IN THE SUPREME COURT OF FLORIDA

NO. 74269

JAMES WILLIAM HAMBLEN,

Petitioner,

v.

RICHARD L. DUGGER, Secretary,
Department of Corrections, State of Florida,

Respondent.

PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF HABEAS CORPUS, REQUEST FOR STAY OF EXECUTION, AND APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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I. JURISDICTION TO ENTERTAIN PETITION, ENTER A STAY OF EXECUTION, AND GRANT HABEAS CORPUS RELIEF

A. JURISDICTION

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process, and the legality of petitioner's capital conviction and sentence of death. See Hamblen v. State, 527 So. 2d 800 (Fla. 1988). Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein involved the appellate review process. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); see also, Johnson (Paul) v. Wainwright, 498 So. 2d 938 (Fla. 1987); cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for petitioner to raise the claims presented in this petition. See, e.g., Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Wilson, supra.

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, see Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977); Wilson v. Wainwright, 474 So. 2d at 1165, and has not hesitated in exercising its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital trial and sentencing proceedings. Wilson; Johnson; Downs; Riley. This petition presents substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. Hamblen's capital conviction and sentence of death, and of this Court's appellate review. Petitioner's claims

are therefore of the type classically considered by this Court pursuant to its habeas corpus jurisdiction. This Court has the inherent power to do justice. As shown below, the ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. See, e.g., Riley; Downs; Wilson; Johnson, supra. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984). The petition includes claims predicated on significant, fundamental, and retroactive changes in constitutional law. See, e.g., Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Tafero v. Wainwright, 459 So. 2d 1034, 1035 (Fla. 1984); Edwards v. State, 393 So. 2d 597, 600 n. 4 (Fla. 3d DCA), petition denied, 402 So. 2d 613 (Fla. 1981); cf. Witt v. State, 387 So. 2d 922 (Fla. 1980). The petition also involves claims of ineffective assistance of counsel on appeal. See Knight v. State, 394 So. 2d 997, 999 (Fla. 1981); Wilson v. Wainwright, supra; Johnson v. Wainwright, supra. These and other reasons demonstrate that the Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of the claims herein presented.

B. REQUEST FOR STAY OF EXECUTION

Mr. Hamblen's petition includes a request that the Court stay his execution (presently scheduled for July 12, 1989). As will be shown, the issues presented are substantial and warrant a stay of execution. This Court has not hesitated in the past to stay executions when warranted to ensure judicious consideration of the issues presented by petitioners litigating during the pendency of a death warrant. See, e.g., Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Copeland v. State (Nos. 69,429 and

69,482, Fla., Oct. 16, 1986); Jones v. State (No. 67,835, Fla., Nov. 4, 1985); see also Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Kennedy v. Wainwright, 483 So. 2d 426 (Fla. 1986). Cf. State v. Sireci, 502 So. 2d 1221 (Fla. 1987).

This is Mr. Hamblen's first and only petition for a writ of habeas corpus. The claims he presents are no less substantial than those involved in the cases cited above. He therefore respectfully urges that the Court enter an order staying his execution, and, thereafter, that the Court grant habeas corpus relief.

II. GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Petitioner submits that his capital conviction and his sentence of death were obtained and then affirmed during the Court's appellate review process in violation of his rights as guaranteed by the fifth, sixth, eighth and fourteenth amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution, for each of the reasons set forth herein.

III. CLAIMS FOR RELIEF

CLAIM I

THE TRIAL COURT ERRED IN ALLOWING MR. HAMBLEN TO WAIVE APPOINTED COUNSEL AND JURY SENTENCING WITHOUT AN ADEQUATE FARETTA WAIVER.

As the affidavits appended to this petition (and incorporated herein) show, James Hamblen is mentally ill and was so at the time of his capital proceedings. Because of the strange manner in which this case proceeded before the trial court, no one (not defense counsel, not the court, not the prosecutor) considered the effects of this man's mental illness on his capacity to validly "waive" counsel (and, later, a penalty phase jury). No one (not counsel who had been asked to serve in

a "stand by" capacity but actually did nothing; not the court, a court that had before it evidence of this man's mental impairments but did nothing about it; not the State, which also had evidence of Mr. Hamblen's mental illness in its files) ever considered the effects of James Hamblen's longstanding psychological impairments on his capacity to "waive" counsel and to then represent himself. No one asked that he be evaluated in this regard. He should have been: such "waivers" require a much higher level of mental health functioning than what is required for a finding of "competency" to proceed in a judicial setting with counsel. The former was never done here. It should have been. (The experts were available.) In failing to order such an evaluation when significant evidence of mental illness was before the trial court, it failed to protect this "pro se" defendant's rights. Relief is appropriate on this basis alone, but there is a great deal more.

Mr. Hamblen was indicted for first degree murder on May 10, 1984 (R. 6). On April 25, 1984, he was declared indigent and the Office of the Public Defender was appointed to represent him (R. 4). The public defender then proceeded to file various motions (E.g., R. 8-10, 11-12, 13-33). Defense counsel also filed motions to have Mr. Hamblen evaluated by a mental health expert (R. 40-42; 51-52).

