IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,161

DAVIDSON JOEL JAMES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT, IN AND FOR HILLSBOROUGH COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. James' motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court summarily denied relief on all claims. No evidentiary resolution of the facts was allowed. This appeal follows.

Citations in the brief shall be as follows: the record on appeal concerning the trial shall be referred to as "R. ___" followed by the appropriate page number. The record on appeal from the first Rule 3.850 proceedings shall be referred to as "PC-R1. ___." The record on appeal from the second Rule 3.850 proceedings shall be referred to as "PC-R2. ___." The Appendix from the first Motion to Vacate will be referred to as "App. ___." All other citations will be self-explanatory or will be otherwise explained.

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INTRODUCTION

Since the filing of Mr. James' Initial Brief, the United States Supreme Court has rendered its decisions in Stringer v. Black, 112 S. Ct. 1130 (1992), Sochor v. Florida, 112 S. Ct. ___ (1992) and Espinosa v. Florida, 112 S. Ct. ___ (1992). These opinions overturned longstanding Florida law that Mavnard v. Cartwrinht, 486 U.S. 356 (1988), is "inapplicable to Florida." Mills v. Dunner, 574 So. 2d 63, 65 (Fla. 1990). See Porter v. Duaaer, 559 So. 2d 201, 203 (Fla. 1990). Brown v. State, 565 So. 2d 304 (Fla. 1990); Occhicone v. State, 570 So. 2d 902 (Fla. 1990). Hence, Mr. James' Argument III and VIII must now be cognizable in Rule 3.850 proceedings. Thompson v. Dugger, 515 So. 2d 173, 175 (Fla. 1987)("We find that the United States Supreme Court's consideration of Florida's capital sentencing statute in its Hitchcpck opinion represents a sufficient change in the law that potentially affects a class of petitioners, including Thompson to defeat the claim of a procedural default").

On June 8, 1992, the United States Supreme Court reversed this Court and held Maynard v. Cartwright, 486 U.S. 356 (1988). is applicable in Florida. Sochor v. Florida, 112 S. Ct. ___ (1992). Thus, Eighth Amendment error before either of the constituent sentencers (in Florida the constituent sentencers are the judge and the jury) requires application of the harmless-beyond-a-reasonable-doubt standard. Specifically, the Supreme Court held:

> In a weighing State like Florida, there is Eighth Amendment error when the sentencer weighs an "invalid" aggravating circumstance in reaching the ultimate decision to impose a sentence. See ***Clemons*** v. ***Mississippi,*** 494 U.S. 738, 752 (1990). Employing an invalid aggravating factor in the weighing process "creates the possibility ... of randomness," ***Stringer*** v. ***Black, 503*** **U.S.** ___, ___ (1992)(slip **op.,** at 12), by placing a "thumb [on] death's side of the scale," ***id.,*** at ___ (slip op., at 81, thus "creat[ing] the risk [of] treat[ing] the defendant as more deserving of the death penalty," ***id.,*** at ___ (slip op., at 12). Even when other valid aggravating factors exist as well, merely affirming a sentence reached by weighing an invalid aggravating factor deprives a defendant of "the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances." ***Clemons, supra,*** at 752 (citing ***Lockett*** v. ***Ohio,*** 438 U.S. 586 (1978), and ***Eddings v. Oklahoma,*** 455 U.S. 104 (1982)); see ***Parker*** v. ***Dugger,*** 498 **U.S.** ___, ___ (1991) (slip op., at 11). While federal law does not require the state appellate court to remand for resentencing, it must, short of remand, either itself reweigh without the invalid aggravating factor or determine that weighing the invalid factor was harmless error. ***Id.,*** at ___ (slip op., at 10).

Sochor, 51 Cr. L. at 2130.

