IN THE SUPREME COURT OF FLORIDA

Case No. 80234

DOMINICK A. OCCHICONE,

Petitioner,

v.

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

-and-

EVERETT I. PERRIN, Superintendent,
Florida State Prison,

Respondents.
_____/

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CLERK, SUPREME COURT
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Chief Deputy Clerk

PETITION FOR WRIT OF HABEAS CORPUS AND EXTRAORDINARY RELIEF

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PETITION FOR WRIT OF HABEAS CORPUS AND EXTRAORDINARY RELIEF

Petitioner, DOMINICK A. OCCHICONE, 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 allow oral argument in this case, 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 the propriety of Mr. Occhicone's death sentence, but also on the cases of a number of other petitioners similarly situated to Mr. Occhicone.

PRELIMINARY STATEMENT

> Although the victim was shot four times, three of the shots may have been fired rapidly and more than one bullet was fatal. Although there was evidence in the record justifying the jury's consideration of the aggravating circumstances under §921.141(5)(h) (The capital felony was especially heinous, atrocious or cruel), it has not been established beyond a reasonable doubt when compared with the facts surrounding other murders.

(R. **1646)** (Circuit Court's "Findings" in support of the death penalty) (emphasis added).

Despite the trial court's ultimate determination that the aggravating circumstance that the murder was "especially heinous, atrocious or cruel" did not apply to Mr. Occhicone's case, the jury was allowed to consider this aggravating circumstance. The only guidance given to Mr. Occhicone's jury concerning this aggravating circumstance was as follows:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:
>
> ... As to Count II only, that is the murder of Martha E. Artzner, the crime for which the Defendant is to be sentenced was especially wicked, evil, atrocious or cruel.

(R. 1357-8). The trial court's written determination that this aggravating circumstance did not apply makes clear that Mr. Occhicone's jury could not have made a proper determination concerning the application of the aggravating circumstance on the

basis of this vague instruction.[1]

Mr. Occhicone objected to this instruction at trial (R. 1134, **1454)** and argued on appeal that this instruction was unconstitutionally vague. This Court on direct appeal denied Mr. Occhicone's claim for relief on the merits:

> We find no merit to the rest of Occhicone's claims. Maynard v. Cartwrisht, **486** U.S. **356**, **108 S.** Ct. **1853**, 100 L.Ed.2d **372 (1988),** did not make Florida's penalty instructions on cold, calculated, and premeditated and heinous, atrocious, or cruel unconstitutionally vague. Brown v. State, **565** So.2d 304 (Fla. 1990); Smalley v. State, **546** So.2d 720 (Fla. **1989).**

Occhicone v. State, 570 So.2d **902, 906 (Fla. 1990).**

A month ago, addressing an instruction identical to the one given in this case, 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 vasue....

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

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[1] The trial court's determination that the "heinous, atrocious or cruel" aggravating circumstance "has not been established beyond a reasonable doubt when compared with the facts surrounding other murders" (R. 1646) is based upon this Court's limiting construction of this aggravating circumstance. The jury was not informed of this Court's limiting construction.

On direct appeal, Mr. Occhicone presented to this Court the very issue which the United States Supreme Court a month ago found sufficient to warrant relief in Esainosa. See Occhicone v. State, 570 So.2d 902, *906* (Fla. 1990). As Espinosa now establishes, the issue warrants relief. Esainosa 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. Cartwrisht, wherein the majority distinguished Florida's sentencing scheme fromthose 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. Cartwrisht **...** 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.").

Esainosa establishes that the rationale which this Court has consistently relied on -- the rationale in effect at the time of the direct appeal in Mr. Occhicone's case -- was constitutionally

deficient. This rationale 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 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 assravatins factor creates the same potential for arbitrariness as the direct weighing of an invalid assravatins 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).

There is now no question that the instruction provided to Mr. Occhicone's jury was unconstitutionally vague on its face. 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. Occhicone's jury could not be squared with Godfrey v. Georgia, **446** U.S. **420** (1980), or Maynard v. Cartwrisht, 486 U.S. 356 (1988). See Espinosa, **112** S. Ct. at __, **1992** U.S. LEXIS **4750** at **3**. **Mr.** Occhicone presents constitutional errors which directly concern the judgment of this Court during appellate review, and the legality of Mr. Occhicone's sentence of death. Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 **So.2d** 956, **960** (Fla. 1981), for the fundamental constitutional errors challenged herein involve the appellate review process.

And there can be no question that in Mr. Occhicone's case the "weighing process [was] infected with [the] vague factor." Stringer v. Black, 112 S. Ct. **1130** (1992); Espinosa. The trial

court's written findings establish that Mr. Occhicone's jury must have improperly applied the aggravating factor to his case because of the lack of sufficient guidance. 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 Mr. Occhicone's jury that the aggravator applied and justified the imposition of the death penalty (R. 1329-30).

In Sochor v. Florida, 112 S. Ct. __, 60 U.S.L.W. 4486 (1992), the United States Supreme Court held that eighth amendment error involving the jury's consideration of an "invalid" aggravating circumstance requires application of the harmless beyond a reasonable doubt standard. Specifically, the Supreme Court held:

> In a weighing State like Florida, there is Eighth Amendment error when the sentencer weighs an "invalid" aggravating circumstance in reaching the ultimate decision to impose a sentence. See Clemons v. Mississippi, 494 U.S. 738, 752 (1990). Employing an invalid aggravating factor in the weighing process "creates the possibility ... of randomness," Stringer v. Black, 503 U.S. __, __ (1992) (slip op. at 12), by placing a "thumb [on] death's side of the scale," id., thus "creat[ing] the risk of treat[ing] the defendant as more deserving of the death penalty." Id. Even when other valid aggravating factors exist as well, merely affirming a death sentence reached by weighing an invalid aggravating factor deprives a defendant of "the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances." Clemons, 494 U.S. at 752 (citing Lockett v. Ohio, 438 U.S. 586 (1978)

> and Eddings v. Oklahoma, 455 U.S. 104 (1982)); see Parker v. Dugger, 498 U.S. (1991) (slip op. at 11). While federal law does not require the state appellate court to remand for resentencing, it must, short of remand, either itself reweigh without the invalid aggravating factor or determine that weighing the invalid factor was harmless error. Id. at — (slip op. at 10).

