IN THE SUPREME COURT OF FLORIDA

NO. 73931

ROY ALLEN HARICH,

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 APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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EMERGENCY:
Death Warrant
Signed for March 29
through April 5, 1989.
Execution Scheduled for
7:00 A.M., March 30, 1989

I.

SUMMARY OF CLAIMS

Petitioner, Roy Allen Harich, brings this action for a writ of habeas corpus to correct capital sentencing errors of constitutional dimension.

As demonstrated by intervening changes in law announced by this Court and the United States Supreme Court, petitioner was sentenced to death on the basis of two constitutionally defective aggravating circumstances. First, as this Court's decision in Roger v. State, 511 So. 2d 526, 533 (Fla. 1987) makes clear, although the sentencing court found the "cold, calculated and premeditated" aggravvating circumstance, petitioner most assuredly did not murder the deceased victim following "a carefully planned or prearranged design." This factor was invalidly applied. Second, as Maynard v. Cartwright, 106 S. Ct. 1853 (1988) makes clear, the failure of any court to properly define and to apply a constitutionally required limiting construction to the "heinous, atrocious and cruel" and "cold, calculated, premeditated" aggravating factors renders those aggravating circumstances defective in petitioner's case. If either of these aggravators was constitutionally defective, petitioner is entitled to a resentencing. See Nibert v. State, 508 So. 2d 1 (Fla. 1987).

Moreover, during the course of the proceedings resulting in petitioner's sentence of death, the burden was unconstitutionally shifted to petitioner on the central question of whether he should live or die. This violated the eighth amendment, abrogated constitutional principles which would normally protect even a misdemeanant, and restricted the sentencer's consideration of the mitigating evidence in the record. On March 27, 1989, the United States Supreme Court granted certiorari to resolve this very eighth amendment issue. See Blystone v. Pennsylvania, 88-6222. As discussed below, a stay of execution in order to afford

Mr. Harich full and fair resolution of his claim would be appropriate.

II.

THIS COURT HAS THE JURISDICTION TO ENTERTAIN THIS PETITION, ENTER A STAY OF EXECUTION, AND GRANT HABEAS CORPUS RELIEF

Petitioner raises constitutional issues which directly concern the appellate review process and the legality of his sentence of death. Smith v. State, 400 So. 2d 956, 960 (Fla. 1981); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); see also Johnson v. Wainwright, 498 So. 2d 938 (Fla. 1986); Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985).

The Supreme Court of Florida has jurisdiction pursuant to Fla. R. App. P. 9.100(a), Fla. R. App. P. 9.030(a)(3) and Fla. Const., Art. V, Sec. 3(b)(9), to review errors that prejudicially deny fundamental constitutional rights. This action is predicated upon such errors and upon substantial changes in the law. See, e.g., Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987).

This Court has consistently exercised its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital trial and sentencing proceedings. Fundamental constitutional error predicated on significant, fundamental, and retroactive changes in constitutional law is presented in this action. Petitioner's claims are of the type classically considered by this Court pursuant to its habeas corpus jurisdiction. Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977); Wilson v. Wainwright, 474 So. 2d at 1165; Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984); 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).

III.

REQUEST FOR STAY OF EXECUTION

Petitioner requests that the Court stay his execution, presently scheduled for March 30, 1989. A stay is warranted because petitioner presents meritorious constitutional claims. See Lightbourne v. Dugger, No. 73,609 (Fla., Jan. 31, 1989); Marek v. Dugger, No. 73,175 (Fla., Nov. 8, 1988); Gore v. Dugger, No. 72,202 (Fla., Apr. 28, 1988); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987). See also, Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987)(granting stay of execution and habeas corpus relief); Kennedy v. Wainwright, 483 So. 2d 424, 426 (Fla.), cert. denied, 107 S. Ct. 291 (1986). Cf. State v. Sireci, 502 So. 2d 1221 (Fla. 1987); State v. Crews, 477 So. 2d 984 (Fla. 1985).

IV.

CLAIMS FOR RELIEF

Petitioner asserts that his sentence of death stands in violation of 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 below.

CLAIM I

THE PENALTY PHASE JURY INSTRUCTIONS SHIFTING THE BURDEN TO PETITIONER TO PROVE THAT DEATH WAS INAPPROPRIATE VIOLATED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS AND DENIED PETITIONER HIS RIGHTS TO AN INDIVIDUALIZED AND RELIABLE CAPITAL SENTENCING DETERMINATION, CONTRARY TO MULLANEY V. WILBUR, 421 U.S. 684 (1975), MILLS V. MARYLAND, 108 S. CT. 1860 (1988), AND ADAMSON V. RICKETTS, 865 F.2d 1011, (9TH CIR. 1988)(EN BANC).

When Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), was pending certiorari review before the United States Supreme Court, this Honorable Court recognized that Hitchcock presented issues

which would drastically alter the standard of review which this Court had been applying to claims of error in Florida capital sentencing proceedings. Accordingly, during the pendency of Hitchcock, this Honorable Court did not hesitate to stay the execution of petitioners presenting similar claims of relief. See Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987).[1]

On March 27, 1989, the United States Supreme Court granted certiorari review in Blystone v. Pennsylvania, 88-6222, in order to determine whether the eighth amendment was violated by a Pennsylvania capital sentencing proceeding in which the jurors were informed that death would be the appropriate penalty unless the petitioner was able to show that the mitigating circumstances proffered overcame the aggravating circumstances. The petitioner in Blystone asserted that the proceeding violated his rights (under Lockett v. Ohio and Hitchcock v. Dugger) to an individualized and reliable capital sentencing determination because the mandatory nature of the statute restricted the jury's full consideration of mitigating evidence. See Petition for Writ of Certiorari, Blystone, supra. (The relevant portions of the Blystone certiorari petition are quoted below.)

