IN THE SUPREME COURT OF FLORIDA

CARY MICHAEL LAMBRIX,

Petitioner,

v. **Case No._____**

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

Respondent.
_____/

PETITION FOR WRIT OF HABEAS CORPUS AND EXTRAORDINARY RELIEF

Petitioner, CARY MICHAEL LAMBRIX, respectfully applies to this Court for a writ of habeas corpus and extraordinary relief. Petitioner also requests that the Court allow oral argument in this case due to the importance of the claims involved and their significance to this Court's capital punishment jurisprudence. See attached request.

PROCEDURAL HISTORY

1. The Circuit Court of the Twentieth Judicial Circuit, in and for Glades County, Florida, entered the judgment and sentence here at issue on March 22, 1984.

2. Mr. Lambrix was indicted on two counts of murder in the first degree on March 29, 1983.

3. Mr. Lambrix entered a plea of not guilty.

4. Mr. Lambrix's first trial before a Glades County jury ended with the declaration of a mistrial on December 17, 1983.

5. A second trial before a second Glades County jury commenced on February 20, 1984. That jury returned a verdict of guilty on both counts of the indictment on February 24, 1984.

6. On February 27, 1984, the penalty phase of Mr. Lambrix's jury trial was held. Mr. Lambrix did not testify at either the guilt or penalty phases of the trial. A majority of the jury recommended death with regard to both convictions.

7. On March 22, 1984, sentencing before the judge was held, and the court imposed two sentences of death.

8. Mr. Lambrix unsuccessfully took a direct appeal from his convictions and sentences. Lambrix v. State, 494 So. 2d 1143 (Fla. 1986). No Motion for Rehearing was ever filed.

9. On September 29, 1987, Mr. Lambrix, proceeding pro se, filed in this Court a Petition for a Writ of Habeas Corpus. The petition was thereafter supplemented by the Office of the Capital Collateral Representative (CCR).

10. The Florida Supreme Court denied Mr. Lambrix's Petition for a Writ of Habeas Corpus on August 18, 1988. Lambrix v. Dugger, 529 So. 2d 1110 (Fla. 1988).

11. The Governor of Florida signed a death warrant against Mr. Lambrix on September 28, 1988, scheduling his execution for November 30, 1988.

12. On October 27, 1988, Mr. Lambrix filed a Motion for Post-Conviction Relief, pursuant to Fla. R. Crim. P. 3.850, and thereafter filed a supplement to his motion in the circuit court. After a non-evidentiary hearing, the circuit court summarily

denied Mr. Lambrix's Rule 3.850 motion, ruling on the merits of every claim, and thereafter denied Mr. Lambrix's timely Motion for Rehearing. Notice of Appeal was filed immediately thereafter.

13. The Florida Supreme Court affirmed the denial of post-conviction relief. Lambrix v. State, 534 So. 2d 1151 (Fla. 1988).

14. On November 30, 1988, Mr. Lambrix, represented by CCR, filed a Petition for Writ of Habeas Corpus in the United States District Court for the Southern District of Florida. Lambrix v. Dugger, Civil Action No. 88-12107-Civ-Zloch.

15. On December 29, 1988, Mr. Lambrix filed a pro se Petition for Writ of Habeas Corpus (And Other Applicable Relief) in the trial court, raising a single claim of juror misconduct. The court denied relief and the Florida Supreme Court affirmed the denial of relief. Lambrix v. State, 559 So. 2d 1137 (Fla. 1990).

16. On May 1, 1989, the federal district court granted CCR's Motion to Withdraw as counsel and subsequently appointed Joel Lumer and Bob Josefsberg to represent Mr. Lambrix. On May 12, 1992, the district court denied relief, after holding an evidentiary hearing. Mr. Lambrix appealed the denial of relief to the Eleventh Circuit, which granted a certificate of probable cause to appeal.

17. On March 3, 1993, the Eleventh Circuit Court of Appeals granted the State's Motion to Hold Further Proceedings in

Abeyance, and directed Mr. Lambrix to return to state court in order to litigate any claims under Espinosa v. Florida, 112 S. Ct. 2926 (1992). Mr. Lambrix files the instant action pursuant to that order.

18. Other than discussed herein, Mr. Lambrix has filed no prior petitions, applications, or motions with respect to the judgments of conviction and sentence imposed.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Florida Rule of Appellate Procedure 9.100(a). This Court has jurisdiction, pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, Section 3(b)(9) of the Florida Constitution. The petition presents constitutional errors which directly concern the judgment of this Court during the appellate process, and the legality of Mr. Lambrix's conviction and 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, including ineffective assistance of counsel on appeal. See Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969). See also Johnson (Paul) v. Wainwright, 498 So. 2d 938 (Fla. 1987). Cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981).

