IN THE SUPREME COURT
OF FLORIDA

CASE NO. 86,837

GARY ELDON ALVORD,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

On Appeal from the Circuit Court
Hillsborough County, Florida

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

Appellant, Gary Eldon Alvord will be referred to herein by name or as "appellant." Appellee, State of Florida, will be referred to herein as the "State" or "appellee." References to the record on appeal will be designated by reference to the relevant page set forth in brackets. Example, [R. 1].

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Mr. Alvord was convicted and sentenced to death for three counts of first degree murder. His conviction and sentence were affirmed on direct appeal by this Court in Alvord v. State, 322 So.2d 533 (Fla. 1975) cert. denied 428 U.S. 923 (1976). Pursuant to Fla.R.Crim.P. 3.850 Mr. Alvord filed a Motion for Post Conviction Relief which alleged as one of its grounds the trial court's limitation by jury instruction of mitigating circumstances. Alvord v. State, 396 So.2d 184, 186 (Fla. 1981). Mr. Alvord's motion was denied by the trial court on August 27, 1979, and that denial was affirmed April 9, 1981. Alvord v. State, 396 So.2d 184 (Fla. 1981).

Thereafter, Mr. Alvord filed a petition for writ of habeas corpus in the federal district court, which asserted as one of its grounds the limitation of mitigating circumstances. Alvord v. Wainwright, 564 F.Supp. 459 (M.D. Fla. 1983). This petition was granted in part on the basis of Proffitt v. Wainwright, 685 F.2d 1227, 1266-1269 (11th Cir. 1982), however, the federal district court rejected petitioner's claim relating to the limitation of mitigating circumstances. Alvord v. Wainwright, 564 F.Supp. 459 (M.D. Fla. 1983). A resentencing was ordered by the district court but, on appeal by the State, the district court's resentencing command was reversed by the Eleventh Circuit and Mr. Alvord's convictions and sentence were affirmed. Alvord v. Wainwright, 725 F.2d 1282 (11th Cir. 1984).

The Eleventh Circuit's reasoning for denying Mr. Alvord relief was subsequently rejected by the United States Supreme Court in Hitchcock v. Dugger, 481 U.S. 393 (1987) and by this Court in Riley v. Wainwright, 517 So.2d 656 (Fla. 1987); Downs v. Dugger, 514 So.2d 1069 (Fla. 1987); Thompson v. Dugger, 515 So.2d 173 (Fla. 1987); and Morgan v. State, 515 So.2d 975 (Fla. 1987). Specifically, this court found that absent harmless error, resentencing is required when the jury was instructed to consider only evidence of statutory mitigating circumstances and the judge failed to consider non-statutory evidence. Id.

Prior to the Hitchcock decision on November 20, 1984, the Governor of Florida issued an executive order directing that a panel of psychiatrists examine Mr. Alvord pursuant to §922.07, Fla.Stat., on November 26, 1984. Alvord v. State, 459 So.2d 317, 318 (Fla. 1984). At the same time on November 20, 1984, Mr. Alvord petitioned this Court for a writ of extraordinary relief and requested a judicial determination of his competency separate from the procedures in §922.07, Fla.Stat. Alvord, 459 So.2d at 319. This petition was denied. Id. Subsequent to this Court's denial of Mr. Alvord's petition for judicial determination of competency pursuant to §922.07, Fla.Stat. (1983), Mr. Alvord was found incompetent to be executed by the three psychiatrists appointed by the Governor. Id. A future mental examination was ordered by the Governor to be conducted on September 29, 1987 to determine if Mr. Alvord's competency to be executed status had changed.