On June 29, 1992, in Espinosa v. Florida, 112 S. Ct. ___, Slip Op. 91-7390 (1992), the United States Supreme Court again reversed this Court and held that this Court had previously failed to correctly apply Mavnard and Godfrev v. Georgia, 446 U.S. 420 (1980):

> Our examination of Florida case law indicates, however, that a Florida trial court is required to pay deference to a jury's sentencing recommendation, in that the trial court must give "great weight" to the jury's recommendation, whether that recommendation be life, see ***Tedder v. State, 322 So.*** 2d 908, 910 (Fla. 19751, or death, see Smith v. ***State,*** 515 ***So.*** 2d 182, 185 (Fla. 19871, cert. denied, 435 U.S. 971 (1988); ***Grossman*** v. ***State,*** 525 ***So.*** 2d **833,** 839 n.1 (Fla. 1988), cert. denied, 489 U.S. 1071-1072 (19891. Thus, Florida has essentially split the weighing process in two. Initially, the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances.
>
> It is true that, in this case, the trial court did not directly weigh any invalid aggravating circumstances. But, we must presume that the jury did so, see *Mills* v. ***Maryland,*** 486 U.S. 367, 376-377 (19881, just as we must further presume that the trial court followed Florida law, cf. ***Walton*** v. ***Arizona,*** 497 U.S. 639, 653 (1990), and gave "great weight" to the resultant recommendation. By giving "great weight" to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found. This kind of indirect weighing of an invalid aggravating factor creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor, cf. ***Baldwin*** v. ***Alabama,*** 472 U.S. 372, 382 (1985), and the result, therefore, was error.

Slip Op. at **3.**

In light of Sochor and Espinosa, the United States Supreme Court granted certiorari review and reversed five other Florida Supreme Court decisions. See Beltran-Lopez v. Florida, 112 S. Ct. ___ (1992); Davis v. Florida, 112 S. Ct. ___ (1992); Gaskin v. Florida, 112 S. Ct. ___ (1992); Henry v. Florida, 112 S. Ct. ___ (1992); Hitchcock v. Florida, 112 **S.** Ct. ___ (1992). In Thompson v. Duaner, 515 So. 2d 173, 175 (Fla. 1987), this Court held Hitchcock v. Dugger, 481 U.S. 393 (19871, to be a change in Florida law because it "represent[ed] a sufficient change in the law that potentially affect[ed] a class of petitioners, including Thompson, to defeat the claim of a procedural default." The same can be said for Espinosa and Sochor. The United States Supreme Court demonstrated that by reversing seven Florida death cases on the basis of the error outlined in Espinosa and Sochor.

Moreover, an examination of this Court's jurisprudence demonstrates the significance of Esuinosa. The Court has steadfastly held for many years that Mavnard and Godfrev did not affect Florida's capital jury instructions regarding aggravating circumstances. This Court repeated that those cases and their progeny had no application in Florida. See Porter v. Duaaer, 559 So. 2d 201, 203 (Fla. 1990)("Mavnard does not affect Florida's death sentencing procedures"); Brown v. State, 565 So. 2d 304, 308 (Fla. 1990)("We have previously found Mavnard inapposite to Florida's death penalty sentencing"); Occhicone v. State, 570 So. 2d 902, 906 (Fla. 1990)("Mavnard [citation] did not make Florida's penalty instructions on cold, calculated, and premeditated and heinous, atrocious, or cruel unconstitutionally vague"); Mills v. Dugger, 574 So. 2d 63, 65 (Fla. 1990)(Mavnard is "inapplicable to Florida, [does] not constitute such change[] in law as to provide post conviction relief").

Thus, just as Hitchcock overturned this Court's firmly entrenched jurisdprudence (the "mere presentation" standard), Espinosa has similarly overturned this Court's longstanding view that Florida's standard jury instruction was not subject to attack under Godfrev and Mavnard. The basis for this Court's position was the Court's view that "in Florida the jury gives us an advisory opinion to the trial judge, who then passes sentence." Smallev v. State, 546 So. 2d 720 (Fla. 1989).[1] However, Espinosa specifically and pointedly rejected that reasoning (when the sentencing judge gives great weight to the jury recommendation, he "indirectly weigh[s] the invalid aggravating factor we must presume the jury found." Slip Op. at 3).[2]

'This Court had relied on Smallev in rejecting the claim made in Esainosa. See Esainosa v. Florida, Slip Op. at 2.

