IN THE SUPREME COURT OF FLORIDA

NO. 80124

GREGORY MILLS,

Petitioner,

v.

HARRY K. SINGLETARY, Secretary,
Florida Department of Corrections,

Respondent.

PETITION FOR EXTRAORDINARY RELIEF AND FOR A WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Mr. Mills' second habeas corpus petition in this Court. It is being filed now because recent decisions by the United States Supreme Court have established that Mr. Mills is entitled to habeas corpus relief and that the prior dispositions of Mr. Mills' claims by this Court were in error.

In Sochor v. Florida, 112 S. Ct. ___, 60 U.S.L.W. 4486 (1992), the United States Supreme Court, in finding that Maynard v. Cartwright, 486 U.S. 356 (1988), was applicable in Florida, held that eighth amendment error occurring either before the trial court or 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., thus "creat[ing] the risk of treat[ing] the defendant as more deserving of the death penalty." Id. Even when other valid aggravating factors exist as well, merely affirming a death 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, 494 U.S. 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, 60 U.S.L.W. at 4487. Sochor further held that the harmless error analysis must comport with constitutional standards. Id. at 4489.

Moreover, in Strinser v. Black, 112 S.Ct 1130 (1992), another United States Supreme Court decision released since Mr. Mills' prior proceedings in this Court, the Supreme Court held that the "use of a vague or imprecise aggravating factor in the weighing process invalidates the sentence and at the very least requires constitutional harmless-error analysis or reweighing in the state judicial system." Id. at 1140. In Stringer, the Supreme Court also set forth the correct standard to be employed by state appellate courts when conducting the harmless-error analysis, a standard which must now be utilized by this Court.

Sochor and Strinser both overturned longstanding Florida law that Maynard v. Cartwright, 486 U.S. 356 (1988), is "inapplicable to Florida." Mills (John) v. Dugger, 574 So. 2d 63, 65 (Fla. 1990). See Porter v. Dugger, 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). Furthermore, in Sochor, the Supreme Court determined that Stringer applied in Florida, and that this Court must consider the Strinser analysis in determining whether

eighth amendment error warranted relief. Sochor, 60 U.S.L.W. at 4487.

Sochor established that when this Court strikes an aggravating factor on direct appeal, the striking of the aggravating factor means that the sentencer considered an invalid aggravating factor and that Eighth Amendment error therefore occurred. When an aggravating factor is "invalid in the sense that the Supreme Court of Florida had found [it] to be unsupported by the evidence[,] . . . . [i]t follows that Eighth Amendment error did occur when the trial judge weighed the . . . factor." Sochor, 60 U.S.L.W. at 4489.[1] When this kind of Eighth Amendment error occurs before a Florida capital sentencer, Sochor held, this Court must conduct a constitutionally adequate harmless error analysis. Id.

Sochor thus overrules longstanding practice of this Court. In Dixon v. State, 283 So. 2d 1, __ (Fla. 1973), this Court wrote that under Florida's capital sentencing statute, "when one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances." Since Dixon, this Court has relied upon this standard when it strikes aggravating circumstances on direct appeal but refuses to remand for resentencing. See, e.g., Shriner v. State, 386 So. 2d 525, 534

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[1] 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).

(Fla. 1980) ("We have here two valid aggravating circumstances counterbalanced by no mitigating circumstances. Since death is presumed in this situation, improper consideration of a nonstatutory factor does not render the sentence invalid."); Demps v. State, 395 So. 2d 501, 506 (Fla. 1981) ("There remain, however, two valid aggravating circumstances, counterbalanced by no mitigating circumstances. Since death is presumed in this situation, the trial court's improper consideration of the factors discussed above does not render the sentence invalid."); Blanco v. State, 452 So. 2d 520, 526 (Fla. 1984) ("Where there are one or more valid aggravating factors that support a death sentence and no mitigating circumstances to weigh against the aggravating factors, death is presumed to be the appropriate penalty."); Smith v. State, 407 So. 2d 894, 903 (Fla. 1982), citing Dixon ("Because there are two aggravating circumstances, and no mitigating ones, the sentence of death would not have to be overturned even if we were to find the first aggravating circumstance improper. The second finding alone is sufficient basis for imposition of the death penalty."); Jackson v. State, 502 So. 2d 409, 412-13 (Fla. 1986)("We are left then with two valid aggravating factors and nothing in mitigation. Under such circumstances, death is presumed to be the appropriate penalty. . . . We have repeatedly held that when there are one or more valid aggravating factors and none in mitigation, death is presumed to be the appropriate penalty."); Cherry v. State, 544 So. 2d 184, 188 (Fla. 1989)("Although we have concluded that

there was an improper doubling, we are still left with three aggravating factors. . . . In the absence of any mitigating factors, under these circumstances we affirm the death penalty.").

The automatic rule of affirmance created by the standard announced in Dixon and followed by this Court in numerous cases since Dixon was soundly rejected in Sochor. In Sochor, this Court had struck an aggravating factor but did not remand for resentencing, writing:

> Even after removing the aggravating factor . . . there still remain three aggravating factors to be weighed against no mitigating circumstances. Striking one aggravating factor when there are no mitigating circumstances does not necessarily require resentencing.

Sochor v. State, 580 So. 2d 595, 604 (Fla. 1991). This Court's statement in Sochor that "[s]triking one aggravating factor when there are no mitigating circumstances does not necessarily require resentencing" is equivalent to its statements of the Dixon presumption in the cases cited above. The United States Supreme Court found this analysis constitutionally inadequate, overruling this Court's longstanding practice.

