IN THE SUPREME COURT OF FLORIDA

NO. 80351

JOHN RICHARD MAREK,

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. Marek's second habeas corpus petition in this Court. It is being filed now because recent decisions by the United States Supreme Court have established that Mr. Marek is entitled to habeas corpus relief, and that the prior dispositions of Mr. Marek's claims by this Court were in error. Mr. Marek previously challenged the jury's death recommendation. At trial and on direct appeal, Mr. Marek, through counsel, argued that the "especially wicked, evil, atrocious, or cruel" aggravating circumstance was unconstitutionally vague and ambiguous, thereby failing to channel the jury's sentencing discretion. Mr. Marek also challenged the "felony murder" aggravating circumstance as creating an automatic aggravating factor which carried a presumption of death. In post-conviction proceedings, Mr. Marek re-raised these issues relying upon the decision in Maynard v. Cartwright, 486 U.S. 356 (1988).

On June 8, 1992, the United States Supreme Court reversed this Court's longstanding jurisprudence and held that Maynard v. Cartwright, 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 (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., at ____ (slip op., at 8), thus "creat[ing] the risk [of] treat[ing] the defendant as more deserving of the death penalty," id., at ___ (slip op., at 12). 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, 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, 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. Marek's 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. Cartwright, wherein the majority distinguished Florida's sentencing scheme from those of Georgia and Oklahoma. See Maynard v. Cartwright, 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, as "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.

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

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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.

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"); Mills v. Dugger, 574 So. 2d 63, 65 (Fla. 1990) (Maynard is "inapplicable to Florida, [does] not constitute such change[] in law as to provide post conviction relief").

In fact, this Court has specifically and repeatedly upheld the standard jury instructions against any eighth amendment challenge. In Cooper v. State, 336 So. 2d 133, 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 interpreation of that term which we gave in Dixon. No more was required." In Vaught 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. 1990); Freeman v. State, 563 So. 2d 73, 76 (Fla. 1990); Brown v. State, 565 So. 2d 304, 308 (Fla. 1990); Smith v. Dugger, 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);

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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.

Trotter v. State, 576 So. 2d 691, 694 (Fla. 1990); Engle v. Dugger, 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:
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> * * *
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> 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.

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

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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.

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]

Following the decision in Smalley, specifically rejecting the Maynard challenge, this Court rejected a number of challenges to the standard jury instructions by citing Smalley 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.

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[5]This list of cases is by no means exhaustive. 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.

1991); Hayes 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); Dougan v. State, 595 So. 2d 1, 4 (Fla. 1992); Hodges v. State, 595 So. 2d 929, 934 (1992).[6]

This Court recognized that 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. Dugger, and declared, "[w]e thus can think of no clearer rejection of the 'mere presentation' standard reflected in the prior opinions of this Court, and conclude that this standard can no longer be considered controlling law." Downs v. Dugger, 514 So. 2d 1069, 1071 (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 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

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[6]Again, this is not an exhaustive list.

in post-conviction proceedings.[7] 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.[8]

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[7]This Court noted in Delap that the United States Supreme Court reversed in Hitchcock despite the failure to object to the jury instruction. However, Davis v. Florida and Gaskin v. Florida were both reversed in light of Espinosa even though no objection to the jury instruction was made, at least according to the State's motion for rehearing in Espinosa appended hereto.

[8]As this Court recently stated:

> Neither the bar nor this Court wishes to stifle innovative claims by attorneys. Nevertheless, under the rules of professional conduct the pursuit of imaginative claims is not without limit. The standard embodied in rule 4.3-1 requiring a good faith argument for the extension, modification or reversal of existing law is broad enough to encompass those cases were the claims are the result of

"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.[9] The question is whether the decisions change Florida's law to such magnitude as to warrant retroactive application.[10]

> innovative theories rather than, as here, an obvious attempt to relitigate an issue that has failed numerous times.

Florida Bar v. Richardson, 591 So. 2d 908 (Fla. 1991).

[9]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.

[10]The State Attorney's Office in State v. Jennings, pending in the Eighteenth Judicial Circuit, in and for Brevard County, conceded that "The United States Supreme Court has established new law in Espinosa v. Florida, No. 91-7390 (June 29, 1992)." The

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 explicitly by this Court throughout that time period were not in conformity with the federal constitution.[11]

This was the precise situation this Court faced in Thompson 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

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State also conceded, "The defendant is entitled to have this Court consider the issues raised by that case. Rule 3.850, F.R.Cr.P." Id. The Attorney General's Office in Tompkins v. Singletary, pending in the United States District Court for the Middle District of Florida, Tampa Division, conceded Espinosa was a change in law. Similarly, the Attorney General's Office in Reed v. State, pending in Jacksonville circuit court, stated "I am not arguing that Espinosa is not a change in law."