[2]This Court relied upon Smalley to reject Mavnard claims in a multitude of cases. Porter v. Dunner, 559 So. 2d 201, 203 (Fla. 1990); Clark v. Dugger, 559 So. 2d 192, 194 (Fla. 1990); Randoleh v. State, 562 So. 2d 331, 339 (Fla. 1990); Freeman v. State, 563 So. 2d 73, 76 (Fla. 1990): Brown v. State, 565 So. 2d 304, 308 (Fla. 1990); Smith v. Duaaer, 565 So. 2d 1293, 1295 n.3 (Fla. 1990); Roberts v. State, 568 So. 2d 1255, 1258 (Fla. 1990); Occhicone v. State, 570 So. 2d 902, 906 (Fla. 1990); Robinson v. State, 574 So, 2d 108, 113 (Fla. 1991); Trotter v. State, 576 So. 2d 691, 694 (Fla. 1990); Engle v. Dugger, 576 So. 2d 696, 704 (Fla. 1991); Hitchcock v. State, 578 So, 2d 685, 688 (Fla. 1990); Shere v. State, 579 So. 2d 86, 95 (Fla. 1991); Davis v. State, 586 So. 2d 1038, 1040 (Fla. 1991).

This Court recognized Hitchcock was a change in law because "[w]e thus can think of no clearer rejection of the 'mere presentation' standard reflected in the prior opinions of this Court, and conclude that this standard can longer be considered controlling law." Downs v. Dunner, 514 So. 2d 1069, 1071 (1987). So too here, Espinosa can be no clearer in its rejection of this Court's position that the judge sentencing insulated the jury instructions regarding aggravating factors from compliance with eighth amendment jurisprudence.

In Delap v. Duaaer, 513 So. 2d 659 (Fla. 1987), this Court held that the change brought by Hitchcock was so significant that the failure to previously raise a timely challenge to the jury instruction would not preclude consideration of a Hitchcock claim in past-conviction proceedings. Such an approach is warranted where attorneys in reliance on this Court's jurisprudence which conclusively, albeit erroneously, settled the issue adversely to the client, chose to forego arguments that would fall on deaf ears in favor of potentially more fertile issues. An attorney is expected to "winnow[] out weaker argument[] and focus[] on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52 (1983).

However, here Mr. James did attack the jury instruction on "heinous, atrocious or cruel." On appeal, this Court struck the aggravator as inapplicable; however, this Court then failed to conduct a harmless-beyond-a-reasonable-doubt analysis of the error. James v. State, 453 So. 2d 786 (Fla. 1984).

This Court's failure to conduct such an analysis was error. An appellate court cannot assume that an invalid aggravating factor had no effect:

> [W]hen the sentencing body is told to weigh an invalid factor in its decision, a reweighing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.

Stringer v. Black, 112 S. Ct. at 1137. In Sochor v. Florida, the Supreme Court specifically held that Stringer applied in Florida, and that this Court must conduct the Stringer analysis in determining whether Eighth Amendment error warranted a new penalty phase proceeding. In

Espinosa, the Court indicated that when the error was before the jury the analysis must include consideration of the error's effect on the jury.

In Mr. James' case, great weight was given to a jury's death recommendation which was premised in part on improper aggravating circumstances. The jury had mitigating circumstances before it on which a binding life recommendation could have been returned. These mitigating factors could have provided a reasonable basis for a life recommendation. Hall v. State, 541 So. 2d 1125 (Fla. 1989). The jury recommendation was seven-five for death, Under the circumstances, the jury's consideration of invalid aggravating circumstances cannot be found to be harmless beyond a reasonable doubt. Had "the thumb" been removed from the death side of the scale, a different result may have occurred. The State cannot show beyond a reasonable doubt that the jury would have still returned death absent the invalid aggravation.

Mr. James' reply brief specifically addresses Arguments I, III and VIII. As to the remaining Arguments II and IV-VII, Mr. James relies upon his initial brief wherein he stated with specificity why the State is in error in claiming "procedural bar." Where new case law develops which changes the law applied by this Court at the time of direct appeal, no procedural bar can arise. Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989). The State fails in its brief to address the new cases relied upon by Mr. James and explain why these cases do not warrant consideration in light of this Court's ruling in Jackson and Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987).

Mr. James does not waive any claims previously discussed. He relies upon the presentations in his initial brief regarding any claims not specifically addressed herein.

