IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,145

PAUL C. HILDWIN,

Appellant,

v.

Richard Dugger
~~STATE OF FLORIDA~~,

Appellee.

SUPPLEMENT TO PETITION FOR EXTRAORDINARY RELIEF AND FOR A WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

A summary Petition for Extraordinary Relief and for a Writ of Habeas Corpus was filed in June, 1990, in order to invoke the habeas corpus jurisdiction of this Court. At that time, Mr. Hildwin's case was being litigated under warrant; CCR was also litigating numerous other outstanding warrants at the time. As a result, counsel was unable to adequately brief the claims present in Mr. Hildwin's case, nor had counsel been able to do any investigation or research into the case. In the summary Petition that was filed, Mr. Hildwin explained his situation to this Court, and requested leave to amend and/or supplement that initial Petition.

Mr. Hildwin therefore presents the instant Petition as an supplement to the original Petition which was filed under the untenable circumstances outlined above.

References to the transcripts and the record of the original trial court proceedings will follow the pagination of the Record on Appeal and will be designated by (R. _____).

PROCEDURAL HISTORY

On September 21, 1985, Mr. Hildwin was arrested on charges of uttering a forged instrument in Hernando County, Florida. On November 22, 1985, Mr. Hildwin was indicted for the first degree murder of Vronzettie Cox.

Trial began August 25, 1986. On September 4, 1986, Mr. Hildwin was found guilty of first degree murder. On September 5, 1986, the jury returned a verdict of death. Mr. Hildwin was

sentenced to death on September 17, 1986. This Court affirmed Mr. Hildwin's conviction and sentence of death. Hildwin v. State, 531 So. 2d 124 (Fla. 1988). The United States Supreme Court denied a petition for writ of certiorari on May 30, 1989.

On May 17, 1990, Governor Bob Martinez signed Mr. Hildwin's death warrant. His execution was set for 7:00 a.m. on July 17, 1990. On June 21, 1990, Mr. Hildwin's execution was stayed by this Court, which ordered that Mr. Hildwin's post-conviction pleadings be filed on or before October 19, 1990. This deadline was then extended to October 24, 1990.

Mr. Hildwin filed a motion under Fla. R. Crim. P. 3.850. After an evidentiary hearing the circuit court denied relief, and Mr. Hildwin appealed. That appeal is presently pending before this Court.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

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. Hildwin's conviction and sentence of death.

Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein involve the appellate review process. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); Baggett v. Wainwright, 229 So. 2d 239, 243

(Fla. 1969); cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Hildwin to raise the claims presented herein. See, e.g., Way v. Dugger, 568 So. 2d 1263 (Fla. 1990); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Wilson.

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. Way; Wilson; Downs; Riley. This petition presents substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. Hildwin's conviction and sentence of death, and of this Court's appellate review. Mr. Hildwin's claims are therefore of the type classically considered by this Court pursuant to its habeas corpus jurisdiction. This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. See, e.g., Riley; Downs; Wilson. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984). The petition includes claims predicated on significant,

fundamental and retroactive changes in constitutional law. See, e.g., Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Tafero v. Wainwright, 459 So. 2d 1034, 1035 (Fla. 1984); Edwards v. State, 393 So. 2d 597, 600 n.4 (Fla. 3d DCA), petition denied, 402 So. 2d 613 (Fla. 1981); cf. Witt v. State, 387 So. 2d 922 (Fla. 1980). 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. Hildwin's claims.

This Court therefore has jurisdiction to entertain Mr. Hildwin's claims to grant habeas corpus relief. This and other Florida courts have consistently recognized that the writ must issue where fundamental error occurs on crucial and dispositive points, or where a defendant received ineffective assistance of appellate counsel. See, e.g., Wilson v. Wainwright, 474 So. 2d 1163; McCrae v. Wainwright, 439 So. 2d 768 (Fla. 1983); State v. Wooden, 246 So. 2d 755, 756 (Fla. 1971); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); Ross v. State, 287 So. 2d 372, 374-75 (Fla. 2d DCA 1973); Davis v. State, 276 So. 2d 846, 849 (Fla. 2d DCA 1973), affirmed, 290 So. 2d 30 (Fla. 1974). The proper means of securing a hearing on such issues in this Court is a petition for writ of habeas corpus. Baggett, 287 So. 2d 374-75; Powell v. State, 216 So. 2d 446, 448 (Fla. 1968).

Mr. Hildwin's claims are presented below. They demonstrate that habeas corpus relief is proper in this case. In light of these circumstances, Mr. Hildwin respectfully urges that the Court grant habeas corpus relief.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Hildwin asserts that his conviction and sentence of death were obtained and then affirmed during the Court's appellate review process in violation of his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution, for each of the reasons set forth herein. In Mr. Hildwin's case, substantial and fundamental errors occurred in his capital trial. These errors were uncorrected by the appellate review process. As shown below, relief is appropriate.

CLAIM I

MR. HILDWIN WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL TO THE FLORIDA SUPREME COURT AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I §§ 9, 16(a) AND 17 OF THE CONSTITUTION OF THE STATE OF FLORIDA.

Appellate counsel failed to present to this Court, for review, compelling issues concerning Mr. Hildwin's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Individually and "cumulatively," Barclay v. Wainwright, 444 So. 2d 957, 959 (Fla. 1984), the claims omitted

by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985). (emphasis in original). In Wilson, this court said:

> [O]ur 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 of 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.

Wilson, 474 So. 2d at 1165. In Mr. Hildwin's case appellate counsel failed to act as a "zealous advocate," and Mr. Hildwin was therefore deprived of his right to the effective assistance of counsel by the failure of direct appeal counsel to raise the following issue to the Florida Supreme Court. Mr. Hildwin is entitled to a new direct appeal.

A. MR. HILDWIN'S DEATH SENTENCE WAS THE RESULT OF A WEIGHING PROCESS WHICH INCLUDED CONSTITUTIONALLY INVALID AGGRAVATING CIRCUMSTANCES AND EVIDENCE AND ARGUMENT IN SUPPORT OF INVALID NONSTATUTORY AGGRAVATING CIRCUMSTANCES, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS.

At the penalty phase of Mr. Hildwin's trial, the jury was instructed to consider four (4) aggravating circumstances. The totality of the instructions given the jury on these aggravating circumstances tracked the statutory language as follows:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence.

> One, the crime for which Paul Christopher Hildwin is to be sentenced was committed while he was under sentence of imprisonment.
>
> Two, the defendant has been previously convicted of another capital offense or a felony involving the use of violence to some person, A, the crime of rape is a felony involving the use of violence to another person, and B, the crime of sodomy is a felony involving the use of violence to another person.
>
> Three, the crime for which the defendant is to be sentenced was committed for financial gain.
>
> Four, the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel.