Petitioner herein presents the same challenge to the proceedings actually conducted in his case. Although this Court has rejected similar claims in the past, see Jackson v. Wainwright, 421 So. 2d 1385 (Fla. 1982), Blystone presents an

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[1]In Riley, a successive post-conviction action, the petitioner urged the court to stay his then-scheduled execution in order to afford him full and fair review of the same issue pending before the United States Supreme Court in Hitchcock v. Dugger. In his petition, Mr. Riley quoted at length from the certiorari petition in Hitchcock. The showing made by the petitioner in Riley was sufficient to demonstrate that Hitchcock would significantly affect his case, and this Court therefore stayed the petitioner's execution. As discussed below, Mr. Harich herein shows that Blystone v. Pennsylvania, 88-6222 (March 27, 1989)(granting certiorari review), will significantly affect his case, and therefore that he is entitled to the same relief as Mr. Riley.

issue which is directly relevant to the disposition of petitioner's claim and which, like Hitchcock, will drastically alter this Court's previous analysis. As in Riley, a stay of execution is appropriate here.

At the penalty phase of petitioner's trial, prosecutorial argument and judicial instructions informed the jury that death was the appropriate sentence unless "sufficient mitigating circumstances exist that outweigh the aggravating circumstances" (R. 859, 914). Such instructions, shifting the burden of proving that life is the appropriate sentence to the defendant, violate the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), as the Court of Appeals for the Ninth Circuit recently held in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(en banc). In Blystone, supra, the United States Supreme Court granted certiorari review to address a similar challenge. There, as here, the proceedings actually conducted created a mandatory presumption of death and restricted the jurors' "full discretion," Petition for Writ of Certiorari, Blystone, supra, in considering mitigation and in assessing whether death was the appropriate penalty. This violated Mr. Harich's rights to an individualized and reliable capital sentencing determination. As the relevant portions of the Blystone petition explained:

> II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER [WHETHER] THE MANDATORY NATURE OF THE PENNSYLVANIA DEATH PENALTY STATUTE RENDERS SAID STATUTE UNCONSTITUTIONAL UNDER [THE] UNITED STATES CONSTITUTION BECAUSE IT IMPROPERLY LIMITS THE FULL DISCRETION THE SENTENCER MUST HAVE IN DECIDING THE APPROPRIATE PENALTY.
>
> The decisions of this Court in the capital context have demonstrated a commitment to the principle that the decision to impose the death penalty reflect an individualized assessment of the appropriateness of death for the particular crime and the particular defendant. The principal (sic), that such punishment be directly related to the personal culpability of a criminal defendant, is the corner-stone of this Court's decisions in Lockett vs. Ohio, 438 U.S. 586 (1978), Eddings vs. Oklahoma, 455 U.S. 104 (1982),

and Hitchcock vs. Dugger, 107 S.Ct. 1821 (1987). The principals (sic) have also lead this Court to invalid[ate] mandatory death penalty schemes because they fail to give the jury the opportunity to consider the character and individual circumstances of a defendant prior to the imposition of a death sentence. Gregg vs. Georgia, 428 U.S. 153 (1976).

The Petitioner concedes that the decisions of this Court have allowed the states to structure or guide the jury's determination of the appropriate penalty. This guiding or channeling function has been approved most recently in Franklin vs. Lynaugh, 108 S.Ct. 2320 (1988). The Petitioner asserts that the mandatory nature of the Pennsylvania Death Penalty Statute [goes] beyond said permissible guiding and improperly limits the full discretion the sentencer must constitutionally have in deciding the appropriate penalty.

Pennsylvania Death Penalty Statute provides that if the sentencer finds that an aggravating circumstance exists, and no mitigating circumstance exist, or if the sentencer finds that aggravating circumstances outweigh mitigating circumstances, the verdict must be a sentence of death. 42 Pa. Const. Stat. S9711 (c) (iv) (Emphasis added). In the instance case, the trial court instructed the jury in accordance with this statutory command (A-151-56).

Petition for Writ of Certiorari, Blystone v. Pennsylvania, pp. 13-14 (appended hereto).

A similar flaw was found by the en banc Ninth Circuit in Adamson, supra. There, the Court of Appeals held that because the Arizona death penalty statute "imposes a presumption of death on the defendant," the statute deprives a capital defendant of his eighth amendment rights to an individualized and reliable capital sentencing determination:

> We also hold A.R.S. sec. 13-703 unconstitutional on its face, to the extent that it imposes a presumption of death on the defendant. Under the statute, once any single statutory aggravating circumstance has been established, the defendant must not only establish the existence of a mitigating circumstance, but must also bear the risk of nonpersuasion that any mitigating circumstance will not outweigh the aggravating circumstance(s). See Gretzler 135 Ariz. at 54, 659 P.2d at 13 (A.R.S. sec. 13-703(E) requires that court find mitigating circumstances outweigh aggravating

circumstances in order to impose life sentence). The relevant clause in the statute--"sufficiently substantial to call for leniency"--thus imposes a presumption of death once the court has found the existence of any single statutory aggravating circumstance.

