IN THE SUPREME COURT OF FLORIDA

NO. 81112

RICKY BERNARD ROBERTS,

Petitioner,

v.

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

Respondent.

PETITION FOR EXTRAORDINARY RELIEF AND FOR A WRIT OF HABEAS CORPUS

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

MARTIN J. MCCLAIN
Chief Assistant CCR
Florida Bar No. 0754773

THOMAS H. DUNN
Special Assistant CCR
Florida Bar No. 871753

OFFICE OF THE CAPITAL COLLATERAL REPRESENTATIVE
1533 South Monroe Street
Tallahassee, FL 32301
(904) 487-4376

COUNSEL FOR PETITIONER

PRELIMINARY STATEMENT

This is Mr. Roberts' second habeas corpus petition in this Court. It is premised upon the presence of fundamental error. State v. Johnson, 18 Fla. L. Weekly 55 (Fla. 1993). Recent decisions by the United States Supreme Court have established that Mr. Robert is entitled to habeas corpus relief, and that the prior dispositions of Mr. Roberts' claims by this Court were in error. Mr. Roberts previously challenged his death sentence, including the jury's death recommendation. On direct appeal, Mr. Roberts argued that the especially heinous, atrocious and cruel aggravating factor had not been applied consistently with previously adopted narrowing constructions. This Court disagreed. Roberts v. State, 510 So. 2d 885 (Fla. 1987). In prior post-conviction proceedings, Mr. Roberts argued that, under Hitchcock v. Dugger, 481 U.S. 393 (1987) and Maynard v. Cartwright, 486 U.S. 356 (1988), the penalty phase jury instructions failed to narrow the facially vague and overbroad aggravating factors. This Court rejected that argument, finding "Maynard is not applicable under Florida's death sentencing scheme." Roberts v. State, 568 So. 2d 1255, 1258 (Fla. 1990). As a result, this Court held that Maynard was not "such a change in the law as to preclude a procedural bar." 568 So. 2d at 1258. However, now Maynard has been held to be applicable in Florida. Thus, Florida's facially vague and overbroad aggravating factors must be cured by the application of a narrowing construction during the jury's consideration of the penalty to recommend.

On June 8, 1992, the United States Supreme Court reversed this Court's longstanding jurisprudence and held Maynard v. Cartwright, 486 U.S. 356 (1988), is applicable in Florida. Sochor v. Florida, 112 S. Ct. 2114 (1992). Specifically, the Supreme Court held:

> In a weighing State like Florida, there is Eighth Amendment error when the sentencer weighs an "invalid" aggravating circumstance in reaching the ultimate decision to impose a sentence. See Clemons v. Mississippi, 494 U.S. 738, 752, 110 S. Ct. 1441, 1450, 108 L.Ed.2d 725 (1990). Employing an invalid aggravating factor in the weighing process "creates the possibility ... of randomness," Stringer v. Black, 503 U.S. ____, ____, 112 S. Ct. 1130, 1139, 117 L.Ed.2d 367 (1992), by placing a "thumb [on] death's side of the scale," id., at ___, 112 S. Ct., at 1137, ____ (slip op., at 8), thus "creat[ing] the risk [of] treat[ing] the defendant as more deserving of the death penalty," id., at ___, 112 S. Ct., at 1139. Even when other valid aggravating factors exist as well, merely affirming a sentence reached by weighing an invalid aggravating factor deprives a defendant of "the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances." Clemons, supra, 494 U.S., at 752, 110 S. Ct., at 1450 (citing Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982)); see Parker v. Dugger, 498 U.S. ____, ____, 111 S. Ct. 731, 739, 112 L.Ed.2d 812 (1991). While federal law does not require the state appellate court to remand for resentencing, it must, short of remand, either itself reweigh without the invalid aggravating factor or determine that weighing the invalid factor was harmless error. Id., at ____, 111 S. Ct., at 738.

Sochor, 112 S. Ct. at 2119.

