IN THE SUPREME COURT OF FLORIDA

DAN PATRICK HAUSER,

Appellant,

v.

CASE NO. 87,580

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT,
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR OKALOOSA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The record on appeal consists of four volumes. Volume I contains documents from the trial court's record and will be referenced by the prefix "R" followed by the page number. Volumes II through IV contain transcripts of the plea and sentencing hearings. References to these volumes will be by the prefix "Tr" followed by the volume number and page number. The prefix "A" will precede references to the appendix to this brief, and references to the presentence investigation report will be designated with to prefix "PSI".

STATEMENT OF THE CASE AND FACTS

On May 8, 1995, an Okaloosa County grand jury indicted Dan Patrick Hauser for one count of first degree murder for the strangulation death of Melanie Marie Rodrigues. (R 11) Hauser changed his plea from not guilty to nolo contendere on November 21, 1995. (R 32-33, Tr II 1-8) At the plea hearing before Circuit Judge G. Robert Barron, the State relied on a probable cause affidavit detailing the findings of the investigation to establish the factual basis for entry of the plea. (Tr II 3-4) The affidavit established the following:

Melanie Rodrigues left her job at a bar, Sammy's on The Island, sometime after 2:00 a.m. on January 1, 1995. (R 3) She did not report for either of her two jobs later that day. (R 3) Her family reported her missing. (R 3) The body of Rodrigues was found inside a room at the Econolodge Motel in Fort Walton Beach on January 3, 1995. (R 3) This motel is less than one half a mile from **Sammy's** on the Island. (R 4) Her body was partially nude and located underneath a bed inside a boxed bed frame. (R 3) Due to the construction of the bed, it would have been impossible for her to have placed herself under the bed inside the boxed frame. (R 3) Some of her personal belongings were found similarly concealed inside the boxed frame of the second bed in the room. (R 3) There were no signs of external trauma to the body. (R 3) An autopsy revealed she died from strangulation. (R 4-5)

The motel records and the clerk, Debra Melton, indicated that the room was last rented to Dan Hauser. (R 3) He checked out midmorning on January 1, 1995. (R 3) The room was not occupied

from that time until the discovery of the body. (R 4) Hauser drove a new, black Nissan truck with a North Carolina dealer tag. (R 3) Investigation disclosed that the truck was stolen. (R 4)

James Melton, the manager of the motel, saw a gold Dodge automobile being driven through the motel property between 2:00 and 2:30 a.m. on January 1, 1995. (R 4) Two people were in the car, but Melton could not describe them. (R 4) The car was parked near the black Nissan truck Hauser drove and the driver of the car placed or retrieved an object inside the truck. (R 4) The two people entered the room rented to Hauser and went onto the balcony. (R 4) Later, Melton cautioned the two who were on the balcony to turn down the music playing from the room (R 4) The gold Dodge was still in the motel parking lot when Rodrigues' body was found and it proved to be registered to her. (R 4)

Hauser was arrested in Nevada on an unrelated matter. (R 5) Investigators interviewed him twice about the Rodrigues homicide. (R 5-6) During the first interview, Hauser said he arrived in Fort Walton Beach on December 31, 1994, and checked into the Econolodge. (R 5) After driving around and purchasing some clothes, he returned to the motel and left on foot. (R 5) He ate dinner and then went to four different bars, including Sammy's on the Island. (R 5) Hauser said he did not recall meeting anyone in particular, but he did talk to a lot of different women. (R 5) He could not recall the latter part of the evening because he was too intoxicated. (R 5) During the search of the Nissan truck, investigators found two Chrysler keys and women's panties, one was a purple thong. (R 5-6) At a second interview, Hauser said

the panties belonged to a woman he met on his way to California. (R 6) Hauser said he keeps track of his keys, but he had no response when asked about the two car keys. (R 7)

Later, investigators established that the car keys in Hauser's possession fit Rodrigues' Dodge automobile and had been made at an Autozone store in Fort Walton Beach. (R 7) A third key investigators found fit the front door of Rodrigues' residence. (R 7) Rodrigues' roommate positively identified the purple thong panties as belonging to Rodrigues. (R 7) Also, a latent fingerprint recovered from a cigarette package found next to Rodrigues' body matched Hauser's prints. (R 7)

Hauser had no additions or corrections to offer to the factual basis. (Tr II 4) Additionally, Hauser admitted his guilt. (Tr II 6) The court questioned Hauser about his understanding of the plea and if he was entering it voluntarily. (Tr II 2-6) Defense counsel advised the court that Hauser had been psychologically evaluated, and he assured the court there was no indication that Hauser was incompetent to proceed. (Tr II 4-5) The judge accepted Hauser's plea as voluntarily entered and set a sentencing hearing for January 29, 1996. (Tr II 6-7) Judge Barron deferred ordering a PSI until after the sentencing hearing. (Tr II 7)

On December 12,1995, Hauser sent a written request for Investigator Griggs from the Okaloosa Sheriff's Department to see him at the jail. (R 74, 82) Griggs responded. (R 82, Tr III 22) Hauser gave Griggs an envelope which contained a handwritten statement about the details of the homicide. (R 75-79, Tr III 22-

23) After reading the statement, Griggs conducted a tape recorded interview of Hauser about the statement and the crime. (R 80-92, Tr III 23-26)

The court held the sentencing hearing on February 6, 1996. (Tr III 1-52) At that time, the court asked about Hauser's desire to waive a penalty phase jury trial and jury sentencing recommendation. (Tr III 8-12) Hauser confirmed that desire. (Tr III 8-12) After inquiring into Hauser's ability to understand his rights and his intent to voluntarily relinquish them, the court found that Hauser waived his right to a jury sentencing recommendation. (Tr III 12-13) Next, the court denied several defense motions concerning the constitutionality of the death penalty and its application. (Tr III 13-18)