Recently, the Eleventh Circuit held in Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988), that a presumption of death violates the Eighth Amendment. The trial judge, applying Florida's death penalty statute, had instructed the jury to presume that death was to be recommended as the appropriate penalty if the mitigating circumstances did not outweigh the aggravating circumstances. Examining the jury instructions, the Eleventh Circuit held that a presumption that death is the appropriate sentence impermissibly "tilts the scales by which the [sentencer] is to balance aggravating and mitigating circumstances in favor of the state." Id. at 1474. The court further held that a presumption of death "if employed at the level of the sentencer, vitiates the individualized sentencing determination required by the Eighth Amendment." Id. at 1473.

The Constitution "requires consideration of the character and record of the individual offender and the circumstances of the particular offense," Woodson, 428 U.S. at 304, because the punishment of death is "unique in its severity and irrevocability," Gregg, 428 U.S. at 187, and because there is "fundamental respect for humanity underlying the Eighth Amendment." Woodson, 428 U.S. at 304 (citation omitted). A defendant facing the possibility of death has the right to an assessment of the appropriateness of death as a penalty for the crime the person was convicted of. Thus, the Supreme Court has held that statutory schemes which lack an individualized evaluation, thereby functioning to impose a mandatory death penalty, are unconstitutional. See, e.g., Sumner v. Shuman, 107 S.Ct. 2716, 2723 (1987); Roberts, 428 U.S. at 332-33; see also Poulos, Mandatory Capital Punishment, 28 Ariz. L. Rev. at 232 ("In simple terms, the cruel and unusual punishments clause requires individualized sentencing for capital punishment, and mandatory death penalty statutes by definition reject that very idea.").

In addition to precluding individualized sentencing, a presumption of death conflicts with the requirement that a sentencer have discretion when faced with the ultimate determination of what constitutes the appropriate penalty. See Comment, Deadly Mistakes: Harmless Error in Capital Sentencing, 54 U. Chi. L. Rev. 740, 754

(1987)("The sentencer's authority to dispense mercy . . . ensures that the punishment fits the individual circumstances of the case and reflects society's interests.").

Arizona Revised Statute sec. 13-703(E) reads, in relevant part: "the court . . . shall impose a sentence of death if the court finds one or more of the aggravating circumstances . . . and that there are no mitigating circumstances sufficiently substantial to call for leniency." Thus, the Arizona statute presumes that death is the appropriate penalty unless the defendant can sufficiently overcome this presumption with mitigating evidence. In imposing this presumption, the statute precludes the individualized sentencing required by the Constitution. It also removes the sentencing judge's discretion by requiring the judge to sentence the defendant to death if the defendant fails to establish mitigating circumstances by the requisite evidentiary standard, which outweigh the aggravating circumstances. See Arizona v. Rumsey, 467 U.S. 203, 210 (19840("death must be imposed if there is one aggravating circumstance and no mitigating circumstance sufficiently substantial to call for leniency"); State v. Jordan, 137 Ariz. 504, 508, 672 P.2d 169, 173 (1983)("Jordan III")(sec. 13-703 requires the death penalty if no mitigating circumstances exist).

The State relies on the holdings of its courts that the statute's assignment of the burden of proof does not violate the Constitution. The Arizona Supreme Court reasons that "[o]nce the defendant has been found guilty beyond a reasonable doubt, due process is not offended by requiring the defendant to establish mitigating circumstances." Richmond, 136 Ariz. at 316, 666 P.2d at 61. Yet this reasoning falls short of the real issue--that is, whether the presumption in favor of death that arises from requiring that the defendant prove that mitigating circumstances outweigh aggravating circumstances, offends federal due process by effectively mandating death.

In addition, while acknowledging that A.R.S. sec. 13-703 places the burden on the defendant to prove the existence of mitigating circumstances which would show that person's situation merits leniency, State v. Poland, 144 Ariz. 388, 406, 698 P.2d 183, 201 (1985) aff'd, 476 U.S. 147 (1986), the State suggests that its statute does not violate the Eighth Amendment because subsection (E) requires the court to balance the aggravating against the mitigating circumstances before it may conclude that death is the appropriate penalty. While the statute does require balancing, it nonetheless deprives the sentencer of the

> discretion mandated by the Constitution's individualized sentencing requirement. This is because in situations where the mitigating and aggravating circumstances are in balance, or, where the mitigating circumstances give the court reservation but still fall below the weight of the aggravating circumstances, the statute bars the court from imposing a sentence less than death and thus precludes the individualized sentencing required by the Constitution. Thus, the presumption can preclude individualized sentencing as it can operate to mandate a death sentence, and we note that "[p]resumptions in the context of criminal proceedings have traditionally been viewed as constitutionally suspect." Jackson, 837 F.2d at 1474 (citing Francis and Sandstrom).
>
> Thus, we hold that the Arizona statute, which imposes a presumption of death, is unconstitutional as a matter of law.

Adamson, 865 F.2d at 1041-44(footnotes omitted)(emphasis in original).

As in Adamson, petitioner's sentencing jury was instructed:

> The State and defendant may now present evidence relative to the nature of the crime and the character of the defendant.
>
> You are instructed that this evidence, when considered with the evidence that you have already heard and received, is presented in order that you may determine, first, whether there is sufficient aggravating circumstances exist [sic] that would justify the imposition of the death penalty. And, second, whether there were mitigating circumstances sufficient to outweigh the aggravating circumstances, if any.