On May 17, 1984, Mr. Hamblen appeared in court with his attorney. The defense attorney entered a plea of not guilty for Mr. Hamblen (R. Vol. II, p. 2), and then proceeded to argue the various motions he had filed (R. Vol. II). Mr. Hamblen was also represented in court on June 14, 1984, when his attorney argued a motion to appoint one confidential expert (R. Vol. III).

After being evaluated by Dr. McMahon and Dr. Miller, Mr. Hamblen appeared in court with defense counsel on July 10, 1984. At that time, defense counsel informed the court that Mr. Hamblen wished to personally address the court. The following occurred:

> THE DEFENDANT: Your Honor, when I was arraigned, Mr. McGuinness, my counsel, entered a plea for me of not guilty by reason of insanity. Now I'd like to dispense with the services of the Public Defender, not because I found their --

(R. 21). At that point the court interrupted Mr. Hamblen to advise him of his right to silence. Thereafter, counsel was "waived" (as a penalty phase jury would later be "waived") and Mr. Hamblen was allowed to proceed pro se. As noted above, although evidence of petitioner's mental illnesses was before the court, the experts were not asked to evaluate and assess whether petitioner's mental state was such that he could validly make such "waivers".

"The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense." Faretta v. California, 422 U.S. 806, ___ 96 S. Ct. 2525, 2533 (1975). However, in order to represent oneself, an accused must "knowingly and intelligently" forego the traditional benefits associated with the right to counsel. Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938); Faretta, supra, 95 S. Ct. at 2541. A higher mental state is required than what is required merely for a finding of competency to proceed with counsel. The record here does not disclose that Mr. Hamblen ever "knowingly and intelligently" waived his right to be represented by counsel.

Precedent is replete with criteria for determining whether an accused has waived his right to counsel. In Faretta, supra, there existed no evidence that the defendant was mentally ill before the Court. Even so, a heightened level of understanding and cognition was required. Footnote 3 of the Faretta opinion quotes the exchange between the court and the defendant. Mr. Faretta was questioned, inter alia, on his understanding of the hearsay rule, how peremptory challenges and challenges for cause are used, and how to conduct voir dire. Mr. Faretta responded in narrative fashion to many of the questions, and indicated that he

had been doing his own legal research to prepare for his trial. Id., 95 S. Ct. at 2528.

Likewise, the Eleventh Circuit discussed the various criteria for a valid waiver of the right to counsel in Fitzpatrick v. Wainwright, 800 F.2d 1057, 1065 (11th Cir. 1986)(emphasis added)(footnote omitted):

> Faretta and its progeny suggest that, in addition to the presence of a clear and unequivocal assertion of the right of self-representation, other safeguards are required. Because a defendant who exercises the right to conduct his own defense relinquishes many of the important benefits associated with the right to an attorney, a trial judge should normally conduct a waiver hearing to insure that the defendant understands the disadvantages of self-representation, including, inter alia, the defendant's understanding of the risks and complexities of his particular case. See Faretta, 422 U.S. at 835, 95 S.Ct at 2541; Raulerson v. Wainwright, 732 F.2d 803, 808 (11th Cir. 1984); Hance v. Zant, 696 F.2d 940, 949 (11th Cir.), cert. denied, 463 U.S. 1210, 103 S.Ct. 3544, 77 L.Ed.2d 1393 (1983), overruled on other grounds, Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985); United States v. Chancey, 662 F.2d 1148, 11522 (5th Cir. 1981)(Unit B).

Some of the factors discussed in Fitzpatrick for analyzing the validity of a purported waiver include the background, experience and conduct of the accused; whether the defendant was represented by counsel prior to trial; whether the defendant knows the nature of the charges and the possible penalties; whether he understands that he will be required to comply with the rules of procedure at trial; whether the waiver is a result of coersion or mistreatment; whether he has knowledge of some legal challenges that might be raised in his case; and whether the waiver is for the purpose of delay or manipulation.

The Court in Fitzpatrick held that the defendant had made a valid waiver, while recognizing "that only rarely will the Faretta standards be satisfied absent a hearing at which the defendant is expressly advised of the risks and disadvantages of

self-representation." Fitzpatrick v. Wainwright, 800 F.2d 1057, 1068 (11th Cir. 1986).

In the dissenting opinion to Fitzpatrick, Senior District Judge Atkins wrote:

> I would prefer to articulate the content of the Faretta colloquy so trial judges would be better guided in the future. For example, the court should inform a defendant that motions may be presented before, during, and after trial. Then the judge should ask the defendant to name one example of a pretrial motion, etc. Next, the court should warn a defendant that he will be required to adhere to the court's rules of evidence and procedure, and quiz the defendant briefly on a couple of rules, as the trial judge in Faretta did. See id. at 808 n. 3, 95 S.Ct. at 2528 n. 3. Then, the court should inquire as to whether the defendant is familiar with each element of the offense charged. Further, the court should inquire as to whether a defendant is aware of any possible defense for each offense. Finally, the court should suggest that counsel could assist the defendant in all areas of defense.

Fitzpatrick, supra, 800 F.2d at 1072, n.12 (Atkins, J., dissenting).

Finally, courts have noted that it is preferable for the court to ask questions designed to elicit from the accused a narrative statement of his understanding rather than "pro forma answers to pro forma questions." United States v. Billings, 568 F.2d 1307, 1309 (9th Cir. 1978); cf. United States v. Curcio, 680 F.2d 881 (2nd Cir. 1982). In Mr. Hamblen's case, all that was elicited were pro forma answers to pro forma questions. After requesting that his attorneys be dismissed, the lower court judge asked Mr. Hamblen certain questions designed to elicit only a yes or no answer (R. 22-25). When Mr. Hamblen did try to respond in a narrative fashion, the court cut him off (R. 31).

