IN THE SUPREME COURT OF FLORIDA

NO. 75556

JOHN GARY HARDWICK,

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

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

A. JURISDICTION

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process, and the legality of Mr. Hardwick's capital conviction and sentence of death. Mr. Hardwick was sentenced to death and on direct appeal this Court affirmed the judgment and sentence. Hardwick v. State, 521 So. 2d 1071 (Fla. 1988). Jurisdiction of this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein involved the appellate review process. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); see also Johnson v. Wainwright, 498 So. 2d 938 (Fla. 1987); cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Hardwick to raise the claims presented herein.

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, see Elledge v. State, 346 So. 2d 998, 1002 (Fla.

1977); Wilson v. Wainwright, 474 So. 2d at 1165, and has not hesitated in exercising its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital trial and sentencing proceedings. This petition presents substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. Hardwick's capital conviction and sentence of death, and of this Court's appellate review.

This Honorable Court has the inherent power to do justice. As shown below, the ends of justice call on the Court to grant the relief sought in this case. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984). The petition includes claims predicated on significant, fundamental, and retroactive changes in constitutional law. See, e.g., Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989); Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Tafero v. Wainwright, 459 So. 2d 1034, 1035 (Fla. 1984); Edwards v. State, 393 So. 2d 597, 600 n.4 (Fla. 3d DCA), petition denied, 402 So. 2d 613 (Fla. 1981); cf. Witt v. State, 387 So. 2d 922 (Fla. 1980). The petition also involves claims of ineffective assistance of counsel on appeal. See Knight v. State, 394 So. 2d 997, 999 (Fla. 1981); Wilson v. Wainwright, supra; Johnson v. Wainwright, supra. These and other reasons demonstrate that the Court's exercise of its habeas corpus jurisdiction, and of its

authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Hardwick's claims.

Mr. Hardwick's claims are presented below. They demonstrate that habeas corpus relief is proper.

B. REQUEST FOR STAY OF EXECUTION

Mr. Hardwick's petition includes a request that the Court stay his execution, presently scheduled for March 14, 1990. As will be shown, the issues presented are substantial and warrant a stay of execution. This Court has not hesitated to stay executions when warranted to ensure judicious consideration of the issues presented by petitioners litigating during the pendency of a death warrant. See Marek v. Dugger (No. 73,175, Fla. Nov. 8, 1988); Gore v. Dugger (No. 72,202, Fla. April 28, 1988); Riley v. Wainwright (No. 69,563, Fla., Nov. 3, 1986); see also Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987).

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

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Petitioner asserts that his convictions and his sentence of death were obtained and then affirmed during the Court's appellate review process in violation of his rights as guaranteed by the fourth, fifth, sixth, eighth and fourteenth amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution, for each of the reasons set forth herein. In Mr. Hardwick's case, substantial and fundamental errors occurred in the guilt and penalty phases of trial, and relief is appropriate.

CLAIM I

MR. HARDWICK WAS DENIED A FULL AND FAIR HEARING ON HIS REQUEST FOR A NEW ATTORNEY, AND HE WAS DENIED HIS RIGHT TO CONFRONT AND CROSS-EXAMINE WITNESSES AND HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE TRIAL COUNSEL OPERATED UNDER A CONFLICT OF INTEREST, AND APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE THIS CLAIM COMPETENTLY, ALL IN VIOLATION OF MR. HARDWICK'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Mr. Hardwick was trapped in a judicial "catch-22". Believing that his attorney was not providing effective representation, Mr. Hardwick, before trial, asked the court to discharge his attorney and appoint substitute counsel. The court denied this request. Mr. Hardwick then explained to the court that, although he did not feel competent to proceed pro se, he

would rather represent himself than have Mr. Tassone represent him. However, the court denied Mr. Hardwick's request to represent himself. The court similarly denied Mr. Hardwick's requests, during trial, for a new attorney.

On direct appeal this Court held that the trial court properly denied Mr. Hardwick's request to represent himself. Hardwick v. State, 521 So. 2d 1071 (1988). This Court further approved the trial court's resolution of Mr. Hardwick's concerns about his attorney's competence. In so approving, this Court adopted a standard set forth in Nelson v. State, 274 So. 2d 256, 258-59 (Fla. 4th DCA 1973). This standard permitted a trial court in such situations to inquire and determine "whether or not there is reasonable cause to believe that the court appointed counsel is not rendering effective assistance of counsel to the defendant." Id. This standard itself, and in particular the method by which Mr. Hardwick's trial judge and this Court addressed this complex problem, violated Mr. Hardwick's constitutional rights in a number of ways.

The standard applied by this Court in these circumstances did not provide for a full evaluation of counsel's effectiveness. Mr. Hardwick made his request both pretrial and during trial, and he repeatedly explained to the court his specific and substantial concerns about counsel's performance. Mr. Hardwick's trial judge, however, did not conduct a full and thorough inquiry into counsel's effectiveness. As the trial judge told Mr. Hardwick,

"I don't want to ask you anything at all, but I'm willing to listen to anything" (R. 63). Then the court listened as Mr. Hardwick explained his reasons for wanting to dismiss his attorney. Mr. Hardwick told the court that his attorney had tried to persuade him to plead guilty, that his attorney had refused to subpoena witnesses that he wanted, and that his attorney did not file motions he wanted filed (R. 64). Mr. Hardwick told the court, "I don't have any confidence he will fight the case for me" (R. 64).

Instead of delving into these concerns the court then listened to the prosecutor's glowing praise of counsel's "exemplary" representation (R. 65). Mr. Hardwick stressed further concerns to the court and emphasized that the court was essentially forcing him to represent himself:

> MR. HARDWICK: May I say something, Your Honor?
>
> THE COURT: Sure.
>
> MR. HARDWICK: Your Honor, on taking depositions -- when depositions were being taken I wanted a motion filed so I could sit in on the depositions. This motion was never filed.
>
> Like I said, the people I wanted subpoenaed were never subpoenaed and those people -- there is people that's coming up disappearing in this case, supposedly witnesses for the State that were supposed to be there at the time I made certain statements, and they said they can't find one of the witnesses now because the statements don't match up, stuff like this. I want them

subpoenaed for trial, stuff like this, Your Honor.

You know, if the Court so forces me to do so I will represent my own self. But it's not my choice I want to represent myself. Because I don't feel I'm adequate to represent my own self in this trial. But if the Court forces me to do so I will represent myself rather than have Mr. Tassone as my counsel.

THE COURT: Well, the law is pretty clear that you either have the right to represent yourself, if you are qualified, --

MR. HARDWICK: I'm not choosing to represent myself.

THE COURT: -- or to have Court-appointed counsel. You are not allowed to fire Court-appointed counsel.

(R. 66-67).

With no further inquiry the trial court made generalized observations, not founded on any record facts, about defense counsel's competence:

I'm not sure what all the details are of why you are upset about the way Mr. Tassone is handling the case. If I were charged with some serious crime Mr. Tassone would be high on the list that I would want to represent me. He is very experienced in major felony cases on both sides of the street. He is not just competent, but he is an expert in these type cases. I don't hear anything in what you have said that would cause me to think that his handling of the case has not been proper.

(R. 67).

The court did not seek any facts or evidence regarding Mr. Hardwick's allegations. Instead the trial court decided that

counsel was competent because he was experienced in capital felonies, although the record contains no evidence to support that determination:

> THE COURT: The fact is, Mr. Hardwick, I agree with you that you are not really competent to represent yourself. Most people are not. Most lawyers are not competent to represent people charged with capital crimes because they just don't do that for a living. But in Mr. Tassone's case he is somebody that has handled a lot of capital felonies. He knows what he is doing. Filing a motion to have you moved all around to attend depositions would have been a waste of his time and mine and yours because I wouldn't grant it.
>
> MR. HARDWICK: Well, Your Honor, I don't feel that that's a waste of time because I know Florida Statutes states it's my right, you know, and -- I mean, my life is at stake in this case. I believe I should be able to exercise all my rights. I feel like the reasons I have stated -- you know, we have got irreconcilable differences, irreconcilable -- whatever.
>
> THE COURT: Yes. You have it right.
>
> MR. HARDWICK: But I don't -- I just wish the Court to note I do not want Mr. Tassone to represent me for these reasons, and that before I have Mr. Tassone represent me -- the Court is forcing me to represent myself.
>
> THE COURT: Okay. I will note those statements for the record and make the defendant's written statement there a part of the record.
>
> I will deny the motion to withdraw.

(R. 68-69).