Sochor, 60 U.S.L.W. at 4487. Sochor further held that the harmless error analysis must comport with constitutional standards. Id. at 4489.

Moreover, in Stringer v. Black, 112 S. Ct. 1130 (1992), another United States Supreme Court decision released since Mr. Occhicone's prior proceedings in this Court, the Supreme Court held that the "use of a vague or imprecise aggravating factor in the weighing process invalidates the sentence and at the very least requires constitutional harmless-error analysis or reweighing in the state judicial system."[2] Id. at 1140. In Strinser, the Supreme Court also set forth the correct standard to be employed by state appellate courts when conducting the harmless-error analysis, a standard which must now be utilized by this Court.

Mr. Occhicone's jury was instructed in unqualified language to apply the invalid "heinous, atrocious, or cruel" aggravator (R. 1357-8). The only question which must be resolved here is whether such error can be deemed harmless beyond a reasonable doubt as to the jury's weighing process and ultimate recommendation for

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[2] This Court has consistently held that it does not engage in appellate reweighing. See Brown v. Wainwright, 392 So.2d 1327, 1331 (Fla. 1981).

death.[3] The Supreme Court in Chapman v. California, 386 U.S. 18, 24 (1967), set forth the "harmless beyond a reasonable doubt" test as whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Petitioner submits that on the facts of this case such an error cannot be deemed harmless beyond a reasonable doubt,

First, the trial judge found that the aggravating circumstance did not apply in this case under a constitutionally "limited" understanding of the aggravating factor. In fact, the trial judge's findings as to this aggravating factor indicate that without additional guidance the jury could not have properly rejected this aggravating circumstance.[4]

Moreover, Mr. Occhicone's jury heard substantial statutory and non-statutory mitigation concerning the tumultuous on-again-off-again relationship between Mr. Occhicone and the victims' daughter and its impact on the alcoholic, emotionally disturbed, and chronically depressed Mr. Occhicone. In light of this compelling mitigation, the jury voted for death by the narrowest of margins, 7 to 5. (R. 1364).

The trial court found both statutory and non-statutory

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[3] Petitioner also submits that the "cold, calculated, and premeditated" and the "during the commission of a burglary" instructions were unconstitutionally vague and that these errors must also be addressed when conducting a harmless error analysis. Mr. Occhicone asserts that three of the four aggravating circumstances that Mr. Occhicone's jury were instructed on were "invalid" under Espinosa. This Court must now revisit these errors which were presented during Mr. Occhicone's direct appeal.

[4] See Section A, supra, for further discussion.

mitigating circumstances. As to the murder of Mr. Artzner, the trial court specifically found that "having considered all of the evidence in the case and having weighed the aggravating and mitigating circumstances, ... the proper sentence, notwithstanding the advisory sentence of the jury to the contrary, is a sentence of life imprisonment." (R. 1646). In its findings in support of the death sentence for the murder of Mrs. Artzner, the trial court found that Mr. Occhicone was at the time of the murder "under the influence of extreme mental or emotional disturbance."[5] The trial court also found that Mr. Occhicone's capacity to conform his conduct to the requirements of the law was impaired, but not substantially impaired.[6] Although rejecting this statutory mitigating circumstance, the trial court did treat the limited impairment as non-statutory mitigation. (R. 1648). Finally, based upon the testimony of Sergeant Peidmonte and Sergeant Belcher of the Pasco County Jail, the trial court found that Mr. Occhicone "has been a good prisoner and has acclimated to the custodial environment." (R. 1649).

Finally, in conducting a harmless error analysis, this Court cannot ignore Justice Kogan's dissent on direct appeal as to the appropriateness of a death sentence in this case:

> I concur with the majority's affirmance of the conviction of first-degree murder, but dissent as to the penalty. The trial judge found that the defendant at the time of the commission of the offense was under the

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[5] Florida Statute §921.141(6)(b).

[6] Florida Statute §921.141(6)(f).

> influence of an extreme mental or emotional disturbance, that he was a heavy drinker, and an alcoholic who was also experiencing depression. The judge found that this depression and alcoholic condition combined to produce in the defendant an extreme mental or emotional disturbance; that fact, coupled with the bizarre facts of this case, indicate a crime committed by a mentally and emotionally disturbed individual. I can only conclude that death is not proportionate here. E.g., Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988).

Occhicone v. State, 570 So.2d 902, 908 (Fla. 1990). (Kogan, J., concurring in part and dissenting in part).

Espinosa overturns this Court's longstanding rejection to challenges of unconstitutionally vague jury instructions concerning aggravating circumstances and requires this Court to reassess its direct appeal denial of this claim on the merits. Espinosa is a change in law as defined by this Court in Witt v. State, 387 So.2d 922, 929-30 (Fla. 1980).

PROCEDURAL HISTORY

Mr. Occhicone was convicted in Pasco County, Florida, of two counts of first-degree murder. The jury recommended death on both counts by a vote of 7-5. The trial court overrode the death sentence as to the first count and imposed death as to the second count. The trial court found the existence of three (3) aggravating factors: (1) previous conviction of a violent felony; (2) during the commission of a burglary; and (3) cold, calculated, and premeditated. (R. 1646-47). The trial court found the statutory mitigating circumstance of "extreme mental or emotional

disturbance" and non-statutory mitigation that Mr. Occhicone's capacity to conform his conduct to the requirements of the law was "undoubtedly impaired" and that he had been a "good prisoner and has acclimated to his custodial environment." (R. 1648-49).