Mr. Hamblen did tell the court that he was 55 years old and had completed 14 year of school (R. 22) and had represented himself in the Indiana Supreme Court and a Federal District Court (R. 29). (He had not, as proper inquiry would have shown, as defense counsel knew, and as the State also apparently knew.)

The problem is not so much with what Mr. Hamblen said, as with what he did not say. The court engaged in no discussions with Mr. Hamblen other than a pro forma reading to him of his rights in conjunction with the guilty plea he entered, uncounseled, after the "waiver". The court also never verified whether the information provided by Mr. Hamblen was accurate.[1] The following exchange is illustrative:

> THE COURT: Do you feel that you are competent to represent yourself?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Have you ever done it before?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: In what court?
>
> THE DEFENDANT: In Indiana Supreme Court, and Federal District Court.
>
> THE COURT: Have you ever done it in a trial court, just a Federal District Court?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: The district court in Indiana was a trial court; wasn't it?
>
> THE DEFENDANT: Yes, sir.

(R. 29-30). Had Mr. Hamblen represented himself in a trial court or not? The answers are contradictory. In Faretta, the "record affirmatively show[ed] that Faretta was literate, competent, and understanding, and that he was voluntarily exercising his free will." 95 S. Ct at 2451. The record here shows very little other than that Mr. Hamblen could answer "yes" and "no" and apparently no longer wanted to "fight on." At a minimum, a more thorough questioning was mandated, particularly in light of the

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[1]As noted, no professional was asked to assess (and the court did not assess) the impact of this man's mental illnesses (see Affidavit of Dr. McMahon, appended hereto, discussing evidence of Mr. Hamblen's "psychosis" and long-term psychological deficiencies noted in her report at the time of the original trial court proceedings) on the validity of his purported "waiver".

fact that the court was aware that Mr. Hamblen had mental problems, which was not the case in Fitzpatrick or Faretta.

This Court concluded in its opinion on direct appeal,

> Upon receiving news of the doctors' reports, Hamblen asked the court to revoke the appointment of the public defender and allow him to represent himself. He simultaneously announced his intention to plead guilty. The trial judge conducted a hearing according to the requirements of Faretta v. California, 422 U.S. 806 (1975), and Goode v. State, 365 So.2d 381 (Fla. 1978), cert. denied, 441 U.S. 467 (1979), to determine Hamblen's fitness for self-representation. The evidence at this hearing showed that Hamblen had had two years of college education, that he understood courtroom procedure, and that he had represented himself while a state prisoner in Indiana. The judge determined that Hamblen met the criteria that enable him to exercise his right of self-representation, but ordered two assistant public defenders to be in the courtroom as emergency backup counsel.

However, the trial judge was not even certain that Mr. Hamblen could read:

> THE COURT: . . . Now, Mr. Hamblen, I'm going to ask the State Attorney to give you a form of waiver for you to review. I'd like for you to examine it carefully, and I'll read it together with you.
>
> MR. BLEDSOE: Your Honor, I have tendered the waiver form that I have prepared to the defendant.
>
> THE DEFENDANT: Your honor, I'm prepared to sign this.
>
> THE COURT: Mr. Hamblen, can you read?
>
> THE DEFENDANT: Yes, sir, I can read.
>
> THE COURT: How many years of school have you completed?
>
> THE DEFENDANT: 14, sir.
>
> THE COURT: I think you told me that once before.
>
> I'm going to read this so there will be no possible misunderstanding about this. You read that form along with me. I'm going to read it right now, and you tell me if anything I say is incorrect in it.

(R. Vol IV, p. 57)(emphasis added). This psychologically impaired individual was quite a few steps removed from acting

"intelligently" and "rationally". The Court erred in assuming a proper waiver on direct appeal. Appellate counsel failed his client by omitting this, one of the few, viable claims present on the record which resulted from these "waivers". See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985)(Court's independent review of record for error is no substitute for effective presentation by counsel); Penson v. Ohio, No. 87-6116, 108 S. Ct. ___ (1988)(same).

Also, it was apparent that Mr. Hamblen did not even know how or where to file anything in his case. After waiving a jury in the penalty phase, the State requested that Mr. Hamblen sign a written "waiver". Mr. Hamblen agreed to do that, but then said:

> THE DEFENDANT: How do I get the waiver to you, Your Honor.
>
> THE COURT: Beg your pardon?
>
> THE DEFENDANT: How do I get the waiver to you?

(R. Vol. IV, p. 52).

The State agreed to take care of the waiver at that point. This is unlike Faretta itself where it is clear that the defendant filed his own motions and knew how to do it:

> THE DEFENDANT: Not bad, your Honor. Last night I put in the mail a 995 motion and it should be with the clerk within the next day or two.

85 S. Ct. at 2528, n.3. Mr. Hamblen knew very little about the criminal justice system.

In light of Mr. Hamblen's history of mental problems, the court's failure to conduct an adequate Faretta hearing, and the failure of the record to affirmatively demonstrate that Mr. Hamblen was "literate, competent, and understanding," or that he was acting intelligently and not as a result of his psychological impairments, Faretta, 95 S. Ct. at 2541, it was error for the trial court to allow Mr. Hamblen to make these "waivers".