[11]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.

challenge found meritorious in Espinosa and Sochor. It was this Court's error that now taints Mr. Marek's 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. Marek files this petition representing his claims which were initially presented in his direct appeal and in his Rule 3.850 motion.

I. PROCEDURAL HISTORY

Mr. Marek was tried in Broward County, Florida, from May 22, 1984 to June 1, 1984, when he was found guilty of first degree murder and kidnapping as charged, and of attempted burglary with an assault and two counts of battery, lesser included offenses. The penalty phase of the proceedings was conducted on June 5, 1984, and the jury recommended a death sentence.

At the penalty phase, the jury received improper instructions regarding aggravating circumstances. The jury was instructed that it could consider that Mr. Marek had been previously convicted of a felony involving the use or threat of violence, and that the crime of kidnapping, a crime for which he

had just been convicted, was such a felony (R. 1322).[12] Over objection (R. 1282), the jury was further instructed that it could find as an aggravating circumstance "that the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious, or cruel" (R. 1322). The judge also told the jury that it could find as an aggravating circumstance "the crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of attempted burglary with an assault, as you found" (Id.), as well as for the purpose of financial gain (Id.) Relying upon the jury's recommendation, the trial court imposed death. The judge found as an aggravating factor that the homicide occurred in the course of an attempted burglary (R. 1346), and that the murder was especially heinous, atrocious, and cruel (R. 1347). Additionally, the court found that Mr. Marek was previously convicted of a violent felony (kidnapping) (R. 1346), and that the murder was committed for pecuniary gain. (Id.). The judge found no mitigating factors. (R. 1351). However, the jury was presented with mitigating evidence which could have served as a basis for a life recommendation.

On direct appeal, Mr. Marek again challenged the standard jury instructions regarding the "especially heinous, atrocious, or cruel" aggravating factor, arguing that the statutory

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[12]In this petition, the record on direct appeal will be referred to as "R. ____" and the record in the prior Rule 3.850 appeal will be referred to as "PC-R. ____", with the appropriate page numbers indicated.

"description provided no guidance in the advisory phase as to precisely what was meant. Such a description is vague and ambiguous and violates the dictates in Godfrey v. Georgia, 446 U.S. 420, 100 S. Ct. 1759, 64 L.Ed 2d 398 (1980)." Marek v. State, No. 65,821, Brief of Appellant at 22-23. Challenges were also presented regarding the other aggravating circumstances found by the trial court. This Court summarily dismissed these arguments: "Appellant next challenges all four aggravating circumstances on which the trial judge based the death sentence. We find that none of appellant's challenges to the aggravating factors have merit." Marek v. State, 492 So. 2d 1055, 1058 (Fla. 1986).

On October 10, 1988, Mr. Marek filed a Motion to Vacate Judgment and Sentence pursuant to Fla. R. Crim. P. 3.850. This motion claimed, inter alia, that Mr. Marek's contemporaneous kidnapping conviction was improperly used to support the prior crime of violence aggravating circumstance (PC-R. 64-67), that no limiting construction ofthe "heinous, atrocious or cruel" aggravating factor was provided to Mr. Marek's jury, in violation of Godfrey v. Georgia and Maynard v. Cartwright (PC-R. 69-75), and that no limiting construction of the "pecuniary gain" aggravating factor was provided to the jury (PC-R. 67-69). An under-warrant Rule 3.850 evidentiary hearing was subsequently held, and on November 7, 1988, the circuit court denied relief. The judge, however, did find sentencing error, concluding that he had improperly used the contemporaneous kidnapping conviction to

establish the "previous conviction of a crime of violence" aggravating circumstance (PC-R. 266). However, because three other aggravating circumstances were upheld on direct appeal and there were no mitigating circumstances, the court upheld the sentence of death (Id.). The trial court further concluded regarding the "heinous, atrocious or cruel" aggravator that "Maynard v. Cartwright . . . cannot be characterized as a change in the law such as to justify revisiting this claim which was raised on direct appeal" (PC-R. 267). Regarding the "pecuniary gain" aggravator, the trial court concluded that the claim "was raised on direct appeal" (PC-R. 266). Mr. Marek appealed; the state did not cross-appeal the circuit court's finding of error.[13] This Court affirmed the denial of post-conviction relief, and denied Mr. Marek's previously-filed state habeas corpus petition. Marek v. Dugger, 547 So. 2d 109 (Fla. 1989).[14]

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[13]In later proceedings in the Eleventh Circuit Court of Appeals, Respondent's counsel conceded that the use of the contemporaneous kidnapping conviction to support the prior crime of violence aggravator was error (Marek v. Singletary, 11th Cir. Case No. 90-6083, Answer Brief of Appellee, pp. 56-57).

[14]Mr. Marek subsequently filed a petition for a writ of habeas corpus in federal district court on October 10, 1989. The district court summarily denied the petition, and an appeal to the Eleventh Circuit Court of Appeals was then perfected. A motion to hold the federal proceedings in abeyance is currently pending in the Eleventh Circuit, in order to allow this Court to act upon the instant petition.

