IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,498

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**ROY ALLEN STEWART,**

Appellant,

**v.**

**STATE OF FLORIDA,**

Appellee.

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**ON APPEAL FROM THE CIRCUIT COURT,**
**OF THE ELEVENTH JUDICIAL CIRCUIT**
**IN AND FOR DADE COUNTY, STATE OF FLORIDA**

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# REPLY BRIEF OF APPELLANT

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## PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Stewart's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court denied Mr. Stewart's claims following a limited evidentiary hearing.

The following symbols will be used to designate references to the record in this instant cause:

"R" -- Record on Direct Appeal to this Court;

"PC-R" -- Record on 3.850 appeal to this Court;

"PC-R2" -- Record on second 3.850 appeal to this Court;

"PC-R3" -- Record on third 3.850 appeal to this Court.

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

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## ARGUMENT IN REPLY

Mr. Stewart called six witnesses at the evidentiary hearings held in January 1990 and February 1991: Stanley Goldstein, Robin Greene, Lance Stelzer, Robert Godwin, Dr. Johnathon Arden and Calvin Fox. The testimony of these witnesses established bona fide doubt about Mr. Stewart's guilt of the crime for which he was sentenced to death. In addition, the testimony of each of these witnesses established bona fide doubt about the propriety of the death sentence in this case.

Calvin Fox was the assistant attorney general who handled Mr. Stewart's case from the direct appeal in 1981 through the appeal in the Eleventh Circuit in 1987. Mr. Fox testified that in reviewing the defense to the ineffective assistance of counsel claim, he came to the conclusion that there was a strong claim of innocence. The more he became familiar with the case, the more his legal doubts were confirmed. Based upon his extensive experience in litigating capital appeals for the state, Mr. Fox came to the conclusion that problems with the criminal investigation of this case resulted in an innocent man, Roy Stewart, being sentenced to death. Mr. Fox testified that practically every point in the alleged confession of Mr. Stewart was inconsistent with the physical facts. Mr. Fox also stated that this alleged confession was critical to the state's case (PC-R3. 2703).

Dr. Johnathon Arden, a forensic pathologist, corroborated Mr. Fox's testimony about the inconsistencies in the confession

and the crime scene. Dr. Arden studied various police reports, the medical examiner's report, photographs of the scene and the victim, exhibits at trial, trial testimony of various witnesses, and the alleged confessions of Mr. Stewart (PC-R3. 261, 2612-13). Dr. Arden's testimony established that Mr. Stewart's alleged confession was inconsistent with the autopsy report, the photographs of the victim, and the testimony of the pathologist at trial (PC-R3. 2646). The ligature marks on the victim's neck were not caused at all in the manner described in the alleged confession (PC-R3.2619).

Dr. Arden also noted that the evidence presented at trial that the victim's stomach was empty at the time of death was inconsistent with the alleged confession (PC-R3. 2630-32). In addition, Dr. Arden testified that other evidence presented at trial was inconsistent with the alleged confession and with police reports (PC-R3. 1943, 1970, 2627, R. 2030, 1925-26, 76-90).

Judge Stanley Goldstein, Mr. Stewart's trial attorney, also testified at the evidentiary hearing. Judge Goldstein, a veteran attorney who practiced law for approximately eighteen years prior to this trial, explained that his investigation of Mr. Stewart's case led him to the conclusion that Mr. Stewart was innocent of the murder. Mr. Goldstein testified that his strategy at trial was dependent upon creating a reasonable doubt in the minds of the jurors. Critical to this defense was any information concerning other suspects. Mr. Goldstein stated in his affidavit

which was filed with the trial court that undisclosed evidence concerning deals between the state and Vanessa Brown were also crucial to his case (PC-R3. 823-28).[1] His attempts to obtain this information from the state were unsuccessful.

