IN THE SUPREME COURT OF FLORIDA

JAMES WILLIAM HAMBLEN,

Petitioner,

v. CASE NO. 74,269

RICHARD L. DUGGER,

Respondent.

_____/

RESPONSE TO PETITIONER'S 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

COMES NOW Respondent, Richard L. Dugger, Secretary, Department of Corrections, State of Florida, by and through undersigned counsel and files this his response to Petitioner's petition and request for stay of execution and as grounds would show:

I. Introduction

Respondent would deny all allegations presented in the instant petition and request for stay of execution and would demand strict proof of each with regard to the assertion that Petitioner is either entitled to habeas corpus relief or stay of execution.

II. Jurisdiction

Petitioner asserts that the instant action is an original action under Rule 9.100(a), Fla.R.App.P. He further asserts that the petition presents constitutional issues which directly concern the judgment of this Court regarding the appellate process, and the validity of the capital conviction and sentence of death imposed. **Hamblen v. State**, 527 So.2d 800 (Fla. 1988). Under the guise that Petitioner's appellate counsel rendered ineffective assistance of counsel, Petitioner raises four claims upon which he seeks relief. Specifically:

> Claim I, the trial court erred in allowing Mr. Hamblen to waive appointed counsel and jury sentencing without an adequate **Faretta** waiver.
>
> 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 statutes, in violation of due process, equal protection and the Eighth and Fourteenth Amendments.
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> 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 (19875); **Lockett v. Ohio**, 438 U.S. 586 (1978), and **Mills v. Maryland**, 108 S.Ct. 1860 (1988).
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> Claim IV, Mr. Hamblen was denied his right to an individualized and fundamentally fair and reliable capital sentencing determination as a result of the presentation and consideration of constitutionally permissible victim impact information contrary to the Eighth and Fourteenth Amendments.

While couched in terms of a challenge to the effectiveness of appellate counsel, Respondent would urge that such effort is a halfhearted attempt to avoid raising these claims in the proper form a Rule 3.850 motion. **Witt v. State**, 387 So.2d 922 (Fla. 1980).

With regard to Petitioner's request for a stay of execution (presently scheduled for July 12, 1989), Petitioner has failed to assert or demonstrate a basis upon which a stay should be forthcoming.

III. Grounds for Habeas Corpus Relief

Petitioner has failed to present claims upon which relief might be granted. His contention that appellate counsel rendered ineffective assistance of counsel for failing to raise the four above-cited claims does not warrant relief.

The record reflects the Petitioner pled guilty and waived his right to have a jury consider whether he should receive a life or death recommendation. On direct appeal, appellate counsel raised two claims for review. (Albeit, Petitioner's guilty plea bars review of all claims not specifically preserved.) Specifically, the appellate counsel argued the trial court erred in allowing Hamblen to waive counsel at the penalty phase,(where, as a result, there was never any advisory proceeding to determine whether death or life imprisonment was the appropriate penalty) and the trial court erred in finding, as an aggravating circumstance, the homicide was committed in a cold, calculated and premeditated manner. On direct appeal, this Court found that the trial court conducted a hearing in

accordance with the requirements of **Faretta v. California**, 422 U.S. 806 (1975), in that this Court held:

> While we commend Hamblen's appellate counsel for a thorough hearing of the question presented by this issue, we decline to accept his logic and conclusions. We find no error in the trial judge's handling of this case. Hamblen had a constitutional right to represent himself, and he was clearly competent to do so. To permit counsel to take a position contrary to his wishes through the vehicle of guardian ad litem would violate the dictates of **Faretta**. In the field of criminal law, there is no doubt that "death is different," but, in the final analysis, all competent defendants have a right to control their own destinies. This does not mean the courts of this state can administer the death penalty by default. The right, responsibilities and procedures set forth in our Constitution and statutes have not been suspended simply because the accused invites the possibility of a death sentence. A defendant cannot be executed unless his guilt and the propriety of his sentence have been established according to law.

527 So.2d at 804.

Moreover, the Court, with regard to Claim II, concluded the trial court erred in finding the murder was committed in a cold, calculated and premeditated manner. However, in reviewing the case in its totality, held:

> ". . . 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, 101 S.Ct. 931, 66 L.Ed.2d 847 (1981).