(R. 755).

The prosecutor reinforced this unconstitutional instruction in his closing argument:

> They are referred to, and the Court will refer to them, as aggravating and mitigating circumstances. And it necessary for you to consider and weigh those circumstances, both the aggravating circumstances and the mitigating circumstances, inn reaching your verdict.
>
> If the mitigating circumstances outweigh the aggravating circumstances, then your verdict should be a recommendation of life imprisonment.

(R. 859).

Immediately before the jury retired to deliberate, the judge compounded this constitutional error yet again:

> THE COURT: Ladies and gentlement of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the Defendant for his crime of first-degree murder. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the Judge; however, it is your duty to follow the law which will now be given to you by the Court and rend to the Court an advisory sentence, based up 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 and aggravating circumstances found to exist.

(R. 914).

Petitioner thus bore the burden of persuasion on the central sentencing issue of whether he should live or die. This unconstitutional burden-shifting violated Mr. Harich's due process and eighth amendment rights. See Mullaney v. Wilbur, 421 U.S. 684 (1975). See also, Sandstrom v. Montana, 442 U.S. 510 (1979); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988).

Moreover, the application of this unconstitutional standard at the sentencing phase violated petitioner's rights to a fundamentally fair, reliable, and individualized capital sentencing determination -- one which is not infected by arbitrary, misleading or capricious factors. See Adamson, supra; Jackson, supra. Consideration of the mitigating factors was restricted: such factors could not be fully considered unless they outweighed the aggravating circumstances. This violated Lockett and Hitchcock.

The focus of a jury instruction claim is on "what a reasonable juror could have understood the charge as meaning." Francis v. Franklin, 471 U.S. 307 (1985); see also Sandstrom v. Montana, 442 U.S. 510 (1979). A reasonable juror could well have understood that petitioner had the ultimate burden to prove that life was the appropriate sentence, and that only those mitigating factors which outweighed the aggravating factors were entitled to

consideration. Death was mandated in this case, unless the petitioner overcame the presumption. This violated the eighth amendment.

Indeed, the Eleventh Circuit has recognized that the express application of such a presumption of death violates eighth amendment principles:

> Presumptions in the context of criminal proceedings have traditionally been viewed as constitutionally suspect. Sandstrom v. Montana, 442 U.S. 510 (1979); Francis v. Franklin, 471 U.S. 307 (1985). When such a presumption is employed in sentencing instructions given in a capital case, the risk of infecting the jury's determination is magnified. An instruction that death is presumed to be the appropriate sentence tilts the scales by which the jury is to balance aggravating and mitigating circumstances in favor of the state.
>
> It is now clear that the state cannot restrict the mitigating evidence to be considered by the sentencing authority. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). . . . Rather than follow Florida's scheme of balancing aggravating and mitigating circumstances as described in Proffitt [v. Florida, 428 U.S. 242, 258 (1976)], the trial judge instructed the jury in such a manner as virtually to assure a sentence of death. A mandatory death penalty is constitutionally impermissible. Woodson v. North Carolina, 428 U.S. 280 (1976); see also State v. Watson, 423 So. 2d 1130 (La. 1982) (instructions which informed jury that they must return recommendation of death upon finding aggravating circumstances held unconstitutional). Similarly, the instruction given is so skewed in favor of death that it fails to channel the jury's sentencing discretion appropriately. Cf. Gregg v. Georgia, 428 U.S. 153, 189 (1976) (sentencing authority's discretion must "be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action").

Jackson v. Dugger, 837 F.2d 1469, 1474 (11th Cir. 1988). Here, the presumption was clear in the jury instructions, and a reasonable juror would likely have understood the instructions as imposing such a presumption.

In Mills v. Maryland, 108 S. Ct. 1860 (1988), the Court focused on the special danger created by improper jury instructions in a capital sentencing proceeding, instructions which, as in petitioner's case, could result in the sentencers' failure to consider factors calling for a life sentence:

> Although jury discretion must be guided appropriately by objective standards, see Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (plurality opinion), it would certainly be the height of arbitrariness to allow or require the imposition of the death penalty [when the jury's weighing process is distorted by an improper instruction]. It is beyond dispute that in a capital case "'the sentencer [may] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" Eddings v. Oklahoma, 455 U.S. 104, 110 (1982), quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) (emphasis in original). See Skipper v. South Carolina, 476 U.S. 1, 4 (1986). The corollary that "the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence'" is equally "well established." Ibid. (emphasis added), quoting Eddings, 455 U.S., at 114.

Mills, 108 S. Ct. at 1865 (footnotes omitted). Cf. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987).