The conviction and sentence were affirmed by this Court on direct appeal. Occhicone v. State, 570 So.2d 902 (Fla. 1990), cert. denied, 111 S. Ct. 2067 (1991).

This is Mr. Occhicone's first application for a writ of habeas corpus. Mr. Occhicone has not filed a Rule 3.850 motion to vacate the judgment and sentence. As a matter of judicial economy, Mr. Occhicone believes that this petition is the most efficient and expedious way to resolve his case. Mr. Occhicone's two-year Rule 3.850 filing deadline is May 20, 1993.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under § 9.100(a), Florida Rules of Appellate Procedure 9.100(a). This Court has jurisdiction, pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, Section 3(b)(9) of the Florida Constitution. The petition presents constitutional errors which directly concern the judgment of this Court during the appellate process, and the legality of Mr. Occhicone's capital sentence of death. Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So.2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein involve the appellate review process. See Wilson v. Wainwright, 474 So.2d 1163 (Fla. 1985); Baggett v. Wainwright,

229 So.2d 239, 243 (Fla. 1969). See also Johnson (Paul) v. Wainwrisht, 498 So.2d 938 (Fla. 1987). Cf. Brown v. Wainwrisht, 392 So.2d 1327 (Fla. 1981).

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

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

Anglin, 88 So.2d 919-20. See also Seccia v. Wainwright, 487 So.2d 1156 (Fla. Dist. Ct. App. 1986) (relying on Anglin). Thus, this Court has held, "Florida law is well settled that habeas will lie for any unlawful deprivation of a person's liberty." Thomas v. Dugger, 548 So.2d 230 (Fla. 1989). When a habeas petitioner alleges such a deprivation, the petitioner "has a right to seek habeas relief," and this Court will "reach the merits of the case." Id. See also State v. Bolyea, 520 So.2d 562, 564 (Fla. 1988) ("habeas relief shall be freely grantable of right to those unlawfully deprived of their liberty in any degree").

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

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Occhicone asserts that his sentence of death was obtained and subsequently affirmed during this Court's appellate review process in violation of his rights as guaranteed by the sixth, eighth, and fourteenth amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution, for each of the reasons set forth herein. In Mr. Occhicone's case, substantial and fundamental errors occurred in his capital trial. These errors were uncorrected by the appellate review process. As demonstrated

below, relief is appropriate.

MR. OCCHICONE'S JURY WAS PRESENTED WITH INVALID AND UNCONSTITUTIONALLY VAGUE AGGRAVATING CIRCUMSTANCES DEPRIVING HIM OF *AN* INDIVIDUALIZED AND CONSTITUTIONALLY FIRM SENTENCING PROCEEDING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Petitioner's sentence resulted from a combination of errors in instructing Mr. Occhicone's jury concerning the proper eighth amendment weighing of aggravating and mitigating circumstances. 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.

There can be no serious dispute over the fact that Espinosa has overruled this Court's prior decisions. The rationale which this Court previously applied to the evaluation of jury instructional error at the penalty phase of a capital trial, the very rationale in effect at the time of the direct appeal in Mr. Occhicone's case, was found constitutionally lacking in Espinosa.[7] Espinosa makes it manifest that the eighth amendment

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[7] 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 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 (continued...)

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 Essinosa, 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 these errors, herein. Petitioner begins his discussion with an independent analysis of each of the invalid and unconstitutionally vague aggravating circumstances presented to the sentencing jury. Petitioner will then establish that this eighth amendment error is not harmless beyond a reasonable doubt, and that a resentencing before a new jury is mandated.

A. "Invalid" Aggravating Circumstances Were Presented to Mr. Occhicone's Jury.

As in Essinosa, the trial court here did not directly weigh any invalid aggravating circumstances. The trial court correctly

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1(...continued)
v. Cartwrisht, 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. Cartwrisht ... 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).

found that the aggravating circumstance that the murder was "heinous, atrocious, or cruel" did not apply to this case. The trial court, however, did find that three aggravating circumstances were established: (1) prior violent felony; (2) during course of a burglary; and (3) cold, calculated and premeditated. This Court on direct appeal upheld the trial court's finding on these aggravating factors. Occhicone v. State, 570 So.2d 902 (Fla. 1990).

Espinosa makes clear, however, that the analysis does not end with the trial court findings concerning aggravating circumstances, but must extend to the jury's weighing process also:

> 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.
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> 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 assravating factor that we must presume the jury found. This kind of indirect weishins 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.

Essinosa, 112 S. Ct. at __, 1992 U.S. LEXIS 4750 at 3 (emphasis added).

1. "Heinous, atrocious, or cruel" aggravating circumstance.

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 Essinosa, 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." Essinosa, 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"

assravator:

> 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 weished the invalid aggravating factor that we must presume the jury found. This kind of indirect weighing of an invalid aggravating factor creates the same sotential for arbitrariness as the direct weighins 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).

Essinosa 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 Supreme Court in Godfrey, Maynard or Shell, the verdict is infected with eighth amendment error. 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).

The trial court determined that the "heinous, atrocious, or cruel" aggravating factor did not apply to this case, but justified instructing the jury on this aggravating circumstance:

> Although the victim was shot four times, three of the shots may have been fired rapidly

> and more than one bullet was fatal. Although there was evidence in the record justifying the jury's consideration of the aggravating circumstances under §921.141(5)(h) (The capital felony was especially heinous, atrocious or cruel), it has not been established beyond a reasonable doubt when compared with the facts surrounding other murders.

