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IN THE SUPREME COURT OF FLORIDA

JAMES WILLIAM HAMBLEN,

Appellant,

v.

CASE NO. 68,843

STATE OF FLORIDA,

Appellee.

By Tanya

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT
IN AND FOR DUVAL COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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INITIAL BRIEF OF APPELLANT

I PRELIMINARY STATEMENT

Appellant, JAMES WILLIAM HAMBLEN, was the defendant in the trial court, and will be referred to in this brief as appellant or by his proper name. Appellee, the State of Florida, was the prosecution and will be referred to as the state. The record on appeal (Volume I) will be referred to by use of the symbol "R". The transcripts of the proceedings in the trial court (Volumes II through X) will be referred to by use of the symbol "T". All emphasis is supplied unless the contrary is indicated.

In accordance with appellant's request, undersigned counsel filed, on August 4, 1986, a motion to withdraw as counsel for appellant. [A copy of that motion is attached to this brief as Appendix A.] In the motion, undersigned counsel stated that appellant is aware that Florida law provides for mandatory appellate review of orders imposing the death penalty, but that appellant, nevertheless, does not wish to be represented on appeal either by undersigned counsel or any other attorney. Undersigned counsel expressed the belief that he "cannot ethically or in good conscience argue on appeal that the death penalty should not have been imposed

on [appellant], since that position is directly contrary to [appellant's] wishes and instructions" [App.A, p.3]. Consequently, undersigned counsel moved to withdraw on the ground of conflict of interest, and asked this Court to allow appellant to proceed pro se. In the alternative, undersigned counsel requested that this Court relinquish jurisdiction to the trial court for the purpose of conducting a hearing to determine the voluntariness of appellant's waiver of appellate counsel, pursuant to Faretta v. California, 422 U.S. 806 (1975) and Bentley v. State, 415 So.2d 849 (Fla. 4th DCA 1982). In view of Fla.Stat. Section 921.141(4) (automatic review by Florida Supreme Court in cases where death penalty is imposed) undersigned counsel did not move to dismiss the appeal, although that was appellant's expressed preference. On August 7, 1986, this Court denied the motion to withdraw, citing Section 921.141(4) [Appendix B].

Although it continues to be undersigned counsel's personal view that he cannot, while purporting to represent appellant, ethically argue for a result (i.e. reversal of the death sentence and a remand for an adversary penalty hearing) which appellant has made it clear he does not want, undersigned counsel is nevertheless obligated to abide by this Court's order denying his motion to withdraw. See Rubin v. State, 490 So.2d 1001 (Fla. 3d DCA 1986). This Court should be aware, however, that the arguments asserted in this brief do not reflect the personal views of appellant, and in fact are inconsistent with appellant's wishes. Accordingly, undersigned counsel is filing with this brief a motion to allow appellant to file a pro se statement of his position, so that this Court, in fulfilling its statutory responsibility in this appeal, will have the benefit of all relevant perspectives. See Florida Constitution, Article I, Section 16 (criminal defendant has a right "to be heard in person, by counsel, or both"); State v. Tait, 387 So.2d

338, 340 (Fla. 1980); Jones v. State, 429 So.2d 396, 397-98 (Fla. 3d DCA 1983) (where defendant is represented by counsel, allowing him to address the court or jury in person is a matter for the sound discretion of the court). Since appellant is being represented by counsel against his will, that is all the more reason why this Court should exercise its discretion to allow him the opportunity to present his own position to the Court. See also Bentley v. State, supra, 415 So.2d at 850-51.

II STATEMENT OF THE CASE AND FACTS

James William Hamblen was charged by indictment returned May 10, 1984 with first degree murder of Laureen Jean Edwards (R.6). On May 17, 1984, through his appointed counsel, appellant entered a plea of not guilty (T.2).

Defense counsel filed a motion for authorization to incur expenses for a confidential psychiatric examination of appellant pursuant to Fla.R.Cr.P. 3.216(a) (R.40-42). Counsel informed the trial court that he wished to retain Dr. Ernest Miller for this purpose (T.3,6,8). The trial court indicated that he would authorize the expenditure if the defense would use another expert, but not if the defense insisted on using Dr. Miller, because "Dr. Miller is customarily used in connection with both parties" (T.4, see R.43-46, T.3-12). Defense counsel stated his position as follows:

> . . . that we are entitled to adequate funds for a defense expert, that by depriving us of Dr. Miller, you put us on a different footing from one more favorably financially situated, and thereby deprive the defendant of equal protection under the law. It's my understanding that the State told me yesterday that they would oppose our use of Dr. Miller. I don't believe they have any standing whatever to do that.

(T.4)

In denying the defense's motion, the trial court explained:

> It is not the intention of the Court to forever prohibit Defendant from having the Court appoint one expert per FRCP 3.216(a) or to refuse to authorize Defendant to hire such an expert. The Court advised defense counsel that it would grant Defendant's motion if some expert other than Dr. Miller would be hired.

(R.45)

Subsequently, the defense filed a motion for appointment of a confidential expert pursuant to Rule 3.216(a) to assist counsel in the preparation of an insanity defense (R.51). The trial court granted this motion and appointed Dr. Elizabeth McMahon, a clinical psychologist (R.53, T.17). Accordingly, appellant was examined by Dr. McMahon on June 30, 1984 (R.53, 70-74). Pursuant to an order of the trial court, appellant was also examined by Dr. Miller, on July 3, 1984 (R.55, 65-68).

On July 10, 1984, defense counsel informed the trial court that, contrary to the advice of counsel, appellant wished to address the court (T.20). Appellant told the court that he wanted to withdraw his plea of not guilty by reason of insanity, and enter a plea of guilty (T.21-22, 25). Also, because he had reached a "divergence of viewpoint" with counsel, he wished to dispense with the services of the Public Defender (T.21-22). The trial court asked appellant a series of questions to determine the voluntariness of his waiver of counsel and his capacity for self-representation (T.22-25, 29-31). Appellant authorized defense counsel to reveal the general results of the confidential psychiatric examinations; both doctors had indicated in their reports that appellant was competent to stand trial, and neither doctor had reached the conclusion that appellant fell within the M'Naghten definition of insanity (T.27-28). The trial court granted appellant's request to discharge appointed counsel, and permitted appellant to represent himself (T.31). The court asked Assistant Public Defenders White and McGuinness to remain in the courtroom and stand ready to assist appellant in an advisory capacity (T.32-33).