In Mills, the court concluded that in the capital sentencing context, the Constitution requires resentencing unless a reviewing court can rule out the possibility that the jury's verdict rested on an improper ground:

> With respect to findings of guilt on criminal charges, the Court consistently has followed the rule that the jury's verdict must be set aside if it could be supported on one ground but not on another, and the reviewing court was uncertain which of the two grounds was relied upon by the jury in reaching the verdict. See, e.g., Yates v. United States, 354 U.S. 298, 312 (1957); Stromberg v. California, 283 U.S. 359, 367-368 (1931). In reviewing death sentences, the Court has demanded even greater certainty that the jury's conclusions rested on proper grounds. See, e.g., Lockett v. Ohio, 438 U.S., at 605 ("[T]he risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty . . . is unacceptable and incompatible with the

> commands of the Eighth and Fourteenth Amendments"); Andres v. United States, 333 U.S. 740, 752 (1948) ("That reasonable men might derive a meaning from the instructions given other than the proper meaning of [section] 567 is probable. In death cases doubts such as those presented here should be resolved in favor of the accused"); accord, Zant v. Stephens, 462 U.S. 862, 884-885 (1983). Unless we can rule out the substantial possibility that the jury may have rested its verdict on the "improper" ground, we must remand for resentencing.

Mills, 108 S. Ct. at 1866-67 (footnotes omitted).

The effects feared in Adamson and Mills are precisely the effects resulting from the burden-shifting instruction given in this case. By instructing the jury that mitigating circumstances must outweigh aggravating circumstances, the prosecution and the trial court unconstitutionally skewed petitioner's sentencing process.

In this case, the error cannot be deemed harmless. Mitigation was found by the sentencing court (see R. 1256)(finding no significant history of prior criminal activity). See Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1987)(since mitigation found by court "[w]e cannot know" whether the result would have been the same, and the error therefore cannot be deemed harmless). Additionally, significant mitigation was before the jury and court. The jury heard evidence concerning Roy Harich's good, non-violent character and reputation in the community. Mr. Harich was regarded as a law abiding citizen (R. 765, 769). His former employer explained that Mr. Harich was a satisfactory and industrious worker (R. 764) and that he would have been reemployed had he been released from jail (R. 765).

The Fire Chief of Holly Hill testified regarding Mr. Harich's work as a volunteer fireman (R. 767-773). When Mr. Harich applied to work as a volunteer at the fire department, an extensive background check was conducted and found to be satisfactory (R. 769). The Fire Chief always considered Mr. Harich a good person (R. 769) and a good fireman and he would

have hired Mr. Harich as a regular professional fireman when he completed his formal training (R. 768). Mr. Harich's performance reports at the fire department were all satisfactory (R. 772) and he was actively engaged in fighting a plague of brush fires the week before the offense (R. 770). Fire department records show that Mr. Harich was fighting fires on June 20th, 22nd, 24th and 26th of 1981 (R. 770).

The jury also heard the testimony of a correctional officer from the county jail who described Mr. Harich as a model prisoner who never caused any trouble whatsoever (R. 774). This officer testified that Mr. Harich would be a model, quiet, and well-behaved inmate and that he would make a contribution to whatever environment the Department of Corrections might place him in (R. 775). Another officer of the jail also testified that Mr. Harich would make a productive contribution as a prisoner and that he would be good and well-behaved (R. 777).

Dr. Elizabeth McMahon, a psychologist, testified at the penalty phase regarding her evaluation of Mr. Harich (R. 777-842). She found Mr. Harich to be an empathetic person who finds it difficult to be emotionally dependent on others (R. 796). When confronted with a conflict, Mr. Harich would walk away and never get into fights (R. 798). One time, when Mr. Harich was hunting and killed a squirrel, he became physically ill (R. 799). Dr. McMahon believed that Mr. Harich was telling the truth regarding the events that occured on the night in question (R. 806) and that he experienced a blackout as a result of alcohol and/or drug consumption (R. 811). To have acted as he did, Mr. Harich would have had to have been acting under the influence of extreme mental or emotional disturbance (R. 821). Dr. McMahon also testified that Mr. Harich's capacity to appreciate the criminality of his conduct or to conform to the requirements of the law was substantially impaired (R. 822), and that he suffered from emotional distress.

Mr. Harich's attorney argued to the jury the mitigating circumstances discussed above: that petitioner had no prior criminal history (R. 889) and that Dr. McMahon's testimony supported findings regarding Mr. Harich's inability to appreciate the criminality of his conduct and extreme mental and emotional distress (R. 890). The jury also heard argument from the defense that Mr. Harich's age of 22 constituted a mitigating circumstance because he was a hard-working young man who supported his family (R. 897). Other aspects of Mr. Harich's character were also valid mitigators: the evidence showed that Mr. Harich's life had been filled with service, work and family (R. 898). In fact, Mr. Harich was known to walk away from violence and, on one occasion, could not even kill a pig that he wanted to eat (R. 898). The record supported counsel's argument.

Here, the jury's consideration of these and other mitigating factors was constrained by the trial court's instructions that death was presumed unless the mitigating factors outweighed the aggravating factors. Mr. Harich's resulting sentence of death thus violated the eighth amendment. In evaluating claims of capital sentencing error, this Court has ordered resentencing when the record reflects that mitigation was before the sentencer. See Elledge, supra. Hall v. State, 14 F.L.W. 101 (Fla. 1989). Mitigation was assuredly before the sentencer in this case. See also Harich v. State, 437 So. 2d 1082, 1087(McDonald, J., dissenting). Relief is therefore appropriate in Mr. Harich's case. At a minimum, a stay of execution is proper pending the United States Supreme Court's resolution of Blystone. See Riley v. Wainwright, supra.

CLAIM II

THE MURDER FOR WHICH PETITIONER WAS CONVICTED WAS NOT COLD, CALCULATED AND PREMEDITATED AS DEFINED BY ROGERS V. STATE, AND VIOLATED MAYNARD V. CARTWRIGHT AND THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE NO LIMITING CONSTRUCTION WAS PROVIDED TO THE JURY OR EMPLOYED BY THE SENTENCING JUDGE.