(R. 1646) (Circuit Court's "Findings" in support of the death penalty).

Mr. Occhicone's jury, armed only with the useless guidance of the standard jury instruction, could not compare this case "with the facts surrounding other murders." The trial court's specific written rejection of the "heinous, atrocious, or cruel" aggravating circumstance based upon the knowledge of this Court's limiting construction of the factor in other cases establishes the prejudicial impact of this eighth amendment error. Unlike Espinosa, in which the trial court and this Court agreed that the heinous, atrocious or cruel aggravating factor did apply, the unconstitutionally vague instruction in this case ensured that Mr. Occhicone's jury erroneously found this aggravating factor -- a factor which as a matter of law does not apply.

With no meaningful guidance from the trial court, Mr. Occhicone's jury was told by the state that the "heinous, atrocious, or cruel" aggravating circumstance applied to this case and justified a death sentence:

> The Court is going to tell you folks that another aggravating factor you can consider is that this crime as it pertains to Mrs. Artzner was especially wicked, evil, atrocious and cruel.

> You can consider and use your God given common sense to determine that when he pulled the trigger and shot Mrs. Artzner not one time, not two times, but four times, that was wicked. That was cruel. That was heinous. And you can consider that in determining if death is the appropriate penalty for the cold-blooded murder of Mrs. Artzner.

(R. 1329-30).[8]

The effect of the State's argument on Mr. Occhicone's jury is unquestionable. The trial court's specific justification for instructing the jury on the "heinous, atrocious or cruel" aggravating circumstance with respect to Mrs. Artzner's murder was that "the victim was shot four times." (R. 1646). Additionally, the jury was not instructed on the "heinous, atrocious, or cruel" aggravating circumstance as to the murder of Mr. Artzner whom the jury heard was shot only once, but remained conscious on the ground bleeding, gave a dying declaration while in pain, and was not pronounced dead until being transported to the hospital. Comparing the facts of Mr. Artzner's murder with the facts of the murder of Mrs. Artzner who, although shot four times died instantaneously, we can safely presume that the jury using their "God given common sense" found, as the state argued, that Mr. Occhicone "shot Mrs. Artzner not one time, not two times, but four times, that was wicked. That was cruel. That was heinous." In fact, the judge's findings as to this aggravating factor indicate that without additional guidance the jury could not have properly rejected this

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[8] The State's closing argument encouraged the jury "to utilize the standards given to you by the court by way of what you can consider as aggravating." (R. 1327).

aggravating circumstance, relying solely upon the number of times Mrs. Artzner was shot.

2. "Cold, calculated and premeditated" assravating circumstance.

As with the "heinous, atrocious, and cruel" aggravating circumstance, the Petitioner objected to the trial court's instruction to the jury on the "cold, calculated, and premeditated" aggravating circumstance. (R. 113_, 1454). The trial court instructed Mr. Occhicone's jury in the language of the standard instruction:

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

(R. 13__). The jury did not receive any of this Court's limiting constructions regarding this aggravating circumstance.

This Court has discussed this aggravating factor on numerous occasions. See Jent v. State, 408 So.2d 1024, 1032 (Fla. 1982); McCray v. State, 416 So.2d 804, 807 (Fla. 1982); Combs v. State, 403 So.2d 418 (Fla. 1981). In Jent, supra, this court stated:

> the level of premeditation needed to convict in the penalty phase of a first degree murder trial does not necessarily rise to the level of premeditation in subsection (5)(i). Thus, in the sentencing hearing the state will have to prove beyond a reasonable doubt the elements of the premeditation aggravating factor -- "cold, calculated ... and without any pretense of moral or legal justification".

408 So.2d at 1032. The court in McCray stated:

> That aggravating circumstance [(5)(i)] ordinarily applies in those murders which are characterized as executions or contract murders, although that description is not

intended to be all-inclusive.

416 So.2d at 807.

This Court has further defined "cold, calculated, and premeditated":

> We also find that the murder was not cold, calculated and premeditated, because the state has failed to prove beyond a reasonable doubt that Rogers' actions were accomplished in a "calculated" manner. In reaching this conclusion, we note that our obligation in interpreting statutory language such as that used in the capital sentencing statute, is to give ordinary words their plain and ordinary meaning. See Tatzel v. State, 356 So.2d 787, 789 (Fla. 1978). Webster's Third International Dictionary at 315 (1981) defines the word "calculate" as "[t]o plan the nature of beforehand: think out ... to design, prepare or adapt by forethought or careful plan." There is an utter absence of any evidence that Rogers in this case had a careful plan or prearranged design to kill anyone during the robbery. While there is ample evidence to support simple premeditation, we must conclude that there is insufficient evidence to support the heightened premeditation described in the statute, which must bear the indicia of "calculation."

Rogers v. State, 511 So.2d 526, 533 (Fla. 1987). This Court's subsequent decisions have plainly recognized that cold, calculated and premeditated requires proof beyond a reasonable doubt of a "careful plan or prearranged design." See Mitchell v. State, 527 So.2d 179, 182 (Fla. 1988) ("the cold, calculated and premeditated factor [ ] require[es] a careful plan or prearranged design."); Jackson v. State, 530 So.2d 269, 273 (Fla. 1988) (application of aggravating circumstance "error under the principles we recently enunciated in Rogers."); Hamblen v. State, 527 So.2d 800, 805 (Fla.

