IN THE BUPREME COURT OF FLORIDA

NO. 80326

JOHN MILLS, JR.,

Petitioner,

v.

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

Respondent.

PETITION FOR EXTRAORDINARY RELIEF AND FOR A WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Mr. Mills' fourth habeas corpus petition in this Court. It is being filed now because recent decisions by the United States Supreme Court have established that Mr. Mills is entitled to habeas corpus relief, and that the prior dispositions of Mr. Mills' claims by this Court were in error. Mr. Mills previously challenged his death sentence, including the jury's death recommendation. On direct appeal, he argued that the jury instructions regarding the "heinous, atrocious or cruel" and "cold, calculated and premeditated" aggravating factors were erroneous and that the legal standards limiting the application of these two factors were not applied. In post-conviction, Mr. Mills argued that the jury instructions regarding these two aggravating factors violated Mavnard v. Cartwright, 486 U.S. 356 (1988). This Court denied relief, holding that Maynard v. Cartwright is "inapplicable to Florida." Mills v. Dugger, 574 So. 2d 63, 65 (Fla. 1990).

On June 8, 1992, the United States Supreme Court reversed this Court's longstanding jurisprudence and held Maynard v. Cartwrisht, 486 U.S. 356 (1988), is applicable in Florida. Sochor v. Florida, 112 S. Ct. 2114 (1992). Thus, Eighth Amendment error before either of the constituent sentencers (in Florida the constituent sentencers are the judge and the jury) requires application of the harmless-beyond-a-reasonable-doubt standard. Specifically, the Supreme Court held:

> In a weighing State like Florida, there is Eighth Amendment error when the sentencer

> weighs an "invalid" aggravating circumstance in reaching the ultimate decision to impose a sentence. *See* Clemons v. Mississippi, 494 U.S. 738, 752, 110 S. Ct. 1441, 1450, 108 L.Ed.2d 725 (1990). Employing an invalid aggravating factor in the weighing process "creates the possibility ... of randomness," Stringer v. Black, 503 U.S. ____, ____, 112 S. Ct. 1130, 1139, 117 L.Ed.2d 367 (1992), by placing a "thumb [on] death's side of the scale," id., at ___, 112 S. Ct., at 1137, ____ (slip op., at 8), thus "creat[ing] the risk [of] treat[ing] the defendant as more deserving of the death penalty," id., at ___, 112 S. Ct., at 1139. Even when other valid aggravating factors exist as well, merely affirming a sentence reached by weighing an invalid aggravating factor deprives a defendant of "the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances." Clemons, supra, 494 U.S., at 752, 110 S. Ct., at 1450 (citing Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982)); see Parker v. Dusser, 498 U.S. ____, ____, 111 S. Ct. 731, 739, 112 L.Ed.2d 812 (1991). 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 ____, 111 S. Ct., at 738.

Sochor, 112 S. Ct. at 2119.

On June 29, 1992, in Espinosa V. Florida, 112 S. Ct. 2926 (1992), the United States Supreme Court again reversed this Court and held that this Court had previously failed to correctly apply Maynard and Godfrey v. Georgia, 446 U.S. 420 (1980):

> 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, 435 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 aggravating factor that we must presume the jury found. This kind of indirect weighing of an invalid aggravating factor creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor, cf. Baldwin v. Alabama, 472 U.S. 372, 382 (1985), and the result, therefore, was error.

112 S. Ct. at 2928.

In light of Sochor and Espinosa, the United States Supreme Court granted certiorari review and reversed five other Florida Supreme Court decisions. See Beltran-Lopez v. Florida, 112 S. Ct. 3021 (1992); Davis v. Florida, 112 S. Ct. 3021 (1992); Gaskin v. Florida, 112 S. Ct. 3022 (1992); Henry v. Florida, 112 S. Ct. 3021 (1992); Hitchcock v. Florida, 112 S. Ct. 3020 (1992).

Espinosa and Sochor represent a change in Florida law which must now be applied to Mr. Mills' claims. In Thompson v. Dugger, 515 So. 2d 173, 175 (Fla. 1987), this Court held Hitchcock v.

Dugger, 481 U.S. 393 (1987), to be a change in Florida law because it "represent[ed] a sufficient change in the law that potentially affect[ed] a class of petitioners, including Thompson, to defeat the claim of a procedural default." The same can be said for Espinosa and Sochor. The United States Supreme Court demonstrated this proposition by reversing a total of seven Florida death cases on the basis of the error outlined in Espinosa and Sochor.

Moreover, an examination of this Court's jurisprudence demonstrates that Espinosa overturned two longstanding positions of this Court. First, this Court's belief that Proffitt v. Florida, 428 U.S. 242 (197), insulated Florida's "heinous, atrocious or cruel" circumstance from Maynard error was soundly rejected. Espinosa, 112 S. Ct. at 2928 ("The State here does not argue that the 'especially wicked, evil, atrocious, or cruel' instruction given in this case was any less vague than the instructions we found lacking in Shell, Cartwright or Godfrey"). Second, this Court's precedent that eighth amendment error before the jury was cured or insulated from review by the judge's sentencing decision was also specifically overturned. Espinosa, 112 S. Ct. at 2929 ("We merely hold that, if a weighing State decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances").