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. Marek'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. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Marek to raise the claims presented herein. See, e.g., Way v. Dugger, 568 So. 2d 1263 (Fla. 1990); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwright, 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. Wainwright, 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. Marek's sentence of death, and of this Court's appellate review. Mr. Marek's 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. 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. Dugger, 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. Marek's claims.

This Court therefore has jurisdiction to entertain Mr. Marek's claims 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. Wainwright, 474 So. 2d 1163; McCrae v. Wainwright, 439 So. 2d 768 (Fla. 1983); State v. Wooden, 246 So. 2d 755, 756 (Fla. 1971); Baggett v. Wainwright, 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. Marek's claims are presented below. They demonstrate that habeas corpus relief is proper in this case. Recent United States Supreme Court decisions demonstrate that the disposition of Mr. Marek's appeal was fundamentally erroneous. In light of these circumstances, Mr. Marek 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. Marek's 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. Marek's case, the jury's death recommendation was tainted by eighth amendment error. The jury was permitted to consider an invalid aggravating circumstance when it was told that Mr. Marek's contemporaneous kidnapping conviction could support the prior crime of violence aggravator. The jury also was not provided instructions limiting the application of the "heinous, atrocious or cruel" and "pecuniary gain" aggravators. Under Espinosa v. Florida, Socher v. Florida, and Stringer v. Black, these errors entitle Mr. Marek to relief.

At the penalty phase, the jury was instructed in the following manner regarding the "prior violent felony" aggravating circumstance:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence:
>
> First, you can consider that the defendant has been previously convicted of a felony involving the use or threat of violence to some person. The crime of kidnapping is a felony involving the use or threat of violence to another person.

(R. 1322). As to this aggravating circumstance, the prosecutor argued that Mr. Marek's contemporaneous conviction of kidnapping

the same victim he had been convicted of murdering established the presence of this aggravating circumstance. (R. 1301).

Mr. Marek's jury, however, was not correctly instructed regarding the applicability of this aggravating circumstance. Contemporaneous convictions prior to sentencing can qualify as previous convictions of a violent felony and may be used as aggravating factors only when the contemporaneous conviction involved either a different victim or a different incident or transaction. Wasko v. State, 505 So. 2d 1314, 1317 (Fla. 1987); Lamb v. State, 532 So. 2d 1051, 1053 (Fla. 1988) ("it is 'improper to aggravate for a prior conviction of a violent felony when the underlying felony is part of the single criminal episode against the single victim of the murder for which the defendant is being sentenced'"). Under this limitation, the prosecutor's argument that the jury should weigh this aggravating circumstance against the mitigating evidence was wrong and was not corrected by the instructions. Mr. Marek's jury did not receive an instruction regarding this limiting construction of this aggravating circumstance. Thus, the instruction "fail[ed] adequately inform [Mr. Marek's] jur[y] what [it] must find to impose the death penalty." Maynard v. Cartwright, 108 S.Ct. at 1858. This aggravating circumstance is invalid, for its description left the sentencer "without sufficient guidance for determining the presence or absence of the factor." Espinosa, 112 S. Ct. at 2928. See Stringer v. Black, 112 S.Ct. 1130 (1992); Sochor v. Florida, 112 S.Ct. 2114 (1992).

In post-conviction proceedings, the circuit court did strike this aggravating factor:

> CLAIM XII - PRIOR VIOLENT FELONY IN AGGRAVATION
>
> This Court finds that this aggravating circumstance must be stricken in light of the Florida Supreme Court's latest pronouncement in Lamb v. State, 13 F.L.W. 530 (Fla. Sept. 1, 1988), and Perry v. State, 522 So. 2d 817 (Fla. 1988). However, MAREK'S sentence of death is still valid where the remaining three aggravating factors were proven beyond a reasonable doubt and upheld on direct appeal and where there were and are no mitigating circumstances applicable to MAREK. Jackson v. State, 502 So. 2d 409 (Fla. 1988).

(Order Denying Motion to Vacate Judgment and Sentence, November 7, 1988 PC-R. 266). The state did not appeal the finding of error, and this Court, in affirming the lower court, did not address the finding that instructional error had occurred at Mr. Marek's penalty phase. Under Espinosa, it must be presumed that the jury directly weighed this invalid aggravating circumstance. Espinosa, 112 S. Ct. at 2928. Moreover, it is presumed that the trial court gave "great weight" to the jury's death recommendation. Id. Indeed, the trial court initially found this aggravating circumstance. What the trial court, and later this Court, failed to do was address the import of this eighth amendment error on the jury's decision to recommend the death penalty.

