IN THE SUPREME COURT OF FLORIDA

NO. 74493

JOHNNY WILLIAMSON,

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, IF NECESSARY, APPLICATION FOR STAY OF EXECUTION PENDING THE FILING AND DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

LARRY HELM SPALDING
Capital Collateral Representative

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

This is an original habeas corpus action. This Court is the proper forum in which to address the claims herein presented, and Mr. Williamson respectfully invokes the habeas corpus jurisdiction of this Honorable Court.

A death warrant has been signed against Mr. Williamson. The instant emergency motion must be filed on this date, November 3, 1989, pursuant to the thirty-day filing deadline established by Fla. R. Crim. P. 3.851 and a seven day extension granted by this Court. Under the two-year filing limitation period of Rule 3.850, however, Mr. Williamson's motion was not due until February 28, 1990. The signing of a death warrant has arbitrarily accelerated the process pursuant to which Mr. Williamson was to seek to vindicate his post-conviction rights. This is unfair and violates due process, equal protection, and the eighth amendment.

The Circuit Court of the First Judicial Circuit, Dixie County, entered the judgments of conviction and sentence under consideration.

Mr. Williamson was convicted and judgment was entered on April 9, 1986. The jury rendered an advisory sentence of death on the next day. The trial court followed the jury's recommendation and sentenced Mr. Williamson to death on May 8, 1986.

Mr. Williamson was indicted by a grand jury for first-degree murder, entered a plea of not guilty, was tried before a jury, convicted and sentenced to death.

Mr. Williamson's conviction and sentence of death was affirmed by the Supreme Court of Florida. Williamson v. State, 511 So. 2d 289 (Fla. 1987). Rehearing was thereafter denied. Id. The United States Supreme Court denied Mr. Williamson's

Petition for a Writ of Certiorari on February 29, 1988, Williamson v. Florida, 108 S. Ct. 1094 (1988), with two Justices dissenting.

Mr. Williamson applied for executive clemency on June 23, 1988. Clemency was denied by the signing of the death warrant also herein at issue.

In the instant motion, references to the transcripts and record of these proceedings will follow the pagination of the Record on Appeal. The trial proceedings will be referred to as "R. ____." All other references are self-explanatory or otherwise explained.

In conjunction with this request for habeas corpus relief, Mr. Williamson respectfully urges that the Court enter a stay of his imminent execution.

CLAIM I

THE JURY WAS INCORRECTLY INSTRUCTED THAT MR. WILLIAMSON HAD NO RIGHT TO DEFEND HIMSELF FROM AN UNLAWFUL ATTACK BY THE ALLEGED VICTIM AND APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM ON DIRECT APPEAL, A VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The death of Mr. Drew, the alleged victim in this case resulted from self-defense. The only witness to the actual beginning of the fight involving Mr. Williamson and Mr. Drew was Omer James Williamson (no relation to Mr. Johnny Williamson). The contention that this was premeditated murder again comes only from Omer Williamson.

That the death of Mr. Drew occurred in an act of self defense was Mr. Williamson's sole defense. Trial defense counsel has related in an affidavit that:

> Johnny Williamson went to see Drew in order to verbally confront him about money owed Drew. Drew pulled a knife on him, and Johnny responded in self-defense. If Johnny Williamson had testified, he would have statedthat he knew Drew had a bad reputation for violence and that Drew came at him with a knife. What Johmmy Williamson was going to

> handle with a conversation blew up because Drew had a knife. The case was definitely self-defense or at the worst manslaughter.
>
> My theory of defense was that Mr. Williamson had acted in self-defense and that the murder was not premeditated. In this regard, the trial court's ruling that we were not entitled to a self-defense instruction was devastating.

(Att. 1).

The jury instructions in this case were prepared and submitted to the court by the State. Defense counsel, upon learning that the instruction on self-defense had been eliminated from the instruction on justifiable use of deadly force moved the court to give the self-defense instruction (R. 774). The court denied the motion (R. 775). The court did not give the self-defense instruction to the jury.

Defense counsel moved for a new trial based on the court's refusal to instruct the jury on self-defense (R. 139-140). Counsel then cited the court's action in refusing to give the self-defense instruction as error in the Judicial Acts To Be reviewed filed on May 8, 1986. The claim that the trial court erred was thus preserved for appeal to this Court. Appellate counsel, however, did not raise this claim in Mr. Williamson's direct appeal. This claim should have been raised on direct appeal and is now brought before the Court in this pleading. Appellate counsel rendered prejudicially ineffective assistance to Mr. Williamson in failing to urge this claim.

The law of the State of Florida, now and at the time of trial, allows a person to defend himself or herself from the unjustified deadly force by another. Mr. Williamson was entitled under the eighth and fourteenth amendments to have the jury correctly instructed on all elements of the crime that the State must prove beyond a reasonable doubt. He was also entitled to jury instructions which did not relieve the State of its burden of proof on all elements of the offense. The State must prove, among other things, the absence of justifiable use of force and

the absence of self-defense. The jury instructions in this case were unconstitutionally burden-relieving, and incorrectly stated the applicable law.

The fundamental principles of the law of defenses are that:

> "[A] defendant is entitled to have the jury instructed on the rules of law applicable to his theory of defense if there is any evidence to support such instructions...
>
> If there is any evidence of [such defense], an instruction should be given. The trial judge should not weigh the evidence for the purpose of determining whether the instruction is appropriate.

Smith v. State, 424 So. 2d 726, 732 (Fla. 1982)(citations omitted)(emphasis supplied). However, in Mr. Williamson's case, the Court did not correct this fundamental error.

Florida recognizes, as do the federal courts, that an evidentiary foundation for a defense instruction may be established by any evidence adduced at trial. Compare Mellins v. State, 395 So. 2d 1207, 1209 (Fla. 4th DCA 1981) (instruction required when defense "suggested" by cross-examination), and Edwards v. State, 428 So. 2d 358, 358-59 (Fla. 3d DCA 1983) (same); with United States v. Stulga, 531 F.2d 1377, 1379-80 (6th Cir. 1976)(evidentiary foundation for defense instruction arising solely from accomplice testimony presented by government); Perez v. United States, 297 F.2d 12, 15-16 (5th Cir. 1961); Strauss v. United States, 376 Ff.2d 416, 419 (5th Cir. 1967).

Moreover, like the federal courts, Florida law demands that trial courts not weigh the evidence, and not impose their perception of the defense in deciding whether the charge is appropriate. Compare Laythe v. State, supra, 330 So. 2d at 114; Taylor v. State, 410 So. 2d 1358, 1359 (Fla. 1st DCA 1982) (Defendant entitled to requested instruction regardless of weakness or improbability of evidence adduced in its support); with United States v. Garner, 529 F.2d 962, 970 (6th Cir. 1976) ("Even when the supporting evidence is weak or of doubtful

credibility its presence requires an instruction on the theory of defense."); Tatum v. United States, 190 F.2d 612 (D.C. Cir. 1951); Strauss v. United States, 376 F.2d 416 (5th Cir. 1967).

Significantly, the Florida standard mandates that the trial court evaluate the sufficiency of the evidence in the light most favorable to the defendant when determining whether to charge on a proffered defense theory. Bolin v. State, 297 So. 2d 317, 319 (Fla. 3d DCA), cert. denied, 304 So. 2d 452 (Fla. 1974). Florida courts have therefore often found fundamental error in the failure to clearly present the defense and the state's burden to the jury. See Mellins v. State, supra 395 So. 2d at 1209 (voluntary intoxication defense negates intent element in specific intent offense; thus, failure to instruct on defense cannot constitute harmless error); Edwards v. State, supra 428 So. 2d at 358-59; Bryant v. State, supra, 412 So. 2d at 349-50; cf. State v. Jones, 377 So. 2d 1163 (Fla. 1979) (failure to instruct on underlying felony in felony murder case).

Under these principles, the facts adduced at Mr. Williamson's capital trial were amply more than sufficient to warrant an instruction on his defense of withdrawal. Especially when taken in the light most favorable to Mr. Williamson, Bolin v. State, supra, 297 So. 2d at 319, the evidence established more than "any evidence" supporting an instruction on Mr. Williamson's theory of defense. Smith v. State, supra 424 So. 2d at 731-32; Bryant v. State, supra, 412 So. 2d at 349-50; Laythe v. State, supra, 330 So. 2d at 114.

