IN THE SUPREME COURT OF FLORIDA

CASE NO. 80326

JOHN MILLS, JR.,

Petitioner

v.

HARRY K. SINGLETARY,
Secretary, Florida Department of Corrections

Respondent.

PETITIONER'S REPLY TO STATE'S RESPONSE TO PETITION FOR EXTRAORDINARY RELIEF AND FOR A WRIT OF HABEAS CORPUS

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CLAIM I

Unable to respond to the substance of Mr. Mills' claim, to the issue of whether Espinosa v. Florida constitutes a change in Florida law requiring review of Mr. Mills' claim, or to the reliability and constitutionality of Mr. Mills' death sentence, the State takes refuge in a technicality--that Mr. Mills' claim is procedurally barred--and in a clearly desperate argument--that the United States Supreme Court was wrong in Espinosa. Since the State apparently believes that it can prevail only if this Court applies a procedural bar and/or only if Espinosa is wrong, the State's arguments implicitly concede that Espinosa entitles Mr. Mills to relief.[1] As Mr. Mills' petition explained, Mr. Mills is entitled to relief under Espinosa because his sentencing jury did not receive constitutionally adequate instructions limiting the application of aggravating factors. Fairness, the prevention of a miscarriage of justice, and the need for reliability in imposing a death sentence require that Espinosa be applied to Mr. Mills' claim and that Mr. Mills be granted relief.

A. ESPINOSA V. FLORIDA MUST BE APPLIED TO MR. MILLS' CLAIM

The State does not address this question, arguing only that the United States Supreme Court was wrong in Espinosa and that

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[1] The positions taken by counsel for the State in other post-conviction cases in which Espinosa claims are being litigated also illustrate the State's desperation in attempting to avoid the issue. In an argument in circuit court in State v. Rutherford (Santa Rose County Case No. 85-I-476), counsel for the State agreed that Espinosa error had occurred but relied upon a procedural bar argument. Applying a procedural bar, the State argued, was a "harsh reality, but that's how it is," even though Espinosa error had occurred.

Mr. Mills' claim is procedurally barred. If, as Mr. Mills argues, Espinosa is a change in Florida law, no procedural bar exists.[2] Nevertheless, the State refuses to address this question.

The State's procedural bar argument relies upon Sochor v. Florida, 112 S. Ct. 2114 (1992), and Kennedy v. Singletary, 17 F.L.W. S464 (Fla. 1992) (Answer at 4). Neither of these cases is dispositive of this issue. Espinosa was issued after Sochor. When Espinosa was issued the Supreme Court remanded five other cases to this Court in light of Espinosa.[3] In its motion for rehearing in Espinosa, the State pointed out:

> Espinosa and its companion cases . . . have also caused considerable confusion with respect to the application of . . . procedural bar to a jury instruction error in Florida. . . . This is because, contrary to Sochor v. Florida, 504 U.S. ___ (1992), this Court has seemingly rejected . . . Florida's procedural default rule . . . in these cases. See Davis, supra (no objection to the HAC jury instruction); Gaskin, supra (no claim of instruction error in Florida courts . . .); Henry, supra (HAC instruction proposed by the defense, was unlike Espinosa's instruction and thus not at issue).

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[2] Mr. Mills continues to maintain that the issue regarding the sufficiency of the jury instructions on aggravating factors was preserved at trial and presented on direct appeal, contrary to the State's misreading of the record. See infra.

[3] 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 v. Florida, No. 91-7390, Petition for Rehearing, p. 16 n.5). Since Espinosa was issued after Sochor and since in Espinosa and its companion cases, the Supreme Court ordered this Court to consider the issue regardless of procedural rules, Sochor clearly does not stand for the proposition advocated by the State in Mr. Mills' case. As the State recognized in its rehearing petition in Espinosa, the Supreme Court departed from reliance upon any procedural rule in Espinosa and its companion cases.

Nor is the State's reliance upon this Court's decision in Kennedy dispositive. Kennedy did not discuss the question of whether Espinosa is a change in Florida law. Moreover, this Court denied relief in Kennedy because the United States Supreme Court denied certiorari in Kennedy on the same day Espinosa was issued. Thus, this Court reasoned that there could not be an Espinosa issue presented in Kennedy: "Kennedy's last petition for certiorari to the United States Supreme Court was denied on the same date that the high Court issued Espinosa. . . . We cannot conceive that the United States Supreme Court would have denied certiorari had it found a valid Espinosa claim in this case." Kennedy, 17 F.L.W. at S464. Kennedy does not answer the question presented by Mr. Mills' petition.