(R. 1121).

As early as Furman v. Georgia, 408 U.S. 238 (1972) the United States Supreme Court has held that the penalty of death may not be imposed under a sentencing procedure that creates a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner. This position was reaffirmed in Gregg v. Georgia, 428 U.S. 153 (1976). In Gregg the Supreme Court held:

> [W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

Gregg v. Georgia, 428 U.S. 189.

The positions in Furman and Gregg, that forbid standardless sentencing discretion, was upheld in Godfrey v. Georgia, 446 U.S. 420 (1980). In Godfrey the Supreme Court held that a state:

> ...must channel the sentencer's discretion by "clear and objective standards" Gregg v. Georgia, 428 U.S. at 198, that provide "specific and detailed guidance," Proffitt v. Florida, 428 U.S. 242, 253 (1976), and that "make rationally reviewable the process for imposing a sentence of death." Woodson v. North Carolina, 428 U.S. 280, 303 (1976).

Godfrey v. Georgia, 446 U.S. at 428.

Appellate counsel did not include in his Initial Brief on appeal a challenge to the Florida Statute setting forth the aggravating circumstances that were applied by Mr. Hildwin's jury under the analysis of Furman, Gregg and Godfrey even though those cases were decided well before Mr. Hildwin's trial and direct appeal to this Court. He also did not include a specific challenge to Mr. Hildwin's sentence of death as being unconstitutional because of the vagueness of the sentencing statute, section 921.141, Florida Statutes, and because of the instructions actually given to the jury. Instead, appellate counsel simply left those issues to be reviewed pursuant to this Court's mandatory capital review without advocacy on behalf of Mr. Hildwin.

The United States Supreme Court recently issued several opinions which unequivocally establish that Mr. Hildwin is entitled to resentencing. See Stringer v. Black, 112 S. Ct. 1130 (1992); Sochor v. Florida, 112 S. Ct. 2114 (1992); Espinosa v. Florida, 112 S. Ct. 2926 (1992); Richmond v. Lewis, 113 S. Ct.

528 (1993). These opinions establish that Eighth Amendment error occurred at Mr. Hildwin's penalty phase. The sentencing jury was not provided constitutionally narrowed aggravating circumstances and was urged to consider nonstatutory aggravating factors. Since the State cannot establish that these errors were harmless beyond a reasonable doubt, Mr. Hildwin is entitled to resentencing.

In Espinosa, the Supreme Court examined a claim that the Florida language regarding the "heinous, atrocious or cruel" aggravating factor was unconstitutionally vague and overbroad because it provided insufficient guidance as to when that aggravator applied. The Supreme Court held the language found in the statute and standard jury instruction to be unconstitutionally vague, and explained:

> Our cases establish that, in a State where the sentencer weighs aggravating and mitigating circumstances, the weighing of an invalid aggravating circumstance violates the Eighth Amendment. See Sochor v. Florida, 504 U.S. ____, ____, 112 S.Ct. 2114, 2119 (1992); Stringer v. Black, 508 U.S. ____, ____, 112 S.Ct. 1130, 1140 (1992); Parker v. Dugger, 488 U.S. ____, ____, 111 S.Ct. 731, 738 (1991); Clemons v. Mississippi, 494 U.S. 738, 752 (1990). Our cases further establish that an aggravating circumstance is invalid in this sense if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor. See Stringer, supra, at ____. We have held instructions more specific and elaborate than the one given in the instant case unconstitutionally vague. See Shell v. Mississippi, 498 U.S. ____ (1990); Maynard v. Cartwright, 486 U.S. 356 (1988); Godfrey v. Georgia, 446 U.S. 420 (1980).

Espinosa, 112 S. Ct. at 2928.

In Espinosa, the State argued that a Florida capital sentencing jury need not receive constitutionally narrowed aggravating circumstances because, according to the State, the jury in Florida is not the sentencer for Eighth Amendment purposes. Espinosa, 112 S. Ct. at 2928. The Supreme Court rejected that argument, holding that a Florida capital sentencing jury is a sentencer for Eighth Amendment purposes and must received constitutionally narrowed aggravating circumstances:

> Our examination of Florida case law indicates, however, that a Florida trial court is required to pay deference to a jury's sentencing recommendation, in that the trial court must give "great weight" to the jury's recommendation, whether that recommendation be life, see Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), or death, see Smith v. State, 515 So.2 d 182, 185 (Fla. 1987), cert. denied, 485 U.S. 971 (1988); Grossman v. State, 525 So.2d 838, 829, n. 1 (Fla. 1988), cert. denied, 489 U.S. 1071-1072 (1989). Thus, Florida has essentially split the weighing process in two. Initially, the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances.
>
> It is true that, in this case, the trial court did not directly weigh any invalid aggravating circumstances. But, we must presume that the jury did so, see Mills v. Maryland, 486 U.S. 367, 376-377 (1988), just as we must further presume that the trial court followed Florida law, cf. Walton v. Arizona, 497 U.S. 639, 653 (1990), and gave "great weight" to the resultant recommendation. By giving "great weight" to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found. This kind of indirect weighing of an invalid

> aggravating factor creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor, cf. Baldwin v. Alabama, 472 U.S. 372, 382 (1985), and the result, therefore, was error.

Espinosa, 112 S. Ct. 2928. The Supreme Court concluded by emphasizing, "if a weighing State decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances." Id.

In Stringer v. Black, the Supreme Court explained that the Florida capital sentencing statute, like the Mississippi statute at issue in Stringer, requires the jury and judge to weigh aggravating factors against mitigating factors in determining whether to impose life or death. Stringer, 112 S. Ct. at 1137. The Supreme Court discussed the "critical importance" of the distinction between weighing states and nonweighing states in assessing the effect of a sentencer's consideration of an invalid aggravating factor:

> In a nonweighing State, so long as the sentencing body finds at least one valid aggravating factor, the fact that it also finds an invalid aggravating factor does not infect the formal process of deciding whether death is an appropriate penalty. Assuming a determination by the state appellate court that the invalid factor would not have made a difference to the jury's determination, there is no constitutional violation resulting from the introduction of the invalid factor in an earlier stage of the proceedings. But when the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only

> constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence. This clear principle emerges . . . from our long line of authority setting forth the dual constitutional criteria of precise and individualized sentencing.

Id.