The first proposition was discussed at length in Smalley V. State, 546 So. 2d 720 (Fla. 1989). There, this Court held that,

because of Proffitt, Florida was exempted from the scope of Maynard:

> It was because of this narrowing construction that the Supreme Court of the United States upheld the aggravating circumstance of heinous, atrocious, or cruel against a specific eighth amendment vagueness challenge in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Indeed, this Court has continued to limit the finding of heinous, atrocious, or cruel to those conscienceless or pitiless crimes which are unnecessarily torturous to the victim. E.g., Garron v. State, 528 So.2d 353 (Fla. 1988); Jackson v. State, 502 So.2d 409 (Fla. 1986), cert. denied, 482 U.S. 920, 107 S.Ct. 3198, 96 L.Ed.2d 686 (1987); Teffeteller v. State, 439 So.2d 840 (Fla. 1983), cert. denied, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984). That Proffitt continues to be good law today is evident from Maynard v. Cartwrisht, wherein the majority distinguished Florida's sentencing scheme from those of Georgia and Oklahoma. See Maynard v. Cartwrisht, 108 S.Ct. at 1859.

546 So. 2d at 722. However, Espinosa clearly held that Proffitt did not insulate Florida's standard jury instruction from compliance with the Eighth Amendment.

The second longstanding rule of law overturned by Espinosa was the view that the judge's sentencing process somehow cured error before the jury. In Breedlove v. State, 413 So. 2d 1, 9 (Fla. 1982), this Court held that impermissible prosecutorial argument to the jury regarding aggravating circumstances was neither prejudicial nor reversible because the judge was not misled and did not err in his sentencing order. Under Espinosa, this conclusion was erroneous. Similarly, in Deaton v. State, 480 So. 2d 1279, 1282 (Fla. 1985), this Court held that the

prosecutor's jury argument in favor of improper doubling of aggravating factors was, in essence, cured when the judge properly merged the aggravating circumstances in his sentencing order. Under Espinosa, this conclusion was erroneous. In Suarez v. State, 481 So. 2d 1201, 1209 (Fla. 1985), this Court rejected a challenge to the jury instructions which failed to advise the jury of the prohibition against improper doubling. There, this Court concluded improper doubling was only error if the judge doubled up aggravators in his sentencing order ("it is this sentencing order which is subject to review vis-a-vis doubling"). Espinosa specifically rejects this reasoning. In Smalley, this Court distinguished Maynard on this basis: "In Oklahoma the jury is the sentencer, while in Florida the jury gives an advisory opinion to the trial judge, who then passes sentence." 546 So. 2d at 722. Espinosa clearly overturns this distinction ("neither actor must be permitted to weigh invalid aggravating circumstances," 112 S. Ct. at 2929).

Espinosa clearly rejected both of this Court's prior lines of reasoning. Florida jury instructions must comply with Maynard and Godfrey despite Proffitt.[1] Further, Florida juries must be correctly instructed on the applicable law regardless of the judge's awareness of the law.

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[1] In fact, in Sochor, the United States Supreme Court questioned whether "the Supreme Court of Florida has [] confined its discussion on the matter to the Dixon language we approved in Proffitt." 112 S. Ct. at 2121.

This Court has steadfastly held for many years that Maynard and Godfrey did not affect Florida's capital jury instructions regarding aggravating circumstances. This Court repeatedly held that those cases and their progeny had no application in Florida. See Porter v. Dugger, 559 So. 2d 201, 203 (Fla. 1990)("Maynard does not affect Florida's death sentencing procedures"); Brown v. State, 565 So. 2d 304, 308 (Fla. 1990)("We have previously found Maynard inapposite to Florida's death penalty sentencing"); Occhicone v. State, 570 So. 2d 902, 906 (Fla. 1990)("Maynard [citation] did not make Florida's penalty instructions on cold, calculated, and premeditated and heinous, atrocious, or cruel unconstitutionally vague"). In fact, the Court relied upon this very reasoning to reject Mr. Mills' prior post-conviction challenge to the adequacy of the jury instructions regarding aggravating factors. Mills v. Dugger, 574 So. 2d 63, 65 (Fla. 1990) (Mavnard is "inapplicable to Florida, [does] not constitute such change[] in law as to provide post conviction relief").

This Court has specifically and repeatedly upheld the standard jury instructions against any Eighth Amendment challenge. In Cooser v. State, 336 So. 2d 1133, 1140-41 (Fla. 1976), this Court found that the trial court erred in finding the "heinous, atrocious or cruel" aggravating factor, but found no error in allowing the jury to rely on the aggravator because "the trial judge read the jury the interpretation of that term which we gave in Dixon. No more was required." In Vausht v. State, 410 So. 2d 147, 150 (Fla. 1982), Vaught argued "that the trial

court failed to provide the jury with complete instructions on aggravating and mitigating circumstances." The contention was found to be "without merit. The trial court gave the standard jury instruction on aggravating and mitigating circumstances." Similarly, in Valle v. State, 474 So. 2d 796 (Fla. 1985), this Court concluded, "the standard jury instructions on aggravating and mitigating circumstances, which were given in this case, are sufficient and do not require further **refinements."** 474 So. 2d at ***805.***[2]

The standard jury instruction regarding "heinous, atrocious and cruel" **was** upheld by this Court in Smalley v. State.[3] However, as noted, Espinosa specifically and pointedly rejected this Court's reasoning in Smalley (when the sentencing judge gives great weight to the jury recommendation, he "indirectly weigh(s) the invalid aggravating factor we must presume the jury found." 112 **s.** Ct. at 2928). This Court relied upon Smalley to **reject** Maynard claims in a multitude of **cases.** Porter v. Dugger, **559 So.** 2d 201, 203 (Fla. 1990); Clark v. Dugger, 559 So. 2d 192, 194 (Fla. 1990); Randolph v. State, ***562*** **So.** 2d 331, 339 (Fla.