The significance of Sochor may be best illustrated by this Court's opinions in White v. State, 446 So. 2d 1031 (Fla. 1984), and White v. Dusser, 565 So. 2d 700 (Fla. 1990). In White v. State, a direct appeal, this Court struck aggravating factors but declined to order resentencing, holding, "When there are one or more valid aggravating factors which support a death sentence, in

the absence of any mitigating factor(s) which might override the aggravating factors, death is presumed to be the appropriate penalty.!! 446 So. 2d at 1037, citing, State v. Dixon. In White v. Dugger, a habeas corpus proceeding in the same case, the petitioner argued that the Court's failure to order resentencing on direct appeal after striking aggravating factors was inconsistent with Clemons v. Mississippi, 110 S. Ct. 1441 (1990). This Court quoted the passage above from the direct appeal opinion and stated:

> Regardless of this language, we are convinced that this Court properly applied a harmless error analysis on direct appeal. To remove any doubt, we again apply this analysis and conclude that the trial court's ruling would have been the same beyond a reasonable doubt even in the absence of the invalid aggravating factors.

White v. Dugger, 565 So. 2d at 702. Thus, in White v. Dugger, this Court stated that the Dixon presumption was a harmless error test and purported to apply a harmless error test in accordance with Clemons. However, Sochor clearly overrules this Court's understanding of harmless error analysis and method for conducting harmless error analysis.

Under Sochor, the appropriate harmless error analysis is that of Chapman v. California, 386 U.S. 18 (1967). Sochor, 60 U.S.L.W. at 4489. This Court, of course, has recognized and adopted the Chasman standard. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). What Sochor does, however, is tell this court that its application of the Chasman standard to Eighth Amendment error does not comport with constitutional requirements. When

discussing this Court's failure to conduct harmless error analysis in Sochor, the United States Supreme Court cited to Yates v. Evatt, **111 S. Ct. 1884 (1991).** In Yates, the jury had been given two unconstitutional instructions which created mandatory presumptions. 111 S. Ct. at 1891. In denying relief, the South Carolina Supreme Court "described its enquiry as one to determine 'whether it is beyond a reasonable doubt that the jury would have found it unnecessary to rely on the erroneous mandatory **presumption,'"** 111 S. Ct. at 1890, and then "held 'beyond a reasonable doubt . . . the jury would have found it unnecessary to rely on either erroeous mandatory presumption.'** Id. at 1891. The United States Supreme Court found the lower court's analysis constitutionally inadequate because the lower court **"did** not undertake any explicit analysis to support its view of the scope of the record to be considered in applying Chapman" and because "the state court did not apply the test that Chapman **formulated."** Id. at 1894. In Yates, the Supreme Court explained that the **"Chapman** test is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" 111 S. Ct. at 1892, quoting Chapman, 386 U.S. at **24. The** Supreme Court elaborated, **"To** say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in **question."** 111 S. Ct. at 1893. In Sochor, the Supreme Court found this Court's analysis deficient for the same reasons the lower court's analysis was found

deficient in Yates: "Since the Supreme Court of Florida did not explain or even 'declare a belief that' this error "was harmless beyond a reasonable doubt" in that "it did not contribute to the [sentence] obtained,' Chaaman, supra, at 24, the error cannot be taken as cured by the State Supreme Court's consideration of the case." 60 U.S.L.W. at 4489. Thus, in Sochor, relying upon Yates, the Supreme Court established that this Court has not been properly applying Chapman in the context of Eighth Amendment error.

Sochor is new law requiring this Court to reassess its direct appeal refusal to order resentencing after striking three aggravating factors in Mr. Mills' case. In Witt v. State, 387 So. 2d 922, 929-30 (Fla. 1980), this Court held that "major constitutional changes of law" as determined by either this Court or the United States Supreme Court are cognizable in post-conviction proceedings. Here, the decision at issue has emanated from the United States Supreme Court. Sochor. Obviously, the decision qualifies under Witt to be a change in law. The question is whether the decision changes Florida law to such an extent as to warrant retroactive application.

To some extent, the question has already been decided by the United States Supreme Court in Stringer V. Black. There, one of the issues was whether Clemons was dictated by precedent or was new law. The Supreme Court held that when the fact that "aggravating factors are central in the weighing phase of a capital sentencing proceedings" is "accorded [its] proper

significance, the precedents even before Maynard and Clemons yield a well-settled principle: use of a vague or imprecise aggravating factor in the weighing process invalidates the sentence and at the very least requires constitutional harmless-error analysis." Stringer, 112 S. Ct. at 1140. Of course, under Florida's capital sentencing statute, aggravating factors have always been "central in the weighing phase." However, as the Supreme Court concluded in Sochor, this Court has not been conducting the appropriate harmless error analysis when it determines that a sentencer has considered invalid aggravating factors. Sochor thus overturns this Court's longstanding practice regarding analysis of Eighth Amendment error and should be applied in Mr. Mills' case. The analysis this Court has employed since Dixon has not been in conformity with the federal constitution.

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 of petitioners, including Thompson." The Court recognized Hitchcock as a change in law because it rejected the notion that mere presentation of nonstatutory mitigation cured the failure to instruct the jury to consider nonstatutory mitigation. 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 (Fla. 1987). The same can be said for Sochor, which can be no clearer in its rejection of this Court's understanding of what is required to conduct a constitutionally adequate harmless error analysis. This Court should treat Sochor's reversal of the Court's longstanding practice as a substantial change in law and consider Mr. Mills' claims.