During trial Mr. Hardwick renewed his request for a new

attorney and explained his reasons to the court. At this point the court again failed to conduct an inquiry into the reasons for Mr. Hardwick's request. However, the court, before ruling on the issue, engaged counsel for the State and defense in an unrecorded bench conference, at which Mr. Hardwick was not present. The court then denied Mr. Hardwick's request.

> MR. TASSONE: Your Honor, my client has advised me that he wishes to address the Court. I have advised him that it is against my advice that he do so, but I believe it's his --
>
> THE COURT: Mr. Hardwick, I will remind you again you are the accused and you don't have to say anything, and anything will be taken down and can be used against you;
>
> Do you understand that?
>
> MR. HARDWICK: Yes, sir.
>
> THE COURT: Do you understand your attorney has advised you not to make any statement?
>
> MR. HARDWICK: All right.
>
> THE COURT: Come up front.
>
> MR. HARDWICK: Mr. Tassone -- I want this entered on the record. Mr. Tassone has refused to ask the State witnesses questions I wanted asked about differences in their sworn statements and depositions.
>
> He has also refused to call the Defense witnesses I wanted called to the witness stand to tell my side of this case.
>
> For this reason, Mr. Tassone is incompetent as counsel, and he is also in collusion with the State, and the trial court has erred by not letting me dismiss Mr. Tassone as counsel on February 25th, 1986 and

appointing substitute counsel. This deprives me of my constitutional right to effective assistance of cousnel. Because of this, I have to ask to represent myself because the Court is forcing me to do this.

THE COURT: Okay.

Did you want to file that?

MR. HARDWICK: Yes, sir (tendering).

THE COURT: Have you signed it? Did you sign it?

MR. HARDWICK: No. Yeah. Let me sign it.

MR. TASSONE: Here you go (tendering).

THE COURT: Okay. Let's file that, please.

Mr. Tassone, could I see you all at the bench a moment.

(Counsel for the State and Defense approached the bench where a side-bar conference was had outside of hearing of court reporter and Mr. Hardwick)

THE COURT: Mr. Hardwick, come back up, please.

Mr. Hardwick, from the request that you just made am I to understand that you want to fire Mr. Tassone and represent yourself?

MR. HARDWICK: I would like the Court to appoint me another counsel.

THE COURT: Okay. I can't do that.

MR. HARDWICK: But if not -- yeah, the Court is forcing me to represent myself rather than proceeding with Mr. Tassone.

THE COURT: There are not three choices. There are only two. You either have to be represented by Mr. Tassone or you will have

to represent yourself.

MR. HARDWICK: Uh-huh (yes).

THE COURT: I can't appoint anybody else.

MR. HARDWICK: Why not?

THE COURT: That is not the law.

MR. HARDWICK: I feel I have valid reasons to fire Mr. Tassone and dismissing him.

THE COURT: It's not the law. The law is you get one attorney appointed.

MR. HARDWICK: It says if you have voluntarily -- reason to dismiss this attorney, another one will be appointed for you.

THE COURT: No.

I will do either of those two ways you want to do. You can represent yourself or you can have Mr. Tassone.

MR. HARDWICK: Is the Court forcing me to represent myself rather than appointing another attorney?

THE COURT: Well, you need to tell me whether you are --

MR. HARDWICK: I'm not going to say that I want to represent myself in front of this Court.

THE COURT: yes.

MR. HARDWICK: That's all there is to it.

THE COURT: Okay.

MR. HARDWICK: I'm not going to say that. Because I do not -- I want another attorney.

THE COURT: Do you think you are capable of representing yourself?

MR. HARDWICK: No, sir, I do not.

THE COURT: Well, quite frankly, I'm certain that you are better off with an attorney than without one. I agree with you on that. The only point on which we disagree is you are telling me Mr. Tassone is not competent.

MR. HARDWICK: We have a big disagreement there.

THE COURT: Well, it's probably in the nature of things that you and I are not going to agree on much.

Okay. Thank you, Mr. Hardwick. Take your seat.

In light of the defendant's statement that he is not competent to represent himself, and he doesn't really wish to represent himself, I will deny his motion to have substitute counsel appointed for Mr. Tassone, and we will proceed with Mr. Tassone as counsel of record.

(T. 664-67).

The trial court proceedings and this Court's approval were also invalid because Mr. Hardwick was essentially forced to litigate an ineffectiveness claim, without any representation. At this point trial counsel, having filed a motion to withdraw based on Mr. Hardwick's complaints of ineffectiveness, was clearly not acting as an advocate for Mr. Hardwick. He was placed in conflict with his client, having to defend himself against his client, and operated under that conflict throughout the proceedings.

Defense counsel's questions at the pretrial hearing illustrate the conflict. After the court denied Mr. Hardwick's request for substitute counsel, defense counsel asked the court whether he should follow Mr. Hardwick's decisions in the case. The court in effect told counsel that he need not follow his client's decisions:

> MR. TASSONE: Yes, Your Honor.
>
> For the record, -- well, I find myself in a quandary. I have received messages, my office has received messages, from Mr. Hardwick that regardless of what the Court's ruling is today that I was fired.
>
> I understand, Your Honor, that I will abide by the Court's ruling in connection with this matter, and I would ask the Court to inquire perhaps of Mr. Hardwick -- I don't want to get into a quandary or a box of being between an order of the Court and the instructions by my client not to proceed further. But as I understand it, that based on the Court's ruling today the Court is advising Mr. Hardwick based on Mr. Hardwick's statement that he feels he is incapable of handling the defense in the case for which he stands before the Court and, secondly, that the Court is denying the motion for me to withdraw, -- as I indicated, I don't want to get into the position of perhaps violating any request by my client as opposed to one of the Court, and I would ask the Court to perhaps inquire of Mr. Hardwick as to whether it is his decision that I do or do not perform certain functions on his behalf?
>
> THE COURT: I don't think he can make that decision. He didn't hire you and he can't fire you. ....as long as I have heard his request to have you relieved and to have other counsel and I have denied those. I think at this point that the thing that is binding on you is my order appointing you.

> Until you are relieved of that order you are to fulfill all the duties as his attorney.
>
> I have to make that clear for the record; he is still going to take these depositions, so forth, for you.
>
> MR. HARDWICK: Basically what the Court is saying is that Mr. Tassone -- he is going to represent me and I'm being denied another attorney?
>
> THE COURT: That's correct.

(R. 80-82).

The positioning of the judicial players at this hearing exemplifies the conflict involved throughout counsel's representation. In the face of Mr. Hardwick's efforts to obtain effective assistance, counsel was placed in a position separate from and in conflict with his client's cause. The court's decision and its advice to counsel reinforced that conflict.

That conflict prevailed throughout the trial and sentencing. Mr. Hardwick repeatedly apprised the court of trial errors that he perceived. Each time that Mr. Hardwick addressed the court, counsel stressed that he had advised Mr. Hardwick not to do so and that Mr. Hardwick proceeded against his advice (See T. 654, 663). The trial court itself took a paradoxical approach to the situation. On the one hand, the court inquired of Mr. Hardwick's wishes on certain decisions (T. 798-801, 811-12). By these inquiries, the court in essence asked Mr. Hardwick to represent himself on those issues, even though it had determined that Mr. Hardwick could not adequately represent himself. In other

instances, the court forced a wedge between Mr. Hardwick and his attorney, telling Mr. Hardwick that he could not make certain decisions (T. 804).

At one point, defense counsel himself questioned his own client, on the record. By this point, any ties binding Mr. Hardwick and his attorney were completely severed:

> MR. TASSONE: Judge, the Judge, court reporter and Mr. Bateh are here.
>
> I have advised Judge Haddock that it was your decision not to come out, and the bailiffs have advised him of the same;
>
> Is that your decision?
>
> MR. HARDWICK: Yes. That's my decision because my witnesses wasn't called and I don't feel that justice is being done and achieved in this trial. This is a mockery of justice.
>
> MR. TASSONE: Okay.
>
> Mr. Hardwick, I was advised by the bailiff -- he indicated that -- you had advised me of that, but one of the bailiffs indicated to me and to the Court that it was your desire to proceed and do your own closing argument.
>
> MR. HARDWICK: You may as well do it. You done did everything else.
>
> MR. TASSONE: Okay.
>
> THE COURT: Do you understand you have the right to be present during this stage of the trial?
>
> MR. HARDWICK: Yeah. I understand it.
>
> THE COURT: And you are waiving that right?

MR. HARDWICK: I reckon. I don't know. I'm just not coming in there.

THE COURT: Okay. Thank you.

(T. 811-12)(conducted in holding cell adjacent to courtroom).

