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CLERK, SUPREME COURT
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Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

NO. 80,351

JOHN RICHARD MAREK,

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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I. INTRODUCTION

The Response filed by the State is an embodiment of the principle "say whatever it takes to win." When the decisions in Espinosa v. Florida, 112 S. Ct. 2926 (1992), and its companion cases[1] were rendered, the capital litigators in the Florida Attorney General's Office were panicked that Espinosa relief may have to be afforded to Florida death row inmates. Since the decision in Espinosa, different courts have heard very different messages from assistant attorneys general, as the latter have desperately sought to nullify the United States Supreme Court's conclusion that Florida's penalty phase standard jury instructions violate the Eighth Amendment.

The United States Supreme Court was told in rehearing petitions that its decision in Espinosa was "directly contrary to the plain language of Florida's capital sentencing statute and the Supreme Court of Florida's interpretation thereof."[2] Espinosa v. Florida, U.S. Sup. Ct. No. 91-7390, Respondent's Petition for Rehearing at 5. The Supreme Court also heard that the Florida Supreme Court "has repeatedly held that their caselaw also provides sentencing rests with the judge. Smalley; Combs v. State, 525 So. 2d 853, 855 (Fla. 1988). []Thus, [the United

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[1] 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).

[2] Certainly if Espinosa is "directly contrary" to this Court's decisions, then this Court's decisions were overturned by Espinosa.

States Supreme] Court's decision in Espinosa and applied in Davis constitutes a departure from established case law."[3] Davis v. Florida, U.S. Sup. Ct. No. 91-7273, Respondent's Petition for Rehearing at 8, 10 (emphasis in original). The United States Supreme Court was scolded for failing to respect the Florida Supreme Court's views: "Until Espinosa, this Court had always followed the Florida Supreme Court's meaning of its own law. [] Significantly, this Court changed its entire view of Florida law on the basis of a footnote in Grossman v. State, 525 So. 2d 833 (Fla. 1988)." Hitchcock v. Florida, U.S. Sup. Ct. No. _____, Respondent's Petition for Rehearing at 7-9. Finally, the United States Supreme Court was told, "contrary to Sochor v. Florida, 504 U.S. ___ (1992), this Court has seemingly rejected both Florida's procedural default rule and harmless error analysis." Espinosa, Respondent's Petition for Rehearing at 16 n. 5.[4] These petitions for rehearing were denied September 4, 1992.

In Tompkins v. Singletary, a federal district court was told:

> However, in all candor, the application of the Espinosa decision must be discussed.

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[3]According to the Davis rehearing petition, Smalley and Combs were overturned by Espinosa.

[4]This Petition for Rehearing was signed by Carolyn Snurkowski, Assistant Attorney General. Ms. Snurkowski also filed the Response in Mr. Marek's case. Yet, in the Response in Marek, Ms. Snurkowski stated, "Indeed, nothing has changed from the last time Marek litigated this issue before the state courts. Certainly, Sochor v. Florida, supra, does not mandate a different result and the decision in Espinosa v. Florida, ___ U.S. ___, 112 S. Ct. 2926, 120 L.Ed. 2d 854 (1992), does not even discuss procedural bar." Response at 11. This statement is at odds with the rehearing request Ms. Snurkowski made in Espinosa.

Prior to the decision in Espinosa, it is clear that the trial judge, and not the jury, was the sentencer for Eighth Amendment purposes. Indeed, the United States Court of Appeals to the Eleventh Circuit, in Mann v. Dugger, 817 F.2d 1471 (11th Cir. 1987), adhere to on rehearing, 844 F.2d 1446 (11th Cir. 1988), concluded that a Florida jury should be treated as "a sentencer" for constitutional purposes. This was the first pronouncement of this theory by any court. In an attempt to correct this misapprehension of the Florida system, the Florida Supreme Court rendered its decision in Combs v. State, 525 So. 2d 853 (Fla. 1988). Combs clearly holds that the trial judge is the sole sentencer in the State of Florida. The Supreme Court of Florida also recognized that the United States Supreme Court "has expressly characterized the jury's role in Florida to be 'advisory' in nature." Combs, Id. at 858. The Combs court relied upon the majority opinion authored by Justice Blackmun in Spaziano v. Florida, 468 U.S. 447 (1984):

> In Florida, the jury's sentencing recommendation in a capital cases is only advisory. The trial court is to conduct its own weighing of the aggravating and mitigating circumstances and, "[n]otwithstanding the recommendation of the 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).