PROCEDURAL HISTORY

Mr. Mills was convicted in Seminole County, Florida, for first degree murder and related offenses. The jury recommended a life sentence, but the judge overrode the recommendation and sentenced Mr. Mills to death. The trial court found the existence of six (6) aggravating circumstances: 1) under sentence of imprisonment; 2) previous conviction of a violent felony; 3) great risk of death to many persons; 4) felony murder; 5) pecuniary gain; and 6) heinous, atrocious, or cruel. The trial court, addressing only statutory mitigating factors, also found that no mitigating circumstances had been established.

The conviction and sentence were affirmed by this Court on direct appeal. Mills v. State, 476 So. 2d 172 (Fla. 1985), cert. denied, 475 U.S. 1031 (1986). This Court struck three of the aggravating circumstances found by the trial court: 1) great risk of death to many persons ("[t]he finding that Mills knowingly created a great risk of death to many persons was, as the state

conceded, erroneous"); 2) pecuniary gain ("[t]he aggravating factors that the capital felony was committed in the course of a burglary and that it was committed for pecuniary gain are in this situation both based on the same aspect of the criminal episode and should therefore have been considered as a single aggravating circumstance"); and 3) heinous, atrocious, or cruel ("the finding of especially heinous, atrocious, or cruel must fall"). Mills, 476 So. 2d at 178. This Court also concluded that "the court's finding that there were no mitigating circumstances was correct." Id. at 179.

After a death warrant was signed, Mr. Mills filed a motion pursuant to Fla. R. Cr. P. 3.850, which was summarily denied. On appeal from this denial, this Court granted a stay of execution and remanded for an evidentiary hearing "in regards to counsel's failure to develop and present evidence that would tend to establish statutory or nonstatutory mental health mitigating circumstances." Mills v. Dugger, 559 So. 2d 578, 579 (Fla. 1990). A hearing was conducted, and relief was denied. On appeal, this Court again affirmed the conviction and sentence. Mills v. State, No. 77,367 (Fla., June 4, 1992).

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100 (a). This Court has jurisdiction pursuant to Fla. R. App. P. 9.030 (a)(3) and Article V, Sec. 3 (b)(9) of the Florida Constitution. The petition presents constitutional errors which directly concern the judgment of this Court during the appellate process,

and the legality of Mr. Mills' capital conviction and sentence of death. Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein involve the appellate review process. See Wilson v. Wainwrisht, 474 So. 2d 1163 (Fla. 1985); Baggett v. Wainwrisht, 229 So. 2d 239, 243 (Fla. 1969). See also Johnson (Paul) v. Wainwrisht, 498 So. 2d 938 (Fla. 1987). Cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981).

This Court has long held that "habeas corpus is a high prerogative writ" which "is as old as the common law itself and is an integral part of our own democratic process." Anglin v. Mayo, 88 So. 2d 918, 919 (Fla. 1955). Because it enjoys such great historical stature, the writ of habeas corpus encompasses a broad range of claims for relief:

> The procedure for the granting of this particular writ is not to be circumscribed by hard and fast rules or technicalities which often accompany our consideration of other processes. If it appears to a court of competent jurisdiction that a man is being illegally restrained of his liberty, it is the responsibility if the court to brush aside formal technicalities and issue such appropriate orders as will do justice. In habeas corpus the niceties of the procedure are not anywhere near as important as the determination of the ultimate question as to the legality of the restraint.

Anglin, 88 So. 2d 919-20. See also Seccia v. Wainwright, 487 So. 2d 1156 (Fla. Dist. Ct. App. 1986) (relying on Anglin). Thus, this Court has held, "Florida law is well settled that habeas will lie for any unlawful deprivation of a person's liberty."

Thomas V. Dugger, 548 So. 2d 230 (Fla. 1989). When a habeas petitioner alleges such a deprivation, the petitioner "has a right to seek habeas relief," and this Court will "reach the merits of the case." Id. See also State v. Bolyea, 520 So. 2d 562, 564 (Fla. 1988) ("habeas relief shall be freely grantable of right to those unlawfully deprived of their liberty in any degree").

This Court has also consistently exercised its authority to correct errors which occurred in the direct appeal process. When this Court is presented with an issue on direct appeal, and its disposition of the issue is shown to be fundamentally erroneous, the Court will not hesitate to correct such errors in habeas corpus proceedings. As this Court has explained, the Court will "revisit a matter previously settled by the affirmance," if what is involved is a claim of "error that prejudicially denies fundamental constitutional rights. . . ." Kennedy v. Wainwright, 483 So. 2d 424, 426 (Fla. 1986). Recent United States Supreme Court decisions demonstrate that the disposition of Mr. Mills' appeal was fundamentally erroneous. In light of these circumstances, Mr. Mills respectfully urges this Honorable Court to "issue such appropriate orders as will do justice." Anglin, 88 So. 2d at 919.

GROUNDS FOR HABEAB CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Mills asserts that his sentence of death was obtained and subsequently affirmed during this Court's appellate review process in

violation of his rights as guaranteed by the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution, for each of the reasons set forth herein. In Mr. Mills' case, substantial and fundamental errors occurred in his capital trial. These errors were uncorrected by the appellate review process. As demonstrated below, relief is appropriate.

CLAIM I

MR. MILLS WAS DEPRIVED OF HIS CONSTITUTIONAL RIGHTS AS SECURED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, WHEN THIS COURT INVALIDATED THREE AGGRAVATING CIRCUMSTANCES AND UPHELD THE JURY OVERRIDE IN HIS APPEAL FROM THE IMPOSITION OF THE DEATH PENALTY AND IN HIS POST-CONVICTION PROCEEDINGS, CONTRARY TO SOCHOR V. FLORIDA, STRINGER V. BLACK, AND PARKER V. DUGGER.