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

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

1990); Freeman v. State, 563 So. 2d 73, 76 (Fla. 1990); Brown V. State, 565 So. 2d 304, 308 (Fla. 1990); Smith v. Dusser, 565 So. 2d 1293, 1295 n.3 (Fla. 1990); Roberts v. State, 568 So. 2d 1255, 1258 (Fla. 1990): Occhicone v. State, 570 So. 2d 902, 906 (Fla. 1990); Robinson v. State, 574 So. 2d 108, 113 (Fla. 1991); Trotter V. State, 576 So. 2d 691, 694 (Fla. 1990); Engle V. Dusser, 576 So. 2d 696, 704 (Fla. 1991); Hitchcock v. State, 578 So. 2d 685, 688 (Fla. 1990); Shere v. State, 579 So. 2d 86, 95 (Fla. 1991); Davis v. State, 586 So. 2d 1038, 1040 (Fla. 1991).

This Court rejected still many other challenges to the adequacy of the standard jury instructions without reference to Smalley or any other authority. As previously noted, in Vaught, this Court gave the standard jury instructions regarding aggravating circumstances a nod of approval. Those standard instructions provided as to "heinous, atrocious or cruel":

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:
>
> * * *
>
> 8. The crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel.

Since this language was in the standard instructions at the time of Vaught, this Court's opinion therein constituted a clear ruling that the instruction was adequate.

In Chandler v. State, 442 So. 2d 171, 172 (Fla. 1983), a challenge was again made to the standard jury instructions given at the penalty phase of a capital proceeding. The lengthy

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

Subsequently, this Court addressed the matter again in Parker v. State, 456 So. 2d 436 (Fla. 1984). There, Parker argued that the death recommendation was invalid due to inadequate jury instructions:

> We must submit that the jury's advisory recommendation of death was invalid in that it was based on improper prosecution argument and inadequate jury instructions. As a consequence of this invalidity, the resulting death sentence must be vacated.
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> * * *
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> Accord Godfrey v. Georgia, 446 U.S. 420, 428-429, 100 S.Ct. 1759 (1980)(reversing death sentence based upon finding of aggravating circumstance not properly charged). The importance of jury instructions in the sentencing process was clearly demonstrated by the Fifth Circuit in Washington v. Watkins, 655 F.2d 1346, 1373-77 (5th Cir. 1981). Instructions in that case informed the jury, contrary to Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954 (1978), that mitigating circumstances were those enumerated by the court. The Fifth Circuit held that even though no mitigating evidence was excluded and counsel had argued unenumerated mitigation, the jury was prevented from properly weighing the sentencing evidence and, therefore, the death sentence could not be constitutionally imposed.
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> Here, without being familiar with the applicable legal standard and in the absence

> of any appropriation instructions, it cannot be said that the jury could properly exercise its decision making authority. The advisory recommendation is consequently a nullity. The sentence imposed as a result of that recommendation cannot stand.

See Initial Brief of Appellant, Parker v. State, Case No. 61,52, at 56, 62. In affirming the death sentence, this Court rejected Parker's arguments:

> Defendant argues that the trial judge erred in denying requested jury instructions. There was no error: the requested instructions were encompassed within the standard jury instructions which were properly given. Jones v. State, 411 So.2d 165 (Fla.), cert. denied, 459 U.S. 891, 103 S.Ct. 189, 74 L.Ed.2d 153 (1982).

456 So. 2d at 444.[4]

The challenge presented in Lemon v. State, 456 So.2d 885, 887 (Fla. 1984), was similarly rejected:

> Appellant complains that the trial court erred in refusing to instruct the jury on the definition of heinous, atrocious, or cruel from State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974); refusing to instruct the jury that a life recommendation could be returned even if no mitigating circumstances were found; and failing to instruct the jury on all the aggravating and mitigating circumstances of section 921.141, Florida Statutes (1981). We find no error. The standard jury instructions given by the trial court were adequate under the circumstances of this case.

Likewise, in Kennedy v. State, 455 So. 2d 351, 354 (Fla. 1984), this Court held the standard jury instructions were

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[4]The citation to Jones v. State refers to the holding there that the standard jury instructions pre-Lockett did not warrant a reversal.

adequate under the Eighth Amendment. "The trial court acted properly by reading the standard jury instructions." 455 So. 2d at 354. Numerous other decisions were issued by this Court specifically approving the standard jury instructions against Eighth Amendment challenges. Lara v. State, 464 So. 2d 1173, 1179 (Fla. 1985)("The judge followed the standard jury instructions. * * * We conclude there was no error in the instructions given by the trial judge regarding aggravating and mitigating circumstances."); Johnson v. State, 465 So. 2d 499, 507 (Fla. 1985)("The instruction on and finding that the murder was especially heinous, atrocious or cruel were also proper"); Bertolotti v. State, 476 So. 2d 130, 132 (Fla. 1985)("Appellant's proposed jury instruction is subsumed in the standard jury instruction given at the close of the penalty phase"); Jennings v. State, 512 So. 2d 169, 176 (Fla. 1987)(the challenge was found meritless without discussion); Hildwin v. State, 531 So. 2d 124, 129 (Fla. 1988)(challenge found meritless without discussion); Mendyk v. State, 545 So. 2d 846, 850 (Fla. 1989)(in response to Mendyk's challenge regarding adequacy of standard instruction on heinous, atrocious or cruel, this Court held "standard jury instructions properly and adequately cover the matters raised by appellant!!). [5]

[5]This list of cases is by no means exhaustive. It has been compiled rather hurriedly. Moreover, a number of cases where the issue was raised have not been included on this list because this Court's opinion failed to refer to the issue in any fashion.