1988) ("Premeditated" refers to a "heightened form of premeditation which is greater than the premeditation required to establish first-degree murder"). This Court requires trial courts to apply these limiting constructions and consistently rejects this aggravator when these limitations are not met. See, e.g., Waterhouse v. State, 17 FLW S277, 280-81 (Fla. May 7, 1992); Gore v. State, 17 FLW S247, 250 (Fla. April 16, 1992); Jackson v. State, 17 FLW S237, 239 (Fla. April 9, 1992); Green v. State, 583 So.2d 647, 652-3 (Fla. 1991); Sochor v. State, 580 So.2d 595, 604 (Fla. 1991); Holton v. State, 573 So.2d 284, 292 (Fla. 1990); Bates v. State, 465 So.2d 490, 493 (Fla. 1985).

Although this Court has attempted to require more in this aggravating circumstance than simple premeditation, the jury was not told that in Mr. Occhicone's case. Mr. Occhicone raised this jury instruction issue on appeal and as with the "heinous, atrocious or cruel" instruction issue, this Court denied relief on the merits finding that "Maynard v. Cartwright, 486 U.S. 356 (1988), did not make Florida's penalty instructions on cold, calculated and premeditated . . . unconstitutionally vague." Occhicone v. State, 570 So.2d 902, 906 (Fla. 1990). Sochor and Espinosa now make clear that this Court was wrong and should revisit this Eighth Amendment error.

In Sochor, the Supreme Court held that this Court's striking of the "cold, calculated and premeditated" aggravating factor meant that eighth amendment error had occurred. The aggravating factor was "invalid in the sense that the Supreme Court of Florida had

found [it] to be unsupported by the evidence . . . It follows that eighth amendment error did occur when the trial judge weighed the coldness factor in the instant case." Sochor, 60 U.S.L.W. at 4489.[9]

Mr. Occhicone's jury was not instructed about these limitations but presumably found this aggravator present. Espinosa, 112 S. Ct. at __, 1992 U.S. LEXIS 4750 at — . The only instruction the jury ever received regarding the definition of "premeditation" was the instruction given at the guilt phase regarding the premeditation necessary to establish guilt of first-degree murder. As this Court has held, merely satisfying this definition does not establish the "cold, calculated, and premeditated" aggravating circumstance. Moreover, it cannot be ignored that Mr. Occhicone's jury had found him guilty of the premeditated murder. Under these circumstances, it must be presumed that the erroneous instruction tainted the jury's recommendation, and in turn the judge's death sentence, with eighth amendment error. Espinosa, 112 S. Ct. at __, 1992 U.S. LEXIS 4750.

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[9] In Sochor, this Court had struck the "cold, calculated and premeditated" aggravating factor because the evidence did not satisfy the limiting construction requiring "heightened" premeditation. Sochor v. State, 580 So.2d 595, 603 (Fla. 1991). Although the trial court found this aggravator and this Court upheld it, Mr. Occhicone does not concede that the aggravator applies to his case. Mr. Occhicone argued at trial and on direct appeal that this aggravator did not apply especially in light of the compelling evidence presentedto the jury concerning his mental and emotional problems. Mr. Occhicone contends that a properly instructed jury would have rejected this aggravator in light of this evidence.

3. **"During the commission of a burglary" aggravating circumstance.**

The trial judge instructed the jury on this aggravating circumstance as follows:

> The crime for which the defendant is to be sentenced was committed while he was engaged in the commission or an attempt to commit the crime of burglary.

(R. 1357, 1605). The judge did not provide any definition of the crime of burglary.

Although counsel objected to the giving of the instruction because the "facts, evidence and circumstances" did not support this aggravating circumstance, there was no specific objection to the failure to instruct the jury on the definition of burglary. This Court on direct appeal held that the claim that the trial court committed reversible error in not defining the crime of burglary "was not preserved" for review. Occhicone v, State, 570 So.2d at 906.

Nevertheless, Petitioner on direct appeal argued that despite the lack of specific objection such error was fundamental error under State v. Jones, 377 So.2d 1163 (Fla. 1979). In Jones, this Court held that in a felony murder prosecution, a complete failure to instruct on the elements of the underlying felony is fundamental error. The Jones court wrote:

> It is essential to a fair trial that the jury be able to reach a verdict based upon the law and not be left to its own devices to determine what constitutes the underlying felony.

377 So.2d at 1165.

In discussing Petitioner's claim of fundamental error, this Court addressed the merits of the claim, and found no fundamental error:

> If the state proceeds in the guilt phase on theories of both premeditated and felony murder, the underlying felony must be defined. Franklin v. State, 403 So.2d 975 (Fla. 1981). Here, however, the state charged Occhicone with two counts of premeditated first-degree murder and the court instructed on and the state argued only premeditated murder. The state need not charge and convict of felony murder or any felony in order for a court to find the aggravating factor of murder committed during the course of a felony. Ruffin v. State, 397 So.2d 277 (Fla.), cert. denied, 454 U.S. 882, 102 S. Ct. 368, 70 L.Ed.2d 194 (1981). While the jury should have been told what constitutes burslarv. the failure to do so is not fundamental error when there are other valid assravating circumstances. The jury does not have to specify what factors it relied on in making its recommendation. Speculating that Occhicone's jury mav have relied on one word without knowing its specific legal definition is of no moment here because the judge as the sentencer must make written findings supporting the sentence. We must assume that the instant judge knew the technical definition of burglary, and the facts support his finding the mother's murder to have been committed during a burglary.

Occhicone v. State, 570 So.2d 902, 906 (Fla. 1990) (emphasis added).