In Stringer, as in Espinosa, the Supreme Court stressed that "if a State uses aggravating factors in deciding who shall be eligible for the death penalty or who shall receive the death penalty, it cannot use factors which as a practical matter fail to guide the sentencer's discretion." 112 S. Ct. at 1139. Use of an aggravating factor "of vague or imprecise content" has a substantial impact upon capital sentencers who weigh aggravating and mitigating factors:

> A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance.

Id.

Sochor v. Florida also discussed the effect of reliance upon invalid aggravating circumstances in a weighing state like Florida:

> In a weighing State like Florida, there is Eighth Amendment error when the sentencer weighs an "invalid" aggravating circumstance in reaching the ultimate decision to impose a death sentence. See Clemons v. Mississippi,

> 494 U.S. 738, 752 (1990). Employing an invalid aggravating factor in the weighing process "creates the possibility . . . of randomness," Stringer v. Black, 503 U.S. ____, ____ (1992)(slip op., at 12), by placing a "thumb [on] death's side of the scale," id., at ____ (slip op., at 8), thus "creat[ing] the risk [of] treat[ing] the defendant as more deserving of the death penalty," id, at ____ (slip op., at 12). Even when other valid aggravating factors exist as well, merely affirming a sentence reached by weighing an invalid aggravating factor deprives a defendant of "the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances." Clemons, supra, at 752 (citing Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982)); see Parker v. Dugger, 498 U.S. ____, ____ (1991)(slip op., at 11).

112 S. Ct. at 2119.

Espinosa, Sochor, and Stringer demonstrate that Mr. Hildwin was denied his Eighth Amendment rights. His jury was permitted to consider "invalid" aggravation because aggravating factors submitted to the jury were vague and overbroad: "an aggravating circumstance is invalid . . . if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." Espinosa, 112 S. Ct. at 2928. Additionally, the jury was urged to consider nonstatutory aggravation.

Espinosa held that Florida capital juries must be properly instructed regarding the application of aggravating circumstances because "Florida has essentially split the weighing process in two. Initially, the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in

turn weighed within the trial court's process of weighing aggravating and mitigating circumstances." Espinosa, 112 S. Ct. at 2928. "[I]f a weighing State decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances." Espinosa, 112 S. Ct. at 2928.

Therefore, even if "the trial court did not directly weigh any invalid aggravating circumstances," it must be "presume[d] that the jury did so." Espinosa, 112 S. Ct. at 2928. In imposing the death sentence, the trial court presumably considered the jury recommendation, also presumably giving it the "great weight" required by Florida law. Espinosa, 112 S. Ct. at 2928. Thus, "the trial court indirectly weighed the invalid aggravating factor[s] that we must presume the jury found. This kind of indirect weighing of . . . invalid aggravating factor[s] creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor, . . . and the result, therefore, was error." Id.

The heinous, atrocious or cruel aggravator considered by Mr. Hildwin's jury does not satisfy the Eighth Amendment. Mr. Hildwin's jury was given the identical aggravator given in Espinosa. Compare R. 1121 ("The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious, or cruel") with Espinosa, 112 S. Ct. at 2928 ("One of the [penalty phase] instructions informed the jury that it was entitled to find as an aggravating factor that the murder . . . was

'especially wicked, evil, atrocious or cruel"). The Supreme Court held this aggravator to be unconstitutionally vague. Id.

The jury also received the overbroad "pecuniary gain" aggravating factor. In Peek v. State, 395 So. 2d 492, 499 (Fla. 1981), this Court said that to find the aggravating circumstances of pecuniary gain it must be established beyond a reasonable doubt that the victim "was murdered to facilitate the theft, or that [the defendant] had [] intentions or profiting from his illicit acquisition." In Small v. State, 533 So. 2d 1137, 1142 (Fla. 1988), the court further explained that Peek held, "it has [to] be [] shown beyond a reasonable doubt that **the primary motive** for this killing **was pecuniary gain.**" In Mr. Hildwin's case, the jury received no guidance explaining this limiting construction or the proper application of this aggravating circumstance. The judge "fail[ed] adequately to inform [Mr. Hildwin's] jur[y] what [it] must find to impose the death penalty." Maynard v. Cartwright.

Further, this Court has repeatedly held that aggravating circumstances specified in Florida's death penalty statute, §921.141(5), Fla. Stat., are exclusive, and no other circumstances or factors may be used to aggravate a crime for purpose of imposition of the death penalty. Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977); Miller v. State, 373 So. 2d 882 (Fla. 1979); Robinson v. State, 520 So. 2d 1 (Fla. 1988). The State's presentation of and both sentencers' consideration of impermissible nonstatutory aggravating circumstances prevented

the constitutionally required narrowing of the sentencer's discretion, creating a constitutionally unacceptable risk that the sentencers imposed the death penalty in an arbitrary and capricious manner. See, Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988); Lowenfield v. Phelps, 108 S. Ct. 546 (1988). These impermissible aggravating factors evoked a sentence that was "an unguided emotional response," a clear violation of Mr. Hildwin's constitutional rights. Penry v. Lynaugh, 109 S. Ct. 2934 (1989). This error undermined the reliability of the jury's sentencing determination and prevented the jury from properly weighing the mitigation presented by Mr. Hildwin. Extra thumbs had been improperly place on death's side of the scale. Stringer.

Mary Winings testified on behalf of the State at the penalty phase of Mr. Hildwin's trial (R. 1110-1111). Her testimony was presented in the State's rebuttal and its alleged purpose was to refute those statements of good character made on behalf of Mr. Hildwin. Realistically, this testimony was presented in an attempt to convince the jury that Mr. Hildwin had committed another sexual battery -- even though the "victim" had not reported the incident to the police, law enforcement had not investigated it, no charges against Mr. Hildwin had been filed and, accordingly, no court of law had ever adjudicated him guilty thereof. The State also elicited evidence of nonstatutory aggravating circumstances from Lorraine Lydon during the penalty phase, which was impermissible and should not have been permitted to be presented to the jury (R. 1044-46). In its closing

argument, the prosecution clearly used Winings' testimony as an aggravating factor in its demand for the death penalty (R. 1114-15).

Considering invalid aggravating factors adds thumbs to "death's side of the scale," Stringer, 112 S. Ct. at 1137, "creat[ing] the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance." Id. at 1139. The errors resulting from the unconstitutional instructions regarding aggravating circumstances provided to Mr. Hildwin's jury and from the introduction of nonstatutory aggravation were not harmless beyond a reasonable doubt. "[W]hen the weighing process has been infected with a vague factor the death sentence must be invalidated." Stringer, 112 S. Ct. at 1139. In Florida, the sentencer weighs aggravation against mitigation in determining the appropriate sentence. Stringer. Thus, assessing whether an error occurring during the sentencing process was harmless or not requires assessing the effect of the error on the weighing process. In Mr. Hildwin's case, the jury must be presumed to have considered invalid aggravating factors, Espinosa, and to have weighed these invalid aggravating factors against the mitigation. Unless the State can establish beyond a reasonable doubt that the consideration of the invalid aggravating factors had no effect upon the weighing process, the errors cannot be considered harmless.