The fundamental errors in the jury instructions in this case rendered the verdicts unreliable. The instruction on self-defense is to fully apprise the jury of the right to defend oneself against excessive force, and if the evidence was susceptible of an interpretation by the jury leading to the conclusion that Mr. Williamson's conduct was justified because of the use or threat of excessive force. The jury should then be

entitled to be instructed on self-defense. Mr. Williamson was entitled to the instruction on self-defense.

Due process and equal protection concerns require that Mr. Williamson's jury should have been instructed according to the applicable Florida law. Mr. Williamson certainly presented more than "any evidence to support such instructions ..." Smith, supra, at 732 (emphasis supplied). However, the jury was instructed as follows:

JUSTIFIABLE HOMICIDE

> The killing of a human being is justifiable homicide and lawful if necessarily done while resisting an attempt to murder or commit a felony upon the defendants, or to commit a felony in any dwelling house in which the defendants were at the time of the killing.

(R. 121). The court declined to read any of the instructions pertaining to self defense, including the instruction relating to the victim's reputation for violence. Mr. Williamson was entitled under Florida law to defend himself from a violent attack. Counsel requested such an instruction, the State argued against it, and the judge refused it. The judge thus directed the verdict for the State on this central issue, something that a judge is simply not allowed to do.

The only possible defense was that Mr. Williamson acted in self-defense, after he was attacked. As explained above, there was evidence demonstrating that Mr. Williamson acted in self-defense. Mr. Williamson was absolutely entitled to an instruction on his theory of defense. There was more than "any evidence" here. Yet the trial court refused to provide the proper instructions.

A criminal defendant's due process right to a conviction resting on proof of his guilt beyond a reasonable doubt, In re Winship, 397 U.S. 358 (1970), requires the trial court to adequately charge the jury on a defense which is timely requested and supported by the evidence. United States ex rel. Means v.

Solem, 646 F.2d 322 (8th Cir. 1980); Zemina v. Solem, 438 F.Supp. 455 (S.D. South Dakota, 1977), affirmed, 573 F.2d 1027 (8th Cir. 1978). See also United States v. Garner, 529 F.2d 962, 970 (6th Cir. 1976); Strauss v. United States, 376 F.2d 416, 419 (5th Cir. 1967); Tatum v. United States, 190 F.2d 612 (D.C. Cir. 1951); Perez v. United States, 297 F.2d 12, 13-14 (5th Cir. 1961); United States v. Lofton, 776 F.2d 918 (10th Cir. 1985).

The due process right to a theory of defense instruction is rooted in a criminal defendant's right to present a defense. As a unanimous Supreme Court explained in a similar context,

> [T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.' California v. Trombetta, 467 U.S. [479], at 485 [1984]. . .
>
> We break no new ground in observing that an essential component of procedural fairness is an opportunity to be heard.

Crane v. Kentucky, 106 S. Ct. 2142, 2146 (1986)(emphasis supplied), citing, inter alia, Chambers v. Mississippi, 410 U.S. 284 (1973); Washington v. Texas, 388 U.S. 14 (1967); In re Oliver, 333 U.S. 257 (1948).

The failure to adequately instruct on a theory of defense is undeniably an error, one of constitutional magnitude, warranting habeas corpus relief. See, e.g., United States ex rel. Means v. Solem, supra, 646 F.2d 322; Zemina v. Solem, supra, 573 F.2d 1027; see also, United States ex rel. Reed v. Lane, 759 F.2d 618 (7th Cir. 1985); United States ex rel. Collins v. Blodgett, 513 F.Supp. 1056 (D. Montana, 1981); cf. Dawson v. Cowan, 531 F.2d 1374 (1976). Here, the error was compounded by the fact that the failure to provide the proper instruction relieved the State of its burden of proof.

Mr. Williamson's conviction was derived from such a constitutionally defective proceeding, for the trial court's refusal to instruct left Mr. Williamson defenseless, see Crane, supra, and relieved the State of its burden to prove his guilt. By taking the self-defense issue from the jury's province, the

trial court effectively directed a verdict for the State on the sole issue raised by the evidence, see, Rose v. Clark, 106 S. Ct. 3101, 3106 (1986); United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73 (1977), and deprived Mr. Williamson of his right "to raise a reasonable doubt in the jurors' minds." Zemina v. Solem, supra, 438 F.Supp. at 470 (S.D. South Dakota 1977), affirmed, 573 F.2d 1027 (8th Cir. 1978). The trial court therefore violated Mr. Williamson's fundamental right to have the state put to its burden, In re Winship, supra, and to have the jury determine whether that burden had been met. In not instructing the jury on the defense of self-defense the court effectively "create[ed] an artificial barrier to the consideration of relevant ... testimony ... [and] the trial judge reduced the level of proof necessary for the [state] to carry its burden." Cool v. United States, 409 U.S. 98, 104 (1972).

In Mullaney v. Wilbur, 421 U.S. 684 (1975), the United States Supreme Court held that jury instructions which shifted the burden of persuasion on an essential element of an offense unconstitutionally relieved the State of the burden to prove guilt beyond a reasonable doubt. Following Mullaney, numerous courts have found errors of constitutional magnitude when criminal defendants were forced to bear the ultimate burden on an element of the offense, as defined by state law. See Holloway v. McElroy, 632 F.2d 605 (5th Cir. 1980); Tennon v. Ricketts, 642 F.2d 161 (5th Cir. Unit B, 1981); Wynn v. Mahoney, 600 F.2d 448 (4th Cir. 1979); cf. Sandstrom v. Montana, 442 U.S. 521 (1979).

Yet, the constitutional principles established by Mullaney permit the State to ask that criminal defendants come forward with some evidence of a defense negating an element of the crime, before the burden shifts to the State to disprove that defense beyond a reasonable doubt. Mullaney, supra, at 701-03; Simopoulos v. Virginia, 103 S. Ct. 2532, 2535 (1983); see generally, Holloway v. McElroy, supra 632 F.2d at 620-28

(analysis of constitutional caselaw respecting the State's burden to prove guilt beyond a reasonable doubt).

Florida's law of defenses follows this approach. Under Florida law, once evidence is presented which tends to support a defense, the burden shifts to the State to disprove the defense beyond a reasonable doubt. See John v. State, 450 So. 2d 898, 900-01 (Fla. 1st DCA 1984); Bolin v. State, 297 So. 2d 317 (Fla. 3d DCA 1974). Although a specific instruction on the State's burden to disprove the defense may not be required, the instructions, taken as a whole, must fairly present the jury with the theory of defense and the State's burden to prove guilt beyond a reasonable doubt. See John, supra, 450 So. 2d at 900-01; Holmes v. State, 374 So. 2d 944 (Fla. 1979), cert. denied, 446 U.S. 913 (1980); Spanish v. State, 45 So. 2d 753 (Fla. 1950); Bolin, supra; McDaniel v. State, 179 So. 2d 576 (Fla. DCA 1965). The State is therefore required to prove that a defense does not raise a reasonable doubt. See Edwards v. State, 428 So. 2d 357 (Fla. 3d DCA 1983) (voluntary intoxication); State v. Bobbitt, 389 So. 2d 1094, 1098 (Fla. 1st DCA 1980) (self-defense); McCray v. State, 483 So. 2d 5 (Fla. 4th DCA 1983) (entrapment); Bryant v. State, 412 So. 2d 350 (Fla. 1982) (withdrawal); John v. State, supra (insanity). In short, when the defense meets its burden of production, and thereby establishes the defense as a material issue, the State must disprove the defense in order to establish the elements of the offense. See, e.g., Graham v. State, 406 So. 2d 503 (Fla. 3d DCA 1981).

The trial court's refusal to provide an instruction on Mr. Williamson's sole defense therefore denied him his right to a conviction resting on proof of his guilt beyond a reasonable doubt on the offense as defined by state law, i.e., under the State's burden to disprove his defense. See Stump v. Bennett, 398 F.2d 111 (8th Cir. 1968); Holloway v. McElroy, supra; Mullaney v. Wilbur, supra; cf. In re Winship, 397 U.S. 358

(1970).