It is of no importance in this case that Mr. Hamblen was given "stand by" counsel to assist him: stand by counsel did

absolutely nothing on this case (no investigation, no preparation, nothing) and did not consult with Mr. Hamblen with regard to any substantive issues. Counsel did not serve in any function in these proceedings. In fact, stand by counsel was and is of the opinion that Mr. Hamblen should not have been allowed to waive counsel.

Neither is this Court's dicta concerning the "waiver", quoted above, controlling. This issue was never raised by appellate counsel, and never briefed by either side. It was not properly brought before this Court before nor subjected to adversarial testing. Appellate counsel had no reason for failing to raise this meritorious issue, and thus rendered ineffective assistance of counsel. Indeed, appellate counsel's ineffectiveness is made plainer by the fact that he himself had consulted Dr. Dee, a qualified mental health professional who told counsel that Mr. Hamblen was mentally ill and that an adequate assessman under Faretta had never been made in this case (See Affidavit of Dr. Dee, appended hereto).

The Court should consider this issue in this habeas corpus proceeding. It was, after all, this Court that (as we respectfully submit) erroneously determined the claim on direct appeal. Jurisdiction thus rests with this Court. Habeas corpus relief is now proper.

CLAIM II

THIS COURT ERRED IN FAILING TO REVERSE MR. HAMBLEN'S SENTENCE OF DEATH AND REMAND FOR RESENTENCING UNDER THE ELLEDGE STANDARD UPON THE STRIKING OF AN AGGRAVATING FACTOR, AND THUS DENIED MR. HAMBLEN THE PROTECTIONS AFFORDED UNDER THE FLORIDA CAPITAL SENTENCING STATUTE, IN VIOLATION OF DUE PROCESS, EQUAL PROTECTION, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

On direct appeal, this Court found that the aggravating factor that the homicide was committed in a cold, calculated, and premeditated manner was not supported by the facts of this case,

and thus struck it. Hamblen v. State, 527 So. 2d 800 (Fla. 1988). However, the majority opinion went on to state:

> Notwithstanding, we are convinced that the elimination of this aggravating circumstance would not have resulted in Hamblen's receiving a life sentence. See Bassett v. State, 449 So. 2d 803 (Fla. 1984); Brown v. State, 381 So. 2d 690 (Fla. 1980); cert. denied, 449 U.S. 1118 (1981).

This failure to reverse and remand for resentencing is in direct conflict with this Court's own longstanding standards. In Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977), this Court expressly held over ten years ago that if improper aggravating circumstances are found, "then regardless of the existence of other authorized aggravating factors we must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death." Accordingly, reversal is required when mitigation may be present and an aggravating factor is struck.[2] That is a fundamental protection afforded to a capital defendant under Florida law.

Thus, when this Court found that the cold, calculated and premeditated aggravating circumstance was improperly found, it was duty bound to reverse the death sentence.[3] This holds true even though two valid aggravating circumstances remained, because the record does not reflect that the sentencing judge found no mitigation: the sentencing court did find nonstatutory mitigating circumstances, even though it did not think them sufficient to outweigh three aggravators.

The trial court's sentence of death in this case read as follows (in relevant part):

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[2]And even when it is not, see Schaefer v. State, 537 So. 2d 988 (Fla. 1989); Nibert v. State, 508 So. 2d 1 (Fla. 1987).

[3]This is especially important in a case such as this, a case in which the record reflected little (if any) adversarial testing of the propriety of death. Indeed, on direct appeal, Justice Ehrlich dissented on this basis alone.

> The Defendant's background and history as set forth in the presentence investigation and the reports of Drs. Miller and McMann do not offer any other sufficient mitigating circumstances. The presentence investigation report contains the recommendation that the Defendant be sentenced to life imprisonment.
>
> In summary, the Court finds that three sufficient, aggravating circumstances exist and no mitigating circumstances exist which would outweigh them and therefore the Court rejects the recommendation of sentence in the presentence investigation report [of life imprisonment]. Consequently, under the evidence and the law of this State a sentence of death is mandated.

(R. 84-85)(emphasis added).

As in Elledge,

> In order to have weighed the aggravating circumstances against the mitigating circumstances, the court must have found some of the latter. Likewise, in concluding "that insufficient mitigating circumstances exist to outweigh the aggravating circumstances" he implicitly found some mitigating circumstances to exist. But did the judge take into account in the weighing process the nonstatutory aggravating circumstance? He did.

346 So. 2d at 696. There is no difference.

Indeed, here (even on the basis of this bizarre sentencing proceeding) there was considerable mitigation before the court. The record was replete with evidence of Mr. Hamblen's mental illness. His attorney alleged that he had been hospitalized for psychiatric treatment on three prior occasions; the psychiatric reports before the court (appended hereto) presented significant mental health and other mitigation; the presentence investigation report also included nonstatutory mitigating factors.