The trial court then questioned appellant as to the voluntariness of his guilty plea (T.33-37), and determined that the plea was freely and volun-

tarily entered (T.37). The assistant state attorney summarized the factual basis of the charge as follows:

> The State would be able to show at trial that James William Hamblen, the defendant, on April 24, 1984, in Duval County, Florida, unlawfully and from a premediated design to effect the death of Laureen Jean Edwards, a human being, did then and there kill Laureen Jean Edwards, by shooting her to death with a pistol.
>
> The State would specifically be able to show on that particular date, officers responded to a silent alarm at the location of the Sensual Woman's Shop, located at 7246 Beach Boulevard, in Jacksonville, Duval County, Florida. At that point in time the defendant was observed coming out of the Sensual Woman's Shop, and was confronted by police officers Hartley and Arnold with the Jacksonville Sheriff's Office, at which time the defendant stated to those officers that he killed the lady inside of the Sensual Woman's Shop.
>
> Investigators entered the shop and found the deceased, Laureen Jean Edwards, lying in a dressing room with an apparent bullet wound to the head.
>
> The defendant was taken into custody. Prior to that, however, an automatic pistol was removed from his person and was secured for evidence.
>
> The defendant was taken to the Police Memorial Building, at which time he was interviewed by Detective Terry of the Jacksonville Sheriff's Office, at which time after approximately an hour-and-a-half interview, he admitted that he, in fact, again, killed Laureen Jean Edwards at the Sensual Woman's Shop, and he executed a written statement to that effect . . . which sets forth all the facts and circumstances surrounding the defendant's coming to Jacksonville and committing the crime that he's charged with.
>
> The medical examiners performed an autopsy on the body of Laureen Jean Edwards, and determined that she was in fact killed as a result of a gunshot wound to the back of the head, and apparently died instantly.

> Your Honor, the State would further be able to show that through the statement of the defendant, James William Hamblen, and other evidence, that the defendant had entered the Sensual Woman's Shop with the intent to commit the crime of robbery on the person of Laureen Jean Edwards, and that because she set off the silent alarm, which I alluded to earlier, he, for that reason, shot Laureen Jean Edwards in the head.
>
> The State would therefore be able to show that this crime was committed as a premeditated act by the defendant, James William Hamblen, and, also as a result of a felony crime, during the commission of the felony crime of robbery, which would also constitute premeditation under the felony murder law of the State of Florida.

(T.37-40).

Appellant stated that he had no objections or exceptions to the facts recited by the prosecutor (T.40). Appellant executed a written waiver of counsel form and a plea of guilty form (R.59-60, T.41-48). The trial court adjudicated appellant guilty of first degree murder (R.75-76, T.48) and ordered a pre-sentence investigation (T.49-50). The court stated that he would impanel a jury for proceedings on the issue of penalty, whereupon the prosecutor noted that appellant had a right to waive that, if he so desired[1] (T.48-50). In response to the trial court's question, appellant said he would like to waive a penalty jury (T.50).

On August 3, 1984, appellant signed a written form waiving a jury in the penalty phase (R.61-63, T.55-63), declined the trial court's offer to appoint counsel for him to consult with before deciding whether to waive

[1] Actually, a defendant has only a limited right to waive an advisory jury in the penalty phase; the trial court then has the discretion to dispense with the jury or to impanel one notwithstanding the defendant's waiver. See Palmes v. State, 397 So.2d 648, 656 (Fla. 1981); State v. Carr, 336 So.2d 358 (Fla. 1976).

a jury recommendation (T55), and declined the appointment of counsel for the penalty phase itself (R.64, T.63-66). Appellant stated that he was willing to provide the Court with copies of the confidential reports of the two doctors who examined him[2] (T.66-70).

On August 20, 1984, the trial court announced that he had received the presentence investigation report[3] (T.79). Appellant acknowledged receipt of a copy of the report, as well as certain letters referred to by the trial judge (R.79-80). In response to the court's inquiry, appellant stated that it was still his intention to represent himself (T.80).

On August 23, 1984, the trial court set a hearing to advise appellant of the fact that a box, containing certain writings and a photograph album with photos of the victim, had been delivered to the judge's chambers by the victim's husband (T.88-89). The trial court stated that he did not intend to consider any of these materials in sentencing appellant unless they were to be introduced into evidence by appellant or the state in the penalty hearing (T.90). Appellant declined to look at the contents of the box, as he had seen them before; his former attorney had brought them over to him five or six weeks earlier (T.91-95).

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[2]The psychological evaluations are contained in the record at R.65-68 (Dr. Miller) and R.70-74 (Dr. McMahon).

[3]The presentence investigation report was sealed and mailed to this Court; the record on appeal provided to the parties does not contain a copy. However, undersigned counsel has had an opportunity to review the report.

The penalty hearing took place on September 7, 1984. In response to the trial court's question, appellant once again stated that he did not want counsel appointed to represent him (T.107). The court noted that Assistant Public Defenders McGuinness and Cofer were available for consultation if appellant so desired (T.107). The court asked appellant if he had any exceptions or objections to the presentence investigation report; appellant answered that he did not (T.109).

Dr. Bonafacio Floro testified for the state that on April 25, 1984, he performed an autopsy on the body of Laureen Jean Edwards (T.115-16). There was a gunshot wound of entrance in the back of the head, slightly to the left (T.117), and an exit wound on the right side of the head (T.118). Based on the presence of powder residue and on the star-shaped appearance of the entrance wound, Dr. Floro concluded that the shot was fired from point-blank range (T.118).

Asked whether he would like to cross-examine the witness, appellant said he had no questions (T.119).