527 So.2d at 805.

IV. Claims for Relief

I.

THE TRIAL COURT DID NOT ERR IN ALLOWING MR. HAMBLEN TO WAIVE APPOINTED COUNSEL AND JURY SENTENCING WITHOUT AN ADEQUATE **FARETTA** WAIVER

Relying on the affidavits appended to his petition (of recent vintage) from Dr. Henry L. Dee and Dr. Elizabeth A. McMahon, Petitioner commences his **Faretta** argument by asserting that he was "mentally ill and was so at the time of his capital proceedings." A review of either affidavit reflects that both opinions are bottomed on the fact that Hamblen pled guilty, and waived a jury for the penalty phase of his trial. The affidavits reflect that Hamblen could not have made a knowing and voluntary waiver of his rights, because he could not have formulated the requisite thought to exercise the waivers. The record of the proceeding demonstrate otherwise. Pre-trial and prior to withdrawing his not guilty by reason of insanity plea, Hamblen was evaluated by Dr. McMahon and Dr. Miller. At that same time, Hamblen was represented by counsel who commenced investigation of a possible insanity defense to the first-degree murder indictment charging Hamblen with the murder of Ms. Laureen Jean Edwards. As reflected by this Court's opinion in **Hamblen v. State**, 527 So.2d at 801:

> Both doctors *reported that Hamblen* was competent to stand trial and was legally sane at the time of the offense. 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**, (cites

> omitted) 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 enabled him to exercise his right of self-representation, but ordered two assistance public defenders to be in the courtroom as emergency back-up counsel.
>
> Hamblen pled guilty and waived his right to have a jury consider whether he should be executed. The State introduced evidence concerning the circumstances of the crime. The State also introduced evidence that Hamblen had been convicted of rape in Indiana in 1964. Hamblen asked his stand-by counsel to cross-examine only one witness, the police records custodian from Indiana. He accepted the State's version of the facts and even conceded on point as to his prior record that the State was having some difficulty establishing. He presented no evidence of mitigating factors and commented that the prosecutor "had correctly assessed my character, and certainly --- had established the aggravated nature of the crime. Therefore, I feel his recommendation of the death penalty is appropriate".

This Court's opinion reflects that Hamblen then chose to disagree with the probation officer who prepared the PSI report that a life recommendation was appropriate. Hamblen logically informed the court that Mr. Chance, the probation officer, was in error with regard to a life recommendation. The trial court, after reviewing the record, including the psychological reports prepared pre-trial, sentenced Hamblen to death. The court found three aggravating factors, that the murder was committed in a cold, calculated and premeditated manner; that Petitioner had been previously convicted of a felony involving violence against another person; and that Petitioner had committed a murder during the course of a robbery. The court found no mitigation.

While acknowledging that **Faretta v. California** grants an accused the right to personally conduct his defense, it is argued that the inquiry made by the trial court does not disclose that Hamblen ever "knowingly and intelligently" waived his right to be represented by counsel. To the contrary, the record is replete with evidence that the court as well as the prosecutor in this case meticulously attempted to protect every right of Mr. Hamblen. Time and time again, inquiry was made of Mr. Hamblen as to whether he understood what was happening, why it was happening and whether he wanted assistance of counsel instead of representing himself. With regard to the **Faretta** colloquy which preceded a finding that he was competent to represent himself, and able to waive the assistance of counsel and a jury at the penalty phase, inquiry was made of Bill White, the assistant public defender assigned to Hamblen's case, as to whether Hamblen should be permitted to undertake such a venture. Mr. White, on more than one occasion, indicated that Hamblen was acting against his advice but further proclaimed that nothing within his knowledge (the doctors reports and his discussions with Hamblen) evidenced that Hamblen was incompetent to represent himself or that he did not understand what was occurring. In **Fitzpatrick v. Wainright**, 800 F.2d 1057 (11th Cir. 1986), cited by Petitioner, the court therein carefully detailed what factors may be viewed when assessing whether **Faretta v. California** has been adhered to. Therein, the court found that **Fitzpatrick** had met the **Faretta** standard. The court observed:

> . . . the ultimate test is not the trial court's express advice, but rather the

> defendant's understanding. (cites omitted). If the trial record demonstrates that **Fitzpatrick's** decision to represent himself was made with an understanding of the risk of self-representation, the knowing, intelligent and voluntary waiver standard of the Sixth Amendment will be satisfied. So long as the record establishes that **Fitzpatrick** "'[knew]" what [he] was doing as his choice [was] made with eyes open,'" the judge's decision to allow **Fitzpatrick** to represent himself will be upheld. See **Faretta**, 422 U.S. at 835, 95 S.Ct. at 2541 (quoting **Adams v. United States ex rel McCann**, 317 U.S. 269, 279, 63 S.Ct. 236, 241-42, 87 L.Ed.2d 268 (1942).

Fitzpatrick v. Wainwright, 800 F.2d at 1065.

The Court went on to observe that a number of factors must be considered in determining whether **Faretta** has been met. First, a valid waiver must be made knowingly and intelligently. In the instant case, the record is replete with evidence of Hamblen's knowingly and intelligently waiving his right to counsel as well as a jury at the penalty phase. Hamblen was not uneducated and appeared articulate and cooperative in discussing matters with the court (as well as his public defender). He was responsive to questions asked. Simply because he did not know how to get a pleading before the trial judge is not evidence that he was uninformed and unknowingly waived his constitutional rights. Moreover, the court made specific inquiry as to Hamblen's mental status and was told and provided evidence, that although Hamblen suffered from an "anti-social personality disorder", he was competent to stand trial and appreciated the difference between right and wrong.

Another factor enunciated by the court in **Fitzpatrick** was whether the defendant was represented by counsel before trial.

Herein, the public defender's office was assigned as counsel of record for Hamblen and commenced representation. It was only after Hamblen was given the reports from the doctors who examined him that he elected to change the plea entered by trial counsel and plead guilty to capital murder.

The **Fitzpatrick** court also looked to whether a defendant understands the charges and the possible penalties he could be subject to if convicted. Not only did Hamblen understand the charges against him but he was fully articulate with regard to what the penalty might be and the aggravating and mitigating circumstances applicable to his case.

The court also noted as a factor whether the defendant understood that he would be required to comply with the rules of procedure at trial. The record reflects that the court specifically informed Hamblen that he would need to execute a written waiver for a jury at the penalty phase before the court would accept a waiver and not impanel a jury for the penalty phase. At all proceedings, Hamblen evidence knowledge of what was going on and adhered to the rules of procedure set forth by the trial court.

The court in **Fitzpatrick** observed:

> Other factors considered by courts in determining the validity of a **Faretta** waiver include whether the waiver was a result of coercion or mistreatment of the defendant (cite omitted) or whether the exchange between the defendant and the court consisted of merely of pro forma answers to pro forma questions, (cites omitted), and whether the defendant had knowledge of possible defenses

> he might raise, **Maynard v. Meachum**, 545 F.2d 273 (1st Cir. 1976); **United States v. Welty**, 674 F.2d 185, 189 (3rd Cir. 1982) . . .

800 F.2d at 1067.

In Hamblen's case, he indicated no coercion or threats or promises were made in exchange for his plea. He also appreciated the possible defenses available and, he did more than just pro forma answer pro forma question (contrary to the assertion contained in this instant petition).

Pursuant to **Fitzpatrick v. Wainwright, supra**, Hamblen received an adequate **Faretta** inquiry.

Appellate counsel will not be found to be wanting where, as here, there is no basis upon which to assert a claim. Moreover, one can rationally argue that appellate counsel necessarily raised this claim in his first issue on direct appeal. Petitioner is not entitled to relief as to Claim I.

II.