The record reveals that defense counsel operated under an actual conflict of interest, a conflict especially offensive because it pitted attorney and client directly against each other. Such a conflict violates the sixth amendment right to effective representation. See Cuyler v. Sullivan, 446 U.S. 335 (1980); Glasser v. United States, 315 U.S. 60 (1942).

Numerous and pervasive differences between Mr. Hardwick and counsel appear even on the face of the record. Although strapped by counsel's lack of advocacy and the court's refusal to protect his rights, Mr. Hardwick managed to place many of his concerns on the record. The picture that emerges is that Mr. Hardwick stood virtually alone at trial and even his advocate opposed him.

"The mere physical presence of an attorney does not fulfill the Sixth Amendment guarantee." Holloway v. Arkansas, 435 U.S. 475, 490 (1978). Mr. Hardwick was deprived of his sixth amendment right to conflict-free counsel.

Defense counsel's attempts to disassociate himself from his client constituted a breach of counsel's duty of loyalty, see King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984), a duty recognized by the United States Supreme Court as "perhaps the most basic of counsel's duties." Strickland v. Washington, 466 U.S. 668, 692 (1984). This is particularly egregious in a

Florida capital case, where the judge ultimately sentences.

Prejudice is presumed when a defendant demonstrates that "an actual conflict of interest adversely affected his lawyer's performance." Cuyler, 446 U.S. at 348. In such cases, prejudice is presumed because any inquiry would require "unguided speculation." Holloway, 435 U.S. at 491. Here, however, the polarized conflict between Mr. Hardwick and his attorney is clear and the adverse effects are also clear.

Even the trial court itself consistently distinguished Mr. Hardwick from his counsel. By its actions, the trial court created circumstances that fed the conflict and prevented counsel from providing meaningful advocacy. Such circumstances themselves further violated Mr. Hardwick's right to effective counsel. See Stano v. Dugger, 889 F.2d 962 (11th Cir. 1989).

The conflict also violated Mr. Hardwick's right to present a defense, see Crane v. Kentucky, 476 U.S. 683 (1986), and right to confront and cross-examine witnesses, Davis v. Alaska, 415 U.S. 308 (1974). Mr. Hardwick was denied these rights not only because he had no one to represent him with regard to his motions to dismiss counsel and appoint another attorney.

This Court's approval of the trial court's findings denied Mr. Hardwick a full and fair hearing on these issues. Appellate counsel was ineffective in failing to competently raise this claim and in failing to request this Court to remand the case for an evidentiary hearing on this issue.

The right to appellate counsel also comprehends the sixth amendment right to effective assistance of counsel. Evitts v. Lucey, 469 U.S. 387 (1985). Appellate counsel must function as "an active advocate," Anders v. California, 386 U.S. 738, 744 (1967), and even a single isolated error by counsel may constitute ineffective assistance, Kimmelman v. Morrison, 477 U.S. 365 (1986).

The error asserted herein undermined the validity of the trial, a trial conducted by an attorney whose effectiveness had been questioned. This fundamental constitutional error goes to the heart of Mr. Hardwick's conviction and sentence.

This claim is now properly before the court pursuant to its habeas corpus authority because it involves substantial and prejudicially ineffective assistance of counsel on direct appeal. This Court often exercises 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). This Court should now grant habeas relief to remedy this violation of Mr. Hardwick's fifth, sixth, eighth, and fourteenth amendment rights.

CLAIM II

THE FLORIDA SUPREME COURT'S FAILURE TO REMAND FOR RESENTENCING AFTER STRIKING TWO AGGRAVATING CIRCUMSTANCES ON DIRECT APPEAL DENIED MR. HARDWICK THE PROTECTIONS AFFORDED UNDER FLORIDA'S CAPITAL SENTENCING STATUTE, AND BY DUE PROCESS, EQUAL PROTECTION, AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The trial court sentenced Mr. Hardwick to death on the basis of five aggravating circumstances (T. 1028-1034). However, on direct appeal, this Court invalidated two of the aggravating circumstances found by the trial court. Hardwick v. State, 521 So. 2d 1071 (Fla. 1988). This Court found no evidence sufficient to establish that the victim was kidnapped or that the killing was for pecuniary gain, and thus struck those aggravators. Id. at 1075-76. However, the Court did not remand the case to the trial court for resentencing without the invalid aggravators, although the jury had heard argument and judicial instructions on them. Id.

This Court's failure to reverse and remand for resentencing directly conflicts with this Court's standards. In Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977), this Court held that if improper aggravating circumstances are found, "then regardless of the existence of other authorized aggravating factors we must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death." Accordingly, it is respectfully submitted that reversal is required when mitigation may be present and an

aggravating factor is struck, Elledge, supra, or even when mitigation is not found and an aggravating factor is struck. Alvin v. State, 548 So. 2d 1112 (Fla. 1989); Schafer v. State, 537 So. 2d 988 (Fla. 1989); Nibert v. State, 508 So. 2d 1 (Fla. 1987).

In Mr. Hardwick's case, the trial jury and court imposed death on the basis of five aggravating circumstances. Further, the trial court relied heavily on the two invalid aggravating circumstances. The trial judge focused on facts that the Supreme Court recognized were not established by the evidence. These facts included the fictitious portrait of Mr. Hardwick as a vicious drug dealer, a portrait painted by the prosecutor for the jury and the judge. The court also relied on its perception of a kidnapping although there was no evidence that the victim was kidnapped (T. 185-86). As in Alvin, supra, there is no way to know if the trial jury and judge would have imposed death in the absence of these aggravating circumstances. As in Alvin, Schafer, Nibert, and Elledge, this Court should have remanded for resentencing so that the trial jury and judge could have properly reweighed aggravation and mitigation. The failure to remand for resentencing deprived Mr. Hardwick of his rights to due process and equal protection by denying him the liberty interest created by Florida's capital sentencing statute. See Vitek v. Jones, 445 U.S. 480 (1980); Hicks v. Oklahoma, 447 U.S. 343 (1980).

The Florida Supreme Court is not the sentencer under Florida

law. Reweighing by the sentencer is what the law requires and what should have been ordered. As the in banc Ninth Circuit Court of Appeals has explained in a related context:

> Post hoc appellate rationalizations for death sentences cannot save improperly channeled determinations by a sentencing court. Not only are appellate courts institutionally ill-equipped to perform the sort of factual balancing called for at the aggravation-mitigation stage of the sentencing proceedings, but, more importantly, a reviewing court has no way to determine how a particular sentencing body would have exercised its discretion had it considered and applied appropriately limited statutory terms.

Adamson v. Ricketts, 865 F.2d 1011, 1036 (9th Cir. 1988)(in banc). The United States Supreme Court has granted certiorari in Clemons v. Mississippi, 109 S. Ct. 3184 (1989), to consider the very questions at issue here: whether the eighth amendment permits an appellate court to save a sentence of death by reweighing aggravating and mitigating factors where the authority for capital sentencing under state law rests exclusively with the trial court sentencer.

In Florida, the trial court (jury and judge) is the only body authorized to weigh aggravating circumstances against mitigating circumstances. In Mr. Hardwick's case, the Florida Supreme Court took over that function, although it is the duty of the jury and judge to engage in a meaningful weighing of aggravating and mitigating circumstances before imposing a death sentence. See, e.g., Nibert v. State, 508 So. 2d 1 (Fla. 1987);

Muehleman v. State, 503 So. 2d 310 (Fla. 1987); Van Royal v. State, 497 So. 2d 625 (Fla. 1986).

The nature of Florida's capital sentencing process ascribes a role to the sentencing jury that is central and "fundamental," Riley v. Wainwright, 517 So. 2d 656, 657-58 (Fla. 1988); Mann v. Dugger, 844 F.2d 1446, 1452-54 (11th Cir. 1988)(in banc), representing the judgment of the community. Id. Thus, when error occurs before a Florida sentencing jury, resentencing before a new jury is required. Riley; Mann. Mr. Hardwick's jury was permitted to consider aggravating circumstances which the Florida Supreme Court later held should not have been considered. Thus, the Florida Supreme Court should have remanded for resentencing before a new jury, rather than assuming (as it implicitly must have) that Mr. Hardwick's jury would still recommend death without the invalidated aggravating factors.

Under Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), a Florida capital jury is treated as a sentencer for eighth amendment purposes. Under Maynard v. Cartwright, 108 S. Ct. 1853 (1988), a sentencing jury must be properly instructed regarding the aggravation it may consider.

The failure to remand for resentencing deprived Mr. Hardwick of his rights to due process and equal protection and violated the sixth, eighth, and fourteenth amendments. This Honorable Court should exercise its inherent jurisdiction and habeas corpus

authority to remedy this error in this capital proceeding. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985).