Furthermore, under the due process clause, "the State may not place the burden of persuasion ... upon the defendant if the truth of the 'defense' would necessarily negate an essential element of the crime charged." Holloway v. McElroy, 632 F.2d at 625. The trial court did more than place the ultimate burden on Mr. Williamson. It took from the State any burden at all on the critical issue at trial. Thus, if the self-defense defense negated any elements of the offense of murder, Mr. Williamson has established a clear abrogation of his constitutional rights. It did. In effect, the trial court created more than a presumption of guilt on those elements, Sandstrom v. Montana, supra, 442 U.S. at 526, it directed the verdict for the State.

"[A] trial judge is prohibited from . . . directing the jury to come forward with [a verdict of guilty] . . . regardless of how overwhelmingly the evidence may point in that direction." Rose v. Clark, supra, 106 S. Ct. at 3106, citing United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73 (1977). The trial court relieved the State of its burden of proof. As this Court has explained, such a deprivation of a capital defendant's constitutional rights cannot be allowed to stand. Potts v. Zant, 734 F.2d 526, 530 (11th Cir. 1984) reh. denied with opinion, 764 F.2d 1369 (1985), cert. denied, 106 S. Ct. 1386 (1986); Holloway v. McElroy, supra 632 F.2d 605; see also, Tennon v. Ricketts, supra, 642 F.2d 161.

In the context of the heightened reliability requirements mandated in capital cases, Gardner v. Florida, supra, 430 U.S. at 357-58 (opinion of Stevens, J.); Woodson v. North Carolina, 428 U.S. 280 (1976); Potts, supra, the failure to present the jury at Mr. Williamson's trial with an instruction on his sole defense, although he adduced sufficient evidence to warrant the charge, requires that he be granted the relief he seeks in the instant proceeding. Beck v. Alabama, 447 U.S. 625 (1980).

A conclusion that the evidence is or is not sufficient to warrant a proffered defense instruction is a question of law, not fact. See United States ex rel. Means v. Solem, 646 F.2d 322, 331 & n.5 (8th Cir. 1980); Zemina v. Solem, 438 F.Supp. 455, 467-68 (D.C. South Dakota 1977), affirmed, 573 F.2d 1027 (8th Cir. 1978); see also Jackson v. Virginia, 443 U.S. 307 (1979); Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981); cf. Brown v. Allen, 344 U.S. 443, 506 (1953).

The Supreme Court has recently explained that harmless error analysis would be inapplicable to a case in which a court "directed a verdict for the prosecution in a criminal trial by jury." Rose v. Clark, supra, 106 S. Ct. at 3106; see also United States v. Goetz, 746 F.2d 705, 708-09 (11th Cir. 1984) (trial judge cannot direct verdict in favor of government, and such action cannot be viewed as harmless error); United States ex rel. Means v. Solem, supra. As discussed above, the trial court's actions resulted in the verdict being directed for the State during Mr. Williamson's capital trial. Such actions cannot be considered harmless error. Rose v. Clark, supra; Goetz, supra.

Even if traditional harmless error analysis were applicable, however, the trial court's error could not be considered harmless beyond a reasonable doubt. While the evidence that a stabbing occurred was clear, what was anything but clear was how it happened, and the degree of Mr. Williamson's culpability. The trial court unconstitutionally removed that issue from the jury's province. The trial court removed this critical factual issue from its rightful place in the jury's consideration, and thus deprived Mr. Williamson of his only defense. The trial court's instructions that the State must prove guilt beyond a reasonable doubt were therefore devoid of meaning. See Sandstrom v. Montana, 442 U.S. 510, 518-19 n.7 (1979); Cool v. United States, 409 U.S. 100, 105 (1972).

> Of the instructions given [by the court], none relate[d] to [petitioner's] theory of [defense]. And the instructions given... [did] little to bring [petitioner's] theory before the jury.

United States ex rel. Means v. Solem, 646 F.2d at 332.

The trial court deprived Mr. Williamson of his basic due process right to have the prosecution prove guilt beyond a reasonable doubt. In re Winship, 397 U.S. 358 (1970); Jackson v. Virginia, supra. The absence of the proffered defense charge "may well have influenced the jury in reaching a verdict of guilty of murder in the first degree." Ross v. Reed, 704 F.2d 705, 707 (4th Cir. 1983), affirmed, Reed v. Ross, ___ U.S. ___, 104 S. Ct. 2901 (1984). The trial court's failure to instruct created the "substantial risk" that the jury was denied the opportunity to entertain a reasonable doubt. Clark v. Jago, 676 F.2d 1099, 1105 (6th Cir. 1982). The trial court permitted the jury to convict Mr. Williamson although the jurors may never have examined all the evidence concerning the elements of the crimes charged. Connecticut v. Johnson, 103 S. Ct. 969, 978 (1983). These deprivations of Mr. Williamson's fundamental constitutional rights to a fair trial cannot be "harmless beyond a reasonable doubt." Chapman v. California, supra.

It is clear that trial counsel requested instructions that the killing would be justifiable if Mr. Williamson were defending himself from a violent attack, and objected to the failure to give them. The failure of appellate counsel to properly raise this issue on direct appeal constituted ineffective assistance of appellate counsel. This claim was apparent from the record. See Matire v. Wainwright, 811 F.2d 1430 (11th Cir. 1987). This Court has held that appellate counsel rendered ineffective assistance in cases involving similar omissions by appellate counsel in failing to raise claims of plain constitutional error which are "of record." See Wilson v. Wainwright, supra; Johnson v. Wainwright, supra.

The proper time to address this issue is in this proceeding. The predicate facts are "of record." Jackson v. Dugger, 14 F.L.W. 355 (Fla. 1989). This claim involves fundamental constitutional error. Habeas corpus relief is appropriate.

CLAIM II

THE INTENSE SECURITY MEASURES UNDERTAKEN DURING MR. WILLIAMSON'S TRIAL BY COURT OFFICERS IN THE PRESENCE OF THE JURY ABROGATED THE PRESUMPTION OF INNOCENCE, DILUTED THE STATE'S BURDEN TO PROVE GUILT BEYOND A REASONABLE DOUBT, AND INJECTED MISLEADING AND UNCONSTITUTIONAL FACTORS INTO THE TRIAL AND SENTENCING PROCEEDINGS, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The fourteenth amendment guarantees a state criminal defendant the right to a fair trial. Fundamental to this guarantee are the defendant's right to be presumed innocent and the State's concomitant duty to prove guilt beyond a reasonable doubt. See In re Winship, 397 U.S. 358 (1970). Therefore, "courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." Estelle v. Williams, 425 U.S. 501, 503 (1976). Procedures or practices which are not "probative evidence" but which create "the probability of deleterious effects" on fundamental rights and the judgment of the jury thus must be carefully scrutinized and guarded against. Id at 504. Similarly, in a capital case, the eighth amendment mandates heightened scrutiny and requires that the proceedings not dilute the jury's sense of responsibility by the injection of impermissible factors. Caldwell v. Mississippi, 105 S. Ct. 2633 (1985).

Prior to trial, counsel for Mr. Williamson joined counsel for the co-defendants in two motions requesting that the court limit and control the obvious display of security measures and constraints during the trial (See Attachments 2 and 3, Motion to

Remove Constraints and To Provide Appropriate Civilian Courtroom Attire, and Motion to Prohibit Obvious Display of Security Measures). The motions set forth counsel's concerns that the placement of armed and uniformed corrections officers within the courtroom or other loactions in the presence of prospective jurors and the use of handcuffs and other restraining devices "will severely prejudice the defendant's right to a fair and impartial trial, and would serve to improperly influence and prejudice the panel of jurors."

Contrary to counsel's requests, Mr. Williamson's jury was presented with nonprobative, inflammatory, and unconstitutional "evidence" throughout his trial. Despite the presumption of innocence, Mr. Williamson's jury was continually reminded that he was a prisoner in the custody of the State.

The security measures at Mr. Williamson's trial were pervasive and overshadowed the legitimate procedures within the courtroom. The extensive nature of the security measures were reported in the Gainesville Sun under the headline, "Security Tight As Inmate Trial Begins." The article described the security measures as follows:

> Robertson and Williamson had their legs shackled together as they sat in the courtroom. Inside the courtroom two armed deputies and four armed correctional officers sat by the exits, while armed correctional officers sat behind and next to Robertson and Williamson.

(Att. 4).