Thereafter, Hitchcock v. Dugger was decided and on September 25, 1987, Mr. Alvord filed his Petition for Extraordinary Relief, for a Writ of Habeas Corpus and Request for Stay of Mental Examination before this Court, seeking a stay of the compelled mental examination ordered by the Governor. Alvord v. State, 541 So.2d 598, 599. This petition alleged that a mental examination should not be conducted in light of Mr. Alvord's possible resentencing under Hitchcock. Alvord v. State, 541 So.2d at 599. On September 28, 1987, this Petition was denied without opinion. Id. On September 28, 1987, a Motion for Rehearing and Motion for Clarification was filed seeking clarification with respect to the Hitchcock claim. Id. On January 26, 1988, this Court directed the State to respond to the issue raised and the State responded. On July 9, 1988, Mr. Alvord filed an amendment to the Petition for Writ of Habeas Corpus and Request for Oral Argument, which raised a separate claim under Caso v. State, 524 So.2d 422 (Fla. 1988).[1] Id. After oral argument, this Court denied relief, finding the Hitchcock error to be harmless. Alvord v. State, 538 So.2d 838 (Fla. 1989), on rehearing, 541 So.2d 598 (Fla. 1989).

In finding the Hitchcock error to be harmless this Court based its finding only with respect to non-statutory mitigating factors developed on the face on the record. Alvord, 541 So.2d at 600. This Court did not address the restriction on non-statutory mitigating circumstances not present on the face of the record.

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[1] The Caso claim is not an issue relevant to this appeal, this Court having previously resolved this issue on its merits after finding error but holding it was harmless.

Id. Following this Court's finding of harmless error as to record Hitchcock non-statutory mitigating factors, this Court issued its opinion in Hall v. State, 541 So.2d 1125 (Fla. 1989).

In Hall, this Court held that a Hitchcock claim should be presented to the trial court as a Rule 3.850 post-conviction proceeding instead of a habeas corpus proceeding in part to allow for an evidentiary hearing to enable a defendant to develop non-record, non-statutory mitigating circumstances. Hall, 541 So.2d at 1128. Based on the Florida Supreme Court's holding in Hall, Mr. Alvord filed his Second Motion for Post-Conviction Relief on June 15, 1989, seeking an evidentiary hearing to allow him to present non-record, non-statutory mitigating evidence to support his Hitchcock claim. [R. 10-25]. Mr. Alvord requested such a hearing as a means to present non-record evidence which did not exist in Mr. Alvord's habeas corpus proceeding and to comply with the mandate of Hall. [R. 10-25].

On July 11, 1989, Mr. Alvord filed a Notice of Intent to Amend Motion for Post-Conviction Relief and on August 1, 1989, Mr. Alvord filed an Amendment to his Second Motion for Post-Conviction Relief in which he proffered several additional non-record, non-statutory mitigating circumstances which he intended to present at the evidentiary hearing he was requesting. [R. 26; 28]. On March 9, 1992, the State filed a Response to Defendant's Second Motion for Post-Conviction Relief, Motion for Summary Judgment and Memorandum of Law in Support Thereof in which the State argued that Mr. Alvord's Hitchcock claim was procedurally barred. [R. 44].

On May 9, 1992, Mr. Alvord filed a Memorandum in Support of Defendant's Second Motion for Post-Conviction Relief. [R. 60]. On November 2, 1992, the trial court entered its Order Granting Evidentiary Hearing on Second Motion for Post-Conviction Relief finding that Mr. Alvord was entitled to an evidentiary hearing in which he may present evidence of non-statutory mitigating evidence that could have been presented at the sentencing, but was not presented due to Hitchcock error. [R. 95].

On June 4, 1993, Mr. Alvord filed a Second Amendment to Second Motion for Post-Conviction Relief based on the United States Supreme Court holding in Espinosa v. Florida, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), and the Florida Supreme Court's opinion in James v. State, 615 So.2d 668 (1993). [R. 104]. On September 23, 1993, the State filed a Response to Defendant's Second Amendment to Second Motion for Post-Conviction Relief. [R. 126]. On May 2, 1994, Mr. Alvord filed Defendant's First Motion for Issuance of Subpoena Duces Tecum Without Deposition to obtain Mr. Alvord's mother's psychiatric records to be presented to the Court at the evidentiary hearing on non-record, non-statutory mitigating circumstances. [R. 139].

