IN THE

SUPREME COURT OF FLORIDA

No. 74,269

JAMES WILLIAM HAMBLEN,

Petitioner,

v.

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

Respondent.

_____/

REPLY TO STATE'S RESPONSE TO
PETITION FOR WRIT OF HABEAS CORPUS

INTRODUCTION

Mr. Hamblen's petition discussed why he is entitled to habeas corpus relief, because the trial court did not conduct a sufficient Faretta hearing, and because that court applied a presumption of death, and considered impermissible victim impact information, and because this Court did not follow its settled standard of review as set forth in Elledge v. State, on direct appeal.

In its response, the State has said little to overcome Mr. Hamblen's entitlement to relief. Each of the State's arguments will be addressed below. First, Mr. Hamblen would respond to the State's demand of "strict proof" with regard to each of Mr. Hamblen's claims for relief.

RESPONSE TO DEMAND

Mr. Hamblen submitted, with his petition, the affidavits of the qualified psychologist who evaluated him at the time of the initial proceedings, psychological reports and the report of a psychiatrist, and a letter from his former defense attorney. It is proper for this Court to consider such materials in aid of the

exercise of its habeas corpus jurisdiction. See Fla. R. App. P. 9.110(e)(h)(i)(Committee Note)("The appendix [to a habeas corpus petition] should contain any documents which support the allegations of fact contained in the petition.") This Court has considered such matters in previous habeas corpus actions.

These affidavits are proof of the claims in which they are cited. The State, apparently conceding the need for evidentiary resolution, has demanded strict "proof". Mr. Hamblen agrees and also urges that he be allowed the opportunity to present live testimony in support of his claim. Therefore, Mr. Hamblen respectfully requests that this Court relinquish jurisdiction and remand this case to the trial court for the needed evidentiary development regarding the issues raised in his petition for habeas corpus relief. See Nixon v. State, No. _____ (Fla. 1989) (remand for evidentiary development; direct appeal); Preston v. Dugger, No. _____ (Fla. 1989)(remand to trial court; habeas petition).

REPLY ARGUMENT

CLAIM I

MR. HAMBLEN IS ENTITLED TO RELIEF UNDER FARETTA V. CALIFORNIA.

The State's response to this claim is noticeably lacking in references to the record. While making the bald statement that "the record is replete with evidence that the court as well as the prosecutor in this case meticulously attempted to protect every right of Mr. Hamblen," the State fails to cite any such instance. This omission is not surprising given what the record actually reflects.

Further, it is well established that the focus is not on the advise given by the court, but the understanding held by the defendant. Fitzpatrick v. Wainwright, 800 F.2d 1057, 1065 (11th Cir. 1986). In Fitzpatrick, a waiver of counsel was found valid because the court was able to discern from the record that the

defendant understood what he was doing. The Eleventh Circuit has recognized that Fitzpatrick represents a "rare case" where the absence of a proper hearing is not fatal. In the normal case, the Eleventh Circuit Court of Appeals "has held that after an unequivocal assertion of his right to proceed pro se, the court must hold a hearing 'to make sure that the accused understands the risks of proceeding pro se.' United States v. Chaney, 662 F.2d 1148, 1152 (5th Cir. Unit B 1981).[4]" Strozier v. Newsome, ___ F.2d ___, slip op. at __ (11th Cir., April 27, 1989). Footnote 4 sets out the following:

> The clear way to avoid the dilemma created by Faretta is for the trial court to conduct a hearing on the record in which the trial judge ensures that the decisions to proceed pro se is being made knowingly and voluntarily. The judge should do more than ask pro forma questions; he should explain the difficulties inherent in any criminal trial, including the importance of evidentiary rules. By engaging in this inquiry on the record, the trial court will safeguard the right to counsel by ensuring that all waivers are made knowingly and voluntarily. Additionally, the court will safeguard the integrity of the judiciary by removing a defendant's ability to manipulate the system and ensure the reversal of his convictions. Finally, making a record of the wavier hearing will assist in appellate review. It may be that a trial judge is satisfied, through his numerous contacts with a defendant, that the waiver of counsel is valid. However, a reviewing court may not assume from a silent record that a waiver is valid. Since a fundamental right is at stake--the right to counsel--trial judges should take the time to inquire into the voluntariness and intelligence of the waiver. Doing so will safeguard the right and protect the judicial system from manipulation.