In light of this nonstatutory mitigation, this Court was in error in failing to reverse Mr. Hamblen's death sentence upon the striking of an improper aggravator under the standard announced in Elledge v. State, supra. This error deprived Mr. Hamblen of his rights to due process and equal protection by denying him the liberty interest created by Florida's capital sentencing statute. See Vitek v. Jones, 445 U.S. 480 (1980); Hicks v. Oklahoma, 447

U.S. 343 (1980). A capital sentencing scheme is only constitutional to the extent that it is applied in a consistent manner to all capital defendants. Mr. Hamblen was not afforded those protections, and was denied his eighth amendment rights. Moreover, appellate counsel rendered ineffective assistance in failing to properly present this issue, and indeed in all but conceding that death was the proper outcome in this case. In any event, this fundamental error is now plain, and should be corrected here. This case should be remanded for resentencing.

CLAIM III

MR. HAMBLEN'S SENTENCE OF DEATH VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE SENTENCING COURT EMPLOYED AN EXPRESS PRESUMPTION OF DEATH AND SHIFTED THE BURDEN TO MR. HAMBLEN TO PROVE THAT DEATH WAS INAPPROPRIATE, IN VIOLATION OF MULLANEY V. WILBUR, 421 U.S. 684 (1975), LOCKETT V. OHIO, 438 U.S. 586 (1978), AND MILLS V. MARYLAND, 108 S. CT. 1860 (1988).

This case involves a flatly unconstitutional express presumption of death. In the sentencing court's own words:

> In summary, the Court finds that three sufficient, aggravating circumstances exist and no mitigating circumstances exist which would outweigh them and therefore the Court rejects the recommendation of sentence in the presentence investigation report [of life imprisonment]. Consequently, under the evidence and the law of this State a sentence of death is mandated.

(R. 84-85)(emphasis added). This is precisely the express presumption of death found to starkly violate the eighth amendment by the Eleventh Circuit Court of Appeals in Jackson v. Dugger, infra. This death sentence simply cannot be allowed to stand, without rejecting what is at the core of what the eighth amendment requires.

The sentencing order in this case undeniably illustrates that the sentencing court applied an express presumption of death. As a result, the sentencing court violated the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), as the Court of

Appeals for the Ninth Circuit recently held in a similar case. See Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(in banc). In Adamson, the Ninth Circuit held that because the Arizona death penalty statute "imposes a presumption of death on the defendant," the statute deprives a capital defendant of his eighth amendment rights to an individualized and reliable sentencing determination:

> We also hold A.R.S. sec. 13-703 unconstitutional on its face, to the extent that it imposes a presumption of death on the defendant. Under the statute, once any single statutory aggravating circumstance has been established, the defendant must not only establish the existence of a mitigating circumstance, but must also bear the risk of nonpersuasion that any mitigating circumstance will not outweigh the aggravating circumstance(s). See Gretzler 135 Ariz. at 54, 659 P.2d at 13 (A.R.S. sec. 13-703(E) requires that court find mitigating circumstances outweigh aggravating circumstances in order to impose life sentence). The relevant clause in the statute--"sufficiently substantial to call for leniency"--thus imposes a presumption of death once the court has found the existence of any single statutory aggravating circumstance.
>
> Recently, the Eleventh Circuit held in Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988), that a presumption of death violates the Eighth Amendment. The trial judge, applying Florida's death penalty statute, had instructed the jury to presume that death was to be recommended as the appropriate penalty if the mitigating circumstances did not outweigh the aggravating circumstances. Examining the jury instructions, the Eleventh Circuit held that a presumption that death is the appropriate sentence impermissibly "tilts the scales by which the [sentencer] is to balance aggravating and mitigating circumstances in favor of the state." Id. at 1474. The court further held that a presumption of death "if employed at the level of the sentencer, vitiates the individualized sentencing determination required by the Eighth Amendment." Id. at 1473.
>
> The Constitution "requires consideration of the character and record of the individual offender and the circumstances of the particular offense," Woodson, 428 U.S. at 304, because the punishment of death is "unique in its severity and irrevocability," Gregg, 428 U.S. at 187, and because there is "fundamental respect for humanity underlying

the Eighth Amendment." Woodson, 428 U.S. at 304 (citation omitted). A defendant facing the possibility of death has the right to an assessment of the appropriateness of death as a penalty for the crime the person was convicted of. Thus, the Supreme Court has held that statutory schemes which lack an individualized evaluation, thereby functioning to impose a mandatory death penalty, are unconstitutional. See, e.g., Sumner v. Shuman, 107 S.Ct. 2716, 2723 (1987); Roberts, 428 U.S. at 332-33; see also Poulos, Mandatory Capital Punishment, 28 Ariz. L. Rev. at 232 ("In simple terms, the cruel and unusual punishments clause requires individualized sentencing for capital punishment, and mandatory death penalty statutes by definition reject that very idea.").

In addition to precluding individualized sentencing, a presumption of death conflicts with the requirement that a sentencer have discretion when faced with the ultimate determination of what constitutes the appropriate penalty. See Comment, Deadly Mistakes: Harmless Error in Capital Sentencing, 54 U. Chi. L. Rev. 740, 754 (1987)("The sentencer's authority to dispense mercy . . . ensures that the punishment fits the individual circumstances of the case and reflects society's interests.").