Since petitioner's direct appeal and prior collateral proceedings, this Court has redefined the "cold, calculated and premeditated" aggravating circumstance. Rogers v. State, 511 So. 2d 526 (Fla. 1987). In Rogers, this Court held that "'calculation' consists of a careful plan or prearranged design." Id. at 533. As this Court recognized, Rogers represented a clear change in law from Herring v. State, 446 So. 2d 1049, 1057 (Fla.), where this Court defined the "cold calculating" aggravator in an ad hoc, rather than "all inclusive," manner. Id. at 1057. This Court's subsequent decisions have plainly recognized that Rogers is indeed a change in law requiring proof beyond a reasonable doubt of a "careful plan or prearranged design." See Mitchell v. State, 527 So. 2d 179, 182 (Fla. 1988)("We recently defined the cold, calculated and premeditated factor as requiring 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 defendant was sentenced to death based on a finding that his crime was "cold, calculated and premeditated," but neither the jury nor trial judge had the benefit of the narrowing definition set forth in Rogers, petitioner's sentence violates the eighth and fourteenth amendments. The record in this case fails to disclose a shred of evidence which could support a finding of "careful plan" or "prearranged design."

In fact, the record establishes precisely the opposite: that, as the surviving victim put it, "[defendant] played it as it came. . . . He didn't seem to have it all planned out." (R.

1175, 1191-92). Petitioner was extremely intoxicated at the time of the offense. Furthermore, here, as in Lloyd v. State, 524 So. 2d 396, 403 (Fla. 1988), "no motive for this offense was established in this record." On these facts, the offense committed by Mr. Harich simply cannot be characterized as the product of a "careful plan" or "prearranged design."

Since handing down Rogers, this Court has reversed several applications of the "cold, calculated and premeditated" aggravator where there was far more of a "careful plan or prearranged design" than here. See, e.g., Hamblen v. State, 527 So. 2d 800 (Fla. 1988)(defendant forced victim to disrobe, she touched a silent alarm, defendant marched her to another room and shot her); Amoros v. State, 523 So. 2d 1256-1257 (after threatening to kill victim's girlfriend, defendant shot victim three times as victim futilely attempted to escape); Lloyd, 524 So. 2d at 397 (victim and five year old son forced into bathroom, victim shot twice).

In Jackson v. State, 530 So. 2d 269 (Fla. 1988), the sixty four year old victim begged for mercy as the defendant bound, gagged and then choked him with a belt. When the victim regained consciousness, Jackson beat the victim's face with the cast on his forearm, straddled the victim's body and repeatedly stabbed him in the chest. Id. at 270. This Court reversed the application of the cold, calculated, aggravating circumstance to Jackson's offense. Here, as in Jackson, "the evidence does not establish the heightened degree of prior calculation and planning required by . . . Rogers." Id. at 273.

The "cold, calculating and premeditated" aggravator is also defective under Maynard v. Cartwright, 108 S. Ct. 1853, 1859 (1988). At the time of petitioner's sentencing, there was no principal limiting application of "cold, calculating and premeditated" as required under Maynard. In fact, the trial court neither gave the jury a limiting instruction nor

articulated any facts to support its finding that the crime was "committed in a cold, calculated and premeditated manner." (R. 1256).

No limiting construction was provided to the jury, and absolutely no limiting construction was employed by the sentencing court. The "finding" quoted above is all the judge said. This violated Maynard v. Cartwright, 108 S. Ct. 1853 (1988). Moreover, Maynard makes clear that this Court's previous affirmance of the petitioner's cold, calculating circumstance -- without articulating and applying a "narrowing principle" -- could not correct the constitutional infirmity of the sentencing jury's unfettered and unnarrowed discretion. Id. The Maynard court rejected just such a claim, holding, "[the Oklahoma Supreme Court's] conclusion that on these facts the jury's verdict . . . was supportable did not cure the constitutional infirmity of the [insufficiently narrowed] aggravating circumstance." Id. Thus, application of the cold, calculated circumstance to petitioner violates not only Rogers, but also Maynard v. Cartwright and the eighth and fourteenth amendments. A stay of execution and habeas corpus relief are appropriate.[2]

In Cartwright, the court looked to state law to determine the appropriate remedy when an aggravating circumstance has been stricken. 108 S. Ct. at 1860. In Cartwright, state law required that a death sentence be set aside when one of several aggravating circumstances was found invalid. Id. Similarly, in Florida, the state high court remands for resentencing when aggravating circumstances are invalidated on direct appeal. See, e.g., Schaefer v. State, ___ So. 2d ___, No. 70,834 (Fla. Jan.

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[2]The analysis of Maynard v. Cartwright presented in Claim III, infra, is not repeated herein but rather is incorporated, in the interests of brevity.

