IN THE SUPREME COURT OF FLORIDA

Case No. 80129

EDWARD D. KENNEDY,

Petitioner,

v.

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

-and-

EVERETT I. PERRIN, Superintendent,
Florida State Prison,

Respondents.
_____/

PETITION FOR WRIT OF HABEAS CORPUS AND
EXTRAORDINARY RELIEF AND CONSOLIDATED
MOTION FOR STAY OF EXECUTION

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Petitioner, EDWARD D. KENNEDY, respectfully applies to this Court for a writ of habeas corpus and extraordinary relief. Petitioner also consolidates in this submission his request that the Court stay his execution, currently scheduled for July 21, 1992.

By separate motion, Petitioner has urged that the Court allow oral argument to be scheduled in this case, including an emergency scheduling if appropriate, due to the importance of the claim involved and its significance to this Court's capital punishment jurisprudence. This Court's disposition will have a direct effect not only on the question of whether Mr. Kennedy lives or dies, but also on the cases of a number of other petitioners similarly situated to Mr. Kennedy. Petitioner respectfully reiterates his request for oral argument herein.

INTRODUCTION -- PETITIONER'S CLAIM WARRANTS RELIEF

> Now, your aggravating circumstances that you may consider are ...:
>
> ... the crimes for which the Defendant is to be sentenced were especially wicked, evil, atrocious, or cruel.

(R. 1211-12). This comprised the entirety of the trial court's instruction on this aggravator in Petitioner's case.

Two weeks ago, addressing an instruction identical to this one, the United States Supreme Court held,

> Our cases establish that, in a State where the sentencer weighs aggravating and mitigating circumstances, the weighing of an invalid aggravating circumstance violates the Eighth Amendment.... Our cases further establish that an aggravating circumstance is invalid in this sense if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor.... We have held instructions more specific and elaborate than the one given in the instant case unconstitutionally vague....

Espinosa v. Florida, 112 S.Ct. ___, 1992 U.S. LEXIS 4750 at 3 (June 29, 1992) (emphasis added) (citations omitted).

Espinosa overrules a formidable body of precedent from this Court holding that Florida's "heinous, atrocious, cruel" jury instructions do not violate the eighth amendment. This precedent, originating with State v. Dixon, 283 So.2d 1 (Fla. 1973), has been applied by this Court with consistent force.[1] It is this analysis,

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[1] See Cooper v. State, 336 So.2d 1133, 1140-41 (Fla. 1976) (ruling that although the trial judge erred in finding "heinous, atrocious, or cruel," there was no error in allowing the jury to rely on the aggravator because "the trial judge read the jury the interpretation of that term which we gave in Dixon. No more was required."); Smalley v. State, 546 So.2d 720, 722 (Fla. 1989) (stating, "[T]here are substantial differences between Florida's capital sentencing scheme and Oklahoma's...," in rejecting a challenge to the instruction under Maynard v. Cartwright); Occhicone v. State, 570 So.2d 902, 906 (Fla. 1990) (ruling that the

now rejected by Espinosa, on which this Court relied to deny relief on direct appeal in Petitioner's case. See Kennedy v. State, 455 So.2d 351, 355 (Fla. 1984) (analyzing the impropriety of the

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challenge to the "heinous, atrocious, or cruel" instruction was meritless, that the instruction is not vague, and that "Maynard v. Cartwright ... did not make Florida's penalty instructions on ... heinous, atrocious, or cruel unconstitutionally vague"); Espinosa v. State, 589 So.2d 887, 894 (Fla. 1991) ("We reject Espinosa's complaint with respect to the text of the jury instruction on the heinous, atrocious, or cruel aggravating factor upon the rationale of Smalley v. State..."); Brown v. State, 565 So.2d 304, 308 (Fla. 1990) ("We have previously found Maynard inapposite to Florida's death penalty sentencing regarding this state's heinous, atrocious, and cruel aggravating factor."); Beltran-Lopez v. State, 583 So.2d 1030, 1032 (Fla. 1991) ("[W]e reject Beltran-Lopez's complaint with respect to the text of the heinous, atrocious, or cruel instruction ..."); Mendyk v. State, 545 So.2d 846, 849 n.3 and 850 (Fla. 1989) (ruling that the request for a limiting definition on "heinous, atrocious, cruel" was properly denied because "the standard jury instructions properly and adequately cover the matters raised by appellant"); Hitchcock v. State, 587 So.2d 685, 688 n.2 (Fla. 1991) ("The following issues have been decided adversely to Hitchcock's contentions: unconstitutionality of the instruction on heinous, atrocious, or cruel..."); Johnson v. State, 465 So.2d 499, 507 (Fla. 1985) ("The instruction on and finding that the murder was especially heinous, atrocious, or cruel were also proper."); Smith v. Dugger, 565 So.2d 1293, 1295 n.3 and 1297 n.7 (Fla. 1990) (challenge to "heinous, atrocious, cruel" instruction "meritless"); Robinson v. State, 574 So.2d 108, 112 and 113 n.6 (Fla. 1991) (trial court erred in finding "heinous, atrocious, cruel" but challenge to instruction "providing this aggravator to the jury deemed meritless"); Trotter v. State, 576 So.2d 691, 694 (Fla. 1991) ("Appellant's argument, that the instruction regarding the aggravating circumstance as heinous, atrocious, or cruel is vague, is without merit"); Randolph v. State, 562 So.2d 331, 338-39 (Fla. 1990) (affirming trial court's finding on the aggravator and finding meritless the challenge to the jury instruction under the "state and federal constitutions"); Delap v. State, 440 So.2d 1242, 1254, 1257 (Fla. 1983) (trial court's finding that "the capital felony was especially cruel" affirmed without comment on deficient jury instruction); Vaught v. State, 410 So.2d 147, 151 (Fla. 1982) (trial court finding on "heinous, atrocious, cruel" affirmed because the offense was "cold and calculated" without analysis of erroneous jury instruction); Henry v. State, 586 So.2d 1033, 1038 (Fla. 1991) (affirming trial court finding on "heinous, atrocious, cruel" and stating, as to the jury, that the law was "adequately

"heinous, atrocious, or cruel" aggravator solely in terms of the sentencing findings of the judge); cf. id. at 354 (stating, "[t]he trial court acted properly by reading the standard jury instructions").

Mr. Kennedy's counsel objected to the instruction, before (R. 1160) and after (R. 1216) it was given.[2] On direct appeal, Petitioner argued that the trial judge's "heinous, atrocious, cruel" finding was error and that the instructions to the jury on this aggravator violated the eighth amendment as construed in Godfrey v. Georgia, 446 U.S. 420 (1980).[3] See Kennedy v. State, No. 61,694, Initial Brief of Appellant at 51 (citing Godfrey); at 52 (arguing that the application of this aggravator was improper);

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set out in the standard jury instructions"); Shere v. State, 579 So.2d 86, 95-96 (Fla. 1991) (trial judge's finding on "heinous, atrocious, cruel" struck without analysis of effect of erroneous instruction on the jury); Demps v. State, 395 So.2d 501, 506 (Fla. 1981) (reversing trial court finding on "heinous, atrocious, cruel" but affirming sentence without analysis of the effect of the improper aggravator on the jury); Roberts v. State, 568 So.2d 1255, 1258 (Fla. 1990) ("Maynard is not applicable under Florida's death sentencing procedure."); Porter v. Dugger, 559 So.2d 201, 203 (Fla. 1990) ("Maynard does not affect Florida's death sentencing procedures."); Clark v. Dugger, 559 So.2d 192, 194 (Fla. 1990) ("We have held that Maynard does not affect Florida's death sentencing procedures").

[2] He also objected to much of what the prosecutor argued and moved for a mistrial (R. 1176, 1180-81, 1188-89, 1190-91, 1195-96). The prosecutor's arguments included the prosecutor's "haranguing" the jury on the improper "heinous, atrocious, cruel" aggravation. Kennedy v. Singletary, 17 FLW S271, S273 (Fla. 1992) (Kogan, J.).

[3] The very precedent on which Maynard and Espinosa relied. See Espinosa, 112 S.Ct. at ___, 1992 U.S. LEXIS at 3 (specifically relying on Godfrey).

at 53 ("Appellant objected to the submission to the jury of an instruction on the aggravating factor (5)(h) ["heinous, atrocious, cruel"] ... The trial court denied appellant's objection. Thereafter, the prosecutor argued to the jury that this aggravating circumstance was established ... and the jury was instructed that this circumstance was one to consider in making their sentence recommendation... It is impossible to determine what effect this erroneous instruction had upon the weighing process of the jury.... It is entirely possible that but for this erroneous aggravating circumstance, the jury would have recommended life. Therefore, appellant is constitutionally entitled to a new sentencing proceeding before the jury..."). As appellate counsel summarized,

> [T]he improper submission to the jury of the aggravating circumstance set forth in (5)(h) requires reversal of [Appellant's] death sentence for a new penalty proceeding before the jury. This is so because it cannot be determined that the erroneous instruction relating to the applicability of this circumstance did not affect the weighing process of the jury...
>
> * * *
>
> [T]he instruction itself was violative of Godfrey v. Georgia, supra, since the judge gave the jury no guidance concerning the meaning of this aggravating circumstance.

Kennedy v. State, No. 61,694, Reply Brief of Appellant at 14-15 and n.15 (emphasis added).[4]

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[4] Relying on this Court's decisions in cases such as Cooper and Vaught (discussed in n.1, supra) the State answered by arguing that no error was involved in the "heinous, atrocious, or cruel" issue. Kennedy v. State, No. 61,694, Answer Brief of Appellee, pp. 40-44. Consistent with the view then in effect -- that there was no impropriety in the standard jury instructions (Cooper) -- the State also sought to insulate the judge's improper findings on aggravation by noting, "the jury recommendation, pursuant to Section 921.141, should be accorded great weight." Id. at 40.

In conformity with the view then in effect (see Cooper, 336 So.2d at 1140 ("Here the trial judge read the jury the interpretation of that term ["heinous, atrocious, or cruel"] which we gave in Dixon. No more was required.")), in its opinion on direct appeal this Court said nothing about the jury's consideration of the improper "heinous, atrocious, or cruel" aggravation -- aggravation on which the jury was "instructed" and "harangued." Kennedy v. Singletary, 17 FLW S271, S273 (Fla. April 30, 1992) (Kogan, J.).

This Court agreed with Mr. Kennedy that "heinous, atrocious, or cruel" was an improper aggravator in this case but, analyzing only the effect of the error on the judge, wrote: "Even with the improper factors eliminated, the trial court's determination that the single mitigating factor did not outweigh the aggravating circumstances found to exist remains the appropriate result under the law." Kennedy v. State, 455 So.2d 351, 355 (Fla. 1984) (emphasis added).[5] Cf. Kennedy, 455 So.2d at 354 ("The trial court acted properly by reading the standard jury instructions.").

> [I]n Kennedy the Court completely neglected to analyze the impact of the trial court's instructions on the penalty phase jury .... [I]n a practical sense, a Florida penalty phase jury shares discretion with the

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Since the State could see no impropriety in the jury instructions, the "great weight" to which the jury's verdict was entitled, the argument went, made any error in the judge's findings of lesser significance.

[5] There was a great deal more mitigation in this case than the statutory factor of extreme duress found by the sentencing judge. The mitigation is outlined in the body of this submission, section B(2), infra.

