1979); In re Winship, 397 U.S. 358, 364 (1970). The standard for determining whether the evidence establishes guilt beyond a reasonable doubt is equally settled:

> The relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Jackson v. Virginia, 443 U.S. at 319. While the Jackson standard is easily articulated, its application is more difficult. In this circuit, however, Cosby v. Jones, 682 F.2d 1373 (11th Cir. 1982) has established principles of application which make this task less burdensome.

> The Supreme Court has ... explained that the Jackson standard is a "more stringent test" than a "more likely than not" standard. [Ulster County Court v. Allen, 442 U.S. 140, 166 (1979).] How much more stringent is uncertain, but it is at least clear that if the reviewing court is convinced by the evidence only that the defendant is more likely than not guilty then the evidence is not sufficient for conviction.

Id. at 1379 (emphasis in original). In a case in which the evidence of guilt depends not upon direct evidence but upon the inferences drawn from the evidence, this analysis must be guided by the following:

> As discussed above, the Court's Ulster case clarifies that if the reviewing court can only say that the ultimate fact is more likely than not, then the Jackson v. Virginia standard has not

> been met. ... This is because Jackson requires that a reasonable juror be able to find the defendant guilty beyond a reasonable doubt, and if the evidence viewed in the light most favorable to the prosecution gives equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged, then a reasonable jury must necessarily entertain a reasonable doubt. [Citation omitted]. This is not to say that whenever the evidence supports a reasonable inference consistent with innocence the jury must acquit, for the Supreme Court has rejected the "theory that the prosecution [must] rule out every hypothesis except that of guilt," Jackson, 443 U.S. at 326, as have we U.S. v. Bell, 678 F.2d 547, 550 (5th Cir. 1982) (Unit B en banc). It is only where, after viewing the evidence in its most favorable light and making all credibility decisions in favor of the state of evidence still fails to at least preponderate in favor of the state, that we become concerned with conflicting inferences....[21]
>
> 21 ....If Jackson's beyond a reasonable doubt standard is to have any meaning, we must assume that when the choice between guilt and innocence from "historical" or undisputed facts reaches a certain degree of conjecture and speculation, then the defendant must be acquitted. Ulster clarifies that this degree of inferential attenuation is reached at the least when the undisputed facts give equal support to inconsistent inferences.

Id. at 1383 and n. 21 (emphasis in original). When these principles are applied to the facts of Mr. Hitchcock's case, the result leaves no room for affirming the district court.

The jury in the present case was instructed that it could find Mr. Hitchcock guilty of murder in the first degree if the homicide was committed with "a premeditated design to effect the death of the person killed" or "by a person engaged in the perpetration of or in the attempt to perpetrate any of the following crimes:..." (T 965). The trial court then went on to list all of the felonies in the statute. However, the court only defined the underlying felony of "involuntary sexual battery" (T 965), which was defined as follows:

> It is a crime to commit sexual battery upon a person over the age of 11 years without that person's consent, and in the process use or threaten to use a deadly weapon, or use actual physical force likely to cause serious personal injury.

(T 968). Thus, a conviction for felony murder depended critically upon a finding of the use of a deadly weapon or the use of "actual physical force likely to cause serious personal injury" in the process of the commission of the sexual battery. It is these facts that "no rational trier of fact could have found ... beyond a reasonable doubt," Jackson v. Virginia, 443 U.S. at 324, on the basis of the record established by the state.

In Cosby's terms, the "'historical' or undisputed facts" material to this issue were presented through the testimony of four prosecution witnesses. First, the police officer in charge of the investigation of this case, Detective Nazarchuk, testified about a pretrial statement made to him by Mr. Hitchcock. The relevant portion of the statement was as follows:

> Question (by Detective Nazarchuk)
>
> James, go back to the evening of July 30th and relate to us or state to us what happened that night.
>
> Answer: (By Mr. Hitchcock) Okay. I came in about 2:30. I came in through the window of the dining room, went into my bedroom and I went back out, and I went to Cynthia's room. I went in. Me and her had sex and she said she was hurting, and she was going to tell her mom. I said, you can't. She said, I am. She started to get out and I wouldn't let her, and she started to holler then.
>
> When she did that I got up and grabbed her by the neck and made her quit hollering.
>
> Then I picked her up and I carried her outside and then I had my hands over her mouth at the time, and we got outside on the grass, I told Cindy; you can't tell your momma. She said I am. I got to, I'm hurting. You hurt me again.
>
> She started to scream then. And I got real tough and I was choking her. I let up, she was screaming, and I hit her again, hit her twice, I think, And she was still hollering so I choked her. I kept choking and choking and don't know what happened, I just choked and choked.

(T 691-693)

Second, Dr. Guillermo Ruiz, the medical examiner, testified that Ms. Driggers died from asphxiation due to strangulation (T 496-497). He also testified that there was a laceration on her left eye that was consistent with a

blunt object (T 500-501). With respect to evidence of sexual activity, he testified that he found spermatazoa in the vagina (T 509-510), and that the hymen had been lacerated within 24 hours prior to death (T 519-520). He further testified that laceration of the hymen is normal when a woman has intercourse for the first time (T 518).

Third, Stephen Platt, the prosecution's serologist, testified that he found a dilute bloodstain, approximately two inches in diameter on the right knee of a pair of pants owned by Mr. Hitchcock (T 584-585). He testified that this blood was consistent with the blood of the deceased (T 522-554). However, he further testified that he could not determine when the bloodstain was placed (T 585-586).

Fourth, Diana Bass, the prosecution's microanalyst, testified that she examined a loose hair found on the vagina of the deceased and found that it was consistent with Mr. Hitchcock's hair (T 629-635).

Even judged from the perspective most favorable to the state, these undisputed facts at most "give[] equal or nearly equal circumstantial support to a theory of guilt and a theory of innocence of the crime charged ...." Cosby, supra, 682 F.2d at 1383. Some of the facts have unequivocal meaning, but these facts do not support a theory of guilt at all. The facts clearly show that Mr. Hitchcock and Ms. Driggers engaged in sexual intercourse. Mr. Hitchcock admitted as much, and this admission was corroborated by the presence of spermatazoa in Ms. Driggers' vagina and the presence of hair consistent with Mr. Hitchcock's hair in her vaginal area. The facts clearly show that Ms. Driggers was chaste prior to the intercourse with Mr. Hitchcock for her hymen was lacerated as a result of the intercourse. No rational inference concerning the voluntariness or involuntariness of the intercourse can be drawn from this fact, however. Finally, the facts clearly show that Mr. Hitchcock used "actual physical force likely to cause serious personal injury" after the sexual intercourse -- consensual or nonconsensual -- was completed. Ms. Driggers was strangled and the region around her left eye was lacerated. While the medical examiner could not determine

whether any of these injuries were inflicted before of during intercourse, Mr. Hitchcock's statement to the police, offered by the prosecution, clearly established that he used this physical force after the sexual activity had been completed, not "in the process" of coercing sexual activity as required under the felony murder theory that was charged. Accordingly, none of these facts established a sexual battery at all, much less the "involuntary sexual battery' with which Mr. Hitchcock was charged.

The only facts which support an inference of guilt at all are what the Florida Supreme Court termed "[t]he total circumstances, including the time of night, entry through a window, the victim's tender years, and medical testimony that the child was of previously chaste character," Hitchcock v. State, supra, 413 So.2d at 745, coupled with Mr. Hitchcock's statement to the police that after after he and Ms. Driggers had intercourse, "she said she was hurting, and she was going to tell her mom." In response to this, Mr. Hitchcock told the police that he "grabbed her by the neck and made her quit hollering" and then carried her outside the house where he told her she could not tell her mother. She responded, "I am. I got to, I'm hurting. You hurt me again." While these facts give circumstantial support to a theory of guilt, they nonetheless give at least equal if not greater support to a theory of innocence.

The theory of guilt relies upon the "total circumstances" as supporting an inference that the sexual intercourse was nonconsensual, since it is somewhat improbable that a previously chaste thirteen-year-old would voluntarily engage in sexual relations at 2:30 A.M. However, even if this inference were preponderant, guilt would not have been established without additional circumstantial proof to support the inference that "in the process [of the sexual battery Mr. Hitchcock] use[d] or threaten[ed] to use a deadly weapon, or used actual physical force likely to cause serious personal injury." Such an inference could possibly be drawn from Ms. Driggers' statements that Mr. Hitchcock "hurt" her and that she was going to tell her mother what he had done. While this certainly does not

support the inference that Mr. Hitchcock used or threatened to use a deadly weapon, it provides some minimal support for the view that he used "actual physical force likely to cause serious personal injury."

However, a theory of innocence is given even stronger -- or at least equally strong -- support by the same facts. The same "total circumstances" could very readily give rise to a theory of consensual sexual relations, for if a previously chaste thirteen-year-old decides she wants sexual relations, and she plans to do so in her own bedroom, she is likely to be as secretive as possible, by having her partner "sneak in" late at night so as not to disturb anyone else in her household. Moreover, such a person as naive and innocent-appearing as was Ms. Driggers, is likely to find her initial experience with intercourse physically painful and frightening as a result. Under such circumstances, she could very well lose her "grown up" confidence, feel deeply ambivalent about what has happened, blame her partner for hurting her, and feel a need to turn to her parents for comfort and protection. Nor would Mr. Hitchcock's violent reaction to Ms. Driggers' promise to tell her mother be inconsistent with the view that, until this happened, Mr. Hitchcock had neither coerced Ms. Driggers to have sexual relations nor in the process used actual physical force likely to cause serious personal injury. At the time Mr. Hitchcock was also living in the same household (that of his brother). The disclosure of his having had sexual relations with his brother's stepdaughter could have had serious repercussions within the family and could have caused his expulsion from the household as well as an outpouring of violence from his brother. Under these circumstances, Mr. Hitchcock's violent reaction to Ms. Driggers' comments certainly does not support an inference that he already acted violently toward Ms. Driggers "in the process" of engaging in sexual relations.

From the perspective of the state, these competing inferences are, at best, "equal or nearly equal," Cosby, supra. Indeed, the inference of guilt should be deemed weaker, because there is no necessary connection between Ms. Driggers'

statement that she was "hurt" and that she was going to tell her mother, and Mr. Hitchcock's having previously used actual physical force likely to cause serious personal injury. There is nothing in these words or the total circumstances that provides a basis to infer that the requisite level of force was threatened or used. Most revealing of this point is the Florida Supreme Court's finding on direct appeal that, at most, the evidence demonstrated a forceful, nonconsensual act of sexual intercourse.

> The total circumstances, including the time of night, entry through a window, the victim's tender years, and medical testimony that the child was of previously chaste character, refuted Hitchcock's claim of consent and could be a basis to find that the sexual battery was committed on the victim by force and against her will, thus warranting the instruction on felony murder.

Hitchcock v. State, supra, 413 So.2d at 745 (emphasis supplied). Thus, not even the Florida Supreme Court could find factual support for the inference that Mr. Hitchcock used the requisite degree of force to be convicted beyond a reasonable doubt of involuntary sexual battery as the underlying felony.

Even if the Florida Supreme Court's analysis were sufficient in one respect -- in finding that guilt could be inferred solely upon facts which supported a theory of coerced, nonconsensual sexual relations (without regard to the degree of coercion, which was a critical element in the way "involuntary sexual battery" was charged in Mr. Hitchcock's case) -- the analysis would nonetheless be insufficient under Jackson, for the same reason the district court's analysis was insufficient (despite its having accounted for the degree of coercion issue). Both courts critically ignored the equally strong inference of innocence supported by the evidence in this case. As demonstrated above, the same facts upon which an inference of guilt can be based (either for coerced, nonconsensual sexual relations or for nonconsensual sexual relations coerced by a higher degree of force) also support -- in at least equal measure -- an inference of innocence, in which consensual sexual relations were engaged in by Mr. Hitchcock and Ms. Driggers. Under these circumstances, Cosby v. Jones compels the conclusion that

the state failed to carry its burden on the theory of felony murder. See also Sanders/Miller v. Logan, 710 F.2d 645 (10th Cir. 1983); Fuller v. Anderson, 622 F.2d 420 (6th Cir. 1981).

Because Mr. Hitchcock's conviction, therefore, could not have been sustained under Jackson v. Virginia upon the felony murder theory, Stromberg and its progeny require habeas corpus relief for the conviction. The verdict here was a general verdict of guilt, after instruction on theories of felony murder and premeditation. (T 998). The verdict unquestionably could have been based at least in part, upon a theory of felony murder which the jury could not constitutionally have relied on. Because of the general verdict, however, it is impossible to determine whether the jury actually did rely on felony murder. The theory of premeditated murder was based upon sharply conflicting evidence, which tended to show an impulsive, unplanned, "I-don't-know-what-happened" kind of killing more than a premeditated killing (T 691-692). Accordingly, one or more jurors could have relied in whole, or in part, on the felony murder theory. It would certainly have been possible for a juror to have used the felony murder theory to have resolved any doubts he may have had concerning premeditation. Indeed, much of the state's evidence was more characteristic of an impulsive, second degree murder, than of a premeditated murder. Under these circumstance, even if the harmless error test articulated in Chapman v. California, 386 U.S. 18 (1967), were applicable,[12] there is a sufficient enough possibility that the verdict could have been based upon felony murder that the error in permitting the jury to consider felony murder cannot be deemed harmless beyond a reasonable doubt.

For these reasons, the district court erred in denying habeas corpus relief for Mr. Hitchcock's conviction.

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12 And it never has been applied in the Stromberg line of cases, Stromberg error having been deemed per se reversible error. See Zant v. Stephens, supra, 103 S.Ct. at 2751 (White, J., concurring).

III. MR. HITCHCOCK'S EIGHTH AMENDMENT RIGHT TO A RELIABLE DEATH SENTENCE AND HIS FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS WERE VIOLATED BY THE TRIAL JUDGE'S APPROVAL OF THE STATE'S OFFER TO MR. HITCHCOCK OF A PLEA OF NOLO CONTENDERE AND LIFE IMPRISONMENT, FOLLOWED BY THE JUDGE'S IMPOSITION OF THE DEATH SENTENCE AFTER MR. HITCHCOCK REJECTED THE PLEA OFFER AND EXERCISED HIS RIGHT TO TRIAL BY JURY.

Prior to Mr. Hitchcock's trial, the court approved the prosecutor's offer of a plea agreement of a life sentence (TS 5-6). Mr. Hitchcock declined the offer. After trial, the court sentenced Mr. Hitchcock to death without any stated justification as to the why the harsher penalty was necessary. Because there is nothing in the judge's sentencing order or his findings of fact which would explain why death in the electric chair was the necessary penalty after trial, while life imprisonment was the appropriate penalty prior to trial, it appears that Mr. Hitchcock may have been sentenced to die for asserting his right to jury trial. Because imposition of death by official act mandates a greater need for reliability than any other punishment, such a possibility is constitutionally unacceptable. Petitioner will show, first, that he has made a prima facie showing of a constitutional violation and, second, that further factual development is required before his constitutional claim may be resolved.

A. The Erroneous Summary Dismissal:
Prima Facie Showing of a Constitutional Violation

The district court summarily dismissed this claim under Rule 4 of the Rules Governing Section 2254 Cases: "Even if Petitioner's factual assertions are true, this ground is patently without merit." (R 1187). The district court relied upon Bordenkircher v. Hayes, 434 U.S. 357 (1978) in support of its as a matter of law ruling (R 1188). That decision, however, does not control this case for it did not involve the unique punishment of death and it did not concern the court's involvement in the plea bargaining process. Those are determinative distinctions that have been recognized by the Supreme Court in situations more closely

analogous to that of the present case. Since the district ruled as matter of law, this portion of the discussion of this claim will thus assume the facts to be true as alleged.

It is black letter law that the right to trial by jury is a fundamental right, Duncan v. Louisiana, 391 U.S. 145, 158 (1968), and that criminal defendants may not be penalized for the exercise of constitutional rights. United States v. Jackson, 390 U.S. 570, 581 (1968); Bordenkircher v. Hayes, supra, 434 U.S. at 363 ["To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort"]. From these two principles follow the command that "the Constitution forbids the exaction of a penalty for a defendant's unsuccessful choice to stand trial." Smith v. Wainwright, 664 F.2d 1194, 1196 (11th Cir. 1981). Such actions would "chill" --if not freeze altogether -- a defendant's right, preserved by the Constitution, to seek a trial. "The chilling effect of such a practice upon standing trial would be as real as the chilling effect upon taking an appeal that arises when a defendant appeals, is reconvicted on remand and receives a greater punishment." United States v. Stockwell, 472 F.2d 1186, 1187 (9th Cir., 1973). See also Hess v. United States, 496 F.2d 936 (8th Cir. 1974); United States v. Derrick, 519 F.2d 1 (6th Cir. 1975); Poteet v. Fauver, 517 F.2d 393 (2d Cir. 1975); Baker v. United States, 412 F.2d 1069 (5th Cir. 1969).

Thus, a court may not penalize a defendant for exercising his constitutional right to stand trial. The difficulty is that a trial court may not place its views on the record, and so the subjective process by which it reached its sentencing decision might not be exposed to view. The issue then becomes: when the only objective evidence is the disparity between the plea offered by the court and the ultimate sentence it imposed, where should the risk of erroneous results be placed? The ninth circuit has held that when the court has been involved in plea bargaining the record must affirmatively show that no weight was given to the refusal to plead guilty:

> [O]nce it appears in the record that the court has taken a hand in plea bargaining, that a tentative sentence has been discussed, and that a harsher sentence has followed a breakdown in negotiations, the record must show that no improper weight was given the failure to plead guilty. In such a case, the record must affirmatively show that the court sentenced the defendant solely upon the facts of his case and his personal history, and not as punishment for his refusal to plead guilty. See generally A.B.A. Project on Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilty §1.8, at 36-37 (1968).