Combs, supra, at 858. The Combs court also recognized that the United States Supreme Court has consistently upheld the validity of Florida's advisory jury system, citing Barclay v. Florida, 463 U.S. 939 (1983); Dobbert v. Florida, 432 U.S. 282 (1977); Proffitt v. Florida, 428 U.S. 242 (1976).

Even more recently, the United States Supreme Court again observed that constitutional challenges to Florida's death sentencing scheme have been repeatedly rejected, a scheme "which provides for

> sentencing by the judge, not the jury." Walton v. Arizona, 497 U.S. ___ (1990). However, Espinosa now makes both the trial judge and the jury constituent parts of the Florida sentencing process. This is clearly a change in the law.

Tompkins v. Singletary, Case No. 89-1638-Civ-F15B, Supplement to the Response at 42-44.[5]

However, before this Court, assistant attorneys general have sung a different tune. In Atkins v. Singletary, Case No. 80,108, this Court was told, "Espinosa does not aid Atkins. There was no procedural default in Espinosa." Atkins v. Singletary, Response at 10.[6] In Mills v. Singletary, Case No. 80,326, the assistant attorney general wrote: "Espinosa is based upon a federal court interpretation of state law which is not binding on this Court and which is clearly erroneous." Mills v. Singletary, Response at 5.[7] And in Mr. Marek's case, the assistant attorney general ignores her own words in the Espinosa Petition for Rehearing, ignores her own words in the Davis Petition for Rehearing, and ignores the United States Supreme Court's words in the Espinosa

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[5]Similarly, the State Attorney in State v. Jennings, conceded to the circuit court that Espinosa was a change in law cognizible in Rule 3.850 proceedings.

[6]However, the assistant attorney general in the Espinosa Petition for Rehearing specifically disagreed: "this Court has seemingly rejected [] Florida's procedural default rule." Moreover in the Davis Petition for Rehearing at 17, the assistant attorney general stated: "At trial, Davis did not object to the jury instruction on heinous, atrocious or cruel." Rehearing was asked because the United States Supreme Court ignored the alleged procedural default. The Supreme Court denied rehearing.

[7]Incredible as it may seem, the assistant attorney general actually argued that a decision of the United States Supreme Court, which reverses this Court, is not binding on this Court.

opinion. Not once does the Response discuss Espinosa's primary holding that a Florida jury must receive constitutional instructions on aggravating factors; not once does it discuss the fact that Espinosa and its companion cases "seemingly rejected [] Florida's procedural default rule."

The assistant attorney general may duck and run, but this Court cannot follow her and hide from Espinosa and its import. Under Espinosa, Mr. Marek's sentence of death stands in violation of the Eighth Amendment. Error occurred before the jury which tainted the sentencing recommendation and requires a resentencing.

II. THE HOLDING OF ESPINOSA V. FLORIDA

In its varied attempts to avoid the issues presented in Mr. Marek's petition and to grasp at any straw it hopes might deny Mr. Marek relief, the State never once discusses Espinosa and its holding. The holding of Espinosa is clear and mandates that Mr. Marek be granted relief. Espinosa holds:

1) A Florida capital sentencing jury is one of the "actors" in the capital sentencing decision.

2) Any "actor" in a capital sentencing decision may not be permitted to rely on a legally invalid aggravating factor.

3) An aggravating factor is legally invalid if its description is so vague that it does not provide guidance as to when the factor does or does not apply.

4) When a sentencing jury is instructed to rely upon a legally invalid aggravating factor, a reviewing court must presume that the jury found that factor to exist.

5) When a Florida capital jury is instructed upon a legally invalid aggravating factor and presumably finds the factor exists, a reviewing court must presume that this error tainted the judge's sentencing decision.

Under Espinosa, if a Florida capital jury does not receive constitutionally adequate instructions on aggravating circumstances, any resulting death sentence has been obtained in violation of the Eighth Amendment. This is what happened in Mr. Marek's case, and he is entitled to relief.