In considering Mr. Mills' issues as to the imposition of the death penalty on his direct appeal, this Court struck three of the six aggravating circumstances found by the trial court. This Court struck the "great risk of death to many persons" aggravator because the trial court's finding of this factor was "erroneous." Mills v. State, 476 So. 2d at 178 (citation omitted). As to the aggravating circumstance of "pecuniary gain," this Court wrote that because this factor was found in addition to the "during the course of a burglary" circumstance, and both factors were based on the same criminal episode, there was improper doubling of the "pecuniary gain" factor. Id. Finally, this Court found that the trial judge's finding of the "heinous, atrocious, or cruel" aggravating circumstance "must fall." Id.

After addressing the aggravating factors, this Court went on to write:

> We conclude that the court's finding that there were no mitigating circumstances was correct. Because there were no mitigating circumstances, we find that the court's erroneous finding of two statutory aggravating circumstances was harmless and did not impair the sentencing process.

Id. at 179 (emphasis added). The Court concluded that because there were "three valid statutory aggravating circumstances, and the trial judge has found that there are no valid mitigating circumstances," the imposition of the death sentence after a jury recommendation of life was "proper" in this case. Id.[2]

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[2] On direct appeal, Justices Overton and McDonald dissented from the affirmance of the jury override. Justice McDonald wrote:

> The jury's recommendation must have been predicated on the circumstances of this homicide and on nonstatutory mitigating evidence. The chief testimony against Mills came from [co-defendant] Ashley. As previously indicated, Ashley received immunity from prosecution for this crime and other crimes in exchange for his testimony. Ashley said that Mills did the killing, but Mills has always denied this. The jury could have found the evidence sufficient to convict but still have doubts about whether Mills intended to kill the victim. It could also have concluded that Mills and Ashley were being treated so disparately when their involvement was substantially the same that any such doubt should be weighed in Mills' favor. Mills was employed at the time of the crime and his employer thought well of him. Mills had a harsh and deprived youth, but his grandmother and sister were supportive of him. During prior incarceration he completed studies to the extent that he passed his G.E.D. tests.
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> Are these circumstances, considered collectively, adequate to find that reasonable persons could recommend life imprisonment? I think so. As previously indicated, adequate and reasonable grounds existed for the judge to impose death. For the death

(continued...)

"[M]erely 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.'" Sochor v. Florida, 112 S. Ct. ___ (1992) (slip op. at 4) (citing Clemons v. Mississippi, 494 U.S. 738, 725; Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982); Parker v. Dugger, 498 U.S. ___ (1991). Moreover, "[e]mploying an invalid aggravating factor in the weighing process 'creates the possibility . . . of randomness.'" Sochor, slip op. at 4 (quoting Stringer v. Black, 503 U.S. ___ (1992) (slip op. at 12).

In Mr. Mills' case, this Court in essence "merely affirmed" Mr. Mills' death sentence. See Sochor. Despite the fact that three aggravating factors were struck, the jury override was affirmed. As the recent Supreme Court opinions in Sochor and Stringer indicate, however, this Court did not engage in the proper analysis in evaluating the impact of these erroneous aggravating circumstances.

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[2] (...continued)
penalty to prevail when there is a jury recommendation of life, however, more than disagreement with a jury's recommendation must be shown. "[T]he facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." This is a difficult test, and it has not been met in this case.

Mills, 476 So. 2d at 180 (McDonald, J., dissenting in part). Justice Overton also dissented from the affirmance of the override, stating simply that "the jury recommendation of life should have been followed for the reasons expressed by Justice McDonald in his dissent." Id. (Overton, J., dissenting in part).

This Court wrote on direct appeal that the trial court's erroneous finding of three of six aggravators was "harmless and did not impair the sentencing process." Mills, 476 So. 2d at 179. This analysis is constitutionally infirm. If this Court was conducting a harmless error analysis, it was faulty under Stringer and Sochor. In addressing the analysis that would be required, Justice O'Connor wrote:

> [T]he Court does not hold that an appellate court can fulfill its obligations of meaningful review by simply reciting the formula for harmless error. In Chapman v. California, 386 U.S. 18 (1967), we held that before a federal constitutional error can be held harmless, the reviewing court must find 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' Id. at 24. This is a justifiably high standard, and while it can be met without uttering the magic words "harmless error," see ante, at 11-12, the reverse is not true. An appellate court's bald assertion that an error of constitutional dimensions was \harmless' cannot substitute for a principled explanation of how the court reached that conclusion. In Clemons v. Mississippi, 494 U.S. 738 (1990), for example, we did not hesitate to remand a case for 'a detailed explanation based on the record' when the lower court failed to undertake an explicit analysis supporting its 'cryptic,' one-sentence conclusion of harmless error. Id. at 753. . . . I do not understand the Court to say that the mere addition of the wards "harmless error" would have sufficed to satisfy the dictates of Clemons.

Sochor, 60 U.S.L.W. at 4489-90 (O'Connor, J., concurring) (emphasis added).