As its first witness, the State presented Dr. Jody L. Nielsen, the medical examiner who performed the autopsy of Melanie Rodrigues. (Tr III 2-7) She conducted the autopsy on January 4, 1996. (Tr III 3) During the examination of the body, Nielsen found hemorrhages on the face, inside of the mouth, and in the eyes. (Tr III 4) She also found a small laceration on the forehead and a small bruise on the left thigh. (Tr III 4) On the neck, Nielsen found red and brown abrasions. (Tr III 4) An internal examination of the neck revealed hemorrhage in the soft tissue and a fracture of the hyoid bone. (Tr III 4) Nielsen concluded that the cause of death was strangulation. (Tr III 4-5) Nielsen testified that strangulation where blood flow is completely stopped on both sides of the neck can produce unconsciousness in 20 seconds. (Tr III 5) She suspected that the

period was somewhat longer in this case based on the hemorrhages in the eyes indicating some blood flow. (Tr III 5) Death due to brain damage can occur within 90 seconds. (TR III 6) The heart may beat for as much as 30 minutes after brain death. (Tr III 7)

Next, the State introduced the written statement Hauser gave to Investigator Griggs on December 12, 1995, and the taped statement Hauser gave on the same date. (Tr III 18-34) Richard Enfield, a correctional officer at the jail, testified that on December 12, 1995, Hauser requested contact with Investigator Griggs. (Tr III 19) Enfield provided the proper form for a written request to Hauser which he signed. (Tr III 19-20) Enfield contacted Griggs who came to the jail. (Tr III 20) Hauser confirmed that he wanted to see Griggs, in Enfield's presence, after Griggs arrived. (Tr III 20-22) Griggs said that after confirming Hauser's request to see him, Hauser handed him an envelope and said it was something he wanted Griggs to read. (Tr III 22) The envelope contained a handwritten statement about the homicide. (Tr III 23) After reading the statement, Griggs started the tape recorder and obtained a taped statement. (Tr III 24-25)

Defense counsel objected to the admissibility of the statements since no Miranda warning was given to Hauser. (Tr III 25-26) Griggs said he never read Hauser his Miranda rights. (Tr III 25) When asked why he did not give the warning, Griggs said he was not going to see Hauser for the purpose of interrogating him since Hauser had already pleaded guilty to the charge. (Tr III 33) The trial judge ruled both statements admissible finding that Hauser voluntarily requested Griggs to see him and

voluntarily handed Griggs the handwritten statement. (Tr III 34) Additionally, the court ruled that since Hauser had already pleaded guilty it was not necessary for Griggs to advise Hauser of his Miranda rights. (Tr III 34) The court admitted both statements. (Tr III 26, 34)

In his handwritten statement, Hauser gave the following account of the night of the homicide:

> On Dec. 31st at around 4:00 p.m. I started going to the local bars looking for a girl I could get to come back to my room. I went to all the strip joints in the area, but spent most of my time at **Sammys'** on the Island. When I first went to Sammys' I noticed one girl who seemed new and a little uneasy. So I kept up with what she was doing. For a few hours I had her and a couple other girls dance for me and also sat at the stage. I left and started going to the other clubs and bars. but there wasn't anything going on anywhere else so around 12:00-12:30 am I went back to Sammys'. I knew Satin had to have cash, I had given here around $100-150 during the night. After watching her for a while I knew if there was going to be anyone who I could get back to my room this would be the one. She was small, easy to overpower and new yet still making money.
>
> For the next few hours I had her and a couple of other girls dance for me, then at around 2:00-2:30 I asked her if she wanted to make a couple hundred dollars to come back to my hotel room with me. Right away she said we could not talk about this inside the club, so she told me to go over to the Tom Thumb store and we would talk about it there.
>
> I walked to the store and she pulled in just as I was walking up and she told me to hop in her car. At first she didn't' really want to come back with me, but I put here at ease and she said ok. So I went into the store to get us some smokes. We drove over to the hotel and she parked next to my truck and I got out walked over to the truck opened up the door to check the alarm and then we went up to the room. We then went into the room, but I had left the heater on all day and night, and we had to go out to the balcony for awhile to let the room cool off. While we were out there a man camp up and told us to turn down the t.v., it was too loud. So after turning down the t.v. we sat on the balcony

and smoked until the room cooled off. We went inside and she took off her clothes and started to dance, after dancing for awhile she came over to where I was sitting on the bed and grabbed at my pants, so I stood up and took off my clothes and we got onto the bed and had sex. We lay in bed for a while then she got up and danced an little longer then had sex again. She lay next to me for around 30-45 min then said she had to get going home, So I stood up at the end of the bed and asked her to give me a hug, I was standing there in front of her thinking this is my last chance, if I want to kill her I am going to have to do it now! So just as we pulled apart I put my hands around her neck and threw her on the bed. I came down on top of her waist and pinned down her arms with my elbows. I put only enough pressure so she could not scream, I wanted to watch the fear in her eyes. I let up so she could take a breath and just stared at her while she started to lose consciousness then let her breath again and said well this is it, I put as much pressure as I could and held it until she gave this shake and her body tensed up then went limp. To make sure she was dead I didn't let go for a while, I put my ear to her chest to make certain I couldn't hear a heart beat. When I was sure she was dead I pulled her off onto the floor so if her muscles let go, there wouldn't be a mess that would be too hard to clean up.