CLAIM III

MR. HARDWICK'S SENTENCING JURY WAS REPEATEDLY MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING, CONTRARY TO CALDWELL V. MISSISSIPPI, 105 S. CT. 2633 (1985), AND IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, AND MR. HARDWICK RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO PROPERLY LITIGATE THIS ISSUE ON APPEAL.

Despite the critical importance of the jury's role at sentencing, see Tedder v. State, 322 So. 2d 908 (Fla. 1975), Mr. Hardwick's jury was repeatedly told by the prosecutor and by the judge himself that their role was minor, that the judge was not obligated to follow their recommendation, and that it was the judge's job, not theirs, to sentence (R. 150; 156-57; 185-87; 192; 963; 966; 996; 1000-01; 1002-03). These comments and instructions derogated the jury's sentencing role, contrary to the eighth amendment, by diminishing their "awesome sense of responsibility" for sentencing. See Caldwell v. Mississippi, 472 U.S. 32, 105 S. Ct. 2633 (1985).

Mr. Hardwick acknowledges that this Court has held that Caldwell is inapplicable in Florida. See King v. Dugger, No. 73,360 (Fla. Jan. 4, 1990). Mr. Hardwick respectfully urges that the Court reconsider that view, and vacate his eighth amendment violative sentence of death.

CLAIM IV

THE PROSECUTOR'S ARGUMENT URGING A DEATH SENTENCE ON THE BASIS OF IMPERMISSIBLE VICTIM IMPACT EVIDENCE, AND THE SENTENCE OF DEATH ON THE BASIS OF SUCH IMPERMISSIBLE FACTORS, DENIED MR. HARDWICK A RELIABLE, INDIVIDUALIZED SENTENCING, IN VIOLATION OF BOOTH v. MARYLAND, SOUTH CAROLINA v. GATHERS AND THE SIXTH, EIGHTH AND, FOURTEENTH AMENDMENTS.

James Pullam, the victim's cousin, made an obscene gesture towards Mr. Hardwick in the courtroom during trial (T. 459-72). Defense counsel drew the court's attention to this action (T. 458). The court had the jury removed and reprimanded Mr. Pullam for his actions. The judge remarked that he had seen the gesture and feared that the jury had seen it as well. Mr. Pullam said on the record, "But I would like everybody in the courtroom to know I know the man killed him" (T. 461). The court barred Mr. Pullam from the courtroom for the rest of the trial (T. 460). Mr. Pullam left the courtroom with a parting insult to Mr. Hardwick, saying on the record, "You killed him. You are going to hang, buddy" (T. 461).

The court recognized the emotional impact on the victim's family and also recognized the potential influence on the jury and the witnesses from viewing the emotional dramatics of the victim's family. After barring Pullam from the trial, the court sent the victim's mother out to calm down Pullam (T. 463). The court said that if Pullam caused any more trouble, the court

would have to declare a mistrial (T. 462-63).

Mr. Hardwick's prosecutor and trial judge, however, expanded the emphasis on victim information. The prosecutor opened his sentencing argument to the jury with this blatant appeal to emotion:

> MR. BATEH: Good afternoon, members of the jury.
>
> Keith Pullum, Randall Keith Pullum, is dead. On December 24th, 1984 he was a living, breathing 17-year-old boy. On that same date, December 24th, 1984, that defendant executed 17-year-old Keith Pullum. He stabbed him through the heart, he shot him in the back and he crushed his skull in.
>
> Keith Pullum is no longer able to experience the joys of life. He is no longer able to experience the love of his family or the companionship of his friends.
>
> It was Keith Pullum's God-given right to live and experience life in all of its phases. That defendant ended that on December 24th, 1984 by brutally torturing Keith Pullum and executing him in cold-blooded murder.
>
> Why? Why did he do that? If you will think back to the evidence, it was because that defendant thought that Keith Pullum had stolen his drugs. He thought, that defendant thought, that Keith Pullum had interfered in his drug business. That was the reason that he tortured and executed Keith Pullum.

(T. 965-66).

The prosecutor expanded this theme to include an improper characterization of Mr. Hardwick as a vicious drug dealer bent on protecting his business:

> It was important to that defendant's financial gain, monetary gain, to execute Keith Pullum and spread the work about it. That's why he went on bragging to the people in that neighborhood. This murder was committed, the murder of Keith Pullum, was committed for pecuniary gain. The defendant's desire to establish his drug-dealing activities, establish his drug-dealing reputation and establish his reputation as being a strict, harsh enforcer caused him to kill Keith Pullum. That's what motivated him to act as a one-man police force, one-man prosecutor, one-man judge, one-man jury, and one-man executioner of Keith Pullum.

(T. 976). The Florida Supreme Court recognized the impropriety of this mischaracterization. On appeal that court found no proof beyond a reasonable doubt that the killing was for financial gain. Hardwick v. State, 521 So. 2d 1071, 1076 (1988).

The prosecutor constantly reminded the jury that the victim was a young boy:

> This defendant took a 17 year-old boy that he thought had stolen his drugs and he tortured him. He tortured him for God knows how long. Do you remember the photographs that we went over? Dr. Floro explained to you these particular photographs. I'm showing you Exhibits 12 and 15 that have been introduced in evidence. Look at those marks from the pistol, from the pistol whipping, Keith Pullum was forced to endure by the hands of that defendant. I ask you is that -- is that cruel? Is that wicked? Is that evil? . . . . to a 17-year-old boy?

(T. 976-77).

The effect of this emotional attack on the jury is irrefutable. A reasonable juror would inevitably be swayed by such an appeal. The trial judge himself failed to withstand the

attack, but instead used these very factors to justify the death sentence he imposed. The trial judge incorporated the State's theme in his written sentencing order:

> (8) In an effort to get back his drugs or punish the person he thought took them, Mr. Hardwick forced a seventeen year old boy to endure approximately five hours of being held prisoner, threatened at gunpoint, beaten, cut with a knife on his chest, neck, and back, stabbed in the heart, shot and finally having his skull crushed in.
>
> (9) At what point Keith Pullum, the seventeen year old victim, became aware that he was in fact going to die, we can only speculate. But there is no doubt that the Defendant told him he was going to kill him in one hour from the time he abducted him at gunpoint. He may not have believed Mr. Hardwick in the beginning, for this man was supposed to be his friend, but undoubtedly, some time during the next six hours, Keith Pullum became aware that he was helpless and in the hands of a person who was in fact going to relentlessly torture him and eventually kill him, and that no amount of begging for mercy was going to help. Whether this occurred immediately after getting in the car shortly after midnight, during the ride to the Hecksher Drive area, when he was taken out of the car and forced to walk down to the river bank, when Hardwick first tied him up, when he began to beat him or when he began sticking his knife into his neck, back and chest, we cannot say specifically. But there is no question that, whether it was for six hours, one hour, or fifteen minutes, there was undeniably a period of time which must have seemed an eternity to Keith Pullum, during which he suffered not only the physical agony of being tortured, but also the excruciatingly horrible certainty of his own impending death. To put a seventeen year old boy through that much physical and mental pain, agony, and horror cannot be described any better than by the words "especially

wicked, evil, atrocious, and cruel."

(T. 185-86).

In addition to using impermissible victim impact evidence, the trial court also relied heavily on its perception of kidnapping. However, the Florida Supreme Court expressly found on appeal that there was no evidence that the victim was kidnapped. Hardwick, 521 So. 2d 1075-76. There was also no evidence that the victim was tortured, nor any evidence that he was held for the five to six hours that the court envisioned. The court's imaginative account of the incident was simply invalid.

In Booth v. Maryland, 482 U.S. 496 (1987), the United States Supreme Court held that victim impact evidence is impermissible in a capital proceeding because it creates "a constitutionally unacceptable risk that the [sentencer] may [have] impose[d] the death penalty in an arbitrary and capricious manner." Id. at 2533 (emphasis added).