> THIS COURT, IN **HAMBLEN V. STATE**, 527 So.2d 800 (Fla. 1988), DID NOT FAIL TO REVERSE MR. HAMBLEN'S SENTENCE OF DEATH AND REMAND FOR RESENTENCING UNDER THE **ELLEDGE** STANDARD UPON THE STRIKING OF AN AGGRAVATING FACTOR

On direct appeal, appellate counsel argued that the aggravating factor of cold, calculated and premeditated was erroneously found by the trial court. This Court agreed. 527 So.2d at 805. The suggestion that appellate counsel did not argue strenuously enough that a life recommendation was appropriate because of the striking of this one aggravating factor belies the appellate record before this Court. (See appellate briefs). In determining that one of the aggravating factors was not appropriate, the court held:

> In the instant case, the evidence does not indicate that Hamblen had a conscious intent of killing Ms. Edwards when he decided to rob the sensual woman. It was only after he became angered because Ms. Edwards pressed the alarm button that he decided to kill her. Unlike those cases in which robbery victims have been transported to other locations and killed sometime later, (cites omitted), Hamblen's conduct was more akin to a spontaneous act taken without reflection. While the evidence unquestionably demonstrates premeditation, we are unable to say that it meets the standard of heightened premeditation and calculation required to support this aggravating circumstance. Notwithstanding, we are convinced that the elimination of this aggravating circumstance would not have resulted in Hamblens' 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, 101 S.Ct. 931, 66 L.Ed.2d 841 (1981).

527 So.2d at 805.

While the striking of a statutory aggravating factor may result in a remand and resentencing, this Court, on a number of occasions, has reviewed the particular circumstances of a given case and ascertained that under no circumstances a life sentence would have been imposed. See, for example, **Rivera v. State**, ____ So.2d ____, Case No. 71,026 (Decided June 29, 1989); **Kennedy v. State**, 455 So.2d 351 (1984); **Clark v. State**, 443 So.2d 973 (Fla. 1983); **Demps v. State**, 395 So.2d 501 (Fla. 1981); **Hargrave v. State**, 366 So.2d 1 (Fla. 1979); **Ferguson v. State**, 417 So.2d 631 (Fla. 1982); **Randolph v. State**, 463 So.2d 186 (1984), and **Shriner v. State**, 386 So.2d 525 (1980). Absent demonstrable evidence that this Court erred in reviewing the appellate record, no relief on this issue should be forthcoming.

III.

HAMBLEN'S SENTENCE OF DEATH DOES NOT VIOLATE 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)

Petitioner next argues that the trial judge's sentencing order "involves a flatly unconstitutional express presumption of death". Specifically, Petitioner points to the trial court's order which reads thusly:

> In summary, the court finds that three sufficient, aggravating circumstanes 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.

(TR 84-85).

To the suggest that the aforementioned "evidence" is an "express presumption of death" is incorrect. Rather, taken full context, the trial court was "summarizing" based on the records presented and the defendant's expression of what penalty ought to be imposed, it's decision as to the appropriate sentence to be imposed.

Petitioner's reliance on **Adamson v. Ricketts**, 865 F.2d 1011 (9th Cir. 1988) (**en banc**), and the United States Supreme Court's recent grant of certiorari in **Blystone v. Pennsylvania**, 109 S.Ct. 1567 (1989), is misplaced. Equally inapplicable is the Eleventh Circuit's opinion in **Jackson v. Dugger**, 837 F.2d 1469 (11th Cir.

1988), wherein the Eleventh Circuit reversed the imposition of the death penalty based on "jury instructions" which tended to "shift the burden to the defendant".

Sub judice neither Florida Statute 921.141 nor the trial court's order evidences any "mandatory death penalty". Moreover, appellate counsel cannot be said to be wanting where, as here, no error exists. Relief should be denied as to Claim III.

IV.

HAMBLEN WAS NOT DENIED HIS RIGHT TO AN INDIVIDUALIZED AND FUNDAMENTALLY FAIR AND RELIABLE CAPITAL SENTENCING DETERMINATION AS A RESULT OF THE PRESENTATION AND CONSIDERATION OF CONSTITUTIONALLY IMPERMISSIBLE VICTIM IMPACT INFORMATION, CONTRARY TO THE EIGHT AND FOURTEENTH AMENDMENTS

Terminally, Hamblen argues that the trial court had before evidence falling within the "victim impact information" which was considered by the trial court. The record reflects to the contrary. In open court, Judge Harris advised Hamblen that he had been furnished with a box containing photos and writings proportedly that of the victim. The court specifically indicated that:

> 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 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 along side -- in the photo album along side the photographs. . .