John Hartley, a patrolman with the Jacksonville Sheriff's Office was dispatched at around 3:00 p.m. on April 24, 1984 to the Sensual Woman's Shop on Beach Boulevard (T.121). Officer Hartley was advised by Officer Arnold that there was a white male inside the business, walking behind the cash register (T.121-22). Hartley looked in the window, and could see the man (T.122). Arnold said the man would not respond to the door, so they figured something was wrong (T.122). After Hartley had been there four or five minutes, the man [identified by Hartley as appellant (T.122)] came out the front door (T.122-23). The officers approached him with weapons drawn, and he put his hands up (T.123). Officer Arnold asked him about the business, and appellant said it wasn't his business (T.123). When

Arnold asked him why the alarm was going off, appellant said it was because he had just shot the woman inside (T.123). Officer Hartley went inside and found Ms. Edwards' body in a dressing room (T.123-24). Officer Arnold searched appellant and disarmed him (T.123-24). According to Hartley, appellant was calm and acting normally; he did not resist at all (T.125).

Asked whether he would like to cross-examine the witness, appellant said he had no questions (T.126).

Detective Anthony W. Hickson arrived at the Sensual Woman's Shop at about 3:50 p.m.; several officers were on the scene and appellant was in custody (T.128). The body of the victim, later identified as Laureen Jean Edwards, was inside a dressing room, on the floor (T.129-130). Through Detective Hickson, the state introduced 17 photographs of the crime scene and the partially clothed body of the victim (T.130-32, 133-38). [In response to the trial court's inquiry, appellant stated that he did not object to the admission of these photographs (T.131-32)]. Detective Hickson collected several items of evidence, including some spent shell casings and bullet fragments, and some latent prints (T.132, 136-37). One photograph depicted the mirrored back wall of the dressing room, which appeared to have been damaged by a gunshot (T.137). Another photograph showed a cash box (which had been removed from the counter in front) on the dressing room floor (T.138). The box contained a few pennies and some credit card receipts (T.138). During the course of the investigation, according to Hickson, it was determined that there should have been some petty cash in the store (T.138). All five sales which had been made that day were through credit cards; there were no cash sales (T.139). When appellant was arrested, he had 27 dollars on his person (T.139).

The state introduced into evidence, without objection by appellant, the .38 automatic revolver which was taken from appellant on April 24, 1984 (T.139-43). The state also introduced a Polaroid booking photograph of appellant taken by Detective Hickson on the date of the arrest (T.146-47). The prosecutor showed Hickson another photograph of appellant taken twenty years earlier, in 1964 (T.147-48); the prosecutor said he would link this item up later on (T.148).

Asked whether he would like to cross-examine the witness, appellant said he had no questions (T.148).

The state next called evidence technician Thomas Z. Martin, III, as a chain of custody witness regarding the revolver, bullets, and empty casings (T.149-54). Appellant had no questions on cross-examination (T.154).

David Warniment of the FDLE was offered by the state as an expert witness in the field of firearms examination (T.155-57). Appellant declined to ask the witness any questions regarding his qualifications (T.157), and the trial court found him qualified to so testify (T.157-58). Warniment test-fired the semiautomatic pistol which had been taken from appellant, using the live cartridges which had been recovered with the weapon (T.163-64). He examined state's exhibits 23 (a fired bullet and cartridge case), 24 (a fired metal jacket and small lead fragments) and 25 (a fired cartridge case), and concluded that they were all fired from appellant's semiautomatic pistol (T.165-66).

Appellant declined to cross-examine the witness (T.166-67).

Detective J.W. Terry interviewed appellant at the Police Memorial Building on April 24, 1984 between 5:00 and 5:30 p.m. (T.169). According to Terry, appellant was calm, coherent, and cooperative (T.169-70). After

Detective Terry advised appellant of his constitutional rights, appellant said he would give a statement (T.174-75). Terry gave appellant the option of writing out the statement himself, or else relating it orally and Terry would write it out (T.174-75). In the latter case, Terry advised appellant, the statement would not be verbatim (T.175). Appellant said that would be fine; Terry could write the statement as he (appellant) related the facts (T.175). Detective Terry then testified as to the contents of the statement:

> Mr. Hamblen told me that he had previously been in Texas, and had traveled to Florida, he had arrived the 23rd of April, and he had registered at a Ramada Inn on the westside of Jacksonville. He had slept the night over there. The next morning he got up and was riding around, and he went out Beach--first he went to the Airport to--he was going to park a rental car and get another rental car, but he realized he didn't have any money to pay the parking fee at the Airport.
>
> He stated he then left the Airport, drove around Beach Boulevard, and saw this boutique, The Sensusal Woman, and then went down to St. Augustine, and he came back. He came back to the boutique, and he decided he was going to rob it.
>
> And Mr. Hamblen stated he went inside, there was a white female inside, he stated he had a firearm, it was a .38 automatic stuck in he back of his trousers. He walked over to a dress rack. She came over, at which time he told her this was a robbery. She gave him the cash box. He said it didn't have very much money in it.
>
> He instructed her to go into a dressing room, and undress so she would not chase him when he left the premises.
>
> I think he said at this time she told him she had more money in the back. They started to go to the back of the business, and he saw her hit a button under a shelf, and he said he figured it was a silent robbery alarm, and went back in the dressing room, and said

> he couldn't figure out why anyone would be so stupid over so little money.
>
> The gun accidentally discharged one time, I believe striking the wall in the back of the dressing room. Mr. Hamblen stated that he then shot the victim in the head. He said it was deliberate.
>
> A few moments later Mr. Hamblen stated a police officer came to the door. He walked outside. The officer told him, he says, "Your robbery alarm is going off."
>
> He said, "I know, I just killed a woman inside."

(T.175-77).

The state introduced into evidence the written statement, which was similar in substance to what Detective Terry had just testified to (T.178-79, see R.56-58). In response to the trial court's inquiry, appellant said he had no objection to the admission of the statement (T.178).

Asked whether he would like to cross-examine the witness, appellant said he had no questions (T.179).