The bulk of the State's response is devoted to arguing that the United States Supreme Court was wrong in Espinosa. While this argument hardly seems worth a reply, it should be noted that the very arguments made in the State's response were made to the

United States Supreme Court in the State's petition for rehearing in Espinosa. The Supreme Court denied rehearing on September 4, 1992, clearly rejecting the State's arguments. Further, the opinion in Espinosa carefully analyzed the Florida capital sentencing system and the role the jury plays in determining sentence. Espinosa, 112 S. Ct. at 2928.[4] The Supreme Court determined that the role allocated to the jury made the jury an "actor" in the sentencing decision, and that therefore, under the federal Constitution, the jury cannot be permitted to weigh invalid aggravating circumstances. 112 S. Ct. at 2929. The United States Supreme Court has the final word on federal law, and Espinosa applies federal law to the Florida system.[5]

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[4] The Supreme Court's analysis of the jury's role in the Florida capital sentencing system is perfectly consistent with this Court's analysis of that role. See, e.g., Riley v. Wainwright, 517 So. 2d 656, 659 (Fla. 1987) ("If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure.").

[5] The Supreme Court's decision in Espinosa did no violence to the Supreme Court's prior precedents, contrary to the State's argument. Thus, while the State argues that Espinosa is contrary to Spaziano v. Florida, 468 U.S. 447 (1984) (Response at 6), in Espinosa, the Supreme Court specifically cited its Spaziano opinion as being consistent with its decision in Esainosa. 112 S. Ct. at 2929. While the State argues that Espinosa is inconsistent with Walton v. Arizona, 497 U.S. 639, 110 S. Ct. 3047 (1990), the State does not mention this passage from Walton: "When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face." 110 S. Ct. at 3057. Having determined in Espinosa that a Florida jury is an "actor" in the sentencing process, the Supreme Court held, consistently with Walton, that the jury must be provided constitutional instructions. The State's argument that Espinosa is somehow inconsistent with Barclay v. Florida, 463 U.S. 939 (1983),

The State argues that Godfrey v. Georgia, 446 U.S. 420 (1980), and Maynard v. Cartwright, 486 U.S. 356 (1988), do not apply in Florida but only apply in states where the jury is the sentencer (Answer at 8). The State recognizes that this is the position held by this Court prior to Essinosa (Id.). The State, however, fails to acknowledge that Espinosa has overruled this position: Espinosa holds that Godfrey and Maynard do apply in Florida and that Florida capital juries must be instructed in accordance with the principles of Godfrey and Maynard. This is precisely the reason that Essinosa constitutes a change in Florida law--the United States Supreme Court has said that this Court's prior holdings do not comport with the federal constitution.

As explained in Mr. Mills' petition, Espinosa constitutes a change in Florida law which requires consideration of Mr. Mills' claim. When Hitchcock v. Dugger, 481 U.S. 393 (1987), was issued by the United States Supreme Court, this Court held that it "represent[ed] a sufficient change in the law that potentially affect[ed] a class of petitioners . . . to defeat a claim of a procedural default," Thompson v. Dugger, 515 So. 2d 173, 175 (Fla. 1987), because Hitchcock rejected this Court's prior views. Downs v. Dugger, 514 So. 2d 1069, 1071 (1987). See also Delap v.

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likewise fails. Barclay involved a trial judge's consideration of a nonstatutory aggravating factor. In Stringer v. Black, 112 S. Ct. 1130 (1992), the Supreme Court explained that it had affirmed the sentence in Barclay only because on direct appeal, this Court had determined that consideration of the improper aggaravating factor was harmless error. 112 S. Ct. 1130. Nothing about Barclay is inconsistent with Essinosa.

Duggar, 513 So. 2d 659 (Fla. 1987) (change in Florida law brought about by Hitchcock so significant that failure to previously raise timely challenge to jury instruction would not preclude consideration of Hitchcock claim in post-conviction). Espinosa is precisely the same kind of change in Florida law as Hitchcock was.

In Stringer v. Black, the Supreme Court explained that in a weighing state like Florida, the death sentencing decision is akin to balancing a scale: aggravating factors are on "death's side of the scale," 112 S. Ct. at 1137, and mitigating factors are on life's side of the scale. After Hitchcock, this Court held that no procedural bar would be applied because Hitchcock represented a change in Florida law. Hitchcock concerned unconstitutional jury instructions regarding the consideration of mitigation--life's side of the scale. Espinosa concerns unconstitutional jury instructions regarding the consideration of aggravation--"death's side of the scale." When a jury is not instructed to consider mitigation, as with a Hitchcock error, weight is removed from life's side of the scale; when a jury is instructed to consider invalid aggravating factors, as with an Espinosa error, weight is added to "death's side of the scale.'' With either error, the result is the same: the scale is tipped toward "death's side" and the resulting death sentence is unconstitutional. There is no rational distinction that would justify holding Hitchcock to be a change in Florida law and not

doing the same with Espinosa. Espinosa is a change in Florida law which must be applied to Mr. Mills' claim.