Former prosecutor Robert Godwin testified that after the trial he became aware of substantial mitigation in Mr. Stewart's case that caused him to reevaluate his stance on Mr. Stewart's death sentence (PC-R3. 2585, 2586). Had he known of this mitigation at the time of trial in 1979, he would have opposed imposition of the death penalty (PC-R3. 2589, 2593, 2604). Mr. Godwin's view is premised upon the mitigation not discovered and presented by trial counsel due to trial counsel's deficient performance. Mr. Godwin testified that Mr. Stewart's death sentence is no longer appropriate in light of this compelling mitigating evidence.

Former prosecutor Lance Stelzer wrote a letter to Governor Graham in 1986, expressing his view that he no longer actively favors the death penalty for Mr. Stewart (PC-R3. 1919). Mr. Stelzer testified below that his feelings in this matter are still the same as those stated in his 1986 letter, in other words he no longer believes that a death sentence is justified in Mr. Stewart's case (PC-R3. 2564, 2565). In response to a question from the defense, Mr. Stelzer answered "Do I actively favor the

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[1]The circuit court did not allow an evidentiary hearing to resolve this issue (see Argument II.)

death penalty at this moment for Roy Stewart -- No" (PC-R3. 2564).

Former collateral counsel testified that she was aware of a letter from Mr. Godwin to the Governor in 1983 stating his belief that the mitigation in Mr. Stewart's case made the death penalty inappropriate. She did not present this evidence in the prior Rule 3.850 because of a mis-guided loyalty to Mr. Godwin (PC-R3. 2640). Ms. Greene recognized that this testimony would have been critical to the prejudice prong of the claim of ineffective assistance of counsel, and that this was a breach of loyalty to her client. In re-direct examination, Ms. Greene reiterated that she did not fulfill her responsibility to her client (PC-R3. 2647).

On July 2, 1991, the circuit court denied Mr. Stewart's Rule 3.850 motion. This appeal followed.

## ARGUMENT I

**MR. STEWART IS FACTUALLY INNOCENT OF THE CAPITAL CRIME OF WHICH HE WAS CONVICTED.**

Evidence uncovered since the time of Mr. Stewart's capital trial and initial post-conviction proceedings establishes that Mr. Stewart is innocent of the offense for which he was convicted and sentenced to death. Consideration of this evidence is required, for it establishes that Mr. Stewart's conviction and death sentence violate the Eighth and Fourteenth Amendments. Jones v. State, 591 So. 2d 911 (Fla. 1991).

Mr. Stewart filed his notice of appeal August 21, 1991. On January 31, 1992, rehearing was denied in Jones v. State, 591 So.

2d 911 (Fla. 1991). Jones is new law that establishes Mr. Stewart's conviction is suspect on the basis of newly discovered evidence of innocence. It was not available at the time of the proceedings below, but warrants consideration of this claim even at this juncture. See Scott v. Dugger, 604 So. 2d 465 (Fla. 1992).

Calvin Fox testified that it was not until he defended trial counsel's handling of the case that he appreciated the claim of innocence (PC-R3. 2323). Every time Mr. Fox defended the case on behalf of the state on legal grounds, the issue of whether or not Mr. Stewart actually did the crime was not really involved (PC-R3. 2314). Although the state asserts that Mr. Fox's concerns should have been presented at an earlier date, they repeatedly concede that Mr. Fox was not forthcoming about his concerns about this case in numerous conversations prior to this hearing (PC-R3. 2574, 2742, 2749-50). Yet, the state charges Mr. Stewart with eliciting information from Mr. Fox which Mr. Fox chose not to speak about. In fact, Mr. Fox refused to testify at the evidentiary hearing in July 1990 until the state waived any rights it had with respect to confidentiality (PC-R3. 2282-86). This information was clearly not available to counsel prior to this hearing in July 1990.

Mr. Fox concluded that practically every point in the confession was inconsistent with the physical facts. The description of the murder in the confession did not fit the investigation. The description of Mr. Stewart leaving the scene

was totally inconsistent with the way the scene turned out.