The prosecutor then stated that he had another witness, but he was from Bloomington, Indiana and had missed his plane due to a computer mix-up (T.179-80). The prosecutor asked the trial court to continue the proceeding until the following Tuesday (T.180). In response to the trial court's inquiry, appellant stated that he had no objection to continuing the hearing until Tuesday (T.181). The court asked appellant if he anticipated bringing in any testimony, so they could set more time on the calendar (T.182). Appellant replied, "No, Your Honor, I will have none" (T.182). The judge told appellant to let him know if he changed his mind (T.183).

The proceedings resumed on September 11, 1984. Appellant once again declined the trial court's offer to appoint counsel to represent him (T.189).

The trial court noted that Assistant Public Defender McGuinness was available to confer with him if he so desired (T.190).

Through Richard E. McMurray, a police officer from Bloomington, Indiana, the state introduced a photographic copy of a police report concerning the arrest of appellant for the April 13, 1964 rape of Miriam Perry (T.191-99). Appellant stated that he had no objection to the admission of this report (T.199). The state also introduced a booking photograph of appellant taken at the time of his 1964 arrest in Indiana (T.195-97, 199-200). Appellant stated that he would like to question Lieutenant McMurray (T.200-01); Mr. McGuinness volunteered to conduct the cross-examination (T.201). On cross, Lieutenant McMurray stated that he was not with the Bloomington police department in 1964, when appellant was arrested (T-201).

> MR. MCGUINNESS: And these documents that the Bloomington police maintained, aren't these routinely forwarded to the Federal Bureau of Investigation for their records?
>
> LT. McMURRAY: Are you talking about the documents that we have here?
>
> Q. I'm talking about the arrest documents, the charge that is brought against the defendant in the case, the disposition of the case,--that information is routinely forwarded to the FBI?
>
> A. I can't answer that in this particular case since I was not working at the police department at that time. In many cases it is not forwarded is the only way I can really answer you.
>
> Q. These photocopies, this is what you brought down from Bloomington, is that correct? Did you bring that with you?
>
> A. No. They were mailed down.

(T.201-02)

The state then offered into evidence a certified copy of the judgment and sentence, the information, and "all documents in the court file pertaining to this case, the State of Indiana versus James W. Hamblen, Jr." (T.203-05). The documents showed that on April 24, 1964, appellant pled guilty to the rape of Miriam Perry and was sentenced to a term of 2 to 21 years imprisonment (T.204). The following proceedings then occurred:

> THE COURT: Do you have any objection, Mr. Hamblen?
>
> MR. HAMBLEN: No, I have no objection.
>
> THE COURT: Let me ask you this question, Mr. Bledsoe: You have the certified copies of James William Hamblen, Jr. My docket shows this case is James William Hamblen.
>
> MR. BLEDSOE [prosecutor]: I'm sorry.
>
> THE COURT: This defendant is James William Hamblen. The certified copy is James William Hamblen, Jr.
>
> MR. BLEDSOE: Yes, sir. He is one and the same individual.
>
> THE COURT: Who said so?
>
> MR. BLEDSOE: You Honor, the records reflect that throughout.
>
> Again, I also offer in evidence the photograph now in evidence as State's Exhibit 30, which if you recall Detective Hickson identified as the very same suspect that he arrested in this case which is before the Court, and this photograph is the photograph taken of James William Hamblen, Jr. in April of 1964 and is part and parcel of the document that Lieutenant McMurray just authenticated, and which was just now presented to the Court.
>
> THE COURT: Mr. Hamblen, do you have any objection to the papers being introduced?
>
> MR. HAMBLEN: No, Your Honor. I will stipulate James William Hamblen, Jr., and James

William Hamblen currently are one and the same.

THE COURT: The documents in the Bloomington, Indiana, court that we have heard about today refer to you?

MR. HAMBLEN: Well, at the time I was in Bloomington my father was alive so I used Junior. He is since deceased. So, I have dropped the Junior.

THE COURT: Well, are you stipulating these documents refer to you?

MR. HAMBLEN: Yes, sir.

THE COURT: All right.

(T.205-06).

The trial court asked appellant if he had any evidence he would like to present (T-206). Appellant answered that he did not (T.206).

THE COURT: Well, I'm going over these with you, so we don't have any misunderstanding about it, Mr. Hamblen.

MR. HAMBLEN: Yes, sir.

THE COURT: The mitigating circumstances set forth in Subsection 6 of Florida Statute 921.141 are six different subparagraphs. I will read these to you and ask you each time whether you have any testimony or evidence you would like to present on your behalf with respect to each one of them.

MR. HAMBLEN: (Nodding head)

THE COURT: The first one is the defendant has no significant history of prior criminal activity.

Do you have any testimony or evidence to present relative to that mitigating circumstance?

MR. HAMBLEN: No, sir.

THE COURT: The next one is the capital

felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

Do you have any evidence or testimony you would like to present with respect to that mitigating circumstance?

MR. HAMBLEN: No, sir.

THE COURT: The next one is the victim was a participant in the defendant's conduct or consented to the act.

Do you have any testimony or evidence you would like to present under that mitigating circumstance?

MR. HAMBEN: No, sir.

THE COURT: The next one is the defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

Do you have any testimony or evidence to present with respect to that?

MR. HAMBLEN: No, sir.

THE COURT: The next one is the defendant acted under extreme duress or under the substantial domination of another person.

Do you have any testimony or evidence you would like to present with respect to that mitigating circumstance?

MR. HAMBLEN: No, sir.

THE COURT: The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

Do you have any testimony or evidence you would like to present with respect to that mitigating circumstance?

MR. HAMBLEN: No, sir.

THE COURT: All right.

> The next one, and the last one, is the age of the defendant at the time of the crime.
>
> You are what; 50?
>
> MR. HAMBLEN: 55.
>
> THE COURT: 55?
>
> MR. HAMBLEN: Yes.
>
> THE COURT: Do you contend that is a mitigating circumstance to be considered in this case?
>
> MR. HAMBLEN: No, sir.
>
> THE COURT: Do you have any testimony at all that you would like to present in connection with these proceedings?
>
> MR. HAMBLEN: No, sir.
>
> THE COURT: All right.