The fact that there was mitigation in the record establishes that the errors were not harmless beyond a reasonable doubt. The jury was permitted to weigh invalid aggravating factors against the mitigation, adding a "thumb" to "death's side of the scale." Stringer, 112 S. Ct. at 1137. These errors skewed the weighing process in a case where mitigation is present in the record, and thus the errors were not harmless. See also Booker v. Dugger, 922 F.2d 633, 644 (11th Cir. 1991)(Tjoflat, C.J., specially concurring)("I cannot conceive of a situation in which a pure reviewing court would not be acting arbitrarily in affirming a death sentence after finding a sentencing error that relates, as the error does here, to the balancing of aggravating and mitigating circumstances. It is simply impossible to tell what recommendation a properly instructed jury would have made or the decision the sentencing judge would have reached."). Mr. Hildwin is entitled to relief.

To the extent that appellate counsel failed to raise this issue on direct appeal Mr. Hildwin was deprived of the effective assistance of counsel as guaranteed under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. This error constituted the denial of due process which rises to the level of fundamental error. State v. Johnson, 18 Fla. L. Weekly 55 (Fla. 1993). The jury was not advised of the elements of the aggravating circumstances. Where the jury is not advised of the elements of the crime, such error is fundamental. Counsel's performance on direct appeal fell below any acceptable standard.

Evitts v. Lucey, 469 U.S. 387 (1985); Strickland v. Washington, 466 U.S. 668 (1984). Had this issue been briefed to this Court on direct appeal there is every degree of certainty that relief would have been granted on this claim.

B. FLORIDA'S STATUTE SETTING FORTH THE AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED IN A CAPITAL CASE IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. THE FACIAL INVALIDITY OF THE STATUTE WAS NOT CURED IN MR. HILDWIN'S CASE WHERE THE JURY DID NOT RECEIVE ADEQUATE GUIDANCE.

At the time of Mr. Hildwin's trial, the language of sec. 921.141 Fla. Stat., which defined the "heinous atrocious and cruel" and the "pecuniary gain" aggravating factors was facially vague and overbroad. "[I]n a 'weighing' State [such as Florida], where the aggravating and mitigating factors are balanced against each other, it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor, even if other, valid aggravating factors obtain." Richmond v. Lewis, 113 S. Ct. 528, 534. A facially vague and overbroad aggravating factor may be cured where "an adequate narrowing construction of the factor" is adopted and applied. Id. However, in order for the violation of the Eighth and Fourteenth Amendments to be cured, "the narrowing construction" must be applied during a "sentencing calculus" free from the taint of the facially vague and overbroad factor. Id. at 535.

In Florida, the jury is a co-sentencer. Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993). "By giving 'great weight' to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the

jury found." Espinosa v. Florida, 112 S. Ct. 2926, 2928 (1992). This indirect weighing of the facially vague and overbroad aggravators violates the Eighth and Fourteenth Amendments. Id. Therefore, the jury's sentencing calculus must be free from facially vague and overbroad aggravating factors. Id. at 2929. Thus, in order to cure the facially vague and overbroad statutory language, the jury must receive the adequate narrowing construction. Id. at 2928.

Richmond and Espinosa have established that Mr. Hildwin's sentence of death rests on fundamental error. Fundamental error occurs when the error is "equivalent to the denial of due process." State v. Johnson, 18 Fla. L. Weekly 55, 56 (Fla. 1993). Fundamental error includes facial invalidity of a statute due to "overbreadth" which impinges upon a liberty interest. Trushin v. State, 425 So. 2d 1126, 1129 (Fla. 1983). The failure to instruct on the necessary elements a jury must find constitutes fundamental error. State v. Jones, 377 So. 2d 1163 (Fla. 1979).

Under Florida law, aggravating circumstances "must be proven beyond a reasonable doubt." Hamilton v. State, 547 So. 2d 630, 633 (Fla. 1989). In fact, Mr. Hildwin's jury was so instructed. The State failed to prove each of these aggravating circumstance beyond a reasonable doubt. Florida law also establishes that limiting constructions of the aggravating circumstances are "elements" of the particular aggravating circumstance. "[T]he State must prove [the] element[s] beyond a reasonable doubt."

Banda v. State, 536 So. 2d 221, 224 (Fla. 1988). Unfortunately, Mr. Hildwin's jury received wholly inadequate instructions regarding the elements of the aggravating circumstances submitted for the jury's consideration. This was fundamental error. State v. Jones.

Moreover, the statute is facially vague and overbroad in violation of the Eighth and Fourteenth Amendments. It impinges upon a liberty interest. Thus, the application of the statute violated due process. State v. Johnson, 18 Fla. L. Weekly at 56.

To the extent that appellate counsel failed to discuss the fundamental error in the direct appeal, he rendered deficient performance. Certainly, this Court was obligated to review for reversible error pursuant to its mandatory review in capital cases. However, Mr. Hildwin was denied an advocate as to this unconstitutional statute. Mr. Hildwin was deprived the effective assistance of counsel as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Evitts v. Lucey, 469 U.S. 387 (1985); Strickland v. Washington, 466 U.S. 668 (1984). This Court must grant habeas relief and allow Mr. Hildwin a new direct appeal where he will be adequately represented.

C. THE TRIAL COURT'S CONSTITUTIONALLY DEFICIENT INSTRUCTIONS WERE FUNDAMENTAL ERROR WHICH VIOLATED MR. HILDWIN'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS, AND COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO URGE THIS DISPOSITIVE, CRITICAL CONSTITUTIONAL CLAIM.