United States v. Stockwell, 472 F.2d 1186, 1187-88 (9th Cir. 1973). See also Hess v. United States, 496 F.2d 936, 938 (8th Cir. 1974).

The need for such an affirmative showing by the trial court in a capital case has two constitutional sources: due process and the eighth amendment. These two sources are not entirely distinct; in some sense due process is defined in terms of the eighth amendment. But it is still useful to analyze the two constitutional sources separately.

The imposition of the death sentence after Mr. Hitchcock refused the plea offer approved by the court amounted to the court's punishing him for exercising his right to jury trial, thus violating the due process principles of North Carolina v. Pearce, 395 U.S. 711, 726 (1969). Pearce involved the imposition of a greater penalty on the defendant upon retrial after he had chosen to exercise his right to appeal his conviction. The Supreme Court found no absolute double jeopardy bar to a greater penalty but did find that the due process clause imposed certain restrictions, concluding that:

> [w]henever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

Id. at 726 (emphasis supplied). The rule of North Carolina v. Pearce, therefore, is that imposition of a harsher punishment after the exercise of a legal right must be supported by an affirmative showing of the judge justifying the harsher penalty.

In deciding whether due process requires an affirmative showing by the court justifying the greater penalty subsequent to Mr. Hitchcock's exercise of his right to jury trial, the death penalty is a substantial factor. The Supreme Court has mandated greater procedural protections to assure reliability, fairness, and consistency in death cases.[13] The due process decisions thus must be read in light of related death penalty decisions invoking procedural protections. Together the eighth amendment and due process decisions amount to a heightened due process protection for capital defendants.

The heightened due process rationale has grown from the fact that the Court, in recognizing death to be a "qualitatively different penalty", Woodson v. North Carolina, 428 U.S.280, 350 (1976), has adopted more stringent procedural requirements to guarantee the constitutionality of capital sentencing processes and to reduce improper death sentences. The Court's heightened due process decisions have paralleled its eighth amendment decisions and reinforced the protections guaranteed by Furman, Proffitt, and their progeny; in many instance the Court applies both an eighth amendment and a due process rationale almost interchangeably. See, e.g., Gardner v. Florida, 430 U.S.349, 357, 358-61 (1977); Green v. Georgia, 442 U.S. 95, 97 (1979); Beck v. Alabama, 447 U.S. 625, 637, 638 (1980).

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[13] One commentator has referred to this mandate of heightened procedural protection as "super due process." Radin, Cruel Punishment and Respect for Persons: Super Due Process for Death, 53 S. Cal. L. Rev. 1143 (1980). See also Note, The Impact of a Sliding-Scale Approach to Due Process on Capital Punishment Litigation, 30 Syracuse L. Rev. 675, 681 (1979).

In considering issues regarding permissible plea bargaining practices, the Supreme Court has been especially careful to carve out a different rule for capital cases than for noncapital cases. Thus, in United States v. Jackson, 390 U.S. 570 (1968), the Court invalidated a procedure where, upon a plea of guilty, the defendant would receive a life sentence but could receive a death sentence if he chose a trial by jury. And in Corbitt v. New Jersey, 439 U.S. 212 (1978) the Court approved a practice of extending leniency in return for a guilty plea in noncapital cases but carefully distinguished capital cases because "the death penalty, which is 'unique in its severity and irrevocability,' ... is not involved here." (citation omitted) Id. at 217.[14] Capital cases carry their own set of governing constitutional principles that distinguish them from noncapital cases, including the greater need for reliability, the need for specific and detailed channeling of discretion, and the need for individualized sentencing. The requirement that the "decision to impose the death sentence be, and appear to be, based upon reason," Gardner v. Florida, 430 U.S. at 358, is not met where a court determines before trial that a life sentence is appropriate, but after trial imposes the death sentence with no pretense of justification for the higher penalty.

Additionally, the unique power of the death penalty to coerce pleas and thus to chill and distort the right to trial was fully recognized by the Supreme Court in United States v. Jackson, supra, and Corbitt v. New Jersey, supra. In Jackson the Court held the capital provision of the Federal Kidnapping Act unconstitutional because it made "the risk of death the price for asserting the right to jury trial, and thereby impairs ... free exercise of that constitutional right." 390 U.S. at 571. Because under the statute "assertion of the right to jury trial

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[14] Justice Stewart, the author of the court's opinion in Bordenkircher, filed a separate concurring opinion in Corbitt, to emphasize the constitutional differences with United States v. Jackson that "the death penalty is not involved here", 439 U.S. at 226, and with Bordenkircher which involved only a prosecuting attorney acting within an adversary system as an advocate, Id. at 227.

may cost him his life," id., the Court saw the issue before it as "whether the Constitution permits the establishment of such a death penalty, applicable only to those defendants who assert the right to contest their guilt before a jury. The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter the Sixth Amendment right to demand a jury trial." Id. at 581. "The question is not whether the chilling effect is incidental rather than intentional; the question is whether that effect is unnecessary and therefore excessive." Id. at 582 . "[T]he evil in the federal statute is not that it necessarily coerces guilty pleas and jury waivers, but simply that it needlessly encourages them. A procedure need not be inherently coercive in order that it be held the impose an impermissible burden upon the assertion of constitutional rights." Id. at 583.

Jackson was not, by its terms, limited to capital cases. But the Jackson Court's reasoning is particularly applicable to death cases, a fact the Court has recognizied in its post-Jackson cases. In Corbitt v. New Jersey, supra, the Court discussed the distinctions between the impermissible pressures to plead it condemned in Jackson and the system it upheld in Corbitt:

> We agree with the New Jersey Supreme Court that there are substantial differences between this case and Jackson, and that Jackson does not require a reversal of Corbitt's conviction. The principal difference is that the pressures to forego trial and to plead to the charge in this case are not what they were in Jackson. First, the death penalty, which is "unique in its severity and irrevocability," Gregg v. Georgia, 428 U.S. 153, 187, 96 S.Ct. 2909, 2931, 49 L.Ed.2d 859 (1976), is not involved here. Although we need not agree with the New Jersey court that the Jackson rationale is limited to those cases where a plea avoids any possibility of the death penalty being imposed, it is a material fact that under the New Jersey law the maximum penalty for murder is life imprisonment, not death. Furthermore, in Jackson, any risk of suffering the maximum penalty could be avoided by pleading guilty. Here, although the punishment when a jury finds a defendant guilty of first-degree murder is life imprisonment, the risk of that punishment is not completely avoided by pleading non vult because the judge accepting the plea has the authority to impose a life term. New Jersey does not reserve the maximum punishment for murder for those who insist on a jury trial.

(Emphasis Supplied) 439 U.S. at 217.

Both of the distinctions outlined in Corbitt apply to this case. As in Jackson, and unlike Corbitt this case involves the uniquely severe and irrevocable penalty of death. Also, as in Jackson, and unlike Corbitt the defendant could absolutely avoid the more severe penalty by a guilty plea. The present case is analogous to the impermissible coercion to plead condemned in Jackson.

The issue is what should a federal habeas court do when the record does not explicitly show that no weight was given to a petitioner's exercise of his right to jury trial, but a disparity between plea and death sentence raises an inference that some weight was in fact given. The answer is the same, whether based on "reliability" grounds or "chilling effect" grounds. In a death case, a trial court must explain on the record why a life sentence was proper before trial and why death had become the only proper sentence after trial. Perhaps the judge learned at trial of facts which tipped the scales in favor of death. We do not know. We only know that the record gives no indication as to whether or not he considered Mr. Hitchcock's failure to plead guilty.

Mr. Hitchcock has stated a prima facie claim for relief. If the facts are as he contends, his death sentence cannot stand.

B. The Need for Further Factfinding

Mr. Hitchcock has thus stated a claim and shown a prima facie case for relief under either or both the Eighth Amendment and the Fourteenth Amendment. The district court erred in summarily dismissing this claim as a matter of law and this cause must be remanded. It must be remanded, for "'[F]act finding is the basic responsibility of district courts, rather than appellate courts ....'" Pullman-Standard v. Swint, 456 U.S. 273, 291-292 (1982); Green v. Zant, 715 F.2d 551, 559 (11th Cir. 1983); Washington v. Strickland, 693 F.2d 1243, 1263 (5th Cir. 1982) (Unit B)(en banc). The district court, under its Rule 4 dismissal, did not reach the facts of this case, except to assume them to be true as alleged, and hence there have been no factfindings on any aspect of this issue.

Though Mr. Hitchcock asserts that the facts of record demonstrate that he is entitled to relief, if there is any dispute of the facts as alleged, that dispute must be resolved in the district court.

The "difficulty is that to date no court has made findings of historical fact necessary to resolve [Mr. Hitchcock's] constitutional claim." Green v. Zant, 715 F.2d 551, 556 (11th Cir. 1983). State court findings of historical fact, i.e., of a recital of external events and the credibility of their narrators, are entitled to a presumption of correctness under 28 U.S.C. §2254(d). But "the initial task of the federal court is to determine whether the state court made factfindings upon which the federal court may properly review the constitutional claims of [the] state prisoner.... The question of whether factfindings were actually made by the state court is a threshold inquiry. This inquiry must occur prior to any discussion of the presumption of correctness." Green, 715 F.2d at 557. Mr. Hitchcock will show, first, that no such findings were made in his case and, second, that even if facts were found they are not entitled to the statutory presumption.

The Florida Supreme Court, in rejecting Mr. Hitchcock's claim based on the plea offer, said:

> Hitchcock's version of the facts surrounding this point, however, is not supported. Rather, it appears from the record, as supplemented, that the judge agreed only to consider such an agreement if Hitchcock were to plead guilty. Because Hitchcock refused to consider a plea, the court never had to consider whether to accept the plea bargain.

Hitchcock v. State, supra, 413 So.2d at 746.

From this passage it is unclear whether the court ruled that as a matter of fact the trial judge did not make a plea offer or whether it ruled that the trial judge's plea offer was legally insufficient to state a constitutional claim. "The issue for [this court] is whether this statement [by the Florida Supreme Court] compels the conclusion that the state court made a finding of fact. The court's order and result supports either of two rival interpretations. On the one hand,

the court might have found that [Hitchcock's evidence] was not credible. On the other hand, the court might have concluded that even if the [evidence] were taken as true, [petitioner] had failed to sustain a claim of a constitutional violation. The difference is crucial to the scope of our review: the former is presumptively correct but we are not bound by the latter." Green v. Zant, 715 F.2d at 557-58.

This court should be "reluctant to choose between these possible interpretations of the state courts' order because the court did not articulate the legal standard it was applying." Id. Under such circumstances, this court "cannot ascertain whether the state court found the law or the facts adversely to petitioner's contentions. Since the decision of the state trier of fact may rest upon an error of law rather than an adverse determination of the facts, a hearing is compelled to ascertain the facts." Id.

Though a state court is not absolutely required to articulate the legal principle it is using to resolve a federal claim, this court should not assume that the state applied the correct standard here. This is so because "there is no clear settled standard" governing the issue presented herein. Id. "If the correct standard is well settled, it is proper to assume it was applied. Conversely, in the absence of such a legal standard, it is of increased importance that the state court articulate the theoretical basis of its decision." Id.

Indeed, the Florida Supreme Court's opinion suggests that the court applied the wrong legal standard. Mr. Hitchcock has shown above that the due process clause and the eighth amendment place upon a trial judge the burden of justifying imposition of a death sentence after trial when a life sentence was appropriate prior to trial. But the Florida Supreme Court held that "there is nothing in the record even hinting that the trial judge imposed the death penalty because Hitchcock chose to have a jury trial." That ruling is directly contrary to the requirement of North Carolina v. Pearce that the reasons for imposing a greater sentence after the exercise of a legal right must be made to "affirmatively

appear" by the sentencing judge. The "hint" that the court imposed a greater penalty because of the exercise of the right to trial comes from the fact that the judge agreed to sentence Mr. Hitchcock to life if he would plead nolo contendere and the same judge sentenced Mr. Hitchcock to death after he exercised his right to a jury trial. Without any expressed and real justification for a harsher penalty of death, the imposition of the death sentence violated the guarantee of due process of law.

Thus, this court should conclude that the state court did not make fact-findings upon which the federal court may properly review the constitutional claim of Mr. Hitchcock. This conclusion means that there is no need to reach "discussion of the presumption of correctness given to factual determinations made by state courts" or examination of the six particularized circumstances which warrant an evidentiary hearing set out in Townsend v. Fair and more recently discussed by this Court in Coleman v. Zant and Thomas v. Zant". Green, 715 F.2d at 557. Because "fact findings is the basic responsibility of the district courts, rather than the appellate courts, ... an evidentiary hearing and appropriate findings of fact are necessary." Id at 559. This Court should remand for that purpose.

Even if this court concludes that the Florida Supreme Court did make findings of historical fact, these findings should not be presumed correct pursuant to 28 U.S.C. §2254 for two reasons. First, such findings are not supported by the record viewed as a whole. While the issue in the present context concerns a plea offer by the trial judge to sentence Mr. Hitchcock to life, the transcript of the plea conference where that offer was made is not available and was thus not before the Florida Supreme Court. The record that was before the state court consisted only of remarks made at the later sentencing proceeding, which in their entirety, were the following:

> "MR. TABSCOTT [defense counsel]: ... I would also remind the Court that prior to trial, the Court did agree to a plea of nolo contendere giving the defendant a life sentence upon that plea. I have nothing further.

THE COURT: I think the record ought to show that the matters we discussed, there was never any understanding, because your client didn't want to consider any plea.

MR. TABSCOTT: That plea was offered to him by the State and the Court, however. And, it is true he declined to enter that plea.

THE COURT: Any other matters?

MR. TABSCOTT: No, sir."

(TAS. 5-6) (Emphasis supplied).

Mr. Hitchcock argued in state court that this colloquy sufficiently established the factual basis of his claim. Quoting only a portion of the foregoing colloquy, however, the Florida Supreme Court held that "the [trial] court never had to consider whether to accept the plea bargain," because petitioner did not enter the plea. Hitchcock v. State, 413 So.2d at 746. The entire colloquy, viewed as a whole, however, does not fairly support such a finding of fact. The entire colloquy indicates that the court did consider the life sentence in return for the plea because it was the court which approved the offer to Mr. Hitchcock. Thus, the trial court's comment that there was "never any understanding" refers only to the fact that Mr. Hitchcock chose not to enter the plea, and did not indicate that the court did not approve such an offer. While the judge's comment that there "was never any understanding" is subject to ambiguity when taken out of context, when the record is viewed as a whole, it plainly shows that the trial court did approve the offer of a life sentence if petitioner would plead nolo contendere. Accordingly, the trial judge's remark that there was "never any understanding" does not support the Florida Supreme Court's finding that the court "never had to consider" the plea offer.

In addition to the colloquy at the sentencing proceedings, the affidavit of trial counsel was supplemented to the record by order of the Florida Supreme Court. That affidavit (executed contemporaneously with the trial proceedings)

pellucidly shows that the trial court offered Mr. Hitchcock life sentence: "Judge Paul indicated he would accept a plea of nolo contendere as charged and that [Mr. Hitchcock] would be sentenced to life imprisonment." (emphasis supplied).

Secondly, to the extent that the Florida Supreme Court made a finding of fact, that finding was not the product of a factfinding procedure adequate to afford a full and fair hearing. When respondents argued before the Florida Supreme Court that the record did not support the factual basis of petitioner's claim, petitioner supplemented the record with the contemporaneous affidavit of trial counsel. This affidavit stated that the trial judge agreed to sentence petitioner to life imprisonment if he would enter a plea of nolo contendere as charged. Respondents thereafter moved to supplement the appellate record with an affidavit from the assistant state's attorney who tried the case, stating that the judge had not approved the plea offer prior to its presentation, but had only agreed to consider such a plea bargain if petitioner accepted it (the Florida Supreme Court never entered a ruling on the state's motion, however). Petitioner continued to press his claim that the record established the factual basis of his claim, but argued alternatively that if the court found the record insufficient and the affidavits contradictory, the court should remand for a hearing in this regard. Instead of remanding, however, the Florida Supreme Court found that the record "as supplemented" demonstrated no prior approval of the plea, but only an agreement by the judge "to consider such an agreement if Hitchcock were to plead guilty." 413 So.2d at 746. Thus, the court resolved clearly contradictory affidavits in favor of the state without any hearing to resolve the factual dispute or to reconstruct the unavailable record. Such a factfinding procedure entitles the facts found to no deference in federal court. See 28 U.S.C. §2254 (d) (2).

Thus either (1) the Florida Supreme Court made no findings of historical fact or (2) even if it did, such findings are not entitled to a presumption of correctness. In either case, the district court's summary dismissal was improper and thus, a remand is necessary.

IV. THE DISTRICT COURT ERRED IN SUMMARILY DISMISSING, AS A MATTER OF LAW, MR. HITCHCOCK'S CLAIM THAT THE DEATH SENTENCE IS BEING ADMINISTERED IN A DISCRIMINATORY AND ARBITRARY MANNER ON THE BASIS OF RACE AND OTHER IMPERMISSIBLE FACTORS IN VIOLATION OF THE EIGHTH AMENDMENT AND THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

This case presents a question that is similar in many respects to that currently under consideration by the en banc Court in Spencer v. Zant, 715 F.2d 1562 (11th Cir. 1983), reh.en banc granted, ___F.2d___ (December 13, 1983). For that reason, Mr. Hitchcock will not elaborate in this brief the detail of the governing constitutional principles. Mr. Hitchcock, like Spencer, alleges that the discriminatory and arbitrary application of the death sentence in Florida, contravenes both the Eighth Amendment proscription against cruel and unusual punishment and the Equal Protection Clause of the Fourteenth Amendment.