Booth mandates reversal where the sentencer is contaminated by victim impact evidence or argument. Mr. Hardwick's trial contains not merely victim impact evidence and argument but also inflammatory conduct by a relative of the victim. Both the jury and judge relied on the victim impact evidence and other improper factors in reaching a sentence of death. Mr. Hardwick's case presents the constitutionally unacceptable risk that his sentence was based on victim impact evidence, instead of an individualized

assessment of the defendant and the crime, in violation of Booth, South Carolina v. Gathers, 109 S. Ct. 2207 (1989), and Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989). Trial counsel objected to the conduct of the victim's cousin. Here, as in Booth, the conduct of the victim's cousin, the victim impact information and the other improper argument "serve[d] no other purpose than to inflame the jury [and judge] and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." Id. Since a decision to impose the death penalty must "be, and appear to be, based on reason rather than caprice or emotion," Gardner v. Florida, 430 U.S. 349, 358 (1977) (opinion of Stevens, J.), such efforts to fan the flames are "inconsistent with the reasoned decision making" required in a capital case. Booth, supra at 2536. This eighth amendment error requires reversal. As the Supreme Court discussed in Caldwell v. Mississippi, 472 U.S. 320 (1985): "Because we cannot say that this [error] had no effect on the sentence decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." Id. at 341. Mr. Hardwick's jury voted for death by a vote of 7 to 5. Appellate counsel should have properly litigated this claim and rendered ineffective assistance in failing to do so. This Honorable Court should remedy this fundamental error.

CLAIM V

VIOLATION OF WITNESS SEQUESTRATION RULE AND PREJUDICIAL CONDUCT BY A SPECTATOR AT TRIAL DEPRIVED MR. HARDWICK OF A FAIR TRIAL BY AN IMPARTIAL JURY, IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

Both the trial court and this Court on appeal found that a violation of the witness sequestration rule occurred during Mr. Hardwick's trial. Defense counsel moved for a mistrial, but the trial court found that the violation did not warrant a mistrial. This Court upheld that ruling. Hardwick v. State, 521 So. 2d 1071 (1988).

The trial was further tainted by a profane gesture directed at Mr. Hardwick by James Pullam, the victim's cousin, during trial. The trial court ordered Mr. Pullam to leave the courtroom. The combined prejudice from this and the witness sequestration rule violation pervaded Mr. Hardwick's trial. The prejudice is especially strong in this case because the witnesses involved in the violation were all State witnesses. The testimony of these witnesses formed the foundation for the State's circumstantial evidence case.

At the beginning of testimony the sequestration rule was invoked but there were only 4 witnesses present; not all of the State's witnesses were present and thus not all of the State's witnesses were ordered sequestered by the judge (R. 277). Several times during trial, witnesses were present in the

courtroom and the judge had to order them to leave. On one occasion the witness was not identified in the record (R. 414); on another occasion both Connie Wright and Daniel Dimaggio, key state witnesses, were present and ordered by the court to leave (R. 498).

The trial judge also had to order the decedent's cousin, James Pullam, to leave the courtroom because he made an obscene gesture towards Mr. Hardwick in the courtroom (R. 459-72). The judge remarked that he had seen the gesture and feared that the jury had seen it as well. When the court, out of the jury's presence, reprimanded Mr. Pullam for his actions, Mr. Pullam said, "But I would like everybody in the courtroom to know I know the man killed him" (R. 461). Pullam left the courtroom with a parting insult to Mr. Hardwick, saying on the record, "You killed him. You are going to hang, buddy" (R. 461).

Pullam's misconduct exacerbated the sequestration violation because he then continued his improper behavior in the hall outside the courtroom.

The initial discovery of the sequestration violation occurred when state witness Richard Jones laughed as he left the stand. On inquiry Mr. Jones said that witnesses were being confused:

> [MR. JONES:] Because this is what has happened here. These people that are standing out there, they have come in here and they have been intimidated. There has been words put in their mouths, like somebody has told me you weren't in a truck by yourself, and I don't think that's fair.

(T. 548).

Jones explained to the court that he and the other people out in the hall had talked about the case:

BY MR. TASSONE [DEFENSE COUNSEL]:

Q. Mr. Jones, you did indicate that you spoke with some witnesses out there?

A. Uh-huh (yes).

Q. And did you tell the other witnesses we will get him?

A. No, sir, I haven't told them. It is not my position to get anybody. My position --

Q. Is it your testimony that you did not say that out there?

A. No, I have not said that out there.

Q. Okay. What did you talk about?

A. We talked about the case primarily, who knows what, who did what, who was where.

Q. Were you instructed by the State that the witnesses could not testify or -- excuse me. -- could not talk about the case?

A. Yes, sir, Mr. Bateh informed me of that.

Q. And you are then violating an order of the Court?

A. Well, it was a suggestion. I don't realize it's an order of the Court. I don't know. I don't know the justice system. I don't know the criminal system. I'm not a lawyer.

Q. Mr. Jones, who did you speak with out there, sir?

A. James primarily.

Q. James who?

A. I don't even know his last name.

Q. Is he still out there?

A. Yes, sir.

Q. Did you speak with anybody else? You said primarily.

A. I have spoken with everybody out there. I'm not going to sit here and tell lies. I have spoken to everyone. I told you what I said.

Q. You spoke with everybody out there?

A. Everybody out there I have spoken to.

Q. And did the people out there today talk about the case while the case was going on?

A. Yes, sir. But nobody has said we will get him. See, this is what you are trying to do; put words in my mouth.

Q. Mr. Jones, let me ask the questions, sir. did the people out there --

A. Well, --

THE COURT: Mr. Jones, you will make it a whole lot simpler on yourself and everybody else if you will calm down and just listen to his questions.

A. I'm not upset, sir. It's just --

THE COURT: You are answering -- you are doing the same thing with me. You are here as a witness.

A. Yes, sir.

THE COURT: You are not an advocate or party in this case. We only want to know what you know.

A. All right, sir.

BY MR. TASSONE:

Q. Did other witnesses out there talk about their case or talk about this case and their testimony involved it?

A. No, sir. Not so much the testimony, no, sir.

Q. What did they talk about? did they talk about the facts of the case, where they were, who was here, who was there?

A. Primarily, yes, sir.

Q. Did they talk about what statements they had heard?

A. Hearsay, yes, sir.

Q. And they had heard that -- did any one witness perhaps say I heard John Hardwick say this?

A. No, sir, not that I know of.

Q. Okay. And how may people have you talked to? How many of the witnesses?

A. I don't know.

Q. Approximately?

A. Several.

Q. Sir?

A. Several.

Q. That's been during the course of this entire day?

A. Yes, sir.

Q. All right. Approximately what time did you arrive here today?

A. 2:30.

Q. And it is now ten of 7:00?

A. Yes, sir.

Q. Approximately?

A. Yes, sir.

MR. TASSONE: Thank you. I have no other question, Your Honor.

THE COURT: Mr. Bateh, do you wish to inquire?

MR. BATEH: No, Your Honor.

THE COURT: Okay.

(T. 549-52)(emphasis added).

In response to further questions from the prosecutor, Jones claimed that the witnesses had been discussing TV shows such as Perry Mason. Viewed in its entirety, Jones' testimony regarding the violation demonstrates that the witnesses were actually discussing details of Mr. Hardwick's case.

Defense counsel moved for a mistrial, but the court denied the motion, finding that any violation of the rule was not substantial (T. 561, 564, 571). However, the court did order both Jones and Pullam to leave not just the courtroom itself but to leave the courthouse entirely (T. 571). While this action by the court is commendable, it failed to remedy the harm that had occurred, harm that now requires a new trial.

Later defense counsel informed the court that someone had called his office and reported hearing Jones discussing his

testimony in the hall outside the courtroom and hearing Jones and other witnesses in the hall talk about the case (T. 667). Defense counsel renewed his motion for mistrial (T. 668). The court maintained its previous finding that a violation had occurred but there was no prejudice (T. 668).

After the jury retired to deliberate in the guilt-innocence phase, the court questioned Dimaggio and Wright about the violation. Dimaggio claimed that he heard no discussion about the witnesses or about the case but admitted that he had talked to Jones about Keith Pullam (T. 937-39). Wright also denied hearing or engaging in discussion about the case (T. 940-42). However, these were the very same witnesses who violated the rule by remaining in the courtroom as spectators (T. 498). That conduct proves that Dimaggio and Wright did not fully understand the rule and probably did not understand the court's inquiry. Jones' testimony similarly demonstrated that neither he nor the other witnesses understood that the sequestration rule was a court order prohibiting any discussion of the case (T. 550).

After the court concluded its inquiry of Dimaggio and Wright, defense counsel told the court that he had tried to reach the woman who had called his office but was unable to identify the woman completely or to contact her (T. 944). Defense counsel once again renewed the motion for mistrial. The court again denied the motion, finding no violation of the rule.

This Court on direct appeal recognized that a violation

occurred. Hardwick, 521 So. 2d at 1075. The totality of the circumstances compels the conclusion that prejudice resulted from that violation.