The trial court's resolution of the issue was constitutionally inadequate, as the United States Supreme Court has indicated:

> 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., at ____ (slip op., at 8), thus "creat[ing] the risk [of] treat[ing] the defendant as more deserving of the death penalty," id., at ___ (slip op., at 12). 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, 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, 112 S. Ct. at 2119. The lower court's subsequent striking of this aggravating factor did nothing to cure the jury error. The court's resolution of the issue clearly did not meet the stringent standards set out by the United States Supreme Court, see Sochor, Stringer v. Black, nor was the lower court's treatment reviewed by this Court on appeal. The eighth amendment instructional error cannot be taken as cured by either the circuit court's, or this Court's, consideration of the case.

Mr. Marek's jury also received constitutionally inadequate instructions regarding the "heinous, atrocious, or cruel" aggravating circumstance. The instructions were erroneous, and the jury considered an invalid aggravating circumstance, as Espinosa v. Florida, 112 S. Ct. 2926 (1992), 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.

Despite defense objections arguing that this aggravator was vague and overbroad because "[a]lmost any capital felony would appear espeially cruel, heinous and atrocious to the layman" (R. 1369), the jury was simply instructed:

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

(R. 1322). This instruction is identical to the instruction which Espinosa held to violate the Eighth Amendment. Espinosa, 112 S. Ct. at 2927 ("One of the instructions informed the jury that it was entitled to find as an aggravating factor that the murder was 'especially wicked, evil, atrocious or cruel.'"). Again, it must be presumed that the jury not only weighed this

invalid aggravating circumstance, but also found it. Espinosa. In giving "great weight" to the jury's recommendation, therefore, the trial court also weighed an invalid aggravating circumstance. The result is eighth amendment error.

As to the "pecuniary gain" aggravating factor, the prosecutor argued that because the victim's watch, earrings, and bracelet were found in the truck that Mr. Marek and his co-defendant "had been in, and the truck that both of them had traveled in, and the truck that both of them had kidnapped [the victim] in," the jury should find "that the killing occurred at least in part for financial gain" (R. 1302). However, Peek v. State, 395 So. 2d 492, 499 (Fla. 1981), holds that to find the aggravating circumstance of pecuniary gain it must be established beyond a reasonable doubt that the victim "was murdered to facilitate the theft, or that [the defendant] had [] intentions of profiting from his illicit acquisition." In Small v. State, 533 So. 2d 1137, 1142 (Fla. 1988), the court explained that Peek held, "it has [to] be [] shown beyond a reasonable doubt that the primary motive for this killing was pecuniary gain." In Mr. Marek's case, the jury received no instruction regarding this limiting construction of this aggravator. In fact, the prosecutor argued that no such limitation was applicable. As a result, the instruction on this aggravator "fail[ed] adequately to inform [Mr. Marek's] jur[y] what [it] must find to impose the death penalty." Maynard v. Cartwright, 108 S. Ct. at 1858.

Mr. Marek's jury was given legally invalid circumstances to apply and weigh, and the jury recommended death. No limiting constructions adopted by this Court were given to the jury as to "heinous, atrocious or cruel," "pecuniary gain" or the prior violent felony aggravating circumstances. The jury's death recommendation was clearly tainted by invalid aggravating circumstances. See Maynard v. Cartwright; Shell v. Mississippi; Stringer 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 invalid aggravating factors upon which the jury was inadequately instructed.

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. Both statutory and nonstatutory mitigating circumstances are set forth in the record. First, the record clearly establishes that Mr. Marek was a good prisoner who had caused no trouble while incarcerated prior to and during trial, and even after he had been convicted of first degree murder. Ms. Terry Webster, a detention officer in the jail, testified during the penalty phase that in the course of working at the jail she came to know John Marek.

Q Did you get to know him at all in the sense of knowing him by sight and speaking with him?

A I basically know most of the detainees in there. I make it a point to get to know them so I can be on a one to one basis with most of them.

Q Did you get to know Mr. Marek in that fashion as well?

A Yes, he was in one of the favored cells.

Q In the course of getting to know him was he ever disrespectful towards you? Did he ever use any foul language in your presence?

A He never used any foul language and he was always polite.

Q Have there been male inmates who have been disrespectful towards you? As a female detention officer do you ever get the wrath?

A Most definitely.

Q Do you put Mr. Marek in that characterization of someone who is disruptive?

A No, sir.

Q Has he ever been anything other than polite with you?

A No.

Q Calling your attention to Mr. Marek in the last, I guess few days, since Friday; are you aware that he was convicted?

A Yes, I am.

Q Did you have any contact with him after that?

A Yes. I've been in contact with him every day since his sentencing or since his conviction.

Q Did you see him on Friday, specifically?

A Yes, I did.

Q Coul you tell the ladies and gentlemen of the jury what his mood was after that?

A He was very upset.

Q Was he angry?

A No.

Q Was he crying?

A He was near crying.

Q Has he been anything other than that since Friday?

A He's been very upset since then.

Q Has he been disrespectful to you even throughout that?

A No.