The evidence Mr. Fox testified about was corroborated by testimony from a pathologist who reviewed the record. After comparing photographs of the victim with Mr. Stewart's alleged confession, the autopsy report, and the pathologist trial testimony, the pathologist discovered that all were inconsistent (PC-R3. 2646). The state asserts that the absence of a ligature mark on the back of the victim's neck can be explained by the rug and clothing in the picture, but Dr. Arden was very clear that it would have to be a substantial amount of hair or clothing to leave a gap of that size. The clothing shown in a photo was on the left arm, and the ligature mark in the photograph was on the left side of the neck. The large gap in the mark that would have required substantial padding was on the right side of the neck.

The circuit court's duty was the very narrow one of ascertaining whether there was new evidence fit for a new jury's judgment. Jones v. State, 591 So. 2d 911, 916 (Fla. 1991).[2] Instead, the circuit court totally ignored evidence that a jury would never ignore. In analyzing a claim of newly discovered evidence, a court must "evaluate the weight of both the newly discovered evidence and the evidence which was introduced at trial." Jones v. State, 591 So. 2d at 916. A proper evaluation of the evidentiary hearing record and the trial record

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[2]At the time of the denial of the post-conviction motion, the trial court did not have the benefit of the Jones probability standard. A remand is appropriate for reconsideration in light of Jones.

establishes that the new evidence, "had it been introduced at the trial, would have probably resulted in an acquittal." Jones v. State, 591 So. 2d 911, 916 (Fla. 1991).[3]

At the very least, the newly discovered evidence presented in the evidentiary hearing below would have resulted in a life sentence. "The Jones standard is also applicable where the issue is whether a life or death sentence should have been imposed." Scott, 604 So. 2d 465 (Fla. 1992). Evidence was presented in the circuit court concerning the reliability of Mr. Stewart's confessions. This evidence is directly relevant to mental issues to be considered during the penalty phase of the trial. In addition, Vanessa Brown stated in her affidavit that Mr. Stewart was "so messed up that he could barely talk that night. He was in no condition to harm anyone. He could barely even stand up" (PC-R3. 748-54)(see Argument II). This newly discovered evidence is also clearly relevant to penalty phase issues. Had this information been presented to the sentencing phase jury and judge, Mr. Stewart would "probably" have received a life sentence. Id. at 469.

When the trial court entered his postconviction order(s) denying 3.850 relief in this cause (PC-R3. 2032-33, 2041), the

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[3]The trial court denied an evidentiary hearing on the issue concerning the withholding of exculpatory evidence with respect to Vanessa Brown (see Argument II). The court erroneously ruled that this issue was procedurally barred. However, the representation in the post-conviction motion that Vanessa Brown was unavailable must be taken as true and an evidentiary hearing must be ordered. Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989).

standard for setting aside a conviction because of newly discovered evidence required a strict conclusive showing that the outcome would have been different. Hallman v. State, 371 So. 2d 482 (Fla. 1979). The trial court did not have the benefit of the Jones probability standard. The issue was whether honest minds, capable of dealing with evidence, would have probably reached a different conclusion, because of the new evidence, from that of the first jury. Jones. Mr. Stewart's conviction and sentence must be evaluated under the new Jones rule. Another evidentiary hearing is required under Jones, and thereafter, a new trial.

## ARGUMENT II

**THE STATE'S INTENTIONAL WITHHOLDING OF EXCULPATORY MATERIAL EVIDENCE AND THE USE OF FALSE AND MISLEADING TESTIMONY VIOLATED MR. STEWART'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.**

Brady v. Maryland, 373 U.S. 83 (1967), does not stand for the proposition that the state must only turn over exculpatory evidence regarding anyone who "testifies" at trial. Brady holds that the state must release any exculpatory information to the defense. Exculpatory information concerning a deal that Vanessa Brown made in return for false information concerning Mr. Stewart's "involvement" with this crime was withheld from the defense at the time of Mr. Stewart's trial. The state's assertion that all information with respect to this deal was available to the defense at the time of trial is contrary to defense counsel's testimony in the evidentiary hearing. Trial counsel testified that although he suspected a deal had been made in return for Ms. Brown's testimony, he was unable to turn up any

evidence of it. Indeed, when he attempted to explore the possibility of such a deal at trial with Detective Simmons, the detective steadfastly maintained that no such "deal" was in existence.