(T.206-09).

Following the prosecutor's closing statement, appellant made the following statement to the court:

> Your Honor, once it was determined to my satisfaction that I was legally sane when this crime was committed, I made the conscious decision to dispense with the services of the Public Defender and to enter a plea of guilty to first degree murder.
>
> Now I would like to say that I have substantially agreed with the remarks of the State's Attorney. I believe that he has correctly assessed my character, and certainly he has convincingly established the aggravated nature of the crime. Therefore, I feel that his recommendation for the death penalty is appropriate. On the other hand, Mr. Chance, the probation officer that compiled the presentence investigation data, believes that my courting the death penalty is seeking the easy way out. He, therefore, recommends a life sentence without an opportunity for parole so that I may reflect upon the senselessness of my crime.[4] Mr. Chance might have a valid point

[4] As appellant pointed out, the recommendation of the PSI is for a life sentence. The complete PSI is in the office of the Clerk of this Court.

> if I were a young man with a whole lifetime ahead of me and with a pocketful of hopes and dreams that are going to go on and realize because of the nature of the sentence--and if I were given to the kind of reflection that he envisions for me. But, as a matter of fact, I'm 55, almost 56 years of age, and I don't harbor any hopes or dreams that are going to be realized in this world, and I am not particularly given to reflection. Therefore, it seems to me that Mr. Chance's recommendation in this instance is inappropriate, and that Mr. Bledsoe's, on the other hand, is appropriate.
>
> That is really all I have to say.

(T.213-15).

On September 21, 1984, prior to the imposition of sentence, appellant again declined the trial court's offer of appointed counsel (T.219). The trial court thereupon sentenced appellant to death (R.77-85, T.221-34). The court found as aggravating circumstances that appellant had previously been convicted of a felony involving the use or threat of violence; that the capital felony was committed in the course of a robbery; and that the homicide was committed in a cold, calculated, and premeditated manner (R.82-83, T.230-31). The court found no statutory mitigating circumstances (R.84, T.232-33), and stated that appellant's "background and history as set forth in the presentence investigation and the reports of Drs. Miller and McMahon do not offer any other sufficient, mitigating circumstances" (R.84, T.233). The court rejected the life recommendation contained in the PSI, and imposed a sentence of death (R.84-85, T.233-34).

Although appellant was advised of his right to appeal (R.85, T.234), no notice of appeal was ever filed. See Preliminary Statement, supra. This appeal follows pursuant to Fla.Stat. Section 921.141(4).

III SUMMARY OF ARGUMENT

The main issue--and, as a result of the manner in which appellant chose to conduct his "defense"--virtually the only issue in this appeal is whether a capital defendant may (either acting pro se or through instructions to counsel) "take a dive" in the penalty proceeding. See People v. Deere, 710 P.2d 925 (Cal. 1985). The position asserted by undersigned counsel in this brief is that society's interest in the fairness and reliability of any decision to impose the death penalty requires an adversary penalty hearing in the trial court, whether the individual defendant likes it or not. See People v. Deere, supra. This Court has, at least implicitly, recognized that its duty to automatically review all cases in which the death penalty is imposed requires an adversary presentation on appeal. It is undersigned counsel's position that (1) the public interest in an adversary proceeding in trial court--where the decision to impose or not to impose a death sentence is made in the first instance--is at least as compelling, if not more so, and (2) that, in the absence of an adversary presentation of mitigating circumstances at the trial level, the record is hopelessly distorted in favor of aggravation, and this Court's review function becomes meaningless. People v. Deere, supra.

IV ARGUMENT

ISSUE I

THE TRIAL COURT ERRED IN ALLOWING APPELLANT TO WAIVE COUNSEL IN THE PENALTY PHASE, WHERE, AS A RESULT, THERE WAS NEVER ANY ADVERSARY PROCEEDING TO DETERMINE WHETHER DEATH OR LIFE IMPRISONMENT WAS THE APPROPRIATE PENALTY.

For all practical purposes, the state, in seeking the death penalty for appellant, had the benefit of co-counsel--Assistant State Attorney Bledsoe and appellant. Before getting into his argument, undersigned counsel wishes to make it absolutely clear what he is not arguing. He is not contending that a defendant may never assert his right to self-representation pursuant to Faretta v. California, 422 U.S. 806 (1975), in the penalty phase of a capital trial. Where a competent defendant wishes to represent himself, and intends to make a bona fide effort to oppose the imposition of death, there is no reason why the principles of Faretta should not apply. Furthermore, undersigned counsel is not contending that appellant was incompetent, either intellectually or psychologically, to waive counsel and handle his own defense. Appellant chose to present no defense to the charge or first degree murder, entering instead a plea of guilty. Assuming (as the trial court determined) that appellant was competent and the plea was voluntary, there is no problem with that. Where the problem lies is that appellant, for all intents and purposes, also pled guilty to the death penalty. It was clear to all concerned that appellant wanted a death sentence, and his "self-representation" was, quite deliberately, no representation at all. Appellant presented no evidence; cross-examined no witnesses[5]; made no objections; waived everything he could possibly

[5]Standby counsel did briefly cross-examine one witness, the Bloomington, Indiana police lieutenant (T.201-02).

waive; helped out the prosecutor, when the latter was having a problem proving up appellant's prior violent felony conviction, by stipulating to it; and made a closing argument in which he urged that death was the proper sentence, and that the probation officer's life recommendation (in the PSI) was "inappropriate".

Thus, the narrow issue in this appeal is whether a capital defendant may "take a dive" in the penalty phase. Conceptually, the issue is the same whether the defendant achieves this result acting pro se (as appellant did here) or by instructing his retained or appointed counsel to refrain from opposing a death sentence (see People v. Deere, 710 P.2d 925, 929-34 (Cal.1985); People v. Burgener, 714 P.2d 1251 (Cal.1986)). As there exists no right to commit suicide at state expense (see People v. Deere, supra, at 929-30; In re Caulk, 480 A.2d 93 (N.H. 1984)), and as the public has a vital interest in ensuring that "any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion"[6] (see Gardner v. Florida, 430 U.S. 349, 357-58 (1977); Beck v. Alabama, 447 U.S. 625, 637-38 (1980)), it is undersigned counsel's position that the state and federal constitutions, and Florida's capital punishment statute, contemplate an adversary penalty proceeding, in which evidence and argument both for and against a death sentence will be heard.