ARGUMENTS

ARGUMENT I

MR. JAMES' DEATH SENTENCES VIOLATES LOCKETT V. OHIO, EDDINGS V. OKLAHOMA AND HITCHCOCK V. DUGGER BECAUSE THE SENTENCING JUDGE LIMITED HIS CONSIDERATION OF MITIGATING FACTORS TO THOSE LISTED IN FLORIDA'S DEATH PENALTY STATUTE AND BECAUSE THE PARTICIPANTS OPERATED UNDER THIS SAME VIEW; AS A RESULT, MR. JAMES' SENTENCES OF DEATH WERE OBTAINED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The State's erroneous assertion that no Hitchcock error occurred because the court considered all of the mitigation presented is not supported by the record. The only mention the court makes of non-statutory mitigation is a one line instruction that the jury may consider "any other aspect of the defendant's character or record and any other circumstance of the offense." (R. 625). In his oral pronouncements at sentencing the judge made no mention of any mitigation or aggravation, and only stated that Mr. James was sentenced to death (R. 737). In his sentencing order, the Judge listed each of the statutory mitigating factors, but made no recognition of the abundance of non-statutory mitigation on the record (R. 962-64). This Court in Waterhouse specifically held that Hitchcock overturned the notion that "mere presentation" of nonstatutory mitigation was enough to satisfy the eighth amendment. This Court concluded that Hitchcock required the sentencer to actually consider the nonstatutory mitigation. In Cheshire, this Court again relied upon this reading of Hitchcock. Though the trial court in Cheshire did mention non-statutory mitigation in its oral statements at sentencing, there was no mention of nonstatutory mitigation in the written sentencing order. This Court held that "the trial court may not constitutionally limit itself solely to considering statutory factors, as the court below apparently did in its written order." Cheshire, 558 So. 2d at 912 citing Hitchcock. This is virtually identical to Mr. James' case, but Mr. James' sentencing judge did not mention non-statutory mitigation in either the oral pronouncements at sentencing or the written sentencing order.

The State would have this Court hold that simply because the trial court did not give the improper "Hitchcock instruction", no error occurred. Yet, Florida abolished the "Hitchcock

instruction" in 1979. The State would have this Court hold that any trial conducted after 1979 cannot contain Hitchcock error due to no "Hitchcock instruction." This Court has clearly recognized that absence of this particular instruction does not preclude relief on the basis of Hitchcock. Wav v. Dugger, 568 So. 2d 1263 (Fla. 1990)(Hitchcock relief granted though trial was not until 1984 and the "Hitchcock instruction" was not given); Waterhouse v. State, 522 So. 2d 341 (Fla. 1988) (Hitchcock relief granted though trial was in 1981); Cheshire v. State, 568 So. 2d 908 (Fla. 1990)(relief granted though trial was not until 1988 and the "Hitchcock instruction" was not given).

In Woods v. Dunner, 711 F. Supp. 586 (M.D. Fla. 1989),[3] the District Court found Hitchcock error even though Mr. Woods' trial occurred in 1983, long after the "Hitchcock instruction" had been abolished. The Court in Woods found that though the jury was not prevented from considering the nonstatutory mitigation, "the sentencing judgment indicate[d] that the state trial judge [] committed the same error as did the state trial judge in Hitchcock." Woods v. Dugger, 711 F. Supp at 602. This same Hitchcock error, failure by the judge to consider the nonstatutory mitigation, was present in Mr. James' trial. When it is apparent from the record that the sentencing judge did not consider non-statutory mitigating evidence, a new sentencing proceeding is mandated. Foster v. State, 518 So. 2d 901, 902 (Fla. 1987) citing Hitchcock; Copeland v. Duaaer, 565 So. 2d 1348, 1349 (Fla. 1990)(trial court's written order expressly confined its consideration to statutory mitigation).

The State's assertion that Mr. James' case is similar to Davis v. State, 589 So, 2d 896 (Fla. 1991), is in error. This Court in Davis considered the trial court's order on direct appeal and found that there was no error. Davis v. State, 461 So. 2d 67, 72 (Fla. 1985). Unlike the present case, this Court, in Davis, did not find that a "considerable amount of evidence" was presented in mitigation to the trial court. James v. State, 453 So. 2d 786, 792 (Fla. 1984). Unlike Davis, the

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[3]Woods was reversed on appeal on other grounds. See Woods v. Dugger, 923 F.2d 1454 (11th Cir. 1991). In fact, the State had conceded Hitchcock error and conducted a resentencing hearing before the appeal to the Eleventh Circuit occurred.

record in Mr. James' case clearly shows that the court did not consider non-statutory mitigation as required by Hitchcock and Lockett v. Ohio, 438 U.S. 586 (1978).