Espinosa now makes clear that we do not have to "speculat[e] that Occhicone's jury may have relied on one word without knowing its specific legal definition," id., instead, "we must presume that the jury did so." Espinosa, 112 S. Ct. at __, 1992 U.S. LEXIS 4750 at 3. The failure to define the underlying felony -- in this case burglary -- made this aggravating circumstance

constitutionally invalid because it was "so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." Id. In fact, the State took advantage of this constitutionally inadequate instruction by arguing for the aggravating factor in equally vague terms -- failing to even articulate what offense Mr. Occhicone intended to commit when he entered the residence. **(R. 1329).** Given the conflicting evidence, we must presume the jury considered "a forced entry into the residence" as sufficient proof of burglary. See Espinosa, 112 S. Ct. at __, **1992** U.S. **LEXIS 4750** at 3. Under Espinosa, this Court's resolution of this issue on appeal was erroneous.[10] Eighth amendment error has been established.

B. The Eighth Amendment Error Which Infected Jury's Weighing Process Is Not Harmless Beyond A Reasonable Doubt.

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 Strinser, 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

[10] We now also know that under Espinosa two of the other aggravators are invalid.

> 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 Mr. Occhicone'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 not conducted any review of the effect of the error in the instructions to Mr. Occhicone's jury on the "heinous, atrocious, or cruel," "cold, calculated and premeditated," or the "during the commission of a burglary" aggravating factors. On direct appeal, this Court never acknowledged that there was any error in the jury instructions as to "heinous, atrocious, or cruel"

and "cold, calculated and premeditated" factors, and simply reviewed the trial court's "findings" as to the "during the commission of a burglary" factor. Occhicone v. State, 570 So.2d at 906.

Mr. Occhicone's jury was presented with three invalid aggravating factors under Espinosa. The state argued with equal furor that these three aggravating factors were applicable and justified a sentence of death. None were emphasized more or less than the other. ***Any*** one of the errors standing alone requires a resentencing in this case before a new jury.

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 from 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 especially "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, "[s]ince 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." 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 Mr. Occhicone'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, Id. The Supreme Court, after all, has explained that a "vague" aggravator such as the one employed here "invalidates" the death sentence. Id.

Under Sochor and Strinser, the appropriate harmless error analysis is that of Chapman v. California, 386 U.S. 18 (1967). Sochor, 60 U.S.L.W. at 4489. This Court, of course, has recognized and adopted the Chapman standard. See State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). What Sochor does, however, is tell this Court that its application of the Chapman standard to eighth amendment error does not comport with constitutional requirements. When discussing this Court's failure to conduct harmless error analysis in Sochor, the United States Supreme Court cited to Yates v. Evatt, 111 S. Ct. 1884 (1991). In Yates, the jury had been given two unconstitutional instructions which created mandatory presumptions. 111 S. Ct, at 1891. In denying relief, the South Carolina Supreme Court "described its enquiry as one to determine 'whether it is beyond a reasonable doubt that the jury would have found it unnecessary to rely on the erroneous mandatory presumption,'" 111 S. Ct. at 1890, and then "held 'beyond a reasonable doubt ... the jury would have found it unnecessary to rely on either erroneous mandatory presumption.'" Id. at 1891. The United States Supreme

Court: found the lower court's analysis constitutionally inadequate because the lower court "did not undertake any explicit analysis to support its view of the scope of the record to be considered in applying Chapman" and because "the state court did not apply the test that Chapman formulated." Id. at 1894. In Yates, the Supreme Court explained that the "Chapman test is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" 111 S. Ct. at 1892, quoting Chapman, 386 U.S. at 24. The Supreme Court elaborated, "To say that an error did not contribute to the verdict is . . . to find that error unimportant in relation to everything else the jury considered on the issue in question." 111 S. Ct. at 1893. In Sochor, the Supreme Court found this Court's analysis deficient for the same reasons the lower court's analysis was found deficient in Yates: "Since the Supreme Court of Florida did not explain or even 'declare a belief that' this error "was harmless beyond a reasonable doubt" in that "it did not contribute to the [sentence] obtained,' Chapman, supra, at 24, the error cannot be taken as cured by the State Supreme Court's consideration of the case." 60 U.S.L.W. at 4489. Thus, in Sochor, relying upon Yates, the Supreme Court established that this Court has not been properly applying Chapman in the context of eighth amendment error.

Mr. Occhicone's jury voted for death by the narrowest of margins, 7 to 5, despite an unconstitutionally skewed weighing process, skewed as to three aggravators. Under the chapman harmless error test, this Court cannot find "beyond a reasonable

doubt that the error complained of did not contribute to the verdict obtained." Chasman, 386 U.S. at 24. Nor could this Court "find that error unimportant in relation to everything else the jury considered on the issue in question." Yates, 111 S. Ct. at 1893. It would be speculation for this Court to find beyond a reasonable doubt that any one of these errors was unimportant to one of the seven jurors voting for death, let alone the cumulative effect of these errors.

As discussed above, the trial court's written findings establish that the unconstitutionally vague "heinous, atrocious or cruel" instruction ensured that Mr. Occhicone's jury improperly weighed this aggravating factor, "creat[ing] the risk that the jury . . . treat[ed] [Mr. Occhiconel as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance." Strinser, 112 S. Ct. at 1137. And the "heinous, atrocious or cruel" aggravating circumstance in this case is truly "an illusory circumstance," for the trial judge found as a matter of law that it did not apply. (R. 1646). In light of the entire record, it would be impossible for this Court to find "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained," Chasman, 386 U.S. at 24, or that the error was "unimportant in relation to everything else the jury considered on the issue in question." Yates, 111 S. Ct. at 1893.

The same can be said for the unconstitutionally vague instruction on the "cold, calculated and premeditated" aggravating

circumstance. As this Court noted on direct appeal, "the state charged Occhicone with two counts of premeditated first-degree murder and the court instructed on and the state argued only premeditated murder." In such a case, it would be pure speculation to find that the jury did not automatically "assume" that this aggravating circumstance was established. Instead, Espinosa dictates that we presume the jury applied the invalid aggravating circumstance. Espinosa, 112 S. Ct. at __, 1992 U.S. LEXIS 4750 at 3.

