IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,161

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DAVIDSON JOEL JAMES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

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# SUPPLEMENTAL 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 followed. Oral argument was held on October 7, 1992. At that time, the Court indicated that the briefs submitted in this case failed to fully address Espinosa and its progeny. Appellant's request for supplemental briefing was granted by this Court.

Mr. James does not waive any claim previously discussed. He relies upon the presentations in his initial brief, reply brief and oral argument regarding any claims not specifically addressed herein.

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. ___." All other citations will be self-explanatory or will be otherwise explained.

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At trial and on direct appeal, Mr. James argued that the instruction provided his jury regarding the "heinous, atrocious or cruel" aggravating factor was unconstitutionally vague. Trial counsel requested a special instruction on this aggravator (R. 919), and objected to the vagueness of the standard instruction (R. 575). On direct appeal, appellate counsel argued that the jury instruction was unconstitutionally vague and cited Godfrey v. Georgia, 446 U.S. 420 (1980)(James v. State, Fla. S. Ct. No. 62,557, Initial Brief of Appellant, pp. 28-30). This Court's direct appeal opinion did not address this issue.

This issue must now be addressed in light of Espinosa v. Florida, 112 S. Ct. 2926 (1992), which held that the identical jury instruction provided to Mr. James' jury is unconstitutionally vague and violates the Eighth Amendment's requirement that capital sentencing discretion be narrowly channeled and limited. Espinosa has established that Mr. James' trial objections and direct appeal arguments were correct and that Mr. James' death sentence is invalid under the Eighth Amendment. Under Espinosa, when a jury is given an unconstitutionally vague instruction on an aggravating factor, "we must presume the jury found" the invalid factor and weighed it against the mitigation. Espinosa, 112 S. Ct. at 2928. In light of the jury's close 7 to 5 vote for death and the mitigation contained in the record (including, for example, the State's concession that Mr. James was not the shooter), the error

in providing the jury the unconstitutional instruction on "heinous, atrocious or cruel" cannot be held harmless beyond a reasonable doubt. Mr. James is entitled to resentencing before a properly instructed jury.

Espinosa represents a change in Florida law which must now be applied to Mr. James' claims. In Thompson v. Dugger, 515 So. 2d 173, 175 (Fla. 1987), this Court held Hitchcock v. Dusser, 481 U.S. 393 (1987), 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. The United States Supreme Court demonstrated this proposition by reversing a total of eight Florida death cases on the basis of the error outlined in Espinosa.[1] Moreover, an examination of this Court's jurisprudence demonstrates that Espinosa overturned two longstanding positions of this Court. First, this Court's belief that Proffitt v. Florida, 428 U.S. 242 (197), insulated Florida's "heinous, atrocious or cruel" circumstance from Maynard error was soundly rejected. Espinosa, 112 S. Ct. at 2928 ("The State here does not argue that the 'especially wicked, evil, atrocious, or cruel' instruction given

[1]In light of Espinosa, the United States Supreme Court granted certiorari review and reversed seven other Florida Supreme Court decisions. See Beltran-Lopez v. Florida, 112 S. Ct. 3021 (1992); Davis v. Florida, 112 S. Ct. 3021 (1992); Gaskin v. Florida, 112 S. Ct. 3022 (1992); Henry v. Florida, 112 S. Ct. 3021 (1992); Hitchcock v. Florida, 112 S. Ct. 3020 (1992); Hodses v. Florida, 52 Crim. L. Rep. 3015 (U.S. Oct. 5, 1992); Ponticelli v. Florida, 52 Crim. L. Rep. 3015 (U.S. Oct. 5, 1992).

in this case was any less vague than the instructions we found lacking in Shell, Cartwright or Godfrey"). Second, this Court's precedent that eighth amendment error before the jury was cured or insulated from review by the judge's sentencing decision was also specifically overturned. Espinosa, 112 S. Ct. at 2929 ("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").