The purpose of the witness sequestration rule is to prevent shaping of witness testimony, to help detect deceptive testimony, and to prevent improper attempts to influence testimony. Geders v. United States, 425 U.S. 83, 87 (1976) and Dumas v. State, 350 So. 2d 464, 465 (Fla. 1977). When there is an indication that the rule was violated, a trial court should conduct an inquiry to determine whether a violation did occur and the effect of that violation on the testimony and the trial. See Steinhorst v. State, 412 So. 2d 332 (Fla. 1982) and United States v. Blasco, 702 F.2d 1315 (11th Cir. 1983). Possible sanctions for a violation include contempt, exclusion of testimony, cautionary instructions to the jury and mistrial. Id.

A mistrial is also appropriate if a jury is exposed to some extraneous influence and there is a reasonable possibility of prejudice to the defendant. See United States v. Cousins, 842 F.2d 1245 (11th Cir. 1988); United States v. Perkins, 748 F.2d 1519 (11th Cir. 1984). A defendant's right to have a jury deliberate free from distractions and outside influences is a paramount right to be closely guarded. Livingstone v. State, 458 So.2d 235 (Fla. 1984).

The record reveals that the court did not properly invoke or implement the witness sequestration rule. Blatant violations

occurred, all involving state witnesses only. Witnesses discussed the case, and witnesses were present in the courtroom as spectators. The court failed to adequately evaluate the prejudicial effect of the witness sequestration violation and the offensive conduct of Mr. Pullam. The inquiry of Jones, Wright and Dimaggio reveals that the witnesses simply refused to abide by or did not understand the rule. Furthermore, the offensive behavior of Mr. Pullam could not but have distracted and prejudiced the jury.

The dignity of the judicial process was destroyed. The conduct of Pullam, Jones and the other witnesses made a mockery of Mr. Hardwick's trial. The improper conduct and the resulting prejudice were in fact substantial and pervasive, and rendered Mr. Hardwick's trial and sentencing fundamentally unfair. This Court should exercise its inherent authority to correct such errors that render capital proceedings unreliable, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and grant habeas corpus relief.

CLAIM VI

THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS APPLIED TO MR. HARDWICK'S CASE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Aggravating circumstance (5)(i) of Section 921.141, Florida Statutes, is unconstitutionally vague, overbroad, arbitrary, and capricious on its face, and as applied in this case, and is in

violation of the sixth, eighth, and fourteenth amendments to the United States Constitution and Article I, sections 2, 9 and 16 of the Florida Constitution. This circumstance is to be applied when:

> The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

921.141(5)(i), Florida Statutes.

The U.S. Supreme Court has stated that:

> An aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty.

Zant v. Stephens, 462 U.S. 862, 877 (1983). Thus, aggravating circumstances that are defined and imposed too broadly fail to satisfy eighth and fourteenth amendment requirements.

Concern over the severity and finality of the death penalty has mandated that any discretion in imposing the death penalty be narrowly limited. Gregg v. Georgia, 428 U.S. 153, 188-89 (1976); Furman v. Georgia, 408 U.S. 238 (1972). The Court in Gregg interpreted the mandate of Furman to require that severe limits be imposed due to the uniqueness of the death penalty:

> Because of the uniqueness of the death penalty, Furman held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.

428 U.S. at 189. Capital sentencing discretion must be strictly guided and narrowly limited.

Section 921.141(5)(i), on its face fails in a number of respects to "genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, supra. This circumstance has been applied to virtually every type of first degree murder. This aggravating circumstance has become a global or "catch-all" aggravating circumstance. Even where the Florida Supreme Court has developed principles for applying the circumstance, those principles have not been applied with any consistency whatsoever.

The Florida Supreme Court has discussed this aggravating factor. See Jent v. State, 408 So. 2d 1024, 1032 (Fla. 1982); McCray v. State, 416 So. 2d 804, 807 (Fla. 1982); Combs v. State, 403 So. 2d 418 (Fla. 1981). In Jent, supra, the court stated:

> the level of premeditation needed to convict in the penalty phase of a first degree murder trial does not necessarily rise to the level of premeditation in subsection (5)(i). Thus, in the sentencing hearing the state will have to prove beyond a reasonable doubt the elements of the premeditation aggravating factor -- "cold, calculated...and without any pretense of moral or legal justification".

408 So. 2d at 1032. The court in McCray stated:

> That aggravating circumstance [(5)(i)] ordinarily applies in those murders which are characterized as executions or contract murders, although that description is not intended to be all-inclusive.

416 So. 2d at 807. Although the Florida Supreme Court has attempted to require more in this aggravating circumstance than simply premeditation, the jury was not told that in Mr. Hardwick's case. In the jury instructions, Mr. Hardwick's trial judge

merely listed the aggravating factors as stated in the statute, including:

> Number 5. The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

(T. 1004).

In part because of the concerns discussed above, the Florida Supreme Court has further defined "cold, calculated, and premeditated":

> We also find that the murder was not cold, calculated and premeditated, because the state has failed to prove beyond a reasonable doubt that Rogers' actions were accomplished in a "calculated" manner. In reaching this conclusion, we note that our obligation in interpreting statutory language such as that used in the capital sentencing statute, is to give ordinary words their plain and ordinary meaning. See Tatzel v. State, 356 So.2d 787, 789 (Fla.1978). Webster's Third International Dictionary at 315 (1981) defines the word "calculate" as "[t]o plan the nature of beforehand: think out ... to design, prepare or adapt by forethought or careful plan." There is an utter absence of any evidence that Rogers in this case had a careful plan or prearranged design to kill anyone during the robbery. While there is ample evidence to support simple premeditation, we must conclude that there is insufficient evidence to support the heightened premeditation described in the statute, which must bear the indicia of "calculation."

Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987). The Florida Supreme Court's subsequent decisions have plainly recognized that cold, calculated and premeditated requires proof beyond a

reasonable doubt of a "careful plan or prearranged design." See Mitchell v. State, 527 So. 2d 179, 182 (Fla. 1988)("the cold, calculated and premeditated factor [] requir[es] a careful plan or prearranged design."); Jackson v. State, 530 So. 2d 269, 273 (Fla. 1988)(application of aggravating circumstance "error under the principles we recently enunciated in Rogers.").

Because neither Mr. Hardwick's jury nor trial judge had the benefit of the narrowing definition set forth in Rogers, his sentence therefore violates the eighth and fourteenth amendments. Moreover, the decision in Rogers preceded the direct appeal decision in Mr. Hardwick's case. Mr. Hardwick was entitled to the benefit of the Rogers rule at his capital sentencing. The judge did not apply any "heightened" premeditation as required by McCray, supra, and certainly he did not properly instruct the jury on this limiting construction. Based upon these instructions, a reasonable juror would automatically presume that the "cold, calculated and premeditated" aggravating factor was present in this case.

What occurred here is precisely what the eighth amendment was found to prohibit in Maynard v. Cartwright, 108 S. Ct. 1853 (1988). In fact, these proceedings are even more egregious than those upon which relief was mandated in Cartwright:

> Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to

> inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238 (1972).

108 S. Ct. at 1859 (emphasis added).

It is respectfully urgged that this Honorable Court should now correct Mr. Hardwick's death sentence, a sentence which violates the eighth amendment principle of Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988):

> Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically asserted that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed.2d (1972).

The "harm" before the jury is plain -- a jury's capital sentencing decision, after all, is not a mechanical counting of aggravators and mitigators. The error denied Mr. Hardwick an individualized and reliable capital sentencing determination. Knight v. Dugger, 863 F.2d 705, 710 (11th Cir. 1989). This Court reviewed this aggravator on direct appeal, but failed to apply the construction of Rogers, McCray, and Cartwright. The Court should remedy this fundamental error at this juncture.

CLAIM VII

THE TRIAL COURT'S ADMISSION OF HEARSAY EVIDENCE DENIED MR. HARDWICK'S RIGHT TO A FAIR TRIAL AND RIGHT TO CONFRONT AND CROSS-EXAMINE WITNESSES, IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS.

The trial court improperly admitted testimony by Connie Wright of statements purportedly made by Mr. Hardwick's wife indicating that he had been out all night on December 23, 1984, the night of the offense. The admission of these unreliable statements prejudiced Mr. Hardwick and impugned the integrity of the trial.

Trial counsel vigorously objected to these statements (T. 450). The court, prosecutor and defense counsel then engaged in a lengthy discussion of the legal principles of hearsay and of the spontaneous statements and excited utterance exceptions (T. 450-58). The prosecutor conceded that the statements were hearsay but contended that they were admissible under the excited utterance exception (T. 451).

The court recognized that hearsay evidence has two flaws: the declarent is not under oath and the declarent is not subject to cross-examination (T. 453). Since the prosecutor argued that the evidence was admissible as an excited utterance, defense counsel asked the court to determine whether there was a startling event or condition triggering that hearsay exception (T. 454-56). The court, however, decided that the evidence was admissible not as an excited utterance but as a spontaneous

statement (T. 457-58).