With respect to the "during the commission of a burglary" instruction, this Court's harmless error determination on direct appeal does not comply with Espinosa in that it completely disregards the jury's role in capital sentencing proceedings:

> While the jury should have been told what constitutes burglary, the failure to do *so* is not fundamental error when there are other valid aggravating circumstances. The jury does not have to specify what factors it relied on in making its recommendation. Speculating that Occhicone's jury may have relied on one word without knowing its specific legal definition is of no moment here because the judge as the sentencer must make written findings supporting the sentence. We must assume that the instant judge knew the technical definition of burglary, and the facts support his finding the mother's murder to have been committed during a burglary.

Occhicone v. State, 570 So.2d at 906.

Under Espinosa, this Court may not "speculate," rather, it must presume that the jury did rely on the invalid aggravating factor. In a case in which the State did not once articulate to the jury what was the underlying offense of the burglary (R. 1329),

this Court cannot say that the error "did not contribute to the verdict [of death] obtained." Chapman, 386 U.S. at 24.

Finally, in addressing each of these errors under a harmless error analysis this Court must also look at the entire record. The record in this case contains a wealth of mitigation evidence with which the jury obviously struggled.

Mr. Occhicone's jury voted for death by the narrowest margin -- 7 to 5. This Court has consistently noted the significance of a 7 to 5 jury vote for death when conducting a harmless error analysis of an error on a sentencing jury. Preston v. State, 564 So.2d 120, 123 (Fla. 1990) (Noting as significant that "the jury only recommended death by a one-vote margin" when conducting a harmless error analysis,. Relief granted.); Way v. Dugger, 568 So.2d 1263, 1266 (Fla. 1990) (During a harmless error analysis the Court noted at the outset that the jury only voted seven to five to recommend death. Relief granted.). Had just one more juror found the scales tipped in favor of mitigation, Mr. Occhicone would have been sentenced to life -- not death. This Court cannot assume that the sentence would be death if the thumb of an invalid aggravating circumstance -- not to mention two other fingers -- "was removed from death's side of the scale." Stringer, 112 S. Ct. at 1137. This Court must find "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman, 386 U.S. at 24. In Mr. Occhicone's case, this Court must say beyond a reasonable doubt that the errors complained of did not contribute to the verdict of just one of the seven jurors who voted

for death. For if any one of the errors could have led one of those seven jurors to vote for death, Mr. Occhicone is entitled to a resentencing. The answer to this inquiry becomes even more apparent when the wealth of statutory and non-statutory mitigating evidence is considered.

The trial court found both statutory and non-statutory mitigating circumstances. As to the murder of Mr. Artzner, the trial court specifically found that "having considered all of the evidence in the case and having weished the aggravating and mitigating circumstance, ... the proper sentence, notwithstanding the advisory sentence of the jury to the contrary, is a sentence of life imprisonment." (R. 1646). In its findings in support of the death sentence for the murder of Mrs. Artzner, the trial court found that Mr. Occhicone was at the time of the murder "under the influence of extreme mental or emotional disturbance,"[11] based upon the "combative and hurtful relationship" with the victims' daughter and Mr. Occhicone's depression and alcohol consumption. (R. 1648). The trial court also found that Mr. Occhicone's capacity to conform his conduct to the requirements of the law was "undoubtedly impaired," but not substantially impaired,[12] based upon Mr. Occhicone's "routine of heavy drinking and other substance abuse." (R. 1648). Although rejecting this statutory mitigating circumstance, the trial court did treat the limited impairment as non-statutory mitigation. (R. 1648). Finally, based upon the

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[11] Florida Statute §921.141(6)(b).

[12] Florida Statute §921.141(6)(f).

testimony of Sergeant Peidmonte and Sergeant Belcher of the Pasco County Jail, the trial court found that Mr. Occhicone "has been a good prisoner and has acclimated to the custodial environment." (R. 1649). Cf. Skiaaer v, South Carolina, 476 U.S. 1, 7 nn.2 & 8 (1986) (explaining that such evidence is mitigating and that failure to consider such factors would undermine the sentencer's "ability to carry out its task of considering all relevant facets of character and record of the individual offender.")

A great deal of significant mitigating evidence was heard by Mr. Occhicone's jury. The murders of Mr. and Mrs. Artzner were the "bizarre"[13] culmination of a very tumultuous, on-again-off-again relationship between Mr. Occhicone and the victims' daughter, Anita Gerrety. The trial court characterized their relationship as "combative and hurtful," specifically noted that Mr. Occhicone "was extravagantly enamored with Anita Gerrety" and was disturbed by Ms. Gerrety's "professed termination of the relationship." (R. 1648). The jury heard about this relationship and its impact on Mr. Occhicone from numerous witnesses called by both the State and the defense.

Ms. Lawson, a bartender, called by the State, described that Mr. Occhicone's drinking became heavier after Ms. Gerrety broke off their relationship (R. 454); that he always seemed extremely upset and depressed over the breakup (R. 451); that he constantly talked

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[13] Justice Kogan, in his dissent on proportionality grounds to the death sentence, characterized the facts of these murders as "bizarre." Occhicone v. State, 570 So.2d at 908 (Kogan, J., concurring in part and dissenting in part).

about Ms. Gerrety (id.); that he would cry a lot when talking to her at the bar (R. 454), and that he still loved Ms. Gerrety. Ms. Lawson's observations were confirmed by several of the state's other witnesses. (Ms. Newell (R. **496, 498);** Ms. Hoffman (R. **472, 477);** and Mr. Andersen (R. **511, 517)).**

Ms. Carrico, **a** bartender and friend of Mr. Occhicone, was called by the defense. Ms. Carrico also noticed a significant change in Mr. Occhicone when Ms. Gerrety broke up with him. The normally happy and bubbly Mr. Occhicone became very depressed, moody, and listless. (R. **934).** She testified that Mr. Occhicone was obsessed with Ms. Gerrety and that she was his main topic of conversation. **(R. 933).** Ms. Carrico also told the jury how Ms. Gerrety would lead Mr. Occhicone on by calling him, visiting him, and spending the night with him, only to tell him the next day to leave her alone. (R. **935-7). In** fact, **Ms.** Gerrety herself confirmed much of this during her cross-examination. (R. 270-296).