> trial court in determining the sentence, because the trial court can reject the jury's determination only in a very narrow class of cases. If the jury is instructed or harangued on factors that could not exist as a matter of law -- as happened here -- then the thumb remains firmly pressed on "death's side of the scale."

Kennedy, 17 FLW at S273 (Kogan, J.) (emphasis added), citing, inter alia, Stringer v. Black, 112 S.Ct. 1130, 1137 (1991).

Mr. Kennedy presented to this Court the very issue as to the jury which the United States Supreme Court two weeks ago found sufficient to merit relief in Espinosa. Compare, e.g., Kennedy v. State, No. 61,694, Appellant's briefs on direct appeal, supra ("[T]he instruction itself was violative of Godfrey v. Georgia ... since the judge gave the jury no guidance concerning the meaning of this aggravating circumstance"), with Espinosa, 112 S.Ct. at ___, 1992 U.S. LEXIS at 3 ("We have held instructions more specific and elaborate than the one given in the instant case unconstitutionally vague.... Godfrey v. Georgia, 446 U.S. 420 (1980)."). This Court did not analyze the jury issue.

As Espinosa now establishes, the issue warrants relief. Espinosa overrules the former line of precedent from this Court upholding the "heinous, atrocious, or cruel" instructions and the Florida sentencing scheme's enforcement of this aggravator. E.g., Cooper v. State, 336 So.2d 1133, 1140 (Fla. 1976) ("Here the trial judge read the jury the interpretation of that term which we gave in Dixon. No more was required."); Smalley v. State, 546 So.2d 720, 722 (Fla. 1989) ("[T]here are substantial differences between Florida's capital sentencing scheme and Oklahoma's ... That Proffitt continues to be good law today is evident from Maynard v.

Cartwright, wherein the majority distinguished Florida's sentencing scheme from those of Georgia and Oklahoma."); Occhicone v. State, 570 So.2d 902, 906 (Fla. 1990) (ruling that the challenge to the "heinous, atrocious, or cruel" instruction was meritless, that the instruction is not vague, and that "Maynard v. Cartwright ... did not make Florida's penalty instructions on ... heinous, atrocious, or cruel unconstitutionally vague"); Clark v. Dugger, 559 So.2d 192, 194 (Fla. 1990) ("We have held that Maynard does not affect Florida's death sentencing procedures.").

Espinosa establishes that the standard on which this Court consistently relied in the past -- the standard in effect at the time of the direct appeal in Mr. Kennedy's case -- was constitutionally deficient.[6] The standard is no longer the "good law" this Court believed it to be in cases such as Smalley:

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

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[6] This standard saw no constitutional error in the "heinous, atrocious, or cruel" jury instructions. Compare Cooper, 336 So.2d at 1140 (finding that trial judge did not err in instructing the jury on the unadorned "heinous, atrocious, or cruel" aggravator), with Kennedy, 455 So.2d at 355 (no analysis of effect on jury of the improper and vague "heinous, atrocious, or cruel" aggravator).

recommendation of a majority of the jury," Fla. Stat. @ 921.141(3).

> Our examination of Florida case law indicates, however, that a Florida trial court is required to pay deference to a jury's sentencing recommendation, in that the trial court must give "great weight" to the jury's recommendation, whether that recommendation be life, see Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), or death, see Smith v. State, 515 So.2d 182, 185 (Fla. 1987), cert. denied, 485 U.S. 971 (1988); Grossman v. State, 525 So.2d 833, 839, n. 1 (Fla. 1988), cert. denied, 489 U.S. 1071-1072 (1989). Thus, Florida has essentially split the weighing process in two. Initially, the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances.
>
> It is true that, in this case, the trial court did not directly weigh any invalid aggravating circumstances. But, we must presume that the jury did so, see Mills v. Maryland, 486 U.S. 367, 376-377 (1988), just as we must further presume that the trial court followed Florida law, cf. Walton v. Arizona, 497 U.S. 639, 653 (1990), and gave "great weight" to the resultant recommendation. By giving "great weight" to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found. This kind of indirect weighing of an invalid aggravating factor creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor, cf. Baldwin v. Alabama, 472 U.S. 372, 382 (1985), and the result, therefore, was error.

Espinosa, 112 S.Ct. at ___, 1992 U.S. LEXIS 4750 at 3 (emphasis added).

Petitioner is entitled to the benefit of this substantial change in the law.[7] Indeed, this case presents a truly "compelling

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[7] There can be little question that Espinosa is entitled to retroactive application: it was announced by the United States Supreme Court; it is constitutional in nature; and it is certainly a development of fundamental significance. Moreland v. State, 582 So.2d 618, 619 (Fla. 1991); Witt v. State, 387 So.2d 922, 931 (Fla. 1980). Like Hitchcock v. Dugger, 107 S.Ct. 1821 (1987), Espinosa overturned, on constitutional grounds, the standard of law which this Court previously applied. See Cooper v. Dugger, 526 So.2d

objective factor" warranting consideration of Petitioner's claim. Moreland, 582 So.2d at 620. This case directly involves the need to "ensur[e] fairness and uniformity in individual adjudications." Id. at 620. Mr. Kennedy has consistently litigated the claim, raising it on direct appeal and then in post-conviction proceedings. The law which this Court previously applied has been overruled by the United States Supreme Court, and the change is directly in Mr. Kennedy's favor. See Downs v. Dugger, 514 So.2d 1069, 1070-71 (Fla. 1987) ("[A] substantial change in the law has occurred that requires [the Court] to reconsider the issue," because "Hitchcock rejected a prior line of cases issued by [the Florida Supreme Court]."); Jackson v. Dugger, 547 So.2d 1197, 1198-

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900, 901 (Fla. 1988) ("There is no procedural bar to [Hitchcock] claims in light of the substantial change in the law that has occurred..."). Espinosa, founded on Godfrey and its progeny, is certainly retroactive. And the "substantial change in the law," Cooper, 526 So.2d at 901, warrants that the merits of Mr. Kennedy's claim be considered and relief be granted in this action. See Thompson v. Dugger, 515 So.2d 173, 175 (Fla. 1987) (rejecting the State's argument that relief should not be granted because of the existence of a procedural bar arising from a pre-Hitchcock adverse decision on the claim because of the change in law established by Hitchcock); Booker v. Dugger, 520 So.2d 246, 247 (Fla. 1988) ("Booker is not barred from raising this claim since Hitchcock represented a sufficient change in the law to defeat the suggestion of procedural default..."); Riley v. Wainwright, 517 So.2d 656, 659 (Fla. 1987) (no procedural bar applicable whether or not claim had been presented to the court and rejected in the past due to the change in law brought about by Hitchcock); Delap v. Dugger, 513 So.2d 659 (Fla. 1987) (due to change in law brought about by Hitchcock, issue addressed on merits although it had not properly been preserved in the past); Downs v. Dugger, 514 So.2d 1069, 1070-71 (Fla. 1987) ("We now find that a substantial change in the law [Hitchcock] occurred that requires us to reconsider issues first raised on direct appeal and then in Downs' prior collateral challenges."); Hall v. State, 514 So.2d 1125, 1126 (Fla. 1989) ("Hitchcock is a significant change in law, permitting defendants to raise a claim under that case in postconviction proceedings.")

99 (Fla. 1989) (because decision of United States Supreme Court rejected the analysis previously applied by the Florida Supreme Court, the Court was required to revisit the constitutional issue in habeas corpus proceedings although it had been previously raised on direct appeal; no procedural bar applied).

The need for review is also especially acute in light of the aggravating factor at issue: the jury's application of the invalid and vague aggravator in Petitioner's case presents error which "invalidates" the death sentence. Stringer v. Black, 112 S.Ct. ___ (1992).

> A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying on the existence of an illusory circumstance. Because the use of a vague aggravating factor in the weighing process creates the possibility not only of randomness but also of bias in favor of the death penalty, we cautioned in Zant that there might be a requirement that when the weighing process has been infected with a vague factor the death sentence must be invalidated.

Stringer v. Black, 112 S.Ct. at ___ (emphasis added). See also Walton v. Arizona, 110 S.Ct. 3047, 3057 (1990) (When a jury is called on to determine whether a capital sentence is appropriate, "it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face. That is the import of our holdings in Maynard and Godfrey.").

There is now no question that the instruction provided to Mr. Kennedy's jury was "unconstitutionally vague on its face." Walton. The unconstitutional vagueness of the factor was made manifest by the ruling in Espinosa -- indeed, in Espinosa, the State conceded that the same instruction as the one given to Mr. Kennedy's jury could not be squared with Godfrey or Maynard v. Cartwright, 486 U.S. 356 (1988). See Espinosa, 112 S.Ct. at ___, 1992 U.S. LEXIS 4750 at 3.

And there can be no question that in Mr. Kennedy's case the "weighing process [was] infected with [the] vague factor." Stringer; Espinosa. This Court has said that the "heinous, atrocious, or cruel" factor is "of the most serious order." Maxwell v. State, No. 77,138 (Fla. June 25, 1992); see also Thompson v. State, 389 So.2d 197, 200 (Fla. 1980) ("special emphasis" given to "heinous, atrocious, or cruel"). Relying on the vague instruction the prosecutor argued to the jury that such a "special emphasis" should be given to this aggravator (R. 1173-74). "[T]he prosecutor harangued the jury with a lengthy, bloody, and highly graphic description of matters he felt justified a finding of heinous, atrocious, or cruel..." Kennedy v. Singletary, 17 FLW S271, S273 (Fla. 1992) (Kogan, J.). "[A] very large part of the case for aggravation was both invalid and a highly prominent feature of the trial." Id. at S273. And employing the most egregious and overinclusive terms he could muster, the prosecutor "harangued" the jury, id. at S273, to vote for death because "heinous, atrocious, or cruel" applied to each decedent.

The prosecutor thus argued for a finding on this aggravator, inter alia, because:

> The crimes for which the Defendant is to be sentenced were especially wicked, evil, atrocious, or cruel. That has special meaning under our law.
>
> ...[T]hat murderer sitting over there took this shotgun and he came out on the porch ... pumped this shotgun and kicked one round over here.... It was fired three times...
>
> [H]e's got time --he's got time to shoot ... Bob McDermon three times, and, during that period of time he hit Trooper McDermon at least twice with the ripping of that lead from that shotgun. He shot him ... all over his body...
>
> But, Bob McDermon was trying to save Bob McDermon's life. He crawled up under that car because he was wounded -- mortally wounded. If he hadn't of received aid from those shotgun blasts, he would have lasted about an hour...
>
> ...[I]f Bob McDermon had of suffered the indignation of saying, "Here's my gun, tie me up. I'm a police officer," he'd be alive. But, he didn't do that and he wouldn't do that.
>
> He had a job to protect you out there, to protect the people...

(R. 1173-75). Defense counsel's objection and mistrial motion were overruled (R. 1176). The prosecutor's argument continued:

> It just tore Bob McDermon to pieces, just ripped his insides to pieces with a high-powered rifle. That's time, that's time for action; that's time to suffer. That's time to be terrorized, time to be afraid, time to be helpless, peppered with and mortally wounded by other shots.
>
> And, he takes that rifle -- I don't want to shock you any more, but, that's atrocious, that's cruel, that's evil. If that's not atrocious, cruel, and evil, the words ought not to be in the English language.