Additionally, even during the selection process, the prospective jury members were introduced to the heavy security measures as they entered the courtroom:

> As part of the security measurers, prospective jurors were held outside the courtroom and walked one-by-one past two deputies before entering the courtroom.

(Att. 4). The jury could not help but be affected by these unusual and unnecessary security measures.

The jury was constantly exposed to the sight of Mr.

Williamson surrounded by and escorted from the courtroom by armed law enforcement personnel. This exposure could do nothing but tell the jury that the State had already determined that Mr. Williamson was guilty, creating a significant probability that the jury's feelings and ultimate judgment regarding Mr. Williamson were based upon nonprobative matters, completely irrelevant to the issues at trial. Moreover, Mr. Williamson and his co-defendant were shackled to each other during the course of the proceedings.

All of these procedures removed Mr. Williamson's presumption of innocence and relieved the State of its burden to prove guilt beyond a reasonable doubt. They injected wholly irrelevant factors into the guilt-innocence and sentencing determinations that the jurors were called on to make. These extreme security measures constituted prejudicial and improper evidence of the State's belief that Mr. Williamson was dangerous and should be executed. The prejudice from such security measures was particularly acute in the penalty phase. It served as a graphic statement of the manpower the State believes is necessary to guard Mr. Williamson if he is given a life sentence. Mr. Williamson's conviction and sentence of death were thus obtained in violation of the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution.

This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. Williamson. For each of the reasons discussed above the Court should vacate Mr. Williamson's unconstitutional sentence of death.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Williamson's death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital

proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

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 law. It was apparent in the record and should have been presented. Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). Moreover, to the extent that facts were not "of record," appellate counsel should have requested that the Court relinquish jurisdiction for proper supplementation of the record.

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. Williamson of the appellate reversal to which he was constitutionally entitled. See Wilson v. Wainwright, supra, 474 So. 2d at 1164-65; Matire, supra. Accordingly, habeas corpus relief should be accorded on the basis of appellate counsel's prejudicially ineffective assistance.

Moreover, this is a claim of fundamental constitutional error, and the merits of the claim should now be properly determined and relief should be granted.

CLAIM III

DURING THE COURSE OF MR. WILLIAMSON'S TRIAL THE COURT IMPROPERLY ASSERTED THAT SYMPATHY AND MERCY TOWARDS MR. BATES WAS AN IMPROPER CONSIDERATION, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The jury in Mr. Williamson's trial was instructed by the trial court, that feelings of mercy or sympathy could play no part in their deliberations as to Mr. Williamson's ultimate fate.

Significantly, the following instructions were the only ones provided by the court with respect to the role that mercy or sympathy could play in deliberations:

> Secondly, the case must be decided only upon the evidence that you have heard from the answers of the witnesses and have seen in the form of exhibits in evidence and these instructions; third, this case must not be decided for or against anyone because you feel sorry for anyone, or are angry at anyone.

(R. 829)(emphasis added).

* * *

> Eight, feelings of prejudice, bias or sympathy are not legally reasonable doubts and they should not be discussed by any of you in any way. Your verdict must be based on your views of the evidence, and on the law contained in these instructions.

(R. 830)(emphasis added). The jury was never informed that a different standard, one allowing for consideration of mercy or sympathy, was applicable at the penalty phase.

In Wilson v. Kemp, 777 F.2d 621, 624 (11th Cir. 1985), the court found that statements of prosecutors, which may mislead the jury into believing personal feelings of mercy must be cast aside, violate the federal constitution:

> The clear impact of the [prosecutor's statements] is that a sense of mercy should not dissuade one from punishing criminals to the maximum extent possible. This position on mercy is diametrically opposed to the Georgia death penalty statute, which directs that "the jury shall retire to determine whether any mitigating or aggravating circumstances . . . exist and whether to recommend mercy for the defendant." O.C.G.A. Section 17-10-2(c)(Michie 1982). Thus, as we held in Drake, the content of the [prosecutor's closing] is "fundamentally opposed to current death penalty jurisprudence." 762 F.2d at 1460. Indeed, the validity of mercy as a sentencing consideration is an implicit underpinning of many United States Supreme Court decisions in capital cases. See, e.g., Woodson v. North Carolina, 428 U.S. 280, 303, 96 S.Ct. 2978, 2990, 49 L.Ed.2d 944 (1976)(striking down North Carolina's mandatory death penalty statute for the reason, inter alia, that it failed "to allow the particularized consideration of relevant aspects of the character and record of each convicted

> defendant before the imposition upon him of a sentence of death"); Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978)(striking down Ohio's death penalty statute, which allowed consideration only of certain mitigating circumstances, on the grounds that the sentencer may not "be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death") (emphasis in original). The Supreme Court, in requiring individual consideration by capital juries and in requiring full play for mitigating circumstances, has demonstrated that mercy has its proper place in capital sentencing. The [prosecutor's closing] in strongly suggesting otherwise, misrepresents this important legal principle.

Wilson v. Kemp, 777 F.2d at 624. Requesting the sentencers to dispel any sympathy they may have had towards the defendant undermined the sentencers' ability to reliably weigh and evaluate mitigating evidence. The sentencers' role in the penalty phase is to evaluate the circumstances of the crime and the character of the offender before deciding whether death is an appropriate punishment. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). An admonition to disregard the consideration of sympathy improperly suggests to the sentencer "that it must ignore the mitigating evidence about the [petitioner's] background and character." California v. Brown, 479 U.S. 538, 107 S. Ct. 837, 842 (1987)(O'Connor, J., concurring). The sympathy arising from the mitigation, after all, is an aspect of the defendant's character that must be considered:

> The capital defendant's constitutional right to present and have the jury consider mitigating evidence during the capital phase of the trial is very broad. The Supreme Court has held that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978) (emphasis in original). See also Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

The sentencer must give "individualized" consideration to the mitigating circumstances surrounding the defendant and the crime, Brown, 479 U.S. at 541; Zant v. Stephens, 462 U.S. 862, 879 (1983); Eddings v. Oklahoma, 455 U.S. 104, 111-12 (1982); Lockett, 438 U.S. at 605, and may not be precluded from considering "any relevant mitigating evidence." Eddings, 455 U.S. at 114. See also Andrews v. Shulsen, 802 F.2d 1256, 1261 (10th Cir. 1986), cert. denied, ___ U.S. ___, 107 S. Ct. 1964, 95 L. Ed. 2d 536 (1987).

Mitigating evidence about a defendant's background or character is not limited to evidence of guilt or innocence, nor does it necessarily go to the circumstances of the offense. Rather, it can include an individualized appeal for compassion, understanding, and mercy as the personality of the defendant is fleshed out and the jury is given an opportunity to understand, and to relate to, the defendant in normal human terms. A long line of Supreme court cases shows that a capital defendant has a constitutional right to make, and have the jury consider, just such an appeal.

In Gregg v. Georgia, 428 U.S. 153 (1976), the Court upheld the Georgia sentencing scheme which allowed jurors to consider mercy in deciding whether to impose the penalty of death. Id. at 203. The Court stated that "[n]othing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution." Id. at 199.

In Woodson v. North Carolina, 428 U.S. 280, 304 (1976), the Court struck down mandatory death sentences as incompatible with the required individualized treatment of defendants. A plurality of the Court stated that mandatory death penalties treated defendants "not as uniquely individual human beings but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty." Id. at 304. The Court held that "the fundamental respect for humanity underlying the Eight Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." Id. The Court explained that mitigating evidence is allowed during the sentencing phase of capital trial in order to provide for the consideration of "compassionate or mitigating factors stemming from the diverse frailties of humankind." Id.

In Eddings v. Oklahoma, 455 U.S. 104 (1982), the Court reviewed a sentencing

judge's refusal to consider evidence of a defendant's troubled family background and emotional problems. In reversing the imposition of the death penalty, the Court held that "[j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence." Id. at 113-14 (emphasis in original). The Court stated that although the system of capital punishment should be "consistent and principled," it must also be "humane and sensible to the uniqueness of the individual." Id. at 110.

In Caldwell v. Mississippi, 472 U.S. 320 (1985), the Court held that an attempt to shift sentencing responsibility from the jury to an appellate court was unconstitutional, in part, because the appellate court is ill equipped to consider "the mercy plea [which] is made directly to the jury." Id. at 330-31. The Court explained that appellate courts are unable to "confront and examine the individuality of the defendant" because "[w]hatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record." Id.