Following the decision in Smalley, specifically rejecting the Maynard challenge, this Court rejected a number of challenges to the standard jury instructions by citing Smallev, as noted previously. However, there was still a number of cases where the challenges to the standard instructions were rejected without specific reference to Smalley. Haliburton v. State, 561 So. 2d 248, 252 (Fla. 1990); Bruno v. State, 574 So. 2d 76, 83 (Fla. 1991); Haves v. State, 581 So. 2d 121, 127 (Fla. 1991); Green v. State, 583 So. 2d 647 (Fla. 1991); Henry v. State, 586 So. 2d 1033 (Fla. 1991); Douqan v. State, 595 So. 2d 1, 4 (Fla. 1992); Hodges v. State, 595 So. 2d 929, 934 (1992).[6]

This Court recognized Hitchcock was a change in law because it declared the standard jury instruction given prior to Lockett to be in violation of the Eighth Amendment. In addition, it rejected the notion that mere presentation of the nonstatutory mitigation cured the instructional defect. After Hitchcock, this Court recognized the significance of this change, Thompson v. Dusser, and declared, "[w]e thus can think of no clearer rejection of the 'mere presentation' standard reflected in the prior opinions of this Court, and conclude that this standard can no longer be considered controlling law." Downs v. Dusser, 514 So. 2d 1069, 1071 (1987). So too here, Espinosa can be no clearer in its rejection of the standard jury instruction and the notion that the judge sentencing insulated the jury instructions

[6]Again, this list is not exhaustive either. It is but a quick compilation.

regarding aggravating factors from compliance with eighth amendment jurisprudence.

In Delap v. Dugger, 513 So. 2d 659 (Fla. 1987), this Court held that the change brought by Hitchcock was so significant that the failure to previously raise a timely challenge to the jury instruction would not preclude consideration of a Hitchcock claim in post-conviction proceedings. Again, the instruction rejected in Hitchcock was, as it is here, a standard jury instruction repeatedly approved by this Court. See Demps v. State, 395 So. 2d at 505. Such an approach is warranted where attorneys in reliance on this Court's jurisprudence which conclusively, albeit erroneously, settled the issue adversely to the client, chose to forego arguments which appear to be meritless in favor of issues with a greater chance of success. This Court should treat Espinosa's reversal of this Court's jurisprudence as a substantial change in law. An attorney is expected to "winnow[] out weaker argument[] and focus[] on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. 745, 751-52 (1983). An attorney should not be required to present issues this Court has ruled to be meritless in order to preserve the issue for the day eight years later that the United States Supreme Court declares this Court's ruling to be in error.

"Fundamental fairness" may override the State's interest in finality. Moreland v. State, 582 So. 2d 618, 619 (Fla. 1991). "The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness." Witt

v. State, 387 So. 2d **922, 925 (Fla. 1980).** "Considerations of fairness and uniformity make it very 'difficult to justify depriving a person of his liberty or **his** life, under process no longer considered acceptable and no longer applied to indistinguishable cases." Id. Accordingly, this Court held in Witt "that only major constitutional changes of law" as determined by either this Court or the United States Supreme Court are cognizable in post-conviction proceedings. 387 **So.** 2d at **929-30.** Here, the decisions at issue have emanated from the United States Supreme Court. Espinosa; Sochor. Obviously, the decisions qualify under Witt to be changes in law.[7] The question is whether the decisions change Florida's law to such magnitude as to warrant retroactive application.

To some extent, the question has already been decided by the United States Supreme Court in Stringer v. Black, 112 **S.** Ct. **1130** (1992). There, the issue was whether Maynard v. Cartwright was dictated by Godfrey v. Georgia or was new law. The Supreme Court held, "Maynard was [] controlled by Godfrey and it did not announce a new rule." 112 **S.** Ct. at **1136.** Thus, according to the United States Supreme Court, Florida has been in violation of the Eighth Amendment since 1980, the year Godfrey was decided. **The standard** jury instructions which have been followed

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[7] In Witt, this Court cited Gideon v. Wainwright, **372** U.S. **335** (1963), as **an** example of a change in law which defeated any procedural default. As a result of Gideon, it was necessary **"to** allow prisoners the opportunity and a forum to challenge those prior convictions which might be affected by Gideon's law change." **Witt,** 387 ***So.*** **2d at** 927.

explicitly by this Court throughout that time period were not in conformity with the federal constitution.[8]

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

In light of this Court's pronouncements following Hitchcock, this Court must find Espinosa and Sochor to constitute a change in law which defeats a procedural bar and permits consideration of Espinosa and Sochor claims in post-conviction proceedings. As this Court held in Adams v. State, 543 So. 2d 1244 (Fla. 1989), capital defendants must be given two years to file claims arising under Espinosa. Pursuant thereto, Mr. Mills files this petition representing his claims which were initially presented in his direct appeal and then represented in habeas corpus proceedings.

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[8] In Gideon, it was determined by the federal courts that the new rule applied retrospectively. Linkletter v. Walker, 381 U.S. 618, *628* n.13 (1965). Thus, there as here, the question was whether those affected by the new rule have a state forum for presenting their claims. This Court must do as it did in Gideon and provide the forum.