(R. 1177), quoted in Kennedy, 17 FLW at S273 n.2 (Kogan, J.).

As to the other decedent, Floyd Cone, the prosecutor argued for death, inter alia, on the basis of this factor because:

> And, Mr. Cone was -- Cone's body was blown apart and died instantaneously right near that front door. Mr Cone suffered; Mr. Cone was -- had time to know that there -- that he was in threat of dying, he was probably going to die if he couldn't do something.
>
> The act of Mr. Cone was atrocious and cruel and heinous.

(R. 1179). Indeed, the prosecutor used "heinous, atrocious, or cruel" as the springboard for an inflammatory and graphic argument on the death penalty itself (see, e.g., R. 1183 ("Let me tell you something, folks, if he could have gotten out of there by killing those officers, if he could have killed Mrs. Templin, that baby, if it would have gotten him out of there he would have killed every one of them. He would have killed every one of them if it had gotten him free..."); R. 1188 ("And, there's one other that polite legal scholars don't talk about, polite legal scholars and scholars. I'll give you Ed Austin on it: I think Bob McDermon and Floyd Cone, as members of our society I think that we owe it to them ... to put this man to death....")).[8]

The jury was instructed in unqualified language to apply this invalid aggravator as to each decedent (R. 1212). Although the

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[8] Defense counsel's objections and mistrial motions were overruled (R. 1176, 1180-81, 1188-89, 1190-91, 1195-96). In his argument, defense counsel was forced into an attempt to ameliorate the powerful effect of the prosecutor's arguments on "heinous, atrocious, or cruel" (See e.g., R. 1199-1200, "I will take issue with the fact that the crime for which the Defendant is to be sentenced was especially wicked, evil, or cruel. I submit to you that that is not the intent of the Legislature... These particular facts, taken in the worst light looking at the Defendant, do not fit that aggravating circumstance...").

jury heard substantial statutory and nonstatutory mitigation (see statement of the case and discussion in text, infra), no analysis of the effect on the jury of the invalid aggravation on which it was "instructed" and "harangued" "occurred within the four corners of the appellate opinion." Kennedy, 17 FLW at S273 (Kogan, J.).

Petitioner's case cannot be squared with Espinosa v. Florida, 112 S.Ct. ___ (1992). A stay of execution affording Petitioner meaningful review in light of Espinosa is manifestly appropriate.

JURISDICTION

This is an original action under Fla. R. App. P. 9.100(a). This Court has jurisdiction pursuant to subsections 3(b)(7) and (9) of Article V of the Florida Constitution and Rule 9.030(a)(3) of the Florida Rules of Appellate Procedure. "All the pertinent facts [relevant to the issue presented] are contained in the original record on appeal..." Jackson v. Dugger, 547 So.2d 1197, 1199-1200 n.2 (Fla. 1989). Intervening United States Supreme Court constitutional law has overruled this Court's prior precedent, including the precedent in effect at the time of Petitioner's direct appeal. Review of this petition is more than appropriate, as the Introduction, supra, and body of this submission, infra, discuss. See also Downs v. Dugger, 514 So.2d 1069, 1070 (Fla. 1987) ("[A] substantial change in the law has occurred that requires us to reconsider issues first raised on direct appeal and then in [petitioner's] prior collateral challenges.")

APPLICATION FOR STAY OF EXECUTION

As this Court has explained, "[t]he doctrine of finality should be abridged" when "a more compelling objective appears, such as ensuring fairness..." Moreland, 582 So.2d 618, 619 (Fla. 1991). This petition is based on a substantial decision -- Espinosa -- which has "drastically alter[ed] the ... substantive underpinnings" of the ruling on direct appeal addressing the death sentence imposed on Petitioner. See Downs v. Dugger, 514 So.2d 1069, 1070-71 (Fla. 1987); Witt v. State, 387 So.2d 922, 925 (Fla. 1980).

Espinosa v. Florida, 112 S.Ct. ___, 1992 U.S. Lexis 4750 (1992), overruled a formidable body of this Court's decisional law. It established that for purposes of Eighth Amendment review of issues involving aggravating factors in Florida, consideration of the judge's findings, without meaningful review of the effect of the error on the jury's sentencing decision, is insufficient. Espinosa thus overruled numerous decisions of this Court holding that it need only consider the effect of penalty phase aggravation error on the sentencing judge, including this Court's previous decisions on Mr. Kennedy's direct appeal, Kennedy v. State, 455 So.2d 351 (Fla. 1984), and previous collateral challenges. E.g., Kennedy v. Singletary, 17 FLW S271 (Fla. 1992).

Espinosa also overruled this Court's decisional law finding no error in the standard jury instruction on the "heinous, atrocious, or cruel" aggravator, Cooper; Smalley, and confirmed that the argument which Mr. Kennedy first raised on direct appeal as to the vagueness and invalidity of the jury instruction on "heinous,

atrocious, or cruel" was the correct constitutional approach. See Espinosa, 112 S.Ct. at ___ (relying on Godfrey v. Georgia).

In overturning this Court's precedents, Espinosa effected a "sweeping change of law," constitutes a "major constitutional change[] of law," and "constitutes a development of fundamental significance." Witt, 387 So.2d at 925, 929, 931; Downs v. Dugger; Thompson v. Dugger, 515 So.2d 173 (Fla. 1987). It is a change in law at least as fundamental and profound as that created by Hitchcock v. Dugger, 481 U.S. 383 (1987). See Downs; Thompson.

To allow Petitioner's execution given the significance of the issues involved in his case and the powerful impact of Espinosa on this Court's capital punishment jurisprudence -- an impact which affects not only Mr. Kennedy's case, but also the cases of a number of other capital petitioners in Florida -- would be to ignore this Court's tradition of "ensuring fairness" in criminal proceedings, a tradition which is rightly the cornerstone of adjudication in capital cases. Wilson v. Wainwright, 474 So.2d 1163 (Fla. 1985); Moreland, 582 So.2d at 619.

The issues presented by this petition are identical to those already found sufficient to warrant relief by the United States Supreme Court in Espinosa. Accordingly, they are not just debatable among reasonable jurists, Barefoot v. Estelle, 463 U.S. 880 (1983), but actually demonstrate that Mr. Kennedy's sentence is unlawful and that he is entitled to relief. Since a stay is warranted when a petitioner demonstrates that he "might be entitled to relief," State v. Schaeffer, 467 So.2d 689, 699 (Fla. 1985), it

is all the more necessary here. A stay of execution in order to afford Petitioner reasoned, judicious and meaningful review is manifestly appropriate, and Petitioner respectfully requests that this Court enter a stay for that purpose.

STATEMENT OF THE CASE

A. Statement of the Relevant Facts

The United States Supreme Court has held that the jury, for all intents and purposes, sentences in capital cases in Florida. Espinosa v. Florida, 112 S.Ct. ___ (1992).[9] When Petitioner's jury was asked to decide his fate, a "very large part of the case for aggravation was both invalid and a highly prominent feature of the trial." Kennedy v. Singletary, 17 FLW at S273 (Kogan, J.). The jury was both "instructed" and "harangued on [aggravation] factors that could not exist as a matter of law ...." Id.

The "most serious" aggravation on which the jury was asked to rely to vote for death was "heinous, atrocious, or cruel." Kennedy, supra, 17 FLW at S273 and n.1. The jury voted for death,

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[9] As Justice Kogan explained, "[I]n a practical sense, a Florida penalty phase jury shares discretion with the trial court in determining the sentence, because the trial court can reject the jury's determination only in a very narrow class of cases." Kennedy v. Singletary, 17 FLW at S273. As the Supreme Court put it in Espinosa, 112 S.Ct. at ___, 1992 U.S. LEXIS 4750 at 3 (citations omitted), "It is true that ... the trial court did not directly weigh any invalid aggravating circumstances. But, we must presume that the jury did so... just as we must further presume that the trial court followed Florida law... and gave "great weight" to the resultant recommendation. By giving 'great weight' to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found. This kind of indirect weighing of an invalid aggravating factor creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor... and the result, therefore, was error."

returning identical death verdicts as to each decedent. The trial judge gave great weight to and relied upon the defective jury vote. Espinosa, 112 S.Ct. at ___ ("We must presume" he did so).[10] He also relied on improper aggravation himself.

On direct appeal, Kennedy v. State, 455 So.2d 351, 354-55 (Fla. 1984), the Florida Supreme Court struck three aggravators, including the "two most serious" ones, Kennedy v. Singletary, 17 FLW at S273 (Fla. 1992) (Kogan, J.), one of which ("heinous, atrocious, cruel") was emphatically argued to the jury by the prosecutor as the reason why death should be imposed as to each decedent.[11] The Florida Supreme Court also affirmed the judge's statutory mitigation finding that Edward Kennedy was acting under extreme duress at the time of the offense. Kennedy, 455 So.2d at 354-55. The jury and judge also heard valid nonstatutory mitigation. See Kennedy v. Dugger, 933 F.2d 905, 910-11 (11th Cir.

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[10] Florida law mandated that he do so, see Tedder v. State, 322 So.2d 908, 910 (Fla. 1975) (jury life verdict); Grossman v. State, 525 So.2d 833, 839 n.1 (Fla. 1988) (jury death verdict), and he did so in this case, as the State argued on direct appeal (see Introduction, n.4, supra).

[11] There were two decedents in this case. The trial court's instructions invited the jury to apply this invalid aggravation as to each decedent. The prosecutor vehemently "harangued the jury with a lengthy, bloody, and highly graphic" argument on this aggravation as to each decedent -- "even though this factor could not have existed in the present case" as a matter of law. Kennedy, 17 FLW at S273 (Kogan, J.). The jury reached identical sentencing verdicts as to each decedent. Mr. Kennedy specifically argued on appeal that the trial court had erred in instructing the jury on the "heinous, atrocious, or cruel" aggravating factor, that the aggravator was unconstitutionally vague under Godfrey v. Georgia, and that consideration of that factor had tainted the jury's weighing process, requiring a new sentencing hearing before the jury. See Introduction, supra, discussing Kennedy v. State, Case No. 61,694, Initial and Reply Briefs of Appellant on direct appeal.

1991) (relying on this mitigation to reject petitioner's claim of ineffective assistance of counsel at sentencing); see also text, section B(2), infra (outlining this mitigation).

After finding that sentencing error occurred the Florida Supreme Court "set forth its entire harmless-error analysis in two threadbare sentences." Kennedy, 17 FLW at S273 (Kogan, J.). The Court's two sentences only discussed the sentencing order of the judge:

> Even with the improper factors eliminated, the trial court's determination that the single mitigating factor did not outweigh the aggravating circumstances found to exist remains the appropriate result under the law. The erroneous findings did not prejudicially affect the weighing process and thus were harmless error.