On June 29, 1992, in Espinosa v. Florida, 112 S. Ct. 2926 (1992), the United States Supreme Court again reversed this Court

and held that this Court had previously failed to correctly apply Maynard and Godfrey v. Georgia, 446 U.S. 420 (1980):

> Our examination of Florida case law indicates, however, that a Florida trial court is required to pay deference to a jury's sentencing recommendation, in that the trial court must give "great weight" to the jury's recommendation, whether that recommendation be life, see Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975), or death, see Smith v. State, 515 So. 2d 182, 185 (Fla. 1987), cert. denied, 435 U.S. 971 (1988); Grossman v. State, 525 So. 2d 833, 839 n.1 (Fla. 1988), cert. denied, 489 U.S. 1071-1072 (1989). Thus, Florida has essentially split the weighing process in two. Initially, the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances.
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> It is true that, in this case, the trial court did not directly weigh any invalid aggravating circumstances. But, we must presume that the jury did so, see Mills v. Maryland, 486 U.S. 367, 376-377 (1988), just as we must further presume that the trial court followed Florida law, cf. Walton v. Arizona, 497 U.S. 639, 653 (1990), and gave "great weight" to the resultant recommendation. By giving "great weight" to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found. This kind of indirect weighing of an invalid aggravating factor creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor, cf. Baldwin v. Alabama, 472 U.S. 372, 382 (1985), and the result, therefore, was error.

112 S. Ct. at 2928. In light of Sochor and Espinosa, the United States Supreme Court has granted certiorari review and reversed eight 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); Hodges v. State, 113 S. Ct. 33 (1992); Ponticelli v. Florida, 113 S. Ct. 32, (1992); Happ v. Florida, 113 S. Ct. 399 (1992).

Espinosa and Sochor represent a change in Florida law which must now be applied to Mr. Roberts' claims. They establish that fundamental error occurred at Mr. Robert's sentencing when his jury was allowed to consider facially vague and overbroad aggravating circumstances. See Trushin v. State, 425 So. 2d 1126, 1129 (Fla. 1983)(facial invalidity of a statute constitutes fundamental error). 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 eight Florida death cases in light of Espinosa and Sochor. Moreover, the United States Supreme Court has further explained this line of cases in its recent decision in Richmond v. Lewis, 113 S. Ct. 528 (1992). There, the Supreme Court held that, where the statutory definition of an aggravating circumstance is facial vague and overbroad, the error may be cured by the application of an adequate narrowing construction during the "sentencing calculus." 113 S. Ct. at 535.

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 (1976), 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"). As explained in Richmond v. Lewis, 113 S. Ct. at 534, "'there is no serious argument that [this factor] is not facially vague'" (quoting Walton v. Arizona, 110 S. Ct. at 3057). Thus contrary to this Court's previously expressed view, the Florida statute is facially vague and overbroad. To cure this Eighth Amendment defect, an adequate narrowing construction must be applied during a "sentencing calculus" which is free from taint. Richmond.

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"); Richmond, 113 S. Ct. at 535 ("Where the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the state appellate

court or some other state sentencer must actually perform a new sentencing calculus, if the sentence is to stand").

The first proposition had been explained 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 death penalty scheme from compliance with the Eighth Amendment. The statutory language is unconstitutionally vague and overbroad, and must be cured in each case by the application of an adequate narrowing construction.

The second longstanding rule of law overturned by Espinosa was the view that the judge's sentencing process somehow cured error before the jury. In Breedlove v. State, 413 So. 2d 1, 9

(Fla. 1982), this Court held that impermissible prosecutorial argument to the jury regarding aggravating circumstances was neither prejudicial nor reversible because the judge was not misled and did not err in his sentencing order. Under Espinosa, this conclusion was erroneous. Similarly, in Deaton v. State, 480 So. 2d 1279, 1282 (Fla. 1985), this Court held that the prosecutor's jury argument in favor of improper doubling of aggravating factors was, in essence, cured when the judge properly merged the aggravating circumstances in his sentencing order. Under Espinosa, this conclusion was erroneous. In Suarez v. State, 481 So. 2d 1201, 1209 (Fla. 1985), this Court rejected a challenge to the jury instructions which failed to advise the jury of the prohibition against improper doubling. There, this Court concluded improper doubling was only error if the judge doubled up aggravators in his sentencing order ("it is this sentencing order which is subject to review vis-a-vis doubling"). Espinosa specifically rejects this reasoning. In Smalley, this Court distinguished Maynard on this basis: "In Oklahoma the jury is the sentencer, while in Florida the jury gives an advisory opinion to the trial judge, who then passes sentence." 546 So. 2d at 722. Espinosa clearly overturns this distinction ("neither actor must be permitted to weigh invalid aggravating circumstances," 112 S. Ct. at 2929).