In Kennedy v. Singletary, No. 79,736 (Fla. April 30, 1992), Justice Kogan commented on the "harmless error" analysis that was

conducted by this Court in that case. In Mr. Mills' case, as in Kennedy, this Court "made a gesture in the direction of harmless-error analysis--but it was only a gesture, and an unconvincing one at that." Kennedy, slip op. at 7 (Kogan, J., specially concurring). This Court's "threadbare" harmlessness analysis in Mr. Mills' case also "verges on boilerplate, and it is certainly devoid of any meaningful analysis." Id. at 8. The language used by this Court in Mr. Mills' direct appeal opinion did not "constitute[] a 'close appellate scrutiny of the import and effect of invalid aggravating factors.'" Id. (citing Strinser, 112 S.Ct. at 1136). Justice Kogan, in frank terms, concluded that "[a]s a matter of conscience, if not law, I believe we are obligated as a Court to do something more than mumble the words 'harmless error' when we excuse a patent violation of death-penalty law." Id. "Empty words devoid of analysis are not enough to satisfy a thoughtful conscience." Kennedy, slip op. at 12.

Mr. Mills' argument became even more compelling with the handing down of this Court's opinion affirming the trial court's denial of post-conviction relief. Mills v. State, No. 77,367 (Fla. June 4, 1992). In this opinion, the Court addressed Mr. Mills' substantial claims of ineffective assistance of counsel at the penalty phase, a claim which had been remanded for evidentiary resolution by this Court. See Mills v. Dugger, 559 So. 2d 578, 579 (Fla. 1990). In this recent opinion, a majority of Justices again affirmed the override, writing that "Mills has

not demonstrated a reasonable probability that the currently tendered evidence would have produced a reversal of the judge's override of the jury's recommendation." Mills, slip op. at 9.[3]

In addressing the evidence that was presented at Mr. Mills' penalty phase, this Court wrote:

> Mills' employer, his grandfather, and his older sister testified at the penalty phase. The grandfather and sister spoke of Mills' father being shot and killed when Mills was a child, of his mother's working as a field hand with the sister being responsible for taking care of her younger siblings, and of his poverty-ridden childhood. Bickerstaff made an impassioned argument to the jury that Mills life should be spared. She emphasized the disparate treatment received by Mills and his codefendant who testified against Mills and argued that Mills' crime was not the type that deserved the death penalty, that Mills had been raised in a ghetto, and that he was capable of being redeemed. After hearing her argument, the jury recommended that Mills be sentenced to life imprisonment.

Mills, slip op. at 2 (emphasis added). As evidenced above, this Court set forth no less than eight (8) nonstatutory mitigating factors that were in the record of the penalty phase.[4]

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[3]Justices McDonald and Overton, who had originally expressed their belief that the override was improper, see Mills v. State, 476 So. 2d 172, 180 (Fla. 1985) (McDonald and Overton, JJ., dissenting in part), now concur in the finding that there was no reasonable basis to produce a reversal of the override.

[4]Evidence of a disadvantaged childhood is mitigating evidence. See Maxwell v. State, No. 77,138 (Fla. June 25, 1992); Heqwood v. State, 575 So. 2d 170 (Fla. 1991); Carter V. State, 560 So. 2d 1166 (Fla. 1990); Brown v. State, 526 So. 2d 903 (Fla. 1988); DuBoise v. State, 520 So. 2d 260 (Fla. 1988). The fact that Mr. Mills was the product of parental neglect is also mitigating. See Maxwell; Heqwood.

Disparate treatment of a co-defendant has long been (continued...)

Presumably, the Court was reviewing the same penalty phase record that this Court had before it on direct appeal. Yet on direct appeal, this Court expressly found that "[b]ecause there were no mitigating circumstances, we find that the court's erroneous finding of two statutory aggravating circumstances was harmless and did not impair the sentencing process." Mills, 476 So. 2d at 179 (emphasis added).[5]

This incongruous situation only adds credence to the fact that this Court "made a gesture in the direction of harmless-

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[4](...continued)
recognized by this Court as mitigation evidence. See Dolinsky v. State, 576 So. 2d 271 (1991); Fuente v. State, 549 So. 2d 652 (Fla. 1989); Pentecost v. State, 545 So. 2d 861 (Fla. 1989); Spivey V. State, 529 So. 2d 1088 (Fla. 1988); Harmon v. State, 527 So. 2d 182 (Fla. 1988); Caillier v. State, 523 So. 2d 158 (Fla. 1988); Burch v. State, 522 So. 2d 810 (Fla. 1988); DuBoise v. State, 520 So. 2d 260 (Fla. 1988); Brookings v. State, 495 So. 2d 135 (Fla. 1986); Herzog v. State, 439 So. 2d 1372 (Fla. 1983); McCampbell V. State, 421 So. 2d 1072 (Fla. 1982); Smith v. State, 403 So. 2d 933 (Fla. 1981); Stokes v. State, 403 So. 2d 377 (Fla. 1981); Barfield V. State, 402 So. 2d 377 (Fla. 1981); Neary V. State, 384 So. 2d 881 (Fla. 1980); Mallov v. State, 382 So. 2d 1190 (Fla. 1979); Brown V. State, 367 So. 2d 616 (Fla. 19179); Slater v. State, 316 So. 2d 539 (Fla. 1975).

Evidence of positive employment history is also mitigating evidence. See Holsworth v. State, 522 So. 2d 348 (Fla. 1988); Fead v. State, 512 So. 2d 176 (Fla. 1987); Proffitt v. State, 510 So. 2d 896 (Fla. 1987); Wasko v. State, 505 So. 2d 1314 (Fla. 1987); McCampbell V. State, 421 So. 2d 1072 (Fla. 1982); Buckrem v. State, 355 So. 2d 111 (Fla. 1977).

The fact that there is a potential for rehabilitation has also been recognized as a mitigating factor. See McCray V. State, 582 So. 2d 613 (Fla. 1991); Carter v. State, 560 So, 2d 1166 (Fla. 1990); Holsworth V. State, 522 So. 2d 348 (Fla. 1988); McCampbell v. State, 421 So. 2d 1072 (Fla. 1982).