This Court has long held that "habeas corpus is a high prerogative writ" which "is as old as the common law itself and

is an integral part of our own democratic process." Anglin v. Mayo, 88 So. 2d 918, 919 (Fla. 1955). Because it enjoys such historical stature, the writ of habeas corpus encompasses a broad range of claims for relief:

> The procedure for the granting of this particular writ is not to be circumscribed by hard and fast rules or technicalities which often accompany our consideration of other processes. If it appears to a court of competent jurisdiction that a man is being illegally restrained of his liberty, it is the responsibility of the court to brush aside formal technicalities and issue such appropriate orders as will do justice. In habeas corpus the niceties of the procedure are not anywhere near as important as the determination of the ultimate question as to the legality of the restraint.

Anglin, 88 So. 2d at 919-20. See also Seccia v. Wainwright, 487 So. 2d 1156 (Fla. 1st DCA 1986) (relying on Anglin). Thus, this Court has held, "Florida law is well settled that habeas will lie for any unlawful deprivation of a person's liberty." Thomas v. Dugger, 548 So. 2d 230 (Fla. 1989). When a habeas petitioner alleges such a deprivation, the petitioner "has a right to seek habeas relief," and this Court will "reach the merits of the case." Id. See also State v. Bolyea, 520 So. 2d 562, 564 (Fla. 1988) ("habeas relief shall be freely grantable of right to those unlawfully deprived of their liberty in any degree").

This Court has also consistently exercised its habeas jurisdiction to correct errors which occurred in the direct appeal process. When this Court is presented with an issue raised on direct appeal, and its disposition of the issue is shown to be fundamentally erroneous, the Court will not hesitate

to correct such errors in habeas corpus proceedings. As this Court has explained, the Court will "revisit a matter previously settled by the affirmance," if what is involved is a claim of "error that prejudicially denies fundamental constitutional rights . . . ." Kennedy v. Wainwright, 483 So. 2d 424, 426 (Fla. 1986). Further, this Court has addressed, pursuant to its habeas jurisdiction, claims premised on retroactive changes in the law. In particular, this Court has addressed claims under Espinosa v. Florida, 112 S. Ct. 2926 (1992). See, e.g., Occhicone v. Singletary, No. 80,234 (Fla., April 8, 1993). As set out in detail below, Espinosa and other recent United States and Florida Supreme Court decisions demonstrate that the disposition of Mr. Lambrix's appeal was fundamentally erroneous. In light of these circumstances, Mr. Lambrix respectfully urges this Honorable Court to "issue such appropriate orders as will do justice." Anglin, 88 So. 2d at 919.

PRELIMINARY STATEMENT

At the sentencing phase of Mr. Lambrix's trial, his jury was instructed to weigh the "especially heinous" aggravating factor. In Espinosa v. Florida, 112 S. Ct. 2926 (1992), the Supreme Court subsequently found the standard jury instruction on this aggravator unconstitutional. And in James v. State, 615 So. 2d 668 (Fla. 1993), this Court found Espinosa to be fully retroactive. Moreover, the jury instructions on the "cold, calculated and premeditated" and "pecuniary gain" aggravating factors given at Mr. Lambrix's trial were also unconstitutionally

vague under Espinosa. Further, the jury was instructed to consider the aggravating factor that the offense was committed during a robbery, which clearly did not apply. It was also highly questionable whether any of those aggravating factors had been proven beyond a reasonable doubt, but the trial court found all of them except the felony (robbery) aggravator. The trial court also found the aggravating factor of prior conviction of a capital felony, based on the fact that there were two murder convictions, although the State had expressly waived reliance on that factor before the jury. Finally, the only aggravating factor found that may have been valid -- that Mr. Lambrix was under a sentence of imprisonment -- was based on the fact that Mr. Lambrix had a two-year sentence, which had nearly expired, for a bad check conviction. Inexplicably, the trial court found no mitigation, although the bad check conviction was Mr. Lambrix's only prior conviction, and despite evidence of non-statutory mitigation concerning his difficult childhood, early good character and development of problems following a head injury while in military service.

Strangely, no sentencing issues were raised on direct appeal. In post-conviction proceedings, Mr. Lambrix alleged in this Court that his appellate counsel was ineffective and raised claims in the trial court under Maynard v. Cartwright, 486 U.S. 356 (1988), regarding the jury instructions and trial court findings on the "especially heinous" and "cold, calculated" aggravating factors. This Court rejected his claims of

ineffective assistance of counsel on appeal. Lambrix v. Dugger, 529 So. 2d 1110 (Fla. 1988). The trial court rejected his Maynard claims, and on appeal, while Mr. Lambrix was under a death warrant, this Court for some reason did not specifically address those claims. Lambrix v. State, 534 So. 2d 1151 (Fla. 1988).