Likewise the procedural posture of this case is similar to that of Spencer -- though in several material ways it is different. Mr. Hitchcock also was denied any opportunity to present the facts in support of his claim -- he proffered all of the then available data, moved for discovery and for funds for expert assistance, and filed a specific additional motion for an evidentiary hearing. His data, proffered through several studies of the pattern of application of the death penalty in Florida, demonstrates powerful, consistent discrimination on the basis of race (of the victim and the defendant) and arbitrariness on the basis of geography (where the offense was tried). Also alleged was discrimination on the basis of sex and socio-economic status. This data by its strength and the consistency of the results from independent sources, sets out a prima facie case of discrimination and arbitrariness in application of the Florida capital sentencing statute and meets many, and proposes to meet all, of the major

concerns expressed by this Court and its predecessor regarding statistical proof of discrimination. The district court, however, did not provide any opportunity for Mr. Hitchcock to prove his allegations. Indeed there was no factual inquiry at all because the court dismissed the claim summarily, as a matter of law, under Rule 4 of the Rules Governing Section 2254 Cases.

This appeal thus presents the question of the propriety of that summary dismissal and the need for this cause to be remanded for factual development and evidentiary hearing.

a. The Clearly Erroneous Summary Dismissal

The district court below did not examine or rule on the basis of the proffered facts and allegations. Rather, the court summarily dismissed the claim, finding a lack of arguable merit. The court based its Rule 4 dismissal upon a clearly erroneous misreading of Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), reasoning that a challenge to the application of the Florida capital sentencing statute was foreclosed "as a matter of law." The district court relied upon the often misinterpreted passage in Spinkellink that "if a state follows a properly drawn statute in imposing the death penalty, then the arbitrariness and capriciousness -- and therefore the racial discrimination -- condemned in Furman have been conclusively removed." (R 1192, quoting, 578 F.2d at 613).

That passage from Spinkellink, of course, does not control to preclude a challenge to the application of a capital sentencing statute.[15] Rather, it stands for the principle that the ultimate resolution of such a claim will depend upon the quality of the evidence presented. Such was the effect of this Court's holding in Smith v. Balkcom, 660 F.2d 573 (5th Cir. 1981) (Unit B), modified, 671

[15] To say, as did the district court, that once the capital sentencing statute has been held facially constitutional, it could not be challenged in its application, would be contrary to settled constitutional jurisprudence. E.g., Yick Wo v. Hopkins, 118 U.S. 356, 373-374 (1886); Zant v. Stephens, 456 U.S. 410, 413 (1982) (per curiam). See also Proffitt v. Wainwright, 685 F.2d 1227, 1261, n. 52 (11th Cir. 1982) (questioning the continuing validity of this holding in Spinkellink).

F.2d 858 (5th Cir. 1982) (Unit B). The Smith opinion and its modification specifically address and reject the reading of Spinkellink given by the district court in the present case. The Smith decision held that a challenge based upon the Equal Protection Clause, does state a claim, and may be established by proof of intentional discrimination through a strong statistical showing. 671 F.2d at 859.

"Intentional discrimination" is the traditional measure of the quality of the proof necessary to make out a claim under the Equal Protection Clause. E.g. Rogers v. Lodge, ___U.S.___, 102 S.Ct. 3272, 3276 (1982). This "intent" does not mean, however, that the petitioner must identify an intentional discriminatory act or a malevolent actor in his particular case, see, e.g., United States v. Texas Educational Agency, 579 F.2d 910, 913-914 & nn. 5-10 (5th Cir. 1978), or that racial discrimination was the primary or dominant purpose, Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 266 (1977). All that must be shown is that discrimination "has been a motivating factor in the decision." Id. See generally Baldus and Cole, Statistical Proof of Discrimination, 23 (1980). The district court below, guided by its misreading of Spinkellink, failed to apprehend the meaning of "intent," believing incorrectly that there is a need to prove a specific discriminatory act in a particular case. This incorrect belief is shown by the court's statement in its order, despite Mr. Hitchcock's equal protection challenge to the statute supported by strong statistical allegations, that intentional discrimination was not alleged by Mr. Hitchcock (R 1193). However, it was of course alleged by Mr. Hitchcock by his equal protection claim and by the quality of proof that he proposed to offer.[16]

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[16] In addition to the equal protection claim, Mr. Hitchcock further alleges a violation of the Eighth Amendment as incorporated by the Fourteenth Amendment. Mr Hitchcock will not elaborate here on the legal basis for of that claim because it is at issue and will be determined in this Court's en banc decision in Spencer v. Zant, supra. However, it can be noted that although the Eighth Amendment and the Equal Protection Clause are similar in many respects as to this claim, under the Eighth Amendment, a pattern of unequal enforcement may be found unconstitutional regardless of a showing of invidious intent. See Furman v. Georgia, 408 U.S. 238 (1972); Godfrey v. Georgia, 446 U.S. 420 (1980). The Eighth Amendment demands

There can be little question therefore that the as-a-matter-of-law basis for the district court's ruling was clearly erroneous. Nor can the Rule 4 summary dismissal be otherwise supported. A petition under §2254 may not be summarily dismissed under Rule 4 unless it "plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court." This standard is the equivalent of that of 28 U.S.C. §2255 which precludes summary dismissal unless the allegations "conclusively show that the prisoner is entitled to no relief" (emphasis added). See Blackledge v. Allison, 431 U.S. 63, 73 & n.4 (1977). Summary dismissal, thus, is a drastic remedy, not generally available in other civil litigation, that is appropriate only against the small number of petitions that present obviously untenable arguments that no amount of factual development could ever make viable. See generally Developments in the Law --Federal Habeas Corpus, 83 HARV.L.REV. 1038, 1178 (1970). Thus, in Blackledge the Supreme Court emphasized that the "critical question" is whether the allegations are "so 'palpably incredible' ... so 'patently frivolous or false' ... as to warrant summary dismissal." Blackledge v. Allison, supra 431 U.S. at 75-76 (citations omitted).

This is not such a case. As shall be discussed below, the allegations were not "frivolous". Far from it, Mr. Hitchcock offered significant information showing that the death penalty has been applied in Florida in a discriminatory and arbitrary manner so as to violate the Eighth and the Fourteenth Amendments. In addition, Mr. Hitchcock requested specific discovery[17] as well as expenses for

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that "any decision to impose the death sentence be, and appear to be, based on reason rather than on caprice and emotion." Gardner v. Florida, 430 U.S. 349 ,358 (1977).

17 Discovery under Rule 6 of the Rules Governing Section 2254 Cases, is one of the specific fact-gathering methods suggested by the Supreme Court prior to ordering summary dismissal. Blackledge v.Allison, supra, 431 U.S. at 81. Of course, the nature of the district court's ruling precluded the claim on its face, as a matter of law, and thus the court never reached the merits of Mr. Hitchcock's discovery request on this claim.

expert assistance and witnesses. These circumstances require that the cause be remanded to the district court to provide the opportunity to Mr. Hitchcock to fairly prove his claim.

b. The Discrimination and Arbitrariness In Florida Capital Sentencing

There is an ever-increasing volume of evidence demonstrating the discriminatory and arbitrary application of the death sentence in Florida. Some of these studies -- all that were then available -- were proffered to the Court below. Though, because of the court's summary as-a-matter-of-law ruling, the proffers were irrelevant.[18] Nonetheless, as soon as it became available, Mr. Hitchcock did provide the court with significant, compelling evidence. The evidence can be summarized briefly here to demonstrate its strength, but, as will be discussed in the following section, this Court should decline to resolve either the factual or legal merits of this claim from an undeveloped, infertile record. An examination of the evidence will show not only that the Rule 4 standard (conclusively entitled to no relief) was not met, but that Mr. Hitchcock has shown a prima facie case of discriminatory application of the ultimate penalty.

In evaluating the evidence of discrimination and arbitrariness, one factor is striking: the various studies done independently, using different methodologies, and gathering data from different sources each reach persistent and consistent conclusions. The similarity of the results of these independent studies give further corroboration to their conclusions, beyond even the meticulous controls incorporated into each study.

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[18] The effect of the district court's ruling was plainly to hold that any evidence would be irrelevant (except perhaps evidence of specific acts of intentional discrimination in a particular case). See discussion at p. 57 - 58, supra). Under usual pleading rules the district court's rejection of Mr. Hitchcock's claim as a matter of law, would have excused him from the duty to proffer additional evidence. "If the judge refuses to entertain a legal theory, however, counsel may be held to be excused from making an offer of proof." 1 Weinstein, Weinstein's Evidence 103-34 (1982). Regardless, the ruling below was not based upon an evaluation of proffered evidence.

A number of studies were completed in the years following the re-enactment of capital sentencing statutes to examine the effect of the new statutes on the disparity and discrimination that had been identified in the pre-Furman statutes. The detail and extensive nature of these studies make it impossible to adequately summarize their contents here. However, it can be observed that despite the differences in their approaches and methodologies, they each reached the same conclusion, with almost identical statistical results: The death sentence was being arbitrarily applied in Florida, as well as in other states, on the basis of the race of the victim and the offender. See, e.g., Bowers & Pierce, Arbitrariness and Discrimination under Post-Furman Capital Statutes, 1980 CRIME AND DELINQUENCY 563;[19] Foley, The Effect of Race on the Imposition of the Death Penalty (Paper presented to a symposium of the American Psychological Association, September 1979)[20].

As a result of this and other previous documentation that race of the victim was a motivating factor in capital sentencing decisions in Florida, Professor Samuel R. Gross and Robert Mauro undertook a study of capital sentencing patterns in eight states, including Florida.[21] This study is the most recent research available. In fact only a "Tentative Draft" dated June 29, 1983 was available

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[19] The Bowers and Pierce study in addition to undertaking its own analysis of data for the post-Furman period through 1977, also reviewed the significant and detailed research that had been done prior to Furman, and concluded that "differential treatment by race of offender and victim has been shown to persist post-Furman to a degree comparable in magnitude and pattern to the pre-Furman period." Id. at 629.

[20] The Foley study, proffered in the district court below (R 1077-1096), with regard to race, studied persons indicted for first degree murder in 21 of the 67 Florida counties between 1972 and 1978 (including Orange County where Mr. Hitchcock was tried in 1977), and concluded that: "The race of the victim is significantly ($p. < .00001$) related to whether or not the defendant received the death penalty. Offenders accused of murder of a White victim are much more likely to receive the death penalty (16.5%) than those accused of murder of a Black victim (2.8%)." (R 1084).

[21] The other seven states studied were: Arkansas, Georgia, Illinois, Mississippi, North Carolina, Oklahoma and Virginia (R 1114).

at the time of the proceedings below. As soon as it became available to him (July 8, 1983), Mr. Hitchcock submitted it to the district court as a supplemental appendix in support of his habeas petition, his motion for evidentiary hearing, and his request for discovery and expert assistance (R 1110-1165).[22] The discussion herein will thus relate only to the tentative draft of that study: Gross and Mauro, Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization (Tentative Draft, June 29, 1983) (hereinafter referred to as "Gross and Mauro"). The tentative draft was, however, expanded in a Pre-Publication Draft, available in October, 1983[23] -- one month after the decision below.

Time and space does not permit a full summary of the Gross and Mauro study here, but its conclusions, demonstrating the significance of its findings, can be briefly discussed. Gross and Mauro analyzed all homicides in Florida[24] during the five-year period 1976-1980 with data from Supplementary Homicide Reports (SHR's) that are filed with the FBI by local police agencies, and from Death Row, U.S.A., the standard reference source for current data on death row inmates.[25] Initially Gross and Mauro found that 43.3% of the victims of homicide during this

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22 At a hearing on pending motions held June 17, 1983 (R VIII), the district court had initially indicated that a hearing could be held on this claim, once the matter of the payment of experts were determined (R 1108, R VIII 56-59). In this regard, the court requested a further proffer so that it might determine the request for "fees for witnesses and other discovery expenses" for "later ruling in accordance with the Criminal Justice Act, 18 U.S.C. §3006A." (R 1108). However, the district court did not reach these questions because, as previously discussed, it dismissed the claim as a matter of law.

23 Though Mr. Hitchcock will not discuss this Pre-Publication Draft because it is not in the present record, it can be noted that this October draft was previously submitted to this Court in the record in the case of Sullivan v. Wainwright, ___F.2d___ (11th Cir. 1983). It is thus available for this Court's review. The posture of the Sullivan case was a successive petition for writ of habeas corpus.

24 Florida's reporting rate for homicides during this period was over 98%.

25 See, e.g., Enmund v. Florida, ___U.S.___, 102 S.Ct. 3368, 3375 nn. 18,19 (1982) (O'Connor, J., concurring).

period were black, but only one in nine death sentences were imposed for black-victim homicides. Based on this extreme correlation between white-victim homicides and death sentences, Gross and Mauro examined the data to determine whether any non-racial factors might explain the strength of this relationship.

Six non-racial factors were examined for their individual and cumulative impact on the death sentencing determination: (1) the commission of a homicide in the course of a felony; (2) the relationship of the offender and victim (stranger or non-stranger); (3) the killing of multiple victims; (4) the killing of a female victim; (5) the use of a gun; and (6) the geographical location of the homicide. Except for the use of a gun, all of these factors were found to be highly predictive of a death sentence. By analyzing the effects of race within each of these highly predictive non-racial factors (and in combination), the study would control for the effect of significant non-racial "explainers" on the overall data regarding disparity on the basis of the race of the victim. However, when this analysis was made it was found that none of the non-racial factors explained away the consistently high correlation between white victims and death sentences. Regardless of the presence of one or more of the non-racial factors, the homicides which, in addition, involved white victims, were much more likely to result in death sentences.

For example, where a separate felony accompanied the homicide, the death sentence was much more likely to be imposed (22.0% of felony homicides as compared with only 0.9% of non-felony homicides). However, even within this narrowed range of highly predictive death sentences, extreme disparity was found in the likelihood of a death-sentence for a white-victim felony homicide (27.5% for white-victim homicides and 7.0% for black-victim homicides).[26] Thus, even

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26 Similar disparity was found for non-felony homicides: 1.5% of white-victim homicides and 0.4% with black-victim received a death sentence.

controlling for the highly predictive factor of a felony homicide, a person killing a white victim was nearly four times more likely to be sentenced to death than one with a black victim.[27]

Similar findings were reached with regard to the other non-racial factors studied. The killing of a stranger was found to be predictive of a death sentence (9.7% to 2.3%) but white-victim homicides remained significantly more likely to receive the death sentence (14.5% to 1.2%) with a person killing a "stranger" white-victim being twelve times more likely to be sentenced to death than with a black victim.[28] Multiple victims was also highly predictive (18.3% to 3.2%) and the race of the victim was significantly correlated to an eventual death sentence (20.4% to 11.1%). For single victim homicides the figures were 5.5% to 0.7%, a factor of eight. For female victim homicides 7.2% received eventual death sentences but only 2.5% of male-victim homicides resulted in death sentences. A death sentence was eight times more likely, however, for a white-victim (male or female) homicide. When rural and urban is considered, the disparity is twelve times more likely for a white-victim rural homicide to receive a death sentence than a black-victim rural homicide and a death sentence is seven times more likely for an urban white-victim homicide than one for a black victim. The use of a gun in a homicide was not predictive a death sentence, but even here the disparities persisted with it being eight times more likely for a death sentence with a black victim.

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27 These figures are strikingly similar to those found by the Bowers and Pierce study. See Bowers and Pierce, supra, at 599. Bowers and Pierce also controlled for regional variations, id. at 604, 606, for stages in the judicial proceedings, id. at 609, 611, and for court-found felony aggravating circumstance, id. at 614, 615. That study found even greater disparities in most instances, than the Gross and Mauro study. Tables summarizing portions of the Bowers and Pierce study are set out at pages 4a-6a of the appendix hereto.

28 Without the "stranger" factor the disparities also persisted with victim being almost four times more likely to be sentenced to death than a black-victim homicide (3.7% to 1.0%).

Gross and Mauro also examined the Florida cases on a "scale of aggravation" to account for the possibility that some combination of the non-racial "aggravating" factors (those found most predictive of a death sentence) might explain the persistent disparities. This scale examined the cumulative effect of these variables, but found that the disparities persisted. Even in the most "aggravated" of cases — those with two or three of the most predictive non-racial factors and thus where the death sentence is most often imposed -- the death sentence was almost four times more likely for white-victim homicides than for ones with black-victims (28.2% to 7.5%). A table summarizing the Gross and Mauro findings on the "scale of aggravation" test is set out on page 1a of the appendix hereto. Further, to determine whether appellate review may have resulted in a correction of the wide racial disparities found at the trial level, the Gross and Mauro study analyzed the racial patterns of death sentences affirmed by the Florida Supreme Court compared to the racial patterns of all homicides. The study also controlled for the most predictive non-racial factors. The result of this analysis was that the ratio of white-victim/black-victim persisted at ratio of six to one (2.2% to 0.4%) (See Appendix at 2a-3a). Appellate review did not eliminate, or even diminish in a significant way, the racially-based imposition of the death sentence.

Lastly,[29] the Gross and Mauro study addressed the question of whether information not included in their data could explain the racial disparities on non-racial grounds. They conclude that in order for an omitted variable to substantially change the results found in their study, the variable would have to meet three conditions: "(1) it must be correlated with the victim's race; (2) it must be correlated with capital sentencing; and (3) its correlation with capital

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29 In the October, 1983 Pre-Publication Draft, Gross and Mauro also reported on "multiple regression analysis" conducted by them to further determine the possibility that some combination of the non-racial factors might explain away the strong race of victim pattern they had discovered in examining the individual factors. The result was the same.

sentencing must not be explainable by the effects of the variables that are already included in our analysis." They concluded that: "Given these requirements it is reasonable to accept the observed patterns as valid descriptions of the systems of capital sentencing that we studied unless some plausible alternative hypothesis can be stated that explains how some legitimate sentencing variable that we did not consider, or some combination of such variables, could account for these patterns. No such hypothesis is apparent." (R 1153)[30] The study thus concludes that: "In sum, we are aware of no plausible alternative hypothesis that might explain the observed racial patterns in capital sentencing, in legitimate non-discriminatory terms." (R 1155).