"Fundamental fairness" may override the State's interest in finality. Moreland v. State, 582 So. 2d 618, 619 (Fla. 1991). "The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness." Witt v. State, 387 So. 2d 922, 925 (Fla. 1980). "Considerations of fairness and uniformity make it very 'difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases." Id. Accordingly, this Court held in Witt "that only major constitutional changes of law" as determined by either this Court or the United States Supreme Court are cognizable in post-conviction proceedings. 387 So. 2d at 929-30. Here, the decision at issue has emanated from the United States Supreme Court. Espinosa. Obviously, the decision qualifies under Witt to be a change in law. The question is whether the decision changes Florida's law to such magnitude as to warrant retroactive application.

This Court recognized Hitchcock was a change in law because it declared the standard jury instruction given prior to Lockett to be in violation of the Eighth Amendment. In addition, Hitchcock rejected the notion that mere presentation of the nonstatutory mitigation cured the instructional defect. After Hitchcock, this Court recognized the significance of this change, Thompson v. Dugger, and declared, "[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 no longer be considered controlling law." Downs v. Dugger, 514 So. 2d 1069, 1071 (1987).[2] So too here, Espinosa can be no clearer in its rejection of the standard jury instruction and the notion that the judge sentencing insulated the jury instructions regarding aggravating factors from compliance with eighth amendment jurisprudence.

Hitchcock held that Florida jury instructions on mitigating factors must comply with the Eighth Amendment.[3] Because

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[2]In Delap v. Dugger, 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 post-conviction proceedings. Again, the instruction rejected in Hitchcock was, as it is here, a standard jury instruction repeatedly approved by this Court. See Demps v. State, 395 So. 2d at 505.

[3]As noted above, this position had been consistently rejected by this Court based upon its views that presentation of nonstatutory mitigating evidence satisfied the Eighth Amendment, see Downs v. Dugger, 514 So. 2d 1069, 1071 (Fla. 1987) (recognizing that Hitchcock rejected the "mere presentation'' standard), and that judge sentencing cured jury instructional error. See Mikenas v. Dugger, 519 So. 2d 601, 602 (Fla. 1988) (continued..)

Hitchcock had so clearly rejected its prior views, this Court held that no procedural bars would be applied to Hitchcock claims raised in post-conviction. See, e.g., Downs; Mikenas; Delap; Thompson. There is no rational distinction which would justify applying a procedural bar to claims regarding instructions on aggravating factors while not applying such a rule to claims regarding instructions on mitigating factors. Aggravation and mitigation are two sides of a scale in a weighing state like Florida. See Stringer v. Black, 112 S. Ct. 1130, 1137 (1992). Hitchcock concerned unconstitutional jury instructions regarding the consideration of mitigation -- life's side of the scale. Espinosa concerns unconstitutional jury instructions regarding the consideration of aggravation -- "death's side of the scale." When a jury is not instructed to consider mitigation, as with a Hitchcock error, weight is removed from life's side of the scale: when a jury is instructed to consider invalid aggravating factors, as with an Espinosa error, weight is added to "death's side of the scale." With either error, the result is the same: the scale is tipped toward "death's side" and the resulting death sentence is unconstitutional. No rational distinction justifies holding Hitchcock to be a change in Florida law and not doing the same with Espinosa. This is particularly clear where this Court's prior rejections of these kinds of claims were premised

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[3](...continued)
(recognizing that judge resentencing did not satisfy Hitchcock where although resentencing judge considered nonstatutory mitigation, original jury was not instructed to consider nonstatutory mitigation).

upon similar erroneous views of what the Eighth Amendment requires--views that were emphatically overruled by the Supreme Court.