Trial counsel made reasonable efforts both before and during trial to discover evidence to impeach Ms. Brown, but due to the state's intentional withholding of material evidence and use of false testimony, was unable to do so. Collateral counsel, Robin Greene, representing Mr. Stewart in post-conviction proceedings from 1982-89 also made efforts through her investigator to contact Ms. Brown to discover if trial counsel's suspicions concerning a deal were well founded. Though the state withheld all information that would indicate a deal had been accepted by Ms. Brown in return for her testimony, counsel still attempted to find evidence to impeach her very damaging testimony. Ms. Brown was unwilling to come forward at that time and discuss the secret and undisclosed deal that she had with the state. Undersigned counsel asserts that all efforts to locate Ms. Brown prior to July 1990 failed. This fact was pled in the Rule 3.850 motion, and absent any contrary indication in the record, must be taken as true. "Because an evidentiary hearing has not been held . . . we must treat [the] allegations as true except to the extent that they are conclusively rebutted by the record." Harich v. State, 484 So. 2d 1239, 1241 (Fla. 1986). Any finding that Ms. Brown was available prior to July 1990 on this record would be improper. The state's assertion that this is not newly

discovered evidence because the witness was available underscores the need for an evidentiary hearing on this issue. The knowledge of the deal made by the police with Ms. Brown and the completely fabricated statement she gave to the police falsely implicating Mr. Stewart in the homicide were unavailable to Mr. Stewart and his counsel until July 1990. This is a factual dispute which requires evidentiary resolution. Lightbourne v. Dugger.

Contrary to the state's assertions concerning the reward Ms. Brown received for her "story", the existence of a 1979 article reporting this reward is irrelevant. "Due diligence" does not require a defendant to read every newspaper in the state to discover information that may be relevant to his trial. "Due diligence" does not require a defendant to question every organization in the state to discover if a reward was given for testimony. And "due diligence" does not require a defendant to disbelieve assertions from the state that no deal was made and no reward was given. Trial counsel erroneously relied on the state's good faith. Mr. Goldstein did all that was necessary to discover the existence of a reward:

> In addition, I was never advised that Ms. Brown was instructed that she should not disclose the existence of her deal with the State and/or the three thousand dollars in reward money she would receive for her cooperation in Mr. Stewart's case. I in fact distinctly recall Detective Simmons' testimony denying that any deals had been struck with Ms. Brown.

(PC-R3. 823-28). Not only was the state not truthful in response to counsel's inquiries, but unbeknownst to trial counsel, the state instructed Ms. Brown to also be untruthful:

> [Detective Singleton] also told me that I should not tell anyone that I would be paid a reward for my statement by the Perrine Women's club, which paid me three thousand dollars for my false testimony.

(PC-R3. 748-54). As a result, material exculpatory information was denied Mr. Stewart.

Exculpatory information withheld by the state violates due process of law under the Fourteenth Amendment. Brady v. Maryland. If there is a reasonable probability that the withheld information could have affected the conviction or sentence, a new trial is required. United States v. Bagley, 473 U.S. 667 (1985). Under the Bagley test if the undisclosed evidence is material and its suppression undermines confidence in the outcome of the trial, then the defendant has been deprived of a fair trial and relief is warranted.

The state's argument that evidence at the hearing in 1990 conclusively showed that all suspects prints were examined at trial is a misstatement of the record. In fact, the evidence offered at the hearing showed no indication in the Metro-Dade files that the fingerprint eliminations testified about at trial did in fact occur. The fact that these fingerprints were allegedly eliminated upon further examination in 1990 is of no importance. Defense counsel was misled with respect to the investigation and existence of other suspects at trial. Defense counsel was never informed that the pursuit of suspects Carl Johnson and Charles Johnson ended with Ms. Brown's false statement. Had defense counsel been provided with this

information, a truly compelling reasonable doubt defense would have been deployed on Mr. Stewart's behalf.