Espinosa clearly rejected both of this Court's prior lines of reasoning. Florida juries must actually apply the narrowing constructions of the otherwise facially vague and overbroad

aggravating factors. Further, the judge's awareness of the narrowing constructions does not cure the overbroad statutory language where the judge is also required to give great weight to the jury's recommendation.

This Court has steadfastly held for many years that Maynard and Godfrey did not affect Florida's capital proceedings. This Court repeatedly held that those cases and their progeny had no application in Florida. See Porter v. Dugger, 559 So. 2d 201, 203 (Fla. 1990)("Maynard does not affect Florida's death sentencing procedures"); Brown v. State, 565 So. 2d 304, 308 (Fla. 1990)("We have previously found Maynard inapposite to Florida's death penalty sentencing"); Occhicone v. State, 570 So. 2d 902, 906 (Fla. 1990)("Maynard [citation] did not make Florida's penalty instructions on cold, calculated, and premeditated and heinous, atrocious, or cruel unconstitutionally vague").

This Court has specifically and repeatedly held that the jury need not receive the narrowing constructions of aggravating circumstances. 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.[1]

The failure to advise the jury of the narrowing construction of "heinous, atrocious and cruel" was upheld by this Court in Smalley v. State.[2] 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); Occhicone v. State, 570 So. 2d 902, 906 (Fla. 1990); Robinson v. State, 574 So. 2d 108, 113 (Fla. 1991); Trotter v. State, 576 So. 2d 691, 694 (Fla. 1990); Engle v. Dugger, 576 So. 2d 696, 704 (Fla. 1991); Hitchcock v. State, 578 So. 2d 685, 688 (Fla. 1990); Shere

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[1]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).

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

v. State, 579 So. 2d 86, 95 (Fla. 1991); Davis v. State, 586 So. 2d 1038, 1040 (Fla. 1991). This Court specifically relied on Smalley in denying Mr. Roberts post-conviction relief. Roberts v. State, 568 So. 2d 1255, 1258 (Fla. 1990).

This Court recognized Hitchcock was a change in law because it found that the jury instruction given prior to Lockett failed to cure the Eighth Amendment error found in the Florida death penalty statute. Hitchcock further held that judge sentencing did not cure the constitutional defect before the jury. In addition, it rejected the notion that mere presentation of the nonstatutory mitigation cured the statutory defect. After Hitchcock, this Court recognized that the facial invalidity of the Florida death penalty statute constituted fundamental error where the jury had not been receiving a curing instruction. This Court held that petitions for a writ of habeas corpus could be presented containing "Hitchcock" claims. Downs v. Dugger, 514 So. 2d 1069, 1071 (1987). So too here, Espinosa establishes fundamental error where the sentencing jury does not receive the narrowing construction which is necessary to cure the facially vague overbroad aggravating factors. State v. Johnson, 18 Fla. L. Weekly at 56 (fundamental error occurs when the error is "equivalent to the denial of due process"); Trushin v. State, 425 So. 2d at 1129 (fundamental error includes facial invalidity of a statute due to "overbreadth").

"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. Facially vague and overbroad statutes which implicate a "liberty" interest and violate due process raise fundamental error questions which are cognizable even though not objected to at trial. State v. Johnson. This Court held in Witt "that only major constitutional changes of law" as determined by either this Court or the United States Supreme Court which establish fundamental error 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; Richmond. Obviously, the decisions qualify under Witt to be changes in law.[3] The question is whether the decisions amount to a change of "fundamental significance." Witt, 387 So. 2d at 931.

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

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[3]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.

been followed explicitly by this Court throughout that time period failed to cure the facially overbroad statute.[4]

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 Richmond claims a forum. The error was perpetuated by this Court in repeatedly denying the precise Eighth Amendment challenge found meritorious in Espinosa and Richmond. The error in many ways is the same error at issue in Hitchcock, i.e., does the judge sentencing insulate fundamental errors before the jury from review. It was this Court's erroneous answer to that question which now taints Mr. Roberts' sentence of death.

Furthermore, this Court has held fundamental error can be raised at any time. To qualify as fundamental error, "the error must be basic to the judicial decision under review and equivalent to a denial of due process." State v. Johnson, 18 Fla. L. Weekley 55, 56 (Fla. 1993). "The facial validity of a statute, including an assertion that the state is infirm because of overbreadth, can be raised for the first time on appeal ...." Trushin v. State, 425 So. 2d 1126, 1129 (Fla. 1983). Fundamental error may be raised in a petition for writ of habeas corpus. Way

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[4]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.

v. Dugger, 568 So. 2d 1263 (Fla. 1990); Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965).