As noted previously, following the filing of a federal habeas corpus petition, the federal district court held an evidentiary hearing and denied relief. On appeal to the Eleventh Circuit, among the claims raised by Mr. Lambrix was that the jury instructions given were unconstitutionally vague, i.e., the Maynard claims that had been presented to the state courts. When Mr. Lambrix cited Espinosa in support of his Maynard claims, the State moved the Eleventh Circuit to stay proceedings and remand the case to the state courts, contending that Mr. Lambrix had failed to exhaust these claims. Without ruling on the exhaustion issue, the Eleventh Circuit simply granted the State's motion.

It is clear that in remanding the case, the Eleventh Circuit was seeking a ruling from the state courts on the merits of Mr. Lambrix's claims, given the intervening decision in Espinosa. If the Eleventh Circuit had found that Mr. Lambrix had failed to exhaust his Espinosa claims, then there would have been no need to send the case back to state courts. Failure to raise a claim in appropriate state post-conviction proceedings in accordance with state procedural rules is itself a procedural default, see Teague v. Lane, 489 U.S. 288, 297-99 (1989), as the Eleventh

Circuit is well aware. See, e.g., Whiddon v. Dugger, 894 F.2d 1266 (11th Cir. 1990) (holding claim defaulted for failure to present within two year time limitation); Parker v. Dugger, 876 F.2d 1470, 1477 n.10 (11th Cir. 1989) (claim procedurally barred for failure to raise on direct appeal or in 3.850 proceedings), rev'd on other grounds, 111 S. Ct. 731 (1991). If the claim had indeed been defaulted for failure to raise it in state court, the Eleventh Circuit would simply have said so and determined whether there was cause and prejudice for the default, not directed that Mr. Lambrix return to state court.[1]

It is clear that Mr. Lambrix's Maynard claims have already been presented to this Court during the proceedings on his Rule 3.850 motion. This is evident from both a review of the procedural posture which his case was in when this Court issued its decision in Lambrix v. State, 534 So. 2d 1151 (Fla. 1988), and a review of that decision. Specifically, on September 28, 1988, the Governor of Florida signed a death warrant against Mr. Lambrix, scheduling his execution for November 30, 1988. On October 27, 1988, Mr. Lambrix filed a Rule 3.850 motion and application for stay of execution in the circuit court, and thereafter filed a supplement to the motion, which included his

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[1]That this is the proper explanation for the Eleventh Circuit action is clear from the federal district court action since it ruled on the merits of Mr. Lambrix's Maynard claims, rejecting the State's arguments that they were procedurally defaulted. Lambrix v. Dugger, Case No. 88-12107-Civ-Zloch, slip op. at 52-58 (S.D. Fla., May 12, 1992), appended hereto as Appendix 1. The district court and implicitly the Eleventh Circuit clearly understood that Mr. Lambrix has exhausted his claims in state court.

Maynard claims. On November 18, 1988, the circuit court summarily denied Mr. Lambrix's Rule 3.850 motion (ruling on the merits) and his application for stay of execution, and thereafter denied Mr. Lambrix's motion for rehearing. On November 28, 1988, Mr. Lambrix filed his application for stay of execution in the Florida Supreme Court, attaching the Rule 3.850 motion and supplement. This Court temporarily stayed Mr. Lambrix's execution to permit oral argument, and then issued its decision on November 30, 1988.

From this review, it is clear that the Maynard claims, like all the other issues presented in the Rule 3.850 motion, were fairly presented to this Court. The Federal District Court certainly reached this conclusion given its discussion of this issue. Appendix 1, at 4-14. The Eleventh Circuit, then, has now directed petitioner to present his claims to the state courts in order that the state courts would have the first opportunity to consider the effect of what is now clear error under Espinosa on petitioner's death sentences. The only issue properly before this Court, then, is the merits of Mr. Lambrix's claims of constitutional error.

On the merits, this is a clear case of error in the jury instructions, under not only Espinosa but its predecessors, Godfrey v. Georgia, 446 U.S. 420 (1980), and Maynard. Further, it is also clear that this Court's inconsistent formulations of the "especially heinous" aggravating factor deprived the trial court of adequate guidance concerning the application of that

factor, in violation of Sochor v. Florida, 112 S. Ct. 2114 (1992), and Arave v. Creech, 113 S. Ct. 1534 (1993). Given the weighing of invalid aggravating factors by the sentencers, Mr. Lambrix's death sentences must be set aside unless the errors were harmless beyond a reasonable doubt. Sochor; Stringer v. Black, 112 S. Ct. 1130 (1992).