The State also erroneously asserts that the court considered all of the mitigation presented. This Court has recognized that Mr. James "presented a considerable amount of evidence" in mitigation. James v. State, 453 So. 2d 786, 792 (Fla. 19841. The trial court is required to set forth in writing its findings in support of the death sentence, Fla. Stat. 1921.141(3), so we can ascertain exactly what was relied upon to find the death sentence. It is clear from this record that the court did not consider any of the mitigating factors present in the record. The mitigating evidence presented on behalf of Mr. James was uncontroverted at trial. The State cross-examined none of the witnesses who testified at penalty phase.[4] This uncontroverted evidence must be construed in favor of any reasonable theory advanced by Mr. James. Maxwell v. State, No. 77,138, slip op. at 6 (Fla. June 25, 1992)("As we stated in Nibert, the court must find and weigh any mitigating circumstance established by 'a reasonable quantum of competent, uncontroverted evidence'"). The evidence supports at least the following reasonable mitigating factors: (1) Mr. James supported girlfriend and children, Geiger v. State, 586 So. 2d 1024 (Fla. 1991); (2) Mr. James was gainfully employed, Buckrem v. State, 355 So. 2d 111 (Fla. 19781; (3) Mr. James has positive traits and rehabilitation potential, McCampbell v. State, 421 So. 2d 1072 (Fla. 1982); (4) Mr. James was good provider for family, Klokok v. State, 589 So. 2d 219 (Fla. 1991); (5) Mr. James' behavior at trial was acceptable, Parker v. State, 476 So. 2d 134 (Fla. 1985); (6) Mr. James has in the past demonstrated concern for others, Turner v. State, 530 *So.* 2d 045 (Fla. 1988); (7) Mr. James was not known to his family as a violent man, Hamilton v. State, 547 *So.* 2d 630 (Fla. 1988); and (8) Mr. James was a good brother, Hall v. State, 568 *So.* 2d 882 (Fla. 1990). All of these clearly are valid nonstatutory mitigating factors which were in the record and not considered by the sentencing judge.

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[4]The State argued in closing that the evidence offered on behalf of Mr. James could not be considered because it only went to mercy or sympathy. Not only was this factually incorrect; the assertion was also a misstatement of the law (see Argument VI).

The State argues that the trial court considered Mr. James' non-triggerman status in the sentencing order but declined to award it any mitigating value. In fact, the only mention of the non-triggerman status is in relation to the statutory mitigating factor of the defendant was as an accomplice (R. 963). It is clear from the record that the court did not consider this fact in the specter of nonstatutory mitigation. It would be unconstitutional for the State to restrict the trial court's consideration of evidence of mitigating circumstances solely to the applicable statutory mitigating factor. See Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990).

The State also argues that Mr. James could have asserted this claim under Lockett in his first 3.850 and to assert the Hitchcock claim in a successive 3.850 is an abuse of writ. Contrary to the State's assertion of a procedural bar, this claim is premised upon the pre-Hitchcock constrainment which warranted post-Hitchcock relief in Hall v. State, 541 So. 2d 1125 (Fla. 1989) (this Court found counsel's misunderstanding of the law "precluded [] counsel from investigating, developing, and presenting possible nonstatutory mitigating circumstances"). In fact, pre-Hitchcock, Hall sought 3.850 relief and was denied. Following Hitchcock, Hall again sought 3.850 relief and a new sentencing was ordered. This Court immediately recognized in its post-Hitchcock decisions that Hitchcock was a substantial change in Florida law. Downs v. Duaaer, 514 So. 2d 1069, 1070 (Fla. 1987). The mere opportunity to present non-statutory mitigating evidence does not meet constitutional requirements if the judge or jury believes that some of the evidence may not be weighed during the formulation of the advisory opinion or during sentencing. Downs, 514 So. 2d at 1071.

Hitchcock requires reversal of a death sentence where the sentencer does not provide meaningful consideration and does not give effect to the evidence in mitigation. Penrv v. Lynaugh, 109 S. Ct. 2934 (1989). This case is identical to Woods, and as the State conceded there, a new sentencing is required.