When direct examination resumed Wright then testified about those inculpatory statements:

DIRECT EXAMINATION
(CONTINUED)

BY MR. BATEH:

Q Miss Wright, I'm going to remind you to please speak up so everyone can hear you.

I would like you to direct your attention to Monday, December 24, 1984;

On that date between the hours of 10:00 in the morning and noon do you recall going to the house that the defendant and his wife Darlene were staying at on Bunyan Drive?

A Yes, sir.

Q What happened when you walked in that house?

A Darlene was yelling at Johnny. She was really very mad because he didn't come in the whole night before and they didn't get to go where they wanted to go. She was very angry.

Q Did she yell at the defendant?

A Yes, sir.

Q She yelled at the defendant because he had been out all that night?

A Yes, sir.

MR. TASSONE: Objection, Your Honor. It's repetitive.

THE COURT: Sustained.

Q In her yelling at the defendant did

she indicate when he had returned?

A She said in the morning.

(R. 465-66).

There is no doubt that these statements were hearsay. The exceptions at issue are described in Fla. Stat. Sections 90.803 (1) and (2):

> 90.803 HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARENT IMMATERIAL
>
> The provision of s. 90.802 to the contrary notwithstanding, the following are not inadmissible as evidence, even though the declarent is available as a witness:
>
> (1) Spontaneous Statement. A spontaneous statement describing or explaining an event or condition made while the declarent was perceiving the event or condition, or immediately thereafter, except when such statement is made under circumstances that indicate its lack of trustworthiness.
>
> (2) Excited Utterance. A statement or excited utterance relating to a startling event or condition made while the declarent was under the stress of excitement caused by the event or condition.

(emphasis added). The trial court erred in admitting these statements as spontaneous statements; nor were they admissible under the excited utterance exception. These errors denied Mr. Hardwick his rights to confront the prosecution's evidence, and thus constituted fundamental sixth, eighth, and fourteenth amendment error.

To qualify as a spontaneous statement there must be some occurrence startling enough to produce nervous excitement and

render the utterance spontaneous and unreflecting. Lyles v. State, 412 So. 2d 458, 460 (1982). The trial court found that Mr. Hardwick's being out all night and his wife's resulting anger were startling events. As defense counsel pointed out at trial, a wife's anger at her husband is a common occurrence, not an exciting or startling condition. Moreover, the fact of Mr. Hardwick's being out all night was the very fact that the state was seeking to prove with these statements. That also could not constitute the requisite startling event.

Further, the lapse of time between the purported exciting event and the statements is too long to justify this exception. The evidence rule provides that the statements must be made while or immediately after the declarent is perceiving the startling event. Fla. Stat. Section 90.803(1). Spontaneous statements must be made before there is time to contrive misrepresentations, while the nervous excitement sill prevails and reflective powers have not had time to control. Lyles, 412 So. 2d at 460. This contemporaneousness is the assurance of reliability. If several hours pass, that reliability is lost and the exception is no longer justified. Id.

Here Connie saw Darlene sometime between 10:00 a.m. and noon on December 23, 1984. Several hours had passed since the preceding night. Even if Darlene was still angry her anger had been sustained over a period of time. The required nervous excitement had lapsed and permitted reflection and alteration.

In these circumstances the statements cannot be deemed trustworthy. In addition, Mr. Hardwick had no opportunity to cross-examine Darlene, to impeach her or to reveal inaccuracies of the statements. The right to cross-examine witnesses is of course an essential fundamental right that the Constitution grants all defendants. See Chambers v. Mississippi, 410 U.S. 284 (1973); Davis v. Alaska, 415 U.S. 308 (1974).

The statements should not have been admitted. They were clearly hearsay and did not properly fit within the spontaneous statements or excited utterance exceptions, nor any other exception to the hearsay rule. This improper evidence laid another brick in the state's wall of circumstantial evidence. Mr. Hardwick was prejudiced by the improper admission of this evidence; its admission was fundamental error. Appellate counsel failed to raise this error and the failure was prejudicially deficient attorney performance. This Court should exercise its habeas corpus authority and correct this fundamental constitutional error.

CLAIM VIII

THE STATE INTRODUCED IRRELEVANT PREJUDICIAL AND INFLAMMATORY EVIDENCE OF "OTHER CRIMES" AND "BAD CHARACTER" AGAINST MR. HARDWICK, AND THE JURY WAS NOT PROPERLY INSTRUCTED REGARDING THE EVIDENCE, ALL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The cornerstone of the State's case was in its characterization of Mr. Hardwick as a drug dealer who killed the victim to enforce and protect his drug business. To support this theme the State introduced evidence of collateral bad acts -- drug possession and sale -- under the guise of similar fact evidence sanctioned by Fla. Stat. Section 90.404(2) and Williams v. State, 110 So. 2d 654 (Fla.), cert. denied, 361 U.S. 847 (1959). The admission of the evidence was itself improper and this error was compounded by the absence of any limiting instruction at the time the evidence was admitted.

Before trial the State filed a Notice of Similar Fact Evidence declaring the prosecution's intent to present evidence of Mr. Hardwick's possession and delivery of methaqualone and cannabis (R. 133). In response defense counsel made a motion in limine to exclude evidence that Mr. Hardwick possessed or sold drugs (R. 135 and T. 88); at the hearing on this motion the State argued that it would present such evidence to establish motive for the killing (T. 89-90). The court agreed that the evidence was prejudicial to Mr. Hardwick but then found that it was nevertheless admissible (T. 95).

Several witnesses testified about Mr. Hardwick's possession and sale of drugs. Jeffrey Showalter testified that Mr. Hardwick had 160 quaaludes on December 23 and 24 (T. 423; 494). Michael Hyzer explained that Mr. Hardwick asked him where he could get some pot to sell and later told Hyzer that he knew where he could get some quaaludes (T. 512). Hyzer testified further that Mr. Hardwick later had a bag of quaaludes and sold 25 to Hyzer for $70.00 (T. 513).

At the time this evidence was presented, the jury received no instruction that this evidence could only be considered for the limited purpose of showing motive. The jury had no idea, until the final instructions, of the limitations of that evidence.

Before those final instructions the prosecutor repeated his dramatic and inaccurate portrayal of Mr. Hardwick as a drug dealer enforcing his business and his reputation. In closing argument at guilt phase the prosecutor argued to the jury that Mr. Hardwick was a drug dealer who stood behind his business (T. 852 and 863). Again in penalty closing phase the prosecutor elaborated on this theme, telling the jury that "Drug dealers to keep their business of drug dealing going have to establish a reputation of being a tough enforcer of drug debts" (T. 975). The prosecutor told the jury, "That's exactly what that defendant did" (T. 975).

The admission of the evidence, the absence of limiting

instructions at admission and the prosecutor's focus on this evidence all erroneously prejudiced Mr. Hardwick and invalidated his conviction and sentence.

For similar fact evidence to be admissible, the state must prove the defendant's connection with a "similar act" by clear and convincing evidence. United State v. Terebeck, 692 F.2d 1345, 1359 (11th Cir. 1982); Parnell v. State, 218 So. 2d 535, 538 (Fla. 3d DCA 1969).

In addition, the Florida Supreme Court has recognized that such evidence is inadmissible if it is overly prejudicial.

> Even when the evidence of separate criminal activity has relevance, it is possible for such evidence as it is presented, to have an improper prejudicial impact that outweighs its probative value.

Straight v. State, 397 So. 2d 903, 909 (Fla. 1981), cert. denied, 454 U.S. 1022 (1982)(emphasis added). The prosecutor's presentation of the "Williams Rule" evidence was beyond the scope of the rule because it created a highly prejudicial portrait of Mr. Hardwick that outweighed any probative value of the evidence.

Such collateral evidence should not be made a feature, rather than an incident of a trial, Zeigler v. State, 404 So. 2d 861 (Fla. 1st DCA 1981). Here the State's entire case rested on its exaggerated and dramatic presentation of this evidence. The prosecutor transformed the collateral evidence into a vituperative and unfounded assault on Mr. Hardwick's character, a clearly impermissible result. See Davis v. State, 276 So. 2d 846

(Fla. 2d DCA 1973), aff'd, 290 So. 2d. 30 (Fla. 1974).

Furthermore, the jury should have received this instruction before the "Williams Rule" evidence was admitted:

> The evidence you are about to receive concerning evidence of other crimes allegedly committed by the defendant will be considered by you for the limited purpose of proving intent on the part of the defendant and you shall consider it only as it relates to those issues.
>
> However, the defendant is not on trial for a crime that is not included in the indictment.