[5]In fact, there was a third aggravating circumstance that was erroneously found by the trial court, that of "great risk of death to many persons," as the state conceded. Mills, 476 So. 2d at 178.

error analysis -- but it was only a gesture, and an unconvincing one at that." Kennedy, slip op. at 7 (Kogan, J., specially concurring). "There is no question that . . . [Mr. Mills] presented such [nonstatutory mitigating] evidence," Parker v. Dusser, 111 S.Ct. 731, 736 (1991), as this Court's recent opinion now demonstrates.

In Sochor, the United States Supreme Court held that when a trial court erroneously weighs one or more aggravating circumstances, eighth amendment error occurs. Sochor, 60 U.S.L.W. AT 4489. The Court further held that in order to meaningfully review such an erroneous sentence, a state supreme court must find beyond a reasonable doubt that the error did not contribute to the verdict obtained. Id.; see also id. at 4489-90 (O'Connor, J., concurring). Such a harmless-beyond-a-reasonable doubt analysis must, by definition, include a review of the entire record before the appellate court. See Yates v. Evatt.

In Mr. Mills' direct appeal, this Court relied on the trial court's finding that there were no mitigating circumstances. Mills, 476 So. 2d at 179. The trial court's sentencing order stated that "there are sufficient aggravating circumstances as specified in 921.141 and insufficient mitigating circumstances therein that a sentence of death is justified." (R. 642). The trial court's reference to insufficient mitigating circumstances therein" clearly refers back to "921.141," i.e., the statutory list of mitigating factors. At the oral pronouncement of sentence, the judge only referred to statutory mitigation, and

found no mitigating circumstances **"at all."** (R. 937). Clearly, what the judge meant when he said he found no mitigating circumstances **"at** all" was that he found no statutory mitigating circumstances, as his sentencing order expressly states. Under the dictates of Sochor, this Court must look beyond the trial judge's sentencing order, which clearly only addressed statutory mitigation, and review the entire record in the case in order to engage in a constitutionally adequate harmless error analysis. It is apparent upon reviewing this Court's most recent opinion that such a review indeed reveals a plethora of nonstatutory mitigation that was in the record. Given the existence of this mitigation in the record, and given the fact that this Court on direct appeal based its affirmance of the death sentence on the fact that "there were no mitigating **circumstances,"** Mills, 476 **So.** 2d at 179, this Court's affirmance of the death sentence **despite** striking three aggravating circumstances was not the result of a "detailed explanation based on the record" of Mr. Mills' case, Sochor (O'Connor, J., concurring), and thus violative of the eighth amendment. Sochor.

In Parker V. Dugger, an override case, the United States Supreme Court faced a similar situation. There, the trial court overrode a jury life recommendation, finding **six** aggravating circumstances and no mitigating circumstances, statutory or nonstatutory. Parker, 111 S. Ct at 734. On direct appeal, this Court struck two aggravating circumstances, yet upheld the override because the trial court had found no mitigation against

which to balance the aggravating factors. Id. In Parker, as in the instant case, this Court "erred in its characterization of the trial judge's findings, and consequently erred in its review of [Mr. Mills'] sentence." Id. at 738.

The Supreme Court explained in Parker that "[i]t is unclear what the Florida Supreme Court did here. It certainly did not conduct an independent reweighing of the evidence. In affirming Parker's sentence, the court explicitly relied on what it took to be the trial judge's finding of no mitigating circumstances." Id.[6] The Parker court went on to write that perhaps this Court instead had conducted a harmless error analysis:

> Believing that the trial judge properly had found four aggravating circumstances, and no mitigating circumstances to weigh against them, the Florida Supreme Court may have determined that elimination of two additional aggravating circumstances would have made no difference to the sentence.

Id. However, the Supreme Court concluded that this Court did not conduct any independent review, as it explained:

> What the Florida Supreme Court could not do, but what it did, was to ignore the evidence of mitigating circumstances in the record and misread the trial judge's findings regarding mitigating circumstances, and affirm the sentence based on a mischaracterization of the trial judge's findings.

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[6] In Mills, this Court wrote that "We conclude that the court's finding that there were no mitigating circumstances was correct." Mills, 476 So. 2d at 179. The Court again reiterated its mere affirmance of the trial court in emphasizing that "the trial judge had found that there are no valid mitigating circumstances. The purported mitigating circumstances claimed by Mills, but not found by the trial judge, are not sufficient to outweigh the aggravating circumstances nor do they establish a reasonable basis for the jury's recommendation." Id.

Id. at 739. Because "the Florida Supreme Court did not come to its own independent factual conclusion . . . [and] . . . it relied on 'findings' of the trial judge that bear no necessary relation to this case," id. at 740, the affirmance of the override "deprived Parker of the individualized treatment to which he is entitled under the Constitution." Id.

In Mr. Mills' case, the jury obviously found sufficient mitigating circumstances to outweigh the aggravating circumstances,[7] for it recommended a life sentence. Further, the jury could have found that the aggravating circumstances that were proved were entitled to little weight.[8] Hallman v. State, 560 So. 2d 223 (Fla. 1990). Given the numerous nonstatutory mitigating circumstances that are present in the record of the penalty phase, "there was evidence from which a reasonable juror could have concluded that death was not an appropriate penalty." Hallman, 560 So. 2d at 227.