ARGUMENT III

THE APPLICATION OF THE AGGRAVATING FACTOR OF COLD, CALCULATED AND PREMEDITATED VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE NO LIMITING CONSTRUCTION WAS PROVIDED TO THE JURY OR EMPLOYED BY THE SENTENCING JUDGE.

A Florida jury must be correctly instructed at the penalty phase proceedings. Hitchcock v. Duseer, 481 U.S. 393 (1987). The jury instructions given to the jury in Mr. James' case did not correctly explain the law relating to the aggravating factor of "cold, calculated or premeditated." No limiting instruction was given to guide the jury in their deliberations. See Espinosa v. Florida, 112 S. Ct. ___ (1992); Mavnard v. Cartwrinht, 108 S. Ct. 1853 (1988).

This Court, in Roaers v. State, 511 So. 2d 526 (Fla. 1987), held that Florida's instruction on "cold, calculated and premeditated" was overbroad and adopted a limiting and narrowing construction. The Constitution forbids overbroad application of aggravating circumstances as violative of the Eighth Amendment. See Esninosa; Mavnard v. Cartwrinht. Mr. James' sentencing jury was not instructed on the limiting construction of the "cold, calculated and premeditated" aggravating circumstance as required by Rogers and Mavnard v. Cartwright.[6]

The instructional error in this case cannot be harmless because mitigation was before the jury which could have served as the basis for a life sentence. See Hall v. State, 541 So. 2d 1125 (Fla. 1989). Mr. James' jury received no limiting instructions regarding the elements of the "two more serious" aggravating circumstances. See Maxwell v. State, No. 77,138, slip op. at 8 (Fla. June, 25, 1992). The trial court relied upon this factor in sentencing Mr. James. This Court affirmed. Sentencing discretion was not channeled and limited in conformity with the law. Godfrev v. Georgia, 446 U.S. 420 (1980). Under Espinosa and Hitchcock, Mr. James is entitled to a new sentencing hearing. Relief is proper,

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[6] In Sochor v. Florida, 112 S. Ct. ___ (1992), Mavnard was held applicable to the "cold, calculated and premeditated" aggravating circumstance.

ARGUMENT VIII

MR. JAMES' SENTENCE OF DEATH VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE JURY INSTRUCTIONS PROVIDED NO LIMITING CONSTRUCTION OF THE "HEINOUS, ATROCIOUS OR CRUEL" AGGRAVATING CIRCUMSTANCE AND THE TRIAL COURT APPLIED NO LIMITING CONSTRUCTION TO THIS AGGRAVATION.

This issue was raised on direct appeal and must be reconsidered because of new law. Espinosa v. Florida, 112 S.Ct. ___ (1992); Sochor v. Florida, 112 S. Ct. ___ (1992); Stringer v. Black, 112 S. Ct. 1130 (1992). No harmless error analysis of the jury's reliance upon invalid aggravation has been conducted in Mr. James' case; in light of Espinosa, Sochor and Strinner, this Court must now engage in that analysis. Since Espinosa must be considered a substantial change in law, this Court must reconsider the issue.

The State asserts that this claim should have been raised on direct appeal and also must have been preserved for appellate review by appropriate objection at the time of trial. In fact, counsel for Mr. James filed a request for a special penalty phase instruction for heinous, atrocious and cruel pre-trial (R. 919), objected to the instruction at trial (R. 575) and raised the issue on direct appeal to this Court (Appellant's Brief, p. 29). The issue has not been waived and must now be revisited in light of Espinosa. Mr. James' jury was given the standard jury instruction which in effect at the time of his trial and which has been declared inadequate in Espinosa.

The instructions were erroneous, and the jury was instructed to consider an overbroad and invalid aggravating circumstance. Shell v. Mississippi, 111 S. Ct. 313 (1990). Under these circumstances, it must be presumed that the jury's recommendation was tainted. Strinner; Sochor; Espinosa. The judge identified five aggravators (prior conviction of a violent felony, the homicide occurred during the commission of a robbery, the homicide was committed to avoid lawful arrest, the homicide was **cold,** calculated and premeditated and the homicide was heinous, atrocious and cruel). He, thereupon, sentenced Mr. James to death.