Espinosa establishes that fundamental error occurred at the penalty phase proceedings leading to Mr. Roberts' sentence of death.

I. 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. Roberts' 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. Roberts 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. Roberts' sentence of death, and of this Court's appellate review. Mr. Roberts' claims are therefore of the type classically considered by this Court pursuant to its habeas corpus jurisdiction. This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. See, e.g., Riley; Downs; Wilson, supra. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984). The petition includes claims predicated on significant, fundamental and retroactive changes in constitutional law. See, e.g., Thompson v. 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. Roberts' claims.

This Court therefore has jurisdiction to entertain Mr. Roberts' claims and to grant habeas corpus relief. This and other Florida courts have consistently recognized that the writ must issue where fundamental error occurs on crucial and dispositive points, or where a defendant received ineffective assistance of appellate counsel. See, e.g., Wilson v. Wainwright, supra, 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).

The claims Mr. Roberts presents are no less substantial than those involved in the cases cited above. He therefore respectfully urges that the Court grant habeas corpus relief.

II. PROCEDURAL HISTORY

On June 21, 1984, Mr. Roberts was charged by indictment with the first degree murder of George Napoles, sexual battery of Michelle Rimondi, and two counts of robbery and kidnapping of Michelle Rimondi. Mr. Roberts entered a plea of not guilty to the charges and was tried before a jury in December of 1985.

After deliberating for twenty three (23) hours, the jury returned a verdict of guilty of first degree murder, sexual battery, and kidnapping, and not guilty of robbery.

In the penalty phase of the trial, the court instructed the jury on several aggravating circumstances, but failed to include the narrowing constructions adopted by this Court. The jury was also instructed regarding the statutory mental health mitigating factors. However, the jury was told that if the mental health mitigation did not rise to the statutory threshold level, only "other aspects" of Mr. Roberts character or background could be considered in mitigation. The trial was prior to the decision in Hitchcock v. Dugger, 481 U.S. 393 (1987), holding that error before a Florida jury was not cured by the judge sentencing. After being erroneously instructed and having deliberated, the jury, by the narrowest margin possible (seven to five (7-5)), recommended that Mr. Roberts be sentenced to death for the first-degree murder conviction.

Under Florida law, the trial judge was required to give great weight to the death recommendation. Prior to the sentencing hearing, the trial judge prepared his written findings as to the aggravating and mitigating circumstances surrounding the murder. At the conclusion of the sentencing, this pre-prepared order was entered. The aggravating circumstances found were as follows: (1) Mr. Roberts has previously been convicted of a violent felony; (2) Mr. Roberts was under sentence of imprisonment; (3) the murder was committed while Mr. Roberts was

engaged in the crime of sexual battery; and (4) it was especially heinous, atrocious and cruel (R. 581-84). The court sentenced Defendant to death (R. 587).

On appeal the Florida Supreme Court affirmed Mr. Roberts' conviction and sentence of death. Roberts v. State, 510 So. 2d 885 (Fla. 1987). On September 28, 1989, Mr. Roberts timely filed his Rule 3.850 motion in state court. At a status hearing conducted on October 25, 1989, the court ruled that the motion to vacate should be summarily denied. No evidentiary hearing was held. A notice of appeal was promptly filed.

The Florida Supreme Court, in its opinion of September 6, 1990, affirmed the trial court's denial of his 3.850 motion and denied his petition for a writ of habeas corpus. Mr. Roberts' petition for rehearing was denied on November 27, 1990. Roberts v. Dugger, 568 So. 2d 1255 (Fla. 1990).

Mr. Roberts thereupon sought federal habeas relief. Proceedings are pending in federal court on Mr. Roberts' petition.

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. Roberts' 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

FLORIDA'S STATUTE SETTING FORTH THE AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED IN A CAPITAL CASE IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF EIGHTH AND FOURTEENTH AMENDMENTS. THE FACIAL INVALIDITY OF THE STATUTE WAS NOT CURED IN MR. ROBERTS' CASE WHERE THE JURY DID NOT RECEIVE ADEQUATE NARROWING CONSTRUCTIONS. AS A RESULT, MR. ROBERTS' SENTENCE OF DEATH IS PREMISED UPON FUNDAMENTAL ERROR WHICH MUST BE CORRECTED NOW IN LIGHT OF NEW FLORIDA LAW, ESPINOSA V. FLORIDA.