In Strozier, the court noted that, under the factors set out in Fitzpatrick, the record supported, to some extent, the validity of the waiver, Strozier at 2196, while in other respects the record was ambiguous. Id., 2197. That court's conclusion was that before a decision could be made on the voluntariness and intelligence of the waiver of counsel, a more accurate record must be made. Thus, the case was remanded to the lower court for the needed evidentiary development.

Likewise, here the record is ambiguous. While there are several instances of the court giving advice to Mr. Hamblen, the record is devoid of any but pro forma responses which do not reliably indicate what Mr. Hamblen's understanding was. The State denies this, but cites to nowhere in the record where Mr. Hamblen responded in anything other than a pro forma manner.

In this case there is an additional factor not present in Strozier or Fitzpatrick: James Hamblen was and is mentally ill. See Report of Dr. McMahon; Report of Dr. Dee (appended to petition for writ of habeas corpus). His mental illness was a central issue the court should have properly assessed before allowing any "waivers". The court had evidence indicating this defendant's mental illness at the time it accepted the waivers. It nevertheless failed to request that the mental health experts assess petitioner's capacity to formulate a knowing, intelligent, and rational waiver, i.e., a waiver not resulting from mental illness. By its terms Faretta and its progeny establish -- a higher and more exacting standard for "competency to waive counsel" than that required for competency to proceed with counsel. Whether Mr. Hamblen met that standard was never assessed -- the experts were never asked to evaluate this issue. They should have been, as the affidavits submitted with Mr. Hamblen's petition demonstrate.

The State argues that "specific inquiry [was made] as to Hamblen's mental status" (Response, 8), but fails to note that no evaluation was ever made of Mr. Hamblen's competency to waive counsel. As noted, this inquiry is quite different than the inquiry into competency to stand trial with counsel. The affidavit of Dr. McMahon, the psychologist appointed at the time of the original proceedings (appended to Mr. Hamblen's petition as Appendix 1), explains that she originally found Mr. Hamblen competent to stand trial with the assistance of counsel, and that his capacity to proceed without counsel is a separate issue that needs to be evaluated separately. Dr. Dee (Appendix 2) concurs

with this analysis in his affidavit. The issue, however, was never assessed at the time.

Finally, the State argues that Mr. Hamblen "adhered to the rules of procedure set forth by the trial court" (Response, 9) but ignores the facts: for example, Mr. Hamblen did not know how to file a motion with the court (R. Vol. IV, p. 52); the court did not believe Mr. Hamblen was able to draft a waiver form and so requested the State provide him with one (R. Vol. IV, p. 57); the court itself had questions about Mr. Hamblen's capacity to undertake these waivers (R. Vol. IV, p. 57).

The record, at best, is ambiguous. Mr. Hamblen's ability to waive his absolute right to counsel should have been adequately assessed prior to the time of his guilty plea. This was not done. The violation of the right to counsel is not subject to a harmless error analysis. Fitzpatrick, supra.

CLAIM II

THIS COURT ERRED UNDER THE ELLEDGE STANDARD

The State cites a string of cases for the proposition that this Court did not err in failing to reverse Mr. Hamblen's sentence of death after striking one of the aggravating circumstances found by the circuit court. This list is impressive until the cases are read. It appears that a majority of these cases cited by the State involve five to seven aggravating circumstances, with one generally found improper by this Court, and absolutely no mitigating circumstances found by the circuit court. Two other cases cited by the State were actually reversed because aggravating circumstances were improperly found, or because mitigating circumstances were analyzed under an improper standard by the circuit court.

Given the record in this case, that only three aggravating circumstances were found, and that mitigating circumstances

appeared in the record,[1] the striking of one of the aggravators should have resulted in Mr. Hamblen's case being remanded for resentencing. Nothing cited by the State demonstrates otherwise. Indeed, this Court struck the key aggravator upon which the lower court relied. This Court is not a trial court: it should not reweigh. Reweighing by the trial court is what the law requires, Elledge, supra, and reweighing by the trial court is what the court should have ordered. The Court fundamentally erred in overlooking this standard, an error which can be explained, at least in part, by appellate counsel's failure to properly present these matters for the Court's review. Habeas corpus relief is proper.

CLAIM III

MR. HAMBLEN'S DEATH SENTENCE MUST BE REVERSED BECAUSE OF THE PRESUMPTION OF DEATH APPLIED BY THE CIRCUIT COURT.