I let her lay in between the beds for a while, so I could think of the best way to get rid of the body.

I went around picking up all the clothes and things from around the room and I threw them next to her. I pulled my things and threw them on to the bed. Then I looked under the bed and saw the baseboard, so I lifted the corner and pushed it aside. I saw that there would be no way to see the body so I threw some of her things under it, and drug her body up and under the bed. I went thru her things to look for her cash, I found $85 in her jeans, so I pulled the bed over her and went thru the rest of her things. Then I put the rest of her things under the other bed, and gathered my things and took them down to the truck. I looked thru her car for anything of value and took a jacket and a camel can cooler. I put these things in my truck then went back to the room to wait until around 9:00 am to check out.

I headed west so I could be as far as I could from Florida. The first night I staied (sic) in a hotel in Beaumont TX. but from there on I slept in rest areas. My hands were so sore for around 6 days it was hard to hold things. When I got to L.A. I thought it best to go north into the Snow Country where I could blend in

> with the ski bums. I got as far as a truck stop outside Auburn CA where I met Chris who owned a chain and Burger shop who put me to work doing odd jobs for him. That is where I met the Capps he also helped me by letting me work around his house and then watching it when he went down to Baja California for two weeks. About a week after he left I took his neighbors trailer and loaded up all of his stuff that had any value and headed East to Reno where I **was** going to run south to Mexico from there. I got to Reno found an R.V. Park and the next day decided to stay one more night, but I was put in jail by 8:00 pm that same night.

(R.76-79).

During the taped statement taken during the subsequent interview, Hauser confirmed the contents of the handwritten statement. (Tr I 83-84) He also added that he had made the decision to kill someone that day around 4:00 or 5:00 p.m. (Tr I 84-85) Hauser said he had previously had the urge to kill someone, but he never acted on it. (Tr I 85) Finally, Hauser also stated,

> ...I can't understand my brain. I know I'm smart, and I know what's going on, you know. And everybody knows, everybody that's talked to me knows I'm intelligent, articulate, I know what time it is. But I don't know why. I have no explanation for why this happened, and I don't think there ever will be....

(Tr I 89-90)

After the presentation of the State's evidence, defense counsel announced to the court that Hauser had instructed him not to present mitigating evidence. (Tr III 35) Counsel represented that mitigating factors had been investigated, and if allowed to do so, he would present evidence relevant to one statutory and five nonstatutory mitigating circumstances. (Tr III 35) Hauser confirmed that he had instructed his lawyer not to present mitigating evidence. (Tr III 36) He further acknowledged that he had the right to present such evidence and that the presentation of

mitigation evidence could make the difference between a life sentence and a death sentence. (Tr III 37) Defense counsel made on oral proffer of the mitigating factors as follows:

> THE COURT: Could you please just list for the court in your -- in good conscious what you feel any mitigating factors might be and whether you have a reason, good reason to believe that they are mitigating factors.
>
> MR. TONGUE: Yes, Your Honor. The first mitigating factor that I -- I would have attempted to give evidence to this court of a would be statutory mitigator which this court would be required to recognize if, in fact, I were able to present the proof of that, would be that Mr. Hauser has no significant criminal history and no history of violent crimes. That is the only statutory mitigator, your Honor, that I believe would apply in this case. As to nonstatutory mitigation, Your Honor, I would have presented evidence of good attitude and conduct while in jail awaiting his trial. In fact, your Honor, I would have presented evidence of the fact that Mr. Hauser had the opportunity to participate in an attempted escape up at the jail and declined to so participate, and that he has not been a disciplinary problem in any way.
>
> Additional nonstatutory mitigation would have been his full cooperation with law Enforcement. And I can -- the testimony of that I believe be backed up by the cooperation that he has given Investigator Griggs through out the investigation of this matter and even after the entry of the plea. The other thing is, Your Honor, that I believe that **the factual** matters in this **would indicate that** Mr. Hauser was under the influence of drugs and/or alcohol or alcohol and/or drugs at the time of this incident. And I believe the facts would indicate that he had been on a drinking binge since probably 4:00 the previous afternoon until the time of the murder, which I believe will be put somewhere in the neighborhood of 3 to 4 a.m. So he had been binging steadily for some 11 or 12 hours. And **the other and** final nonstatutory mitigator I would have offered, your Honor, would be emotional and mental health problems and a history of those which would date back at least to the age of approximately 14 of Mr. Hauser.

(Tr III 37-39) Counsel also proffered a letter from Hauser's mother in **which she** refused to cooperate with efforts to

investigate mitigating evidence in accordance with her son's wishes. (Tr III 39) (R 96)

The trial judge noted that one proffered mitigating factor was Hauser's past emotional and mental health problems. (Tr III 40) This prompted the court to ask counsel if he was aware of anything which might affect Hauser's ability to understand the proceeding and the consequences of his actions. (Tr III 40) Counsel stated that a psychologist had examined Hauser on two occasions and the report did not indicate any mental competency issue. (Tr III 40-41) The trial judge accepted the proffered mitigating factors and stated, "I will give them due consideration in my determination on sentencing in this matter even without evidence to support them." (Tr III 41-42)

The court heard argument of counsel. (Tr III 45-51) After noting that Hauser had requested that a presentence investigation report not be prepared, the judge ordered a PSI. (Tr III 51) Sentencing was scheduled for March 4, 1996. (Tr III 52)