The accuracy, validity and reliability of the Gross and Mauro study is, however, confirmed by much more than that perfectly proper logic. It is confirmed initially by the consistency of their results for Florida with the other seven states included within their study — if their were anything peculiar about the quality of their data for Florida, that peculiarity would be seen in different results for the other states.

Perhaps more convincing, however, is the consistency of the findings of the Gross and Mauro study with the findings of other research. This consistency appears not only for Florida but with the other states included within the Gross and Mauro study that have also been studied by other researchers. The close similarity of their findings regarding Florida with that of the Bowers and Pierce and the Foley studies have already been mentioned. However, it is worthy to note that the Gross and Mauro findings regarding Georgia are also consistent with the Bowers and Pierce study of Georgia, and are replicated in results of more in-depth research done in other states which controlled for numerous possible

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[30] It is also worthy to note again the posture of this case. Even if there were an alternative hypothesis offered that was said to explain the vast disparities found by Gross and Mauro, the proper place for such factfinding would be in the district court, not in this Court and not on an as-a-matter-of-law summary dismissal under Rule 4.

variables. For example, a sophisticated study by Baldus, Woodworth and Pulaski currently before this Court in Spencer as to Georgia, using a logistic regression model and accounting for more than 200 variables, arrived at the same conclusions as did the Gross and Mauro study of Georgia. This consistency between the Gross and Mauro findings and the more in-depth study by Baldus suggests strongly that the results that Baldus found for Georgia would be replicated in Florida were such an in-depth study undertaken.[31] The consistency between the results validates the Gross and Mauro methodology and demonstrates that potential problems of sample selection and omitted variables are only potential and not actual. There are also several other studies involving Florida that have reached the same conclusion as did Gross and Mauro, using different methodologies and approaches.[32] The uniformity of results is striking.

Accordingly, the evidence proffered by Mr. Hitchcock will prove strongly and convincingly that race is a motivating factor in Florida capital sentencing. His data proves a prima face case -- under Smith v. Balkcom, supra, equal protection standards and under the arbitrariness standard of the Eighth Amendment. But, of course, the posture of this case does not require (or even call for) this Court to decide whether the claim has been proven. It is only required that this Court determine that Mr. Hitchcock should be given the opportunity to prove this claim,

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31 In their October Pre-Publication Draft, Gross and Mauro specifi cally compare the results of their study to that of Baldus, as well as to an in-depth study of Mississippi conducted by another researcher, Richard Berk.

32 E.g., Radelet, Racial Characteristics and the Imposition of the Death Penalty, 46 AMER. SOC. REV. 918 (1981); Zeisel, Race Bias in the Administration of the Death Penalty: The Florida Experience, 95 HARV. L. REV. 456 (1981); Foley & Powell, The Discretion of Prosecutors, Judges, and Juries in Capital Cases, 7 CRIM. JUST. J. 16 (1982); Radelet & Pierce, Race and Prosecutorial Discretion in Homicide Cases (Pre-Publication Draft, 1983).

i.e., that the summary dismissal under Rule 4 was erroneous. Certainly that dismissal was in error and the strength of the evidence alone demands that Mr. Hitchcock be given the opportunity to prove his claim.[33]

c. The Need for Factfinding and Evidentiary Hearing

A remand to the district court for an evidentiary hearing is appropriate, for only in that manner will there be an adequate foundation upon which to resolve the substance of Mr. Hitchcock's constitutional claims. The present record is undeveloped. Whether, as Mr. Hitchcock alleges, the Florida capital sentencing system continues to operate in a discriminatory pattern, as it did prior to Furman v. Georgia, 408 U.S. 238 (1972), has yet to be examined in the necessary adversary context. In such posture this Court should not reach the substance of the claims and make binding legal precedent until the evidentiary and legal context in which they arise become clear. E.g. Chastleton Corp. v. Sinclair, 264 U.S. 543, 549 (1924).

While Mr. Hitchcock has proffered significant support for his claims and further support is available from reported research, additional evidence continues to be developed in this rapidly emerging area of research and law. Mr. Hitchcock furnished that evidence to the district court as soon as it became available, but even so, expanded information has become available even since the filing of his notice of appeal. It would be inappropriate thus to reach an issue

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[33] Though Mr. Hitchcock has focused in this discussion, upon the race discrimination in Florida's capital sentencing system, his claim includes also the arbitrariness in that system on the basis of geography -- the location of the homicide as an aggravating circumstance. In support of this claim Mr. Hitchcock proffered testimony previously given in the district court by Bowers and Pierce (R 971-1075) (this testimony is summarized in a table at page 7a of the appendix hereto), showing a vast, statistically significant, disparity in how the death sentence is imposed in Florida, and Mr. Hitchcock offered answers to the court's question regarding the reliability of the underlying data. Mr. Hitchcock also alleged sex and socio-economic discrimination, supported by the Foley study. He proffered information and sought discovery in each of these areas. However, the district court's ruling dismissing the claim as a matter of law, foreclosed any factual inquiry.

of such constitutional magnitude, where the operation of Florida's capital sentencing as a whole may be implicated, on the virtually barren record in this case.

There has been no dispute in this case that the requirements of Townsend v. Sain, 372 U.S. 293 (1963), and 28 U.S.C. §2254 (d) are met. The district court's ruling below was based solely on a legal misreading of Spinkellink v. Wainwright, supra.[34] Mr. Hitchcock is indigent and is thus required to rely upon whatever data may be by chance available through independent sources. Though what he has presented is strong, he cannot be faulted for not furnishing more data sooner for he lacks funds and the state courts have denied him either discovery or funds for experts or assistance.[35] Neither the district court nor respondent thus have expressed doubts (other than Spinkellink) that the claim requires a hearing under the standards articulated in Townsend or that the additional evidence only recently available meets the "materiality" requirement of Thomas v. Zant, 697 F.2d 977 (11th Cir. 1983).[36] Mr. Hitchcock's good faith effort to present all of the evidence at his disposal (without funds, assistance or discovery[37]), demonstrates that his claim meets virtually every branch of the Townsend standards. See Townsend v. Sain, supra, 372 U.S. at 313.

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[34] Likewise, the only response offered by Wainwright was that under Spinkellink, claims "about discrimination bsed on whatever factors is a matter of law, not one of fact." (R VIII 49-50).

[35] Mr. Hitchcock furnished the state courts with all of the informa tion then available to him and he informed the state courts that additional research would be soon available. The state courts, however, denied him either time, funds or a hearing in which to present that data. In fact, the Gross and Mauro Tentative Draft was available in June, the month after the expedited state court proceedings were concluded.

[36] Moreover, even were such doubts expressed, such doubt should have been explored at a separate hearing. See Thomas v. Zant, supra.

[37] In Gibson v. Jackson, 578 F.2d 1045 (5th Cir., 1978), the Fifth Circuit declined to decide whether the Constitution mandates financial assistance to an indigent in state post-conviction proceedings. However, citing Townsend, Judge Rubin noted in his addendum that if the failure to provide such assistance results in a "less than full and fair state court proceeding, petitioner will be entitled to an evidentiary hearing de novo in federal court." Id. at 1052.

For these reasons, this cause must be remanded so that there can be a full factual development of the critical constitutional issues presented.

V. AT THE TIME OF MR. HITCHCOCK'S TRIAL, THE RAPE PORTION OF THE 5(d) AGGRAVATING CIRCUMSTANCE --COMMISSION OF THE HOMICIDE IN THE COURSE OF COMMITTING RAPE -- FAILED TO MEET THE REQUIREMENTS OF FURMAN V. GEORGIA THEREBY INVALIDATING ITS USE IN MR. HITCHCOCK'S TRIAL AND, UNDER THE FACTS OF HIS CASE, HIS DEATH SENTENCE.

At the time of Mr. Hitchcock's trial, one of the statutory aggravating circumstances was that

> [t]he capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit ... rape ....

Fla.Stat. §921.141(5)(d)(1975). Nearly four years earlier, however, the crime of "rape" in Florida had been repealed, and various crimes defined generally as "sexual battery" had taken its place. While the elements of rape were included within some of the crimes encompassed by sexual battery, there were also crimes of sexual battery which punished acts of sexual misconduct which would not previously have been serious enough to have been punished as rape. Despite these significant changes, the death penalty statute continued to aggravate a homicide conducted in the course of "rape." As a result, by the time of Mr. Hitchcock's trial, there was much uncertainty about whether a crime of sexual misconduct could still serve as an aggravating circumstance at all, and if so, what the elements of such a crime were. Because of this confusion, this aggravating circumstance could have been applied in a haphazard manner in cases which were very similar factually.

Under these circumstances, Mr. Hitchcock submits that this aggravating circumstance failed to meet its central task under Furman: to provide a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." Gregg v. Georgia, 428 U.S. 153, 188 (1976), quoting Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring). Thus, as Mr. Hitchcock demonstrates herein, the reliance on this

aggravating circumstance in his case was invalid. As he further demonstrates, because there was a statutory mitigating circumstance found in his case as well, the consideration of the invalid statutory aggravating circumstance cannot be deemed harmless. As a result of the sentencer's reliance on the rape aggravating circumstance therefore, the district court erred in not granting the writ.

In order for a statutory aggravating circumstance to pass constitutional muster, the Supreme Court has repeatedly held that it must be capable of rational application: it must apply consistently to some facts and not to others, and it must be capable of such application. In short, it must provide a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." Gregg, supra. In its most recent explanation of this principle, the Supreme Court has said,

> [E]ach statutory aggravating circumstance must satisfy a constitutional standard derived from principles of Furman itself. For a system "could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman could occur." 428 U.S. at 195, n. 46. To avoid this constitutional flaw, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.... Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.

Zant v. Stephens, ___U.S.___, 103 S.Ct. 2733, 2742-2743 (1983) (emphasis supplied).

It is precisely this function which the rape aggravating circumstance could not play in Florida at the time of Mr. Hitchcock's trial. Because there was confusion at that time as to what facts would establish this aggravating circumstance -- if indeed it were still an aggravating circumstance — the circumstance could not have "genuinely narrow[ed]" or "circumscribed" the class of persons eligible for the death penalty. Florida law simply did not provide a definition of what conduct this circumstance reached and what conduct it did not reach.

At the time Florida's death penalty statute, Fla.Stat. §921.141, was first passed, rape was a capital felony which could be committed in only two ways: by gaining carnal knowledge of a child under the age of eleven, or by gaining carnal knowledge of a person eleven years old or older "by force and against his or her will." Fla.Stat. §794.01 (1971). In December of 1972 the Legislature amended Section 921.141 to its present form. Ch. 72-724, Laws of Fla., also amended the rape statute to create two different crimes of rape -- one a capital felony and one a life felony. Capital rape only involved cases where the victim was under eleven years of age. The life felony of rape still required the actual use of force when the victim was over the age of eleven. Fla.Stat. §794.01 (1973).

Thus, when §921.141(5)(d) established as an aggravating circumstance the commission of the homicide during the course of the commission of "rape," the underlying felony could be established by showing only that the defendant gained carnal knowledge of a child less than eleven years old or that the defendant gained carnal knowledge of a person eleven years or more "by force and against his or her will" (emphasis supplied).

In 1974 the Florida Legislature abolished the crime of rape and replaced it with a statute relating to "sexual battery."[38] That statute, with a minor amendment immaterial to the discussion here, was the statute in effect at the time of Mr. Hitchcock's trial. (A copy of the sexual battery statute is set out at pages 8a-9a of the Appendix hereto). The sexual battery statute replaced the capital felony and the life felony provided for in the rape statute with, in descending order of seriousness, a capital felony, a life felony, six felonies of the first degree, and one felony of the second degree. Fla.Stat. §§794.011(2)-(5). The capital felony, life felony, and second degree felony substantially replicated

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[38] Initially, the replacement statute related to "involuntary sexual battery," Ch. 74-121, Laws of Florida, but by the time it was reported in Florida Statutes, it was called "sexual battery," Fla.Stat. §794.011 (Supp. 1974). The substantive crimes, however, were defined identically in the session law and the codified law.

the "by force and against [the victim's] will" elements of the former rape statute.[39] However, the first degree felonies established by the sexual battery statute created a whole category of offenses not encompassed by the former rape statute. Rather than requiring the use of "force", as did rape, these felonies required only that the unconsented-to sexual battery be accomplished by threats of serious violence or retaliation, §794.011(4)(b),(c), or by taking unfair advantage of the victim, because of the victim's physical helplessness, §794.011 (4)(a), debilitated state due to involuntary intoxication caused by the defendant, §794.011(4)(d), mental defectiveness known by the defendant, §794.011(4)(f), or special relationship with the defendant, §794.011(4)(e). Thus, the replacement of the two rape offenses by the nine sexual battery offenses was more than just a reorganization of the elements of rape into additional offenses; it was in addition to this, the creation of new sexual battery offenses relying upon factual elements not previously encompassed by the two rape offenses.

Despite this significant change having occurred in the definition of rape/sexual battery offenses, the Florida Legislature did not amend the portion of §921.141(5)(d) referring to "rape" as the underlying felony in this aggravating circumstance. In apparent response to the repeal of the rape felonies, however, the Florida Supreme Court nonetheless deleted the reference to "rape" and did not replace it with "sexual battery," in the standard jury instruction respecting this aggravating circumstance. See Appendix at 10a-18a, setting forth

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[39] The capital felony was for "[a] person ... who commits sexual battery upon ... a person 11 years of age or younger," §794.011 (2); the life felony was for "[a] person who commits sexual battery upon a person over the age of 11 years, without that person's consent, and in the process thereof uses or threatens to use a deadly weapon or uses actual physical force likely to cause serious personal injury," §794.011(3); and the second degree felony was for the same kind of sexual battery covered by the life felony, with the difference that there was the use of "physical force and violence not likely to cause serious personal injury," §794.011 (5).

the standard jury instructions for capital penalty proceedings, which were adopted as part of the new standard jury instructions in 1976, in Standard Jury Instructions in Criminal Cases, 327 So.2d 6 (Fla. 1976), at numbered page 77.

The failure of the standard jury instructions to mention rape, involuntary sexual battery, sexual battery, or any other sexual offense in aggravation was very significant. The standard jury instructions are approved by the Florida Supreme Court, and thus carry great weight with trial courts in Florida. In its preliminary comments upon the instructions, the Florida Supreme Court has said that the instructions are "intended as a definitive statement of the law on which a trial jury is required to be instructed." Notes on the Scope, Organization and Use of These Instructions, Florida Standard Jury Instructions in Criminal Cases xxi (1981). The court has further stated that the standard jury instructions are "presumptively correct and complete". Ray v. State, 403 So.2d 956, 961 n.7 (Fla. 1981). Florida's lower courts have consistently held therefore that the standard jury instructions should be followed "in the absence of extraordinary circumstances." Moody v. State, 359 So.2d 557, 560 (Fla. 4th DCA 1978); Leverette v. State, 295 So.2d 372, 373 (Fla. 1st DCA 1974). Accordingly, the failure to include any sexual offense, under this aggravating circumstance in the standard jury instructions could well have led to tremendous confusion on the part of the trial courts of the state.

As a result, the rape aspect of aggravating circumstance (5) (d) was clearly susceptible of "arbitrary and capricious application" at the time of Mr. Hitchcock's trial, and thus, could not have "genuinely narrow[ed] the class of persons eligible for the death penalty ...." Zant v. Stephens, supra, 103 S.Ct. at 2742-2743. Section 921.141 stated that if the capital felony occurred during a "rape" there was an aggravating circumstance. Yet, there had been no crime of rape in Florida for several years. The closest analogue to the prior rape statute was the sexual battery statute. Yet the sexual battery statute covered a far broader range of conduct than the prior rape state and involved a far greater

range of penalties. There was no mention of sexual battery as an aggravating circumstance in the capital sentencing statute. Moreover, the standard jury instructions contained no mention of any sexual offense -- rape or sexual battery -- in aggravation.

Trial courts in Florida were thus left with several choices at this period of time. The court could have followed the capital sentencing statute and instructed the jury that if the homicide was committed during a rape there was an aggravating factor.

A second option available to the trial court could have been to follow the standard jury instructions and not instruct on any sexual offense in aggravation. This would have been the most persuasive option, since the standard jury instructions are given great weight in Florida and are to be followed whenever possible.

A third option could have been to substitute sexual battery for rape. This was the closest analogue in the Florida Statutes at the time. Yet, the sexual battery statute covered a far broader range of conduct than the prior rape statute. It also carried a much wider range of penalties. Moreover, the term "sexual battery" was not mentioned either in the capital sentencing statute or in the standard jury instructions relating to the sentencing phase

The probabilities for the arbitrary and capricious application, of this aggravating circumstance were, therefore, very high at the time of Mr. Hitchcock's trial. Some trial judges may not have instructed on any sexual offense, others may have instructed on rape, and still others may have instructed on sexual battery. The trial court in the present case took the seemingly least likely option of all, instructing on sexual battery.[40] Precisely because there were all of these options, however, this circumstance was incapable of providing

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[40] While the judge characterized the sexual battery as "involuntary" sexual battery, the crime he referred to -- as it had been instructed in the guilt-innocence portion of the trial -- was the sexual battery life felony, §794.011(3).

a "meaningful basis for distinguishing the few cases in which [death was] imposed from the many in which it [was] not," Gregg v. Georgia, supra, 428 U.S. at 188. Thus, it was invalid.