Kennedy v. State, 455 So.2d at 355 (emphasis added), quoted in Kennedy v. Singletary, 17 FLW at S273 (Kogan, J.).[12]

The jury was never mentioned. The Court said nothing: indicating that it had considered the effect of the sentencing infirmities on the jury, see Kennedy, 455 So.2d at 355 ("the trial court's determination"); or about the actual record of the sentencing hearing; or about the nonstatutory mitigation; or to demonstrate that it was requiring the State, as "beneficiary of [the] error" to "prove that the error ... did not contribute to the result," Chapman v. California, 386 U.S. 18, 24 (1967); or which can be deemed an acknowledgement that "evaluation of the

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[12] The Florida Supreme Court has made it plain that it does not independently "reweigh" evidence of aggravation and mitigation, Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981); Parker v. Dugger, 111 S.Ct. 731, 738 (1991), and the Court did not do so in Petitioner's case.

consequences of an error may be more difficult in the sentencing phase of a capital case" because of the discretion afforded to jurors, Satterwhite v. Texas, 486 U.S. 249, 258 (1988). The Court referred neither to the jury, nor to the nonstatutory mitigation, nor to the sentencing record, nor to the effect the improper aggravation had on the jury's consideration, including the jury's weighing of the mitigation presented. The death sentences were thus affirmed.

Espinosa v. Florida now demonstrates that the previous disposition of this case cannot be squared with the eighth amendment.

B. Procedural History

1. Mr. Kennedy was convicted on two counts of first degree murder in the Circuit Court of the Fourth Judicial Circuit, on December 4, 1981.

2. Mr. Kennedy had been incarcerated at Union Correctional Institution (U.C.I.). During the time he was imprisoned there, U.C.I. was the largest institution in the Florida system, was grossly overcrowded, degrading and violent, and was virtually ruled by inmate gangs organized along racial lines. Mr. Kennedy, a black man, attempted to survive at U.C.I., attempted to mediate between the inmate groups, and was neither a management problem nor a victimizer. On April 11, 1981, he followed two other inmates in an escape, an escape resulting in the tragic episode at issue in this case.

3. Mr. Kennedy testified at the penalty phase of the trial, and other mitigating evidence was also presented. On December 5, 1981, the jury rendered death sentencing verdicts with respect to the two murder counts. On January 12, 1982, the trial court imposed death sentences, finding seven aggravating circumstances, the statutory mitigating circumstance of extreme duress, and non-statutory mitigating factors (see infra).

4. On direct appeal, the Florida Supreme Court affirmed the convictions and sentences, Kennedy v. State, 455 So.2d 351 (Fla. 1984), despite finding that two of the aggravating circumstances had been improperly found by the sentencing court and two others were improperly doubled by the court at sentencing (including "heinous, atrocious, or cruel"). The Court did not discuss the nonstatutory mitigating evidence presented by Mr. Kennedy and did not analyze the effect of the improper "heinous, atrocious, or cruel" aggravation on the jury's verdict.

5. Mr. Kennedy's applications for post-conviction relief in the state courts were unsuccessful. See Kennedy v. Wainwright, 483 So.2d 424 (Fla. 1986); Kennedy v. State, 547 So.2d 912 (Fla. 1989); Kennedy v. Dugger, No. 74,814 (Fla. Oct. 6, 1989).

6. Mr. Kennedy thereafter pursued habeas corpus relief in the United States District Court for the Middle District of Florida. The District Court allowed an oral proffer from counsel and then denied relief. Kennedy v. Dugger, No. 89-829-CIV-ORL-19 (M.D. Fla., Oct.9, 1989) (Fawsett, J.).

7. The Court of Appeals for the Eleventh Circuit granted a certificate of probable cause to appeal but thereafter denied relief. Kennedy v. Dugger, 933 F.2d 905 (1991).

8. The Court of Appeals denied Mr. Kennedy's request for rehearing.

9. On January 21, 1992, the United States Supreme Court denied Mr. Kennedy's petition for writ of certiorari, with three Justices -- Justice Blackmun, Justice O'Connor, and Justice Kennedy -- dissenting from the denial. Kennedy v. Singletary, 117 L.Ed.2d 124 (1992). On March 23, 1992, the Court denied Mr. Kennedy's petition for rehearing. Kennedy v. Singletary, 117 L.Ed.2d 654 (1992).

10. On March 27, 1992, Governor Lawton Chiles signed a warrant for the execution of Mr. Kennedy. The execution was scheduled for April 29, 1992.

11. This Court temporarily stayed Mr. Kennedy's execution, but then denied relief. Kennedy v. Singletary, Nos. 79,736 & 79,741, 17 FLW S271 (Fla. April 30, 1992). Proceedings in the United States District Court and Eleventh Circuit Court of Appeals resulted in the denial of relief. Kennedy v. Singletary, No. ____ (11th Cir. April, 1992). The United States Supreme Court stayed Mr. Kennedy's execution while considering his certiorari petition to this Court. Kennedy v. Singletary, No. 91-8111, Order A-808 (U.S., May 1, 1992). The Court subsequently declined to grant certiorari review. Kennedy v. Singletary, 112 S.Ct. ___ (June 29, 1992).

12. On July 2, 1992, Governor Chiles again signed a warrant for the execution of Mr. Kennedy. The execution is currently scheduled for July 21, 1992.

GROUNDS FOR HABEAS CORPUS RELIEF

THE SENTENCING ERRORS IN PETITIONER'S CASE REQUIRE THAT THIS COURT STAY PETITIONER'S EXECUTION AND VACATE THE DEATH VERDICT.

Petitioner's sentence resulted from a combination of errors in instructing the penalty phase jury and errors by the sentencing judge in making the findings in imposing death. That there was fundamental constitutional error in the instructions to the jury is a matter which is now not open to debate. Espinosa v. Florida, 112 S.Ct. ___, 1992 U.S. LEXIS 4750 (1992). Espinosa demonstrates that this Court failed to provide meaningful review to the flawed jury sentencing proceeding on direct appeal, and failed to cure the errors when they were brought to this Court's attention in prior post-conviction pleadings.

There can be no serious dispute over the fact that Espinosa v. Florida has overruled this Court's prior decisions (see Introduction, supra). The standard which this Court previously applied to the evaluation of aggravation jury sentencing error, the very standard in effect at the time of the direct appeal in Petitioner's case, was found constitutionally lacking in Espinosa.[13] Espinosa makes it manifest that the eighth amendment

[13] Espinosa overrules precedent finding the "heinous, atrocious, cruel" instruction constitutionally appropriate, Cooper v. State, 336 So.2d 1133, 1140-41 (Fla. 1976) (finding that although the trial judge erred in his finding of "heinous, atrocious, or cruel," there was no error in instructing the jury on

error which infected the sentencing proceedings in petitioner's case "invalidates" the death sentences. Stringer v. Black, 112 S.Ct. 1130, ___ (1992) (holding, consistent with Espinosa, that the vagueness of the "heinous, atrocious, or cruel" instruction invalidates the death sentence). This Court's direct appeal ruling is contrary to the teachings of Espinosa, while Espinosa demonstrates that relief is now appropriate.

Petitioner addresses the errors, herein. Petitioner begins his discussion with an analysis of the impact of Espinosa on Florida capital sentencing law. Espinosa is a watershed decision which alters Florida capital sentencing law and has widespread implications that this Court should study and consider in a

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this aggravator because, "Here the trial judge read the jury the interpretation of that term which we gave in Dixon. No more is required."); and Smalley v. State, 546 So.2d 720, 722 (Fla. 1989) (ruling that the standards of Godfrey v. Georgia, 446 U.S. 420 (1980), and Maynard v. Cartwright, 486 U.S. 356 (1988), are inapplicable to Florida's instruction on "heinous, atrocious, or cruel"). It overrules precedent rejecting challenges to the vagueness of the "heinous, atrocious, or cruel" instruction, Occhicone v. State, 570 So.2d 902, 906 (Fla. 1990) (finding challenge to the jury instruction on the aggravator meritless because "Maynard v. Cartwright ... did not make Florida's penalty instructions on ... heinous, atrocious, or cruel unconstitutionally vague."); Brown v. State, 565 So.2d 304, 308 (Fla. 1990) ("We have previously found Maynard inapposite to Florida's death penalty sentencing regarding this state's heinous, atrocious, and cruel aggravating factor."). It overrules precedent evaluating the effect of error on the "heinous, atrocious, cruel" aggravator solely on the basis of the judge's findings. Cooper; Smalley; Robinson v. State, 574 So.2d 108, 112-113 and n.6 (Fla. 1991). And it overrules the very standards employed on direct appeal in Petitioner's case. Kennedy v. State, 455 So.2d 351, 354, 355 (Fla. 1984) (noting that the "trial court acted properly by reading the standard instructions" and later analyzing the effect of the error in the application of "heinous, atrocious, or cruel" solely as to the findings of the trial judge). See also Introduction, n.1, supra (collecting cases).

reasoned and judicious fashion. A stay of execution, affording such review, is appropriate.

A. The Impact of Espinosa on Florida Capital Sentencing Law

1. The Jury Acts as the Sentencer in Florida

In prior proceedings in this case, Mr. Kennedy, like certain other capital defendants in Florida, urged this Court to acknowledge that the Florida penalty phase jury, for all intents and purposes, is the capital sentencer. Accordingly, Mr. Kennedy argued that the United States Supreme Court's decisions, see, e.g., Godfrey v. Georgia, 446 U.S. 420 (1980), Maynard v. Cartwright, 486 U.S. 356 (1988), and Shell v. Mississippi, 112 L.Ed.2d 1 (1990), requiring that sentencing juries receive limiting instructions concerning the application of the facially vague "heinous, atrocious, or cruel" aggravating factor, required Florida sentencing juries to receive constitutionally sufficient limiting instructions on the factor.

This Court consistently rejected the claim. See Cooper v. State, 336 So.2d 1133, 1140 (Fla. 1976) (although the trial judge erred in his finding of "heinous, atrocious, or cruel," ruling that there was no error in instructions to the jury on this aggravator because, "Here the trial judge read the jury the interpretation of that term which we gave in Dixon. No more was required."); Brown v. State, 565 So.2d 304, 308 (Fla. 1990) ("Maynard inapposite to Florida's death penalty sentencing regarding this state's heinous, atrocious, and cruel aggravating factor."); Mendyk v. State, 545 So.2d 846, 850 (Fla. 1989) ("[T]he standard jury instructions

properly and adequately" guide the jury in applying the aggravator); Robinson v. State, 574 So.2d 108, 112-13 and n.6 (Fla. 1991) (although trial judge erred in his findings of "heinous, atrocious, or cruel" the instructions on this aggravator are not "unconstitutionally vague"); Occhicone v. State, 570 So.2d 902, 906 (Fla. 1990) ("heinous, atrocious, cruel" instruction not "unconstitutionally vague"); see also Smalley v. State, 546 So.2d 720, 722 (Fla. 1989); Shere v. State, 579 So.2d 86, 95-96 (Fla. 1991) (trial judge's finding on "heinous, atrocious, cruel" struck without analysis of effect of erroneous instruction on the jury); Kennedy v. State, 455 So.2d 351, 354-55 (Fla. 1984) (similar analysis).

The United States Supreme Court has now decisively overruled this Court's position. Thus, in Espinosa v. Florida, 1992 U.S. Lexis 4750 (1992), addressing the State's argument based on Smalley, the Court held:

> Our examination of Florida case law indicates, however, that a Florida trial court is required to pay deference to a jury's sentencing recommendation, in that the trial court must give "great weight" to the jury's recommendation, whether that recommendation be life, or death. Thus, Florida has essentially split the weighing process in two. Initially, the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances.
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> .... [I]f a weighing State decides to place capital-sentencing authority in two actors [i.e. the sentencing jury and judge] rather than one, neither actor must be permitted to weigh invalid aggravating circumstances.