None of this was considered in this Court's analysis on direct appeal. While the Court, in passing, did use the word "harmless" after relying on the trial court's erroneous finding of no mitigating circumstances, "the bald assertion that an error

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[7] See Mills, slip op. at 2, for a list of the mitigation that this Court has found to exist in the record.

[8] Given that fact that one of the aggravating circumstances on which the jury was instructed, and one which was struck on direct appeal, was "heinous, atrocious, or cruel", it is evident that the case in aggravation was weak. The "heinous, atrocious, or cruel" aggravator is one of the most serious, as this Court has recognized. See Maxwell v. State, No. 77, 138 (Fla. June 25, 1992); Kennedy v. Singletary, No. 79,736 (Fla. April 30, 1992).

of constitutional dimensions was 'harmless' cannot substitute for a principled explanation of how the court reached that conclusion." Stringer, 60 U.S.L.W. at 4489 (O'Connor, J., concurring). This must particularly be true when a record which indeed evidenced the existence of mitigating circumstances was incorrectly found not to contain mitigation, three of six aggravators were struck on direct appeal, and the mitigation that was on the record provided a reasonable basis for the jury's life recommendation.

Another disturbing aspect of Mr. Mills' case is that there are presently five Justices on this Court who have, at one time or another, agreed that the override was improper. On direct appeal, Justices Overton and McDonald found the presence of mitigating evidence in the record, and concluded that under Tedder v. State, 322 So. 2d 908 (Fla. 1975), the override should not be sustained. Mills, 476 So. 2d at 180 (Overton and McDonald, JJ., dissenting in part). In an appeal from the summary denial of post-conviction relief, Justice McDonald, in dissenting from the granting of an evidentiary hearing, again reiterated that "counsel presented a substantial amount of mitigating evidence and secured a jury recommendation of life imprisonment." Mills v. Dusser, 559 So. 2d at 580 (McDonald, J., dissenting in part) ("Through counsel's efforts, the jury learned of the disparate treatment of Mills and his codefendant, that Mills was holding down a job and that his employer thought well of him, that he had a harsh and deprived youth, and that he

passed his G.E.D. tests"). He went on to conclude, however, that "the override sentence is the law of the case." Id. (citing Johnson v. Dugger, 523 So. 2d 161 (Fla. 1988)). Then-Justice Barkett, concurring in the grant of an evidentiary hearing, would also have granted habeas relief to Mr. Mills. Id. at 579 (Barkett, J., concurring in part and dissenting in part). In this Court's most recent opinion, then-Justice Barkett again dissented from the affirmance of the jury override. Mills v. State, slip op. at 11-12 (Barkett, J., dissenting). Then-Chief Justice Shaw concurred in Justice Barkett's dissenting opinion. Id. at 12. Justice Kogan would also reduce Mr. Mills' sentence to life. Id. at 13-14 (Kogan, J., dissenting).

Thus, five out of seven members of this present Court have at one time or another stated that Mr. Mills should receive the benefit of the jury's life recommendation. Given this situation, it is manifestly apparent that the override death sentence in this case is arbitrary. If the direct appeal occurred today, rather than in 1985, at least five members of this Court would vote for life imprisonment. Mr. Mills is now sentenced to death because his direct appeal occurred in 1985 rather than today. A person's life cannot depend on when an appellate court reviews the case. See Engle v. Florida, 108 S. Ct. 1094, 1098 (1988) (Marshall and Brennan, JJ., dissenting from denial of petition for writ of certiorari) ("appealing a 'life override' under

Florida's capital sentencing scheme is akin to Russian Roulette").[9]

In light of the new law enunciated in Sochor and Strinser, and under Parker v. Dugger, it is clear that substantial constitutional errors have permeated Mr. Mills' case since the time of the direct appeal. This Court struck three aggravating circumstances and affirmed the override, erroneously finding that there was no mitigation presented at the penalty phase. The

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[9]Justices Marshall and Brennan also make an interesting and valid point in Ensle that fully applies to Mr. Mills' case:

> [T]he Florida Supreme Court's endorsement of the trial judge's refusal to consider the mitigating effect of petitioner's lesser role in this case is at odds with other Florida Supreme Court decisions applying the Tedder standard. This inconsistency is unexplained. The haphazard application of the Tedder standard in cases in which an accomplice's lesser role may have influenced the jury's recommendation of life imprisonment convinces me that the Florida sentencing scheme is being applied in a manner inconsistent with the requirements of due process.

Engle, 108 S.Ct at 1097 (Marshall and Brennan, JJ., dissenting from the denial of petition for writ of certiorari). In Mr. Mills' case, Justice McDonald also recognized this problem when he wrote:

> The chief testimony against Mills came from [codefendant] Ashley. As previously indicated, Ashley received immunity from prosecution for this crime and other crimes in exchange for his testimony. Ashley said that Mills did the killing, but Mills has always denied this. The jury could have found the evidence sufficient to convict but still have had doubts about whether Mills intended to kill the victim. It could also have concluded that Mills and Ashley were being treated so disparately when their involvement was substantially the same that any such doubt should be weighed in Mills' favor.

Mills, 476 So. 2d at 180 (McDonald, J., dissenting in part).

Court's most recent opinion in Mr. Mills' case refutes the contention that no mitigation was in the record. In light of the fact that mitigation was before the jury that sentenced Mr. Mills to life imprisonment, the trial court's erroneous application of aggravating circumstances cannot be harmless beyond a reasonable doubt. No meaningful review of Mr. Mills' case took place, Stringer; Sochor, for if it had, the override would have been reversed on direct appeal. Relief is more than warranted at this time.