Arizona Revised Statute sec. 13-703(E) reads, in relevant part: "the court . . . shall impose a sentence of death if the court finds one or more of the aggravating circumstances . . . and that there are no mitigating circumstances sufficiently substantial to call for leniency." Thus, the Arizona statute presumes that death is the appropriate penalty unless the defendant can sufficiently overcome this presumption with mitigating evidence. In imposing this presumption, the statute precludes the individualized sentencing required by the Constitution. It also removes the sentencing judge's discretion by requiring the judge to sentence the defendant to death if the defendant fails to establish mitigating circumstances by the requisite evidentiary standard, which outweigh the aggravating circumstances. See Arizona v. Rumsey, 467 U.S. 203, 210 (1984)("death must be imposed if there is one aggravating circumstance and no mitigating circumstance sufficiently substantial to call for leniency"); State v. Jordan, 137 Ariz. 504, 508, 672 P.2d 169, 173 (1983)("Jordan III")(sec. 13-703 requires the death penalty if no mitigating circumstances exist).

The State relies on the holdings of its courts that the statute's assignment of the burden of proof does not violate the Constitution. The Arizona Supreme Court

> reasons that "[o]nce the defendant has been found guilty beyond a reasonable doubt, due process is not offended by requiring the defendant to establish mitigating circumstances." Richmond, 136 Ariz. at 316, 666 P.2d at 61. Yet this reasoning falls short of the real issue--that is, whether the presumption in favor of death that arises from requiring that the defendant prove that mitigating circumstances outweigh aggravating circumstances, offends federal due process by effectively mandating death.
>
> In addition, while acknowledging that A.R.S. sec. 13-703 places the burden on the defendant to prove the existence of mitigating circumstances which would show that person's situation merits leniency, State v. Poland, 144 Ariz. 388, 406, 698 P.2d 183, 201 (1985) aff'd, 476 U.S. 147 (1986), the State suggests that its statute does not violate the Eighth Amendment because subsection (E) requires the court to balance the aggravating against the mitigating circumstances before it may conclude that death is the appropriate penalty. While the statute does require balancing, it nonetheless deprives the sentencer of the discretion mandated by the Constitution's individualized sentencing requirement. This is because in situations where the mitigating and aggravating circumstances are in balance, or, where the mitigating circumstances give the court reservation but still fall below the weight of the aggravating circumstances, the statute bars the court from imposing a sentence less than death and thus precludes the individualized sentencing required by the Constitution. Thus, the presumption can preclude individualized sentencing as it can operate to mandate a death sentence, and we note that "[p]resumptions in the context of criminal proceedings have traditionally been viewed as constitutionally suspect." Jackson, 837 F.2d at 1474 (citing Francis and Sandstrom).
>
> Thus, we hold that the Arizona statute, which imposes a presumption of death, is unconstitutional as a matter of law.

Adamson, supra, 865 F.2d at 1041-44 (footnotes omitted)(emphasis in original).

What occurred in Adamson is precisely what occurred in Mr. Hamblen's case. The standard upon which the court based its determination violated the eighth and fourteenth amendments. See Mullaney v. Wilbur, 421 U.S. 684 (1975), Lockett v. Ohio, 438 U.S. 586 (1978), and Mills v. Maryland, 108 S. Ct. 1860 (1988). The sentencing court's presumption shifted to Mr. Hamblen the

burden on the central sentencing issue of whether he should live or die. This unconstitutional burden-shifting violated Mr. Hamblen's due process and eighth amendment rights. See Mullaney, supra. See also Sandstrom v. Montana, 442 U.S. 510 (1979); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). The application of that unconstitutional standard at the sentencing phase violated Mr. Hamblen's rights to a fundamentally fair and reliable capital sentencing determination, i.e., one which is not infected by arbitrary, misleading and/or capricious factors. See Adamson, supra; Jackson, supra. Indeed, in a strikingly similar case, the express application of a presumption of death was found to violate the eighth amendment by the Eleventh Circuit Court of Appeals in Jackson v. Dugger, 837 F.2d 1469, 1474 (11th Cir. 1988). Here, the judge employed the exact same presumption of death condemned in Jackson v. Dugger.

The United States Supreme Court recently granted a writ of certiorari in Blystone v. Pennsylvania, 109 S. Ct. 1567 (1989), to review a very similar claim. The question presented in Blystone has obvious ramifications here. Under Pennsylvania law, the jury is instructed that where it finds an aggravating circumstance present and no mitigation is presented, it "must" impose death. However, if mitigation is found then the jury must decide whether the aggravating circumstances outweigh the mitigating. Thus, under Pennsylvania law, the legislature chose to place upon a capital defendant a burden of production as to evidence of mitigation and a burden of persuasion as to whether mitigation exists. However, once evidence of a mitigating circumstance is found then the state bears the burden of persuasion as to whether the aggravating circumstances outweigh the mitigating such that a death sentence should be returned.

Under Florida law, once one of the statutory aggravating circumstances is found by definition sufficient aggravation exists to impose death. Here, the judge turned this into an

express presumption of death: he imposed upon the defendant the burden of production and the burden of persuasion of the existence of mitigation, and the burden of persuasion as to whether the mitigation outweighs the aggravation. Certainly, the standard used here ("death is mandated") falls far shorter of allowing for a reliable and individualized capital sentencing determination than the Pennsylvania statute at issue in Blystone. "Mandatory" death sentences have, after all, been long condemned under the eighth amendment. See Woodson v. North Carolina, 428 U.S. 280 (1976); Sumner v. Shuman, 107 S. Ct. 2716 (1987).