Espinosa, 112 S.Ct. at ___, 1992 U.S. Lexis 4750 at 3-4 (citations omitted). Since the jury was instructed to rely on the unconstitutionally vague "heinous, atrocious, or cruel" instruction, and since it is "presume[d] that the trial court followed Florida law ... and gave 'great weight' to the [jury's] resultant [death] recommendation," the "heinous, atrocious, or cruel" instruction invalidated the death sentence. Espinosa, 112 S.Ct. ___, 1992 U.S. LEXIS 4750 at 3; Stringer v. Black, 112 S.Ct. at ___.

A host of consequences follow from the Supreme Court's holding. For example, presentation of an "invalid aggravating factor" to the sentencing jury in a "weighing" state like Florida requires "invalidation of the death sentence," which may only be affirmed by a reviewing court after determining, with the thoroughness and care demanded by the eighth amendment, "what the sentencer [i.e., the jury] would have done absent the factor." Stringer v. Black, 112 S.Ct. ___, 117 L.Ed.2d 367, 378 (1992). When a jury sentences, "it is essential that the jurors be properly instructed regarding all facets of the sentencing process." Walton v. Arizona, 110 S.Ct. 3047, ___, 111 L.Ed.2d 511, 528 (1990). "[E]valuation of the consequences of an error" on the jury at sentencing is, after all, "difficult" because of the discretion that is afforded the sentencers. Satterwhite v. Texas, 486 U.S. 249, 258 (1988). It is even more difficult where, as here, there exists mitigation on which the jury could rely to vote for life. See Hall v. State, 541 So.2d 1125, 1128 (Fla. 1989) (given that

mitigation was available, "it would be a remarkable exercise in speculation to conclude ... beyond a reasonable doubt" that the constitutional error was harmless). It is precisely because of these reasons that the Mississippi Supreme Court has remanded for jury resentencing in every case involving the "heinous, atrocious, or cruel" instruction after the issuance of the Supreme Court's decisions in Clemons v. Mississippi, 110 S.Ct. 1441 (1990), and Shell v. Mississippi, 110 S.Ct. ___, 112 L.Ed. 2d 1 (1990). See Jones v. State, 1992 Miss. Lexis 345 (Miss. June 10, 1992) (remanding for jury resentencing); Shell v. State, post-remand, 595 So.2d 1323 (Miss. 1992) (remanding for jury resentencing); Clemons v. State, post-remand, 593 So.2d 1004 (Miss. 1992) (remanding for jury resentencing); see also Johnson v. State, 547 So.2d 59 (Miss. 1989) (remanding for jury resentencing). Espinosa holds that all of the safeguards that are required to ensure that sentencers' decisions are reliable, and that the discretion of sentencers be suitably guided, channeled and limited, apply with full force to the Florida capital sentencing jury.

2. Florida's Jury Instructions on the Heinous, Atrocious or Cruel Aggravating Factor Violate the Eighth Amendment

Espinosa specifically holds that Florida's standard jury instructions on the "especially heinous, atrocious or cruel" aggravating factor, see e.g., Florida Standard Jury Instructions (Criminal) (1981), violate the Eighth Amendment. As the Court noted in Espinosa, the weighing of an aggravating circumstance violates the eighth amendment if the description of the circumstance "is so vague as to leave the sentencer without

sufficient guidance for determining the presence or absence of the factor." Espinosa, 112 S.Ct. at ___, 1992 U.S. Lexis 4750 at 3. The Court further noted that it previously held "instructions more specific and elaborate" than Florida's "heinous, atrocious, or cruel" instruction to be unconstitutionally vague. Id.

After concluding that in every sense meaningful to the eighth amendment the Florida jury sentences, the Supreme Court had no difficulty in concluding that the provision of the Florida "heinous, atrocious, or cruel" instruction violated the eighth amendment. The error in Espinosa was not cured by any trial court "independent" weighing of aggravation and mitigation, even though the trial court did not improperly weigh the "especially heinous" aggravator:

> It is true that, in this case, the trial court did not directly weigh any invalid aggravating circumstances. But, we must presume that the jury did so, see Mills v. Maryland, 486 U.S 367, 376-77 (1988), just as we must further presume that the trial court followed Florida law, cf. Walton v. Arizona, 497 U.S. 639, 653 (1990), and gave "great weight" to the resultant recommendation. By giving "great weight" to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found. This kind of indirect weighing of an invalid aggravating factor creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor, cf. Baldwin v. Alabama, 472 U.S. 372, 382 (1985), and the result, therefore, was error.

Espinosa, 112 S.Ct. at ___, 1992 U.S. Lexis 4750 at 3 (emphasis added).

Espinosa makes it undeniable, therefore, that where a Florida jury recommends death after receiving either the standard jury instruction or any similar instruction that suffers from the

defects identified by the Court in Godfrey, Maynard or Shell, the verdict is infected with eighth amendment error.[14] In such cases, the death sentence is tainted because the jury presumably weighed an invalid aggravating factor, thus placing a thumb on "death's side of the scale." Stringer v. Black, 112 S.Ct. 1130, 1137, 117 L.Ed.2d 367, 379 (1992). And, given the way in which the jury was "harangued" on this improper aggravation in Petitioner's case, "the thumb remain[ed] firmly pressed on 'death's side of the scale.'" Kennedy, 17 FLW at S273 (Kogan, J.) (emphasis added), citing Stringer, 112 S.Ct. at 1137.

3. Review of the Impact of the Error on the Jury

This Court has consistently eschewed either the intention or the authority to conduct appellate reweighing of aggravation and mitigation such as the "reweighing" described in Clemons v. Mississippi, 494 U.S. 738 (1990). See, e.g., Parker v. Dugger, 111 S.Ct. 731, 738 (1991); Hudson v. State, 538 So.2d 829, 831 (Fla.); Brown v. Wainwright, 392 So.2d 1327, 1331-2 (Fla. 1981). Accordingly, when a sentence is tainted by eighth amendment error, this Court must either conduct constitutionally appropriate

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[14] Cf. State's "Response to Kennedy's Petition for Writ of Habeas Corpus, Etc.," Kennedy v. Singletary, Case No. 79,736 (Fla. 1992), at p. 20 (emphasis in original) -- arguing that "No court has ever held that a jury instruction given as to an unfound aggravating circumstance constitutes a basis for vacation of a sentence of death" and citing for support Daugherty v. State, 533 So.2d 287, 288 (Fla. 1988) (holding challenge to vagueness of "heinous, atrocious, or cruel" instruction meritless because trial judge did not find the factor in his order). Espinosa plainly rejects the State's argument and directly overturns the ruling of this Court in cases such as Daugherty. See also Introduction, n.1, supra (collecting cases).

harmless error review or remand for resentencing. Stringer v. Black; Espinosa.

Espinosa held that this Court's review must consider the impact of errors involved in the "heinous, atrocious, or cruel" aggravator on the sentencing jury, independent of any error in the trial court's weighing of the aggravation and mitigation. Cf. Kennedy v. State, 455 So.2d 351, 355 (Fla. 1984) (trial court's findings on aggravating factors, including "heinous, atrocious, or cruel," ruled "harmless," without analysis of the effect of the improper "heinous, atrocious, or cruel" aggravator on the jury), and Kennedy v. Singletary, 17 FLW S271, S272-73 (Fla. 1992) (Kogan, J.) (harmless error review was insufficient because court failed to "analyze the impact of the trial court's instructions on the penalty phase jury").

As set forth above, Espinosa establishes that the Florida penalty phase jury is "the sentencer" for eighth amendment purposes, and that the jury must be presumed to weigh any invalid aggravating circumstances on which it is instructed. Accordingly, it is clear that Espinosa requires consideration of whether any eighth amendment error affected the jury's weighing process. When the jury is "the sentencer," and the jury is "instructed to consider an invalid factor," the reviewing court must determine what the jury "would have done absent the factor. Otherwise, the defendant is deprived of the precision that individualized consideration demands under the Godfrey and Maynard line of cases." Stringer v. Black, 112 S.Ct. at ___, 117 L.Ed.2d at 378-79.

B. The Sentencers' Consideration of the "Especially Heinous" Aggravating Factor Infected the Balancing Process in Petitioner's Case With Reversible Error

The facts of this case were summarized by this Court in its opinion on direct appeal as follows:

> The evidence showed that appellant was an inmate at Union Correctional Institute, serving a sentence of life imprisonment when, on April 11, 1981, he escaped. He broke into a home where he changed clothes and took into his possession a shotgun and a rifle. Before he could depart the premises, however, the owner of the home arrived accompanied by a highway patrolman. A brief gun battle ensued in which appellant shot and killed both men.

Kennedy v. State, 455 So.2d 351, 353 (Fla. 1984).

The prosecution sought the death penalty with respect to both of the murders of which Mr. Kennedy was convicted. Over Petitioner's timely objection (R. 1160-61, 1216), the trial court instructed the jurors that they could consider the aggravating factor of "heinous, atrocious or cruel" with respect to each decedent (R. 1211-12). The trial court's entire instruction with respect to the "heinous, atrocious or cruel" aggravating circumstance read as follows:

> Now, your aggravating circumstances that you may consider are limited to any of the following that are established by the evidence: ....
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> * * *
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> ... the crimes for which the Defendant is to be sentenced were especially wicked, evil, atrocious, or cruel.

(R. 1211-12). This instruction, and the remainder of the court's instructions, made it clear to the jury that while they were to reach a separate sentencing verdict for each count, the aggravating circumstances on which they were instructed applied to both counts

(R. 1211-15). The prosecution argued vigorously that the "heinous, atrocious or cruel" aggravating factor applied to both decedents (R. 1174-79)[15] and forcefully asserted that the jury should rely on "heinous, atrocious, or cruel" in its decision as to sentence (Id.).

The jury reached identical sentencing verdicts with respect to both decedents (R. 1217, 1218). The trial court imposed the death sentence for each murder, finding that only one was heinous, atrocious or cruel (and also cold, calculated and premeditated),[16] that both murders were for the purpose of hindering law enforcement and finding four other aggravating factors with respect to the offenses (R. 388-89). The trial court expressly found that one of the murders was not "heinous, atrocious or cruel," although it had instructed the jury that the aggravating factor could be applied to both decedents. Compare R. 389 (sentencing order), with R. 1211-12 (sentencing instructions). The trial court found the statutory mitigating circumstance of extreme duress (R. 389-91), and, as discussed in n.25, infra, must be construed to have found the nonstatutory mitigating circumstances presented by Mr. Kennedy. (See, infra, discussing the mitigation which the jury heard and the analysis of Parker v. Dugger, 111 S.Ct. 731 (1991)).

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[15] See, e.g., R. 1177 (McDermon); R. 1179 (Cone).

[16] The prosecution did not request and the court did not instruct the jury on the cold, calculated and premeditated aggravating factor, although the court later found it with respect to one of the offenses (to be later reversed on this finding by the Florida Supreme Court).