In Skipper v. South Carolina, 476 U.S. 1 (1986), the trial court had precluded the defendant from introducing evidence of his good behavior while in prison awaiting trial. The Court held that the petitioner had a constitutional right to introduce the evidence, even though the evidence did not relate to his culpability for the crime. Id. at 4-5. The Court found that excluding the evidence "impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender." Id. at 8.

"Mercy," "humane" treatment, "compassion," and consideration of the unique "humanity" of the defendant, which have all be affirmed as relevant considerations in the penalty phase of a capital case, all inevitably involve sympathy or are sufficiently intertwined with sympathy that they cannot be parsed without significant risk of confusion in the mind of a reasonable juror. Webster's Third International Dictionary (Unabridged ed. 1966) describes "mercy" as "a compassion or forbearance shown to an offender," and "a kindly refraining from inflicting punishment or pain, often a refraining brought about by a genuinely felt compassion and sympathy." Id. at 1413 (emphasis added). The word "humane" similarly is defined as "marked by compassion, sympathy, or consideration for other human beings." Id. at 1100 (emphasis added). Webster's definition of "compassion"

is a "deep feeling for and understanding of misery or suffering," and it specifically states that "sympathy" is a synonym of compassion. Id. at 462. Furthermore, it defines "compassionate" as "marked by . . . a ready inclination to pity, sympathy, or tenderness." Id (emphasis added).

Without placing an undue technical emphasis on definitions, it seems to us that sympathy is likely to be perceived by a reasonable juror as an essential or important ingredient of, if not a synonym for, "mercy," "humane" treatment, "compassion," and a full "individualized" consideration of the "humanity" of the defendant and his "character." . . . [I]f a juror is precluded from responding with sympathy to the defendant's mitigating evidence of his own unique humanness, then there is an unconstitutional danger that his counsel's plea for mercy and compassion will fall on deaf ears.

Here, the petitioner did offer mitigating evidence about his background and character. Petitioner's father testified that petitioner was a "happy-go-lucky guy" who was "friendly with everybody." The father also testified that, unlike other people in the neighborhood, petitioner avoided violence and fighting; that he (the father) was in the penitentiary during the petitioner's early childhood; that petitioner was the product of a broken home; and that petitioner only lived with him from about age 14 to 19. Although the father admitted that petitioner once was involved in an altercation at school, he suggested that it was a result of the difficulties of attending a school with forced bussing. Record, vol. V, at 667-82.

Petitioner's counsel, in his closing argument, then relied on this testimony to argue that petitioner's youth, race, school experiences, and broken home were mitigating factors that the jury should consider in making its sentencing decision. In so doing, defense counsel appealed directly to the jury's sense of compassion, understanding, and sympathy, and asked the jury to show "kindness" to his client as a result of his background. Record, vol. V, at 708-723. . . . [There is] an impermissible risk that the jury did not fully consider these mitigating factors in making its sentencing decision.

. . .

As we discussed above, sympathy may be an important ingredient in understanding and appreciating mitigating evidence of a defendant's background and character.

Parks v. Brown, 860 F.2d at 1554-57. On April 25, 1989, the United States Supreme Court granted a writ of certiorari in order to review the decision in Parks. See Saffle v. Parks, 109 S. Ct. 1930 (1989). A stay of execution in Mr. Williamson' case would be more than appropriate pending the United States Supreme Court's establishing of standards for a determination of this claim.

The United States Supreme Court recently held in a case declared to be retroactive on its face that a capital sentencer jury must make a "reasoned moral response to the defendant's background, character, and crime." Penry v. Lynaugh, 109 S. Ct. 2934, 2947 (1989). It is improper to create "the risk of an unguided emotional response." 109 S. Ct. at 2951. A capital defendant should not be executed where the process runs the "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Penry, 109 S. Ct. at 2952. There can be no question that Penry must be applied retroactively. The Court there concluded that, Jurek v. Texas, 428 U.S. 262 (1976), notwithstanding, the Texas death penalty scheme previously found constitutional created the "risk that the death [would] be imposed in spite of factors which [] call[ed] for a less severe penalty." 109 S. Ct. at 2952. Thus Mr. Penry's claim was cognizable in post-conviction proceedings. John Penry sought, and was granted relief, in part on the identical claim now pressed by Mr. Williamson. Penry alleged that under Texas' functional equivalent of aggravating factors his jury was precluded from considering a discretionary grant of mercy based on the existence of mitigating factors. Id., 109 S. Ct. at 2942. The Court found that, as applied to Penry, the failure to so instruct was not a legitimate attempt by Texas to avoid unbridled discretion, 109 S. Ct. 2951, but rather, an impermissible attempt to restrain the sentencer's discretion to decline to impose a death sentence. 109 S. Ct. 2951. In Mr.

Williamson's case, the sentencer was expressly told that Florida law precluded considerations of sympathy and mercy. The net result is the same: the unacceptable risk that the jury's recommendation of death was the product of an unguided emotional response and therefore unreliable and inappropriate in Mr. Williamson's case. This error undermined the reliability of the jury's sentencing verdict.

The error here undermined the reliability of the sentencing determination and prevented the jury from assessing mitigation. The court's instructions impeded a "reasoned moral response" which by definition includes sympathy. Penry v. Lynaugh, 109 S. Ct. 2934, 2949 (1989). For each of the reasons discussed above the Court should vacate Mr. Williamson's unconstitutional sentence of death. This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Williamson's death sentence.

The retroactive opinion in Penry requires that this issue to be addressed and fully assessed at this juncture. The eighth amendment cannot tolerate the imposition of a sentence of death where there exists a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Penry, 109 S. Ct. at 2952. Moreover, appellate counsel rendered ineffective assistance in failing to urge the claim. Accordingly, habeas corpus relief should be accorded.

CLAIM IV

MR. WILLIAMSON'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. WILLIAMSON TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE SENTENCING JUDGE HIMSELF EMPLOYED THIS IMPROPER STANDARD IN SENTENCING MR. WILLIAMSON TO DEATH.

A capital sentencing jury must be:

> [T]old that the state must establish the existence of one or more

> aggravating circumstances before the death penalty could be imposed . . .
>
> [S]uch a sentence could be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Williamson's capital proceedings. To the contrary, the burden was shifted to Mr. Williamson on the question of whether he should live or die. In Hamblen v. Dugger, ___ So. 2d ___, 14 F.L.W. 347 (Fla. 1989), a capital post-conviction action, this Court addressed the question of whether the standard employed shifted to the defendant the burden on the question of whether he should live or die. The Hamblen opinion reflects that claims such as the instant should be addressed on a case-by-case basis in capital post-conviction actions. Mr. Williamson herein urges that the Court assess this significant issue in his case and, for the reasons set forth below, that the Court grant him the relief to which he can show his entitlement.

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), and Dixon, for such instructions unconstitutionally shift to the defendant the burden with regard to the ultimate question of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating Caldwell v. Mississippi, 472 U.S. 320 (1985); Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Maynard v. Cartwright, 108 S. Ct. 1853 (1988). Mr. Williamson's jury was unconstitutionally instructed, as the record makes abundantly clear (See R. 940, 941). This claim is now properly before this Court, and Rule 3.850 relief would be more than proper. Moreover, the claim is properly before the Court because trial counsel ineffectively

failed to properly litigate this issue at the time of the original proceedings.

At the penalty phase of trial, judicial instructions informed Mr. Williamson's jury that death was the appropriate sentence unless "mitigating circumstances exist to outweigh any aggravating circumstances" (R. 940). Such instructions, which shift to the defendant the burden of proving that life is the appropriate sentence, violate the eighth and fourteenth amendments, as the Court of Appeals for the Ninth Circuit recently held in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(in banc). This claim involves a "perversion" of the jury's deliberations concerning the ultimate question of whether Mr. Williamson should live or die. See Smith v. Murray, 106 S. Ct. 2661, 2668 (1986). No bars apply under such circumstances. Id.

The jury instructions here employed a presumption of death which shifted to Mr. Williamson the burden of proving that life was the appropriate sentence. As a result, Mr. Williamson's capital sentencing proceeding was rendered fundamentally unfair and unreliable.