The State's theory in this case was both premeditated and felony-murder: that the decedent was killed to further a sexual

battery committed during the course of a robbery. The trial court specifically instructed the jury on premeditated murder (R. 992). Immediately after that instruction, the trial court instructed the jury on felony-murder (R. 993). The trial court also instructed on second degree murder (R. 994-995). The jury was then instructed on murder in the third degree:

> Third degree murder; Before you can find the defendant guilty of third degree murder, the State must prove the following three elements beyond a reasonable doubt:
>
> (1) Vronzettie Cox is dead.
>
> (2) The death occurred as a consequence of and while Paul Christopher Hildwin was engaged in the commission of grand theft.
>
> (3) Paul Christopher Hildwin was the person who actually killed Vronzettie Cox.
>
> It is not necessary for the State to prove the killing was perpetrated with a design to effect death.
>
> The definition of grand theft is as follows: Before you can find the defendant guilty of theft, the State must prove the following two elements beyond a reasonable doubt:
>
> (1) Paul Christopher Hildwin knowingly and unlawfully obtained the property of Vronzettie Cox.
>
> (2) He did so with the intent to either temporarily or permanently appropriate the property of Vronzettie Cox to his own use or to the use of any person not entitled to it.
>
> The punishment provided by law for the crime is greater depending on the value of the property taken. Therefore, if you find the defendant guilty of theft, <u>you must determine by your verdict whether the value of the property taken was less than a hundred dollars or more, but less than $20,000</u>.

(R. 995-996)(emphasis added).

The trial court thus gave an instruction to the jury that was patently ambiguous. This ambiguity was never corrected. The ambiguity continued, however, when the court instructed on manslaughter:

> Manslaughter: Before you can find the defendant guilty of manslaughter, the State must prove the following elements beyond a reasonable doubt:
>
> (1) Vronzettie Cox is dead.
>
> (2) The death was caused by the wrongful act of Paul Christopher Hildwin.
>
> The definition of culpable negligence is: Before you can find the defendant guilty of culpable negligence, the State must prove the following two elements beyond a reasonable doubt:
>
> (1) Paul Christopher Hildwin inflicted actual personal injury on Vronzettie Cox.
>
> (2) He did so through culpable negligence.
>
> Actual injury is not required.
>
> I will now define culpable negligence for you. Each of us has a duty to act reasonably towards others. If there is a violation of that duty without any conscious intention of harm, that violation is negligence, but culpable negligence is more than a failure to use ordinary care for others. In order for negligence to be culpable, it must be gross and flagrant. Culpable negligence is a course of conduct showing reckless disregard for human life or the safety of persons exposed to its dangerous effects or such an entire want of care as to raise the presumption of a conscious indifference of the consequences or which shows wantonness or recklessness or grossly careless disregard for the safety and welfare of the public or such an indifference

to the rights of others as is equivalent to an intentional violation of such rights.

(R. 996-998)(emphasis added).

As is obvious from the jury instruction the jury was never told what part culpable negligence played in determining whether manslaughter had been committed.

In Franklin v. State, 403 So.2d 975 (Fla. 1981), the Florida Supreme Court held that the failure to instruct fully and accurately on the elements of felony murder, including the underlying felony, was fundamental error. Accord, State v. Jones, 377 So.2d 1163 (Fla. 1979). In Franklin, the error was raised for the first time on direct appeal. Nevertheless, the Court held that where a conviction is sought on the "dual theories of premeditation and felony murder and there is error because the trial judge fails to instruct on the underlying felony, the conviction can stand only if the error is harmless.... The reviewing court must be satisfied beyond a reasonable doubt that the failure to so instruct was not prejudicial and did not contribute to the defendant's conviction." Franklin, 403 So. 2d at 976.

The result of the ambiguous instructions given to the jury was that the elements of two lesser included offenses, third degree murder and manslaughter, were never accurately explained. The jury, after deliberations, returned a general verdict of first degree murder and did not specify whether Mr. Hildwin was guilty of premeditated or felony murder. The jury could well have convicted on a "felony-murder" theory.

The importance of the ambiguities is clear. Given the fact that the third degree murder instruction erred as to the dollar amount necessary to constitute grand theft it is indeed likely that the ambiguity caused the jury to simply disregard third degree murder as an alternative. This is especially true since the amount stolen by Mr. Hildwin may easily not have exceeded one hundred dollars ($100.00).

The manslaughter instruction was even more vague than the instruction on third degree murder, since the jury was never told what culpable negligence had to do with the crime. The court, at a bench conference, noted that it was unsure of the instruction that it had just given. Nevertheless, the decision was made not to clarify the issue for the jury:

> If counsel would approach the bench a moment.
>
> (Whereupon, the following proceedings were had at the bench.)
>
> THE COURT: In the instruction for manslaughter is that culpable negligence in the body of the instruction? It's just says the evidence --
>
> MR. HOGAN: What does it say?
>
> THE COURT: It just says the definition of culpable negligence.
>
> MR. HOGAN: Shouldn't it say culpable negligence?
>
> THE COURT: Why don't we just check it out and we can send it back to them.
>
> MR. HOGAN: All right.
>
> THE COURT: All right. Now, the first degree felony murder.

* * *

> THE COURT: All right. I will inquire of the State and of the defense has the Court left out any instructions or misread any of the instructions to the jury?
>
> MR. HOGAN: No, sir.
>
> MR. LEWAN: No, sir.

(R. 1004-1005).

The instruction was therefore never clarified for the jury. They were allowed to speculate, at Mr. Hildwin's expense, as to what evidence was sufficient to support a conviction on either one of these two lesser included offenses. Mr. Hildwin's conviction therefore stands in dark violation of the most rudimentary of due process rights. See, In re Winship, 397 U.S. 358 (1970); Mullaney v. Wilbur, 421 U.S. 684 (1975); cf. Bryant v. State, 412 So. 2d 347 (Fla. 1982).

Furthermore, under the eighth amendment's heightened due process scrutiny Beck v. Alabama, 447 U.S. 625 (1980), the trial court's fundamental error in its instructions to the jury simply cannot be allowed to stand.

The errors herein at issue are classic examples of fundamental constitutional error, as this Court has made explicit. See Franklin, supra; Jones, supra. As such, the issue must be determined on the merits and relief must be granted at this time -- fundamental constitutional error must be corrected whenever the issue is presented -- whether on appeal or in post-conviction proceedings. See, e.g., Dozier v. State, 361 So. 2d 727, 728 (Fla. 4th DCA 1978); Flowers v. State, 351 So. 2d 387

(Fla. 1st DCA 1977); Nova v. State, 439 So. 2d 255, 261 (Fla. 3rd DCA 1983); Cole v. State, 181 So. 2d 698 (Fla. 3rd DCA 1966).

To the extent that appellate counsel failed to discuss the fundamental error in the direct appeal, he rendered deficient performance. Certainly, this Court was obligated to review for reversible error pursuant to its mandatory review in capital cases. However, Mr. Hildwin was denied an advocate as to this fundamental error. Mr. Hildwin was deprived the effective assistance of counsel as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Evitts v. Lucey, 469 U.S. 387 (1985); Strickland v. Washington, 466 U.S. 668 (1984). This Court must grant habeas relief and allow Mr. Hildwin a new direct appeal where he will be adequately represented.