This Court has steadfastly held for many years that Maynard, 486 U.S. 356 (1988), and Godfrey, 446 U.S. 420 (1980), did not affect Florida's capital jury instructions regarding aggravating circumstances. This Court repeatedly held that those cases and their progeny had no application in Florida. See Porter v. Dugger, 559 So. 2d 201, 203 (Fla. 1990)("Maynard does not affect Florida's death sentencing procedures"); Brown v. State, 565 So. 2d 304, 308 (Fla. 1990)("We have previously found Maynard inapposite to Florida's death penalty sentencing"); Occhicone v. State, 570 So. 2d 902, 906 (Fla. 1990)("Maynard [citation] did not make Florida's penalty instructions on cold, calculated, and premeditated and heinous, atrocious, or cruel unconstitutionally vague").

This Court has specifically and repeatedly upheld the standard jury instructions against any Eighth Amendment challenge.[4] The standard jury instruction regarding "heinous,

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[4] In Cooper v. State, 336 So. 2d 1133, 1140-41 (Fla. 1976), this Court found that the trial court erred in finding the "heinous, atrocious or cruel" aggravating factor, but found no error in allowing the jury to rely on the aggravator because "the trial judge read the jury the interpretation of that term which we gave in Dixon. No more was required." In Vaught v. State, 410 So. 2d 147, 150 (Fla. 1982), Vaught argued "that the trial court failed to provide the jury with complete instructions on aggravating and mitigating circumstances." The contention was found to be "without merit. The trial court gave the standard jury instruction on aggravating and mitigating circumstances." Similarly, in Valle v. State, 474 So. 2d 796 (Fla. 1985), this (continued...)

atrocious and cruel" was upheld by this Court in Smallev v. **State,** 546 So. 2d 720 (Fla. 1989).[5] However, as noted, Espinosa specifically and pointedly rejected **this** Court's reasoning in Smalley (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."** 112 S. Ct. at 2928). This **Court** relied upon **Smalley** to **reject** Maynard claims in a multitude of cases.[6]

In Chandler v. State, 442 So, 2d 171, 172 (Fla. 1983), a challenge was again made to the standard jury instructions given

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[4](...continued)
Court concluded, "the standard jury instructions on aggravating and mitigating circumstances, which were given in this case, are sufficient and do not require further refinements." 474 So. 2d at ***805.*** In Valle, this Court cited Demps v. State, 395 So. 2d 501, 505 (Fla. 1981), for the proposition that the standard jury instructions "are sufficient and do not require further refinements." At issue in Demps was the failure to instruct the jury regarding nonstatutory mitigating factors. When the United States Supreme Court subsequently disagreed with the standard jury instructions on that point, it was held to be a substantial change in law which "defeat[ed] a claimed procedural default." Demps v. Dusser, 514 So. 2d 1092, 1093 (Fla. 1987).

[5]This Court had relied on Smallev in rejecting the identical claim made in Espinosa. **See** Espinosa **v.** Florida, 112 S. Ct. at 2928.

[6]**Porter** v. Dugger, 559 So. 2d 201, 203 (Fla. 1990); Clark v. Dugger, **559** So. 2d 192, 194 (Fla. 1990); Randolph 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. Dugger, 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. Dusser, 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).

at the penalty phase of a capital proceeding. The lengthy challenge contained in the Initial Brief as Point XII specifically included an attack on the instruction on "heinous, atrocious, or cruel" in light of Godfrey v. Georgia. See Initial Brief of Appellant, Chandler v. State, Case No. 60,790, at 32-34. As to this challenge, this Court in a footnote said, "We find no merit to these issues." 442 So. 2d at 172.

Subsequently, this Court addressed the matter again in Parker v. State, 456 So. 2d 436 (Fla. 1984). There, Parker argued that the death recommendation was invalid due to inadequate jury instructions. See Initial Brief of Appellant, Parker v. State, Case No. 61,52, at 56, 62. In affirming the death sentence, this Court rejected Parker's arguments. 456 So. 2d at 444. The challenge presented in Lemon v. State, 456 So. 2d 885, 887 (Fla. 1984), was similarly rejected:

> Appellant complains that the trial court erred in refusing to instruct the jury on the definition of heinous, atrocious, or cruel from State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974); * * *
>
> We find no error. The standard jury instructions given by the trial court were adequate under the circumstances of this case.