In Adamson, 865 F.2d at 1041-44, 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. What occurred in Adamson is precisely what occurred in Mr. Williamson's case. See also Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). The instructions, and the standard upon which the sentencing court based its own determination, violated the eighth and fourteenth amendments. The burden of proof was shifted to Mr. Williamson on the central sentencing issue of whether he should live or die. Moreover, the application of this unconstitutional standard at the sentencing phase violated Mr. Williamson'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. The unconstitutional presumption inhibited the jury's ability to "fully" assess mitigation, in violation of Penry v. Lynaugh, 109 S. Ct. 2935 (1989), a decision which was declared, on its face, to apply retroactively to cases on collateral review.

The focus of a jury instruction claim is "what a reasonable juror could have understood the charge as meaning." Francis v. Franklin, 471 U.S. 307 (1985); see also Sandstrom v. Montana, 442 U.S. 510 (1979). Here, the jury was in essence told that death was presumed appropriate once aggravating circumstances were established, unless Mr. Williamson proved that the mitigating circumstances outweighed the aggravating circumstances. A reasonable juror could have well understood that mitigating circumstances were factors calling for a life sentence, that aggravating and mitigating circumstances had differing burdens of proof, and that life was a possible penalty, while at the same time understanding, based on the instructions, that Mr. Williamson had the ultimate burden to prove that life was appropriate. This violates the eighth amendment.

This error cannot be deemed harmless. In Mills v. Maryland, 108 S. Ct. 1860 (1988), the court concluded that, in the capital sentencing context, the Constitution requires resentencing unless a reviewing court can rule out the possibility that the jury's verdict rested on an improper ground. Id. 108 S. Ct. at 1866-67. Under Hitchcock, Florida juries must be instructed in accord with the eighth amendment principles. The constitutionally mandated standard demonstrates that relief is warranted in Mr. Williamson's case.

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. In Pennsylvania, 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 the instructions and standard employed in Mr. Williamson's case, once one of the statutory aggravating circumstances was found by definition sufficient aggravation existed to impose death. The jury was then directed to consider whether mitigation had been presented which outweighed the aggravation. Thus under the standard employed in Mr. Williamson's case, the finding of an aggravating circumstance operated to impose 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 employed here was more restrictive of the jury's ability to conduct an individualized sentencing than the Pennsylvania statute at issue in Blystone. See also, Boyde v. California, 109 S. Ct. 2447 (1989).

The effects feared in Adamson and Mills are precisely the effects resulting from the burden-shifting instruction given in Mr. Williamson's case. In being instructed that mitigating circumstances must outweigh aggravating circumstances before it could recommend life, the jury was effectively told that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances outweighed the aggravating circumstances. This jury was thus

constrained in its consideration of mitigating evidence, Hitchcock, 107 S. Ct. 1821 (1987), and from evaluating the "totality of the circumstances," Dixon v. State, 283 So. 2d 1, 10 (Fla. 1973), in determining the appropriate penalty. The jury was not allowed to make a "reasoned moral response" to the issues at Mr. Williamson's sentencing or to "fully" consider mitigation. Penry v. Lynaugh, supra. There is a "substantial possibility" that this understanding of the jury instructions resulted in a death recommendation despite factors calling for life. Mills, supra. The death sentence in this case is in direct conflict with Adamson, Mills, and Penry, supra. This error "perverted" the jury's deliberations concerning the ultimate question of whether Mr. Williamson should live or die. Smith v. Murray, 106 S. Ct. at 2668.

This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. Williamson. For each of the reasons discussed above the Court should vacate Mr. Williamson's unconstitutional sentence of death.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Williamson's death sentence. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error. Appellate counsel rendered ineffective assistance in failing to urge this claim. Moreover, the claim involves fundamental error. The standards by which the claim is to be determined are now about to be established by the United States Supreme Court. Accordingly, a stay of execution is proper. Habeas corpus relief should be accorded.

CONCLUSION AND RELIEF SOUGHT

Many of the claims set out above involve, inter alia, ineffective assistance of appellate counsel, as well as fundamental error. The appellate level right to counsel also comprehends the sixth amendment right to effective assistance of counsel. Evitts v. Lucey, 105 S. Ct. 830 (1985). Appellate counsel must function as "an active advocate," Anders v. California, 386 U.S. 738, 744, 745 (1967), providing his client the expert professional . . . assistance . . . necessary in a system governed by complex laws and rules and procedures. . . ." Lucey, 105 S. Ct. at 835 n.6.

Even a single, isolated error on the part of counsel may be sufficient to establish that the defendant was denied effective assistance, Kimmelman v. Morrison, 106 S. Ct. 2574, 2588 (1986); United States v. Cronic, 466 U.S.S 648, 657 n.20 (1984); see also Johnson (Paul) v. Wainwright, 498 So. 2d 938 (Fla. 1987), notwithstanding the fact that in other aspects counsel's performance may have been "effective". Washington v. Watkins, 655 F.2d 1346, 1355 (5th Cir.), reh. denied with opinion, 662 F.2d 1116 (1981).

Moreover, as this Court has explained, the Court's "independent review" of the record in capital cases neither can cure nor undo the harm caused by an appellate attorney's deficiencies:

> It is true that we have imposed upon ourselves the duty to independently examine each death penalty case. However, we will be the first to agree that our judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an art, not a science. We cannot, in hindsight, precisely measure the impact of counsel's failure to urge his client's best claims.

> Nor can we predict the outcome of a new appeal at which petitioner will recieve adequate representation. We are convinced, as a final result of examination of the original record and appeal and of petitioner's present prayer for relief that our confidence in the correctness and fairness of the result has been undermined.

Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985). "The basic requirement of due process," therefore, 'is that a defendant be represented in court, at every level, by an advocate who represents his client zealously within the bouds of the law." Id. at 1164 (emphasis supplied).

Appellate counsel here failed to act as an advocate for his client. As in Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987), there simply was no reason here for counsel to fail to urge meritorious claims for relief. Counsel ineffectively simply failed to urge them on direct appeal. As in Matire, Mr. Williamson is entitled to relief. See also Wilson v. Wainwright, supra; Johnson v. Wainwright, supra. The "adversarial testing process" failed during Mr. Williamson's direct appeal -- because counsel failed. Matire at 1438, citing Strickland v. Washington, 466 U.S. 668, 690 (1984).

To prevail on his claim of ineffective assistance of appellate counsel Mr. Williamson must show: 1) deficient performance, and 2) prejudice. Matire, 811 F.2d at 1435; Wilson, supra. As the foregoing discussion illustrates, he has.

The claims are also presented as independent claims raising matters of fundamental error and/or are predicated upon significant changes in the law. Because the forgoing claims present substantial constitional questions which go to the heart of the fundamental fairness and reliability of Mr. Williamson's capital conviction and sentence of death, and of this Court's appellate review, they should be determined on their merits. At this time, a stay of execution, and a remand to an appropriate trial level tribunal for the requisite findings on contested evidentiary issues of fact -- including inter alia appellate

counsel's deficient performance, -- should be ordered. The relief sought herein should be granted.

WHEREFORE, Johnny Williamson through counsel, respectfully urges that the Court issue its writ of habeas corpus and vacate his unconstitutional 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 question of fact, Mr. Williamson 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 question attendant to his claims, including inter alia, questions regarding counsel's deficient performance and prejudice.

Mr. Williamson urges that the Court grant him habeas corpus relief, or alternatively, a new appeal, for all 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,

LARRY HELM SPALDING
Capital Collateral Representative

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COUNSEL FOR PETITIONER

By: 
Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing has been furnished by first class, U.S. Mail, postage prepaid, to Richard Martell, Assistant Attorney General, Department of Legal Affairs, Magnolia Park Courtyard, 111-29 North Magnolia Drive, Tallahassee, Florida 32301, this 3rd day of November, 1989.

Attorney

STATE OF FLORIDA)
) ss.
COUNTY OF SUWANNEE)

AFFIDAVIT OF DANIEL A. MCKEEVER, JR., ESQ.

I, DANIEL A. MCKEEVER, JR., being duly sworn or affirmed, do hereby depose and say:

1. My name is Daniel A. McKeever, Jr., and I am an attorney in private practice in Live Oak, Florida, practicing since 1973. I am also a member of the Alabama Bar.