D. THE INTENSE SECURITY MEASURES IMPLEMENTED DURING MR. HILDWIN'S TRIAL IN THE JURY'S PRESENCE 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 AND MR. HILDWIN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN COUNSEL FAILED TO ZEALOUSLY ADVOCATE AND LITIGATE THIS ISSUE.

The extreme security measures employed during Mr. Hildwin's trial, in particular Mr. Hildwin being handcuffed, shackled and chained to a "hook" in the floor in the presence of the jury effectively destroyed any presumption of innocence during the guilt phase of Mr. Hildwin's trial and unmistakably telegraphed to his jury at the penalty phase that Mr. Hildwin was a dangerous man. The prejudice from the extreme security measures, and the

shackling, in the circumstances of this case far outweighed any possible danger and caused an unconstitutional conviction and sentence. Trial counsel raised numerous objections to the excessive security measures (R. 14, 136, 156, 210, 718).

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, 472 U.S. 320 (1985).

The United States Supreme Court analyzed the effect of security measures in Holbrook v. Flynn, 475 U.S. 560 (1986):

> Central to the right to a fair trial, guaranteed by the Sixth and Fourteenth Amendments, is the principle that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial,

> and not on the grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." Taylor v. Kentucky, 436 U.S. 478, 485 (1978).

Holbrook, 475 U.S. at 567.

The Court in Holbrook ultimately found that the defendant had failed to show prejudice from the security. There, the security measures consisted merely of four uniformed Highway Patrol Officers at a multi-defendant trial. Here, the security measures imposed were far more visible to Mr. Hildwin's jury and were simply unnecessary.

Here, Holbrook's recognition that "certain practices pose such a threat to the 'fairness of the factfinding process' that they must be subjected to 'close judicial scrutiny'" applies per force. Holbrook, 475 U.S. 568 (quoting Estelle v. Williams, 425 U.S. 501, 503-04 (1976)); see also Elledge v. Dugger, 823 F.2d 1451 (11th Cir. 1987). The Holbrook court approved Estelle's recognition that where a defendant is forced to wear prison garb before a jury, "the constant reminder of the accused's condition implicit in such distinctive, identifiable attire may affect a juror's judgment." Holbrook, 475 U.S. 568 (quoting Estelle, 425 U.S. at 504-05). Leg shackles are even more offensive.

In Mr. Hildwin's case the combination of extraordinary security measures and other circumstances of the case, under any level of scrutiny, was impermissibly prejudicial. Holbrook, 475 U.S. at 569. The use of shackles is particularly prejudicial and offensive. "Due process requires that shackles be imposed only

as a last resort." Spain v. Rushen, 883 F.2d 712, 728 (9th Cir. 1989). In Spain, the court held that the trial court violated that capital defendant's rights by requiring him to wear shackles at trial. Id. at 713.

The court recognized five (5) inherent disadvantages to physical restraint of defendants on the fairness of the trial:

> (1) Physical restraints may cause jury prejudice, reversing the presumption of innocence;
>
> (2) Shackles may impair the defendant's mental faculties;
>
> (3) Physical restraints may impede the communication between the defendant and his lawyer;
>
> (4) Shackles may detract from the dignity and decorum of the judicial proceedings; and
>
> (5) Physical restraints may be painful to the defendant.

Spain, 883 F.2d at 721.

The Eleventh Circuit has similarly found that forcing a defendant to wear shackles at sentencing was unconstitutional, even though the defendant at that point had been adjudged guilty. Elledge v. Dugger, 823 F.2d at 1450. The Court explained that

> Initially, the prejudice perceived when a defendant is seen in shackles by the jury involves the presumption of innocence. The issue has usually arisen in the context of a determination of guilt or innocence. Courts focus upon the prejudicial impact restraints have on the defendant's presumption of innocence. See e.g. Allen v. Montgomery, 728 F.2d 1409, 1413 (11th Cir. 1984); Collins v. State, 297 S.E. 2d 503, 505 (Ga. App. 1982); State v. Tolley, 226 S.E. 2d 353, 367 (N.C. 1976).

Id. There the court went on to explain that the danger of prejudice extends even beyond the presumption of innocence. Shackles may have unknown and unpredictable adverse effects on the jury, such as an improper suggestion of future dangerousness. Id.

The unique circumstances of this case demanded careful consideration by the trial judge, consideration that apparently was not given. "[R]eviewing courts require that trial judges pursue less restrictive alternatives before imposing physical restraints." Spain, 883 F.2d at 721. Although shackling may sometimes be appropriate, "[t]he degree of prejudice is a function of the extent of chains applied and their visibility to the jury." Id. at 722. Even if shackles seem reasonably necessary, a trial court should take steps to discover and prevent prejudice to the jury, such as polling the jury about the impact of the restraints and providing a curative instruction. Elledge, 823 F.2d at 1452. But in Mr. Hildwin's case no action was taken to discover or alleviate the adverse effects of the shackles. Mr. Hildwin's trial judge failed to consider less restrictive alternatives and failed to recognize the tremendous irreparable prejudice.

This Court has examined this issue in other recent cases, and has altered the standards that were applied during Mr. Hildwin's case. In Bello v. State, 14 F.L.W. 340 (Fla. July 14, 1989), the Court granted a new sentencing to a capital defendant who was shackled during the penalty phase of his trial. The

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Court recognized that shackling is an inherently prejudicial restraint and that the constitutional concern centers on possible adverse effects on the presumption of innocence. Id. at 341. In Bello, as here, defense counsel objected to the shackling but the trial judge overruled the objection. There, as here, the trial judge merely relied on law enforcement's opinion. This Court held that the defendant was entitled to a new trial because the trial judge made no appropriate inquiry. Id.

Spain and Bello mandate that relief be given now. Bello has changed the applicable standard for assessing this claim.

The errors in Mr. Hildwin's trial are now obvious. In Mr. Hildwin's trial, while any one aspect of the security measures alone was prejudicial, the cumulative effect of security measures and other circumstances overwhelmed the jurors with irrelevant and unconstitutional evidence of cuffing and shackling. The trial judge failed to conduct a full inquiry. The judge failed to carefully weigh the prejudice in this particular case. The eight (8) law enforcement officers, the handcuffs, shackles and especially being chained to the floor labeled Mr. Hildwin before the jury as a dangerous, guilty man. The chaining of Mr. Hildwin to a "hook" in the floor in the presence of the jury was at once irrelevant and unconstitutional.