III. PREVIOUS CONVICTION OF A CRIME OF VIOLENCE

Mr. Marek's jury was instructed to consider his contemporaneous conviction of kidnapping as a previous conviction of a crime of violence which constituted an aggravating circumstance. Mr. Marek's sentencing judge treated the contemporaneous conviction as an aggravating circumstance. In denying post-conviction relief, the sentencing judge ruled that he had erred. However, sentencing relief was not granted because "three aggravating factors" remained and the judge found in his view no mitigating circumstances.[8] The judge cited Jackson v. State, 502 So. 2d 409 (Fla. 1988), as the standard on which he relied in reaching his conclusion. In Jackson, this Court held where an aggravator was struck but others remained and the judge

[8]In denying Rule 3.850 relief, the judge stated, "Being a 'model prisoner' is not a factor in mitigation." Order Denying Motion to Vacate, at 8. The judge was wrong as a matter of law. Skipper v. South Carolina, 476 U.S. 1 (1986). Certainly, the jury could have premised a life sentence upon this mitigating evidence which the judge as a matter of law refused to consider.

found nothing in mitigation, "death is presumed to be the appropriate sentence." 502 So. 2d at 412.

In the Response, the State concedes that this aggravating factor was improperly considered in Mr. Marek's case: "What Marek is actually arguing is that this Court failed to make an explicit finding that any error was harmless beyond a reasonable doubt." Response at 8. Thus, there is no dispute that Eighth Amendment error occurred.

The dispute here concerns the harmless error analysis to be employed in Mr. Marek's case and whether the standard used comports with Espinosa and the cases relied upon therein. During Rule 3.850 review, the judge refused to reverse relying on this Court's holding in Jackson v. State, that "death is presumed to be the appropriate sentence." 502 So. 2d at 412.

In its Response, the State does not once mention Jackson v. State or its language "death is presumed." This is because the United States Supreme Court has specifically held that analysis does not comport with the Eighth Amendment. The Court recently explained:

> But when 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. This clear principle emerges not from any single case, as the dissent would require, post, at 7-10, but from our long line of authority setting forth the dual constitutional

> criteria of precise and individualized sentencing. Thus, the principal difference between the sentencing systems of Mississippi and Georgia; the different role played by aggravating factors in the two States, underscores the applicability of Godfrey and Maynard to the Mississippi system.

Stringer v. Black, 112 S. Ct. 1130, 1137 (1992). "Florida, like Mississippi, is a weighing state." Id. Thus, Stringer applies with full force to Florida. As a result, "a reviewing court in a weighing state may not make the automatic assumption that such a factor has not infected the weighing process." Id.

Under the proper analysis consideration must be given to the actual effect on the jury's weighing process. Consideration of a "prior violent felony" certainly precluded consideration of "no significant criminal history" as a mitigating factor. Striking this aggravating factor affected not just the aggravating side on the balancing scales, but the mitigating side as well.

Moreover, the question is not what the judge found as to mitigation, but what the jury could have found, and whether a binding life recommendation could have been returned. Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989). Mr. Marek presented mitigating evidence and argument that the jury could reasonably have found warranted a life sentence.[9] Moreover, the judge stated at trial that he would follow whatever the jury

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[9]In its Response, the State concedes "we can never know what the jury may or may not have considered with regard to the aggravating factors presented." Response at 9. Given that concession, the error cannot be found harmless beyond a reasonable doubt.

recommended in this case (R. 1287). Under Espinosa and Stringer, the error here was not harmless beyond a reasonable doubt.

IV. HEINOUS, ATROCIOUS OR CRUEL.

Continuing its "say whatever is necessary to win" strategy, the State argues, contrary to the record, that Mr. Marek's claim regarding the "heinous, atrocious or cruel" aggravating factor is procedurally barred (Response at 9-10). The State completely ignores the fact that on direct appeal, Mr. Marek challenged the jury instructions regarding the "heinous, atrocious or cruel" aggravating factor, arguing that the statutory "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. George." Marek v. State, No. 65,821, Brief of Appellant at 22-23 (emphasis added). This argument clearly identified the error -- i.e., that this aggravator was not sufficiently defined for the jury (the statutory "description provided no guidance in the advisory phase") -- and cited the appropriate federal law -- Godfrey. The citation to Godfrey clearly identifies the issue: Godfrey was concerned with whether the jury was provided a constitutionally adequate definition of an aggravating factor. This Court denied relief on the merits: "We find that none of appellant's challenges to the aggravating factors have merit." Marek v. State, 492 So. 2d 1055, 1058 (Fla. 1986).

The State also tries to mislead this Court regarding why the trial court denied relief when this claim was represented in Rule

3.850 proceedings. The State says the trial court found the claim procedurally barred because "no attack as to the vagueness of this aggravating factor instruction was presented" on direct appeal (Answer at 10). This is flatly wrong. The trial court denied relief because "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). This Court then affirmed the trial court because the claim was "either raised or could have been raised previously." Marek v. Dugger, 547 So. 2d 109 (Fla. 1989). This claim was raised previously, and the State cannot be permitted to rewrite the record.