The circuit court denied an evidentiary hearing on this claim because it concluded the claim was "procedurally barred" (PC-R3. 2522). However, the circuit court failed to credit Mr. Stewart's allegation that Vanessa Brown was previously unavailable. This allegation had to be taken as true. Under Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989), the facts upon which this claim is based were unknown to either Mr. Stewart or his counsel. Accepting the allegation as true established cause as explained in Lightbourne. Therefore, an evidentiary hearing was required.

A procedural bar, after all, is inapplicable where as here the facts upon which the claims are predicated were unknown to Mr. Stewart or his counsel at the time of trial, when his prior post-conviction application was filed, or at any other time in the past. The facts could not reasonably have been ascertained, for the state kept them concealed.

The violations of Mr. Stewart's rights pled in this appeal show that state misconduct precluded the development of true facts and resulted in the presentation of falsehoods during the trial proceedings in this case. Cf. Smith v. Murray, 477 U.S. 527, 538 (1986). Former counsel reasonably relied on the state's good faith. The state had said to counsel that it had turned over all the facts. In fact, the state did not. An evidentiary hearing on this claim is required.

## ARGUMENT III

**ROY ALLEN STEWART WAS PREJUDICED BY INEFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. MR. STEWART'S PRIOR COLLATERAL COUNSEL FAILED TO PRESENT EVIDENCE OF PREJUDICE AS A FAVOR TO THE PROSECUTOR AND IN VIOLATION OF HER OBLIGATION TO MR. STEWART.**

The evidence in the hearing below established that the unpresented mitigation in Mr. Stewart's case would have convinced the trial prosecutor not to seek a death sentence. Neither the circuit court nor this Court factored this information into the prior review of Mr. Stewart's death sentence during the original Rule 3.850 proceedings. This evidence clearly establishes prejudice. The ruling as to prejudice should be revisited in light of this newly presented evidence. Subsequent information which affects a prior consideration of a defendant's death sentence requires review by this Court. See Scott v. Dugger, 604 So. 2d 465, 468-69 (Fla. 1992).

This evidence was not presented in the initial Rule 3.850 proceeding because collateral counsel did not call the trial prosecutor to testify as a personal favor to the prosecutor even though the failure to present this evidence was not in Mr. Stewart's best interest. There is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the

outcome. Strickland v. Washington 446 U.S. 668, 693 (1984).[4]

In denying Mr. Stewart's current motion to vacate, the circuit court concluded that this evidence that the state attorney would not have pursued the death penalty was as a matter of law "not sufficient" ("the announced change of position of the prosecutors of the case is not sufficient to vacate the judgments that have been reached")(PC-R3. 2033). The circuit court's conclusion is error as a matter of law. Trial counsel's deficient performance was clearly prejudicial as this new evidence now establishes. But for trial counsel's failures, there is a reasonable probability of a different outcome.

## ARGUMENT IV

### ESPINOSA V. FLORIDA ESTABLISHES THAT MR. STEWART'S DEATH SENTENCE WAS THE PRODUCT OF CONSTITUTIONALLY INVALID JURY INSTRUCTIONS AND THE IMPROPER APPLICATION OF STATUTORY AGGRAVATING CIRCUMSTANCES IN VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The State argues that Mr. Stewart's claims regarding the penalty phase jury instructions on aggravating factors are procedurally barred. Espinosa v. Florida, 112 S. Ct. 2926 (1992), is a change in Florida law which must now be applied to Mr. Stewart's claims. James v. State, 18 Fla. L. Weekly 139 (Fla. March 4, 1993). In Thompson v. Dugger, 515 So. 2d 173, 175 (Fla. 1987), this Court held Hitchcock v. Dugger, 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

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[4]"[W]e believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in this case." Strickland, 466 U.S. at 693.

of petitioners, including Thompson, to defeat the claim of a procedural default." The same is true of Espinosa. The United States Supreme Court demonstrated this proposition by reversing numerous Florida death cases on the basis of Espinosa and Sochor v. Florida, 112 S.Ct. 2114 (1992).