These outrageous security measures insulted the fundamental premise of a fair trial and a presumption of innocence. The only suitable remedy is a new, constitutional trial and sentencing. The fifth, sixth, eighth, and fourteenth amendments were

violated. Fundamental constitutional error occurred, and Mr. Hildwin is entitled to relief on this claim.

To the extent that appellate counsel failed to discuss the fundamental error in the direct appeal, he rendered deficient performance. Certainly, this Court was obligated to review for reversible error pursuant to its mandatory review in capital cases. However, Mr. Hildwin was denied an advocate as to this issue. Mr. Hildwin was deprived the effective assistance of counsel as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Evitts v. Lucey, 469 U.S. 387 (1985); Strickland v. Washington, 466 U.S. 668 (1984). This Court must grant habeas relief and allow Mr. Hildwin a new direct appeal where he will be adequately represented.

E. THE TRIAL COURT'S UNCONSTITUTIONAL SHIFTING OF THE BURDEN OF PROOF SENTENCING DEPRIVED MR. HILDWIN OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS. THE RULINGS CREATED CIRCUMSTANTIAL INEFFECTIVE ASSISTANCE OF COUNSEL.

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. Hildwin's capital proceedings. To the contrary, the

burden was shifted to Mr. Hildwin on the question of whether he should live or die.

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), Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988), cert. denied, 108 S. Ct. 2005 (1988), 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 Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Maynard v. Cartwright, 108 S. Ct. 1853 (1988). Mr. Hildwin's jury was unconstitutionally instructed, as the record makes abundantly clear (See R. 1122).

The jury instructions here employed a presumption of death which shifted to Mr. Hildwin the burden of proving that life was the appropriate sentence. 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. Under Hitchcock, Florida juries must be instructed in accord with the Eighth Amendment principles. Hitchcock constituted a change in law in this regard. Under Hitchcock and its progeny, an objection, in fact, was not necessary to preserve this issue for review because

Hitchcock decided after Mr. Hildwin's trial worked a change in law; Florida sentencing juries must be instructed in accord with Eighth Amendment principles. Hitchcock held that the Eighth Amendment applied to the Florida penalty phase proceedings in front of the jury and did not just apply to the proceedings before the judge. The jury is a co-sentencer. Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993). Mr. Hildwin's sentence of death is neither "reliable" nor "individualized." 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. Hildwin.

To the extent that appellate counsel failed to adequately brief this issue on direct appeal to this Court Mr. Hildwin was deprived of the effective assistance of appellate counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution. Evitts v. Lucey, 469 U.S. 387 (1985); United States v. Garcia, 997 F.2d 1273 (9th Cir. 1993). Performance of counsel fell well below acceptable standards, and Mr. Hildwin was prejudiced. This petition should be granted.

K. MR. HILDWIN'S SENTENCING JURY WAS REPEATEDLY MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO LITIGATE THIS ISSUE.

A capital sentencing jury must be properly instructed as to their role in the sentencing process. Hitchcock v. Dugger, 481 U.S. 393 (1987); Caldwell v. Mississippi, 472 U.S. 320 (1985); Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), cert.

denied, 109 S.Ct. 1353 (1989). In fact, on the basis of Hitchcock, this Court has reversed instructional error where no objection to the inadequate instruction was asserted at trial. Meeks v. Dugger, 576 So.2d 713 (Fla. 1991); Hall v. State, 541 So.2d 1125 (Fla. 1989).

In Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), relief was granted to a capital habeas corpus petitioner presenting a claim involving prosecutorial and judicial comments and instructions which diminished the jury's sense of responsibility and which violated the Eighth Amendment in the same way in which the comments and instructions discussed below violated Mr. Hildwin's Eighth Amendment rights. Mr. Hildwin is entitled to relief under Mann. A contrary result would result in the totally arbitrary and freakish imposition of the death penalty and would violate Eighth Amendment principles.

Caldwell involved prosecutorial/judicial diminution of a capital jury's sense of responsibility which was far surpassed by the jury-diminishing statements made during Mr. Hildwin's trial. In Mann, and again in Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988), the Eleventh Circuit determined that Caldwell assuredly does apply to a Florida capital sentencing proceeding, and that when either judicial instructions or prosecutorial comments minimize the jury's sentencing role, relief is warranted. See Mann. Caldwell involves the most essential Eighth Amendment requirements of any death sentence: that such a sentence be

individualized and that such a sentence be reliable. Caldwell, 472 U.S. at 340-41.

From the very start of the trial the role of the jury in sentencing was trivialized in a steady stream of misstatements (R. 36-158). What was emphasized to Mr. Hildwin's jury was not, as required, that the jury's sentencing role is integral, central and critical.

By far, the most grievous comments and instructions diminishing the jury's sense of responsibility in violation of Caldwell and the eighth amendment came from the court, itself, during the penalty phase. In the court's opening comments of the penalty phase, the Court stated:

> THE COURT: Ladies and gentlemen of the jury, you found the defendant guilty of first degree murder. The punishment for this crime is either death by -- either death or life imprisonment without the possibility of parole for 25 years. The final decision as to what punishment shall be imposed rests solely with the judge. However, the law requires that you the jury render to the Court an advisory sentence as to what punishment should be imposed upon the defendant.

(R. 1016-17)(emphasis added).

The most serious trivialization of the jury's proper role, however, was in the jury instructions. Instead of the jury being told that its sentencing role is integral, central and critical, they were told that the final decision was the judge's responsibility:

> THE COURT: Ladies and gentlemen of the jury, it's now your duty to advise the Court as to what punishment should be imposed upon the

> defendant for his crime of murder in the first degree. As you have been told, the final decision as to what punishment shall be imposed is the ((responsibility of the judge.))
>
> However, it's your duty to follow the law that will now be given to you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.
>
> Your advisory sentence should be based on the evidence as you heard while trying the guilt or innocence of the defendant and the evidence that's been presented to you in these proceedings.

(R. 1120-21)(emphasis added).

Therefore, rather than stressing that the jury's sentencing decision is integral and will stand unless patently unreasonable, the court and the prosecutor stressed to Mr. Hildwin's jury that the "final decision" belonged to the court.

These instructions, and the trial judge's earlier comments, like those instructions in Mann, "expressly put the court's imprimatur on the prosecutor's previous misleading statements." Mann, 844 F.2d at 1458 ("[A]s you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge." [Emphasis in original]).

In a capital case, the jurors are placed "in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice . . . Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an

intolerable danger that the jury will in fact choose to minimize the importance of its role." Caldwell, 472 U.S. at 332-33 (emphasis supplied). When we understand these factors, we can appreciate why comments and instructions such as those provided to Mr. Hildwin's jurors, and condemned in Mann, served to diminish their sense of responsibility, and why the State cannot show that the comments at issue had "no effect" on their deliberations. Caldwell, 472 U.S. at 340-41.