On direct appeal, Mr. Kennedy argued, inter alia, that his death sentence must be vacated because the trial court had improperly "doubled" the aggravating factors of murder committed to avoid arrest and murder committed to hinder law enforcement, had erred in finding the "heinous, atrocious or cruel" and "cold, calculated and premeditated" aggravating factors, and had improperly considered the nonstatutory aggravating circumstance of future dangerousness. Kennedy v. State, Case No. 61,694, Initial Brief of Appellant at 46-55.

Mr. Kennedy also specifically argued that the court had erred in instructing the jury on the heinous, atrocious or cruel aggravating factor and that consideration by the jury of that factor had tainted the jury's weighing process, requiring a new sentencing proceeding before the jury. Id. at 53.[17] Mr. Kennedy argued specifically that this aggravator, and the instructions emanating from it, violated Godfrey v. Georgia, 446 U.S. 420 (1980), that the aggravator was invalid in this case, and that the error required jury resentencing. See, e.g., Kennedy v. State, No. 61,694, Initial Brief of Appellant at 51 (citing Godfrey); at 52 (arguing that the application of this aggravator was improper); at 53 ("Appellant objected to the submission to the jury of an instruction on the aggravating factor (5)(h) ["heinous, atrocious, cruel"] ... The trial court denied appellant's objection. Thereafter, the prosecutor argued to the jury that this aggravating

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[17] Ten years later, the United States Supreme Court confirmed that this argument was correct. Espinosa v. Florida, 112 S.Ct. ___, 51 Cr.L.Rptr. 3096 (1992).

circumstance was established ... and the jury was instructed that this circumstance was one to consider in making their sentence recommendation... It is impossible to determine what effect this erroneous instruction had upon the weighing process of the jury.... It is entirely possible that but for this erroneous aggravating circumstance, the jury would have recommended life. Therefore, appellant is constitutionally entitled to a new sentencing proceeding before the jury...").

As appellate counsel summarized,

> [T]he improper submission to the jury of the aggravating circumstance set forth in (5)(h) requires reversal of [Appellant's] death sentence for a new penalty proceeding before the jury. This is so because it cannot be determined that the erroneous instruction relating to the applicability of this circumstance did not affect the weighing process of the jury...
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> * * *
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> [T]he instruction itself was violative of Godfrey v. Georgia, supra, since the judge gave the jury no guidance concerning the meaning of this aggravating circumstance.

Kennedy v. State, No. 61,694, Reply Brief of Appellant at 14-15 and n.15 (emphasis added).

This Court agreed with Mr. Kennedy that the trial court erred in finding the heinous, atrocious or cruel and cold, calculated and premeditated aggravating circumstances and in doubling the avoid arrest and hinder law enforcement circumstances. Kennedy v. State, 455 So.2d 351, 354-55 (Fla. 1984). The Court, however, failed completely to address Mr. Kennedy's argument that the instruction on "heinous, atrocious or cruel" impermissibly infected the jury's weighing process. The Court upheld the death sentences by

reviewing only the trial court's findings. Id. at 355 ("the trial court's determination"; the trial court's "findings"); cf. id. at 354 ("The trial court acted properly by reading the standard jury instructions.").

This record, when reviewed in light of the United States Supreme Court's recent decision in Espinosa, establishes the following bases for relief: (1) the jury that issued two death sentencing verdicts on Ed Kennedy did so after being instructed in the bare terms of a vague aggravating circumstance that could not be applied validly in this case as a matter of law; (2) a death sentence imposed in a weighing state on the basis of a vague and/or illusory aggravating circumstance must be invalidated; and (3) no review of the effect of this error on the jury's weighing process was ever conducted. In these circumstances, Mr. Kennedy's death sentences are constitutionally invalid. In light of Espinosa, this Court must either vacate the death sentences and impose life sentences or remand for a new sentencing proceeding before a jury.

1. Petitioner's Sentencing Jury Was Instructed Only in the Bare Terms of a Facially Vague Aggravating Factor

As set forth above, the trial court instructed the jurors that they could consider and weigh the "heinous, atrocious or cruel" aggravating circumstance in making their sentencing determination on both of the counts of which Mr. Kennedy was convicted. The trial court's instructions gave the jury no more guidance concerning the application of the aggravating circumstance than the bare words of the statute (Compare R. 1211-12, with § 921.141(5)(h), Fla. Stat.). The United States Supreme Court has repeatedly

struck down death sentences rendered by juries that received far more specific instructions. See Espinosa, 112 S.Ct. at ___ (expressly saying so). The Court has expressly recognized that where the jury votes for death after receiving an unconstitutionally vague instruction concerning an aggravating factor, the death sentence violates the eighth and fourteenth amendments to the United States Constitution. Espinosa, relying on Maynard v. Cartwright, 486 U.S. 356 (1988), and Godfrey v. Georgia, 466 U.S. 420 (1980). Like the Supreme Court in Espinosa, Mr. Kennedy's argument on direct appeal relied on Godfrey.

As discussed above, the United States Supreme Court has now overruled this Court's law and held that the principles established in Godfrey and Maynard fully apply to Florida. Espinosa, supra. Mr. Kennedy's sentencing jury received exactly the same instruction as the one given in Espinosa. It is now beyond question that the giving of that instruction violated Petitioner's rights under the eighth and fourteenth amendments. Moreover, the prejudicial impact of the instruction was heightened because the "heinous, atrocious, or cruel" aggravating factor should not have been at issue in this case. The trial judge said so as to one decedent in his order and this Court said so as to the other decedent on direct appeal. The trial judge, however, instructed the jury that this aggravator applied to each decedent; the prosecutor "harangued" the jury on this aggravator as to each decedent, Kennedy, 17 FLW S273 (Kogan, J.); and this Court afforded no review to Mr. Kennedy regarding the jury's application of this aggravator as to the two decedents on

direct appeal. The express language of the Court's opinion on direct appeal demonstrates unequivocally that "the Court completely neglected to analyze the impact of the trial court's instructions on the penalty phase jury." Kennedy, 17 FLW at S273 (Kogan, J.).

This Court's attempts to provide some definition to the facially vague "heinous, atrocious, or cruel" aggravating factor have met with serious difficulties.[18] In one type of case, however, the Court has consistently held that the aggravating circumstance should not apply -- those cases in which death results quickly from gunshots and the victim was not aware of impending death for any extended period of time.[19] For this reason, the trial court found that one of the offenses was not especially heinous, atrocious or cruel (R. 389). For this reason, this Court struck the trial court's finding of the aggravating circumstance with respect to the other decedent. Kennedy v. State, 455 So.2d at 355. Indeed, the court struck the aggravating factor with almost no discussion, simply citing Tafero v. State, 403 So.2d 355 (Fla.

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[18] See, e.g., Barnard, The 1988 Survey of Florida Law: Death Penalty, 13 Nova L. Rev. 907, 927-36 (1989); Mello, Florida's "Heinous, Atrocious or Cruel" Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making It Smaller, 13 Stetson L. Rev. 523 (1984); Rosen, The "Especially Heinous" Aggravating Circumstance in Capital Cases -- The Standardless Standard, 64 N.C.L. Rev. 941 (1986).

[19] See, e.g., McCray v. State, 416 So.2d 804, 805, 807 (Fla. 1982) (three shots to the abdomen); Odam v. State, 403 So.2d 936, 942 (Fla. 1981) (instantaneous death caused by gunfire), cert. denied, 456 U.S. 925 (1982); Lewis v. State, 398 So.2d 432, 434, 438 (Fla. 1981) ("a murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murder, is as a matter of law not heinous, atrocious or cruel").

1981), cert. denied, 455 U.S. 983 (1982).[20] But the jury was given no restraints when it was instructed on this aggravator and the prosecutor relied on the vague instructions as the springboard for a "lengthy, bloody, and highly graphic description" "harangu[ing]" the jury to find "heinous, atrocious, or cruel" as to each decedent. Kennedy, 17 FLW at S273 (Kogan, J.).

Given the absolute lack of guidance concerning the proper application of the factor in the trial court's instructions, there can be little question that the jury was free to render a death verdict based on an honest belief that "every unjustified, intentional taking of human life is 'especially heinous.'" Maynard, 486 U.S. at 364, quoting Godfrey, 446 U.S. at 429. The jurors were also free to consider the prosecutor's argument that the factor applied to both counts, based in part on totally irrelevant and prejudicial comments such as that one of the victims, a trooper, "had a job to protect you out there," R. 1175, and that the killing of the other victim was "atrocious and cruel and heinous" because his body was "blown apart." (R. 1179). See also Introduction, supra (quoting other comments by prosecutor). The instructions and argument permitted and encouraged the jury to consider anything at all about the crime, the defendant or the victims with respect to this aggravating factor, and then to render a death verdict based upon it. Here, as in Espinosa, "we must presume that the jury" weighed the "heinous, atrocious, or cruel"

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[20] It is even more clear that the aggravating factor could not apply in this case than in Tafero, where there was no evidence that the victims had directed gunfire at the defendant.

aggravating factor. Espinosa, 112 S.Ct. at ___, 1992 U.S. LEXIS 4750 at 3.

The effect of jury weighing of an invalid aggravating factor on the resulting death sentence has been discussed by the United States Supreme Court in a number of cases, notably Espinosa and Stringer v. Black, 112 S.Ct. 1130, 111 L.Ed.2d 367 (1992). In Stringer, the Court held that relying on such an aggravating factor, particularly in a weighing state, invalidates the death sentence:

> Although our precedents do not require the use of aggravating factors, they have not permitted a State in which aggravating factors are decisive to use factors of vague or imprecise content. A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying on the existence of an illusory circumstance. Because the use of a vague aggravating factor in the weighing process creates the possibility not only of randomness but also of bias in favor of the death penalty, we cautioned in Zant that there might be a requirement that when the weighing process has been infected with a vague factor the death sentence must be invalidated.

Id. 111 L.Ed.2d at 382.

Consideration of an invalid aggravating factor distorts the entire weighing process, adding improper weight to death's side of the scales and depriving the defendant of the right to an individualized sentence:

> [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.

Id., 111 L.Ed.2d at 379. The "weighing process" when Petitioner's case was heard by the jury was "skewed" in the same way that the process was skewed by the invalid aggravator in Espinosa.

This Court has repeatedly rejected claims of error under Godfrey and did not grant relief on Petitioner's Godfrey challenge on direct appeal. Similarly, after the issuance of Maynard v. Cartwright, this Court denied relief on claims founded on Maynard. All of these decisions were based on this Court's view that the standard jury instruction on "heinous, atrocious, or cruel" was not constitutionally invalid or vague, Cooper, 336 So.2d 1140; Occhicone, 570 So.2d at 906; Brown, 565 So.2d at 308, and that imposition of sentence by the trial judge, who is assumed to apply a limiting construction to the aggravating factor, cures deficiencies in jury instructions on aggravation. See Smalley v. State, 546 So.2d at 722; Cooper, supra; Brown, supra. Espinosa has now overruled this precedent.