On June 14, 1995, the State filed a Motion for Rehearing on Issue of Defendant's Entitlement to an Evidentiary Hearing on Defendant's Second Motion for Post-Conviction Relief in which the State argued that Mr. Alvord's Hitchcock and Espinosa claims were procedurally barred. [R. 141]. Notwithstanding the Court's Order granting Mr. Alvord a right to an evidentiary hearing on non-

record, non-statutory mitigating circumstances, the trial court on July 19, 1995 sua sponte ordered a rehearing for oral argument regarding Mr. Alvord's right to an evidentiary hearing. [R. 165]. Following oral argument the trial court, on September 28, 1995, entered its Order Denying Defendant's Second Motion for Post-Conviction Relief. [R. 170]. Despite the trial court's earlier ruling, the trial court found that the issues raised by the defendant pursuant to Hitchcock and Espinosa were procedurally barred. [R. 170]. On October 24, 1995, Mr. Alvord filed his timely Notice of Appeal and this appeal follows. [R. 166].

POINTS ON APPEAL

I.

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

A. MR. ALVORD'S HITCHCOCK CLAIM IS NOT PROCEDURALLY BARRED

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

SUMMARY OF THE ARGUMENT

The trial court committed reversible error when it sua sponte found that Mr. Alvord's Hitchcock claim was procedurally barred thus denying him an evidentiary hearing in order to present non-record, non-statutory mitigating circumstances. Mr. Alvord's claim of non-record, non-statutory Hitchcock error is not procedurally barred because his contention that non-record mitigating circumstances were wrongfully withheld from the jury and judge during sentencing has never been presented to any court.

In Mr. Alvord's Fla.R.Crim.P. 3.850 motion he proffered sufficient non-record, non-statutory mitigating evidence including but not limited to evidence of his life-long psychiatric disorders, childhood hospitalizations, his drug and alcohol abuse, severe emotional problems as a result of a deprived childhood and capacity for rehabilitation. Such proffered evidence of non-record, non-statutory mitigating evidence was sufficient to warrant an evidentiary hearing on his Rule 3.850 motion and thus the trial court committed reversible error when it denied his motion.

ARGUMENT

I.

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

The trial court committed reversible error when it found that Mr. Alvord's Second Amended Motion for Post-Conviction relief pursuant to Hitchcock v. Dugger, 481 U.S. 393, 207 S.Ct. 1821, 95 L.Ed.2d 347 (1987), and Espinosa v. Florida, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 852 (1992), were procedurally barred. [R. 170]. As such, this Court must reverse the trial court's order and remand this cause to the trial court with directions that Mr. Alvord be given an evidentiary hearing in which he can present non-statutory mitigating circumstances which were not properly considered at his initial sentencing.

A.

MR. ALVORD'S HITCHCOCK CLAIM IS NOT PROCEDURALLY BARRED

Contrary to the trial court's holding, Mr. Alvord's Hitchcock claim as to non-record, non-statutory mitigating circumstances is not procedurally barred. Where a claim has previously been raised and ruled upon, it is procedurally barred from subsequent review by a court. Davis v. State, 589 So.2d 896, 899 (Fla. 1991). Mr. Alvord's claim of non-record, non-statutory Hitchcock error is not procedurally barred because his contention that non-record mitigating circumstances were wrongly withheld from the jury and

judge during the sentencing phase of his trial has never been addressed by any court.

Mr. Alvord was tried in 1974 before Lockett v. Ohio, 438 U.S. 586 (1978) and Songer v. State, 365 So.2d 626 (Fla. 1978), at a time when Florida judges and lawyers labored under the view that the introduction of evidence in capital sentences was restricted to a narrow statutory list. See Songer v. Wainwright, 769 F.2d 1488, 1494 (11th Cir. 1985) (en banc) (Hall, Kravitch, Johnson and Anderson, JJ., concurring) ("of course, neither the state trial judge nor Songer's counsel [preclusive] construction of the statute was unfounded. Quite the contrary, theirs was the most reasonable interpretation of Florida law at the time."); see also Harvard v. State, 486 So.2d 537 (Fla. 1986); Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987); Hargrave v. Dugger, 832 F.2d 1528 (11th Cir. 1987).