This Court recognized Hitchcock was a change in law because it declared the standard jury instruction given prior to Lockett violated the Eighth Amendment. In addition, it rejected the notion that mere presentation of nonstatutory mitigation cured the instructional defect. After Hitchcock, this Court recognized the significance of this change in 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). Espinosa can be no clearer in its rejection of both the standard jury instruction and the notion that the judge sentencing insulated the jury instructions regarding aggravating factors from compliance with the Eighth Amendment.

Additionally, the United States Supreme Court's decisions in Espinosa and Richmond v. Lewis, 113 S. Ct. 528 (1992), establish that fundamental error occurred at Mr. Stewart's penalty phase when the jury was given unbridled, unguided discretion to return a death sentence. Fundamental error occurs when the error is "equivalent to the denial of due process." State v. Johnson, 18 Fla. L. Weekly 55, 56 (Fla. 1993). Fundamental error includes

facial invalidity of a statute due to "overbreadth" which impinges upon a liberty interest. Trushin v. State, 425 So. 2d 1126, 1129 (Fla. 1983). Florida's statutory list of aggravating circumstances is facially vague and overbroad. This is so because the aggravating circumstances as listed in the statute "fail[] adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238 (1972)." Maynard v. Cartwright, 486 U.S. 356, 361-62 (1988).

This vagueness and overbreadth can be cured by limiting constructions which define the statutory language. However, the limiting construction must actually be communicated to and relied upon by the sentencer. Richmond, 113 S. Ct. at 535. Espinosa and Richmond establish that Florida's vague and overbroad list of aggravating factors has not been cured in this manner.[5] For

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[5]The state asserts that Mr. Stewart failed to raise the issue of the unconstitutionally vague jury instructions with respect to the instructions other than "heinous, atrocious, or cruel" below, and is barred from doing so now. The opinion in Espinosa became final June 29, 1992, ten (10) months after Mr. Stewart's notice of appeal. Prior to Espinosa and its progeny, this Court had consistently denied claims concerning the unconstitutionality of the jury instructions on aggravating factors. Although Claim VI. in Mr. Stewart's Rule 3.850 Motion dealt specifically with the instruction of "heinous, atrocious or cruel", Mr. Stewart argued that jury instructions must meet Eighth Amendment standards (3.850 p. 126). To the extent this Court rules that these issues were not adequately raised below, this Court must allow Mr. Stewart to file these claims in the Court below based upon Espinosa as new law.

In addition, the United States Supreme Court has granted a writ of certiorari to review the issue of the constitutionality of the aggravating factor of "in the course of a felony":

example, in Espinosa, the United States Supreme Court held that Florida's "heinous, atrocious or cruel" aggravating factor is unconstitutionally vague and overbroad. Espinosa further held that it violates the Eighth Amendment for a Florida capital sentencing jury to be instructed on a vague and overbroad aggravating factor.[6] Richmond explained that although the vague and overbroad statutory language listing an aggravating factor may be cured by a limiting construction, that limiting construction must actually be employed by the sentencer. The upshot of Espinosa and Richmond is that in Florida, the vague and overbroad statutory language listing aggravating factors can only be cured by providing the jury with definitions limiting the application of the aggravating factors and informing the jury regarding how these factors are to be applied. Failing to cure the vague and overbroad statutory language, as occurred in Mr.

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> Question presented: Does Eighth Amendment prohibit sentencer in capital felony-murder prosecution from considering as aggravating circumstance fact that murder was committed in perpetration of felony?