The presentence investigation was signed by the preparer on February 27, 1996. (PSI 16) Evidence of Hauser's mental problems and drug and alcohol abuse appeared in the report. (PSI 7, 13, 14) In 1991, a court in Oregon placed him on probation for a bad check with the condition he obtain drug and alcohol abuse treatment. (PSI 7) Hauser was discharged from the Army in 1988, after a psychological examination showed that he was unable to adjust to military life. (PSI 13) At that time, Hauser had reported suicidal ideations. (PSI 13) The PSI included the following comments:

> Type of Discharge: Entry level status performance and conduct/general discharge.
>
> Comments: It should be noted that Pvt. Hauser was seen at the Community Mental Health Service at the commander's request due to his inability to adjust to the army. The soldier related some vague suicidal ideations but has no plan and there was no apparent intent. There was apparent thought disorder. The problems presented by this individual did not warrant disposition through medical channels. It was unlikely that efforts to rehabilitate him would be successful. If this individual was made to continue active duty, he would probably become an extremely disruptive influence and be at high risk for acting out behavior. Based upon the conditions and the problems presented by this soldier, it was recommended that he be administratively separated from the military. It was further noted that Hauser was then cleared for administrative active deemed appropriate by command. It was also noted by one of his supervisors that the defendant lacked motivation, had an abnormal attitude towards the military, an inability to adapt socially or emotionally to military life. He also lacked the qualities necessary to become a productive soldier.

(PSI 13) The preparer of the PSI also noted that Dr. Larson had seen Hauser while incarcerated in the Okaloosa County Jail. (PSI 13) Finally, the PSI included evidence of Hauser's long-term drug and alcohol abuse problems. (PSI 13) Specifically, the report stated that Hauser had been abusing alcohol since age 12 or 13. (PSI 13) This progressed to cocaine, speed, marijuana, and several psychotropic drugs. (PSI 13) Hauser's aunt placed Hauser in a drug treatment program in California in 1988, after Hauser ran away from home. (PSI 13)

On March 4th, the court allowed the State to present victim impact evidence through the testimony of the victim's mother and grandmother. (Tr IV 3-8) Defense counsel declined to make further comments regarding sentencing, but he noted that he had submitted a letter to the court on the matter. (Tr IV 8) (letter attached to

PSI) He also advised the court that the letter was against his client's wishes, and Hauser wanted the court to disregard it. (Tr IV 8-9) The judge stated he had already reviewed the letter, but he would give Hauser's request due consideration. (Tr IV 9) The prosecutor presented some additional argument before the court pronounced sentence. (Tr IV 9-11)

Judge Barron sentenced Hauser to death for the murder. (Tr IV 11-21) (R 119-124)(A 1-6) The court found three aggravating circumstances: (1) the homicide was committed for pecuniary gain; (2) the homicide was committed in a cold, calculated and premeditated manner; and (3) the homicide was especially heinous, atrocious or cruel. (R 120-123) (A 2-4) In mitigation, Judge Barron considered the five proffered mitigating circumstances as if proven by the preponderance of the evidence and concluded they would not outweigh the aggravating circumstances. (R 122-123) (A 4-5) The five mitigating circumstances proffered and accepted as proven were: (1) Hauser had no significant criminal history; (2) Hauser's good conduct in jail; (3) Hauser's cooperation with **law** enforcement; (4) Hauser was under the influence of drugs or alcohol at the time of the offense; and (5) Hauser suffered from mental or emotional problems since age fourteen. (R 122)

Notice of appeal to this Court was filed on March 6, 1996. (R 138)

SUMMARY OF ARGUMENT

In his sentencing order, the trial judge assumed, even though there was no evidence offered by the defense, that the proffered mitigating circumstances had been proven by a preponderance of the evidence. The court then assumed that the weight of these mitigating circumstances were not sufficient to outweigh the aggravating circumstances. Both of these assumptions were based on no evidence. Compounding the problem, the trial court failed to even acknowledge the mitigating evidence which was available from verified information contained in the presentence investigation report. The result is a death sentencing decision which ignores available evidence and imposes sentence based on assumptions about the existence, quality and weight of mitigating evidence. Hauser's death sentence has been imposed in violation of the United States and Florida Constitutions.

The trial judge denied a defense motion to suppress a tape recorded statement obtained from Hauser in violation of Miranda. Because Hauser had already entered a plea to the homicide charge, the investigator who conducting the custodial interrogation was under the mistaken belief that he did not need to advise Hauser of his rights pursuant to Miranda. In ruling that the statement was admissible, the trial judge also erroneously ruled that Miranda warnings were not required during custodial interrogation after entry of a guilty plea. The statement was obtained in violation of Hauser's constitutional rights and it should not have been admitted in the sentencing proceeding. Admission of the statement was not harmless, since it provided a substantial

portion of the evidence the court relied upon to find the CCP aggravating circumstance.

In Hamblen v. State, 527 So.2d 800 (Fla. 1988), this Court held that a competent defendant in a capital case can waive the presentation of mitigating evidence. Hamblen allows the trial court the discretion to require, through special counsel, the presentation of mitigation over a defendant's objection. However, the trial court is not required to use such a procedure to insure mitigation is presented for its use in the sentencing decision. Nevertheless, the trial court and this Court on appellate review are required to examine the record for what mitigation is present in the record to insure the fair application of the death penalty, even though the defendant chooses not to present such evidence. The holding in Hamblen, which permits the defendant to deprive the sentencer of mitigating information, is inconsistent with the requirement that the sentencer, and this Court on review, must examine available mitigation to insure a fair application of the death penalty. This Court must recede from Hamblen.