At the time of Mr. Alvord's sentencing his trial counsel, the trial judge, and this Court operated under the "reasonable" yet unconstitutional restrictive interpretation of the Florida death penalty statute, believing that non-statutory mitigating circumstances were not admissible at the sentencing hearing. As a consequence, Mr. Alvord was denied an individualized and reliable capital sentencing determination through the operation of State law. Subsequent to Mr. Alvord's sentencing, the United States Supreme Court in Hitchcock v. Dugger, 481 U.S. 393 (1987) established for the first time that non-statutory mitigating circumstances can be presented at sentencing and it is error for a

trial court to instruct otherwise. Id. The United States Supreme Court holding in Hitchcock was found by this Court to be a substantial change in the law. Cooper v. Dugger, 526 So.2d 900 (Fla. 1988) (Lockett/Hitchcock claim subject to no procedural bar because Hitchcock claim represents a substantial change in the law); Thompson v. Dugger, 515 So.2d 173 (Fla. 1987) (Hitchcock is a "change in the law" cognizable in post-conviction proceedings); Downs v. Dugger, 514 So.2d 1069, 1070 (Fla. 1987) ("We now find that a substantial change in the law has occurred that requires us to reconsider [a Hitchcock issue]").

There is no dispute that Hitchcock error existed in Mr. Alvord's flawed 1974 capital sentencing proceedings. At the trial court level the State has conceded that such a Hitchcock error existed, and this Court has found such error to exist. Alvord, 541 So.2d at 599. As such all decisions by counsel and Mr. Alvord at the time of the trial/sentencing proceeding were predicated upon and inextricably linked to the unconstitutional capital sentencing scheme in force in Florida in 1974. Therefore, any "strategy" or "waivers" of trial counsel in his failure to present or fully develop non-statutory mitigating circumstances were a function of the statute, and if there were waivers in 1974, they may not be used to bar review of Mr. Alvord's present Hitchcock claim.

When Mr. Alvord filed his direct appeal and his first Rule 3.850 motion, Hitchcock v. Dugger did not exist, and since the ruling in Hitchcock has been found to be a "substantial change" in the law, Mr. Alvord's direct appeal and his first 3.850 motion

cannot act as a procedural bar to Mr. Alvord's present claim. Alvord v. State, 322 So.2d 533 (Fla. 1975); Alvord v. State, 396 So.2d 184 (Fla. 1981); Thompson, 515 So.2d at 175.

Mr. Alvord's initial Hitchcock claim to this Court was not brought pursuant to Fla.R.Crim.P. 3.850 but, instead, was brought by a direct habeas petition pursuant to Art. V, §3(b)(1)(9), Fla.Const. Alvord v. State, 541 So.2d at 598. Pursuant to Art. V, §3(b)(1)(9), Mr. Alvord's petitioned this Court on September 25, 1987, seeking to stay a mental examination directed by the Governor to determine his competency. Alvord v. Dugger, 541 So.2d at 599. Mr. Alvord's request for a stay was denied in an unreported Order of this Court. Id. Mr. Alvord also challenged by habeas petition whether he was entitled to a new sentencing proceeding in light of the Hitchcock decision and whether statements were improperly admitted in his case in chief. Id.

At the time of Mr. Alvord's habeas petition on September 25, 1987, this Court had not defined the confines and procedure for raising a Hitchcock claim. It was not until May 11, 1989 that this Court announced its decision in Hall v. State, 541 So.2d 1125 (Fla. 1989) which defined the proper procedure for raising a Hitchcock claim.[2] Specifically in Hall, this Court noted that Hitchcock claims had come before the court by way of both 3.850 motions and habeas corpus petitions. Id. at 1128. This Court then went on to hold that all Hitchcock claims should be brought by way of

[2] This Court issued its decision in Hall on May 11, 1989, the same day it denied Mr. Alvord's request for rehearing on the denial of his Hitchcock habeas petition.