CLAIM II

MR. MILLS' SENTENCE RESTS UPON *AN* UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF STRINGER V. BLACK, MAYNARD V. CARTRIGHT, HITCHCOCK V. DUGGER, AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

This issue was presented on direct appeal, Mills v. State, 476 So. 2d at 178, and in Mr. Mills' prior habeas corpus petition. Mills v. Dugger, 559 So. 2d at 579. The issue should be reconsidered on the basis of Stringer v. Black. Under Florida law, capital sentencers may reject or give little weight to any particular aggravating circumstance. A jury may return a binding life recommendation because the aggravators are insufficient. Hallman v. State, 560 So. 2d 233 (Fla. 1990). The sentencer's understanding and consideration of aggravating factors may lead to a life sentence.

Mr. Mills was convicted of one count of felony murder, with burglary being the underlying felony. The trial court found both the "felony murder" aggravating circumstance as well as the

"pecuniary gain" aggravator. The death penalty in this case was predicated upon unreliable automatic findings of statutory aggravating circumstances -- the very felony murder finding that formed the basis for the conviction.

A state cannot use aggravating "factors which as a practical matter fail to guide the sentencer's discretion." Stringer V. Black, 112 S. Ct. 1130 (1992). Stringer is new law which has been articulated since Mr. Mills' prior proceedings. The sentencer was entitled automatically to return a death sentence upon a finding of first degree felony murder. Every felony murder would involve, by necessity, the finding of a statutory aggravating circumstance, a fact which, under the particulars of Florida's statute, violates the eighth amendment. This is so because an automatic aggravating circumstance is created, one which does not "genuinely narrow the class of persons eligible for the death penalty," Zant v. Stephens, 462 U.S. 862, 876 (1983), and one which therefore renders the sentencing process unconstitutionally unreliable. Id. "Limiting the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Maynard V. Cartwright, 486 U.S. 356, 362 (1988). Because Mr. Mills was convicted of felony murder, he then automatically faced statutory aggravation for felony murder. These aggravating factors were "illusory circumstance[s]" which "infected" the weighing process; these aggravators did not narrow and channel the sentencer's

discretion as they simply repeated elements of the offense. Stringer, 112 S. Ct. at 1139. In fact, this Court has held that the felony murder aggravating factor alone cannot support the death sentence. Rembert v. State, 445 So. 2d 337 (Fla. 1984). Yet the trial court did not apply this limitation in overriding the life recommendation and imposing the death sentence.

Recently the Wyoming Supreme Court addressed this issue in Engberg v. Meyer, 820 P.2d 70 (Wyo. 1991). In Engberg, the Wyoming court found the use of an underlying felony both as an element of first degree murder and as an aggravating circumstance to violate the eighth amendment:

> In this case, the enhancing effect of the underlying felony (robbery) provided two of the aggravating circumstances which led to Engber's death sentence: (1) murder during commission of a felony, and (2) murder for pecuniary gain. As a result, the underlying robbery was used not once but three times to convict and then enhance the seriousness of Engberg's crime to a death sentence. All felony murders involving robbery, by definition, contain at least the two aggravating circumstances detailed above. This places the felony murder defendant in a worse position than the defendant convicted of premeditated murder, simply because his crime was committed in conjunction with another felony. This is an arbitrary and capricious classification, in violation of the Furman/Gregg narrowing requirement.
>
> Additionally, we find a further Furman/Gregg problem because both aggravating factors overlap in that they refer to the same aspect of the defendant's crime of robbery. While it is true that the jury's analysis in capital sentencing is to be qualitative rather than a quantitative weighing of aggravating factors merely because the underlying felony was robbery, rather than some other felony. The mere

> finding of an aggravating circumstance implies a qualitative value as to that circumstance. The qualitative value of an aggravating circumstance is unjustly enhanced when the same underlying fact is used to create multiple aggravating factors.
>
> When an element of felony murder is itself listed as an aggravating circumstance, the requirement in W.S. 6-5-102 that at lest one "aggravating circumstance" be found for a death sentence becomes meaningless. Black's Law Dictionary, 60 (5th ed. 1979) defines aggravation as follows:
>
> > "Any circumstance attending the commission of a crime or tort which increases its guilt or enormity or adds to its injurious consequences, but which is above and beyond the essential constituents of the crime or tort itself." (emphasis added).
>
> As used in the statute, these factors do not fit the definition of "aggravation." The aggravating factors of pecuniary gain and commission of a felony do not serve the purpose of narrowing the class of persons to be sentenced to death, and the Furman/Gregg weeding-out process fails.

820 P.2d at 89-90.

Wyoming, like Florida, provides that the narrowing occur at the penalty phase. See Stringer v. Black. The use of the "in the course of a felony" aggravating circumstance is unconstitutional. As the Engberg court held:

> [W]here an underlying felony is used to convict a defendant of felony murder only, elements of the underlying felony may not again be used as an aggravating factor in the sentencing phase. We acknowledge the jury's finding of other aggravating circumstances in this case. We cannot know, however, what effect the felony murder, robbery, and pecuniary gain aggravating circumstances found had in the weighing process and in the

> jury's final determination that death was appropriate.

820 P. 2d at 92. This error cannot be harmless in this case:

> [W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing 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, 112 S. Ct. at 1137.

This claim is cognizable in these proceedings on the basis of Stringer v. Black. Mr. Mills was denied a reliable and individualized capital sentencing determination, in violation of the sixth, eighth, and fourteenth amendments. Relief is proper at this time.

CONCLUSION

For each of the foregoing reasons, Mr. Mills asks this Court to vacate his unconstitutional death 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 8, 1992.

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