At the time of Mr. Roberts' trial, sec. 921.141, Fla. Stat. (1985), provided in pertinent part:

> (5) AGGRAVATING CIRCUMSTANCES.-- Aggravating circumstances shall be limited to the following:
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> (a) The capital felony was committed by a person under sentence of imprisonment.
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> (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
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> ...
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> (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
>
> ...
>
> (h) The capital felony was especially heinous, atrocious or cruel.
>
> ....

The United States Supreme Court recently said, "'there is no serious argument that [the language "especially heinous, cruel or

depraved"] is not facially vague.'" Richmond v. Lewis, 113 S. Ct. 528, 534 (1992). Clearly, Florida's statutory language ("especially heinous, atrocious, or cruel") is facially vague and overbroad in violation of the Eighth and Fourteenth Amendments. In addition, this Court has said that where an aggravator merely repeats an element of the crime of first degree murder the aggravator is facially vague and overbroad. Porter v. State, 564 So. 2d 1060, 1063-64 (Fla. 1990). Since Mr. Roberts was convicted of felony murder, the "in the course of a felony" aggravating factor was facially vague and overbroad.

"[I]n a 'weighing' State [such as Florida], where the aggravating and mitigating factors are balanced against each other, it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor, even if other, valid aggravating factors obtain." Richmond, 113 S. Ct. at 534. A facially vague and overbroad aggravating factor may be cured where "an adequate narrowing construction of the factor" is adopted and applied. Id. However, in order for the violation of the Eighth and Fourteenth Amendments to be cured, "the narrowing construction" must be applied during a "sentencing calculus" free from the taint of the facially vague and overbroad factor. Id. at 535.

In Florida, great weight is given to a jury's recommendation of death. "By giving 'great weight' to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found." Espinosa v. Florida, 112

S. Ct. 2926, 2928 (1992). This indirect weighing of the facially vague and overbroad aggravator violates the Eighth and Fourteenth Amendment. Id. Therefore, the jury's sentencing calculus must be free from facially vague and overbroad aggravating factors. Id. at 2929. Thus, in order to cure the facially vague and overbroad statutory language, the jury must receive the adequate narrowing construction. Id. at 2928.

Espinosa was a repudiation of this Court's prior reasoning that the judge's consideration of the narrowing construction cured the facially vague and overbroad statutory language. See Smalley v. State, 546 So. 2d 720 (Fla. 1989); Suarez v. State, 481 So. 2d 1201 (Fla. 1985); Deaton v. State, 480 So. 2d 1279 (Fla. 1985); Breedlove v. State, 413 So. 2d 1 (Fla. 1982). Espinosa was a change of "fundamental significance." Witt v. State, 387 So. 2d 922, 931 (Fla. 1980).

Moreover, Richmond and Espinosa have established that Mr. Roberts' sentence of death rests on fundamental error. Fundamental error occurs when the error is "equivalent to the denial of due process." State v. Johnson, 18 Fla. L. Weekly 55, 56 (Fla. 1993). Fundamental error includes facial invalidity of a statute due to "overbreadth" which impinges upon a liberty interest. Trushin v. State, 425 So. 2d 1126, 1129 (Fla. 1983). The failure to instruct on the necessary elements a jury must find constitutes fundamental error. State v. Jones, 377 So. 2d 1163 (Fla. 1979).

Under Florida law, aggravating circumstances "must be proven beyond a reasonable doubt." Hamilton v. State, 547 So. 2d 630, 633 (Fla. 1989). In fact, Mr. Roberts' jury was so instructed. Florida law also establishes that limiting constructions of the aggravating circumstances are "elements" of the particular aggravating circumstance. "[T]he State must prove [the] element[s] beyond a reasonable doubt." Banda v. State, 536 So. 2d 221, 224 (Fla. 1988). Unfortunately, Mr. Roberts' jury received no instructions regarding the elements of the aggravating circumstances submitted for the jury's consideration. This was fundamental error. State v. Jones.