Fla.R.Crim.P. 3.850 instead of by habeas corpus petitions, in part to enable a defendant to have an evidentiary hearing to build a record on non-statutory mitigating circumstances which could have been presented at sentencing but were not as a result of Hitchcock error. Id.

Prior to this Court's ruling in Hall, Mr. Alvord filed his Hitchcock claim by way of a habeas petition requesting this Court to review the Hitchcock error which had occurred in his case knowing that this Court could not go beyond the record of his case. Yet, at the time because Hall had not been decided, Mr. Alvord did not know how to trigger a hearing to establish what non-record mitigating evidence may have merited a new sentencing hearing in his case because the procedure for such a hearing was not yet established. Prior to this Court's holding in Hall, it seemed appropriate to request this Court to review the record of the case for error. As this Court noted prior to Hall it was not uncommon for Hitchcock claims to be brought by way of habeas corpus petition. Hall, 541 So.2d at 1128.

In reviewing Mr. Alvord's habeas corpus Hitchcock claim this Court explicitly recognized that a Hitchcock violation had occurred stating, "We recognize the Hitchcock error and must now determine whether the error was harmless." Alvord, 541 So.2d at 599. This Court then went on to find that the Hitchcock error was harmless in Mr. Alvord's case stating:

> We find the mitigating evidence clearly insufficient to change the sentencing decision given the circumstances in this case. Based

> on the record, we conclude that the Hitchcock error was harmless.

Id. at 600 (emphasis added). It is clear that this Court's finding, that based on the record, Hitchcock error was harmless, in no way procedurally bars Mr. Alvord from an evidentiary hearing in order to present evidence of non-record, non-statutory mitigating circumstances. Nor does the court's finding procedurally bar a determination following a hearing as to whether such non-record evidence, if it had been considered, might have influenced the jury's sentencing recommendation and the judge's sentence in his case. In fact, this Court's holding in Hall implicitly establishes that Mr. Alvord's Hitchcock claim is not procedurally barred and he is entitled to an evidentiary hearing in which to present non-record, non-statutory mitigating circumstances. Hall, 541 So.2d at 1126.

In Hall, this Court held that a previous finding of harmless error on a Hitchcock claim pursuant to a habeas petition did not bar a subsequent finding pursuant to a Rule 3.850 motion that a new sentencing was required. Id. This Court, rejecting the trial court's finding that Hall's claim was procedurally barred, held:

> We do not agree with the trial court's ruling that our denial of relief in Hall VI,[3] constitutes a bar under the law in the case and res judicata. This case involves

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[3] Mr. Hall had appeared many times before the State and federal courts before receiving relief, as true of most still living inmates who experience unconstitutional pre-1978 Florida sentencing proceedings. In Hall v. State, 541 So.2d 1125 (Fla. 1989), this Court recited the procedural history of Mr. Hall's case, and designated Mr. Hall's last appearance before the court -- the State habeas corpus proceeding -- as "Hall VI."

> significant additional non-record facts which were not considered in Hall VI, because that was a habeas corpus proceeding with no further development of evidence beyond the record.

Id. (emphasis added).

In justifying this Court's holding in Hall VI, this Court noted that "appellate courts are reviewing, not fact finding courts." Id. at 1128. This Court further noted that in reaching its decision it was "aided by the [trial] court's findings of fact at the Rule 3.850 hearing." Id.

Similar to Hall VI, in 1987, Mr. Alvord filed a petition for writ of habeas corpus in this Court, raising only a record-bound Hitchcock claim. Alvord, 541 So.2d at 599. Similar to Hall VI, Mr. Alvord's habeas petition was denied. Alvord, 541 So.2d at 600. Following this denial, this Court issued its opinion in Hall, finding in essence that a Hitchcock claim should not be brought by way of habeas corpus but instead by Rule 3.850 motion to allow the defendant an evidentiary hearing and the opportunity to present non-record, non-statutory mitigating circumstances. Hall, 541 So.2d at 1128. Similar to Hall VI, Mr. Alvord filed a Rule 3.850 motion challenging non-record Hitchcock error. Mr. Alvord's second Rule 3.850 motion is nothing more than a response to this Court's holding in Hall, and this Court's direction to defendants to file Hitchcock claims with the trial courts in the form of a Rule 3.850 motion to permit the development of non-record mitigating circumstances.