Significantly, this Court has apparently determined, in denying undersigned counsel's motion to withdraw and to allow appellant to proceed pro se, that a capital defendant is entitled to an adversary appeal, whether

[6]Presumably, a death sentence should not be based, or appear to be based, on the defendant's caprice or emotion, any more than that of the judge, the prosecutor, the jury, or the press.

he wants one or not.[7] However, as a result of appellant's refusal to contest the appropriateness of the death sentence below, there is essentially nothing to argue on appeal, other than that appellant should not have been allowed to do what he did. See People v. Deere, supra, at 930 ("[to] permit a defendant convicted of a potentially capital crime to bar his counsel from introducing mitigating evidence at the penalty phase because he wants to die [would] . . . prevent this court from discharging its constitutional and statutory duty to review a judgment of death upon the complete record of the case, because a significant portion of the evidence of the appropriateness of the penalty would be missing).

"Death is a different kind of punishment from any other which may be imposed in this country . . .. From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action." Gardner v. Florida, supra, 430 U.S. at 357-58; Beck v. Alabama, supra, 447 U.S. at 637. For the same reasons why an adversary appeal is mandatory in all death penalty cases, those reasons are even more compelling that there must be an adversary proceeding in the first instance --in the trial court--to determine whether or not the death penalty should be imposed.

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[7] Fla.Stat. Section 921.141(4), provides for automatic review by this Court of capital convictions and sentences, but nothing in that subsection prohibits an appellant from waiving counsel or proceeding pro se. Since the motion filed by undersigned counsel did not ask that the appeal be dismissed, the undersigned can only assume that the denial of his motion to withdraw indicates this Court's belief that, to fulfill its automatic review function, an adversary presentation of the issues is required.

In People v. Deere, 710 P.2d 925 (Cal. 1985), the defendant entered a guilty plea, waived a penalty jury, and instructed his trial attorney not to offer any mitigating evidence. The defendant addressed the trial court, saying "I know what I done was wrong", and "I always believed [in] an eye for an eye. I feel I should die for the crimes I done." Trial counsel made it clear to the trial court "that the decision [not] to resist--indeed to invite--a death sentence was not his own but the defendant's." On the automatic appeal of Deere's death sentence, the California Supeme Court said this:

> As Justice Rutledge wrote, "To state the question often is to decide it. And it may do this by failure to reveal fully what is at stake." (Yakus v. United States (1944) 321 U.S. 414, 482, 64 S.Ct. 660, 695, 88 L.Ed. 834 (dis.opn.).) The dilemma in the present case is that the question may be put in one of two ways, each deciding the issue differently.
>
> If the question is whether this defendant may elect to sacrifice his life to atone for the murders he committed, the answer is affirmative. While at common law suicide was a felony punishable by forfeiture of property to the king and ignominious burial, there is nothing in modern law to prevent a person from resolving or attempting to end his life. (In re Joseph G. (1983) 34 Cal.3d 429, 433, 194 Cal.Rptr. 163, 667 P.2d 1176.) Indeed, there is a body of law evolving that appears to respect a person's choice of how and when to die. (See, e.g., Health and Saf. Code, Sections 7185-7195 [the Natural Death Act].)
>
> However, if the question is whether a person may compel the people of the State of California to use their resources to take his life, the answer must be negative. This is so for several reasons. First, to hold otherwise would make superfluous the constitutional requirement that every capital case be reviewed by the Supreme Court and that no judgment of death be executed unless it has been affirmed by this court. (Cal. Const., art. VI, Section 11.)

People v. Deere, supra, at 929-30.

The California Supreme Court went on to discuss a previous capital case in which the defendant had attempted to "take a dive" and invite the death penalty:

> In this respect the case at bar is remarkably similar to People v. Stanworth [457 P.2d 889 (Cal. 1969). That defendant not only sought to waive a jury trial on penalty, he attempted to dismiss his counsel so that no evidence would be presented on his behalf. Much like Deere, Stanworth told the trial judge: "I plead guilty; I confessed. I'll even give you my life. I'll sign my own death warrant . . . .. I would like to plead no contest and have no witnesses whatsoever on my behalf . . .. I don't want nothing in my behalf." (Id. at p.829, fn. 11, 80 Cal.Rptr. 49, 457 P.2d 889.) After conviction, Stanworth sought to "waive" or dismiss his automatic appeal, or at least to have it decided by a perfunctory affirmance. (Id. at p.830, fn. 12, 80 Cal.Rptr. 49, 457 P.2d 889.) He wrote to this court that "I and I alone must suffer for my acts and I understand also that the law holds me to task for my actions . . .. [P]lease be merciful and give me an endless sleep as soon as you can . . . I want no re-trial, no penalty trial or any favorable action from this Court[;] all I want, is to die." (Ibid, fn. 13, 80 Cal.Rptr. 49, 457 P.2d 889.)
>
> We rejected Stanworth's attempt to dismiss his appeal, reiterating the longstanding rule that the statute providing for automatic appeals from judgments of death (Section 1239, subd. (b)) imposes a duty on this court in such cases to examine the complete record in order to determine whether the defendant has had a fair trial. As Justice Sullivan wrote for the court (Id. at p. 833, 80 Cal.Rptr. 49, 457 P.2d 889), "It is manifest that the state in its solicitude for a defendant under sentence of death has not only invoked on his behalf a right to review the conviction by means of an automatic appeal but has also imposed a duty upon this court to make such review. We cannot avoid or abdicate this duty merely because defendant desires to waive the right provided for him."