Numerous other decisions were issued by this Court specifically approving the standard jury instructions against Eighth Amendment challenges.[7]

Following the decision in Smallev, specifically rejecting the Maynard challenge, this Court rejected a number of challenges to the standard jury instructions by citing Smallev. However, there was still a number of cases where the challenges to the standard instructions were rejected without specific reference to Smallev. Haliburton v. State, 561 So. 2d 248, 252 (Fla. 1990); Bruno V. State, 574 So. 2d 76, 83 (Fla. 1991); Haves v. State, 581 So. 2d 121, 127 (Fla. 1991); Green V. State, 583 So. 2d 647 (Fla. 1991); Henrv v. State, 586 So. 2d 1033 (Fla. 1991); Dougan v. State, 595 So. 2d 1, 4 (Fla. 1992); Hodges v. State, 595 So. 2d 929, 934 (1992).

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[7] Lara v. State, 464 So. 2d 1173, 1179 (Fla. 1985)("The judge followed the standard jury instructions. * * * We conclude there was no error in the instructions given by the trial judge regarding aggravating and mitigating circumstances."); Johnson V. State, 465 So. 2d 499, 507 (Fla. 1985)("The instruction on and finding that the murder was especially heinous, atrocious or cruel were also proper"); Bertolotti v. State, 476 So. 2d 130, 132 (Fla. 1985)("Appellant's proposed jury instruction is subsumed in the standard jury instruction given at the close of the penalty phase"); Jennings v. State, 512 So. 2d 169, 176 (Fla. 1987)(the challenge was found meritless without discussion); Hildwin v. State, 531 So. 2d 124, 129 (Fla. 1988)(challenge found meritless without discussion); Mendyk V. State, 545 So. 2d 846, 850 (Fla. 1989)(in response to Mendyk's challenge regarding adequacy of standard instruction on heinous, atrocious or cruel, this Court held "standard jury instructions properly and adequately cover the matters raised by appellant"). A number of cases where the issue was raised have not been included on this list because this Court's opinion failed to refer to the issue in any fashion.

This Court should treat Espinosa's reversal of Florida precedent as a substantial change in law. 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). An attorney should not be required to present issues this Court has ruled to be meritless in order to preserve the issue for the day years later that the United States Supreme Court declares this Court's rulings to be in error.[8] Mr. James is entitled to relief under both Espinosa and Sochor.

Attorneys in reliance on this Court's jurisprudence which conclusively, albeit erroneously, settled the issue adversely to the client, chose to forego arguments which appear to be meritless in favor of issues with a greater chance of success. This was the precise situation this Court faced in Thomason,

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[8] In Florida, an attorney is not required to anticipate that this Court will change its position on an issue, see Spaziano v. State, 489 So. 2d 720, 721 (Fla. 1986) (trial counsel not ineffective in failing to litigate issue regarding hypnotically induced testimony when this Court did not establish per se rule against admission of such testimony until nine years after trial); Muhammed v. State, 426 So. 2d 533, 538 (Fla 1982) (trial counsel not ineffective in failing to request particular instruction when this Court had not yet established right to such an instruction), or that the United States Supreme Court will reverse this Court's view on an issue. See Stevens v. State, 552 So. 2d 1082, 1084-85 (Fla. 1989) (trial counsel not ineffective for failing to litigate Fourth Amendment challenge to admission of confession on basis that defendant was arrested in his home without a warrant absent exigent circumstances when Florida law allowed such an arrest, a view later rejected by the United States Supreme Court in Payton V. New York, 445 U.S. 573 (1980)). Indeed, in Florida, an attorney may be subject to disciplinary proceedings for attempting to relitigate issues which have been repeatedly rejected. See The Florida Bar v. Richardson, 591 So. 2d 908, 910 (Fla. 1991).