The question remaining is whether the Florida courts' reliance on this invalid statutory aggravating circumstance requires Mr. Hitchcock's death sentence to be set aside. Under the circumstances of his case and the holding of Barclay v. Florida, ___U.S.___, 103 S.Ct. 3418 (1983), it must. Critically, the trial judge found one statutory mitigating circumstance in Mr. Hitchcock's case ("the age of the defendant"), although he found that this circumstance did not outweigh the three statutory aggravating circumstances also found. On appeal, the Florida Supreme Court sustained the finding of all three aggravating circumstances. Under Florida's harmless error rule, however, had the Florida Court found invalid even one of these aggravating circumstances, the death sentence would have been vacated, for the reliance on even one invalid aggravating circumstance, in a case where there is at least one statutory mitigating circumstance, can never be harmless. Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977). See, e.g., Foster v. State, 436 So.2d 56, 58-59 (Fla. 1983); Moody v. State, 418 So.2d 989, 995 (Fla. 1982).

The plurality opinion in Barclay v. Florida holds that the Florida harmless error rule as expressed in Elledge is constitutionally acceptable and thus, must govern a federal court's analysis of harm in the circumstances presented. 103 S.Ct. at 3426-3427, 3428 (plurality opinion). The concurring opinion in Barclay is consistent with this analysis, but goes further. Since, in the concurring justices' view, the weighing of statutory mitigating circumstances and statutory aggravating circumstances is a "threshold" determination, 103 S.Ct. at 3430-3431, error in the consideration of an aggravating factor -- where there is a statutory mitigating circumstance -- would require reversal as a matter of federal law. Cf. 103 S.Ct. at 3431 n.4, 3433. Under either analysis, the result is the same:

because the sentencing judge found a statutory mitigating circumstance, his reliance on the invalid rape/sexual battery aggravating circumstance cannot be deemed harmless.[41]

For these reasons, the writ must be granted and Mr. Hitchcock's death sentence, set aside.

VI. THE REQUIREMENT IN FLORIDA THAT THE JURY BE INSTRUCTED AS TO ALL LESSER-INCLUDED OFFENSES, REGARDLESS OF WHETHER THERE WAS EVIDENCE TO SUPPORT THOSE LESSER OFFENSES, RENDERED THE FLORIDA CAPITAL SENTENCING SYSTEM AS A WHOLE VIOLATIVE OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

A system of capital sentencing which includes a requirement that juries be instructed not only upon the offense charged but also upon all lesser-included offenses -- regardless of whether there is an evidentiary basis for such instructions -- interjects into that capital sentencing process constitutionally irrelevant considerations. This is so, because a system that permits juries to render verdicts on lesser offenses that are not fairly supported by the evidence, unleashes those juries to return verdicts on lesser offenses with no guidance and without checks upon the exercise of discretion. The effect of such an unchecked license is to unchannel the process by which the death sentence is meted out, for an unchanneled verdict on a lesser offense is also an unchanneled verdict precluding the death sentence. While such unguided discretion may work to a capital defendant's advantage or to his disadvantage, it is still an arbitrary system.

That it is an unconstitutionally arbitrary system does not require speculation. The Supreme Court so held in Hopper v. Evans, 456 U.S. 605 (1982). John Evans had been convicted of capital murder and sentenced to death at a time when

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41 Even though, under this analysis, there is no need to determine "actual" harm -- since Elledge's harmless error rule otherwise requires a finding of harm to Mr. Hitchcock -- it is nonetheless instructive that the dissenting judges in the Florida Supreme Court on direct appeal would have set aside the death sentence on the basis of their analysis that one of the three aggravating circumstances was improperly considered. Hitchcock v. State, supra, 413 So.2d at 748 (McDonald, J., joined by Overton, J. dissenting).

Alabama law precluded instructions on all lesser included offenses. Subsequent to his trial the Supreme Court held that this statutory preclusion was unconstitutional. Beck v. Alabama, 447 U.S. 625 (1980). Based upon the Beck decision the Fifth Circuit set aside Evans conviction, interpreting Beck as requiring instructions on all lesser offenses in every case, even in one such as Evans' where there had been no evidentiary basis for such lesser instructions. Evans v. Britton, 628 F.2d 400 (5th Cir. 1981). The Supreme Court overturned that decision in Hopper v. Evans. It held not only that the Fifth Circuit had misconstrued Beck as requiring instructions on lesser offenses in every case, but also, explained that the procedure approved by the Fifth Circuit -- instructing on lessers for which there was no evidence — would directly affront the guarantee of due process of law. The opinion of the Chief Justice for the Court in Beck, explained:

> In Roberts v. Louisiana, supra [428 U.S. 325 (1976)], the Court considered a Louisiana statute which was the obverse of the Alabama preclusion clause. In Louisiana, prior to Roberts, every jury in a capital murder case was permitted to return a verdict of guilty of the non-capital crimes of second-degree murder and manslaughter, 'even if there [was] not a scintilla of evidence to support the lesser verdicts.' Id. at 334, 49 L.Ed. 2d 974, 96 S.Ct. 3001 (plurality opinion). Such a practice was impermissible, a plurality of the Court concluded, because it invited the jurors to disregard their oaths and convict a defendant of a lesser offense when the evidence warranted a conviction of first-degree murder, inevitably leading to arbitrary results. Id. at 335, 49 L.Ed. 2d 974, 96 S.Ct. 3001 (plurality opinion). The analysis in Roberts thus suggests that an instruction on a lesser offense in this case would have been impermissible absent evidence supporting a conviction of a lesser offense.
>
> Beck held that due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction. But due process requires that a lesser included offense instruction be given only when the evidence warrants such an instruction. The jury's discretion is thus channeled so that it may convict a defendant of any crime fairly supported by the evidence.

(emphasis in original) 456 U.S. at 611. A system that mandates instructions on lesser included offenses regardless of the evidence is thus a system that violates due process by its inevitable arbitrary results.[42]

Florida is such a system. It cannot be disputed that Florida law at the time of Mr. Hitchcock's trial, required juries in all homicide cases to be instructed (and allowed to return verdicts) on all lesser degrees of homicide --attempted first degree, second and third degree murder and manslaughter -- even if there was no support in the evidence for such an instruction. It would serve no purpose here to cite to the dozens and dozens of Florida decisions that have reaffirmed this settled principle. In Brown v. State, 206 So.2d 377 (Fla. 1968), the leading Florida case on lesser instructions, the Court summarized the settled rule that where an offense is divisible into degrees (such as homicide) there must be an instruction on "all lesser degrees" and that "it is immaterial ... whether there is any evidence of a crime of such a degree." Id. at 381. Until October of 1981, this mandate that every lesser included offense go to the jury even if there is no evidence for it was required by statute.[43]

Likewise beyond dispute, is that juries did, under that system, in fact return verdicts for lesser offenses that were wholly unsupported by the evidence. For example, in Killen v. State, 92 So.2d 825 (Fla. 1957) the defendant had been charged with first degree murder and had been convicted of manslaughter. He claimed on appeal that there was no evidence to support that verdict. The

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42 See also Bell v. Watkins, 692 F.2d 999, 1004 n. 6 (5th Cir. 1983) (explaining that Hopper held that "due process requires that the lesser included offense instruction be given only when the evidence warrants such an instruction"); State v. Strickland, 298 S.E.2d 645, 655-656 (N.C. 1983) (overruling its prior case law rule mandating lessers regardless of the evidence, based in part upon its reading of Hopper as casting "serious doubts" as to whether its rule is "constitutionally permissible."

43 Sections 919.14, 919.16, Florida Statutes (1965) subsequently adopted as Rules 3.490, 3.510, Florida Rules of Criminal Procedure. The rule was changed effective October 1, 1981 to provide that instructions on lesser offenses be given only when there is evidentiary support. In Re Florida Rules of Criminal Procedure, 403 So.2d 979 (Fla. 1981).

Florida Supreme Court, applying the well-settled rule, held that it did not matter that there was no evidence to support the manslaughter verdict because the evidence "clearly proved" he was guilty of first degree murder. Id., at 826-827. These holdings so repeatedly occur in Florida law that the fact that under this system juries returned verdicts frequently for lesser offenses that were not fairly supported by the evidence is not subject to serious challenge. See, e.g., Hodella v. State, 27 So.2d 674 (Fla. 1946); Bailey v. State 224 So.2d 296 (Fla. 1969); Damon v. State, 397 So.2d 1224, 1228-29 (Fla. 3d DCA 1981); Vause v. State, 424 So.2d 52, 55 (Fla. 1st DCA (1983).

Accordingly, at the time of Mr. Hitchcock's case: ONE the Florida system required that in homicide cases juries be instructed on all lesser degrees of homicide regardless of whether there was a scintilla of evidence to support them; TWO, juries in Florida did return verdicts in first degree murder cases for lesser offenses wholly unsupported by the evidence; and THREE, Hopper v. Evans, supra held that a system that instructs the jury on lesser included offenses that are unsupported by the evidence "inevitably lead[s] to arbitrary results" and hence due process requires that lesser included offense instructions be given "only" when supported by the evidence. It follows that the Florida system at the time of Mr. Hitchcock's trial was an unconstitutionally arbitrary system violative of due process. Mr. Hitchcock cannot be sentenced to die pursuant to an unconstitutional system.

This Court must address this systemic defect in the Florida capital sentencing process as it has not been addressed by the previous courts. Though presented in precisely the same manner to the district court below, that court did not address this claim -- except by its general finding that the entire habeas petition lacked arguable merit. Likewise, though the issue was presented to the Florida courts in precisely the same manner as it is now presented, (See pages 35-36 of Appellant's Initial Brief on 3.850), the Florida Supreme Court totally misconstrued the question as being a claim that somehow the 1981 change

in the Florida rules (see n. 43, supra) had made the prior rule arbitrary. Under such a construction of the issue, the Court ruled that this change in the law was not sufficient for providing relief:

> The claim that the current standard jury instructions (which require instructing only on those lesser degrees of homicide supported by the evidence and which is similar to the instruction upheld in Hopper v. Evans, 456 U.S. 605, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1982)) makes the former jury instructions arbitrary because of unchanneled jury discretion does not meet the test set out in Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067, 101 S.Ct. 796, 66 L.Ed.2d 612 (1980), for providing relief because of a change in the law.

Hitchcock v. State, 432 So.2d 42, 49 n.3 (Fla. 1983). The Florida Supreme Court thus missed the issue and failed to rule upon it (and under the expedited review process, no rehearing was permitted by the Court so that Mr. Hitchcock could correct the Court's misconstruction). Therefore no prior court has addressed the issue presented.

The Florida capital sentencing system was unconstitutionally arbitrary at the time of Mr. Hitchcock's trial. The writ must issue.

VII. THE SUPREME COURT OF FLORIDA'S PRACTICE, UNAUTHORIZED AND UNANNOUNCED BY STATUTE OR RULE, OF REQUESTING AND RECEIVING EX PARTE INFORMATION CONCERNING APPELLANTS IN PENDING CAPITAL APPEALS WITHOUT NOTICE TO THESE APPELLANTS OR THEIR ATTORNEYS, DENIED OR APPEARED TO DENY DEATH-SENTENCED APPELLANT, INCLUDING MR. HITCHCOCK, DUE PROCESS OF LAW, THE EFFECTIVE ASSISTANCE OF COUNSEL, AND THE RIGHT OF CONFRONTATION AND SUBJECTED THE TO CRUEL AND UNUSUAL PUNISHMENT AND TO COMPULSORY SELF-INCRIMINATION, IN VIOLATION OF THE FOURTEENTH AMENDMENT AND ITS INCORPORATED GUARANTEES.

This issue involves the Florida Supreme Court's practice of regularly and secretly soliciting extra-record psychiatric profiles and other such sensitive reports from state agencies concerning death-sentenced defendants whose appeals were pending before the Florida Supreme Court. Mr. Hitchcock recognizes, at the outset, that aspects of this practice were passed upon by this Court in Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983)(en banc). However, because of the manner in which Ford was decided there are still unresolved legal issues concerning this practice.

This practice was held not to constitute a constitutional violation by a six to five vote in Ford. Of the six judges forming the majority, five joined in the plurality opinion, id. at 808-820, and the sixth, Judge Tjoflat, issued a separate opinion, concurring in part and dissenting in part. Id. at 824-844. Judge Tjoflat's opinion was thus essential to form a majority on the ultimate question of the constitutionality of this practice as it was presented by Mr. Ford. However, Judge Tjoflat reserved judgment concerning the possible unconstitutionality of this practice on another ground not raised in Ford. He stated:

> Although the premise that judges can and do disregard that which they must disregard is a basic and, indeed, an absolute notion in our system of justice, this premise may in some instances be overridden by the equally fundamental notion that 'justice must satisfy the appearance of justice.' Offutt v. United States, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed.11 (1954). There are circumstances in which the appearance of impropriety arising from the court's consideration of prejudicial evidence is so great that the judge must step down. The judge steps down not because the judicial system assumes he is incapable of performing but because the appearance of impropriety to society at large is too detrimental to the judicial system.
>
> Petitioner has never made this latter argument, however, rather, he has merely attacked the premise that judges can disregard nonrecord materials. Because petitioner makes no assertion that as a matter of federal constitutional law, members of the Florida Supreme Court should be forced to step down in this situation on the ground of appearance of impropriety, I intimate no view on this claim.

Id. at 833. Thus, the constitutionality of the Florida Supreme Court's practice must be reconsidered, in light of the question of whether it raised an appearance of impropriety.

Unlike Mr. Ford, Mr. Hitchcock did specifically assert that the Florida Supreme Court's secret practice constituted an "appearance of impropriety" requiring that he be granted relief (R 953). The district court, however, did not analyze this claim in its summary dismissal except to say that it was foreclosed by Ford (R 1190). Ford however does not control — for the en banc decision leaves open a fundamental question. And the answer to that question demands that relief be granted.

The doctrine that any appearance of impropriety is to be strictly avoided is well established in our jurisprudence, as "justice must satisfy the appearance of justice." Offut v. United States, 348 U.S. 11 (1954); In re Murchison,349 U.S. 133, 136 (1955); Taylor v. Hayes, 418 U.S. 488, 501 (1974); Ward v. Village of Monroeville, 409 U.S. 57, 59-60 (1972); Mayberry v. Pennsylvania, 400 U.S. 455 (1971); In re Oliver, 333 U.S. 257, 278 (1948); Tumey v. Ohio, 273 U.S. 510, 523, 534 (1927); Fredonia Broadcasting Corporation, Inc. v. RCA Corporation, Inc., 569 F.2d 251, 256 (5th Cir. 1978). This doctrine has been applied in a wide variety of situations and is constitutionally-based in the Due Process Clause of the Fourteenth Amendment. In Re Murchison, supra 349 U.S. at 135-136. This doctrine imposes the constitutional requirement that every criminal trial should comport with due process in fact, as well as in appearance. Estes v. Texas, 381 U.S. 532, 543 (1965); Painter v. Leeke, 485 F.2d 427, 429 (4th Cir. 1973); United States v. Brown, 539 F.2d 467 (5th Cir. 1976). The right to procedures comporting with "the appearance of justice" applies with equal force on appeal. Suggs v. United States, 391 F.2d 971, 974 (D.C. Cir. 1968). It is also clear that some procedures can have such a strong appearance of impropriety that no showing of actual prejudice is required. Estes v. Texas, supra, 381 U.S. 542-554; United States v. Brown, supra, 539 F.2d at 469-470.

In addition to a criminal defendant's (or appellant's) due process right to procedures that satisfy the "appearance of justice," society has a deep interest that the criminal justice system satisfy this requirement. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571-572 (1980)(Plurality opinion). Secret proceedings generally undermine this important goal. Id. Moreover, there is a special importance both to a defendant and to society of avoiding the appearance of impropriety in a capital case:

> Death is a different kind of punishment from any other which may be imposed in this country....It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

(emphasis supplied) Gardner v. Florida, 430 U.S. 349, 357-358 (1977)(plurality opinion). Thus, the need to avoid any appearance of impropriety is especially strong in a capital case. This is equally true on appeal. Suggs v. United States, supra.

As reviewed by this Court in Ford, the Supreme Court of Florida, since at least as early as 1975, engaged in the continuing practice of requesting and receiving information concerning capital appellants which was not presented at trial and not a part of the trial record or record on appeal. The details of that practice were fully presented to this Court in Ford and thus will not be reiterated here by Mr. Hitchcock[44], except to emphasize that it was carried out in secret and involved the gathering of specific information by the court with regard to death sentenced defendants that were then before that court for review of their sentences.

Mr. Hitchcock's direct appeal was pending in the Florida Supreme Court from February 11, 1977 (the date the Notice of Appeal was filed) until May 27, 1982 (the date the Petition for Rehearing was denied). Thus, his case was pending in the Florida Supreme Court during the time the practices described above were occurring.

The actions of the Florida Supreme Court clearly raise an appearance of impropriety. The practices involved here contravene the fundamental constitutional principle that "justice must satisfy the appearance of justice." Offut, supra at 14. The Florida Supreme Court systematically and secretly ordered psychiatric, psychological, and other reports concerning pending capital cases. This certainly raises the appearance of impropriety. This practice inherently raises such questions; thus it constitute a due process violation. See Estes, supra at 542-543; United States v. Brown, supra at 469-470. This procedure

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[44] Mr. Hitchcock did support his claim in the lower court by a proffered appendix illustrating the practice (R 63-264).

created such an appearance of impropriety that it cannot be constitutionally tolerated; regardless of whether it actually affected the appellate process. See In Re Murchison, supra at 136.

Therefore, Mr. Hitchcock's death sentence must be vacated.

CONCLUSION

For the reasons set forth herein, the summary dismissal of Mr. Hitchcock's petition for writ of habeas corpus must be reversed, and this cause must be remanded to the District Court with directions to grant habeas corpus relief.

Respectfully Submitted,

RICHARD L. JORANDBY
PublicDefender
224 Datura Street/13th Floor
West Palm Beach, Florida 33401
(305) 837-2150

CRAIG S. BARNARD
Chief Assistant Public Defender

RICHARD H. BURR, III
Of Counsel

RICHARD B. GREENE
MICHAEL A. MELLO
Assistant Public Defenders

By _____
CRAIG S. BARNARD
Counsel for Petitioner-Appellant

APPENDIX E

No._____

IN THE SUPREME COURT OF THE UNITED STATES

JAMES E. HITCHCOCK
PETITIONER

VS.