2. In January 1986 I was appointed by the court to represent Johnny Williamson for a charge of capital murder in State v. Williamson, No. 85-130, Circuit Court, Third Judicial Circuit, in and for Dixie County, Florida.

3. This was the first court appointed death case I ever defended although I prosecuted many such cases during my 10 years as an assistant state attorney.

4. There seemed to be Brady problems all over the place; I would take a statement from a witness and get new facts that I would then realize the State should have had but had not disclosed. I still don't feel that the real truth of the matter came out in the trial either due to facts that were omitted or misrepresented.

5. One thing that made the case harder to defend was the visiting conditions and atmosphere at the prison. The guards were always telling me to hurry up and it was not

conducive to effective communication with Johnny Williamson.

6. Johnny Williamson went to see Drew in order to verbally confront him about money Drew owed. Drew pulled a knife on him, and Johnny responded in self-defense. If Johnny Williamson had testified, he would have stated that he knew Drew had a bad reputation for violence and that Drew came at him with a knife. What Johnny Williamson was going to handle with a conversation blew up because Drew had a knife. The case was definitely self-defense or at the worst manslaughter.

7. My theory of defense was that Mr. Williamson had acted in self-defense and that the killing was not premeditated. In this regard, the trial court's ruling that we were not entitled to a self-defense instruction was devastating. Self-defense was our only defense and without the instruction we were precluded from presenting, arguing or establishing our only defense and my ability to be effective was substantially impaired. For tactical reasons, I discouraged Johnny Williamson from testifying, although the final decision was his.

8. In regard to the codefendant, Omer Williamson, I was taken by surprise by his last minute change of plea. His attorney was Baya Harrison. The last minute plea definitely hurt our defense.

9. Since this was a court appointed case, I turned the responsibility for the direct appeal over to the Public Defender for the Second Judicial Circuit. As I recall this

was a time in which the Public Defender's office seemed to be overwhelmed with cases. Today Mike Allen is allowed to withdraw from cases, but back then it seemed a lot of pressure was being applied to handle an awfully large number of cases. I can think of no reason why the issue that the court erred in refusing to give the jury instruction on self-defense was not raised on direct appeal.

10. I requested a confidential, mental health evaluation of Johnny Williams's competency. Johnny's lifelong institutionalization seemed to have affected him mentally. I recognized that his thought processes were not normal. I do not presently recall whether I asked the appointed expert or other experts to evaluate whether or not mental health related statutory or nonstatutory mitigating circumstances existed in the case. I note that I would have presented to the jury and court all mitigation at sentencing.

FURTHER AFFIANT SAYETH NAUGHT.

DANIEL A. MCKEEVER, JR., ESQ.

Sworn of affirmed before me this 23rd day of October, 1989.

Notary Public

My commission expires:

Notary Public, State At Large, Florida.
My Commission Expires February 28, 1993

IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DIXIE COUNTY.

CASE NO. 85-130-CF

STATE OF FLORIDA,

-vs-

JOHNNY WILLIAMSON,
OMER JAMES WILLIAMSON, and
JAMES ROBERTSON,

Defendants.

MOTION TO REMOVE CONSTRAINTS AND TO PROVIDE APPROPRIATE CIVILIAN COURTROOM ATTIRE

Come now the undersigned Attorneys, for and on behalf of the Defendant, JAMES ROBERTSON, and file this Motion To Remove Constraints and To Provide Appropriate Civilian Courtroom Attire, and say as follows:

1. That the Defendant is now, and has been for a number of years, an inmate in the custody and control of the Florida Department of Corrections.

2. That at all previous proceedings had in this cause, the Defendant has appeared in the Courtroom clad in prison uniform, and constrained with handcuffs and leg irons or cuffs.

3. That the Defendant is charged with the offense of Murder in the first degree, and will be tried by jury.

4. That the Defendant's appearance in the courtroom, in the presence of prospective jurors, clad in prison uniform and physically restrained by handcuffs and other restraining devices will severely prejudice the Defendant's right to a fair and impartial trial, and would serve to improperly influence and prejudice the panel of jurors who will be selected to try the Defendant.

5. That there exists adaquate measures which can be taken to insure courtroom security without the necessity of parading the Defendent before the jury while the Defendant is physically constrained with handcuffs and other physical restraining devices.

6. That as a result of being an inmate as aforesaid, the

Defendant is indigent, and does not possess and has no means of obtaining appropriate civilian shoes and clothing for his use during his trial.

WHEREFORE, the Defendant moves this Court for an Order:

(a) Directing that all physical restraining devices be removed from the Defendant prior to his appearance in the courtroom prior to and during the trial of the Defendant;

(b) Directing that the appropriate officials of the Florida Department of Corrections, the Dixie County Sheriff's Office, or any other agency having custody and control of the Defendant at the time of trial, provide the Defendant with appropriate civilian attire to be worn by the Defendant during his trial;

(c) Granting such other and further relief as the Defendant may be entitled as a matter of law and discretion.

SLAUGHTER AND SLAUGHTER
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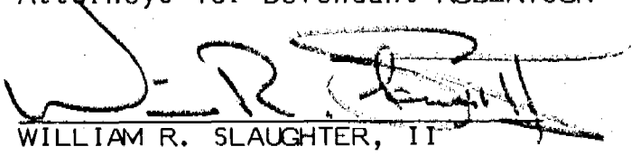
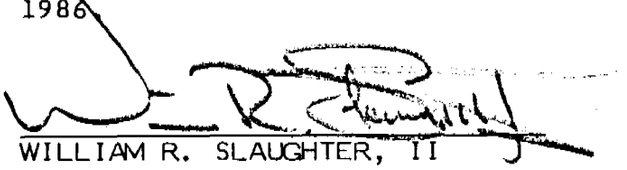
Phone (904) 362-2324
Attorneys for Defendant ROBERTSON

By: 
WILLIAM R. SLAUGHTER, II

I HEREBY CERTIFY that a true and correct copy hereof was furnished to The Honorable JERRY M. BLAIR, State Attorney for the Third Judicial Circuit, Post Office Box 1089, Perry, Florida 32347 and DANIEL A. McKEEVER, JR., Esquire, Post Office Drawer "S", Live Oak, Florida 32060 by regular United States Mail, this 28th day of March, A.D. 1986.


WILLIAM R. SLAUGHTER, II

IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DIXIE COUNTY.

CASE NO. 85-130-CF

STATE OF FLORIDA,

-vs-

JOHNNY WILLIAMSON,
OMER JAMES WILLIAMSON, and
JAMES ROBERTSON,

Defendants.

MOTION TO PROHIBIT OBVIOUS DISPLAY OF SECURITY MEASURES

Come now the undersigned Attorneys, for and on behalf of the Defendant, JAMES ROBERTSON, and file this Motion To Prohibit Obvious Display of Security Measures, and say as follows:

1. That the Defendant is now, and has been for a number of years, an inmate in the custody and control of the Florida Department of Corrections.

2. That at all previous proceedings had in this cause, a number of highly visible, armed, and uniformed Corrections Officers have been stationed at various locations within the courtroom.

3. That the Defendant is charged with the offense of Murder in the first degree, and will be tried by jury.

4. That the placement of armed and uniformed Corrections Officers within the courtroom or other locations in the presence of prospective jurors will severely prejudice the Defendant's right to a fair and impartial trial by creating in the minds of jurors the impression or suggestion that the Defendant is "dangerous" or otherwise poses a threat to the safety of said jurors or others connected with the trial of this cause.

5. That the Defendant recognizes the need for increased security during his trial due to the fact that a number of witnesses who are expected to testify at the trial of the Defendant are prison inmates. However, adaquate measures can be taken to insure courtroom security without the necessity of placing armed and uniformed officers throughout the courtroom and

in other areas where jurors or prospective jurors might be present. For example, the use of such officers, dressed in civilian attire, would provide adaquate security without attracting the attention of the jurors.

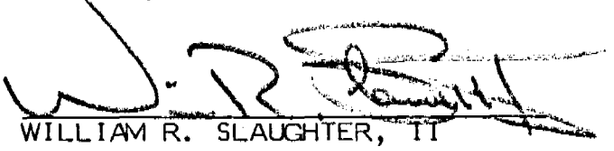
WHEREFORE, the Defendant moves this Court for an Order:

(a) Directing that uniformed and armed officers be excluded from the courtroom or other areas in which such officers might be observed by the jury and prospective jury, except for those occasions where it is necessary for such officers to escort inmate witnesses about the premises;

(b) Adopting such other courtroom security measures which this Court deems necessary to insure that the trial of the Defendant is conducted in an orderly and secure manner without calling such measures to the attention of the jury panel.