19, 1989)(remanded for resentencing where three of five aggravating circumstances stricken and no mitigating circumstances identified); Nibert v. State, 508 So. 2d 1 (Fla. 1987)(remanded for resentencing where one of two aggravating circumstances stricken and no mitigating circumstances found); cf. Rembert v. State, 445 So. 2d 337 (Fla. 1984)(directing imposition of life sentence where one of two aggravating circumstances stricken and no mitigating circumstances found). Furthermore, in this case, the trial court did determine that mitigating factors were present (R. 2354) and substantial mitigation was before the jury.[3] Thus, the striking of this aggravating factor would certainly have required resentencing under Florida law. See Elledge v. State, 346 So. 2d 998 (Fla. 1977)(resentencing required where mitigation present and aggravating factor struck). As this Court recently made clear in Hall v. State, 14 F.L.W. 101 (Fla. 1989), when capital sentencing error is shown relief is appropriate when the mitigation proffered by the petitioner provides a reasonable basis for a life recommendation. See also Harich v. State, 437 So. 2d 1082, 1087 (Fla. 1983)(McDonald, J., dissenting). There is a reasonable basis here, and relief is appropriate.

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[3]Unrefuted evidence was presented at the penalty phase of the trial, for example, that petitioner had been a good inmate, had been very trusted, and would be able to adjust to prison and not harm others. Under Florida law good conduct while in prison is mitigating. Harmon v. State, 527 So. 2d 182, 189 (Fla. 1988). Obviously, the ability to adjust to a prison environment and the fact that Mr. Harich posed no danger in such an environment is mitigation. Skipper v. South Carolina, 106 S. Ct. 1669 (1986). Since there was no effort by the State to refute or challenge this evidence, there can be no dispute that mitigation was established. See Magwood v. Smith, 791 F.2d 1438 (11th Cir. 1986).

CLAIM III

THE "HEINOUS, ATROCIOUS AND CRUEL" AGGRAVATING CIRCUMSTANCE WAS APPLIED TO PETITIONER'S CASE WITHOUT ARTICULATION OR APPLICATION OF A NARROWING PRINCIPLE IN VIOLATION OF MAYNARD V. CARTWRIGHT AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

Petitioner was sentenced to death based on a finding that the murder was "wicked, evil, atrocious and cruel." Such a vaguely worded aggravating circumstance is impermissible under the eighth and fourteenth amendments unless the jury is provided with and the courts articulate and apply a "narrowing principle" which goes beyond merely reciting the specific facts that may support the finding of such an aggravating circumstance in the particular case. Maynard v. Cartwright, 108 S. Ct. 1853 (1988). No court in this case articulated and applied a "narrowing principle" to the "wicked, evil, atrocious and cruel" aggravating circumstance. No limiting construction was provided to the jury. Accordingly, petitioner's death sentence violates the eighth and fourteenth amendments.

In Proffitt v. Florida, 428 U.S. 242, 255-56 (1976) the United States Supreme Court saved Florida's use of an "especially heinous, atrocious, or cruel" aggravating circumstance from the charge that it was unconstitutionally vague on its face by holding that the aggravator was "construed" to be "directed only at 'the conscienceless or pitiless crime which is unnecessarily torturous to the victim.' State v. Dixon, 283 So. 2d [1,] 9 [(1973)]." This narrowing construction was not applied in petitioner's case.

In Maynard v. Cartwright, 108 S. Ct. at 1859, the United States Supreme Court held that the narrowing construction could not be fulfilled by a mere recitation of the evidence which supported the finding of that aggravating circumstance. In Maynard, the defendant had been sentenced to death under Oklahoma law based in part on the finding that the crime was "especially

heinous, atrocious, or cruel." Id. at 1856. There as here, the jury had not been given any instructions to guide its discretion in applying this aggravating circumstance. Id. at 1859. In particular, the United States Supreme Court held that the use of the word "especially" did not cure the overbreadth of the aggravating factor. Id. There as here, the jury's unchanneled discretion was not cured by any limiting construction thereafter applied by a reviewing court. Specifically, the court held that the Oklahoma courts' "conclusions that on these facts the jury's verdict that the murder was especially heinous, atrocious, or cruel was supportable did not cure the constitutional infirmity of the aggravating circumstance." Id. In short, the Court held that mere recitation of the facts of the particular case is not enough; a "narrowing principle to apply to those facts" must be articulated and actually applied. Petitioner's case is identical to Maynard. Id.

While the court's decision in Maynard relied heavily on its earlier decision in Godfrey v. Georgia, 446 U.S. 420 (1980), the Maynard decision went well beyond Godfrey in deciding that a mere recitation of the facts of the case did not serve as a sufficient articulation and application of a narrowing principle. In Godfrey, the Georgia Supreme court asserted that the jury's verdict that the offense was "outrageously or wantonly vile, horrible or inhuman" was "factually substantiated." 446 U.S. at 431-32. The United States Supreme Court found this insufficient to cure the jury's unchanneled discretion in applying this factor because the facts in Godfrey did not meet the Georgia Supreme Court's own articulation of the narrow construction of that aggravator. Id. at 432.

Thus, it was not until the decision in Maynard that the United States Supreme Court made it clear that courts imposing and reviewing death sentences must both articulate a narrowing principle and apply that principle to the specific facts of the

case before them. Until Maynard, the United States Supreme Court had approved a factual comparison of cases without requiring the articulation and application of a narrowing principle. See Proffitt v. Florida, 428 U.S. at 258. This Court followed suit. Maynard demonstrates that that analysis was erroneous.