ARGUMENT

ISSUE I

THE TRIAL COURT IMPROPERLY SENTENCED HAUSER TO DEATH AFTER ALLOWING HIM TO WAIVE THE PRESENTATION OF MITIGATING EVIDENCE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I SECTIONS 9, 16 AND 17 OF THE CONSTITUTION OF FLORIDA.

A.

THE TRIAL COURT FAILED TO PROPERLY EVALUATE, CONSIDER AND WEIGH **EVIDENCE OF MITIGATING CIRCUMSTANCES AVAILABLE IN THE RECORD.**

The trial judge's sentencing order states the following about the court's treatment of mitigation in this case:

> B. MITIGATING FACTORS
>
> Although the defense presented no evidence in support of mitigating factors, Defendant's attorney has proffered one statutory and four non-statutory mitigating circumstances for the Court's consideration. The Court is accepting the proffered mitigating circumstances as if evidence had been presented in support thereof and the Court has considered the possible outcome on the Court's decision had these mitigating factors been proven by a preponderance of the evidence. Defendant's attorney proffered the following statutory and non-statutory mitigating circumstances:
>
> 1. No significant criminal history.
>
> 2. Good attitude and conduct at jail.
>
> 3. Full cooperation with law enforcement.
>
> 4. Under the influence of drugs or alcohol.
>
> 5. Emotional or mental health problems since fourteen years of age.
>
> The first three listed mitigating factors, even if proven by preponderance of the evidence, if taken together, would not be sufficient to outweigh any of the above listed aggravating factors.

> As to the fourth mitigating factor, that the Defendant was under the influence of drugs or alcohol at the time of the commission of the crime, the Court would state that if the evidence presented to the Court tending to establish this mitigating factor, to the extent to convince the Court that due to the use of drugs and/or alcohol, the Defendant was unaware of his actions or unable to control his actions, or unable to remember the events of that evening, this mitigating factor would be given substantial weight by this Court. However, the Defendant's hand-written statement and the taped recorded interview would tend to indicate to the Court that the Defendant had a total recollection of very specific events throughout the course of the day, up to and including the moment of the murder. In reviewing the Defendant's detailed statement, it would appear that the Defendant's use of alcohol and/or drugs on that date did not affect his ability to remember very specific and vivid details and to perform this act in a cool, calm, calculated manner and would certainly not be sufficient to outweigh any of the aggravating factors listed herein.
>
> As to the fifth mitigating factor, Defendant's 'emotional or mental health problems since fourteen years of age", the Court finds that even if this mitigating circumstance had been proven by a preponderance of the evidence, it would not be sufficient to out weigh the aggravating circumstances enumerated herein.
>
> The Court has very carefully considered and weighed the aggravating circumstances presented by the State and the mitigating circumstances proffered by the attorney for the Defendant, and being ever mindful that human life is at stake and in the balance, the Court finds that the aggravating circumstances present in this case outweigh the mitigating circumstances proffered by Defendant's attorney.

(R 122-123) (A 4-5)

In this sentencing order, the trial judge assumed, even though there was no evidence offered by the defense, that the proffered mitigating circumstances had been proven by a preponderance of the evidence. (R 123)(A 4) The court then assumed that the weight of these mitigating circumstances were not sufficient to outweigh the aggravating circumstances. (R 123-124) (A 4-5)

Both of these assumptions were based on no evidence. Compounding the problem with this order based on no evidence, the trial court failed to even acknowledge the mitigating evidence which was available from verified information contained in the presentence investigation report. The result is a death sentencing decision which ignores available evidence and imposes sentence based on assumptions about the existence, quality and weight of mitigating evidence. Hauser's death sentence has been imposed in violation of the United States and Florida Constitutions. Amends. IV, V, VIII, XIV, U.S. Const.; Art. I, Secs. 9, 16, 17, Fla. Const.; see, Parker v. Dugger, 498 U.S. 308, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991).

This Court has held that the trial court in a capital case must consider and weigh all mitigating circumstances available and expressly evaluate the mitigation in the sentencing order. E.g., Santos v. State, 591 So.2d 160 (Fla. 1991); Campbell v. State, 571 So.2d 415 (Fla. 1990); Rogers v. State, 511 So.2d 526 (Fla. 1987). In Campbell, this Court gave instructions to the trial judges on how to evaluate mitigating evidence and circumstances in a capital sentencing proceeding. This Court stated:

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. See Rogers v. State, 511 So.2d 526 (Fla.1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). The court must find as a mitigating circumstance each proposed factor that is mitigating in nature and has been reasonably established by the greater weight of the evidence: "A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reason-

> ably convinced that a mitigating circumstance exists, you may consider it as established." Fla.Std.Jury Instr. (Crim.) at 81. The court next must weigh the aggravating circumstances against the mitigating and, in order to facilitate appellate review, must expressly consider in its written order each established mitigating circumstance. Although the relative weight given each mitigating factor is within the province of the sentencing court, a mitigating factor once found cannot be dismissed as having no weight. To be sustained, the trial court's final decision in the weighing process must be supported by "sufficient competent evidence in the record." Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla.1981). Hopefully, use of these guidelines will promote the uniform application of mitigating circumstances in reaching the individualized decision required by law.