Q Would you just tell the ladies and gentlemen of the jury, I guess in closing, whether he would fall into the category of someone you have trouble with in the jail or you don't?

A We have never had any problems with him the jail.

(R. 1297-99).

Additionally, Mr. Marek was 21 years old at the time of the offense. There was evidence that Mr. Marek consumed a large quantity of alcohol on the date of the offense. Mr. Marek's equally or more culpable[15] co-defendant received a life sentence.

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[15]The trial court found that Mr. Marek and his co-defendant "acted in concert" (R. 1473). Further, the co-defendant was cnvicted of "sexual battery with great force" while Mr. Marek was acquitted of these charges and convicted of "simple battery" and "attempted burglary."

This evidence and argument provided a reasonable basis upon which the jury could have based a life recommendation.[16] See Hall v. 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 aggravating 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 balancnig 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).

Clearly, then, the jury's death recommendation is tainted by eighth amendment errors. Invalid aggravating circumstances were considered by the jury. The jury received inadequate

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[16] See Fla. Stat. §921.141(6)(g) (age of defendant is mitigating factor); Holsworth v. State, 522 So. 2d 348, 354 (Fla. 1988) ("potential for rehabilitation and productivity within the prison system" is valid mitigating factor); Castro v. State, 547 So. 2d 111, 116 (Fla. 1989) (evidence that defendant was drinking at the time of the offense is valid mitigation); 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 distrubance relevant to the crime must be considered and weighed") (emphasis in original); Brookings v. State, 495 So. 2d 135, 142 (Fla. 1986) (disparate treatement of equally culpable co-defendant is valid mitigating factor).

instructions which must be presumed to have affected the consideration of aggravating circumstances and resulted in additional extra thumbs on the death side of the scales. Espinosa; Stringer. Under Espinosa, Sochor and Stringer, this Court must revisit the issue and conduct the appropriate analysis. Relief is clearly warranted at this time.

CLAIM II

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

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. Marek was convicted of one count of first-degree murder and kidnapping as charged, as well as the lesser-included offense of attempted burglary. The trial court found both the "felony murder" aggravating circumstance as well as the "pecuniary gain" aggravator. The court found that the attempted burglary served as the underlying felony to satisfy the "felony murder" aggravating circumstance. (R. 1346). The death penalty in this case was predicated upon unreliable automatic findings of statutory aggravating circumstances -- the very felony murder finding that formed the basis for the conviction.

A state cannot use aggravating "factors which as a practical matter fail to guide the sentencer's discretion." Stringer v. Black, 112 S. Ct. 1130 (1992). Stringer is new law which has been articulated since Mr. Marek's prior proceedings. The sentencer was entitled automatically to return a death sentence upon a finding of first degree felony murder. Every felony murder would involve, by necessity, the finding of a statutory aggravating circumstance, a fact which, under the particulars of Florida's statute, violates the eighth amendment. This is so because an automatic aggravating circumstance is created, one which does not "genuinely narrow the class of persons eligible for the death penalty," Zant v. Stephens, 462 U.S. 862, 876 (1983), and one which therefore renders the sentencing process unconstitutionally unreliable. Id. "Limiting the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Maynard v. Cartwright, 486 U.S. 356, 362 (1988). Because Mr. Marek was convicted of felony murder, he then automatically faced statutory aggravation for felony murder. These aggravating factors were "illusory circumstance[s]" which "infected" the weighing process; these aggravators did not narrow and channel the sentencer's discretion as they simply repeated elements of the offense. Stringer, 112 S. Ct. at 1139. In fact, this Court has held that the felony murder aggravating factor alone cannot support the death sentence. Rembert v. State, 445 So. 2d 337 (Fla. 1984).

Yet the trial court did not apply this limitation in either instructing the jury or imposing the death sentence.

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

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

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

820 P.2d at 89-90.

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

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

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

> [W]hen the sentencing body is told to weigh an invalid factor in its decision, a

> reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.

Stringer, 112 S. Ct. at 1137.

This claim is cognizable in these proceedings on the basis of Stringer v. Black. Mr. Marek 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 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 18, 1992.

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Case No. 91-7390

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1991

HENRY JOSE ESPINOSA, *Petitioner*,

v.

THE STATE OF FLORIDA, *Respondent*.

PETITION FOR REHEARING

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QUESTION PRESENTED

WHETHER THIS COURT'S DECISION RESTS UPON AN ERRONEOUS CONSTRUCTION OF STATE LAW.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
Continued

CASES — PAGE

TABLE OF AUTHORITIES
Continued

CASES — PAGE

OTHER AUTHORITIES

STATEMENT OF THE CASE

The Petitioner, Henry Jose Espinosa, was convicted of first-degree murder, among other crimes. *Espinosa v. State*, 589 So.2d 887, 889 (Fla. 1991). Espinosa was tried together with his co-defendant, Mauricio Beltran-Lopez. *Id.* The historical facts of the murder are recited in *Espinosa, supra*, at 889-90.