The jury also heard from Ms. Gerrety that just two weeks before the murders, Ms. Gerrety visited Mr. Occhicone and told him she had just had an abortion but she would not tell him whether it was his child or not. (R. **312-3).** Ms. Carrico saw Mr. Occhicone right after Ms. Gerrety told him of the abortion. He was convinced it was his child and was very upset. Ms. Carrico told the jury that Mr. Occhicone was crying, shaking, and vomiting. (R. **939).** In fact during the two weeks before the murders, Mr. Occhicone was obsessed with Ms. Gerrety and the abortion. He talked constantly about it with everyone. (R. **455,** Ms. Lawson; **R.** 472, 476-7,

Ms. Hoffman; R. 507, Ms. Newell; and R. 517, Mr. Anderson).

On the basis of this evidence alone, the jury saw Mr. Occhicone as a man obsessed with Ms. Gerrety; a man in emotional turmoil and tormented by the woman he loved; and a man in a serious state of depression. They also learned from these same witnesses that Mr. Occhicone was an alcoholic who routinely drank a quart and a half of vodka a day starting at 7:00 a.m., seven days a week for almost seven months up to the time of the murders. (R. 448-9, 453, 467, 516, 518, 955).

The jury also heard from three defense mental health experts who testified that Mr. Occhicone was under extreme mental or emotional disturbance at the time of the offense (R. 968, 1042, 1177) and that his capacity to conform his conduct to the requirements of the law was substantially impaired. (R. 969, 1044, 1178). According to the experts, Mr. Occhicone was a man on a self-destructive course. They described him as an emotionally unstable person and a severe alcoholic. Moreover, they described the significance of this stormy love-hate relationship with Ms. Gerrety and how it aggravated this emotionally disturbed alcoholic. By the time of the murders, Mr. Occhicone was having a major depressive episode and suffering from a serious and severe acute and chronic mental illness. (R. 1038). The experts agreed that the murders were the culmination of this tormented relationship and were not the result of a planned murder scheme but the impulsive reaction of a severely disturbed man.

The wealth of statutory and non-statutory mitigating evidence

presented to the jury and found by the judge is surely sufficient to support a jury's verdict of life under Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). In fact, the trial court here overrode the jury's recommendation for death for Mr. Artzner's murder and imposed life. Had the jury been properly instructed on the aggravating circumstances and voted for a life sentence on Mrs. Artzner's murder, it is quite apparent that the trial court would not have overridden that recommendation.

Finally, in conducting a harmless error analysis, this Court cannot ignore Justice Kogan's dissent on direct appeal as to the appropriateness of a death sentence in this case:

> I concur with the majority's affirmance of the conviction of first-degree murder, but dissent as to the penalty. The trial judge found that the defendant at the time of the commission of the offense was under the influence of an extreme mental or emotional disturbance, that he was a heavy drinker, and an alcoholic who was also experiencing depression. The judge found that this depression and alcoholic condition combined to produce in the defendant an extreme mental or emotional disturbance; that fact, coupled with the bizarre facts of this case, indicate a crime committed by a mentally and emotionally disturbed individual. I can only conclude that death is not proportionate here. E.g., Fitzpatrick v. State, 527 So.2d 809 (Fla. 1988).

Occhicone v. State, 570 So.2d 902, 908 (Fla. 1990). (Kogan, J., concurring in part and dissenting in part).

Given the mitigating evidence, the jury vote of seven to five for death, and Justice Kogan's dissent on proportionality grounds, it is impossible to say beyond a reasonable doubt, without speculation, that the instruction and argument concerning the

"heinous, atrocious, or cruel" aggravating factor did not have an effect on the jury's weighing process.[14]

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 v. State, **584** So.2d **563** (Fla. 1991), or than it was for the Mississippi Supreme Court in Johnson, Clemons, Jones or Shell. The instruction on the "heinous, atrocious, or cruel" aggravating circumstance violated Mr. Occhicone's rights under Article I, Section 17, of the Florida Constitution and under the eighth amendment. That error was not harmless beyond a reasonable doubt. Mr. Occhicone is entitled to

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[14] In this regard, as noted above, the Mississippi Supreme Court's decisions reviewing claims of Mavnard error are instructive. In Johnson v. Mississippi, **547** So.2d 59, 1989 Miss. LEXIS 356 (Miss. 1989), the court held that Mavnard 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).

a new sentencing proceeding before a properly instructed jury.

It is beyond dispute that Article I, Section 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., Woodsonv. 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. Dusser, 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 rationale applied by this Court on direct appeal in Petitioner's case. Espinosa also demonstrates that the argument Mr. Occhicone presented on direct appeal challenging the jury instructions on the "heinous, atrocious, or cruel," "cold, calculated, and premeditated," and "during the commission of a burglary" aggravators was right all along. It is

manifestly appropriate for this Court to grant relief, thus correcting the constitutional injustice this case involves.

CONCLUSION

For the reasons stated, this Court should 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 Robert A. Butterworth, Attorney General, Department of Legal Affairs, 2002 North Lois Avenue, Suite 700, Tampa, Florida 32607-2366, this 30th day of July, 1992.

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