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Hamblen's death sentence. The constitutional errors herein presented "precluded the development of true facts," and "perverted the [sentencer's] deliberations concerning the ultimate question[s] whether in fact [James Hamblen should have been sentenced to die.]" Smith v. Murray, 106 S. Ct. 2661, 2668 (1986)(emphasis in original). Under such circumstances, the ends of justice require that the claim now be heard.

Moreover, the claim is now properly brought pursuant to the Court's habeas corpus authority for it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This issue involved a classic violation of longstanding principles of federal and Florida law. See Mullaney, supra; Arango v. State, 411 So. 2d 172 (Fla. 1982). It virtually "leaped out upon even a casual reading of transcript." Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). This clear claim of per se error, see Jackson v. Dugger, supra, required no elaborate presentation -- counsel only had to direct this Court to the issue. Counsel, without any discernible reason, ignored it.

No tactical decision can be ascribed to counsel's failure to urge the claim. No procedural bar precluded review of this

issue. See Johnson v. Wainwright, supra, 498 So. 2d 938. However, counsel's failure, a failure which could not but have been based upon ignorance of the law, deprived Mr. Hamblen of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, for each of these reasons, habeas corpus relief should now be accorded.

CLAIM IV

MR. HAMBLEN WAS DENIED HIS RIGHTS TO AN INDIVIDUALIZED AND FUNDAMENTALLY FAIR AND RELIABLE CAPITAL SENTENCING DETERMINATION AS A RESULT OF THE PRESENTATION AND CONSIDERATION OF CONSTITUTIONALLY IMPERMISSBLE VICTIM IMPACT INFORMATION, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Hamblen pled guilty to the shooting death of Laureen Jean Edwards. Prior to the penalty phase, Judge Harris held a hearing to advise Mr. Hamblen that he had been furnished "a box" by Robert L. Edwards, the victim's husband.

> THE COURT: All right. Let me mention these things to you:
>
> Unsolicited by me and during my absence a box was delivered to my chambers by a person who identified himself to my secretary as Robert L. Edwards who said to her that he is the husband of the victim in this case, Laureen Jean Edwards. The Court examined the box to determine its contents and discovered certain writings and a photograph album which contained photos of the victim and others and contained certain writings therein. The Court made a brief review of the writings and reviewed a few but not all of the photographs, but not all the writings which were written alongside -- in the photo album alongside the photographs.
>
> MR. HAMBLEN: (Nodding head)
>
> THE COURT: These appeared to be descriptive of the victim and descriptive of some of the pictures in the album.
>
> MR. HAMBLEN: Yes.
>
> THE COURT: The contents of the box have now been furnished to the clerk for filing in this case for identification (tendering).

(R. Vol. VI, 88-9)(emphasis added). The judge later stated that he did not intend to consider the writings or the photos in the box unless they were later offered into evidence (R. Vol. IV, 90), but the damage had already been done. The court had already "reviewed the box."

Prior to sentencing, the court also had a pre-sentence investigation report (P.S.I.). Included in the P.S.I. was the following statement:

> Victim's Statement: The following is a statement obtained from the victim's husband, Robert Edwards. "I feel that as my wife is dead, nothing can be done to bring her back. It's obvious to me that Mr. Hamblen is cruel and inhuman and cannot control his actions. The man is not stable when angered. Based on this, I cannot see any way that society can accept him back. If placed under the same stress, he would do it again as he has basic character defects. I don't believe he is stable and he would murder again, whether it was five, ten or twenty years from now. I don't think rehabilitation would do him any good as we do not have the ability in society to determine if a person has been rehabilitated. The least we can expect the Court to do is to leave no chance of parole. As I feel that he cheated my wife out of a lot of life, he took no time to get to know her and he had no reason to kill her as he did. He took her life for nothing, he gained nothing from it and for these reasons I can't forgive him. I feel that he is an example in our society of mans inhumanity to man which is rooted in his military days in Korea which gave him the ability to kill and the insensivity to kill, so that in effect he is a victim of that same period. The end result is that two people are now dead for no reason at all, with the possibility that he will be third."

There was no statement that this was not considered. The evidence described above could only have influenced the judge in one way -- to give a death sentence because of who the victim was, and because of the impact left by her loss. This was patently unfair and violated Mr. Hamblen's right to a reliable and individualized capital sentencing determination.

It was on this and other similarly improper "evidence" that the judge relied when deciding whether James Hamblen should be

sentenced to death. The image which was portrayed was obvious and obviously unconstitutional: the victim who would be missed, pain and sorrow were suffered by the victim's husband, etc.; on the other hand there was the defendant. Such "comparable worth" presentations have been classically condemned. Moore v. Kemp, 809 F.2d 702 (11th Cir. 1987)(in banc); Vela v. Estelle, 708 F.2d 954 (5th Cir. 1983). Petitioner's resulting sentence of death was fundamentally unfair and unreliable, and stands in violation of the eighth and fourteenth amendments.

Booth v. Maryland, 107 S. Ct. 2529 (1987), which is virtually identical to Mr. Hamblen's case, sets the constitutional standard: matters such as those upon which Mr. Hamblen's judge based his sentencing determination are flatly improper. Booth prohibits consideration in the capital sentencing process of "the emotional impact of the crimes on the [victim's] family."