Downs, and Delap, wherein this Court ruled finality must give way to fairness. It is only fair that this Court give those with Espinosa claims a forum. The error dates back to the adoption by this Court of erroneous jury instructions. The error was perpetuated by this Court in repeatedly denying the precise Eighth Amendment challenge found meritorious in Espinosa. It was this Court's error that now taints Mr. James' sentence of death.

## 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 AGGRAVATING FACTOR.**

Counsel for Mr. James filed a request for a special penalty phase instruction for the aggravating factor of heinous, atrocious and cruel (R. 919), objected to the vagueness of the instruction at trial (R. 575), and raised the issue on direct appeal to this Court (Initial Brief of Appellant, Fl. S. Ct. No. 62,557, pp. 28-30). 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 was in effect at the time of his trial and which has been declared inadequate in Espinosa:

> The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel.

(R. 624). This is identical to the instruction proclaimed invalid in Espinosa.

In oral argument in this Rule 3.850 appeal, the State falsely asserted that this issue was not raised on direct appeal. A quick look at the direct appeal brief filed on behalf of Mr. James' shows that this is patently untrue. After reviewing Florida law on the requested instruction, Appellant summarized:

> Finally, in Godfrey V. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), the United States Supreme Court declared a death sentence invalid where it was based upon a jury finding that the murder was "outrageously or wantonly vile, horrible and inhuman" (at 100 S.Ct. 1764), and the Georgia Supreme Court had not placed a sufficiently limiting construction on the scope of this aggravating circumstance. Similarly, James's death sentence must not be allowed to stand where the jury was not properly directed in its consideration of the aggravating circumstance of "especially heinous, atrocious, or cruel".

Initial Brief of Appellant, Fl. S. Ct. No. 62,557, p. 30 (emphasis added). This issue was clearly preserved for review.[9]

On direct appeal, this Court found this aggravating circumstance to be invalid. The factor was struck because it had been misapplied as a matter of law. James v. State, 453 So. 2d 786 (Fla. 1984). 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:

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[9] Appellant does not concede that it is necessary to contemporaneously object nor to raise this issue on direct appeal to preserve the issue for review, although both were done in Mr. James' case. Espinosa is a change in law, and should be treated by this Court in the same manner as Hitchcock claims.

> 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.

112 S.Ct. at 2928 (emphasis added).[10]

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.

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[10]Under Espinosa, when the jury is given an unconstitutionally vague instruction on an aggravating factor, it must be presumed that the jury found the invalid aggravator to exist and weighed the invalid aggravator against mitigation. This presumption is not inconsistent with the Supreme Court's opinion in Sochor v. Florida, 112 S. Ct. 2114 (1992). There, the Court "decline[d] to presume jury error" because "although a jury is unlikely to disregard a theory flawed in law, it is indeed likely to disregard an option simply unsupported by evidence." 112 S. Ct. at 2122. Espinosa error involves "a theory flawed in law" -- that is, the error results from giving a jury a legally invalid instruction, not a factually unsupported instruction. When a jury is instructed on "a theory flawed in law," Espinosa holds that courts must presume jury error.

Mississippi, 111 S.Ct. 313 (1990); Stringer; Sochor. The State must therefore establish beyond a reasonable doubt that the error was harmless. 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."

Here, it cannot be said that the improper instruction and argument had no effect upon the jury. It cannot be contested that mitigating circumstances were present which would have provided a reasonable basis upon which the jury could have based a life recommendation. See Hall v. State, 541 So. 2d 1125 (Fla. 1989)(question whether constitutional error was harmless is whether properly instructed jury could have recommended life). There was a wealth of mitigation presented on Mr. James' behalf at trial: Mr. James was not the shooter (a fact conceded by the State); he contributed to the support of the household; he cared for his terminally ill sister; he was gainfully employed; he was known to family and friends to be non-violent; he had a high school education; he contributed financially to the well-being and education of his son; he helped his mother take care of business after his sister died; and, he was responsive to the emotional, financial and personal needs of his daughter and helped her in the transition from a girl to a young woman.