MICHAEL D. CREWS, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS

AND

PAMELA JO BONDI, ATTORNEY GENERAL,
STATE OF FLORIDA

RESPONDENTS.

ON PETITION OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JAMES L. DRISCOLL JR
FLORIDA BAR NO. 0078840
LAW OFFICE OF THE CAPITAL COLLATERAL REGIONAL COUNSEL
3801 CORPOREX PARK DRIVE STE 210
TAMPA, FLORIDA 33619
PHONE NO. (813)740-3544 EXT 108
FAX NO. (813) 740-3554
ATTORNEY OF RECORD FOR PETITIONER

CAPITAL CASE
QUESTIONS PRESENTED

1. Whether a petitioner, after receiving sentencing phase relief on a federal habeas petition, may raise guilt phase issues in a federal habeas petition following a new death sentence if the petitioner raised guilt phase federal constitutional claims in state court, which were determined on the merits, without permission to file a successor from the federal appellate court.

2. Whether a state court may prohibit the relevant sentencers from considering as mitigation a prosecutor's offer to recommend a life sentence in return for a plea of guilty.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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in State Custody, filed in the United States Court of Appeals for the Eleventh Circuit, contained in Appendix K.

APPENDIX M: Motion to Withdraw Mandate and/or Vacate, Modify and/or Clarify Order Denying Application for Leave to File a Second or Successive Habeas Corpus Petition, 28 U.S.C. §2244(b), and for Rehearing in Part of Argument that this Section is Inapplicable to Mr. Hitchcock's Unique Procedural Posture, and Suggestion for Rehearing and Rehearing En Banc, filed in the United States Court of Appeals for the Eleventh Circuit

APPENDIX N: Order denying Motion contained in Appendix M.

APPENDIX O: Order of Dismissal Without Prejudice issued by the United States District Court, Middle District of Florida.

APPENDIX P: Petitioner's Motion to Alter or Amend the order contained in Appendix O.

APPENDIX Q: Order of United States District Court, Middle District of Florida granting Motion to Alter or Amend allowing penalty phase claims to be refiled in an amended petition.

APPENDIX R: First Habeas Petition following resentencing that was dismissed by the order contained in Appendix O.

APPENDIX S: Amended Habeas Petition denied by order contained in Appendix B.

APPENDIX T: Supreme Court of Florida's Order remanding for a determination of guilt phase postconviction issues.

APPENDIX U: Copy of Slip Opinion *Insignares v. Sec, Florida DOC*, ___F.3d___, (11th Cir. 2014); Case 12-12378 (June 24, 2014) Slip Op.

Appendix V: Statutory and Constitutional Provisions Involved

TABLE OF AUTHORITIES CITED

STATUTES AND RULES

IN THE SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears at Appendix A to the petition and is reported at *Hitchcock v. Sec'y, Fla. Dep't of Corr.*, 745 F.3d 476 (11th Cir. 2014). Rehearing and Rehearing En Banc were denied on May 5, 2014 and appears at Appendix C.

The opinion of the United States District Court was not reported. A copy of the order appears at Appendix B to the petition.

The opinion of the Supreme Court of Florida on the merits following appeal of the judgment and sentence of death after retrial appears at Appendix D to the petition and is reported at *Hitchcock v. State*, 755 So.2d 638 (Fla. 2000).

The opinion of the Supreme Court of Florida on the merits following direct appeal of Petitioner's Motion to Vacate judgment and Sentence of Death appears at Appendix E to the petition and is reported at *Hitchcock v. State*, 991 So.2d 337 (Fla. 2008).

The opinion of the Supreme Court of Florida on the merits following appeal of the judgment and sentence of death appears at Appendix F and is reported at *Hitchcock v. State*, 413 So.2d 741

(Fla.1982)

Other Opinions and Orders are contained in the Appendix and/or referenced within.

JURISDICTION

The date the United States Court of Appeals for the Eleventh Circuit decided the case was March 12, 2014. A timely petition for rehearing was filed on March 31, 2014. The United States Court of Appeals denied the motion on May 5, 2014. A copy of the order denying rehearing appears at Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are lengthy and are reproduced in Appendix V.

STATEMENT OF THE CASE

In 1976 Mr. Hitchcock was arrested and indicted for first degree murder. Mr. Hitchcock was tried, convicted and sentenced to death in 1977. The Florida Supreme Court affirmed. *Hitchcock v. State*, 413 So.2d 741 (Fla.1982), *cert. denied*, 459 U.S. 960 (1982). (Appendix F).

During the pendency of a death warrant Mr. Hitchcock sought state postconviction relief. The postconviction court denied relief. The Florida Supreme Court affirmed the denial. *Hitchcock v. State*, 432 So.2d 42 (Fla. 1983).

Following postconviction, Mr. Hitchcock first sought federal habeas relief in the United States District Court, Middle District of Florida. The court dismissed the Petition. Mr. Hitchcock appealed the denial of federal habeas corpus relief. The Eleventh Circuit Court affirmed the district court's decision and denied relief en banc and rehearing. *Hitchcock v. Wainwright*, 745 F.2d 1332 (11th Cir. 1984); *Hitchcock v. Wainwright*, 770 F.2d 1514 (11th Cir. 1985); *Hitchcock v. Wainwright*, 777 F.2d 628 (11th Cir. 1985). This Court granted certiorari and reversed on penalty phase. *Hitchcock v. Wainwright*, 476 U.S.1168, 106 S.Ct. 2888 (1986); *Hitchcock v. Dugger*, 481 U.S. 393, 107 S. Ct. 1821 (1987).

After resentencing proceedings, Mr. Hitchcock was again sentenced to death. The Florida Supreme Court affirmed the trial court. *Hitchcock v. State*, 578 So.2d 685 (Fla. 1990). This Court denied certiorari, *Hitchcock v. Florida*, 502 U.S. 912, 112 S. Ct. 311 (1991), but later granted rehearing and granted penalty phase relief, *Hitchcock v. Florida*, 505 U.S. 1215, 112 S. Ct. 3020 (1992). The Florida Supreme Court reversed on remand. *Hitchcock v. State*, 614 So.2d 483 (Fla. 1993).

After a third resentencing, Mr. Hitchcock was sentenced to death. The Florida Supreme Court, however, reversed the trial court and remanded the case for a new sentencing. *Hitchcock v. State*, 673 So.2d 859(Fla. 1993). After a fourth sentencing, Mr. Hitchcock was again sentenced to death, which the Florida Supreme Court

affirmed. *Hitchcock v. State*, 755 So.2d 638 (Fla. 2000), *cert. denied*, 531 U.S. 1040; 121 S. Ct. 633 (2000). (Appendix D)

With a conviction *and* sentence that were final, Mr. Hitchcock sought postconviction relief in State court. Mr. Hitchcock's initial Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend was dismissed by the postconviction court as was an amended motion. Mr. Hitchcock also filed a Motion for DNA testing which was denied.[1]

Mr. Hitchcock filed a Second Amended Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend on November 30, 2001. The postconviction court granted Mr. Hitchcock's Motion to Amend Section D and his Motion to Amend Section E. The postconviction court granted a hearing on all claims for which Mr. Hitchcock requested a hearing. The postconviction court held an evidentiary hearing which began on April 7, 2003 and was continued for further testimony to May 8, 2003. The postconviction court entered a written order on October 27, 2003, denying each claim of the Second Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend.

After the postconviction court denied relief on Mr.

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[1] Mr. Hitchcock also filed a Motion for DNA testing under Florida Rule of Criminal Procedure 3.853 which was denied on June 25, 2002. The Florida Supreme Court affirmed on appeal. *Hitchcock v. State*, 866 So.2d 23 (Fla. 2004).

Hitchcock's Second Motion to Vacate Judgment of Conviction and Sentence with Special Request for Leave to Amend he appealed to the Florida Supreme Court. With his initial brief, Mr. Hitchcock filed a Petition for Writ of Habeas Corpus invoking the Florida Supreme Court's original jurisdiction. On May 3, 2005, the Florida Supreme Court relinquished jurisdiction to the postconviction court for a decision of the merits of Mr. Hitchcock's guilt phase postconviction claims. (Appendix T). The postconviction court held additional evidentiary hearings on these claims. Following the hearing, the postconviction court denied relief and Mr. Hitchcock appealed the denial to the Florida Supreme Court. Following supplemental briefing and oral argument the Florida Supreme Court denied the habeas petition and affirmed the postconviction court's denial of relief. *Hitchcock v. State*, 991 So.2d 337 (Fla. 2008). (Appendix E). Mr. Hitchcock filed a motion for rehearing which the Florida Supreme Court denied on September 17, 2008. The court issued the mandate on October 3, 2008.

Mr. Hitchcock then sought relief in federal court. On October 6, 2008, Mr. Hitchcock filed a Petition for a Writ of Habeas Corpus under 28 U.S.C. §2254 in the United States District Court, Middle District of Florida. (Appendix R). This Petition raised both guilt phase claims concerning Mr. Hitchcock's 1977 conviction and penalty phase claims concerning his 1996 death sentence.

On this same date, Mr. Hitchcock filed an Application for

Leave to File a Second or Successive Habeas Corpus Petition in the Eleventh Circuit. (Case No. 08-15867)(Appendix K). This Application sought permission to be heard on the guilt phase claims contained in Mr. Hitchcock's Petition for Writ of Habeas Corpus in the aforementioned Appendix R.

On November 5, 2008, the Eleventh Circuit denied Mr. Hitchcock permission to proceed on his guilt phase claims. (Appendix L). Mr. Hitchcock filed a Motion to Withdraw Mandate and/or Vacate, Modify and/or Clarify Order Denying Application for Leave to File a Second or Successive Habeas Corpus Petition, 28 U.S.C. §2244(b), and for Rehearing in Part of Argument that this Section is Inapplicable to Mr. Hitchcock's Unique Procedural Posture, and Suggestion for Rehearing and Rehearing En Banc. (Appendix M). On December 15, 2008, the Eleventh Circuit denied this Motion. (Appendix N).

On February 3, 2009, the district court issued an Order dismissing Mr. Hitchcock's Habeas Petition without prejudice. The Order was based on the fact that Mr. Hitchcock had previously filed a habeas petition in Case Number 6:83-cv-357-Orl-11. The district court's order found that "the present habeas petition is a second or successive application." (Appendix O). The district court then "dismissed [this case] without prejudice to allow Petitioner the opportunity to seek authorization from the Eleventh Circuit Court of Appeals." (Appendix O).

Mr. Hitchcock filed a Motion to Alter or Amend Judgment, as

rendered in the district court's order filed under Document 10. (Appendix P). The district court granted the Motion Alter or Amend to the extent that Mr. Hitchcock could proceed on his 1996 penalty phase claims. The district court ordered Mr. Hitchcock to file an amended petition omitting the guilt phase issues. (Appendix Q).

Mr. Hitchcock filed an Amended Petition for Writ of Habeas Corpus. (Appendix S). On September 20, 2012, the district court denied Mr. Hitchcock's Amended Petition for a Writ of Habeas Corpus. (Appendix B). The district court granted a Certificate of Appealability on Ground III, but only on the part the district court listed as [part] 3. (Appendix B at 52, fn 13).

Mr. Hitchcock filed a Motion to Alter or Amend Judgment and Included Memorandum of Law. On October 31, 2012, the district court denied the motion. On November 29, 2012, Mr. Hitchcock filed a Notice of Appeal and an Application for a Certificate of Appealability (Appendix G). On December 3, 2012, the district court denied the Application for a Certificate of Appealability. (Appendix H).

In the United States Court of Appeals for the Eleventh Circuit, Mr. Hitchcock renewed his application for an expanded COA for the grounds which the district court denied a COA. (Appendix I). On August 6, 2013, the Eleventh Circuit granted expansion, in part, and denied expansion, in part. In doing so, the court allowed an additional penalty phase issue to be heard but denied a COA on

issue presented first in the instant petition. (Appendix J). Mr. Hitchcock raises the issue that the district court initially granted a COA as the second reason for granting certiorari, below.

On March 12, 2014, the United States Circuit Court for the Eleventh Circuit affirmed the district court's denial of habeas corpus relief. *Hitchcock v. Sec'y, Fla. Dep't of Corr.*, 745 F.3d 476 (11th Cir. 2014) (Appendix A). A properly filed, timely Motion for Rehearing and Rehearing En Banc was filed on March 31, 2014, which was denied on May 5, 2014. (Appendix C).

REASONS FOR GRANTING THE WRIT

I. DESPITE HAVING FILED A PREVIOUS FEDERAL HABEAS PETITION, MR. HITCHCOCK DID NOT NEED PERMISSION TO RAISE HIS EXHAUSTED GUILT PHASE CLAIMS IN THE FEDERAL HABEAS PETITION THAT HE FILED AFTER THE HE WAS RESENTENCED AND HIS JUDGMENT AND SENTENCE BECAME FINAL.

A. MR. HITCHCOCK'S CASE

Since the time of his plea of not guilty, Mr. Hitchcock has maintained his innocence. This Court and the Florida Supreme Court have granted him relief from his death sentence. As yet, no court has granted Mr. Hitchcock a new trial on the issue of his guilt. Mr. Hitchcock disputes his convictions and the constitutionality of the legal proceedings that led to his conviction.

Since the judgment against Mr. Hitchcock last became final in 2000, upon this Court's denial of his petition for writ of certiorari, Mr. Hitchcock availed himself of every opportunity to

raise claims that his conviction and death sentence violated the United States Constitution. While he was unsuccessful, so far, he was able to have his federal issues decided in state court, without regard to whether the issue involved his death sentence or his conviction. Mr. Hitchcock, like most individuals sentenced to death in state court, sought federal review of the claims that he had exhausted through the state postconviction process. At least as far as the claims that raised issues of his guilt, the federal district court and the Eleventh Circuit denied Mr. Hitchcock a determination on the merits of these claims.

After Mr. Hitchcock's 1977 conviction and death sentence was affirmed on appeal to the Florida Supreme Court, and certiorari was denied by this Court, the Governor of the State of Florida signed a death warrant. Florida's postconviction system was much different at the time. When Mr. Hitchcock first sought state postconviction, there was no established time for filing a postconviction motion, which would generally not begin in a death case until after the warrant.

The Florida rule in effect when Mr. Hitchcock filed this motion in 1983 did not bar successor postconviction motions. *See Re Florida Rules of Criminal Procedure*, 343 So.2d 1247, 1264-65 (Fla. July 1, 1977); *see also In re Rule 3.850 of the Florida Rules of Criminal Procedure*, 481 So.2d 480(Fla. 1985)(in which the Florida Supreme Court amended the Rule to read as follows: "Any

person whose judgment and sentence became final prior to January 1, 1985, shall have until January 1, 1987, to file a motion in accordance with this rule."). Mr. Hitchcock's case was pending before this Court at that time. Additionally, Florida had not yet provided for a uniform manner for providing postconviction counsel. Volunteer attorneys represented some individuals and others, as was the case with Mr. Hitchcock, kept their counsel from the direct appeal.

With Mr. Hitchcock under a death warrant, his counsel expeditiously sought relief from the state courts. Under such circumstances, the main goal would have been to save Mr. Hitchcock's life. Counsel were ultimately successful in obtaining relief from this Court so, indeed, that goal was accomplished.

Mr. Hitchcock returned to the trial court for new sentencing procedures but not a new trial on his guilt. The court sentenced him to death, which was affirmed by the Florida Supreme Court. This Court initially denied his cert petition but granted relief on rehearing. After the next resentencing, the court again sentenced Mr. Hitchcock to death but the Florida Supreme Court reversed this death sentence on appeal. After a fourth sentencing trial, the court again sentenced him to death and the Florida Supreme Court affirmed. *See Hitchcock v. State*, 755 So.2d 638 (Fla. 2000)

Following this Court's denial of certiorari, Mr. Hitchcock

was, practically and formally, in a postconviction posture. Much had changed in the intervening years. By this time, Florida had changed the procedural rules for seeking postconviction relief and added a time limit for seeking state postconviction relief. Additionally, Florida provided for the appointment of postconviction counsel to represent an individual following the direct appeal in the state and federal courts. Within the time limits imposed, postconviction counsel was called upon to fully investigate and develop claims in state and federal court.

Change also came in the federal courts through the passage of The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). AEDPA imposed strict limits on the granting of writs of habeas corpus in federal court, including time limitations. Under AEDPA, each claim required exhaustion, and barring some exception, a determination of the merits.

Mr. Hitchcock raised his guilt phase claims in state court first, with the hope of receiving the new trial that he submitted he was entitled to under the United States Constitution. All of the claims that were at issue were overwhelmingly federal claims of constitutional violation that he needed to exhaust in state court before proceeding to federal court.

Mr. Hitchcock raised claims in his state postconviction motion that alleged that his 1977 guilt phase counsel was ineffective in investigating, preparing and the questioning of

witnesses. Mr. Hitchcock testified at the 1977 trial that his brother, Richard Hitchcock, committed the murder after Richard found Mr. Hitchcock, the Petitioner, in a post-sexual situation with the victim. Mr. Hitchcock also raised claims that his 1977 trial counsel was ineffective for failing to properly seek the admission of similar-fact evidence that the person who Mr. Hitchcock alleged had committed the murder, Richard, had repeatedly seen the women in his family as his sexual property and would choke them when they resisted his sexual attacks or simply showed interest in another male. This would have greatly supported Mr. Hitchcock's trial testimony and would have showed that Richard had a motive to commit the murder and that he did so following his usual *modus operandi*. As a separate actual innocence issue, and in support of a finding of ineffective assistance of counsel, Mr. Hitchcock presented two witnesses that Richard made admissions concerning the murder.