The victim's family in Booth, had "noted how deeply the [victims] would be missed," 107 S. Ct. at 2531, explained the "painful, and devastating memory to them," Id. at 4, and spoke generally of how the crime had created "emotional and personal problems [for] the family members . . ." Id. This evidence was presented through the introduction of a victim impact statement. The Court found the introduction of this information to be constitutionally impermissible, as it violated the well established principle that the discretion to impose the death penalty must be "suitably directed and limited so as to minimize the risks of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976)(joint opinion of Stewart, Powell, and Stevens, JJ.); California v. Ramos, 463 U.S. 992, 999 (1983).

The Booth Court ruled that the sentencer was required to provide, and the defendant had the right to receive, an "individualized determination" based upon the "character of the

individual and the circumstances of the crime." Booth v. Maryland, supra; see also Zant v. Stephens, 462 U.S. 862, 879 (1983); Eddings v. Oklahoma, 455 U.S. 104, 112 (1982). The Booth Court noted that victim impact evidence had no place in the capital sentencing determination, for such matters have no "bearing on the defendant's 'personal responsibility and moral guilt.'" 107 S. Ct. at 2533, citing Enmund v. Florida, 458 U.S. 282, 801 (1982). A contrary approach would run the risk that the death penalty will be imposed because of considerations that are "constitutionally impermissible or totally irrelevant to the sentencing process." See Zant v. Stephens, supra, 462 U.S. at 885.

The Booth Court explained that wholly arbitrary reasons such as "the degree to which a family is willing and able to express its grief [are] irrelevant to the decision whether a defendant, who may merit the death penalty, should live or die." Id. at 2534. Thus the Court concluded that "the presence or absence of emotional distress of the victim's family, or the victim's personal characteristics are not proper sentencing considerations in a capital case." Booth, 107 S. Ct. at 2535 (emphasis supplied). But those were precisely the considerations before the judge at petitioner's sentencing. Since the decision to impose the death penalty must "be, and appear to be, based on reason rather than caprice or emotion," Gardner v. Florida, 430 U.S. 349, 358 (1977)(opinion of Stevens, J.), proceedings such as those resulting in Mr. Hamblen's death sentence are flatly "inconsistent with the reasoned decision making" required in capital cases. Booth, supra, 107 S. Ct. at 2536.

In short, the presentation of matters concerning "the personal characteristics of the victim" and the views of the victim's relatives before a capital sentencer violates the eighth amendment because such factors create "a constitutionally unacceptable risk" that the death penalty may be imposed "in an

arbitrary and capricious manner." Booth, supra, 107 S. Ct. at 2533. It is constitutionally impermissible to rest a sentence of death on a comparison of the "worth" of the defendant to that of the victim. Cf. Booth, supra; Vela v. Estelle, 708 F.2d 954 (5th Cir. 1983); see also Moore v. Kemp, 809 F.2d 702, 747-50 (11th cir. 1987)(in banc)(Johnson, J., concurring in part and dissenting in part). "Worth of victim" and "comparable worth" have nothing to do with 1) the character of the offender, and/or 2) the circumstances of the offense. See Zant v. Stephens, 462 U.S. 862, 879 (1983). They deny the defendant an individualized sentencing determination, and render any resulting sentence arbitrary, capricious, and unreliable. See generally, Booth, supra, 107 S. Ct. at 2532-35. In short, the eighth amendment forbids the imposition of a sentence of death because of the impact of the victim's loss on the victim's relatives. But this is precisely what happened in this case.

Appellate counsel should have presented this significant claim. In fact, Booth had already been decided. The claim was obvious even upon a casual reading of the record. See Matire v. Wainwright, supra; Johnson v. Wainwright, supra. In failing to urge this claim of patent eighth amendment error appellate counsel rendered ineffective assistance. There was no strategy for the failure to urge this claim: the omission makes no sense. Booth involves the essential prerequisites to the constitutional validity of any sentence of death: that such a sentence be individualized and that such a sentence be reliable. Under the eighth amendment, a defendant simply cannot "waive" his right to a reliable capital sentencing determination, and no such "waiver" is reflected by the record here. The claim involves fundamental eighth amendment error. The error should now be corrected.

IV. CONCLUSION AND RELIEF REQUESTED

WHEREFORE, petitioner, through counsel, respectfully urges that the Court issue its Writ of habeas corpus and vacate his unconstitutional capital conviction and sentence of death. He also prays that the Court stay his execution on the basis of, and in order to fully determine, the significant claims herein presented. Since this action also presents significant questions of fact, counsel urges that the Court relinquish jurisdiction to the trial court, or assign the case to an appropriate authority, for the resolution of the evidentiary factual questions attendant to the claims herein presented, including inter alia, questions regarding counsel's deficient performance and prejudice.

Petitioner urges that the Court grant him habeas corpus relief, or, alternatively, a new appeal, for all of the reasons set forth herein, and that the Court grant all other and further relief which the Court may deem just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing motion has been forwarded by (U.S. MAIL) (HAND DELIVERY) to Carolyn Snurkowski, Assistant Attorney General, Department of Legal Affairs, Magnolia Park Courtyard, 111-29 North Magnolia Drive, Tallahassee, Florida 32301, this 5th day of June, 1989.

Attorney