Following this Court's decision in Hall, facing similar circumstances as presently face Mr. Alvord, this Court has remanded

to the trial court with directions that an evidentiary hearing take place in order to develop non-record, non-statutory mitigating circumstances which were not present on the record because of Hitchcock error. Meeks v. Dugger, 576 So.2d 713, 716 (Fla. 1991).

In Meeks, the defendant was before this Court on a writ of habeas corpus in which he alleged that available non-statutory mitigating evidence was excluded from his sentencing hearings, and he was therefore entitled to a new sentencing proceeding pursuant to Hitchcock v. Dugger. Id. In Meeks, this Court rejected the State's contention that any Hitchcock error alleged in Meeks' petition was harmless. In granting an evidentiary hearing this Court stated:

> We might accept the proposition [that Hitchcock error was harmless] if we look only at the face of the record. However, according to affidavits filed with this motion, Meeks' [trial] counsel did not seek to develop nonstatutory mitigating evidence because he was constrained by the then-prevailing statutory construction. These affidavits assert that substantial nonstatutory mitigating evidence could have been presented, including the fact that Meeks had been a patient in a state mental hospital, that he had received subsequent-treatment with psychotropic medication, that he had a history of drug abuse and alcohol abuse, and that he suffered from severe emotional problems as a result of his deprived childhood. On their face, the contents of these affidavits are sufficient to negate the conclusion that Hitchcock error was harmless. The merits of the claims can only be determined by an evidentiary hearing.

Meeks, 576 So.2d at 716. (emphasis added).

Similar to Meeks, Mr. Alvord's second 3.850 motion and accompanying affidavit on their face were sufficient to negate the

conclusion that Hitchcock error was harmless entitling Mr. Alvord to an evidentiary hearing. As was the case in Meeks, Mr. Alvord's pleadings also raised evidence of mental health problems, schizophrenia, commitments to mental health hospitals, history of drug and alcohol abuse, and severe emotional problems as a result of his deprived childhood. [R. 10-25, 28].

Given this Court's findings in Hall and Meeks, it is clear that Mr. Alvord's Hitchcock claim is not procedurally barred. The trial court committed reversible error when it reversed its initial holding affording a hearing and denied Mr. Alvord's motion. An evidentiary hearing and an opportunity to present non-record, non-statutory mitigating circumstances is required -- to present circumstances which have not been properly considered by any court.

As such, this Court must reverse the trial court's order and remand this cause to the trial court with directions to conduct an evidentiary hearing on Mr. Alvord's non-record, non-statutory mitigating circumstances and to determine whether such evidence entitles Mr. Alvord to a new sentencing hearing.

B.

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

The law is clear that under Rule 3.850 procedure, a movant is entitled to an evidentiary hearing unless the motion or files and records in the case conclusively show that the movant is entitled to no relief. O'Callaghan v. State, 461 So.2d 1354, 1355 (Fla. 1984). Additionally, the trial court must accept as true the defendant's factual allegations except to the extent they are conclusively rebutted by the record. Harich v. State, 484 So.2d 1239, 1241 (Fla. 1986). As well, this Court has held that "[t]his Court encourages holding evidentiary hearings whenever a culpable issue is raised under Rule 3.850." State v. Henry, 456 So.2d 466, 468 (Fla. 1984). In the present case, the record is clear that Mr. Alvord raised culpable issues entitling him to an evidentiary hearing.