571 So.2d 415, 419-20. (Footnotes omitted)

In Farr v. State, 621 So.2d 1368 (Fla. 1993), this Court held that the requirements of Campbell apply with equal force to cases where the defendant has waived the presentation of mitigation and sought the imposition of a death sentence. Remanding the case for resentencing, this Court said,

> ...Our law is plain that such a requirement in fact exists. We repeatedly have stated that mitigating evidence must be considered and weighed when contained anywhere in the record, to the extent it is believable and uncontroverted. E.g., Santos v. State, 591 So.2d 160 (Fla.1991); Campbell v. State, 571 So.2d 415 (Fla. 1990); Rogers v. State, 511 So.2d 526 (Fla.1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). That requirement applies with no less force when a defendant argues in favor of the death penalty, and even if the defendant asks the court not to consider mitigating evidence. . . .
>
> ... because the trial court failed to consider all of the available mitigating evidence, the death sentence imposed by the trial court is vacated. On remand, the trial court shall conduct a new penalty phase hearing in which it weighs all available mitigating evidence against the aggravating factors. In this respect, we call to the trial court's attention our holdings in Santos, Campbell, and Rogers. The court then shall determine the proper penalty in accordance with Florida law.....

Farr, 621 So.2d 1368, 1369-70.

The trial court's treatment of mitigation in this case failed to meet the requirements of Campbell and Farr. Specifically, the trial judge never acknowledged in his sentencing order the verified mitigating evidence contained in the presentence investigation report. The following information about Hauser's mental health and alcohol and drug abuse history was revealed in the PSI:

1. Between the age of 12 to 13, Hauser began drinking alcohol. (PSI 13)

2. Around the age of 13, Hauser was using cocaine, speed, marijuana and other drugs. (PSI 13)

3. By age 16, Hauser was drinking a six-pack of beer a day as well as drinking hard liquor. (PSI 13)

4. Before he turned 18, Hauser was discharge from the Army in 1988, because of his mental and emotional condition. The Army's report indicated though disorders, a high risk for acting out behavior and suicidal ideations. (PSI 13)

5. Also in 1988, Hauser's aunt placed him in a drug treatment program. (PSI 13)

6. In 1991, a court in Oregon ordered Hauser to submit drug and alcohol treatment as part of a bad check charge disposition. (PSI 7)

In the sentencing order, the court stated the following about this subject:

As to the fourth mitigating factor, that the

> Defendant was under the influence of drugs or alcohol at the time of the commission of the crime, the Court would state that if the evidence presented to the Court tending to establish this mitigating factor, to the extent to convince the Court that due to the use of drugs and/or alcohol, the Defendant **was** unaware of his actions or unable to control his actions, or unable to remember the

> events of that evening, this mitigating factor would be given substantial weight by this court . However, the Defendant's hand-written statement and the taped recorded interview would tend to indicate to the Court that the Defendant had a total recollection of very specific events throughout the course of the day, up to and including the moment of the murder. In reviewing the Defendant's detailed statement, it would appear that the Defendant's use of alcohol and/or drugs on that date did not affect his ability to remember very specific and vivid details and to perform this act in a cool, calm, calcu-lated manner and would certainly not be sufficient to outweigh any of the aggravating factors listed herein.
>
> As to the fifth mitigating factor, Defendant's 'emotional or mental health problems since fourteen years of age", the Court finds that even if this mitigating circumstance had been proven by a preponderance of the evidence, it would not be sufficient to out weigh the aggravating circumstances enumerated herein

(R 122-123)(A 4-5) From this order, it is impossible to determine if the judge ever read the PSI. The order's silence on the mitigating facts present in the PSI undermines the confidence in the court's sentencing decision. Hauser's death sentence cannot stand on such an order which fails to meet the minimal safeguards this Court requires to insure the propriety of a death sentence in cases such as this one. See, e.g., Farr v. State, 621 So.2d 1368.

The death sentence has been imposed in this case without proper consideration of the mitigation available in the record and with improper assumptions about the weight of any possible mitigation. This Court must remand for resentencing to insure a death sentence is not carried out where the sentencing authority

has failed to adequately consider, evaluate and weigh the mitigation in the case.

B.

THE TRIAL COURT CONSIDERED IN AGGRAVATION OF SENTENCE A STATEMENT OBTAINED FROM HAWSER IN VIOLATION OF THE UNITED STATES AND FLORIDA CONSTITUTIONS.

Investigator Griggs testified that he did not read Hauser his rights as required by Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), prior to the custodial interrogation of Hauser on December 12, 1995. (Tr III 25) Griggs did not read the rights or obtain a waiver because he had not intended to interrogate Hauser when he went to the jail to see him and because Hauser had already pleaded guilty to the murder charge. (Tr III 33) The trial court denied the defense motion to suppress the handwritten statement since Hauser had initiated the meeting with Griggs and handed the unsolicited handwritten statement to him. (Tr III 34) Although the subsequent taped statement was the product of Griggs' custodial interrogation of Hauser without Miranda warnings, the court also admitted the taped interview statement. (Tr III 34) The court ruled that Miranda warnings were not required prior to the interview because Hauser had already pleaded guilty to the charge. (Tr III 34) (Hauser's actually entered a nolo contendere plea. R 32, Tr II 2)

The court's ruling that Hauser no longer had a privilege against self incrimination or right to counsel during interrogation after a guilty plea was incorrect. These constitutional protections remained after the guilty plea with as much force as

before entry of the plea. A criminal defendant retains the privilege against self incrimination through sentencing and until the judgement of guilt and sentence become final after an appeal. See, Lanenberger v. State, 519 So.2d 712 (Fla. 1st DCA 1988); Meehan v. State, 397 So.2d 1214 (Fla. 2d DCA 1981); King v. State, 353 So.2d 180 (Fla. 3d DCA 1977). Additionally, Hauser's Sixth Amendment right to counsel certainly continued past the guilty plea stage and there can be no valid waiver of this right to counsel without Miranda warnings and a waiver of counsel. See, Patterson v. Illinois, 487 U.S. 285, 299-300, 108 S.Ct. 2389, 101 L.Ed.2d 261, 276-277 (1988). Consequently, the warning requirements of Miranda and a waiver of rights by the one being questioned apply to custodial interrogations occurring after a guilty plea and before sentencing. Even though Hauser initiated the contact with Griggs, there can be no valid interrogation absent warnings and a waiver of rights. Oregon v. Bradshaw, 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983); Edwards v. Arizona, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). The statement obtained from Hauser during the custodial interview on December 12, 1995, was improperly obtained and used in violation of his constitutional right to counsel and privilege against self incrimination. Amends. V, VI, VIII, XIV U.S. Const.; Art. I, Secs. 9, 16, 17 Fla. Const.