Moreover, the statute is facially vague and overbroad in violation of the Eighth and Fourteenth Amendments. It impinges upon a liberty interest. Thus, the application of the statute violated due process and constituted fundamental error. State v. Johnson, 18 Fla. L. Weekly at 56. Accordingly, this fundamental error is cognizable in habeas corpus proceedings since Espinosa and Richmond are decisions of "fundamental significance" revealing fundamental error. Witt v. State, 387 So. 2d at 931.

CLAIM II

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. Roberts' case, the jury's death recommendation was tainted by Eighth Amendment error. The jury received constitutionally inadequate instructions regarding the

aggravating circumstances. The instructions were erroneous, and the jury considered invalid aggravating circumstances, as Espinosa v. Florida and Shell v. Mississippi, 111 S. Ct. 313 (1990), explicitly hold. Under Espinosa, it must be presumed that the erroneous instructions tainted the jury's recommendation with Eighth Amendment error. Under these circumstances, it must be presumed that the judge's death sentence was tainted with Eighth Amendment error as well. Espinosa v. Florida.

The jury instructions provided inadequate guidance regarding the aggravating circumstances. The jury was simply told:

> "The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence."
>
> "The crime for which the Defendant is to be sentenced was committed while he was under sentence of imprisonment."
>
> "The Defendant has been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person."
>
> "The crime for which the Defendant is to be sentenced was committed while he was engaged in the commission of or the attempt to commit the crime of sexual battery and/or kidnapping."
>
> "The crime for which the Defendant is to be sentenced was especially wicked, evil, atrocious or cruel."

(R 3496-97).

The "in the course of a robbery" instruction lacked the limiting language of this Court in Rembert v. State, 445 So. 2d 337, 340 (Fla. 1984), while the "under sentence of imprisonment"

instruction contained none of the strictures imposed by this Court in Songer v. State, 544 So. 2d 1010 (Fla. 1984). The "heinous, atrocious, and cruel" instruction was identical to that instruction expressly struck down in Espinosa and did not contain the limiting language which this Court employed in State v. Dixon, 283 So. 2d 1 (1973).

In Espinosa, the Supreme Court explained that "an aggravating circumstance is invalid . . . if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." 112 S. Ct. at 2928. Under these circumstances, it must be presumed that the erroneous instruction tainted the jury's recommendation, and in turn the judge's death sentence, with Eighth Amendment error. Espinosa, 112 S. Ct. at 2928. Mr. Roberts was sentenced to death. Again, Espinosa clearly holds that because Florida law requires great weight be given to the jury's death recommendation, the Eighth Amendment errors before the jury infected the judge's imposition of death. Thus, a reversal is required unless the errors were harmless beyond a reasonable doubt. Stringer v. Black.

The errors were not harmless beyond a reasonable doubt. Here, it cannot be contested that mitigating circumstances were present which would have constituted a reasonable basis for a life recommendation. As Judge Tjoflat recently stated:

> I cannot conceive of a situation in which a pure reviewing court would not be acting arbitrarily in affirming a death sentence after finding a sentencing error

> that relates, as the error does here, to the balancing of aggravating and mitigating circumstances. It is simply impossible to tell what recommendation a properly instructed jury would have made or the decision the sentencing judge would have reached.

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

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 . . . instruction was harmless." Similarly, harmless error analysis must be conducted as to whether the jury's consideration of the wholly invalid aggravating factors upon which it was inadequately instructed was harmless beyond a reasonable doubt. No analysis of the Eighth Amendment errors before the jury has been conducted, nor can any meaningful analysis result in anything less than a remand for a new sentencing hearing before a properly instructed jury.

Here, the jury was not only improperly instructed, the prosecutor took advantage of these instructions by repeatedly proffering arguments which were directly contrary to this Court's decisions. As regards the under sentence imprisonment aggravating factor, the prosecutor argued:

> The first aggravating circumstance that we see is the one that we're going to argue first, the crime for which the Defendant has to be sentenced and was committed while the Defendant was under sentence of imprisonment. If you find that to have been proven, then there is an aggravating circumstance which

you certainly can consider. This is sort of a cut and dry type of thing.

In other words, the defendant was at the time under sentence of imprisonment when he committed the offense, or he wasn't, and the documents that we have introduced into this trial and the testimony that you have heard shows you that the Defendant, Ricky Roberts, had been convicted in Maryland in 1974 and had been at that time sentenced to life imprisonment and had ultimately been paroled from that sentence after serving approximately eight and one-half years in prison.

Once again, he was paroled.