Specifically, in Mr. Alvord's Second Motion for Post-Conviction Relief, Mr. Alvord proffered several non-statutory mitigating factors which were not presented at his sentencing, which included evidence of his life-long psychiatric disorders and his capacity for rehabilitation. [R. 16-18]. Specifically, it was proffered that throughout Mr. Alvord's life he had been the victim of one of the most extreme forms of psychiatric disorders known to the medical profession, having been first institutionalized in 1958 at the age of thirteen. [R. 16]. It was further proffered that Mr. Alvord remained in mental institutions until early 1973 when he

escaped and came to Florida. [R. 16]. It was further noted that Mr. Alvord was under an adjudication of insanity and incompetency at the time of the crimes for which he had been condemned to die. [R. 17].

In Mr. Alvord's Second Motion for Post-Conviction Relief, it was established that at the time of Mr. Alvord's trial the law precluded jurors from considering Mr. Alvord's traumatic mental health during early childhood, and thus counsel for Mr. Alvord did not investigate or develop a substantial number of non-statutory mitigating circumstances present in Mr. Alvord's life including but not limited to Mr. Alvord's traumatic life as a child, and later, as a teenager. Such proffered evidence by Mr. Alvord illustrated that since Mr. Alvord's jury was instructed to consider only the defendant's mental condition at the time of the crime, Mr. Alvord's early childhood and life-long mental history could not be considered by the jury and thus, such evidence was not developed by trial counsel and presented to the jury. See Messer v. Florida, 834 F.2d 890, 893-895 (11th Cir. 1987).

Following the filing of Mr. Alvord's Second Motion for Post-Conviction Relief, Mr. Alvord filed an Amendment to Second Motion for Post-Conviction Relief as a means to amend his 3.850 motion to include additional proffered evidence of non-record, non-statutory mitigating circumstances. [R. 28]. Specifically, it was proffered that Mr. Alvord suffers from a genetic mental disorder, in the form of schizophrenia, which has plagued his family for three generations. [R. 28]. It was further proffered that Mr. Alvord's

mother suffered from nervous breakdowns throughout her life, requiring repeated hospitalizations and continuous medication. [R. 28]. Additionally, it was proffered that Mr. Alvord's son, Gary, Jr., also suffers from the same disorder and manifests the same symptoms as his father. [R. 28].

It was further proffered that as a result of Mr. Alvord's mother's mental illness she was unable to care for Mr. Alvord and even rejected him at birth. [R. 28]. Additionally, Mr. Alvord's mother suffered a total mental breakdown shortly after Mr. Alvord's birth and was hospitalized thus establishing that as a young infant Mr. Alvord was completely cut-off from any maternal nurturing and was effectively abandoned by his mother. [R. 29].

Furthermore, it was proffered by Mr. Alvord that as a result of his mother's mental illness he was neglected, forced to wear used clothing (sometimes even female clothing), sucked his thumb until age twelve, received no parental supervision, and was deprived of any form of maternal nurturing and love. [R. 29]. In addition to his lack of maternal care, it was proffered that Mr. Alvord suffered from severe rejection by his father, who blamed him for his wife's illness. [R. 29]. As well, although Mr. Alvord's father had the financial resources to properly provide and care for him, his father's neglect lead to Mr. Alvord having to wear second-hand clothes resulting in emotional abuse from his peers. [R. 29]. Mr. Alvord's early childhood hospital admission records often referred to him as "rather thin," ill-kept and "not to neatly dressed or groomed." [R. 29-30]. It was further proffered, that

Mr. Alvord's parental neglect and abuse was well documented by Mr. Alvord's early childhood physicians who noted his "severe experiences of rejection by his parents and parent figures." [R. 29-30].

In addition to abuse and neglect at home by his parents it was further proffered that before Mr. Alvord was eleven years old his parents placed him in foster homes and group homes, where he suffered repeated abuse. [R. 30]. Specifically, at the age of twelve Mr. Alvord was placed in Northville Hospital where homosexuality and involuntary homosexual activity was rampant. [R. 30]. In addition to rampant homosexuality, the living conditions at Northville Hospital were unbearable especially during the summer where temperatures in the hospital, which lacked ventilation, exceeded 100 degrees. [R. 30]. It was further proffered, that despite these trying conditions, abuse and rejection at home, Mr. Alvord was described as "quiet and docile, and very kind to pets" as well as a good elementary student. [R. 29]. Additionally, despite Mr. Alvord's mother's rejection he remained a loyal and devoted son to his mother throughout her life frequently sending her postcards and paintings he had made. [R. 30].