When enacting Section 921.141, Florida Statutes, the Legislature recognized that a capital defendant's constitutional rights must be protected in the sentencing phase of a capital trial. Subsection 921.141(1) relaxes the evidence rules for

penalty phase, but the subsection specifically states the evidence obtained in violation of a defendant's constitutional rights may not be admitted:

> ...this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida.

See, Harich v. State, 437 So.2d 1082, 1085-86 (Fla. 1983). The admission of the taped statement in Hauser's sentencing violated this statutory provision as well as the United States and Florida Constitutions. The court should have excluded the taped statement from evidence at the sentencing proceeding.

The tape recorded statement provided evidence which the trial court used in its sentencing decision which was not available from any other source. In the sentencing order, the court referenced the information from the taped statement which was used as a major basis for finding that the homicide was cold, calculated and premeditated. Additionally, the court used the recorded statement to negate the offered mitigating circumstance that Hauser was under the influence of alcohol and drugs at the time of the crime. Regarding the CCP circumstance, the court wrote:

> The Defendant's taped statement also makes further reference to his pre-designed plan to kill. At one point in his taped interview he states that around four or five o'clock P.M. that day he decided to kill someone. That was approximately ten hours prior to the actual murder.
>
> On page 5 of the transcript the Defendant indicates that he has had the urge to kill for quite some time, but that the circumstances were never just right but in Melanie Rodriguez he 'found some one that was naive,

> small" and the circumstances were right to satisfy his urge to kill. Mr. Hauser killed Melanie Rodriguez as a result of his long standing plan to kill somebody. There was absolutely no pretense of moral or legal justification, and the murder was committed in order to allow the Defendant to experience the "satisfaction" of a killing (page 8, transcript). This aggravating circumstance was proved beyond a reasonable doubt,

(R 121) (A 3) As to the mitigating circumstance, the court further wrote:

> However, the Defendant's hand-written statement and the taped recorded interview would tend to indicate to the Court that the Defendant had a total recollection of very specific events throughout the course of the day, up to and including the moment of the murder. In reviewing the Defendant's detailed statement, it would appear that the Defendant's use of alcohol and/or drugs on that date did not affect his ability to remember very specific and vivid details and to perform this act in a cool, calm, calculated manner and would certainly not be sufficient to outweigh any of the aggravating factors listed herein.

(R 123)(A 5) This evidence provided the significant evidence of a preplanned and calculated homicide and the primary reason for rejecting the significance of a mitigating circumstance.

The trial judge erred in admitting the taped recorded statement. Hauser's death sentence based on this inadmissible evidence should be reversed.

C.

THIS COURT SHOULD RECEDE FROM *HAMBLEN v. STATE* AND REQUIRE THE DEVELOPMENT OF MITIGATION ON THE RECORD BEFORE IMPOSITION OF A DEATH SENTENCE.

Although this Court has chosen not to recede from Hamblen v. State, 527 So.2d. 800 (Fla. 1988) in other cases, e.g., Farr v. State, 656 So.2d 448 (Fla. 1995); Lockhardt v. State, 655 So.2d

69 (Fla. 1995); Clark v. State, 613 So.2d 412 (Fla. 1992), the argument is again presented here for the Court's reconsideration.

This Court has now decided several cases where a capital defendant desires that nothing be presented to mitigate his sentence and held **that a** competent defendant in a capital case can refuse to contest the imposition of a death sentence and waive the presentation of evidence in mitigation. In Hamblen, the defendant waived counsel and pled guilty to first degree murder. He also waived a jury sentencing recommendation; presented no evidence in mitigation and challenged none of the aggravating evidence. On appeal, the question was whether the trial court erred in allowing Hamblen to represent himself at the penalty phase. Appellate counsel argued that the court should have appointed special counsel to present and argue mitigation. This court rejected his argument:

> We find no error in the trial judge's handling of this case. Hamblen had a constitutional right to represent himself, and he was clearly competent to do so. To permit counsel to take a position contrary to his wishes through the vehicle of guardian ad litem would violate the dictates of Faretta [v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)]. In the field of criminal law, there is not that 'death is different,' but, in the final analysis, all competent defendants have a right to control their own destinies.

Ibid. at 804. This Court also found that the judge in Hamblen had protected society's interest in insuring that the death sentence was properly imposed since he carefully analyzed the propriety of the aggravating circumstances and the possible

statutory and nonstatutory mitigating evidence. Ibid. The opinion concluded:

> We hold that there was no error in not appointing counsel against Hamblen's wishes to seek out and to present mitigating evidence and to argue against the death sentence. The trial judge adequately fulfilled that function on his own, thereby protecting society's interests in seeing that the death penalty was not imposed improperly.

Ibid.