I. PROCEDURAL HISTORY

The jury found Mr. Mills guilty on December 4, 1982 (R. 231-37)[9], and recommended a death sentence on December 6, 1982 (R. 242). The jury received improper instructions regarding aggravating circumstances. At the penalty phase charge conference, defense counsel objected to the jury instructions on the "heinous, atrocious or cruel" and "cold, calculated and premeditated" aggravating factors (R. 2260-63). Regarding the "heinous, atrocious or cruel" factor, defense counsel cited Riley v. State, 366 So. 2d 19, 21 (Fla. 1978) (R. 2260), which held that this factor applied only when the facts supported the limiting construction adopted in Dixon v. State, 283 So. 2d 1 (Fla. 1973). The trial court decided to instruct on this factor to "[l]et the jury make the determination" (R. 2262), but agreed to give the jury some of the Dixon language "to give [the jury] some understanding of what those two words mean" (R. 2263). Regarding the "cold, calculated and premeditated" factor, defense counsel argued that unless this factor were further defined, it would apply to anyone convicted of first-degree murder (R. 2262), because no definition of "cold" and "calculated" was provided (2263). The jury instructions regarding aggravating circumstances provided in part:

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

[9] In this petition, the record from Mr. Mills' direct appeal will be designated as "R. ____," with the appropriate page number.

> a cold, calculated or premeditated manner without any pretence of moral or legal justification. Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain; utter indifference to; or enjoyment of the suffering of others, pitiless.

(R. 2335).[10] The judge, relying upon the jury's recommendation, imposed death (R. 273-74).

Mr. Mills appealed his convictions and sentence to this Court. Issues regarding the "heinous, atrocious or cruel" and "cold, calculated and premeditated" aggravating factors were presented. See Mills v. State, 462 So. 2d 1075, 1080-81 (Fla. 1985) (discussing "heinous, atrocious or cruel" factor); id. at 1081 (discussing "cold, calculated and premeditated" factor).

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[10]This instruction was insufficient under Godfrey v. Georgia and Maynard v. Cartwright. In Maynard, the jury received this instruction:

> [T]he term "heinous" means extremely wicked or shockingly evil; "atrocious" means outrageously wicked and vile, "cruel" means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others.

Cartwright v. Maynard, 822 F.2d 1477, 1488 (10th Cir. 1987)(in banc), affirmed, 486 U.S. 356 (1988). In Shell v. Mississippi, 111 S. Ct. 313 (1990), the jury was instructed:

> [T]he word heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others.

111 S. Ct. at 313 (Marshall, J., concurring). The Supreme Court found this instruction insufficient: "Although the trial court in this case used a limiting instruction to define the 'especially heinous, atrocious, or cruel' factor, that instruction is not constitutionally sufficient." Shell, 111 S. Ct. at 313. The instruction provided Mr. Mills' jury is similarly infirm.

Appellant's Initial Brief on direct appeal argued that "the trial court erred in instructing the jury" on these two aggravating factors (Initial Brief of Appellant, p. 44), and that the legal standards limiting the application of these two factors were not applied (Jd. at 44, 47). This Court affirmed Mr. Mills' convictions and sentences. Mills v. State.

On April 28, 1987, Mr. Mills filed a motion pursuant to Fla. R. Crim. P. 3.850. The trial court conducted a limited evidentiary hearing on May 1, 1987, and denied all relief on May 4, 1987. On May 5, 1987, this Court heard oral argument on Mr. Mills' state petition for a writ of habeas corpus, which had been filed on May 4, 1987, and on his Rule 3.850 appeal. That same date -- May 5, 1987 -- this Court denied all relief. Mills v. State, 507 So. 2d 602 (Fla. 1987).

Mr. Mills filed a federal petition for a writ of habeas corpus on May 6, 1987. On October 15, 1987, the district court issued an order denying relief on several of Mr. Mills' claims and scheduling an evidentiary hearing on one claim. While Mr. Mills' federal petition was pending before the district court, he filed a second state habeas corpus petition in this Court on January 8, 1988. That petition was denied without opinion on February 15, 1988. Mills v. Dugger, 523 So. 2d 578 (Fla. 1988). The district court held an evidentiary hearing on January 13 and 15, 1988. On August 25, 1988, the district court issued an order denying all relief. Mr. Mills appealed to the Eleventh Circuit Court of Appeals.

While Mr. Mills' appeal was pending before the Eleventh Circuit, he requested that those proceedings be held in abeyance pending the filing and disposition of a state habeas corpus petition. The Eleventh Circuit granted that request on October 3, 1989. Mr. Mills filed a habeas corpus petition in this Court on November 15, 1989. Issues regarding the "heinous, atrocious or cruel" and "cold, calculated and premeditated" aggravating factors were represented to this Court in those habeas corpus proceedings. There, the Court rejected the issues, writing:

> As Mills concedes, or as the state points out, or as our own observations have disclosed, most of the current issues have been raised and considered before.
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> . . . .
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> In attempting to avoid a procedural bar Mills relies on cases such as . . . Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988).
>
> All of the cases he cites, however, are inapplicable to Florida, are not such changes in the law as to provide post-conviction relief, or are factually distinguishable from the instant case, and we have rejected the issues raised here in other cases. . . Therefore, the issues raised in the petition are procedurally barred.

Mills v. Dugger, 574 So. 2d 63, 65 (Fla. 1990). This Court denied all relief, and the litigation in the Eleventh Circuit proceeded. Mr. Mills' case is still pending in the Eleventh Circuit.

II. JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process, and the legality of Mr. Mills' 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. Wainwriqht, 474 So. 2d 1163 (Fla. 1985); Baggett v. Wainwrisht, 229 So. 2d 239, 243 (Fla. 1969); cf. Brown v. Wainwriqht, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Mills to raise the claims presented herein. See, e.g., Way v. Dusser, 568 So. 2d 1263 (Fla. 1990); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwrisht, 517 So. 2d 656 (Fla. 1987); Wilson.

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, see Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977); Wilson v. Wainwrisht, 474 So. 2d at 1165, and has not hesitated in exercising its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital trial and sentencing proceedings. Way; Wilson; Downs; Riley. This petition presents substantial constitutional

questions which go to the heart of the fundamental fairness and reliability of Mr. Mills' sentence of death, and of this Court's appellate review. Mr. Mills' claims are therefore of the type classically considered by this Court pursuant to its habeas corpus jurisdiction. This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. See, e.g., Riley; Downs; Wilson, supra. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984). The petition includes claims predicated on significant, fundamental and retroactive changes in constitutional law. See, e.g., Thompson v. Dusser, 515 So. 2d 173 (Fla. 1987); Tafero v. Wainwright, 459 So. 2d 1034, 1035 (Fla. 1984); Edwards v. State, 393 So. 2d 597, 600 n.4 (Fla. 3d DCA), petition denied, 402 So. 2d 613 (Fla. 1981); cf. Witt v. State, 387 So. 2d 922 (Fla. 1980). These and other reasons demonstrate that the Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Mills' claims.

This Court therefore has jurisdiction to entertain Mr. Mills' claims and to grant habeas corpus relief. This and other Florida courts have consistently recognized that the writ must issue where fundamental error occurs on crucial and dispositive

points, or where a defendant received ineffective assistance of appellate counsel. *See,* e.g., Wilson v. Wainwrisht, supra, 474 So. 2d 1163; McCrae v. Wainwrisht, 439 So. 2d 768 (Fla. 1983); State v. Wooden, 246 So. 2d 755, 756 (Fla. 1971); Baggett v. Wainwrisht, 229 So. 2d 239, 243 (Fla. 1969); Ross v. State, 287 So. 2d 372, 374-75 (Fla. 2d DCA 1973); Davis v. State, 276 So. 2d 846, 849 (Fla. 2d DCA 1973), affirmed, 290 So. 2d 30 (Fla. 1974). The proper means of securing a hearing on such issues in this Court is a petition for writ of habeas corpus. Baggett, 287 So. 2d 374-75; Powell v. State, 216 So. 2d 446, 448 (Fla. 1968).

Mr. Mills' claims are presented below. They demonstrate that habeas corpus relief is proper in this case. The claims Mr. Mills presents are no less substantial than those involved in the cases cited above. He therefore respectfully urges that the Court grant habeas corpus relief.

III. GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Petitioner asserts that his sentence of death was obtained and then affirmed during the Court's appellate review process in violation of his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution, for each of the reasons set forth herein. In Mr. Mills' case, substantial and fundamental errors occurred in his capital trial. These errors were uncorrected by the appellate review process. As shown below, relief is appropriate.

CLAIM I

THE JURY'S DEATH RECOMMENDATION WHICH WAS ACCORDED GREAT WEIGHT BY THE TRIAL COURT WAS TAINTED BY CONSIDERATION OF INVALID AGGRAVATING CIRCUMSTANCES, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

In Mr. Mills' case, the jury's death recommendation was tainted by Eighth Amendment error. The jury received constitutionally inadequate instructions regarding "heinous, atrocious or cruel." The instructions were erroneous, and the jury considered an invalid aggravating circumstance, as Espinosa v. Florida and Shell v. Mississippi, 111 S. Ct. 313 (1990), explicitly hold. Under Espinosa, it must be presumed that the erroneous instruction tainted the jury's recommendation with Eighth Amendment error. Under these circumstances, it must be presumed that the judge's death sentence was tainted with Eighth Amendment error as well. Espinosa v. Florida.

The jury instructions provided inadequate guidance regarding the "heinous, atrocious or cruel" aggravating circumstances. Defense counsel's objection to this aggravating circumstance was overruled (R. 2260-62), and then the jury was simply told:

> The crime for which the Defendant is to be sentenced was especially wicked, evil, atrocious, or cruel. The crime for which the Defendant is to be sentenced was committed in a cold, calculated or premeditated manner without any pretence of moral or legal justification. Heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain; utter indifference to; or enjoyment of the suffering of others, pitiless.

(R. 2335). Indeed, the trial court's mixing the "heinous, atrocious, or cruel" and "cold, calculated" aggravating circumstances could only have served to create further confusion in the jurors and to produce a greater lack of guidance.

Further, the jury also received the standard jury instruction regarding "cold, calculated and premeditated." The jury did not receive any of this Court's limiting constructions regarding "cold, calculated and premeditated." In Espinosa, the Supreme Court explained that "an aggravating circumstance is invalid . . . if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." 112 S. Ct. at 2928. This Court has held that "calculated" consists "of a careful plan or prearranged design," Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987), and that "premeditated" refers to a "heightened" form of premeditation which is greater than the premeditation required to establish first-degree murder. Hamblen v. State, 527 So. 2d 800, 805 (Fla. 1988). This Court requires trial judges to apply these limiting constructions and consistently rejects this aggravator when these limitations are not met. See, e.g., Waterhouse v. State, 17 F.L.W. S277, 280-81 (Fla. May 7, 1992); Gore v. State, 17 F.L.W. S247, 250 (Fla. Apr. 16, 1992); Jackson v. State, 17 F.L.W. S237, 239 (Fla. Apr. 9, 1992); Green v. State, 583 So. 2d 647, 652-53 (Fla. 1991); Sochor v. State, 580 So. 2d 595, 604 (Fla. 1991); Holton v. State, 573 So. 2d 284, 292 (Fla. 1990); Bates v. State, 465 So. 2d 490, 493 (Fla. 1985).