The mitigation present in the record has repeatedly served as a reasonable basis for a life recommendation.[11]

The jury was given erroneous instructions which resulted in improper aggravation to weigh against the mitigation. Under Stringer, Espinosa and Sochor it is clear that Mr. James should have a new jury sentencing untainted by the error which occurred at the first proceeding.

As Judge Tjoflat recently 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.

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[11] See Hawkins v. State, 436 So. 2d 44 (Fla. 1983)(evidence that defendant was a non-shooter is valid mitigation); Mallov v. State, 382 So. 2d 1190 (Fla. 1979)("...the conflict in the testimony as to who was the actual triggerman..." is a basis for a jury recommendation of life); Bedford v. State, 589 So. 2d 245 (Fla. 1991)(history of nonviolence is valid mitigating factor); Holsworth v. State, 522 So. 2d 348, 354 (Fla. 1988)("potential for rehabilitation and productivity within the prison system" is valid mitigating factor); Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990)("Events that result in a person succumbing to the passions or frailties inherent in the human condition necessarily constitute valid mitigation"); Neary v. State, 384 So. 2d 881 (Fla. 1980)(relevant involvement in the crime is a mitigating factor); Washington v. State, 432 So. 2d 44 (Fla. 1983)("character as testified to by members of his family" is valid mitigation); Rogers v. State, 511 So. 2d 526 (Fla. 1987)(defendant is a good husband, father and provider): Turner v. State, 530 So. 2d 45 (Fla. 1988)("The defendant has in the past demonstrated concern for others and unselfishness"); Hall v. State, 568 So. 2d 882 (Fla. 1990)(good son and brother); Buckrem v. State, 355 So. 2d 111 (Fla. 1978)(gainful employment is a mitigating factor).

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

Davidson James' penalty jury recommended death by the slimmest of margins--seven (7) to (5). The errors detailed in this claim cannot be harmless beyond a reasonable doubt under these circumstances.

Where improper aggravating circumstances are weighed by the jury, "the scale is more likely to tip in favor of a recommended sentence of death." Valle v. State, 502 So. 2d 1225 (Fla. 1987). "A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance." Stringer, 112 S. Ct. at 1139. The jury, here, was left with the open-ended discretion found to be invalid in Furman v. Georgia, 408 U.S. 238 (1972).

Application of the harmless beyond a reasonable doubt standard requires this Court to presume an error was harmful unless and until the State proves that there is no possibility that the jury vote for death would have changed but for the extra thumbs on the death side of the scale. Brown v. Dugger, 831 F.2d 1547 (11th Cir. 1987). The State cannot make this showing in Mr. James' case. Mr. James is entitled to resentencing before a properly instructed jury.

## ARGUMENT III

**MR. JAMES' SENTENCE OF DEATH VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE JURY INSTRUCTIONS PROVIDED NO LIMITING CONSTRUCTION OF THE "COLD, CALCULATED AND PREMEDITATED'' AGGRAVATING CIRCUMSTANCE AND THE TRIAL COURT APPLIED NO LIMITING CONSTRUCTION TO THIS AGGRAVATOR.**

A Florida jury must be correctly instructed at the penalty phase proceedings. Hitchcock V. Dugger, 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 and premeditated." No limiting instruction was given to guide the jury in their deliberations. See Espinosa; Mavnard V. Cartwright.

In Sochor, the United States Supreme Court held that this Court's striking of the "cold, calculated and premeditated" aggravating factor meant that Eighth Amendment error had occurred. The aggravating factor was "invalid in the sense that the Supreme Court of Florida had found [it] to be unsupported by the evidence . . . . It follows that Eighth Amendment error did occur when the trial judge weighed the coldness factor in the instant case." Sochor, 112 S. Ct. at 2122.[12]

The United States Supreme Court recently reversed and remanded in light of Espinosa a case in which the sole jury instruction issue was the vague instruction on the cold,

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[12] In Sochor, this Court had struck the "cold, calculated and premeditated" aggravating factor because the evidence did not satisfy the limiting construction requiring "heightened" premeditation. Sochor V. State, 580 So. 2d 595, 603 (Fla. 1991).

calculated and premeditated aggravating factor. Hodses v, Florida, 52 Crim. L. Rep. 3015 (U.S. Oct. 5, 1992).[13] The Supreme Court's holding in Espinosa is clearly applicable to vague jury instructions on the aggravating factor of cold, calculated and premeditated.