In this case, the courts failed to articulate and apply any "narrowing principle" to cure the unconstitutional overbreadth of the "especially wicked, evil, atrocious and cruel" aggravator. First, the trial court gave the jury no guidance to channel their discretion in applying this factor. The "especially wicked, evil, atrocious and cruel" factor in this case is indistinguishable from the "especially heinous, atrocious, or cruel" language condemned as overbroad in Maynard v. Cartwright. The danger is that "an ordinary person could honestly believe that every unjustified intentional taking of human life is 'especially heinous.'" Maynard v. Cartwright, 108 S. Ct. at 1859. See also Mills v. Maryland, 108 S. Ct. 1860 (1988). That danger was effectuated in petitioner's case.

Second, in his sentencing order (R. 1255), the trial court merely articulated facts in support of this aggravator, without articulating and applying any "narrowing principle." Here, as in Adamson v. Ricketts, 865 F.2d 1011, 1036 (9th Cir. 1988), the trial court's recitation of facts supporting a finding of the "heinous, cruel and depraved" circumstance was insufficient to cure the constitutional infirmity: the trial court failed to apply a narrowing principle to those facts. "[T]he Supreme Court has repeatedly emphasized [that] it is the suitably directed discretion of the sentencing body which protects against arbitrary and capricious capital sentencing." Id. (emphasis in original)(citations omitted).

Finally, in the direct appeal, this Court merely dismissed the defendant's claim of error on this aggravator without discussion. 437 So. 2d 1082, 1086 (Fla. 1983). Of course, the

articulation and application of a narrowing principle by this Court alone would not be sufficient to cure the unconstitutional overbreadth of the "wicked, evil, atrocious and cruel" aggravator. See Adamson v. Ricketts, 865 F.2d at 1036 ("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").

Accordingly, petitioner was sentenced to death on the basis of an aggravating circumstance which was unconstitutionally applied under the eighth and fourteenth amendments.

This Court has consistently held that if a death sentence is based on an erroneous finding of one or more aggravating circumstances and at least one mitigating circumstance was found, then the case must be remanded to the trial judge for resentencing. See, e.g., Elledge, supra; Bates v. State, 465 So. 2d 490, 496 (Fla. 1985); Oats v. State, 446 So. 2d 90, 95 (Fla. 1984); Moody v. State, 418 So. 2d 989 (Fla. 1982); Menendez v. State, 368 So. 2d 1278, 1282 (1979). For example, in Bates v. State, this Court remanded the case for resentencing after throwing out two aggravating circumstances leaving three aggravators and one mitigating circumstance. 465 So. 2d at 495.

In this case, the trial court found a mitigating circumstance in petitioner's lack of a significant previous criminal record. Accordingly, the constitutional infirmity of either the "wicked, evil, atrocious and cruel" or "cold, calculated and premeditated," see Claim II, supra, aggravators requires resentencing.

CLAIM IV

PETITIONER'S PRESENT CHALLENGE TO THE APPLICATION OF THESE AGGRAVATING CIRCUMSTANCES IS NOT BARRED.

In Witt v. State, 387 So. 2d 922 (Fla. 1980), cert. denied, 449 U.S. 1067 (1980), the Florida Supreme Court held that state

post-conviction relief is available to a litigant on the basis of a "change of law" which: "(a) emanates from [the Florida Supreme] Court or the United States Supreme Court, (b) is constitutional in nature, and (c) constitutes a development of fundamental significance."

Although petitioner challenged the application of the "especially wicked, evil, atrocious and cruel" and the "cold, calculated and premeditated" aggravating circumstances on direct appeal, he is entitled to reassert these claims now due to intervening changes in law. As shown above, both Maynard v. Cartwright, 108 S. Ct. 1853 (1988) and Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987), are developments of fundamental significance demonstrating errors of constitutional dimension in petitioner's sentence of death.

Violations of both Maynard and Rogers are of constitutional significance because they result in arbitrary and capricious sentences. As a result, petitioner's claim is properly before the court, for he was denied an individualized and reliable capital sentencing determination. See Reynolds v. State, 429 So. 2d 1331, 1333 (Fla. App. 1983)(sentencing error); Palmes v. Wainwright, 460 So. 2d 362, 265 (Fla. 1984)(suppression of evidence); Nova v. State, 439 So. 2d 255, 261 (Fla. App. 1983)(right to jury trial); O'Neal v. State, 308 So. 2d 569, 570 (Fla. 2d DCA 1975)(right to notice); French v. State, 161 So. 2d 879, 881 (Fla. 1st DCA 1976)(denial of continuance); Flowers v. State, 351 So. 2d 3878, 390 (Fla. 1st DCA 1977)(sentencing error); Cole v. State, 181 So. 2d 698 (Fla. 3d DCA 1966)(right to presence of defendant at taking of testimony).

Substantial, intervening changes in the law demonstrate that Mr. Harich's death sentence is unreliable and wrongful. See Moore v. Kemp, 824 F.2d 847, 857 (11th Cir. 1987)(in banc); Smith v. Murray, 106 S. Ct. 2661, 2668 (1986). This Court should reach the merits, and issue its Writ of habeas corpus.

CONCLUSION AND RELIEF SOUGHT

WHEREFORE, Roy Allen Harich, through counsel, respectfully urges that the Court issue its writ of habeas corpus and grant him a stay of execution and the relief he seeks. Mr. Harich alternatively urges that the Court grant him a new appeal for all of the reasons stated 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 HAND DELIVERY/U.S. MAIL, to Margene Roper, Assistant Attorney General, 125 North Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014, this 28th day of March, 1989.

Attorney