In support of non-statutory, non-record mitigating circumstances it was further proffered that during the times surrounding the crimes in which Mr. Alvord was convicted he was under the extreme influence of drugs and alcohol, to the extent that he was frequently irrational and disoriented as to time and space. [R. 30]. As well, it was proffered that during the period

of Mr. Alvord's incarceration at the Hillsborough County Jail, he was for months at a time, striped naked in a solitary cell, without sheets or linens in extreme conditions of confinement yet never presented any behavior problems while incarcerated. [R. 31]. See Skipper v. South Carolina, 476 U.S. 1 (1986) (it is error to exclude from the jury mitigating evidence regarding defendant's behavior while incarcerated which is relevant to defendant's potential for rehabilitation).

Additionally, it was proffered that throughout his life, Mr. Alvord has been an extremely talented artist. [R. 31]. Lacking funds he has often made his own art materials. [R. 31]. Mr. Alvord's art work illustrates another side of his personality, that of a sensitive individual. [R. 31]. As was the case with Mr. Alvord's traumatic childhood and mental illness this mitigating evidence was not presented and fully developed at his sentencing. Finally, it was further proffered that additional non-statutory mitigating circumstances existed including but not limited to the fact that Mr. Alvord continues to suffer from mental illness to such a degree that he has been found to be incompetent to be executed pursuant to §922.07, Fla.Stat. [R. 31].

In support of his proffer of evidence of non-record, non-statutory mitigating circumstances, Mr. Alvord attached to his Amendment to Second Motion for Post-Conviction Relief a five-page investigation affidavit confirming through witness testimony, Mr. Alvord's difficult childhood and family life. [R. 33-37]. In a further attempt to proffer sufficient evidence of non-statutory

mitigating evidence Mr. Alvord obtained from the trial court a subpoena duces tecum without deposition to obtain his deceased mother's psychological records. [R. 139].

If Mr. Alvord's jury had been advised of all these proffered non-statutory mitigating circumstances, there exists a substantial possibility that the jury would have returned a recommendation of life which the trial judge would not have been free to override under Tetter v. State, 322 So.2d 908 (Fla. 1975). This Court in Meeks, acknowledged that similar proffered evidence of non-record, non-statutory mitigating circumstances, as were proffered by Mr. Alvord, warranted an evidentiary hearing to determine the merits of such claims. Meeks, 576 So.2d at 716. (evidentiary hearing ordered where defendant proffered evidence of mental illnesses, hospitalizations, history of drug and alcohol abuse, and severe emotional problems as a result of deprived childhood).

In the present case, on the record before the trial court Mr. Alvord alleged specific facts that when considering the totality of those circumstances were not conclusively refuted by the record. Harich, 484 So.2d at 1241. As such, Mr. Alvord had proffered sufficient evidence warranting an evidentiary hearing and the trial court committed reversible error when it sua sponte denied Mr. Alvord an evidentiary hearing on his Second Amended Motion for Post-Conviction Relief. As such, this Court must reverse the trial court's order and remand Mr. Alvord's case with directions to the trial court to conduct an evidentiary hearing on his Hitchcock claim.

CONCLUSION

For the foregoing reasons this Court must reverse the trial court's order denying appellant's Second Amended Motion for Post-Conviction Relief and shall remand this cause to the trial court with directions that it hold an evidentiary hearing to allow the appellant to present evidence of non-statutory mitigating circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Candance M. Sabella, Esquire, Assistant Attorney General, Dept. of Legal Affairs/Tampa Office, 2002 No. Lois Avenue, Ste. 700, Tampa, FL 33607-2366, by United States Mail, this 13th day of May, 1996.

ATTORNEY

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