Mr. Hitchcock challenged the possibility that evidence that could be used to exonerate him may have been destroyed. Mr. Hitchcock also argued that the hair analysis used against him at trial was unscientific and conducted by a hair analyst using poor lab techniques. This was never disclosed by the State in violation of due process. There was a high likelihood of false inclusion and exclusion and the jury was allowed to consider false evidence in finding Mr. Hitchcock guilty. Lastly, Mr. Hitchcock alleged that

during the 1977 jury selection he was denied due process and his right to counsel because he was not present at bench conferences when peremptory challenges were exercised during voir dire.

After Mr. Hitchcock filed a valid and proper state postconviction motion, the state postconviction court granted him a hearing on all of the claims for which he requested a hearing. Nevertheless, the court denied Mr. Hitchcock's motion and found that the guilt phase claims were procedurally barred because Mr. Hitchcock had never received a new guilt phase trial. Mr. Hitchcock appealed and the Florida Supreme Court remanded the case back to the motion court for a determination of his guilt phase claims because Mr. Hitchcock's judgment and sentence had not become final until after his last resentencing had become final. (Appendix T) After further hearings, the motion court denied relief on the merits, and the Florida Supreme Court affirmed the denial on the merits. *Hitchcock v. State*, 991 So.2d 337 (Fla. 2008). (Appendix E).

In anticipation of the problems he would face in federal court, Mr. Hitchcock filed both a fully-pleaded petition under §2254, raising both guilt and penalty phase claims, and sought permission from the Eleventh Circuit Court of Appeals to file a successive or second petition. The application to the Eleventh Circuit specifically argued that permission was not necessarily needed and that permission was sought in an abundance of caution.

(Appendix K).

The Eleventh Circuit ruled on Mr. Hitchcock's Application For Leave to File a Second or Successive Habeas Petition. The court did not address Mr. Hitchcock's argument that permission was not required for the district court to adjudicate Mr. Hitchcock's recently-exhausted federal claims in federal court and denied Mr. Hitchcock permission. Mr. Hitchcock filed a "Motion to Withdraw Mandate and/or Vacate, Modify and/or Clarify Order Denying Application for Leave to File a Second or Successive Habeas Corpus Petition, 28 U.S.C. §2244(b), and for Rehearing in Part of Argument that this Section is Inapplicable to Mr. Hitchcock's Unique Procedural Posture, and Suggestion for Rehearing and Rehearing En Banc." (Appendix M). This motion also argued that Mr. Hitchcock did not require permission to file his guilt phase claims.

Mr. Hitchcock then awaited the next action by the district court with the full knowledge that he also had important claims that involved just the resentencing portion of his judgment and conviction. The district court, rather than dismiss or deny the guilt phase claims, proceeded to dismiss Mr. Hitchcock's entire petition. Mr. Hitchcock filed a Rule of Civil Procedure 59(e) motion arguing under *Magwood v. Culliver,* 555 F.3d 968 (11th Cir. 2009), he was entitled to at least have his penalty phase claims determined. The court agreed to just that (Appendix Q) and Mr. Hitchcock filed an amended petition with just penalty phase claims.

(Appendix S).

After the district court adjudicated just the amended claims, the court denied habeas relief and granted a certificate of appealability on just part of one claim. Mr. Hitchcock filed an application for a COA in the district court and the Eleventh Circuit arguing that in light of this Court's recent decision in *Magwood v. Patterson,* 562 U.S. 320, 130 S.Ct. 2788 (2010), reasonable jurists could disagree whether Mr. Hitchcock required permission to raise claims concerning his conviction when he in fact had received a new judgment upon imposition of the last death sentence. The application for a COA on this point was denied by both courts.

The Eleventh Circuit found that:

> First, Hitchcock seeks an expansion of the district court's COA to address whether the guilt phase claims raised in his unamended habeas petition, filed on October 6, 2008, were properly dismissed as second and successive. Phrased another way, Hitchcock questions whether he needed permission from this court in order to proceed on his guilt phase claims, which he contends were not final until he was resentenced to death in 1996. But we specifically addressed the second or successive nature of Hitchcock's guilt phase claims—identical to the ones raised here when we denied his Application for Leave to File a Second or Successive Habeas Petition on November 5, 2008. Accordingly, his motion is denied as to these claims.

(Appendix J, page 2). The court's denial of leave to file, as referenced, failed to address whether Mr. Hitchcock needed permission for his guilt phase claim to be heard due to his

receiving a new judgment when he was last resentenced to death. See (Appendix L). Because the court never specifically ruled on this argument, Mr. Hitchcock filed a "Motion to Withdraw Mandate and/or Vacate, Modify and/or Clarify Order Denying Application for Leave to File a Second or Successive Habeas Corpus Petition, 28 U.S.C. §2244(b), and for Rehearing in Part of Argument that this Section is Inapplicable to Mr. Hitchcock's Unique Procedural Posture, and Suggestion for Rehearing and Rehearing En Banc." (Appendix M). The Eleventh Circuit denied this Motion in summary fashion. (Appendix N).

Both courts' denials of a COA on whether the district court erred in dismissing Mr. Hitchcock's guilt phase claims and requiring him to file an amended petition raising just penalty phase claims denied Mr. Hitchcock the opportunity on appeal to argue that he did not need permission to file guilt phase claims. Mr. Hitchcock, accordingly asks this Court to grant certiorari and find that he did not need such permission.

B. RECENT CASES AND THE SPLIT BETWEEN CIRCUITS

In *Insignares v. Sec, Florida DOC*, ___F.3d___, (11th Cir. 2014); Case 12-12378 (June 24, 2014) Slip Op., the Eleventh Circuit affirmed the district court's finding that a petition was not successive "[b]ecause resentencing by the state judge resulted in a new judgment, making this the first challenge to that new judgment . . .." Slip Op. at 2. The court recognized in *Insignares*

what Mr. Hitchcock had urged all along - - when an individual receives a new sentence in state court it results in a new judgment and allows guilt and sentencing issues to be raised. Mr. Hitchcock's habeas petition likewise followed a new judgment. Accordingly, the district court should have adjudicated the claims.

In *Insignares*, the petitioner was convicted following a jury trial. Slip Op. at 4. Following conviction, but before appeal, he filed a motion to correct sentence under Florida Rule of Criminal Procedure 3.800 and was resentenced. *Id.* Following direct appeal, the state appellate court reversed his criminal mischief conviction but otherwise affirmed. *Id.*

The petitioner sought postconviction relief in state court, was denied and the denial was affirmed on appeal. *Id.* at 4-5; citing *Insignares v. State*, 957 So.2d 680 (Fla. 3d DCA 2007). The petitioner filed his first federal habeas petition under §2254 in the district court. He filed the same issues in the first petition as he later filed in his second petition. Slip Op. at 5. The district court dismissed the petition as untimely and, without a certificate of appealability, he appealed to the Eleventh Circuit Court of Appeals. The Eleventh Circuit dismissed for failure to prosecute. *Id.* at 5.

The petitioner filed a second Florida Rule 3.800 motion to correct sentence. *Id.* The state court granted the motion and

reduced his sentence on the attempted murder charge. *Id.* The petitioner filed a second Florida Rule 3.850 motion challenging his conviction and alleging actual innocence, which was denied and affirmed without an opinion. *Id.* at 6. (Citations omitted).

The petitioner then filed the §2254 petition that was at issue in the appeal before the Eleventh Circuit. *Id.* at 6. The magistrate judge found the petition "was not 'second or successive' under *Magwood v. Patterson*, 562 U.S. 320, 130 S.Ct. 2788 (2010), because it was [the petitioner's] first petition to challenge the new judgment entered after resentencing." *Id.* at 6. (Citations to magistrate's report and recommendation omitted). The magistrate recommended that the claims be rejected. The district court adopted the recommendation and granted a COA on 4 issues. *Id.* at 6-7.

The Eleventh Circuit decided the appellate issues, but first needed to decide whether the district court had jurisdiction to hear the petition because the petitioner never sought permission to file a second or successive petition from the appellate court. *Id.* at 7. The State contended that the petition was successive because the petitioner had filed an earlier petition raising the same issues in federal court. *Id.* at 7. The petitioner countered that the 2011 petition was not successive because it was "his first challenge to the new judgment" and "not 'second or successive.'" *Id.* at 8. The court held that the petitioner's second in-time habeas petition was not successive and accordingly, the district

court had jurisdiction to decide the claims without the appellate court's permission.

In reaching this decision, the appellate court applied this Court's reasoning in *Magwood v. Patterson*, 561 U.S. 320, 130 S. Ct. 2788 (2010). In *Magwood*, the district court "conditionally granted" relief from the death sentence. *Id.* at 326, 130 S.Ct. at 2793. The petitioner in *Magwood* was resentenced to death and again sought federal review of the death sentence raising a new claim that he had not raised in the initial petition. *Id.* at 327, 130 S.Ct. at 2794.

The district court conditionally granted relief again. *Id.* at 329, 130 S.Ct. at 2794-95. The Eleventh Circuit Court of Appeals reversed "in relevant part." This Court described the Eleventh Circuit's reasoning as follows:

> [A]ny claim that "challenge[s] the new, amended component of the sentence" should be "regarded as part of a first petition," and any claim that "challenge[s] any component of the original sentence that was not amended" should be "regarded as part of a second petition." Applying this test, the court held that because Magwood's fair-warning claim challenged the trial court's reliance on the same(allegedly improper) aggravating factor that the trial court had relied upon for Magwood's original sentence, his claim was governed by § 2244(b)'s restrictions on "second or successive" habeas applications. The Court of Appeals then dismissed the claim because Magwood did not argue that it was reviewable under one of the exceptions to § 2244(b)'s general rule requiring dismissal of claims first presented in a successive application.

Id. at 329; 130 S.Ct. at 2795 citations and footnote omitted.

This Court granted certiorari and addressed the issue of whether the petitioner's habeas petition following resentencing subjects the claims that could have been raised to AEDPA's restrictions on successive federal petitions. *Id.* at 330, 130 S.Ct. at 2795. The petitioner raised a "fair warning claim" that could have been, but was not, raised in the first petition and not simply a claim raising a deficiency that occurred during the resentencing proceedings.

This Court "granted certiorari to determine whether Magwood's application challenging his 1986 death sentence, imposed as part of resentencing in response to a conditional writ from the District Court, is subject to the restraints that §2244(b) imposes on the review of 'second or successive' habeas applications." *Id.* at 330. 130 S.Ct. at 2795. This Court reversed, finding that "Magwood's first application challenging his new sentence under the 1986 judgment is not 'second or successive' under § 2244(b) to bar review of the fair-warning claim Magwood presented in that application." *Id.* at 342-43, 130 S. Ct. at 2803.

This Court found that Magwood's case did not present a question that was of concern to the State - - whether a petitioner who receives habeas relief as to sentence "may file a subsequent application challenging not only his resulting, new sentence, but also his original *undisturbed* conviction." *Id.* at 342, 130 S. Ct. at 2802. The Court had "no occasion to address that question

because Magwood ha[d] not attempted to challenge his underlying conviction." *Id.* The issue that was not before this Court in *Magwood* was before the Eleventh Circuit Court of Appeals in *Insignares*. As that court acknowledged:

> The wrinkle in *Magwood* is that the Court expressly reserved the question of whether a subsequent petition challenging the undisturbed conviction would be "second or successive" after the state imposes only a new sentence. *Id.* at 342, 130 S. Ct. at 2802. That is the question we must decide.

Insignares, Slip Op. at 12. The Eleventh Circuit Court of Appeals proceeded to decide that question.

The Eleventh Circuit followed this Court's reasoning in *Magwood* that "courts must look to the *judgment* challenged to determine whether a petition is second or successive. AEDPA does not define the phrase 'second or successive.'" *Insignares,* Slip Op. at 9; citing *Magwood* at 331-32, 130 S. Ct. at 2796. To determine the meaning of "second or successive" the Eleventh Circuit followed this Court in looking to §2254(b)(1). Slip Op.at 9; citing *Id.* at 332, 130 S. Ct. at 2797 (citation and internal quotation marks omitted).

In *Magwood*, this Court found that "[t]he limitations imposed by §2244(b) apply only to a 'habeas corpus application under §2254,' that is, an 'application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court,' § 2254(b)(1)." *Id.* at 9; citing *Magwood* at 332, 130 S.Ct.

at 2797. As explained by the Eleventh Circuit, in *Magwood,* "in accordance with AEDPA" this Court:

> recognized a habeas application seeks invalidation "'*of the judgment* authorizing the prisoner's confinement,'" and, even if the application is successful, "'the State may seek a new judgment.'" *Id.* (quoting *Wilkinson v. Dotson*, 544 U.S. 74, 83, 125 S. Ct. 1242, 1248 (2005)). Therefore, the judgment is the center of the analysis, "both § 2254(b)'s text and the relief it provides indicate that the phrase 'second or successive' must be interpreted with respect to the judgment challenged."

Slip Op. 9-10 citing *Id.* at 332-33, 130 S. Ct. at 2797.

The Eleventh Circuit found that this Court "also clarified that the phrase 'second or successive' applies to habeas *petitions*, not to the *claims* they raise. On appellate habeas review in *Magwood*, [the Eleventh Circuit] had 'concluded that the first step in determining whether §2244(b) applies is to "separate the new claims challenging the resentencing from the old claims that were or should have been presented in the prior application."" Slip Op. at 10; citing *Magwood* at 329, 130 S. Ct. at 2795 (quoting *Magwood v. Culliver*, 555 F.3d 968, 975 (11th Cir. 2009))(Emphasis in the original).

In *Magwood*, this Court stated, "although . . . many rules under §2244(b) focus on claims, that does not entitle us to rewrite the statute to make the phrase 'second or successive' modify claims as well." Slip Op.at 11; citing *Magwood* at 334-35, 130 S.Ct. at 2798. The Eleventh Circuit summarized this Court's opinion in *Magwood*:

> Based on this analysis, the Court concluded that: "AEDPA's text commands a more straight-forward rule: where . . . there is a new judgment intervening between the two habeas petitions, an application challenging the resulting new judgment is not second or successive." *Id.* at 341-42, 130 S. Ct. at 2802 (citation and internal quotation marks omitted). Throughout its opinion, the Court emphasized the effect of a new judgment. "Because Magwood's habeas application challenge[d] a new judgment for the first time, it [was] not 'second or successive' under § 2244(b)." *Id.* at 323-24, 130 S. Ct. at 2792 (footnote omitted). The Court agreed with Magwood that § 2244(b) "appl[ies] only to a 'second or successive' application challenging the same state-court judgment." *Id.* at 331, 130 S. Ct. at 2796. Since his petition was his "first application challenging [an] intervening judgment," it was not "second or successive," regardless of whether he had raised the claims before. *Id.* at 336, 339, 130 S. Ct. at 2799, 2801. Put simply, the first application to challenge a judgment is not subject to AEDPA's restrictions on successive petitions—"the existence of a new judgment is dispositive."

Slip Op. at 11; citing *Magwood* at 338, 130 S. Ct. at 2800.

Before finding that Insignares did not need permission to file his habeas petition, the Eleventh Circuit discussed the split between the Circuit Courts of Appeal in dealing with variations of this issue. The court found that, "The Second, Fifth, and Ninth Circuits have considered whether vacating one count of a multi-count conviction results in a new judgment that allows a renewed challenge to the other counts. The Second and Ninth Circuits held that it does result in a new judgment . . ." Slip Op. at 12.

The *Insignares* court noted that the Seventh Circuit's decision in *Johnson v. United States*, 623F.3d 279 (7th Cir. 2013), found the petitioner's "'proposed §2255 motion [is] not . . .

successive because it is his first §2255 challenging the amended judgment of conviction. A different result is not warranted by the fact . . . that he effectively challenges an unamended component of the judgment.'" Slip Op. at 12, FN 6; citing *Johnson* at 46. (Internal footnote omitted). The court also noted that although the Ninth Circuit had "'no occasion to address' the precise scenario this case presents," the Ninth Circuit "conclude[d], as a matter of first impression, that the basic holding of *Magwood* applies here: the latter of two petitions is not 'second or successive' if there is a 'new judgment intervening between the two habeas petitions.'" Slip Op. at 12, FN 6; citing *Wentzell v. Neven*, 674 F.3d 1124, 1127 (9th Cir. 2012); (internal citations omitted in Slip Op.).

The *Insignares* court noted that the Fifth Circuit, as the case was presented to the court, found that because "[t]he district court did not enter an amended judgment of conviction in this case" and "[n]o new sentence was imposed" the less fundamental change made to Lampton's judgment of conviction [was] not enough to allow him to bypass AEDPA's restrictions on piecemeal habeas litigation." Slip Op. at 12 quoting *In re Lampton*, 667 F.3d 585, 589-90 (5th Cir. 2012).

The *Insignares* court found that while the cases before "the Second and Ninth Circuits concluded that the petitions were not successive even though they challenged unamended portions of the

judgment, . . . [t]hose cases, however, involved different facts from those [in Insignares]." Slip. Op. at 12. The *Insignares* court found that the only circuit that has addressed the precise question the court was faced with in *Insignares* was the Seventh Circuit in *Suggs v. United States*, 705 F.3d 279 (7th Cir. 2013). Slip Op. at 12. The *Insignares* court distinguished *Suggs* because:

> That court concluded resentencing in district court did not allow the prisoner to challenge his underlying conviction again without first seeking authorization to file a second petition. *Id.* at 280-81. But the Seventh Circuit did not reach this conclusion by writing on a clean slate. The court instead looked to pre-Magwood precedent, which held habeas petitions "are not second or successive when they allege errors made during the resentencing, but they are second or successive when they challenge the underlying conviction." Id. at 282 (citing *Dahler v. United States*, 259 F.3d 763 (7th Cir. 2001)). The Seventh Circuit further reasoned that, because *Magwood* expressly declined to decide the issue, its prior precedent was not overruled. *Id.* at 284.