The State's procedural bar argument also relies upon Sochor v. Florida, 112 S. Ct. 2114 (1992), and Kennedy v. Singletary, 17 F.L.W. S464 (Fla. 1992) (Response at 10-11). 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.[10] 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.

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[10] 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).

> 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).

(Espinosa v. Florida, No. 91-7390, Petition for Rehearing, p. 16 n.5). The United States Supreme Court denied rehearing in Espinosa on September 4, 1992. In Davis v. Florida, one of the cases remanded in light of Espinosa, the State's rehearing petition argued:

> Further, the State has consistently maintained, this claim is procedurally barred. At trial, Davis did not object to the jury instruction on heinous, atrocious or cruel. On appeal to the Florida Supreme Court, Davis argued that §921.141(5)(h), Fla. Stat. was unconstitutionally vague and that it was error to instruct the jury on the factor, not that the instruction itself was vague.

Davis v. Florida, U.S. Sup. Ct. No. 91-7273, Respondent's Petition for Rehearing at 17-18. The Supreme Court also denied rehearing in Davis on September 4, 1992.

Since Espinosa and Davis were 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. Marek's 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. Marek's petition.

The State has refused to discuss whether Espinosa constitutes a change in Florida law, instead relying upon Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989), for the proposition that a procedural bar can be applied to a claim premised upon a change in Florida law. Of course, Jackson did not involve a challenge to a standard jury instruction, as Mr. Marek's claim does, but involved a challenge to the presentation of a kind of evidence, a challenge which was available under state law prior to Booth v. Maryland.

Moreover, the State does not address this Court's response to Hitchcock v. Dugger, 481 U.S. 393 (1987), a case which did

involve a standard jury instruction.[11] When Hitchcock 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 about a standard jury instruction. Downs v. Dugger, 514 So. 2d 1069, 1071 (1987). See also Delap v. 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

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[11]The State never once even refers to Delap v. Dugger, 513 So. 2d 659 (Fla. 1987), let alone distinguishes it. This failure must be viewed as confirmation that Delap cannot be distinguished.

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. Marek's claim.

The State does not mention that the jury instruction given in Mr. Marek's case is identical to the instruction condemned in Espinosa. Thus, the State simply fails to address the indisputable fact that Eighth Amendment error occurred at Mr. Marek's penalty phase.

The State also presents harmless error argument that is contrary to Espinosa and its predecessors. The State argues that the error was harmless because the jury would have found "heinous, atrocious and cruel" "no matter what instruction was given" (Response at 12), and because the trial court and this Court applied a limiting construction to the aggravator (Response at 15). Regarding the State's first harmless error argument, Espinosa held 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 (emphasis added). When a jury has been instructed on such an "invalid" aggravating factor, "we must presume the jury found" the factor. Id. Thus, the appropriate harmless error analysis must determine what the jury would have done without the invalid factor: "In order for a state appellate court to affirm a death sentence after the sentencer was instructed to consider an invalid factor, the court must determine what the sentencer would have done absent the factor." Stringer v. Black, 112 S. Ct. 1130, 1137 (1992) (emphasis added). The State's first harmless error argument is wrong under Espinosa and Stringer.

The State's second harmless error argument is also wrong under Espinosa. If the jury considered an invalid aggravating factor, Espinosa says, that consideration taints the judge's sentencing decision, regardless of whether the judge considered an invalid factor:

> 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, ... just as we must further presume that the trial court followed Florida law, ... and gave "great weight" to the resultant recommendation. By giving "great weight" to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found. This kind of indirect weighing of an invalid aggravating factor creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor, ... and the result, therefore, was error.

Espinosa, 112 S. Ct. at 2928. Under Espinosa, if error occurred before the jury, that error has tainted the sentencing decision.

A harmless error analysis must therefore determine whether the error was harmless as to the jury's decision, i.e. whether it can be said beyond a reasonable doubt that the error did not affect the jury's weighing of aggravation and mitigation. In Mr. Marek's case, the mitigation in the record would have provided a reasonable basis for a life recommendation, and thus the error cannot be held harmless beyond a reasonable doubt.

V. PECUNIARY GAIN.

As to Mr. Marek's challenge to the application of the pecuniary gain aggravating factor, the state says:

> Marek is procedurally barred from raising this claim in that he raised the identical claim in his prior collateral litigation and albeit he challenged the sufficiency of the evidence with regard to whether pecuniary gain was a proper aggravating factor in his case, he did not challenge, either at trial or on direct appeal, the alleged deficiency in the jury instruction.