In Sochor, the United States Supreme Court held that this Court's striking of the "cold, calculated and premeditated" aggravating factor meant that Eight Amendment error had occurred. The aggravating factor was "invalid in the sense that the Supreme Court of Florida had found [it] to be unsupported by the evidence . . . . It follows that Eighth Amendment error did occur when the trial judge weighed the coldness factor in the instant case." Sochor, 112 S. Ct. at 2122.[11]

Mr. Mills' jury was not told about the limitations on the "cold, calculated and premeditated" factor but presumably found this aggravator present. Espinosa, 112 S. Ct. at 2928. The only instruction the jury ever received regarding the definition of "premeditated" was the instruction given at the guilt phase regarding the premeditation necessary to establish guilt of first-degree murder. As this Court has held, this definition does not establish the "cold, calculated and premeditated" aggravator. 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 2928.

The trial court neither gave the jury a limiting instruction as to the elements necessary to establish that the crime was "committed in a cold, calculated and premeditated manner" nor

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[11] 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).

applied such a limiting construction itself. Although defense counsel objected to the jury being instructed on this aggravating circumstance because there was no definition of **"cold"** or **"calculated"** (R. 2262-63), the trial court overruled **the** objection (R. 2263), and instructed the jury on this circumstance without providing a limiting construction.

In Mr. Mills' case, the trial court compounded the vagueness problem by combining the instructions regarding "heinous, atrocious and cruel" with the instruction regarding "cold, calculated, and premeditated" **(R. 2334-35).** There **is** no way a reasonable juror could understand that a different standard applies to these aggravating circumstances, or that there was any limiting construction of the **"cold,** calculated and premeditated" aggravating circumstance.

Mr. Mills **was** sentenced to death. Again, Espinosa clearly holds that because Florida law requires great weight be given to the jury's death recommendation, the Eighth Amendment errors before the jury infected the judge's imposition of death. Thus, a reversal is required unless the errors were harmless beyond a reasonable doubt. Stringer V. Black.

The errors were not harmless beyond a reasonable doubt. Here, it cannot be contested that mitigating circumstances were present which would have constituted a reasonable basis for a life recommendation. The defense presented evidence of Mr. Mill's lack of significant criminal history (R. 2327), his age **(R. 2273, 2329),** his low **IQ** (R. 2276), **his** difficulties in making

social or rational judgments (R. 2278-79), his general nonviolence (R. 2281), and his potential for rehabilitation (R. 2283-84, 2332-33).[12] Regarding Mr. Mills' low IQ, the defense mental health expert testified that Mr. Mills has a borderline IQ which is between retarded and low average (R. 2276). The expert's testing showed no violence in Mr. Mills' personality, and family members told the expert that Mr. Mills was not a fighter but would keep to himself if he became upset (R. 2281). Regarding Mr. Mills' inability to make social or rational judgments, the expert testified that Mr. Mills has difficulty understanding people or comprehending why people do the things they do and that Mr. Mills feels a sense of isolation and alienation (R. 2282). The expert testified that Mr. Mills could be rehabilitated because he had the potential to learn the right way of doing things (R. 2283), was not a psychopath (R. 2284), and has a conscience (R. 2296). The defense argued these matters to the jury (R. 2330-32), and also argued that life was appropriate because Mr. Mills' conviction was based upon the highly self-interested testimony of Michael Fredrick (R. 2325). This evidence and argument provided a reasonable basis upon which the jury could have based a life recommendation.[13] See Hall v.

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[12]In the Eleventh Circuit, counsel for the Respondent agreed that this information was presented to Mr. Mills' jury (Mills v. Singletary, No. 88-3945, Answer Brief of Appellee, pp. 32-33).

[13]See Fla. Stat. sec. 921.141(6)(a)(lack of significant criminal history is mitigating factor); Fla. Stat. sec. 921.141(6)(g)(age of defendant is mitigating factor); Freeman v. State, 547 So. 2d 125, 129 (Fla. 1989)(low IQ is valid mitigating factor); Bedford v. State, 589 So. 2d 245 (Fla. 1991)(history of

State, 541 So. 2d 1125 (Fla. 1989)(question whether constitutional error was harmless is whether properly instructed jury could have recommended life). However, the jury was given erroneous instructions which resulted in improper aggravation to weigh against the mitigation.

As Judge Tjoflat recently stated:

> I cannot conceive of a situation in which a pure reviewing court would not be acting arbitrarily in affirming a death sentence after finding a sentencing error that relates, as the error does here, to the balancing of aggravating and mitigating circumstances. It is simply impossible to tell what recommendation a properly instructed jury would have made or the decision the sentencing judge would have reached.