The State's argument on this claim is unpersuasive. It has stated that reliance on Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(in banc), Blystone v. Pennsylvania, 109 S. Ct. 1567 (1989) and Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988), is misplaced, but gives no reason for that statement. The Jackson standard has been acknowledged in the past by members of this Court, as the Jackson court noted:

> In this case, however, the jury was instructed that death was presumed to be the appropriate penalty. Justice McDonald of the Florida Supreme Court has astutely pointed out the problems created when such a presumption is relied upon by the sentencing authority:
>
> > I would also like to comment on the reference in the majority opinion to State v. Dixon, 283 So.2d 1 (Fla.1973), cert. denied, 416 U.S. 943 [94 S.Ct. 1950, 40 L.Ed.2d 295] (1974). I do not

---

[1]As noted in Claim III, infra, the circuit court's order is ambiguous as to what mitigation was found, although it notes a general finding of nonstatutory mitigation "outweighed" by the aggravating factors, including the one that this Court struck.

> embrace the language from that opinion recited in this majority opinion as "when one or more of the aggravating circumstances is found death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances." If that language is restricted to the role of this Court in reviewing death sentences imposed by the trial court, it is acceptable. But I fear that it is construed by the trial judges as a directive to impose the death penalty if an aggravating factor exists that is not clearly overridden by a statutory mitigating factor. The death sentence is proper in many cases. But it is the most severe and final penalty of all and should, in my judgment, be exercised with extreme care. I am unwilling to say that a trial judge should presume death to be the proper sentence simply because a statutory aggravating factor exists that has not been overcome by a mitigating factor.
>
> Randolph v. State, No. 54-869 (Fla. Nov. 10, 1983)(LEXIS, States library, Fla. file) (McDonald, J., dissenting), withdrawn, 463 So.2d 186 (Fla. 1984), cert. denied, 473 U.S. 907, 105 S.Ct. 3533, 87 L.Ed.2d 656 (1985).
>
> Such a presumption, if employed at the level of the sentencer, vitiates the individualized sentencing determination required by the Eighth Amendment.

Jackson, 837 F.2d at 1473 (emphasis added). That standard was not applied in this case. This Court fundamentally erred in its disposition on direct appeal. Appellate counsel was ineffective in failing to urge the claim. Relief is appropriate.

At the very least, Mr. Hamblen's execution should be stayed until Blystone is decided by the United States Supreme Court. That case could have direct application to Mr. Hamblen's sentence.

CLAIM IV

IMPERMISSIBLE VICTIM IMPACT INFORMATION WAS CONSIDERED BY THE SENTENCING COURT, AND RESENTENCING IS MANDATED.

The State's argument on this claim is essentially that the circuit court did not consider any of the impermissible victim impact information presented. While the judge did state that he

was not going to consider the box of material that he had reviewed concerning the victim, he said no such thing about the victim's husband's recommendation in the Pre-Sentence Investigation.

The sentencing court was also provided, by the state, with copies of letters from relatives of the victim. (R. Vol. V, p. 79-80). While these letters were not made part of the record on appeal, counsel did find them in the State Attorney's file, and has appended them hereto. These letters are identical to the type of victim impact information condemned in Booth v. Maryland, 107 S. Ct. 2529 (1987). The failure to mention this material, and the material referred to above in the court's sentencing order does not mean that it was not considered.

Reliance by the State on Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981), is misplaced. That case predates Booth, supra, by six years. The United States Supreme Court recognized the risk that impermissible information might have upon a sentencing jury. The same has been recognized before a sentencing judge. Scull v. State, Slip. Op. No. 68,919 (Fla. Sept. 8, 1988). To agree with the State would eviserate the constitutional infirmities cured by Booth. Appellate counsel rendered ineffective assistance in failing to present the claim. Relief is now proper.

WHEREFORE, because the proceedings resulting in James William Hamblen's capital conviction and sentence of death violated the fifth, sixth, eighth and fourteenth amendments, habeas corpus relief is proper, and the Writ should issue.

RESPECTFULLY SUBMITTED,

LARRY HELM SPALDING
Capital Collateral Representative

BILLY H. NOLAS
JULIE D. NAYLOR
FRANCISCO RIVERA

OFFICE OF THE CAPITAL
COLLATERAL REPRESENTATIVE
1533 South Monroe Street
Tallahassee, FL 32301
(904) 487-4376

By: Julie D. Naylor
Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. MAIL/HAND DELIVERY, to Carolyn Snurkowski, Assistant Attorney General, Department of Legal Affairs, Magnolia Park Courtyard, 111-29 North Magnolia Drive, Tallahassee, Florida 32301, this 5 day of July, 1989.

Julie D. Naylor
Attorney