Slip Op. at 12-13; citing *Suggs*, *supra*. The court noted that there was a vigorous dissent in *Suggs* which "contended that, although *Magwood* did not answer the precise question in *Suggs*, it expressly rejected the claims-based approach of the circuit precedent." Slip Op. at 13, FN 8; citing *Suggs*, 705 F.3d at 287 (Sykes, J., dissenting).

In deciding *Insignares*, the Eleventh Circuit went on to state:

> Neither do we write on a clean slate. We have addressed the effect of resentencing on AEDPA's statute of limitations. *Ferreira v. Sec'y, Dep't of Corr.*, 494 F.3d 1286 (11th Cir. 2007). The prisoner in *Ferreira* had been resentenced by the state trial judge and sought federal review of his underlying conviction. *Id.* at 1288. The

issue was whether resentencing rendered timely his otherwise untimely challenge to the conviction. *Id.* Prior to *Ferreira*, we viewed the conviction and sentence as two separate judgments, each with its own statute of limitations. Responding to the Supreme Court's decision in *Burton*, which ruled AEDPA's statute of limitations "[does] not begin until both [the] conviction and sentence 'bec[o]me final,'" *Burton*, 549 U.S. at 156, 127 S. Ct. at 799, we overruled our incorrect understanding of separate judgments of conviction and sentence. *Ferreira*, 494 F.3d at 1293.

In *Ferreira*, we explained there is one judgment, comprised of both the sentence and conviction. *Id.* at 1292 ("[T]he judgment to which AEDPA refers is the underlying conviction and most recent sentence that authorizes the petitioner's current detention."); cf. *Deal v. United States*, 508 U.S. 129, 132, 113 S. Ct. 1993, 1996 (1993) ("A judgment of conviction includes both the adjudication of guilt and the sentence."). Applying that rule, we held "that AEDPA's statute of limitations runs from the date the judgment pursuant to which the petitioner is in custody becomes final, which is the date both the conviction and sentence the petitioner is serving become final." *Ferreira*, 494 F.3d at 1288. The limitations provisions of AEDPA "are specifically focused on the judgment which holds the petitioner in confinement," and resentencing results in a new judgment that restarts the statute of limitations. Id. at 1292-93. Since there was a new judgment, we saw no reason to differentiate between a claim challenging a conviction and one challenging the sentence.

Having reviewed *Magwood* and the cases of other circuits, we return to the basic proposition underlying Burton and Ferreira: there is only one judgment, and it is comprised of both the sentence and the conviction. In *Ferreira*, resentencing by the state judge resulted in a new judgment. *Magwood* explains, the "existence of a new judgment is dispositive" in determining whether a petition is successive. 561 U.S. at 338, 130 S. Ct. at 2800. Based on these cases, we conclude that when a habeas petition is the first to challenge a new judgment, it is not "second or successive," regardless of whether its claims challenge the sentence or the underlying conviction.

> Insignares's first federal habeas petition was decided in 2008. In 2009, the state judge granted a motion to reduce Insignares's mandatory-minimum imprisonment sentence from 20 years to 10 years but retained his 27-year imprisonment sentence. The 2009 resentencing by the state judge resulted in a new judgment, and the 2011 petition is his first federal challenge to that 2009 judgment. Therefore, Insignares's 2011 petition is not "second or successive," and the district judge had jurisdiction to decide it.

Slip Op. at 13-15.

The *Insignares* approach is both legally and practically sound in comparison to other approaches. As found in *Insignares*, successive clearly refers to petitions under AEDPA. The "courts must look to the *judgment* challenged to determine whether a petition is second or successive. AEDPA does not define the phrase 'second or successive.'" *Insignares*, Slip Op. at 9; citing *Magwood* at 331-32, 130 S. Ct. at 2796. Upon resentencing the prospective habeas petitioner receives a new judgment, after which a habeas petition may be filed challenging all of the exhausted federal claims denied in state court.

In practice, some claims will involve both guilt and sentencing phase issues. Especially in a capital scheme like Florida's, but indeed in all cases, facts concerning the offense overwhelmingly impact the sentencer's decision. To the extent that such facts come without the efficacy of fair and constitutional adversarial proceedings, the imposition of the death penalty cannot be justified. In a case like Mr. Hitchcock's, the failure

to consider constitutional errors that would result in a new guilt phase trial leaves Mr. Hitchcock without recourse to avoid the fate of execution for a crime he submits he did not commit. Based on this Court's prior decisions on actual innocence, *see Herrera v. Collins*, 506 U.S. 390, 113 S.Ct. 853 (1993), the raising of constitutional claims may be the only way to avoid an unjust sentence.

C. MR. HITCHCOCK WAS ENTITLED TO SEEK FEDERAL HABEAS CORPUS RELIEF ON HIS GUILT PHASE CLAIMS THAT THE UNITED STATES CONSTITUTION WAS VIOLATED, OTHERWISE THE STATE COURT DECISIONS WOULD EVADE THE SCRUTINY ALLOWED UNDER AEDPA.

As Mr. Hitchcock argued in his "Application for Leave to File A Second or Successive Habeas Corpus Petition," this Court has long held that "Final judgment in a criminal case means the sentence. The sentence is the judgment." *Berman v. United States*, 302 U.S. 211, 212, 58 S.Ct. 164, 166 (1937)(citations omitted). This is a well-recognized principle that was applicable in *Insignares* when the court found that upon resentencing the petitioner received a new judgment. Mr. Hitchcock received a new judgment when he was last sentenced to death.

After pursuing postconviction, Mr. Hitchcock was then free to proceed to federal court to seek a remedy for the denial of his rights in claims that he exhausted in state court. Mr. Hitchcock cited *Magwood v. Culliver*, 555 F.3d 968 (11th Cir. 2009), and the district court granted the original motion to alter or amend based

on this case. (Doc. 10 and 14). *Magwood* v. *Culliver* at least stood for the proposition that upon obtaining habeas relief on sentencing only, Mr. Hitchcock could raise sentencing issues. *Magwood* was reversed in part, further extending the claims Magwood could raise. *Magwood v. Patterson*, 561 U.S. 320, 130 S.Ct. 2788 (2010). This Court, however, specifically declined to review the very issue presented here and stated:

> The State believes this result follows because a sentence and conviction form a single "judgment" for purposes of habeas review. This case gives us no occasion to address that question, because Magwood has not attempted to challenge his underlying conviction. We base our conclusion on the text, and that text is not altered by consequences the State speculates will follow in another case.

Id. at 2802-03 (footnotes omitted). As stated above, the Eleventh Circuit answered the question left open in *Magwood* in *Insignares*. That court did so correctly and showed that Mr. Hitchcock was not required to seek permission for a successive or second habeas petition from the appellate court for the district court to consider the guilt phase claims that Mr. Hitchcock raised in his habeas petition filed after he last completed state postconviction review.

While AEDPA provides barriers to obtaining relief, it does allow relief to be granted when a state court decision is contrary to, or an unreasonable application of this Court's precedent, or based on an unreasonable finding of fact. Mr. Hitchcock overcame

the State's attempt to procedurally bar his guilt phase claims raising violations of the United States Constitution in state postconviction review. The Florida Supreme Court found that because Mr. Hitchcock's judgment *and* sentence only became final upon this Court's denial of certiorari following direct appeal, Mr. Hitchcock was entitled to a determination of the merits of his guilt phase claims. (Appendix T).

When the trial court denies postconviction claims and the Florida Supreme Court affirms, any individual, subject to the requirements of AEDPA, may seek the review that is available in federal court. Mr. Hitchcock was denied this opportunity through no fault of his own.

While Mr. Hitchcock's case was in federal court, moving towards the relief this Court would later provide when it granted certiorari, Florida imposed a time limit for seeking postconviction relief in state court. Mr. Hitchcock could not even begin to seek state postconviction relief, let alone federal, because he did not have a judgment that was final.

Repeatedly, Mr. Hitchcock was retried following constitutional error, twice found by this Court, and once found by the Florida Supreme Court. After each new resentencing, Mr. Hitchcock received a new judgment but could only seek federal review for his federal guilt phase claims when he had exhausted them. The reason that it took so long to complete this were the

actions of the state and some of the courts. The state prolonged Mr. Hitchcock's attempt to seek guilt phase justice by continually violating his rights. Later, when Mr. Hitchcock sought postconviction relief in state court, the postconviction court initially denied Mr. Hitchcock a ruling on the merits, only to be corrected by the Florida Supreme Court. Later, the federal courts denied Mr. Hitchcock an opportunity to seek a remedy for the constitutional violations that occurred during his guilt phase based on the faulty legal analysis that was corrected in *Insignares*. As in *Insignares*, Mr. Hitchcock is entitled to a determination of his federal constitutional claims under the applicable standards.

D. CONCLUSION.

Mr. Hitchcock permitted to raise federal guilt phase issues in state court. When he was denied relief in state court, he sought federal review of his federal claims in federal court. While federal habeas review under AEDPA is hardly de novo review, it does serve the function of limiting how far from the requirements of the Constitution a state court may stray.

Mr. Hitchcock repeatedly received new judgments after this Court and the Florida courts found constitutional error. Once the resentencing was final, Mr. Hitchcock had a new judgment and he was free to challenge in federal court like any other convicted and sentenced individual who had properly exhausted federal claims

of constitutional violation. Mr. Hitchcock, in a case involving actual innocence, requests nothing more than to argue for the justice he has long been denied and to do so as any other petitioner denied a remedy for constitutional violations by the state courts would be able to do. This Court should grant certiorari and find that the district court should determine the merits of Mr. Hitchcock's timely and exhausted federal claims.

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE MR. HITCHCOCK WAS DENIED HIS RIGHT TO HAVE MITIGATION CONSIDERED BY THE RELEVANT SENTENCERS BECAUSE THE TRIAL COURT REFUSED TO CONSIDER THE ORIGINAL PROSECUTOR'S OFFER TO RECOMMEND LIFE HAD MR. HITCHCOCK PLED GUILTY.

In 1977, prior to Mr. Hitchcock's first trial, the prosecutor offered to "recommend" a life sentence for Mr. Hitchcock in return for pleading guilty as charged. Upon penalty phase retrial, Mr. Hitchcock sought to present the fact that the State had offered Mr. Hitchcock a life sentence as mitigation. The court refused to consider the affidavit. The affidavit provided in relevant part:

> On January 17, 1977 the State of Florida Represented by the undersigned Joseph Micetich Jr., did discuss with Mr. Charles Tabscott, the attorney representing defendant JAMES ERNEST HITCHCOCK the possibility of said JAMES ERNEST HITCHCOCK entering a plea of guilty to the charge of murder in the first degree. The State of Florida offered to recommend a life sentence with a mandatory minimum of twenty-five year sentence in return for the said defendant's plea of guilty as charged to murder in the first degree.
>
> On January 18, 1977 this plea discussion was brought to the attention of the Honorable Maurice M. Paul, the judge

> who presided over the case at trial. Judge Paul indicated that he would consider the State of Florida's sentence recommendation, should the said defendant actually plead guilty as charged. At no time did said defendant ever indicate that he would plead guilty and at no time did Judge Paul ever indicate what sentence he would actually pronounce upon said defendant before the time of the actual sentencing, after trial, on February 4, 1977.

This issue was last raised on direct appeal to the Florida Supreme Court following Mr. Hitchcock's last resentencing trial. *See Hitchcock v. State*, 755 So.2d 638 (Fla. 2000)(Appendix D).

The district court denied habeas relief on this claim. The court, after debating the relevance of the State's life offer, found "it cannot be said that the trial court violated clearly established federal law when it rejected this evidence as irrelevant to mitigation." (Appendix B). The court granted a COA on this issue. (Appendix B at 52, FN 13)

The Eleventh Circuit affirmed the district court's denial of habeas relief, although there was a dispute concerning the legal justification for the decision. The majority found that:

> Evidence of a rejected plea offer for a lesser sentence, like evidence of innocence or evidence of the geographical location of the crime, is not a mitigating circumstance because it sheds no light on a defendant's character, background, or the circumstances of his crime. Such a plea offer does not by itself show that the prosecutor believed the defendant did not deserve the death penalty. A plea offer of a non-capital sentence in a capital case may simply reflect a desire to conserve prosecutorial resources, to spare the victim's family from a lengthy and emotionally draining trial, to spare them the possibility of protracted appeal and post-conviction proceedings (spanning in this case more than three decades), or to avoid any possibility, however

slight, of an acquittal at trial.

Hitchcock v. Sec'y, Fla. Dep't of Corr., 745 F.3d 476, 483 (11th Cir. 2014). (Appendix A). The concurring opinion expressed concern with the implication in the majority opinion that such "evidence is per se irrelevant" and would not have applied de novo review when the case could have been decided solely under AEDPA's standards. *Id.* at 486-87.

The affidavit of prosecutor Micetich shows clear mitigation that was never considered by the relevant sentencers. This Court has consistently held that a constitutional death sentence requires consideration of all relevant mitigation. *Eddings v. Oklahoma*, 455 U.S. 104, 102 S. Ct. 869 (1982); *Hitchcock v. Dugger*, 481 U.S. 393, 107 S. Ct. 1821 (1987); *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954 (1978); *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669 (1986). Such was the nature of the State's offer to recommend life in the instant case when the circumstances and context of this evidence is considered.

Despite the clear rule requiring the admission of relevant evidence under this Court's precedent, the majority appears to say that an offer of a life sentence can never be relevant and that in Mr. Hitchcock's case it was clearly not. The concurring opinion took exception to a per se rule that an offer or a rejection of a life offer could never be mitigating but did not find that relief should be granted.

While a rejected plea offer or the offer itself may not be mitigating, such is not always the case if the offer has relevance other than its mere existence or occurrence. If the offer has such relevance, it cannot be excluded under this Court's decisions cited above.

The offer to recommend life in Mr. Hitchcock's case was relevant because it could place the alleged crime committed by Mr. Hitchcock and his character in the proper context in proximity to the offense. The State's continuous deprivation of Mr. Hitchcock's constitutional rights removed the relevant sentencers' decisions from close proximity to the crime and prevented full and proper consideration of Mr. Hitchcock's mitigation and age. As Mr. Hitchcock received one sentencing after another, his body, mind, appearance, and his mitigation grew old. Acknowledging that life was appropriate when Mr. Hitchcock stood accused as a mere 20-year-old with no real adulthood behind him was important mitigation that should have been considered.

The majority opinion's conjecture that a plea offer to a non-capital sentence may have had other justifications, *see Hitchcock*, 745 F.3d at 483, does not go to the admissibility, but to the weight that the relevant sentencers should afford the evidence. A death penalty trial is one of the most adversarial proceedings that may take place in the legal system. There are at least two sides to the dispute. The majority opinion offers a concise

statement of an argument the State could offer as a counter to the defense presentation of mitigation. The possibility of a counter argument does not determine relevance. Counter arguments may be accepted by the decision-makers, or not.

The United States Constitution requires consideration of all relevant mitigation whether or not a counter-argument is made during the adversarial process. Mr. Hitchcock was denied his right to have relevant evidence considered in his case for life. Because Mr. Hitchcock was denied his right to present relevant mitigation, and because the Circuit Court's application of a per se rule that fails to account for cases in which a prosecutor's offer is relevant under particular facts and circumstances, this Court should grant certiorari.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

James L. Driscoll Jr.

Attorney of Record for Petitioner

Date: August 1, 2014.

No._____

IN THE SUPREME COURT OF THE UNITED STATES

_____

JAMES E. HITCHCOCK-PETITIONER

VS.

MICHAEL D. CREWS, SECRETARY,
FLORIDA DEPARTMENT OF CORRECTIONS
AND

PAMELA JO BONDI, ATTORNEY GENERAL,
STATE OF FLORIDA

RESPONDENT

PROOF OF SERVICE

I, James L. Driscoll Jr., do swear or declare that on this date, August 1, 2014, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS and PETITION FOR WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Mitchell Bishop, Assistant Attorney General, Office of the Attorney General 444 Seabreeze Blvd. 5th Floor, Daytona Beach, Florida 32118

I declare under penalty of perjury that the foregoing is true and correct.

Executed on August 1, 2014

James L. Driscoll Jr

No._____

IN THE SUPREME COURT OF THE UNITED STATES

JAMES E. HITCHCOCK
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RESPONDENTS.

ON PETITION OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

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in State Custody, filed in the United States Court of Appeals for the Eleventh Circuit, contained in Appendix K.

APPENDIX M: Motion to Withdraw Mandate and/or Vacate, Modify and/or Clarify Order Denying Application for Leave to File a Second or Successive Habeas Corpus Petition, 28 U.S.C. §2244(b), and for Rehearing in Part of Argument that this Section is Inapplicable to Mr. Hitchcock's Unique Procedural Posture, and Suggestion for Rehearing and Rehearing En Banc, filed in the United States Court of Appeals for the Eleventh Circuit

APPENDIX N: Order denying Motion contained in Appendix M.

APPENDIX O: Order of Dismissal Without Prejudice issued by the United States District Court, Middle District of Florida.

APPENDIX P: Petitoner's Motion to Alter or Amend the order contained in Appendix O.

APPENDIX Q: Order of United States District Court, Middle District of Florida granting Motion to Alter or Amend allowing penalty phase claims to be refiled in an amended petition.

APPENDIX R: First Habeas Petition following resentencing that was dismissed by the order contained in Appendix O.

APPENDIX S: Amended Habeas Petition denied by order contained in Appendix B.

APPENDIX T: Supreme Court of Florida's Order remanding for a determination of guilt phase postconviction issues.

APPENDIX U: Copy of Slip Opinion *Insignares v. Sec, Florida DOC*, ___F.3d___, (11th Cir. 2014); Case 12-12378 (June 24, 2014) Slip Op.

Appendix V: Statutory and Constitutional Provisions Involved