Tennessee v. Middlebrooks, 53 Cr.L. 3013, cert. granted, April 19, 1993. If, as Mr. Stewart argues, the United States Supreme Court determines that the use of the "in the course of a felony" aggravator was improper, then under James v. State, Mr. Stewart will be entitled to the benefit of Middlebrooks.

[6]This reasoning, of course, applies to any aggravating factor whose statutory language is vague and overbroad, not just to the "heinous, atrocious or cruel" aggravating factor. See Hodges v. Florida, 113 S. Ct. 33 (1992) (remanding for reconsideration in light of Espinosa where only aggravating factor at issue was "cold, calculated and premeditated").

Stewart's case, constitutes fundamental error. This fundamental error must now be corrected in Mr. Stewart's case.[7]

At trial, defense counsel argued that unless the factor of "heinous, atrocious or cruel" were further defined, it would apply to anyone convicted of first-degree murder (R. 2258-63). This objection was correct under this Court's limiting construction of this aggravator. See Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992). See also Arave v. Creech, 52 Cr.L. 2373 (Mar. 30, 1993) ("If the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm"). On direct appeal, appellate counsel noted that "in light of decisions of this Court and of the Supreme Court of the United States, defendant will not present repetitive arguments concerning the constitutionality vel non of

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[7]In State v. Johnson, 18 Fla. L. Weekly 55 (Fla. 1993), this Court held that fundamental error is error which is "basic to the judicial decision under review and equivalent to a denial of due process." 18 Fla. L. Weekly at 56. In Johnson, this Court determined that a statute which "affects a quantifiable determinant of the length of sentence that may be imposed on a defendant" involves "fundamental 'liberty' due process interests." Id. This Court thus held that a facial challenge to the statute's constitutional validity constituted fundamental error. Id. In Johnson, the statute at issue affected whether the defendant would receive a maximum sentence of twenty-five years or a maximum sentence of three and one half years. Id. In this case, the statute at issue affects whether Mr. Stewart will live or die. Clearly, the facial constitutionality of the capital sentencing statute constitutes fundamental error which must now be considered. Additionally, as in Johnson, the challenge presented herein to the capital sentencing statute "falls within the definition of fundamental error as a matter of law and does not involve any factual application." 18 Fla. L. Weekly at 56.

Section 921.141. However, defendant does not waive any contentions that capital punishment is per se violative of the Eighth and Fourteenth Amendments or that Section 921.141 is unconstitutional on its face" (Initial Brief of Appellant, p. 40). The issue regarding the unconstitutionally vague jury instruction was presented at trial and on direct appeal, and this Court must address it in these proceedings. James v. State, 18 Fla. L. Weekly 139 (Fla. Mar. 4, 1993).

The state mischaracterizes trial counsel's objection to the jury instruction as being to the applicability of the factor and not to the wording of the instruction. This ignores the point that it is the undefined vague language which creates uncertainty as to the aggravator's application to a particular set of facts.[8] This argument misses the point of Espinosa and of all post-Furman death penalty law.[9]

Mr. Stewart was provided court appointed counsel. Counsel objected to the vague jury instructions. He meant his objection to be to the vague and overbroad language of the statute and the instructions. Counsel on direct appeal expressly did not waive any issues to the constitutionality of the jury instructions in Section 921.141. Mr. Stewart thus previously presented this

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[8]The "heinous, atrocious, or cruel" instruction given in Mr. Stewart's case was virtually identical to the instruction found unconstitutionally vague by the United States Supreme Court in Maynard v. Cartwright.

[9]Mr. Stewart has sought in a separate motion a remand of these proceedings to permit testimony from trial and appellate counsel regarding the actions they took in raising this issue at and on appeal.

claim which was rejected on the merits. No procedural bar applies. The decisions in James and Espinosa have now established that this claim was wrongly decided and that Mr. Stewart is now entitled to relief. Espinosa establishes that the substance of Mr. Stewart's claim was correct. James establishes that appellate counsel had a duty to raise this claim.[10] His failure to do so was deficient performance which prejudiced Mr. Stewart.