At the close of the evidence in the penalty hearing, the jury was, *inter alia*, instructed that it was entitled to find, as an aggravating factor, that the murder of which it had found Espinosa guilty was "especially wicked, evil, atrocious or cruel." (HAC) The jury's recommendation, and the trial judge's findings of aggravating and mitigating factors are reported in *Espinosa, supra*, at 891. The trial judge applied the HAC aggravating factor in sentencing

Petitioner to death, based upon written findings that the victim had been strangled and repeatedly stabbed while alive.[1]

On appeal to the Supreme Court of Florida, Espinosa argued that the HAC instruction was vague. He also argued that there was insufficient evidence to support the finding of the HAC factor. The Florida Court rejected the Petitioner's claim with respect to the HAC jury instruction in reliance upon *Smalley v. State*, 546 So.2d 720 (Fla. 1989). As to the sufficiency of the HAC factor, the Court affirmed the trial judge's findings by holding, "the trial judge's finding that this aggravating

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[1] The trial court also found Espinosa had been previously convicted of a violent felony, §921.141(5)(b); the murder was committed to prevent a lawful arrest, §921.141(5)(d); and the murder was committed during an armed robbery, §921.141(5)(e).

factor applied was supported by the medical examiner's testimony that Teresa [victim] was alive while she was being strangled and repeatedly stabbed." *Espinosa v. State, supra*, at 894.

On certiorari, Espinosa argued to this Court that the Supreme Court of Florida had failed to honor the "rule in *Proffitt v. Florida,* 428 U.S. 242 (1976) reaffirmed in *Maynard v. Cartwright*, 486 U.S. 356 (1988)" to the effect that a limiting instruction had to be given on the HAC factor. (Petition, pp. 29-31). Espinosa only argued that the Florida Supreme Court's decision in *Smalley, supra*, was not controlling because: (1) *Smalley* incorrectly stated that Florida juries are given a narrowing instruction; and, (2) this Court never had an opportunity to review *Smalley. Id.*

This Court on June 29, 1992, summarily reversed and remanded, going substantially beyond the argument presented by Espinosa. This Court stated that Florida has decided "to place capital sentencing authority in two actors rather than one," *Espinosa v. Florida*, 505 U.S. ___ (1992), and held, in part:

> 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, [cite omitted] or death, [cites omitted]. Thus Florida has essentially split the weighing process in two. Initially the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances.

Espinosa v. Florida, supra (emphasis added).

REASONS FOR GRANTING REHEARING

This Court should (1) vacate its summary reversal, and (2) set this matter for full briefing and oral argument.

The Court's holding, that Florida's capital sentencing authority is split between the trial judge and jury because the former "weighs" the latter's recommendation in its weighing of aggravating and mitigating circumstances, is directly contrary to the plain language of Florida's capital sentencing statute and the Supreme Court of Florida's interpretation thereof. The interpretation of state law by a state's highest court is binding on the federal courts. This Court's independent interpretation of Florida's death sentencing scheme is based upon an erroneous interpretation of Florida law.

Spaziano, 468 U.S. 447, 465 (1984) ("Our responsibility, however, is not to second-guess the deference accorded the jury's recommendation in a particular case, but to insure that the result of the process is not arbitrary or discriminatory."). The Court recognized this was so while acknowledging that the trial court was required to do an independent weighing "regardless" of the jury's recommendation. *See Goode v. Wainwright*, 464 U.S. 78, 84 (1983); *Stringer v. Black*, 503 U.S. ___, 117 L.Ed.2d 367, 381, 112 S.Ct. ___ (1992) ("It would be a strange rule of federalism that ignores the view of the highest court of a state as to the meaning of it's own law.")

Section 921.141(3), Fla. Stat. unquestionably allocates the sole sentencing authority to the judge

"notwithstanding the recommendation of . . . the jury." There is no statutory requirement that the trial judge "weigh" the jury's recommendation in its weighing of the aggravating and mitigating circumstances. In fact, as noted by this Court, the express statutory provisions mean that, "Regardless of the jury's recommendation, the trial judge is required to conduct an independent review of the evidence and to make his own findings regarding aggravating and mitigating circumstances." *Spaziano v. Florida*, 468 U.S. 447, 466 (1984). (emphasis added).[2]

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[2] "If a judge may be vested with sole responsibility for imposing the penalty, then there is nothing constitutionally wrong with the judge's exercising that responsibility after receiving the advice of the jury. The advice does not become a judgment simply because it comes from the jury." *Spaziano*, 468 U.S. at 465.