(TR 88-89).

The court went to explain to Mr. Hamblen that:

Now, Mr. Hamblen, **the court does not intend to consider these writings or photos in determining your sentence unless they are offered by you or by the State at the sentencing proceeding hearing.**

Now, at this time I'm requesting the clerk to tender to you the photo album and the writings which were delivered to my chambers, and I will not permit you to have an opportunity to review each one of the them in the jury room of this court in the company of the bailiff. You may have such time as you feel is necessary to fully review the contents of the photograph album and the separate writings therein and the separate writings that were apart from the photo album. After you have reviewed the photos and the writings I will ask the bailiff to notify the court at which time you may return and stand before the bench, and if you desire to have a copy of the photos and the writings in the album the court will request the state attorney to provide a set for you as soon as possible. Now, if you find anything in the photo album, including the writings therein, or any of the separate writings included in the box, I made copies of those for you this morning. If you desire to bring that before the court, to bring it to the court's attention at your sentencing proceeding, you may do so. As you have previously been advised, you may present any testimony or evidence that you desire to show, any of the statutory mitigating circumstances, and the court will consider other matters that you feel would be offered to the court for consideration. The court will determine at that time whether it will have any value in determining your sentence.

Do you have any questions about the use of the photo album or the contents or the writings at the sentencing proceeding?

MR. HAMBLEN: No questions, Your Honor, except that I have had the opportunity to see the album before.

(TR 90-91).

Petitioner also argues that contained in the presentence investigation report, (unobjected to by Petitioner or stand-by

counsel) was a victim's statement. The victim's husband, Robert Edwards, observed that it was obvious to him that Mr. Hamblen was a cruel and inhumane person and could not control his actions. He further indicated that he did not believe the rehabilitation would do anything for Hamblen however, what he ultimately sought was that "the least we can expect the court to do is to leave no chance of parole".

The victim impact statement of Mr. Edwards, contained what Mr. Edwards "believed" to be the character and nature of Hamblen. Hamblen thought no more or no less of himself when, in fact, he agreed with the prosecutor's assessment of him and disagreed with the probation officer's plea for a life sentence for Mr. Hamblen. No objection was raised to the victim impact statement contained in the PSI report.

With regard to the box containing photographs and writings of the victim, the trial court expressly stated he was not and did not use any materials contained therein in assessing whether the death penalty should be imposed. Simply because a trial court has access to "suspect" information does not result in error especially where the trial court indicated he did not use the information. **Brown v. Wainwright**, 392 So.2d 1327 (Fla. 1981). Moreover, there is no reference to either the contents of the "box" or the victim impact statement of the victim's husband in the sentencing order. **Grossman v. State**, 525 So.2d 833 (Fla. 1988), **cert. denied**, 109 S.Ct. 1354 (1989). Hamblen's **Booth v. Maryland**, 107 S.Ct. 2529 (1987) claim is groundless.

Appellate counsel will not be found to be ineffective for failing to raise a claim on direct appeal which was (a) not objected to at trial and (b) not error, or (c) harmless error beyond a reasonable doubt. See trial judge's order RA 77-85.

V. Conclusion

Based upon the foregoing, the Petition for Writ of Habeas Corpus should be denied.

Respectfully submitted,

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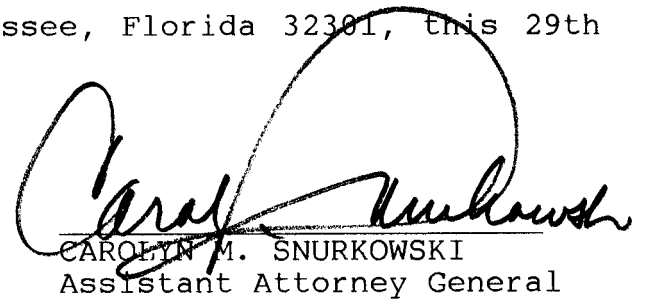
Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Mr. Billy H. Nolas, Esq., Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 29th day of June, 1989.



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