Later, in Anderson v. State, 574 So.2d 87 (Fla. 1991), the defendant directed his lawyer not to present any evidence at the penalty phase of his trial. Counsel told the judge what he would have presented in mitigation had his client not directed him to do otherwise, On appeal, counsel argued that Anderson's orders to his lawyer denied him his Sixth Amendment right to the effective assistance of counsel. He also argued the court had not determined if Anderson had freely and voluntarily waived his constitutional right to present mitigating evidence. This court rejected both arguments, finding that Anderson's comments on the record were sufficient to waive mitigating evidence and because he had counsel, no Faretta inquiry was required. Ibid. at 95.

In Pettit v. State, 591 So.2d 618 (Fla. 1992), this Court adhered to the rule announced in Hamblen that a competent defendant could waive the presentation of mitigating evidence. This Court affirmed the trial court's decision to allow the defendant to waive the presentation of mitigating evidence and the subsequent sentence of death. However, this Court reiterated the responsibility of the trial judge to analyze the possible

statutory and nonstatutory mitigating factors. The trial judge satisfied the requirement in Pettit when he had the two neurologists who had examined Pettit to testify at the sentencing hearing. Pettit, at 620.

Although Hamblen, Pettit and Anderson said that a capital defendant who wants to die can exercise control over his destiny at the trial phase -- waive counsel, plead guilty, waive the presentation of all mitigating evidence -- this same control does not extend to the appeal stage. This Court's opinion in Klokoc v. State, 589 So.2d 219 (Fla. 1991) establishes this limit on the defendant's ability to control capital sentencing. In that case, the court accepted the defendant's plea of guilty to first degree murder, and as in Anderson, the defendant refused to permit his lawyer to participate in the penalty phase of the trial. Counsel asked to withdraw, but the court denied the request. Then, contrary to this Court's holding in Hamblen, the trial judge appointed special counsel to "represent the public interest in bringing forth mitigating factors to be considered by the court in the sentencing proceeding." 589 So.2d at 220. Special counsel presented mitigation. This type of procedure would also have been necessary had the trial court chosen to exercise its discretion to obtain a jury recommendation before sentencing. See, State v. Carr, 336 So.2d 358 (Fla. 1976). Following his client's wishes, appellate counsel asked this Court to allow him to withdraw and to dismiss the appeal. This Court denied that request, saying,

> ... counsel for the appellant is hereby advised that in order for the appellant to receive a meaningful appeal, the Court must have the benefit of an adversary proceeding with diligent appellate advocacy addressed to both the judgment and the sentence.
>
> Accordingly, counsel for appellant is directed to proceed to prosecute the appeal in a genuinely adversary manner, providing diligent advocacy of appellant's interests.

589 So.2d at 221-222. The result of the appeal was a reversal of Klokoc's death sentence as disproportional.

Hamblen, Pettit and Anderson, which allow a capital defendant to thwart the adversarial system at penalty phase in the trial court, are inconsistent with this Court's requirement in Klokoc that the adversarial system be preserved on appeal. This Court's review of a death sentence, where the facts were not developed below, does not protect against the improper imposition of the penalty. Appellate review in Klokoc was facilitated because the trial judge preserved the adversarial system at penalty phase when he appointed special counsel. Had he not done so, this Court would not have had the record to review the propriety of the death sentence and society would have improperly executed a man and aided a suicide. Procedures must be in place to prevent such a miscarriage of justice. This Court must require the adversarial system to work. Facts pertinent to the sentencing decision must not be kept hidden from the jury and judge. A trial judge has the discretion to conduct a penalty phase trial and obtain a jury recommendation even where the defendant has waived his right to have such a procedure. State v. Carr, 336 So.2d 358. Consequently, there should then be no impediment to

requiring the presentation of mitigation evidence over a defendant's desire to waive the presentation of mitigation.

The trial judge and this Court have the duty under the Eighth and Fourteenth Amendments to examine the record for mitigating facts and to consider those facts in reaching a decision concerning the proper sentence. Parker v. Dugger, 498 U.S. 308, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991); Santos v. State, 591 So.2d 160 (Fla. 1991); Campbell v. State, 571 So.2d 415 (Fla. 1990); Rogers v. State, 511 So.2d 526 (Fla. 1987). This Court has held that this examination of the record for mitigating facts fully apply when a defendant pleads guilty and waives the presentation of mitigation. Farr v. State, 621 So.2d 1368 (Fla. 1993), after remand, 656 So.2d 448 (Fla. 1995). But, if procedures are not in place to insure those facts are presented in the record, this constitutional mandate fails in its purpose. In the interest of fair application and appellate review of capital sentences, this Court must recede from Hamblen. Hauser's case should be reversed for a new penalty phase where mitigation evidence can be fully developed to insure the constitutional application of the capital sentencing. Amends. V, VIII, XIV, U.S. Const.; Art. I, Secs. 9, 16, 17 Fla. Const.

CONCLUSION

For the foregoing reasons and authorities, this Court should reduce Dan Patrick Hauser's death sentence to life imprisonment, or alternatively, remand this case for a new sentencing proceeding.

Respectfully submitted,

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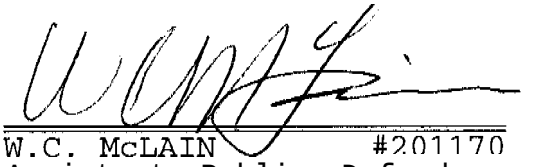

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief of Appellant has been furnished by delivery to Richard Martell, Assistant Attorney General, Criminal Appeals Division, The Capitol, Plaza Level, Tallahassee, Florida, 32301; and a copy has been mailed to appellant, Mr. Dan Hauser, on this 13 day of August, **1996.**

W.C. McLAIN