He then came to Florida ultimately and committed the crimes against George Napoles and Michelle Rimondi which you have heard during the course of this trial.

You might think, for example, "Well, the guy who was on parole, he wasn't under sentence of imprisonment, he wasn't in prison, he was on parole."

Well, this is true, but the law says that if you're on parole that is a functional equivalent of a sentence of imprisonment so, if you find the Defendant, Ricky Roberts, was, in fact, on parole, as I think you will when you examine these documents, then the State has proven that first aggravating factor, that is, the crime was committed by the Defendant while he was under sentence of imprisonment.

(R 3445-46).

The prosecutor argued as to the prior crime of violence:

Mr. Lange pointed out that the victim didn't come in to testify. That is absolutely true, but I don't think you will see anywhere on this chart that the victim herself not testifying is a mitigating factor, just because the victim didn't come in. That's not mitigating.

(R 3448).

As to especially heinous, atrocious or cruel, the prosecutor urged an overbroad application:

> It's not a pleasant thing to do. It's very important thing to do. Dr. Micozzi helps us to show that the crime was, in itself, cruel, heinous and atrocious. I think even without Dr. Micozzi, I think each of you would be able to agree that this crime is particularly cruel because you have somebody who has really not done any harm to anyone out there, drinking to much and lying in the back seat of the car, so a guy comes up with an idea of raping his girlfriend.

(R 3453).

Clearly, then, the jury's death recommendation is tainted by Eighth Amendment errors. The jury received inadequate instructions which must be presumed to have affected the consideration of aggravating circumstances and resulted in extra thumbs on the death side of the scales. Espinosa; Stringer. Since Espinosa is a change in law, this claim is cognizable now. The prosecutor compounded this error by arguing that the circumstances were substantially broader than what this Court has held them to be. Under Espinosa, this Court must revisit the issue and conduct the appropriate analysis. In light of the mitigation before the jury, the errors cannot be harmless beyond a reasonable doubt, and a new jury sentencing must be ordered.

CLAIM III

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

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

Mr. Roberts was convicted of one count of first-degree murder, with sexual assault being the underlying felony. The jury was instructed on both premeditated and felony murder, and returned a general verdict. At the penalty phase, the jury was instructed on the "felony murder" aggravating circumstance. The death penalty in this case was predicated upon an unreliable automatic findings of a statutory aggravating circumstances -- the very felony underlying the conviction.[5]

A state cannot use aggravating "factors which as a practical matter fail to guide the sentencer's discretion." Stringer v.

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[5]This Court recognized in Porter v. State, 564 So. 2d 1060, 1063-64 (Fla. 1990), that an aggravator which merely repeats an element of first degree murder is facially vague and overbroad.

Black, 112 S. Ct. 1130 (1992). Stringer is new law which has been articulated since Mr. Roberts' prior proceedings and has become applicable to Florida through Espinosa. The sentencer, as instructed at Mr. Roberts' trial, 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). If Mr. Roberts 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.

Recently the Wyoming Supreme Court addressed this issue in Engberg v. Meyer, 820 P.2d 70 (Wyo. 1991). In Engberg, the Wyoming court found the use of an underlying felony both as an

element of first degree murder and as an aggravating circumstance to violate the eighth amendment:

> In this case, the enhancing effect of the underlying felony (robbery) provided two of the aggravating circumstances which led to Engberg's death sentence: (1) murder during commission of a felony, and (2) murder for pecuniary gain. As a result, the underlying robbery was used not once but three times to convict and then enhance the seriousness of Engberg's crime to a death sentence. All felony murders involving robbery, by definition, contain at least the two aggravating circumstances detailed above. This places the felony murder defendant in a worse position than the defendant convicted of premeditated murder, simply because his crime was committed in conjunction with another felony. This is an arbitrary and capricious classification, in violation of the Furman/Gregg narrowing requirement.
>
> Additionally, we find a further Furman/Gregg problem because both aggravating factors overlap in that they refer to the same aspect of the defendant's crime of robbery. While it is true that the jury's analysis in capital sentencing is to be qualitative rather than a quantitative weighing of aggravating factors merely because the underlying felony was robbery, rather than some other felony. The mere finding of an aggravating circumstance implies a qualitative value as to that circumstance. The qualitative value of an aggravating circumstance is unjustly enhanced when the same underlying fact is used to create multiple aggravating factors.
>
> When an element of felony murder is itself listed as an aggravating circumstance, the requirement in W.S. 6-5-102 that at lest one "aggravating circumstance" be found for a death sentence becomes meaningless. Black's Law Dictionary, 60 (5th ed. 1979) defines aggravation as follows:
>
> > "Any circumstance attending the commission of a crime or tort which increases its guilt or enormity