Under Florida's capital statute, the jury has the primary responsibility for sentencing. Its decision is entitled to great weight. McCampbell v. State, 421 So.2d 1072, 1075 (Fla. 1982); Espinosa v. Florida. Thus, intimations and instructions that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is free to impose whatever sentence he or she sees fit irrespective of the sentencing jury's decision, is inaccurate and is a misstatement of Florida law. See Mann, 844 F.2d at 1450-55 (discussing critical role of jury in Florida capital sentencing scheme); Espinosa. The judge's role, after all, is not that of the "sole" or "ultimate" sentencer. Espinosa ("Florida has essentially split the weighing process in two"). The jury's sentencing verdict may be overturned by the judge only if the facts are "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). Mr. Hildwin's jury, however, was led to believe that its determination meant very little and that the judge was free to impose whatever sentence he wished.

In Caldwell, the Court held "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death lies elsewhere," and that therefore prosecutorial arguments which tended to diminish the role and sense of responsibility of a capital sentencing jury violated the Eighth Amendment. Id., 472 U.S. at 328-29. Because the "view of its role in the capital sentencing procedure" imparted to the jury by the improper and misleading argument was "fundamentally incompatible with the eighth amendment's heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case,'" the Court vacated Caldwell's death sentence. Caldwell, 472 U.S. at 340. The same vice is apparent in Mr. Hildwin's case, and Mr. Hildwin is entitled to the same relief.

The constitutional vice condemned by the Caldwell Court is not only the substantial unreliability that comments such as the ones at issue in Mr. Hildwin's case inject into the capital sentencing proceeding. There is also the unacceptable risk of bias in favor of the death penalty which such "state-induced suggestions that the sentencing jury may shift its sense of responsibility" creates. Id. at 330. A jury which is unconvinced that death is the appropriate punishment might nevertheless vote to impose death as an expression of its "extreme disapproval of the defendant's acts" if it holds the mistaken belief that its deliberate error will be corrected by

the 'ultimate' sentencer, and is thus more likely to impose death regardless of the presence of circumstances calling for a lesser sentence. See Caldwell, 472 U.S. at 331-32. Moreover, a jury "confronted with the truly awesome responsibility of decreeing death for a fellow human," McGautha v. California, 412 U.S. 183, 208 (1971), might find a diminution of its role and responsibility for sentencing attractive. Caldwell, 472 U.S. at 332-33. As the Caldwell Court explained:

> In evaluating the prejudicial effect of the prosecutor's argument, we must also recognize that the argument offers jurors a view of their role which might frequently be highly attractive. A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion. Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize its role. Indeed, one could easily imagine that in a case in which the jury is divided on the proper sentence, the presence of appellate review [or judge sentencing] could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in.

Id. at 332-33 (emphasis supplied). When this occurs, as it did in this case, the unconstitutionally unacceptable risks of unreliability and bias in favor of the death penalty also unconstitutionally infect the trial judge's sentence. The

Supreme Court in Espinosa v. Florida held, "if a weighing states decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances." Id. The Court reasoned:

> It is true that, in this case, the trial court did not directly weigh any invalid aggravating circumstances. But, we must presume that the jury did so, [], just as we must further presume that the trial court followed Florida law, [], and gave "great weight" to the resultant recommendation. By giving "great weight" to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found. This kind of indirect weighing of an invalid aggravating factor creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor, [], and the result, therefore, was error.

Id. [citations omitted]. By the same logical process, when comments and instructions diminishing the role and responsibility of the jury create a constitutionally unacceptable risk of unreliability and bias in favor of the death penalty directly affecting the jury's decision, then the trial court's decision is also indirectly infected with the error because the court gives great weight to the jury's recommendation. Cf. Espinosa. Thus, Eighth Amendment error occurs at both levels of Florida's sentencing scheme.

Caldwell and Mann teach that given comments such as those provided to Mr. Hildwin's capital jury the State must demonstrate that the statements at issue had "no effect" on the jury's sentencing verdict. Caldwell, at 341. This the State cannot do. Here the significance of the jury's role was minimized and the

comments at issue created a danger of bias in favor of the death penalty. Had the jurors not been misled and misinformed as to their proper role, had their sense of responsibility not been minimized, and had they consequently voted for life, such a verdict, for a number of reasons, could not have been overridden -- for example, the evidence of non-statutory mitigation in the record provided more than a "reasonable basis" which would have precluded an override. See Hall v. State, 541 So.2d 1125 (Fla. 1989); Brookings v. State, 495 So.2d 135 (Fla. 1986); McCampbell v. State, 421 So.2d 1072 (Fla. 1982). The Caldwell violations here assuredly had an effect on the jurors, an error infecting the sentencing judge as well because of the great weight he must give the juror's verdict. Espinosa. This case, therefore, presents the very danger discussed in Caldwell: that the jury may have voted for death because of the misinformation it had received concerning is role and responsibility. This case also presents a classic example of a case where Caldwell error cannot be deemed to have had "no effect" on the verdict or upon the court's sentence. Espinosa.

Longstanding Florida case law established the basis for raising this issue on appeal. See Pait v. State, 112 So. 2d 380, 383-84 (Fla. 1959)(holding that misinforming the jury of its role in a capital case constituted reversible error); Breedlove v. State, 413 So. 2d 1 (Fla. 1982). Appellate counsel had no strategic reason for failing to raise this issue. It resulted from ignorance of the law and thus constituted prejudicially

deficient performance. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). Counsel's failure was deficient performance under Atkins v. Attorney General, 932 F.2d 1430 (11th Cir. 1991), and Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990), which clearly prejudiced Mr. Hildwin. No tactical decision can be ascribed to counsel's errors. Counsel's failure could only have been based upon ignorance of the law, and deprived Mr. Hildwin of the effective assistance of counsel and his Sixth and Eighth Amendment rights. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). Mr. Hildwin was deprived of the effective assistance of appellate counsel. Accordingly, Mr. Hildwin was denied his Sixth, Eighth and Fourteenth Amendment rights.

CONCLUSION

For all of the reasons discussed herein, Mr. Hildwin respectfully requests that the Court grant habeas corpus relief.

I HEREBY CERTIFY that a true copy of the foregoing Supplement to Petition for Extraordinary Relief and for a Writ of Habeas Corpus has been furnished by United States Mail, first class postage prepaid, to all counsel of record on February 18, 1994.

MICHAEL J. MINERVA
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