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

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

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nonviolence is valid mitigating factor); Holswarth v. State, 522 So. 2d 348, 354 (Fla. 1988)("potential for rehabilitation and productivity within the prison system" is valid mitigating factor); Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990)("Events that result in a person succumbing to the passions or frailties inherent in the human condition necessarily constitute valid mitigation"; "any emotional disturbance relevant to the crime must be considered and weighed")(emphasis in original); Douglas v. State, 575 So. 2d 165, 167 (Fla. 1991)("The credibility of [the state's primary witness's] testimony concerning the circumstances surrounding this murder could have reasonably influenced the jury's [life] recommendation").

tainted by invalid aggravating circumstances. See Maynard v. Cartwrisht; Shell v. Mississippi; Strinser v. Black; Sochor v. Florida; Espinosa v. Florida. In Clemons v. Mississippi, 110 S. Ct. 1441, 1451 (1990), the Supreme Court explained, "it would require a detailed explanation based upon the record for us possibly to agree that the error in giving the invalid 'especially heinous' instruction was harmless." Similarly, harmless error analysis must be conducted as to the jury's consideration of the "cold, calculated and premeditated" aggravating factor upon which the jury was inadequately instructed. However, no analysis of the Eighth Amendment errors before the jury has been conducted. This Court has failed to comply with Eighth Amendment jurisprudence based upon its erroneous understanding outlined in Smallev, which was overturned in Espinosa.

Clearly, then, the jury's death recommendation is tainted by Eighth Amendment errors. The jury received inadequate instructions which must be presumed to have affected the consideration of aggravating circumstances and resulted in extra thumbs on the death side of the scales. Espinosa; Strinser. Under Espinosa, Sochor and Strinser, this Court must revisit the issue and conduct the appropriate analysis. In light of the mitigation before the jury, the errors cannot be harmless beyond a reasonable doubt, and a new jury sentencing must be ordered.

CLAIM II

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

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

Mr. Mills was convicted of one count of first-degree murder, with burglary and kidnapping being the underlying felonies. The jury was instructed on both premeditated and felony murder (R. 1988-90), and returned a general verdict **(R. 2008).** At the penalty phase, the jury was instructed on both the "felony murder" aggravating circumstance as well as the "pecuniary gain" aggravator **(R. 2335).** The death penalty in this case was predicated upon unreliable automatic findings of statutory aggravating circumstances -- the very felonies underlying the conviction.

A state cannot use aggravating "factors which as a practical matter fail to guide the sentencer's discretion." Strinser v. Black, **112 S.** Ct. **1130 (1992).** Strinser is new law which has

been articulated since Mr. Mills' prior proceedings. The sentencer was entitled automatically to return a death sentence upon a finding of first degree felony murder. Every felony murder would involve, by necessity, the finding of a statutory aggravating circumstance, a fact which, under the particulars of Florida's statute, violates the eighth amendment. This is so because an automatic aggravating circumstance is created, one which does not "genuinely narrow the class of persons eligible for the death penalty," Zant v. Steshens, 462 U.S. 862, 876 (1983), and one which therefore renders the sentencing process unconstitutionally unreliable. Id. "Limiting the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Maynard v. Cartwright, 486 U.S. 356, 362 (1988). If Mr. Mills was convicted of felony murder, he then automatically faced statutory aggravation for felony murder. These aggravating factors were "illusory circumstance[s]" which "infected" the weighing process: these aggravators did not narrow and channel the sentencer's discretion as they simply repeated elements of the offense. Stringer, 112 S. Ct. at 1139. In fact, this Court has held that the felony murder aggravating factor alone cannot support the death sentence. Rembert v. State, 445 So. 2d 337 (Fla. 1984). Yet the trial court did not instruct the jury on and did not apply this limitation in imposing the death sentence.

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

> In this case, the enhancing effect of the underlying felony (robbery) provided two of the aggravating circumstances which led to Engberg's death sentence: (1) murder during commission of a felony, and (2) murder for pecuniary gain. As a result, the underlying robbery was used not once but three times to convict and then enhance the seriousness of Engberg's crime to a death sentence. All felony murders involving robbery, by definition, contain at least the two aggravating circumstances detailed above. This places the felony murder defendant in a worse position than the defendant convicted of premeditated murder, simply because his crime was committed in conjunction with another felony. This is an arbitrary and capricious classification, in violation of the Furman/Gregg narrowing requirement.
>
> Additionally, we find a further Furman/Gregg problem because both aggravating factors overlap in that they refer to the same aspect of the defendant's crime of robbery. While it is true that the jury's analysis in capital sentencing is to be qualitative rather than a quantitative weighing of aggravating factors merely because the underlying felony was robbery, rather than some other felony. The mere finding of an aggravating circumstance implies a qualitative value as to that circumstance. The qualitative value of an aggravating circumstance is unjustly enhanced when the same underlying fact is used to create multiple aggravating factors.
>
> When an element of felony murder is itself listed as an aggravating circumstance, the requirement in W.S. 6-5-102 that at lest one "aggravating circumstance" be found for a death sentence becomes meaningless. Black's

Law Dictionary, 60 (5th ed. 1979) defines aggravation as follows:

> "Any circumstance attending the commission of a crime or tort which increases its guilt or enormity or adds to its injurious consequences, but which is above and beyond the essential constituents of the crime or tort itself." (emphasis added).

As used in the statute, these factors do not fit the definition of "aggravation." The aggravating factors of pecuniary gain and commission of a felony do not serve the purpose of narrowing the class of persons to be sentenced to death, and the Furman/Gregg weeding-out process fails.

820 P.2d at 89-90.

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

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

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

> [W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless-error analysis

> or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.

Stringer, 112 S. Ct. at 1137.

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

CONCLUSION

For each of the foregoing reasons, Petitioner asks this Court to vacate his unconstitutional death sentence, and grant all other relief which is just and equitable.

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by United States Mail, first class postage prepaid, to all counsel of record on August 12, 1992.

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