Response at 16.

Again Respondent misrepresents the record. In denying the Rule 3.850 motion, the sentencing judge found as a matter of fact that Mr. Marek raised this issue on direct appeal: "This claim is procedurally barred as it was raised on direct appeal" (PC-R. 266).

Moreover, this factual finding is consistent with the United States Supreme Court's action in Davis v. Florida. There, the Supreme Court reversed on the basis of Espinosa error where on direct appeal appellant challenged the application of the aggravating factor. See Davis Petition for Rehearing at 17-18.

Despite the State's complaint that the issue was procedurally defaulted in Davis, the Supreme Court denied rehearing.

Mr. Marek's jury was a sentencer for Eighth Amendment purposes. However, Mr. Marek's jury was not told that an element of the pecuniary gain aggravating factor was that the primary motive for the homicide was pecuniary gain. According to Walton v. Arizona, 110 S. Ct. 3047, 3057 (1990): "When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process." Since Espinosa holds that a Florida jury is one of two final sentencers, Walton applies in Florida. In Mr. Marek's case, the instruction on pecuniary gain was deficient. As a result, the aggravating factor is rendered invalid.

Accordingly, the harmless error analysis employed in Mr. Marek's case must include consideration of this error. Certainly, the error cannot be found harmless beyond a reasonable doubt.

VI. THE AUTOMATIC AGGRAVATING FACTOR

Regarding this claim, the State argues procedural bar, failing to address Mr. Marek's contention that Stringer v. Black, 112 S. Ct. 1130 91992), constitutes a change in Florida law requiring consideration of the claim. While the State accuses Mr. Marek's counsel of "mysteriously overlooking ... Lowenfield v. Phelps, 108 S. Ct. 546 ... (1988)" (Response at 19), the State overlooks Stringer which clearly holds that Lowenfield does not apply in a weighing state like Florida. Stringer, 112 S. Ct. at

1138 ("Lowenfield, arising under Louisiana law, is not applicable here" because "[u]nlike the Mississippi process, in Louisiana the jury is not required to weigh aggravating against mitigating factors"). "Florida, like Mississippi, is a weighing State." Id. at 1137. Thus, Lowenfield is not applicable to Mr. Marek's claim.

The State also makes light of Mr. Marek's citation to Engberg v. Meyer, 820 P.2d 70 (Wyo. 1991), a decision of the Wyoming Supreme Court (Response at 19). The analysis of Engberg demonstrates the merit of Mr. Marek's claim and should be instructive, as should another state high court's decision that an element of a capital crime may not be used as an aggravating circumstance. State v. Middlebrooks, No. 01-5-01-9102-CF-00008 (Tenn. Sept. 8, 1992). As in Mississippi (Stringer v. Black), Wyoming (Enberg v. Meyer), and Tennessee (State v. Middlebrooks), Florida is a weighing state in which narrowing the class of death eligible persons occurs at the penalty phase. These cases and their logic demonstrate Mr. Marek's entitlement to relief.

VII. HARMLESS ERROR

The State contends any and all error was harmless.[12] However, the State fails to conduct the harmless error analysis which the United States Supreme Court specifically set forth in Stringer v. Black, 112 S. Ct. 1130 (1992). There, the Court held:

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[12]The State never considers the cumulative impact of the errors.

> In order for a state appellate court to affirm a death sentence after the sentencer was instructed to consider an invalid factor, the court must determine what the sentencer would have done absent the factor. [] 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.

The State never addresses this standard or considers the ample mitigation on which the jury may have based a life recommendation. This mitigation was set forth in the original petition and will not be repeated here. However, in light of the mitigation, a life recommendation would have been binding. In fact, the trial judge indicated in this case he would follow the jury's recommendation whichever way it went. Under these circumstances, it cannot be said beyond a reasonable doubt that absent the extra thumb[s] on the death side of the scale, a life recommendation would not have been returned.

CONCLUSION

For the reasons discussed herein and in Mr. Marek's petition, Mr. Marek 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 October 2, 1992.

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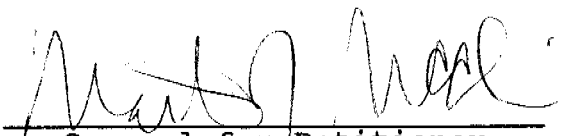
By: 
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