Recently, Judge Tjoflat stated:

> I cannot conceive of a situation in which a pure reviewing court would not be acting arbitrarily in affirming a death sentence after finding a sentencing error that relates,

> as the error does here, to the balancing of aggravating and mitigating circumstances. It is simply impossible to tell what recommendation a properly instructed jury would have made or the decision the sentencing judge would have reached.

Booker v. Duaaer, 922 F.2d 633, 644 (11th Cir. 1991)(Tjoflat, C.J. specially concurring).

The legislature intended the sentencing jury's recommendation to be an integral part of the determination of whether a capital defendant lives or dies. The validity of the jury's recommendation is directly related to the reliability of the information it receives to form a basis for such recommendation. Messer v. State, 330 So. 2d 137, 142 (Fla. 1976). In Hall v. State, this Court found sentencing error which infected the proceedings before both the jury and the judge. According to the Court's reasoning in Hall, the all important factor in determining whether the error was harmless is the effect the error may have had upon the jury, not the trial judge. Here, it cannot be said that the improperly admitted evidence, instruction and argument had no effect upon the jury. Moreover, it cannot be contested that mitigating circumstances were present which would have constituted a reasonable basis for a life recommendation. The mitigation present in the record has repeatedly served as a reasonable basis for a life recommendation. See Argument I, supra. Under Stringer, Espinosa and Sochor it is clear that Mr. James should have a new jury untainted by the error which occurred at the first proceeding.

This was error as the United States Court explicitly held:

> [W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing caurt may not assume it would have made no difference if the thumb had been removed from death's side of the scale.

Stringer v. Black, 112 S. Ct. 1131, 1137 (1992).

On direct appeal, an aggravating circumstance was found to be invalid. This factor -- heinous, atrocious or cruel -- was struck because it had been misapplied as a matter of law. Just as the trial judge had misapplied it, so too the jury misapplied it because the jury instructions and prosecutorial argument directed the jury to apply the invalid aggravating factor. As the United States Supreme Court explained in Espinosa:

Our cases establish that, in a State where the sentencer weighs aggravating and mitigating circumstances, the weighing of an invalid aggravating circumstance violates the Eighth Amendment. See ***Sochor v. Florida,*** 504 U.S. ___, ___ (1992)(slip op., at 4); ***Stringer*** v. ***Black,*** 508 U.S. ___, ___ (1992)(slip op., at 6-7); ***Parker*** v. ***Dugger,*** 498 U.S. ___, ___ (1991)(slip op., at 11); ***Clemons*** v. ***Mississippi,*** 494 U.S. 738, 752 (1990). Our cases further establish that an aggravating circumstance is invalid in this sense if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor. See ***Stringer, supra,*** at ___. We have held instructions more specific and elaborate than the one given in the instant case unconstitutionally vague. See ***Shell v. Mississippi,*** 498 U.S. ___ (1990); ***Maynard*** v. ***Cartwright,*** 486 U.S. 356 (1988); ***Godfrey*** v. ***Georgia,*** 446 U.S. 420 (1980).

The State here does not argue that the "especially wicked, evil, atrocious or cruel" instruction given in this case was any less vague than the instructions we found lacking in Shell, ***Cartwright*** or ***Godfrey.*** Instead, echoing the State Supreme Court's reasoning in ***Smalley*** v. ***State,*** 546 ***So.*** 2d 720, 722 (Fla. 1989), the State argues that there was no need to instruct the jury with the specificity our cases have required where the jury was the final sentencing authority, because, in the Florida scheme, the jury is not "the sentencer" for Eighth Amendment purposes. This is true, the State argues, because the trial court is not bound by the jury's sentencing recommendation; rather, the court must independently determine which aggravating and mitigating circumstances exist, and, after weighing the circumstances, enter a sentence "[n]otwithstanding the recommendation of a majority of the jury," Fla. Stat. 9921.141 **(3).**

Our examination of Florida case law indicates, however, that a Florida trial court is required to pay deference to a jury's sentencing recommendation, in that the trial court must give "great weight" to the jury's recommendation, whether that recommendation be life, see ***Tedder*** v. ***State,*** 322 ***So.*** 2d 908, 910 (Fla. 1975), or death, see ***Smith*** v. ***State,*** 515 ***So.*** 2d 182, 185 (Fla. 1987), cert. denied, 485 U.S. 971 (1988); ***Grossman v. State,*** 525 ***So.*** 2d 833, **839,** n. 1 (Fla. 1988), cert. denied, 489 U.S. 1071-1072 (1989). Thus, Florida has essentially split the weighing process in two. Initially, the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances.