(Pattern Jury Instructions; Fla. Stat. sec. 90.404).

The jury never received this instruction and had no indication of how to evaluate the evidence. The jury did not learn of the limited purpose of the evidence until final instructions. By that time the jury had already heard several witnesses describe Mr. Hardwick's possession and sale of drugs, and had twice heard the prosecutor, in opening and closing argument, portray Mr. Hardwick as a vicious drug dealer. The vision of Mr. Hardwick as a "Miami Vice" culprit was cemented. By its presentation of this evidence the state in effect also convicted Mr. Hardwick of the crimes of possession and sale of drugs. The impact of this evidence is inescapable and the prejudice overwhelming.

The error infected both the guilt phase and sentencing. The jury was instructed that it could consider the evidence presented in the guilt phase in its sentencing decision. "Williams Rule" error must be carefully reviewed if it affects a capital penalty

phase. In Mr. Hardwick's case, the error infected not only the guilt phase, but also the penalty phase. Castro v. State, 547 So. 2d 111 (Fla. 1989); Mills v. Maryland, 108 U.S. 1860 (1988).

Since Mr. Hardwick's jury was bombarded with this improper characterization of Mr. Hardwick, the sentencing was not a reasoned moral response based on individual culpability. See Penry v. Lynbaugh, 109 S. Ct. 2934 (1989). The resulting death sentence is unreliable and unconstitutionally.

The court committed prejudicial fundamental error in admitting the "Williams Rule" evidence, and in not giving proper instructions to the jury on the "Williams Rule" evidence. Appellate counsel rendered prejudicially deficient ineffective assistance of counsel in failing to raise this clear and prejudicial error. This Court should exercise its inherent habeas authority to remedy this error.

CLAIM IX

MR. HARDWICK'S SENTENCING JURY WAS IMPROPERLY INSTRUCTED ON THE "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING CIRCUMSTANCE IN VIOLATION OF MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

This Court has held that the "especially heinous, atrocious or cruel" statutory language is directed only at "the consciousness or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 282 So. 2d 1, 9 (Fla. 1973).

The Dixon construction has not been consistently applied, and Mr. Hardwick's jury in this case was never apprised of such a limiting construction. The instructions as given failed to narrow the jury's discretion and thus violated Maynard v. Cartwright, 108 S. Ct. 1853 (1988), and Hitchcock v. Dugger, 107 S. Ct. 1821 (1987).

Mr. Hardwick's trial judge merely listed for the jury the statutory aggravating factors, including:

> Number 4. The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel.

(T. 1004). The trial court gave the jury no further guidance by which to assess this aggravating factor. Although the Florida Supreme Court reviewed this aggravating factor on appeal, the Court did not address the sufficiency of the jury instructions. Since a capital sentencing decision is not a mere counting of aggravating and mitigating factors, and since the Florida Supreme Court struck two aggravating factors on Mr. Hardwick's appeal, Hardwick, 521 So. 2d at 1075-76, the manner in which Mr. Hardwick's jury assessed this factor is important.

In Cartwright, the Supreme Court unanimously held that instructions such as those provided at Mr. Hardwick's penalty phase did not "adequately inform juries what they must find to impose the death penalty." 108 S. Ct. at 1858. The jury instructions in Mr. Hardwick's case violated Cartwright. See also Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(en banc)

(finding that Cartwright and the eighth amendment were violated when heinous, atrocious, or cruel was not sufficiently limited).

In Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), the Supreme Court treated the Florida jury as sentencer for purposes of eighth amendment instructional error review, as have the Eleventh Circuit and, on occasion, the Florida Supreme Court. See Mann, supra; Riley v. Wainwright, 517 So. 2d 565 (Fla. 1987).

Instructional error is reversible where it may have affected the jury's sentencing verdict. Id. The bottom line here is that this jury was unconstitutionally instructed.

The error denied Mr. Hardwick an individualized and reliable capital sentencing determination. Knight v. Dugger, 863 F.2d 705, 710 (11th Cir. 1989). The jury could have reached a different balance if it had been properly instructed on this aggravating circumstance. Relief is warranted under Hitchcock, Cartwright, and the eighth amendment. A new jury sentencing proceeding must be ordered.

Recently, a petition for a writ of certiorari was granted in Clemons v. Mississippi, 109 U.S. 3184 (1989), in order to resolve the question of when Cartwright error may be harmless. The United States Supreme Court has also granted writs of certiorari to consider the failure of the Arizona courts to properly qualify "especially heinous, cruel or depraved." These cases may also have import in Mr. Hardwick's case. See Walton v. Arizona, 110 S. Ct. 49 (1989).

This claim involves fundamental constitutional error. Principles of fundamental fairness require that this Honorable Court exercise its habeas corpus authority to remedy the error.

CLAIM X

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

The jury in Mr. Hardwick's trial was admonished by the State Attorney, and instructed by the trial court, that feelings of mercy or sympathy could play no part in their deliberations on Mr. Hardwick's ultimate fate. The judge, in guilt phase instructions, told the jury not to consider any feelings of sympathy. Significantly, the only one provided by the court with respect to the role that mercy or sympathy could play in deliberations was at guilt-innocence, when the court told the jury that such considerations should play no part.

Also, the prosecutor expressly warned the jury not to consider mercy and sympathy in their deliberations:

> Warning number two. Please do not be swayed by pity or sympathy for the defendant. I ask you what sympathy, what pity, what mercy, he showed Keith Pullum? How much mercy did he show Keith Pullum?
>
> I ask you to follow the law in this case. The aggravating circumstances clearly outweigh the mitigating circumstances. And the recommendation of death is what the law, what justice and what plain fairness demands. And I ask you to show the defendant the same

amount of pity and mercy that he showed 17-year-old Keith Pullum on Christmas Eve, 1984. The same amount of mercy.

I ask you to follow the law in this case, and I ask you to return a verdict of or a recommendation -- return a recommendation of death.

Thank you.

(T. 989-90)(emphasis added).

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. 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 considerations 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. Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988). 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. 930 (1989). A stay of execution in Mr. Hardwick's 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 that a capital sentencing jury must make a "reasoned moral response to the defendant's background, character, and crime." Penry v. Lynaugh, 109 S. Ct. 2934, 2947 (1989).

In Mr. Hardwick's case, the sentencer was expressly told that Florida law precluded considerations of sympathy and mercy. Nothing was said at the penalty phase to correct that misimpression. The net result is an unacceptable risk that the jury's recommendation of death was unconstitutionally tainted. This error undermined the reliability of the jury's sentencing verdict. This error is especially apparent in a case like this, one where the jury's vote was by the slimmest of margins -- 7 to 5.

In light of the prosecutor's argument and the court's instructions, Mr. Hardwick's jurors could well have reasonably believed that there was no vehicle for expressing the view that Mr. Hardwick did not deserve to be sentenced to death based upon mercy or sympathy. Cf. Penry v. Lynaugh, 109 S. Ct. at 2934, 2950. Counsel was prejudicially deficient in not objecting to the court's inappropriate and unconstitutional instruction.

The error here undermined the reliability of the sentencing determination. For each of the reasons discussed above the Court should vacate Mr. Hardwick's unconstitutional sentence of death. This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Hardwick's death sentence.

This Court may also review this claim pursuant to its habeas corpus authority because it involves substantial and prejudicially deficient assistance of counsel on direct appeal, as counsel should have raised the claim. Habeas corpus relief is proper.

CONCLUSION AND RELIEF SOUGHT

The various claims set out above all involve, inter alia, ineffective assistance of appellate counsel, and/or 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 receive 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 bounds of the law." Id. at 1164 (emphasis supplied).

Appellate counsel here failed to effectively advocate for his client. Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987). As in Matire, Mr. Hardwick is entitled to relief. See also Wilson v. Wainwright, supra; Johnson v. Wainwright, supra.

This petition also presents independent claims raising matters of fundamental error and/or claims predicated upon significant changes in the law. Because the foregoing claims present substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. Hardwick's capital conviction and sentence of death, and of this Court's appellate review, they should be determined on their merits. 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.

WHEREFORE, John Gary Hardwick, Jr., 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. Hardwick 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 the claims presented, including, inter alia, questions regarding counsel's deficient performance.

Mr. Hardwick urges that the Court grant 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,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, first class, postage prepaid, to Mark Menser, Assistant Attorney General, Department of Legal Affairs, Magnolia Park Courtyard, 111-29 North Magnolia Drive, Tallahassee, Florida 32301, this 16th day of February, 1990.

Attorney