The jury in Mr. James's case received the standard jury instruction regarding "cold, calculated and premeditated." The jury did not receive any of this Court's limiting constructions regarding @@cold,calculated and premeditated."[14] In Espinosa, the Supreme Court explained that "an aggravating circumstance is invalid . . . if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." 112 S. Ct. at 2928.

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[13]The jury instruction on cold, calculated and premeditated give in Hodses was identical to the jury instruction given in Mr. James' case:

> The crime for which the defendant is to be sentenced was committed in (sic) cold, calculated and premeditated manner, without any pretense of moral or legal justification.

(R. 624).

[14]This Court has held that "calculated" consists "of a careful plan or prearranged design," Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987), and that "premeditated" refers to a "heightened" form of premeditation which is greater than the premeditation required to establish first-degree murder. Hamblen v. State, 527 So. 2d 800, 805 (Fla. 1988). This Court requires trial judges to apply these limiting constructions and consistently rejects this aggravator when these limitations are not met. See, e.g., Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992); Gore v. State, 599 So. 2d 978 (Fla. 1992); Jackson v. State, 599 So. 2d 103 (Fla. 1992); Green v. State, 583 So. 2d 647, 652-53 (Fla. 1991); Sochor v. State, 580 So. 2d 595, 604 (Fla. 1991); Holton v. State, 573 So. 2d 284, 292 (Fla. 1990); Bates v. State, 465 So. 2d 490, 493 (Fla. 1985).

However, these limitations, designed to narrow the scope of this otherwise open-ended aggravator, were not provided to Mr. James' jury. Thus, the jury in Mr. James' case had unbridled and uncontrolled discretion to apply the death penalty in direct violation of the Eighth Amendment. Both judge and jury improperly considered an invalid aggravating factor.

Prior to trial, counsel for Mr. James filed a Motion to Declare Florida Statute 921.141 Unconstitutional based on the newly adopted unconstitutionally vague instruction on the aggravating factor of cold, calculated and premeditated (R. 755-56).[15] The motion argued that the vague instruction did not limit the types of murders for which death was the appropriate penalty.[16] After argument in which defense counsel cited the controlling state law of Dixon v. State, the motion was denied (R. 646). During the charge conference defense counsel also objected to the applicability of the cold, calculated and premeditated aggravating factor to Mr. James' case, arguing that it was clearly not supported by the evidence (R. 575). This objection was overruled. Immediately following the instructions to the jury, all previous objections to the instructions were renewed (R. 629).

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[15]The statutory language is the same as the instruction given to Mr. James' jury.

[16]This is essentially the same argument that counsel for Mr. Hodges made during the charge conference at his trial. Hodges Record on Appeal, pp. 705-06.

This Court has repeatedly refused to consider claims attacking the constitutionality of the standard jury instructions on aggravating factors. As a result of this Court's stated views, on direct appeal, Mr. James' appellate counsel presented an argument attacking the facial and as applied constitutionality of the cold, calculated and premeditated aggravating factor (James v. State, Fla. S. Ct. No. 62,557, Initial Brief of Appellant, pp. 30-31, 56-58). This Court declined to address the issue on direct appeal. James v. State, 453 So. 2d 786 (Fla. 1984).