It is true that, in this case, the trial court did not directly weigh any invalid aggravating circumstances. But, we must presume that the jury did so, see ***Mills*** v. ***Maryland,*** 486 U.S. ***367,*** 376-377 (1988), just as we must further presume that the trial court followed Florida law, cf. ***Walton*** v. ***Arizona,*** 497 U.S. 639, 653 (1990), and gave "great weight" to the resultant recommendation. By giving "great weight" to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found. This kind of indirect weighing of an invalid aggravating factor creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor, cf. ***Baldwin v. Alabama,*** 472 U.S. 372, 382 (1985), and the result, therefore, was error.

We have often recognized that there are many constitutionally permissible ways in which States may choose to allocate capital-sentencing authority. See ***id.,*** at 389; ***Spaziano v. Florida.*** 468 U.S. 447, 464 (1984). Today's decision in no

> way signals a retreat from that position. We merely hold that, if a weighing State decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances.

51 Cr. L. at 3096-97.

Here, Mr. James' jury was given a legally invalid circumstance to apply and weigh. They were told in the instructions and by the prosecutor that heinous, atrocious or cruel could be established. No limiting constructions adopted by this Court were given to the jury. The jury's death recommendation was clearly tainted by the invalid aggravating circumstance. See Espinosa, Maynard v. Cartwright; Shell v. Mississiaai; Stringer; Sochor. In Clemons v. Mississippi, 110 S. Ct. 1441, 1451 (1990), the Supreme Court explained "it would require a detailed explanation based upon the record for us possibly to agree that the error in giving the invalid 'especially heinous' instruction was harmless." This Court has failed to comply with Eighth Amendment jurisprudence.

This case is virtually identical to Espinosa v. Florida, No. 91-7390 (U.S. June 29, 1992), in which the United States Supreme Court reversed the judgment of the Florida Supreme Court because the jury was given an invalid instruction on the "heinous, atrocious and cruel" factor and the judge and jury weighed that vaguely defined factor in sentencing. The court held that Florida's standard "heinous, atrocious and cruel" jury instruction is unconstitutionally vague in violation of the Eighth Amendment. The Supreme Court rested its decision on the principle of law established in Godfrey v. Georgia, 446 U.S. 420 (1980), and its progeny.

Because Mr. James was sentenced to death based on a finding that his crime was "heinous, atrocious and cruel" and "cold, calculated and premeditated,"[6] but neither the jury nor trial judge had the benefit of the proper limiting definitions Mr. James' sentence violates the Eighth and Fourteenth Amendments. Clearly, in light of the wealth of mitigation presented to the jury (see

[6] See Argument III.

Argument I, supra), the extra thumbs on the death side of the scale cannot be found harmless beyond a reasonable doubt.[7]

Clearly, then the jury's death recommendation is tainted by Eighth Amendment error. An invalid aggravating circumstance was considered by the jury. Under Sochor and Stringer, this Court must revisit the issue and conduct the appropriate analysis. In light of the State's recitation of all the mitigation before the jury, the error cannot be harmless beyond a reasonable doubt,

CONCLUSION

For each of the foregoing reasons and those stated in his initial brief, Mr. James asks this Court to vacate his unconstitutional capital conviction and sentence, and grant all other relief which is just and equitable.

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by United States Mail, first class postage prepaid, to all counsel of record on July 6, 1992.

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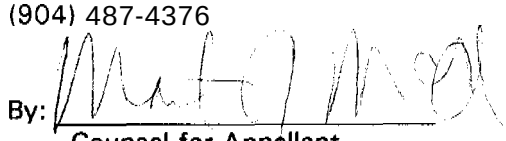
By: 
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[7] In fact, the State has not even attempted to argue the error was harmless beyond a reasonable doubt. See Waterhouse v. State, 522 So. 2d 341, 344 (Fla. 1988).