Certainly, Mr. Stewart did not do anything to waive his Eighth Amendment rights. He relied upon the state to provide him adequate counsel to protect his constitutional rights. According to the state's argument, due to circumstances completely out of Mr. Stewart's control, the violation of Mr. Stewart's Eighth Amendment rights should be ignored while Mr. James receives redress. Such a result "would not be fair." James, 18 Fla. L. Weekly at 139.

If this Court finds that the objection was inadequate, counsel's failure to adequately object was deficient performance. Counsel obviously meant to object, and in fact thought he was objecting. His failure to adequately carry out his intention was

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[10]In fact, James for the first time held that appellate attorneys had a duty to raise and preserve Espinosa claims. It was not until James was decided that Mr. Stewart had a claim to present that Mr. Schrank rendered ineffective assistance during the direct appeal. In light of the opinion in James, Mr. Stewart submits an evidentiary hearing is necessary to get the facts concerning the ineffective assistance of appellate counsel. See Swafford v. State, No. 80,182; see also Smith, F.L. v. State, No. 78,199.

not reasonable performance. To the extent that the state argues and this Court accepts that Mr. Stewart's direct appeal counsel failed to adequately preserve his Espinosa claim, appellate counsel rendered ineffective assistance of counsel since he knew the claim was preserved at trial, he believed the claim had merit, he believed he adequately raised the claim on direct appeal, he had no tactical or strategic decision for not raising the issue, and he did not intend to waive the issue.

Recently in Lockhart v. Fretwell, 113 S. Ct. 838 (1993), it was conceded that the failure to adequately object to a jury instruction on an aggravating circumstance was deficient performance. 113 S. Ct. at 842 n.1. Similarly in Atkins v. Attorney General, 932 F.2d 1430 (11th Cir. 1991), the Eleventh Circuit found counsel's failure to object to evidence of previous arrests was deficient performance. In Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989), the failure to object at sentencing to consideration of a prior plea of nolo contendere was found to be deficient performance.

Here, to the extent this Court finds counsel's performance deficient, Mr. Stewart was prejudiced. Had an objection been made, reversal would be required. James. Because the claim regarding the "heinous, atrocious or cruel" jury instruction was raised at trial and on direct appeal, "it would not be fair to deprive [Mr. Stewart] of the Espinosa ruling." James, 118 Fla. L. Weekly at 139. Under James, the erroneous jury instructions cannot be held harmless beyond a reasonable doubt: "We cannot

say beyond a reasonable doubt . . . that the invalid instruction did not affect the jury's consideration." Id.

The State argues that the errors were harmless because the jury would have found this aggravating factor even if they had the proper instruction, but this is not the correct harmless error standard. 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 error. Brown v. Dugger, 831 F.2d 1547 (11th Cir. 1987). It is impossible that the jury vote would not have been affected by the erroneous application of five aggravators.[11] There was mitigation in the record which would have provided a reasonable basis for a life recommendation. See Hall v. State, 541 So. 2d 1125 (Fla. 1989)(question whether constitutional error was harmless is whether properly instructed jury would reasonable basis for life recommendation). Mr. Stewart is entitled to relief.

**ARGUMENT V**

Mr. Stewart relies on the arguments presented in his Initial Brief to the Court with respect to all claims not otherwise addressed in this brief.

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[11]In addition, the jury was not advised of the narrowing constructions which caused the judge to conclude three aggravating factors were not present. Mr. Stewart's jury could have impermissibly relied on these aggravators, and thus the trial court's reliance on the jury's verdict was improper. The jury did not receive instructions on the narrowing constructions which rendered these aggravators inapplicable.

## CONCLUSION AND RELIEF SOUGHT

On the basis of the argument presented herein, and on the basis of what was submitted to the Rule 3.850 trial court, Mr. Stewart respectfully submits that he is entitled to a relief, and respectfully urges that this Honorable Court set aside his unconstitutional capital convictions and sentence of death.

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 7, 1993.

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