(c) Granting such other and further relief as the Defendant may be entitled as a matter of law and discretion.

SLAUGHTER AND SLAUGHTER
Post Office Box 906
Live Oak, Florida 32060
Phone (904) 362-2324
Attorneys for Defendant ROBERTSON

By: 
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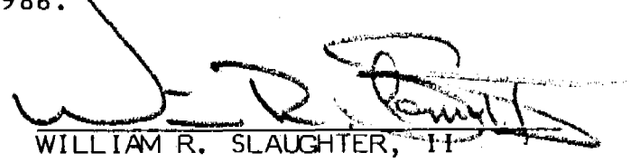
WILLIAM R. SLAUGHTER, II

Gville Sun 4/9/86

tournament teams. The team members worked hard and brought in two first place finishes and one second. Team members from the sixth grade were Mike Bowman, Jim Carpenter, Paul Tate, and Jeff Keene; from the seventh grade the team members were Joel Caren, John Trumphy, Jim Mallard and Casey Hall; the eighth grade team consisted of Daniel Weaver, Berdell Knowles, Kenya Hillard and Matt Glover.

Chamber printing a promotional brochure

The Interlachen Chamber of Commerce is in the process of printing a promotional brochure for the area. The brochure will be sent to people writing in for information about the Interlachen area, as well as distributed by local business people and at tourist information centers throughout Florida.

Any organization, church or business wanting information about getting something in the brochure can call Ruth Balnum. Deadline to submit information for printing is this Thursday.

'Hoosier' day lunch at Ravine Gardens

All Indiana residents, ex-residents, whatever, are invited to a covered dish dinner at 1 p.m. Sunday at the Ravine Gardens in Palatka. Bring your covered dish full of good stuff to eat, your table service and eating tools, plus a serving piece.

For more information call Marion Issacs in Interlachen.

Church news

The First Congregational Church of Interlachen — with a normal attendance of about 50 — hosted almost 150 people at their Easter Sunday service.

They brought in 11 new members and Pastor Falknor baptized two of his grandsons who traveled 1200 miles for the occasion.

At the covered dish dinner David Covington, Marion Issacs and Richard Vermeuilen were given certificates of thanks for their help in renovating the church rectory. Kip Benjamin headed up the crew that did the work.

At the dinner that was held after the church services. Pastor Falknor's father, Rush Falknor, celebrated his 80th birthday by cutting a very large birthday cake and sharing it with all who were present.

Around town

Jewel Strickland's daughter Melba and her husband Joe of Orlando visited her here for Easter.

Fred and Edna Bearse of Interlachen traveled to St. Petersburg where they met their daughter Marilyn and

swine show. It [illegible]

follow at 7 p.m. Entertainment tonight will be provided by cloggers and a local talent show.

The traditional rural-urban day picnic, sponsored by the Starke Rotary Club, will follow the formal opening of the fair at noon Wednesday.

The normal $1 admission charge [illegible] at 1 p.m. and students from elementary school through high school will be admitted free until 5 p.m. McDonaldland characters also will be at the fair in the afternoon.

The auction sale of market hogs entered in the swine show will begin at 7

featured at the Bradford County fair for a number of years. But for the second consecutive year, fair officials have opted for nightly entertainment instead of inviting the beauty queen.

The $1 admission charge covers the nightly shows.

Security tight as inmate trial begins

By GARY KIRKLAND
Sun staff writer

CROSS CITY — Security was heavy Monday morning as the first-degree murder trial of two former Cross City Correctional Institution inmates began at the Dixie County Courthouse.

Dixie County Sheriff Glen Dyals said rumors from the prison concerning a possible escape attempt by Johnny Williamson, 43, and James Robertson, 22, prompted the increased security measures.

Robertson and Williamson had their legs shackled together as they sat in the courtroom. Inside the courtroom two armed deputies and four armed correctional officers sat by the exits, while armed correctional officers sat behind and next to Robertson and Williamson.

Circuit Judge L. Arthur Lawrence said he had not heard of any specific problems that might be expected. Security normally would be increased when a number of inmates are expected as possible witnesses, he said.

Robertson, Williamson and a third inmate, 30-year-old Omer James Williamson, were all charged with first-degree murder and possession of contraband, following the stabbing death of Daniel Drew last June 20. The stabbing occurred outside a maintenance shop on the CCCI compound. In February, Omer Williamson pleaded guilty to both charges and is expected to be the state's main witness.

Assistant State Attorney Dave Phelps said Johnny Williamson stabbed Drew, while Omer Williamson held Drew and Robertson served as a lookout. Phelps said Drew made the sharpened pipe used in his own murder, and that he had handed the weapon to Johnny Williamson just prior to the stabbing.

Drew was "no angel" according to Phelps. He said Drew supplied marijuana to both Omer Williamson and Johnny Williamson. That marijuana, according to Phelps, was supposed to be sold for cash, not credit. Omer Williamson, however, sold the marijuana for credit, Phelps said, and later decided not to pay Drew $15. Phelps said Johnny Williamson came up with a plan to kill Drew, rather than pay the $15.

"It's a mess, but not first-degree murder," said Johnny Williamson's attorney, Dan McKeever.

McKeever said Omer Williamson, "the guy that got the deal" was the only witness who could supply critical information that would tie his client to the murder. McKeever characterized Omer Williamson as a child abuser, homosexual and a liar.

Robertson's attorney, William Slaughter, said his client didn't help plan or commit the murder, and didn't even know of the murder until after it occurred. He also said his client had no motive in the murder.

Most of the time in court Monday was spent on jury selection. Forty-six prospective jurors were called before a 12-member jury and two alternates were selected. As part of the security measurers, prospective jurors were held outside the courtroom and walked one-by-one past two deputies before entering the courtroom.

State Attorney Jerry Blair asked each prospective juror about their feelings on the death penalty. About a dozen of the jurors that were excused said during questioning that they worked in, or had family members who worked in the prison.

The trial is scheduled to continue this morning with testimony from inmates who were in the prison compound the day of the murder. The trial is expected to last at least three days.

[illegible] efforts of former Town Clerk Aletha Woodworth, because the town's history is centered around the railroad. At the time the town received the caboose it was hoped that it might someday house the town's historical documents.

Gilchrist landfill to open April 21

By GARY KIRKLAND
Sun staff writer

TRENTON — The Gilchrist County landfill near Bell is expected to reopen April 21 and residents can plan to pay when they dump their garbage.

The Gilchrist County Commission voted Monday to reopen the landfill, and also adopted a fee system that will help pay for landfill operation. The landfill has been closed since last fall when it was flooded by rains from Hurricane Elena.

Gilchrist Clerk of the Courts Jackie Barron said that until the dump is reopened, residents will be able to use the dumpsters at the landfill. Since the landfill closed, garbage collected in the dumpsters has been hauled by a private contractor to the Levy County landfill between Bronson and Williston.

The commission approved a charge of $7.50 per ton for dumping, with a minimum charge of 25 cents a bag. Barron said the fee will actually be based on volume instead of weight, and that scales won't be installed at the landfill.

Before the landfill reopens there is still work to be done to correct problems found during a Department of Environmental Regulation inspection. Barron said a sign at the dump needs to be repaired and a large pile of trash needs to be buried.

Residents near the landfill had feared the flooding could pollute nearby drinking-water wells. DER recently approved a plan to install a groundwater monitoring system at the landfill. Commissioners awarded a contract Monday to Universal Engineering to install the monitoring wells.

Universal Engineering agreed to install the seven-well system at a cost of $16,000. The wells will be used to gather water samples, which will be tested for signs of pollution.

Melrose observing National Library Week with activities

Melrose
475-1119

There is a book sale at the library this week — which is National Library Week — during library business hours. Several programs area planned at the library this [illegible]

will be Thursday, April 24.

Melrose beautification and clean-up week

The annual Melrose beautification and

to to noon. If a person cannot go to the fire station, call to Roy Marsden of Ed Simmons, both listed in the Melrose phone book, to arrange for a home visit