Likewise, the Florida Supreme Court has interpreted the above statute as requiring the trial judge to make an "independent" determination regarding factual findings to support its sentencing determination, regardless of the jury's recommendation. *Grossman v. State*, 525 So.2d 833, 839 (Fla. 1988) ("[T]he judge shall weigh the aggravating and mitigating circumstances and enter a sentence of life imprisonment or death based on the judge's weighing process. ... notwithstanding the jury recommendation, ... the trial judge is required to make an independent determination, based on the aggravating and mitigating factors.") (emphasis added); *See also, Ross v. State*, 386 So.2d 1191, 1197 (Fla. 1980); *Rogers v. State*, 511 So.2d 526, 536 (Fla. 1987) (The Court rejected the

defendant's argument that the trial court gave undue weight to the jury's death recommendation, and stated: "The trial court in imposing sentence must exercise independent discretion ... ".); *Eutzy v. State*, 458 So.2d 755 (Fla. 1984) (the Court expressly rejected any proposition that a jury's recommendation of life could "destroy the trial judge's statutory authority to independently weigh the evidence and to impose sentence.").

The "independent" determination of the judge is further illustrated by Florida's decisions which allow the trial judge to consider and deliberate the aggravating and mitigating circumstances while the jury is similarly deliberating. *King v. State*, 390 So.2d 315, 321 (Fla. 1980); *Randolph v. State*, 463 So.2d 186 (Fla. 1985).

Moreover, a sentence of death can be imposed in the absence of any recommendation by the jury, in that §921.141(1) specifically provides that the jury can be waived, *State v. Carr*, 336 So.2d 358 (Fla. 1976), albeit, no sentence can ever be imposed with "just" an advisory jury's recommendation. Obviously, if Florida has truly "split" the capital sentencing authority between two "actors," a defendant could not waive the presence or participation of one of the "actors." Indeed, the trial judge's independent responsibility is such that his failure to timely comply with his statutory duty of preparing written findings will result in the imposition of a life sentence, regardless of any jury recommendation. Fla. Stat. 921.141(3); *Christopher v. State*, 583 So.2d 642 (Fla. 1991).

Additionally, there is no requirement that the sentencing jury be apprised of all the relevant evidence in the case; *Cf. Cochran v. State*, 547 So.2d 928, 931 (Fla. 1989) and cases cited therein, or a requirement that the jury be instructed on all of the potential aggravating factors found by the judge. *Hoffman v. State*, 474 So.2d 1178, 1182 (Fla. 1985).

The independent finding and weighing of the aggravating and mitigating circumstances by the trial judge is in accordance with the purpose of the Florida capital scheme to have "judicial experience" serve as a check and balance against the "emotions of the jurors." *State v. Dixon*, 283 So.2d 1, 8 (Fla. 1973); *Rogers, supra*, at 536. The role of the jury is somewhat analogous to that of victims of crime or their

next of kin, who, under Fla. Stat. 921.143 (1991), have an absolute right to appear before the court and make a statement, but whose statement is not, by statute, delineated as "binding" or a factor to be expressly considered in the imposition of sentence.

This Court, in its summary reversal, ignored all of the above state law and its own previous pronouncements as to the role of the trial judge as the sentencer in the Florida capital sentencing scheme.[3] Instead, this Court focused on the erroneous assumption that the trial judge "weighs" the jury's recommendation in its "process of

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[3] See the repeated rejection of challenges to Florida's capital sentencing scheme which "provides for sentencing by the judge, not the jury". *Walton v. Arizona*, 479 U.S. ___, 110 S.Ct. ___, 111 L.Ed.2d 513, 524 (1990), citing *Hildwin v. Florida*, 490 U.S. 638 (1989); *Spaziano, supra*; *Proffit, supra*.

weighing aggravating and mitigating circumstances" because the trial judge must give "great weight" to the jury's recommendation. In *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975), relied upon by the Court for this interpretation, the Florida Supreme Court held, "In order to sustain a sentence of death following a jury recommendation of life, **the facts suggesting a sentence of death** should be so clear and convincing that virtually no reasonable person could differ." Clearly, the contemplated sentence under *Tedder* is still death. *See Marshall v. State*, ___ So.2d ___ (Fla. July 16, 1992) (override sustained where "record contains insufficient evidence to reasonably support the jury's recommendation of life."). This does not mean that a jury's recommendation must enter the judge's independent

findings of fact as to the existence of sufficient aggravating factors and whether those are outweighed by the existence of mitigating factors. The Florida Supreme Court, in *Combs v. State*, 525 So.2d 853, 856-7 (Fla. 1988), expressly disagreed with a federal court's interpretation of the role of the jury as "critical" in the Florida capital scheme, and stated: "We find the phraseology of §921.141, Florida Statutes (1985), which expressly directs that the jury's responsibility is 'advisory', was apparently not taken into account ... ". The Supreme Court of Florida then held:

> Clearly, under our process, the trial court is the final decision-maker and the sentencer - not the jury. This Court had no intention of changing the clear statutory directive that the jury's role is advisory when we held that, before a judge may override a jury recommendation of life

> imprisonment, he must find the facts are 'so clear and convincing that virtually no reasonable person could differ,' *Tedder v. State*, 322 So.2d 908, 910 (Fla. 1975).