> Stanworth cited People v. Werwee (1952) 112 Cal.App.2d 494, 500, 246 P.2d 704, for the proposition that "'Although a defendant may waive rights which exist for his own benefit, he may not waive those which belong also to the public generally.'" (People v. Stanworth, supra, 71 Cal.2d at p.834, 80 Cal.Rptr. 49, 457 P.2d 889.) It further quoted (ibid.) from People v. Blakeman (1959) 170 Cal.App.2d 596, 598, 339 P.2d 202, the view that "'The fallacy of this argument is that we are not dealing with a right or privilege conferred by law upon the litigant for his sole personal benefit. We are concerned with a principle of fundamental public policy. The law cannot suffer the state's interest and concern in the observance and enforcement of this policy to be thwarted through the guise of waiver of a personal right by an individual. "Any one may waive the advantage of a law intended [solely] for his benefit. But a law established for a public reason cannot be contravened by a private agreement." (Civ.Code, Section 3513.)'"
>
> To permit a defendant convicted of a potential capital crime to bar his counsel from introducing mitigating evidence at the penalty phase because he wants to die, as did this defendant, would likewise violate the fundamental public policy against misusing the judicial system to commit a state-aided suicide. It would also prevent this court from discharging its constitutional and statutory duty to reveiw a judgment of death upon the complete record of the case, because a significant portion of the evidence of the appropriateness of the penalty would be missing.

People v. Deere, supra, at 930.

After a brief discussion of the principles of Woodson v. North Carolina, 428 U.S. 280 (1976) and Lockett v. Ohio, 438 U.S. 586 (1978), the Deere court went on to say (at 931):

> To allow a capital defendant to prevent the introduction of mitigating evidence on his behalf withholds from the trier of fact potentially crucial information bearing on the penalty decision no less than if the defendant

> was himself prevented from introducing such evidence by statute or judicial ruling. In either case the state's interest in a reliable penalty determination is defeated.

See also Gardner v. Florida, supra, 430 U.S. at 357-58; Beck v. Alabama, supra, 447 U.S. at 637-38.

Based on the foregoing principles, the California Supreme Court concluded that the defense attorney's compliance with his client's instructions, under these circumstances, amounted to ineffective assistance of counsel, and that the "judgment of death imposed in such circumstances constitutes a miscarriage of justice." People v. Deere, supra, at 934. "[N]ot only did defendant not have a fair penalty trial--in effect he had no penalty trial at all" People v. Deere, supra, at 934.

Justice Broussard, joined by Justice Grodin, filed a concurring opinion in Deere in which he expressed reservations about describing the case as one involving ineffective assistance of counsel, but agreeing that the state's interest in the reliability of penalty determinations in capital trials envisions "that this interest will be protected by an adversary proceeding in which the prosecuting attorney will present the aggravating evidence and defense counsel will present the mitigating evidence." People v. Deere, supra, at 934 (Broussard, J., concurring). "A penalty trial at which all mitigating evidence is withheld is inadequate to safeguard the state's interest in the reliability of penalty decisions; as the majority point out, it is equivalent to "no penalty trial at all." People v. Deere, supra, at 934 (Broussard, J., concurring).

The Deere decision was followed by the California Supreme Court in People v. Burgener, 714 P.2d 1251, 1274-76 (Cal. 1986), in which defense

counsel, acting on the instructions of his client, "threw in the towel" at the penalty phase, and invited the jury to impose the death penalty.

In the present case, appellant, acting as his own defense counsel, "threw in the towel" in the penalty phase, invited the trial court to impose a death sentence, and even made a rather persuasive argument against the life recommendation made by the probation officer who prepared the PSI. No evidence in mitigation was presented, and there was no attempt to challenge the state's evidence in aggravation. Undersigned counsel is not contending that appellant should be heard to challenge the effectiveness of his own self-representation. See Faretta v. California, 422 U.S. 806, 834-35, n. 46 (1975) ("[W]hatever else may or may not be open to him on appeal, a defendant who elects to represent himself cannot thereafter complain that the quality of his own defense amounted to a denial of 'effective assistance of counsel'"). To the contrary, appellant did a perfectly fine job of accomplishing the objective of his "defense"--he wanted a death sentence and he got one. In fact, he still wants a death sentence, and given a choice, he would fire undersigned counsel and dismiss this appeal. By denying undersigned counsel's motion to withdraw, this Court has, at least implicitly, recognized that the automatic appeal provided in death penalty cases is not solely for the benefit of the defendant as an individual, but serves important societal interests as well. Therefore, the defendant cannot waive his right to appeal a death sentence, nor can he forego an appeal by failing to file a notice. In the aforementioned motion, undersigned counsel made it clear that appellant understood that an appeal was automatic and could not be voluntarily dismissed, but that appellant did not wish to be represented in his appeal by the undersigned or any other attorney. [See Appendix A, p.2] Pursuant to appellant's wishes and

instructions, undersigned counsel asked this Court to allow him to withdraw and to permit appellant to proceed pro se, or, in the alternative, to relinquish jurisdiction to the trial court for a hearing to determine the voluntariness of appellant's waiver of appellate counsel. Clearly, it was not appellant's intention, if he had been allowed to represent himself on appeal, to seek reversal of his death sentence or to prosecute the appeal in an adversary manner. Rather, it was his intention to do exactly what he did in the penalty phase--take a dive. This Court, in denying the motion to withdraw, refused to allow this to happen.

Society's interest in an adversary appeal of each and every case in which the death penalty is sought to be carried out is a strong one--but it is certainly no more compelling than society's interest in an adversary penalty hearing in the trial court itself, where the decision between life and death is made in the first instance. See People v. Deere, supra, Furthermore, if a death-seeking defendant (whether acting pro se or through instructions to counsel) is permitted to distort the record by refusing to present any evidence or argument as to why the death penalty should not be imposed, then this Court's automatic review function is rendered meaningless. See People v. Deere, supra. Appellant's death sentence should be reversed, and the case remanded for an adversary penalty proceeding, with counsel appointed to represent the position that the death penalty

should not be imposed on appellant.[8]

[8]Undersigned counsel would note that the issue raised in this appeal has not been squarely addressed in prior decisions of this Court. Goode v. State, 365 So.2d 381 (Fla. 1978) and Smith v. State, 407 So.2d 894, 899-900 (Fla. 1981) appear to deal primarily with the voluntariness of a waiver of counsel in the penalty phase, and the competency of the defendant to assert his right to self-representation. See also Muhammad v. State, ___ So.2d ___ (Fla. 1986) (Case No. 63,343, opinion filed July 17, 1986) (11 FLW 359). None of these decisions directly addresses the issue of whether, as a matter of public policy, a capital defendant should be permitted (whether pro se or through counsel) to "take a dive" in the penalty phase, or whether society has a right to an adversary death penalty proceeding whether the defendant likes it or not.