> or adds to its injurious consequences, but which is above and beyond the essential constituents of the crime or tort itself." (emphasis added).
>
> As used in the statute, these factors do not fit the definition of "aggravation." The aggravating factors of pecuniary gain and commission of a felony do not serve the purpose of narrowing the class of persons to be sentenced to death, and the Furman/Gregg weeding-out process fails.

820 P.2d at 89-90.

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

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

820 P.2d at 92. In State v. Middlebrooks, No. 01-S-01-9102-CR-00008, Supreme Court of Tennessee (decided September 8, 1992), the Tennessee Supreme Court followed the decision in Engberg. In a decision remanding for a new sentencing a case involving the torture murder of a fourteen year old boy, the Tennessee Supreme Court adopted the rationale expressed by Justice Rose of the Wyoming Supreme Court seven years before the majority of that

court granted Mr. Engberg a new sentencing hearing in Engberg v. Meyer:[6]

> Automatically instructing the sentencing body on the underlying felony in a felony murder case does nothing to aid the jury in its task of distinguishing between first-degree homicides and defendants for the purpose of imposing the death penalty. Relevant distinctions dim, since all participants in a felony murder, regardless of varying degrees of culpability, enter the sentencing stage with at least one aggravating factor against them.
>
> * * *
>
> A comparison of the sentencing treatments afforded first-degree-murder defendants further highlights the impropriety of using the underlying felony to aggravate felony-murder. The felony murderer, in contrast to the premeditated murderer, enters the sentencing stage with one aggravating circumstance automatically against him. The Disparity in sentencing treatment bears no relationship to legitimate distinguishing features upon which the death penalty might constitutionally rest.

Middlebrooks, slip op. at 55, citing Engberg v. State, 686 P.2d 541, 560 (Wyo. 1984)(Rose J., dissenting).

Compounding this error is the fact that this Court has held that the aggravating circumstance of "in the course of a felony" is not sufficient by itself to justify a death sentence in a felony-murder case. Rembert v. State, 445 So. 2d 337, 340 (Fla. 1984)(no way of distinguishing other felony murder cases in which defendants "receive a less severe sentence"); Proffitt v. State, 510 So. 2d 896, 898 (Fla. 1987)("To hold, as argued by the

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[6]At that new sentencing hearing Mr. Engberg received a life sentence.

State, that these circumstances justify the death penalty would mean that every murder during the course of a burglary justifies the imposition of the death penalty"). However here, the jury was instructed on this aggravating circumstance and told that it was sufficient for a recommendation of death unless the mitigating circumstances outweigh the aggravating circumstance. The jury did not receive an instruction explaining the limitation contained in Rembert and Proffitt. There is no way at this juncture to know whether the jury relied on this aggravating circumstance in returning its death recommendation. "[I]t is constitutional error to give weight to an unconstitutionally vague aggravating factor, even if other, valid aggravating factors obtain." Richmond, 113 S. Ct. at 534. In Maynard v. Cartwright, 486 U.S. at 461-62, the Supreme Court held that the jury instructions must "adequately inform juries what they must find to impose the death penalty." Espinosa v. Florida held that Florida sentencing juries must be accurately and correctly instructed regarding aggravating circumstances in compliance with the eighth amendment. This claim is cognizable in these proceedings on the basis of Stringer v. Black and Espinosa v. Florida.

Mr. Roberts was denied a reliable and individualized capital sentencing determination, in violation of the sixth, eighth, and fourteenth amendments. The 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.

Relief is proper at this time.

CONCLUSION

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

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by United States Mail, first class postage prepaid, to all counsel of record on January 21, 1993.

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

MARTIN J. MCCLAIN
Chief Assistant CCR
Florida Bar No. 0754773

THOMAS H. DUNN
Special Assistant CCR
Florida Bar No. 871753

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE
1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376

By: _____
Counsel for Petitioner

Copies furnished to:

Ralph Barriera
Assistant Attorney General
Ruth Bryan Owen Rhode Building
Dade County Regional Service Center
401 NW Second Avenue, Suite 921N
Miami, FL 33128