Id. at 857. The Florida Court, relying on *Spaziano, supra*, noted:

> 'The trial court is to conduct its own weighing of the aggravating and mitigating circumstances and, "[n]otwithstanding the recommendation of a majority of the jury," is to enter a sentence of life imprisonment or death; in the latter case, specified written findings are required. Fla. Stat. §921.141(3) (1983).'

Id. at 858, citing *Spaziano, supra*, 468 U.S. at 451. (emphasis added).

Because of the diverse views of "what" the Florida death penalty scheme entails,[4] the State is entitled to fully

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[4] In the event that this Court considers Florida law to be insufficiently clear, the Respondent respectfully requests that this Court certify this question of State law to the Supreme Court of Florida, pursuant to Article V, section 3(b)(6) of the Florida Constitution:

brief and orally argue the merits of this issue.[5] Should this Court accept

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Whether the trial judge must weigh the jury's recommendation in its process of weighing aggravating and mitigating circumstances? *See, e.g., The Florida Star v. B.J.F.*, 484 U.S. 984 (1987).

[5] As seen above, this Court's decision is a departure from established law. Apart from the erroneous construction of Florida law, Espinosa and its companion cases, *Henry v. Florida*, 51 Cr. L. 3097 (July 1, 1992); *Davis v. Florida*, *Id.*, and *Gaskin v. Florida*, *Id.*, have also caused considerable confusion with respect to the application of harmless error and procedural bar to a jury instruction error in Florida. *See Kennedy v. Singletary*, ___ So.2d ___ (Fla. 1992), ___ F.L.W. S___, *slip op.* at 3, (Kogan J., concurring specially) ("I also note with some perplexity the confusing opinions issued by the United States Supreme Court ..."). This is because, contrary to *Sochor v. Florida*, 504 U.S. ___ (1992), this Court has seemingly rejected both Florida's procedural default rule and harmless error analysis in these cases. *See Davis, supra* (no objection to the HAC jury instruction); *Gaskin, supra* (no claim of instruction error in Florida courts; additionally the Florida Supreme Court expressly found that death would be imposed even in the absence of HAC); *Henry, supra* (HAC instruction proposed by the defense, was unlike Espinosa's instruction and thus not at issue).

Respondent's statement of Florida's law, then summary reversal herein should be vacated, because this case is controlled by *Walton v. Arizona*, 479 U.S. ___, 110 S.Ct. ___, 111 L.Ed.2d 513 (1990). In *Walton, supra*, 111 L.Ed.2d at 528, this Court expressly held:

> When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. That is the import of our holdings in *Maynard* and *Godfrey*. But the logic of those cases has no place in the context of sentencing by a trial judge.

(emphasis added). Trial judges are presumed to know and follow the law, where the highest court of a state has narrowly defined a circumstance. *Id.* In the instant case, this Court has already held that the Florida Supreme Court has narrowed the definition of the HAC factor. *Proffitt, supra; Walton, supra*, 111

L.Ed.2d at 529. *Sochor v. Florida*, 504 U.S. ___ (1992). The sentencer herein, the trial judge, is presumed to have applied the narrowing definition. *Walton, supra*, at 528. The logic of *Maynard v. Cartwright, supra* and *Godfrey v. Georgia*, 446 U.S. 42 (1980), is thus not applicable to the Florida sentencing scheme.

Finally, the Supreme Court of Florida affirmed the trial judge's finding that the murder was "heinous, atrocious or cruel," and expressly found sufficient evidence of that factor. This Court has held that even if the sentencer fails to apply a narrowing construction of the HAC factor, "the Constitution does not necessarily require that a state appellate court vacate a death sentence based on that factor." *Walton, supra*, 111 L.Ed.2d at

528. "[A] state appellate court may itself determine whether the evidence supports the existence of the aggravating circumstance as properly defined...". *Id.; see also, Lewis v. Jeffers*, 497 U.S. ___, 111 L.Ed.2d 606, 622, 110 S.Ct. ___ (1990). Thus any error in the HAC jury instruction *sub judice* was harmless beyond a reasonable doubt, given the Supreme Court of Florida's determination that the evidence supported the existence of this aggravating circumstance as properly defined.[6]

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[6] *See Kennedy v. Singletary*, ___ So.2d ___ (Fla. July 16, 1992) ("In any event, even if not procedurally barred, the error in giving the instruction and the error in the instruction's wording clearly was harmless beyond a reasonable doubt, in light of the entire record in this case."); *Satterwhite v. Texas*, 486 U.S. 249, 258 (1988).

CONCLUSION AND CERTIFICATION

For the foregoing reasons, Respondent respectfully requests this Court reconsider its summary reversal and grant full briefing and oral argument herein.

This Petition for Rehearing is made in good faith and not for the purposes of delay.

Respectfully submitted,

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