ISSUE II

THE TRIAL COURT ERRED IN FINDING AS AN AGGRAVATING CIRCUMSTANCE THAT THE HOMICIDE WAS COMMITTED IN A COLD, CALCULATED, AND PREMEDITATED MANNER.

Simple premeditation is not sufficient to support a finding of the "cold, calculated, and premeditated" aggravating circumstance; the evidence must show beyond a reasonable doubt that there was a "heightened degree of premeditation, calculation, or planning." Richardson v. State, 437 So.2d 1091, 1094 (Fla. 1983); see also White v. State, 446 So.2d 1031, 1037 (Fla. 1984). In Preston v. State, 444 So.2d 939, 946-47 (Fla. 1984), this Court observed:

> This aggravating circumstance has been found when the facts show a particularly lengthy, methodic, or involved series of atrocious events or a substantial period of reflection and thought by the perpetrator. See, e.g., Jent v. State (eyewitness related a particularly lengthy series of events which included beating, transporting, raping, and setting victim on fire); Middleton v. State, 426 So.2d 548 (Fla. 1982) (defendant confessed he sat with a shotgun in his hands for an hour, looking at the victim as she slept and thinking about killing her); Bolender v. State, 422 So.2d 833 (Fla. 1982); cert.denied, 103 S.Ct. 2111 (1983) (defendant held the victims at gunpoint for hours and ordered them to strip and then beat and tortured them before they died).

In the present case, the physical evidence relating to the manner of death and appellant's written statement to Detective Terry establish that the shooting was premeditated, but do not establish that there was any "heightened" level of premeditation or any substantial period of reflection or thought prior to the shooting. According to appellant's statement

(R.56-68, T.175-77), he had run out of money; on the way to the beach, he passed the Sensual Woman's Shop, and the name caught his eye. He thought this might be a good place to get some money. He drove to St. Augustine and back, and by this time he had decided he was going to rob the store. He went into the store and looked around as if he were going to buy something. When the woman approached him, he pulled the gun on her and told her it was a robbery. She walked over to the counter and got the cash box; appellant took the money and put it in his pocket. At that point, according to appellant's statement:

> I then took the woman into a dressing room, and told her to take all her clothes off. I wanted her to remove her clothes, so she wouldn't run out the door after me when I left. I did not rape the woman. While the woman was taking her clothes off, the gun accidently went off shattering the mirror behind her. The woman got undressed at this time, and she told me that she had more money in the back of the business that she would give me. The woman and I left the dressing room to go to the back of the business and as we passed the counter, I saw her hit a button on the shelf. I knew it was a robbery alarm, and it made me mad. I thought how could anybody be so stupid over so little money. I took the woman in the dressing room and shot her in the head. It was deliberate. When I went to the front door of the business, I saw a police car out front. I opened the door, and the patrolman told me your alarm went off. I said, yeah I know, the woman pushed it and I shot her.

(R.57-58).

If appellant's statement is the truth (and there is no evidence that it isn't, and certainly there is nothing in the record to indicate any motivation on appellant's part to minimize his guilt or to try to avoid a death sentence), then it is clear that appellant did not intend to kill the victim

at the time he decided to rob the store[9], or at the time he took the money from the cash box and directed her to disrobe. It was only after she told him that she had more money at the back of the business, and appellant saw her press the alarm, that he became angry, took her back into the dressing room, and shot her. That is premeditation, unquestionably, but it is premeditation upon reflection of very short duration. See Wilson v. State, ___ So.2d ___ (Fla. 1986) (Case No. 67,721, opinion filed September 4, 1986) (11 FLW 471, 472). See also Richardson v. State, supra, at 1094.

Moreover, the physical evidence is consistent with appellant's statement, including the location of the bullet wound, the fact that the body was partially clothed when found, the fact that the alarm did indeed go off, and even the fact that the mirror was damaged by a gunshot. The psychological evaluations of Dr. Miller and Dr. McMahon, which were before the trial court, were also consistent with the conclusion that appellant did not decide to shoot the victim until he became incensed when she activated the alarm (R.65-66, 73-74).

Because of the trial court's invalid finding of the "cold, calculated, and premeditated" aggravating circumstance, and since the trial court found no "sufficient" mitigating circumstances to "outweigh" the aggravating factors [see Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977)], and since the trial court rejected the recommendation of the presentence investigation

[9]The fact that a robbery may have been committed with heightened premeditation does not automatically transfer to a homicide committed in the course of that robbery. Gorham v. State, 454 So.2d 556, 559 (Fla. 1984); Hardwick v. State, 461 So.2d 79, 81 (Fla. 1984).

report that appellant be sentenced to life imprisonment [Cf. Lewis v. State, 398 So.2d 432, 439 (Fla. 1981)], appellant's death sentence must be reversed and the case remanded for further proceedings. For the reasons stated in Issue I, supra, those proceedings should include an adversary penalty hearing, in which counsel should be appointed to present and argue the case in mitigation.

V CONCLUSION

Based on the foregoing argument, reasoning, and citation of authority, undersigned counsel respectfully requests that appellant's death sentence be vacated, and the case remanded to the trial court for an adversary penalty hearing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Assistant Attorney General Norma J. Mungenast, The Capitol, Tallahassee, FL, 32301, and by U.S. Mail to Mr. James William Hamblen, #095136, Florida State Prison, Post Office Box 747, Starke, FL, 32091 this 15 day of October, 1986.

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