Mr. James' initial brief on direct appeal was filed on December 10, 1982. At that time, Florida law clearly held that the standard jury instructions regarding aggravating factors were immune to attack. In Cooper V. State, 336 So. 2d 1133, 1140-41 (Fla. 1976), this Court found that the trial judge erred in finding the "heinous, atrocious or cruel" aggravating factor, but found no error in allowing the jury to rely on the aggravator because "the trial judge read the jury the interpretation of that term which we gave in Dixon. No more was required." In Vausht v. State, 410 So. 2d 147, 150 (Fla. 1982), the appellant argued "that the trial court failed to provide the jury with complete instructions on aggravating and mitigating circumstances," but this Court found the argument to be "without merit" because "[t]he trial court gave the standard jury instruction on aggravating and mitigating circumstances." In Breedlove v. State, 413 So. 2d 1, 9 (Fla. 1982), this Court held that

impermissible prosecutorial argument to the jury regarding aggravating circumstances was not reversible because the judge was not misled and did not err in his sentencing order. It is clear at the time Mr. James' direct appeal was filed that this Court would reject out of hand any attack regarding the jury's consideration of aggravating factors and would only consider the judge's findings regarding aggravating factors.

Thus, appellate counsel did all that it was reasonably possible to do at the time regarding presentation of an argument attacking the jury instructions on aggravating factors. Appellate counsel argued:

> As there was no evidence presented below from which the jury could properly have concluded that the homicide in this case was "especially wicked, evil, atrocious or cruel," or that the crime was committed in a "cold, calculated and premeditated manner, without any pretense of moral or legal justification," the trial court also erred in instructing the jury that they could find these two aggravating circumstances, over defense objections (R 574-575, 624). The current Florida Standard Jury Instructions in Criminal Cases, at page 78, direct the trial judge to give instructions only upon those aggravating circumstances for which evidence has been presented. (These aggravating circumstances will be discussed in detail in Issue VIII).
>
> The importance of suitable jury instructions was emphasized by the United States Supreme Court in Gregg...

(Initial Brief of Appellant, pp. 30-31). This argument was contained in Issue IV in the brief, the claim which dealt with the unconstitutionally vague jury instructions given to the jury. This claim identified the error--i.e., that aggravating factors

were not sufficiently defined for the jury--and cited the appropriate federal law--Godfrey. The citation to Godfrey clearly identifies the issue: Godfrey was concerned with whether the jury was provided a constitutionally adequate definition of an aggravating factor. In light of this Court's consistent view of such issues, appellate counsel could do no more.

The instructional error in this case cannot be harmless because mitigation was before the jury which could have sewed 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, 603 So. 2d 490 (Fla. 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. Godfrey v. Georgia, 446 U.S. 420 (1980). Under Espinosa, Mr. James is entitled to a new sentencing hearing. Relief is proper.

## CONCLUSION

Mr. James' jury was given legally invalid circumstances to apply and weigh, and the jury recommended death by the slimmest of margins. No constitutionally adequate limiting constructions were given to the jury as to "heinous, atrocious or cruel" or "cold, calculated and premeditated." The jury's death recommendation was clearly tainted by invalid aggravating

circumstances. See Maynard v. Cartwright; Espinosa; Shell; Strinser; Sochor.

The jury received inadequate instructions which must be presumed to have affected the consideration of aggravating circumstances and resulted in extra thumbs on the death side of the scales. Espinosa; Strinser. Under Espinosa, Sochor and Strinser, this Court must revisit the issue and conduct the appropriate analysis. The error in giving the jury the invalid jury instruction on the heinous, atrocious or cruel aggravator cannot be harmless. The jury vote for death was seven to five. Had one less juror voted for death, the life recommendation would have been binding on the trial judge. Tedder v. State, 322 So. 2d 908 (Fla. 1975). The consideration by the jury of the invalid instruction on cold, calculated and premeditated only compounds the error. Clearly, in light of the wealth of mitigation presented to the jury, the extra thumbs on the death side of the scale cannot be found harmless beyond a reasonable doubt. A new jury sentencing before a properly instructed jury must be ordered.

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 November 2, 1992.

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