A substantial portion of this Court's capital sentencing law, including the law in effect at the time of Petitioner's direct appeal, has been thus overruled by the intervening decision of the United States Supreme Court. In such circumstances, the interests in fairness and evenhanded treatment of similarly situated persons counsels relief. See Downs, 514 So.2d at 1070 ("We now find that a substantial change in law has occurred the requires us to reconsider issues first raised on direct appeal and then in Downs' prior collateral challenges."). Mr. Kennedy should not be executed

while other persons with exactly the same claim have their sentences vacated.[21]

The impact of Espinosa on Mr. Kennedy's death sentence is plain: Mr. Kennedy's death sentence is invalid. His jury was instructed to consider a "vague," "imprecise" and "illusory" aggravating factor. The jury's weighing process was "infected" by that factor, introducing bias in favor of the death penalty and skewing the result of the entire process. Because the sentencing of Mr. Kennedy to death on the basis of such a proceeding violated his rights under the eighth amendment, the resulting death sentence "must be invalidated." Stringer, 112 S.Ct. at ___.

2. The Error in Instructing Mr. Kennedy's Jury in the Bare Terms of the Vague and Illusory Aggravating Factor Was not Harmless

This Court has not conducted any review of the effect of the error in the instructions to Petitioner's jury on the "heinous, atrocious, or cruel" aggravating factor. On direct appeal, this Court never acknowledged that there was any error in the jury instructions, and simply reviewed the trial court's "findings." Kennedy v. State, 455 So.2d at 354.[22]

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[21] The need to "ensur[e] fairness and uniformity in individual adjudications," Moreland, 582 So.2d at 620, which establishes that no procedural bar should be applied and that Petitioner should receive the benefit of Espinosa (see n.6, supra) is particularly manifest in this case: Mr. Kennedy never waived the issue and steadfastly sought correction by this Court of the constitutional shortcomings which infected his sentencing proceeding.

[22] Significantly, echoing Justice Kogan's separate opinion in the prior habeas proceeding in this case, the United States Supreme Court has rejected the assertion that "an appellate court can fulfill its obligations of meaningful review by simply reciting the formula for harmless error." See Sochor v. Florida, 51 Cr.L. Rptr.

In no way could this Court's review of the trial court's findings on direct appeal be carried over to the error in instructing the jury, because the harmless error analysis with respect to jury instructions at capital sentencing is entirely different. This principle is well recognized in the context of Hitchcock jury instruction error. As this Court explained, "It is of no significance that the trial judge stated that he would have imposed the death penalty in any event," Hall v. State, 541 So.2d 1125, 1128 (Fla. 1989), for jury harmless error review is quite different than the review involved when a trial judge's sentencing findings are at issue. This is why the United States Supreme Court has held that harmless error analysis of juror capital sentencing error is "difficult" because of the discretion afforded the sentencers. Satterwhite v. Texas, 486 U.S. 249, 258 (1988); Stringer v. Black, 112 S.Ct. 1130 (1992). This is why the Eleventh Circuit Court of Appeals has held that reviewing courts should avoid "speculat[ing] as to the effect" of constitutional error in capital sentencing involving a jury, Booker v. Dugger, 922 F.2d 633, 636 (11th Cir. 1991), and why that court has held, "Since the [Florida supreme] court could not determine with certainty what the jury's recommendation ... would have been [absent the constitutional error]," Booker, 922 F.2d at 646 (Tjoflat, C.J., concurring) (emphasis added), the affirmance of a death sentence on the basis of a harmless error finding must be deemed "arbitrary."

2129, 2132 (1992) (O'Connor, J., concurring); Espinosa, supra; see also discussion in text, infra.

Id. at 645. This is why this Court has noted that where, as here, mitigation is present, it would be "speculative" to find jury sentencing error harmless. Hall, 541 So.2d at 1128; see also Preston v. State, 564 So.2d 120, 123 (Fla. 1990) (Juror sentencing error not harmless because "[t]here was mitigating evidence introduced, even though no statutory mitigating circumstances were found [by the trial judge]."). And this is why the Mississippi Supreme Court has never held, after the United States Supreme Court found the Mississippi "heinous, atrocious, or cruel" instruction unconstitutionally vague, Clemons; Shell, that the errors involved in a jury's consideration of that aggravator could be deemed harmless. Jones v. State, 1992 Miss. LEXIS 345 (Miss. June 10, 1992); Shell v. State, 595 So.2d 1323 (Miss. 1992); Clemons v. State, 593 So.2d 1004 (Miss. 1992); see also Johnson v. State, 547 So.2d 59 (Miss. 1989). Because errors such as those involved in Petitioner's case firmly press the thumb on "death's side of the scale," Stringer v. Black, 112 S.Ct. at 1137, such errors can rarely be properly found harmless beyond a reasonable doubt.

The errors cannot be found harmless beyond a reasonable doubt in this case absent the type of "speculation" which the eighth amendment forbids. See Kennedy, 17 FLW at S273 (Kogan, J.) (discussing this issue in light of the fact that the jury was "instructed" and "harangued" on the invalid aggravation). The Supreme Court, after all, has explained that a "vague" aggravator such as the one employed here "invalidates" the death sentence. Stringer v. Black, 112 S.Ct. ___. Here, as in Omelus v. State, 584

So.2d 563, 567 (Fla. 1991), it is certainly "difficult to consider the hypothetical" of whether a judicial override of a properly instructed jury's life verdict would have been appropriate.[23] In fact, the same factors that led this Court to find that the error was not harmless in Omelus require the same result in Petitioner's case.

First, the prosecutor argued on the "heinous, atrocious, or cruel" aggravation with great emphasis (R. 1173-79). It must be assumed that this argument, and the vague instruction on which it was predicated, had a considerable impact on the jury. Espinosa; Kennedy, 17 FLW at S273 (Kogan, J.). Second, the "heinous, atrocious, or cruel" aggravating factor has been recognized by this Court to be one of the "most serious" aggravating factors, on which "great emphasis" is placed. Maxwell v. State, No. 77,138, slip op. at 8 and n.4 (Fla. June 25, 1992); Thompson v. State, 389 So.2d 197, 200 (Fla. 1980). The prosecutor in fact so argued in Petitioner's case. Third, as in Omelus, the trial court here found the statutory mitigating factor of extreme duress, based on "all of the circumstances under which [Mr. Kennedy] found himself that day in the Cone home" (R. 390). Those circumstances included evidence regarding the horrendous conditions at Union Correctional Institution and the damage those conditions inflicted on Mr. Kennedy (R. 1137, 1145, 1148-49); the fact that Mr. Kennedy had not slept or eaten for days before the incident; the fact that the

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[23] This is another reason why a stay is necessary. This Court should not attempt to make this determination under the time pressure of an impending execution.

killings took place during a gun battle in which Mr. Kennedy believed he was acting in self-defense; and the fact that Mr. Kennedy behaved passively and non-violently in prison (R. 1122). The jury, like the court, may well have found those facts to be mitigating.[24]

Fourth, a great deal of significant mitigating evidence was heard by the jury at the penalty phase. Indeed, the Eleventh Circuit Court of Appeals relied on the presence of these very nonstatutory mitigating factors to deny relief on Petitioner's claim of ineffective assistance of counsel at sentencing. Thus, the Court of Appeals found "no prejudice" as to counsel's failure "to present additional evidence" relating, inter alia, to Mr. Kennedy's background, upbringing, stuttering, and the difficulties he experienced as the "only black in an all white school," because

> Kennedy testified at the penalty phase and described these identical background facts in detail. See Trial Transcript, Vol. 9, at 1126-33.

Kennedy, 933 F.2d at 910. The panel also found no prejudice as to counsel's failure to present additional evidence relating to the conditions at the Union Correctional Institution and Mr. Kennedy's background and adjustment because

> Kennedy described the conditions at UCI to the jury. Trial Transcript, Vol. 9, at 1137, 1145, 1148-49 .... Testimony was also presented at the penalty phase that Kennedy was not a violent person in prison ....

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[24] The fact that the trial court failed to instruct the jury on the mitigating factor of extreme duress, R. 1213, although it found the factor to be present, R. 390, added to the unconstitutional effect of the erroneous aggravating factor on the jury's weighing process.

Kennedy, 933 F.2d at 911.

Statutory and nonstatutory mitigating circumstances were reflected by the record, heard by the jury, and found by the trial court here.[25] The presence of the mitigation establishes the speculative nature of any argument that the jury sentencing errors should be deemed "harmless beyond a reasonable doubt." Booker, supra, 922 F.2d at 644 n.15 (the reason for the rule against speculation as to the effect of jury sentencing error in capital

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[25] As the opinion in Parker v. Dugger, 111 S.Ct. 731 (1991), demonstrates, the judge here must have found nonstatutory mitigation. Had the sentencing judge only found one mitigator, he would not have referred to the mitigating factors in the plural, as "mitigating circumstances," in his order. Thus, as in Parker v. Dugger, and for the same reasons discussed therein, the judge at sentencing here must have credited the nonstatutory mitigating evidence presented by Mr. Kennedy, see Parker, 111 S.Ct. at 736-37, in addition to the statutory factor of "extreme duress." As Parker also explained, given the facts reflected by the record of this case, the reviewing court is required to "assume that the trial judge considered [the nonstatutory mitigating] evidence before passing sentence." Id., 111 S.Ct. at 736. As in Parker, 111 S.Ct. at 736, the trial judge here "said he did." Compare Kennedy, R. 388 (sentencing order) ("[T]he Court has carefully considered and reviewed the testimony, evidence and finding by the jury of guilt ... together with the evidence and testimony submitted by the State and the defense at the penalty proceedings ...") (emphasis added), with Parker, 111 S.Ct. at 736 (Relying on the fact that "[t]he sentencing order states: 'Before imposing sentence, this Court has carefully studied and considered all the evidence and testimony at trial and at advisory sentencing proceedings ...'") (emphasis in original).

As in Parker, the trial judge in Mr. Kennedy's case instructed the jury to consider nonstatutory mitigating evidence and it must be "assume[d] the judge applied the same standard himself." Id. at 736. As in Parker, the trial judge in Mr. Kennedy's case referred to "mitigating circumstances" in the plural. Compare Kennedy, R. 390 (finding, in the plural, "mitigating circumstances" outweighed by aggravating circumstances), with Parker, 111 S.Ct. at 738 (finding, in the plural, "no mitigating circumstances" to outweigh aggravators). Accordingly, as in Parker, the trial judge "must, therefore, have found at least some nonstatutory mitigating circumstances." Id. at 736.

cases is that the reviewing court cannot "know for sure what the advisory jury ... would have done in the absence of the invalid aggravating circumstance" when there exists mitigation).

At sentencing in Petitioner's case, the jury and judge heard the testimony of two individuals who had known Mr. Kennedy at the Union Correctional Institution. Henry J. Gray testified that he was involved in the Growth Orientation Laboratory of Inner Learning Experience and also the work with Juvenile Delinquents which was a program geared toward trying to help juveniles and young inmates (R. 1116-117). Mr. Lawrence Cone, also a UCI inmate, was part of that program (R. 1121) as was Mr. Kennedy (R. 1149). Mr. Kennedy was making the attempt to keep others from making the same mistakes he had made. He was helpful to others in the institution and provided a positive and non-threatening model for other inmates (R. 1122). He was not violent, posed no threat to others, was a well-behaved and disciplined prisoner, and was a positive presence. Cf. Skipper v. South Carolina, 476 U.S. 1, 7 n.2, 8 (1986) (explaining that such evidence is mitigating and that the failure to consider such factors would undermine the sentencer's "ability to carry out its task of considering all relevant facets of the character and record of the individual offender.")