B. MR. MILLS' CLAIM WAS PRESERVED AT TRIAL AND ON DIRECT APPEAL

The State argues that Mr. Mills' claim was not preserved at trial or on direct appeal (Response at 2-3). However, the State recognizes that in a pretrial motion Mr. Mills challenged the application of the "heinous, atrocious and cruel" and "cold, calculated and premeditated" aggravating factors and that this motion was argued at the penalty phase charge conference (Response at 2). Nevertheless, the State contends that these arguments did not preserve the issue. The State has apparently not read the record cited by Mr. Mills.

At trial, Mr. Mills did object to the wording of the jury instructions on the "heinous, atrocious or cruel" and "cold, calculated and premeditated" aggravating factors. 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). Clearly, the judge, having agreed to provide some definition of this aggravator to the jury, understood that trial counsel was objecting to the adequacy of the jury instructions.[6] 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 (R. 2263). Again, defense counsel was clearly objecting to the wording of the jury instruction on this **aggravator.**

The State also argues that Mr. Mills' claim was not presented on direct appeal (Response at 3). Again, the State has not examined the record. Issues regarding the "heinous, atrocious or cruel" and "cold, calculated and premeditated" aggravating factors were presented on direct appeal. 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). 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)(emphasis added), and that the legal standards **limiting** the application of these two factors were not applied **(Id.** at **44, 47).**

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[6]As explained infra, the additional language the judge added to the instruction has **already** been found to be insufficient to cure the vagueness problem. Shell v. Mississippi, 111 S. Ct. 313 **(1990).**

Maybe what the State is arguing is that Mr. Mills' claim was not preserved well enough. If that is the State's argument, that is precisely why Espinosa must be recognized as a change in Florida law. In Mr. Mills' case, trial counsel attempted to preserve this issue, and appellate counsel attempted to present the issue on direct appeal. Of course, that presentation was limited because this Court had repeatedly rejected claims attacking the standard jury instructions on aggravating factors. Mr. Mills should not now be penalized because trial and appellate counsel made a limited attempt to raise an issue this Court had repeatedly rejected when the United States Supreme Court has now said that this Court's position did not comport with the federal Constitution.

C. MR. MILLS IS ENTITLED TO RELIEF UNDER ESPINOSA

The State's response does not address whether Espinosa error occurred at Mr. Mills' penalty phase and does not argue that any such error was harmless beyond a reasonable doubt. As Mr. Mills' petition explains, Espinosa error did occur and was not harmless beyond a reasonable doubt.

The jury was not provided constitutionally adequate instructions regarding the "heinous, atrocious or cruel" and "cold, calculated and premeditated" aggravating factors. The jury instructions provided:

> 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). The jury instruction on "heinous, atrocious or cruel" was insufficient under Godfrey v. Georgia, Maynard v. Cartwright, and Shell v. Mississippi, 111 S. Ct. 313 (1990). 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). The Supreme Court found this instruction inadequate. 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.

The jury instruction regarding "cold, calculated and premeditated" was also infirm. 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 Eighth Amendment error had occurred; in other words, Godfrey and Maynard apply to this aggravating factor. 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.[7]

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@@as 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.

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.

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[7] 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).

The erroneous jury instructions were not harmless beyond a reasonable doubt. As Mr. Mills' petition explains, mitigation was presented which would have constituted a reasonable basis for a life recommendation (Petition, pp. 27-29). In light of this mitigation, the errors cannot be considered harmless beyond a reasonable doubt. Mr. Mills is entitled to resentencing.

CLAIM II

Regarding this claim, the State again argues procedural bar, failing to address Mr. Mills' contention that Stringer v. Black, 112 S. Ct. 1130 (1992), constitutes a change in Florida law requiring consideration of the claim. On the merits, the State argues that Stringer "did not address Florida's procedure which enables the judge, as actual sentencer, to independently weigh aggravating factors by relying upon existing legal precedents unavailable to a mere jury" (Response at 10)(emphasis in original). As Espinosa has made clear (consistently with this Court's precedents), a Florida capital jury cannot be discounted as "mere." This is why, under Espinosa, the correct law established in "existing legal precedents" must be made "available" to the jury. As Mr. Mills' petition explains, he is entitled to relief on this claim.

CONCLUSION

For the reasons discussed herein and in Mr. Mills' petition, Mr. Mills asks this Court to vacate his unconstitutional death sentence and grant all other relief which is just and equitable.

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by United States Mail, **first** class postage prepaid, to all counsel of record on **September 28, 1992.**

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