From the testimony of Mr. Kennedy (R. 1126-1150) the sentencing jury learned that Mr. Kennedy had grown up an only child in the sole Black family in a White neighborhood near Boston. Mr. Kennedy recalled his childhood before school as "beautiful" (R. 1127). "I was carefree, funloving. I didn't have any problems."

(R. 1127). As he entered school, however, "I was made aware that I was different, you know, and the difference was the color of my skin" (R. 1127).

> [A]s time went on, this became a problem and it began to bother me. And, as they grew older and I grew older, the teasing and the little things that they did began to mature, you know, as they got older.
>
> You know, the teasing was more pointed, more heated, and I began to fight. The only way that I knew how to fight then was with my fists. I became -- I became a belligerent person in relation to that.
>
> I get out of elementary school, I go into junior high, the same thing, and, this went on for my 12 years of high school.

(R. 1128).

Mr. Kennedy explained that he began to stammer as a result of these difficulties:

> I don't stammer now half as much as I did then. Back in those years -- this was in '56 or '57 -- I could hardly talk, you know.
>
> Q Were you able to get along with girls with that problem?
>
> A No, no, that's -- you know, like I was -- you know, I'd go off and stay by myself. You know, I didn't want to be bothered.
>
> So, I graduated from high school in June of '63 and I went into the job market. You know, now, I'm not stupid; I was a C student. But, I have the intelligence to be a B or B+ student, so, I could have done fairly well for myself in the job market.
>
> The people -- my graduating class, the boys and girls I graduated with, a lot of them went to college, and, the ones that didn't, they got decent jobs. I mean, not menial jobs, but they got decent jobs.
>
> I couldn't get a job. I tried to get jobs as a salesman; you know, all I could get is jobs as, you know, a flunkee or pumping gas in a gas station, washing cars, things like this.

And, it was a pattern, you know.

And, I seen my schoolmates getting a piece of the cake, you know, of the American Dream, and, all I was getting was crumbs that was falling off the table.

Then, I began to become socially aware. Up to this time I really wasn't into the race thing, you know. It really -- it meant something to me because I knew I was black, but, it didn't mean that much to me.

But, when I got into the world, and, you know, and tried to live, you know, an honest life, this was during the time the Civil Rights Movement was at its most intense period. You know, when -- the day after I graduated from high school, [Medgar Evers] was killed down here in Mississippi, you know.

And, I began to become aware of the social aspects in this country that related to me and my race of people.

Now, up to this time I really hadn't had that much exposure to blacks, right? The only exposure that I would have would be on the weekends when I would go to Boston and hang out with a few of my family's friends, you know, but I really hadn't been exposed to blacks, and, you know, their lifestyle.

But, when I got into the world and I really encountered this race thing, it more or less drove me there because there wasn't too much else that I could relate to, you know, at that time.

And, I started hanging out in Boston and I started hanging around with street people, you know, people that -- kids that grew up in the streets.

You know, they had education but it wasn't education comparable with mine. There was only a few that had high school educations. But, most of them, they had seventh, eighth grade and then they quit, you know, and they'd run in the streets.

They call it hustling; they're stealing, you know, they doing all kinds of things to get by because that's ghetto life.

And, I began to hang out with them and I really didn't relate to what they were doing, but, I could relate to why they were doing it, you know, because the certain -- the circumstances that brought about why they felt the way they felt, you know, I could understand it.

I didn't -- I didn't condone it or relate to it, but I could understand it. And, this was about the closest thing that I could relate to in the society at that time. I felt like a total outsider; you know, I didn't feel a part of the society at all. You know, I felt like I wasn't a part.

Q You weren't part of the white society nor the black?

A Right, exactly, of the majority. I felt as though I wasn't a part of the majority. I felt like, you know, a stepchild; you know, an unwanted stepchild.

(R. 1129-1132). The sentencing jury and judge heard evidence of racism and its effects, and of hatred, poverty, discrimination, and their effects on Mr. Kennedy. They also learned of Mr. Kennedy's efforts to find employment and his inability to do so because of discrimination, and of the fact that he nevertheless made efforts to better himself.

Mr. Kennedy also testified about the pervasive negative effect of UCI and why he believed he had to follow in the escape for his own safety:

That place is nothing but a human dungheap, a human garbage can.

(R. 1144).

When I was there, you know, I was having problems trying to deal with Raiford, you know, and they don't have a mental health department there. They got a few psychologists there.

I put in -- I requested to see one of them so I could gain some kind of understanding, you know, between myself and the way things are run here, you know. Maybe -- I was asking for help, that's what I was doing, you know, but nothing ever came of it.

They put me on hold because the Institution is not geared towards that, you know; it's geared toward punishment. That's the theme, that's the concept; you

know, "You're here, you're an animal, and, we're going to punish you," and that's the concept. That's how it is.

(R. 1145). Mr. Kennedy was asked to describe this "human dungheap":

> Raiford is not the kind of institution that is geared toward rehabilitation. You know, they don't embrace the concept.
>
> They don't have programs there to rehabilitate people, you know, it's a 20th Century slave labor camp.
>
> The only rehabilitative program there is a program run by inmates, and, I was a part of that. That was the program that the two gentlemen that came in here were a part of.
>
> That was the only thing -- that's the only vehicle for rehabilitation they've got there. There's no -- there's no opportunity to really get involved in cohesive, concrete program that's run by the administration because they don't have them.
>
> You know, the only thing that you can do is do it on your own if you can. But, the negativity that's present in the institution, the negative flow that is going -- that is going on between the inmates and the administration is my involvement.
>
> You know, to give you an example, I get there February 3rd in 1979. Now, I know I'm in the south, but I don't think it's like this. I'm there three months and I heard correctional officers referring to certain inmates as "boy." And, then I heard another one referring to another inmate as "nigger," you know.
>
> I say, "Where am I at?" You know, that's kind of -- that's the kind of negativity that goes on there and that's not conducive to rehabilitation, to self-help, to growth.

(R. 1148-49). Mr. Kennedy also demonstrated his remorse over the incident:

> I know they died at my hands, you know, and I'm sorry for it.

> I apologized to the Troopers out there in Templin's trailer; I said, "I'm sorry," and they know I said that. I said, "I'm sorry."
>
> But, you know -- I'm at a loss for words. I don't know what to say.

(R. 1146).

The jury and judge knew about Mr. Kennedy's fear, that he had not slept or eaten for days before the incident, the turmoil and damage inflicted on Mr. Kennedy at UCI, that Mr. Kennedy believed he was acting in self-defense at the time of the incident, his remorse over the offense, that he wanted no one harmed, that he was a pacifist and positive role model in prison, that he intervened in the prison to stop fights, his lack of racial hatred, and his nonviolent nature.[26] There were nonstatutory mitigating factors here, factors which were not insignificant, see e.g., Skipper; Eddings v. Oklahoma, 455 U.S. 104 (1982), and factors which went beyond the statutory mitigating factor of extreme duress which the judge found.

Given the mitigating evidence, it is impossible to say beyond a reasonable doubt, without speculation, that the instruction and

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[26] Defense counsel argued these mitigating factors, while also trying to ameliorate the effect of the overbroad "heinous, atrocious, or cruel" aggravation on which the jury was instructed and which the prosecutor vociferously argued, see Kennedy, 17 FLW at S273 (Kogan, J.) ("the prosecutor harangued the jury with a lengthy, bloody, and highly graphic" argument on "heinous, atrocious, or cruel").

argument concerning the "heinous, atrocious, or cruel" aggravating factor did not have an effect on the jury's weighing process.[27]

It is no more possible for a reviewing court to determine here, without speculation, that the jury instruction error was harmless than it was in Omelus or than it was for the Mississippi Supreme Court in Johnson, Clemons, Jones or Shell (See n. 27, supra). The instruction on the "heinous, atrocious, or cruel" aggravating circumstance violated Mr. Kennedy's rights under Article I, § 17, of the Florida Constitution and under the eighth amendment. That error was not harmless beyond a reasonable doubt.

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[27] In this regard, as noted above, the Mississippi Supreme Court's decisions reviewing claims of Maynard error are instructive. In Johnson v. Mississippi, 547 So.2d 59, 1989 Miss. Lexis 356 (Miss. 1989), the court held that Maynard error required resentencing before the jury because:

> [T]his aggravating circumstance was considered by the ... trial jury, and argued by the State at trial as an additional reason for imposing the death sentence. We cannot know what the sentence of that jury would have been in the absence of this aggravating circumstance.

Johnson, 547 So.2d at ___, 1989 Miss. Lexis 356 at 5-6. Similarly, in every case in which it has considered whether error in instructing the jury on the "heinous, atrocious, or cruel" aggravating factor was harmless, the Mississippi Supreme Court has determined that it could not "throw out this aggravating circumstance and say with any confidence that the jury verdict would have been the same." Clemons v. State, 593 So.2d 1004, ____, 1992 Miss. Lexis 7, 9 (Miss. 1992); accord Shell v. State, 595 So.2d 1323 (Miss. 1992); Jones v. State, 1992 Miss. Lexis 345 (June 10, 1992). In several of these cases, moreover, the facts strongly supported the existence of the heinousness factor, and were plainly more egregious than the facts involved in Petitioner's case. See, e.g., Shell v. State, 554 So.2d 887 (Miss. 1989) (victim viciously beaten to death with tire iron); Clemons v. State, 535 So.2d 1354 (Miss. 1988) (victim forced out of delivery vehicle and onto ground at gunpoint, then shot after being made to plead for life).

Mr. Kennedy is entitled to a new sentencing proceeding before a properly instructed jury.

It is beyond dispute that Article I, § 17 of the Florida Constitution and the eighth and fourteenth amendments to the United States Constitution require individualized sentencing determinations in death penalty cases. See, e.g., Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976). Meaningful appellate review of the record of the sentencing determination plays a "crucial role" in implementing the requirement of individualized sentencing and in "ensuring that the death penalty is not imposed arbitrarily or irrationally." Parker v. Dugger, 111 S.Ct. 731, 112 L.Ed.2d 812, 826 (1991). Where the sentencer, particularly in a "weighing state," id. at 824, considers an invalid aggravating factor, "close appellate scrutiny of the import and effect" of the invalid factor is required in order to implement the requirement of individualized sentencing in capital cases. Stringer v. Black, 112 S.Ct. 1130, 111 L.Ed.2d 367 (1992). And,

> [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.

Id., 112 S.Ct. at 1137, 111 L.Ed.2d at 379.

Espinosa has overturned the analysis applied by this Court on direct appeal in Petitioner's case. Espinosa also demonstrates that the argument Mr. Kennedy presented on direct appeal and in prior post-conviction proceedings (challenging the provision to the jury of the "heinous, atrocious, or cruel" aggravator) was right all along. It is manifestly appropriate for this Court to grant

relief, thus correcting the constitutional injustice this case involves. And it would be eminently reasonable for this Court to grant a stay of execution while it determines the substantial issues arising from the United States Supreme Court's recent decision in Espinosa.

CONCLUSION

For the reasons stated, this Court should stay Petitioner's execution, grant resentencing before an appropriately instructed jury, and grant all other and further relief which the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery/facsimile transmission/United States Mail, first class, postage prepaid, to Richard Martell, Assistant Attorney General, Department of Legal Affairs, Magnolia Park Courtyard, 111-29 North Magnolia Drive, Tallahassee, Florida 32301 this 15 day of July, 1992.

Attorney