In this case, as in Hitchcock v. State, 614 So. 2d 483 (Fla. 1993), it would be impossible to find that the errors were harmless beyond a reasonable doubt. This is true with respect to the undisputed error in instructing the jury on the "especially heinous" aggravating factor alone. Id. Further, it is literally impossible to tell what part instructions on three invalid aggravating circumstances -- cold, calculated; pecuniary gain; and felony murder -- played in the jury's death verdict. Any of those invalid aggravating circumstances could have been the one that was crucial to the sentencing jury. Moreover, there was mitigation presented that the jury could have relied on to support a life verdict -- evidence that petitioner had only one prior conviction, a conviction that did not involve violence; evidence of his traumatic childhood, in which he was abandoned by his mother; evidence of his good character and honorable military service; evidence that he was damaged by a serious head injury while in military service. A thumb was placed on "death's side of the scale" -- it is impossible to tell how the scales would have balanced if the thumb had not been there. Mr. Lambrix is

entitled to a new sentencing proceeding in which the scales are fairly balanced.

In addition to his claims regarding invalid aggravation, since Mr. Lambrix has been directed to file state proceedings at this time, he also presents a claim of fundamental error regarding his conviction. The State presented a theory of cold-blooded, planned and calculated murder at Mr. Lambrix's trial. That was the theory on which his conviction of premeditated murder was apparently based, and that was the theory on which the trial court found the "cold, calculated" aggravating factor. But that theory was only one possible inference from the scanty and circumstantial evidence concerning the manner in which the homicides took place. Other equally and indeed more plausible inferences from the circumstantial evidence were available. As such, Mr. Lambrix's convictions of premeditated murder are inconsistent with this Court's longstanding requirement that "[w]here the element of premeditation is sought to be established by circumstantial evidence, the evidence relied upon by the state must be inconsistent with every other reasonable inference." Cochran v. State, 547 So. 2d 928, 930 (Fla. 1989).

Inexplicably, appellate counsel failed to raise this claim of fundamental error regarding Mr. Lambrix's first-degree murder convictions. This Court should now review the merits of this claim, both because of the necessity to correct the miscarriage of justice that resulted when Mr. Lambrix was convicted of first-degree and sentenced to death based on insufficient evidence, and

because appellate counsel was ineffective in failing to raise this claim. When the merits are considered, Mr. Lambrix will be entitled either to a new trial or to have his convictions reduced to second-degree murder.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Lambrix asserts that his convictions and sentence of death were obtained and subsequently affirmed during this Court's appellate review process in violation of his rights as guaranteed by the 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. Lambrix's case, substantial and fundamental errors occurred in his capital trial. These errors were uncorrected by the appellate review process. As demonstrated below, relief is appropriate.

CLAIM I

MR. LAMBRIX'S JURY WEIGHED INVALID AND UNCONSTITUTIONALLY VAGUE AGGRAVATING CIRCUMSTANCES, IN VIOLATION OF HIS RIGHT TO AN INDIVIDUALIZED AND RELIABLE SENTENCING PROCEEDING, AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, §§ 9, 16 AND 17 OF THE FLORIDA CONSTITUTION.

Mr. Lambrix's death sentence resulted from a combination of errors in instructing his jury concerning the proper eighth amendment weighing of aggravating and mitigating circumstances. That there was fundamental constitutional error in the instructions to the jury is a matter which is now not open to

debate. Espinosa v. Florida, 112 S. Ct. 2926 (1992). Nor is there any question that in an appropriate case, those errors require that a new sentencing proceeding be conducted. Hitchcock v. State, 614 So. 2d 483 (Fla. 1993). Moreover, Espinosa is such a fundamental change in Florida law that it has been applied retroactively in post-conviction proceedings. James v. State, 615 So. 2d 668 (Fla. 1993). The Eleventh Circuit Court of Appeals directed Mr. Lambrix to return to state court to present his claim under Espinosa. This Court should take the opportunity presented to it to remedy the "Espinosa" constitutional violations that took place at Mr. Lambrix's trial and on appeal.

A. "Invalid" Aggravating Circumstances were Presented to Mr. Lambrix's Jury.

In Sochor v. Florida, 112 S. Ct. 2114, 119 L.Ed.2d 326 (1992), the Supreme Court made clear that the eighth amendment is violated whenever the sentencer in a "weighing" state, like Florida, considers an "invalid" aggravating circumstance. An aggravating circumstance may be invalid either because it does not apply as a matter of law, or because it is so undefined that it fails to offer adequate guidance to the sentencer. As the Court noted in Sochor, either type of error tilts the weighing process in favor of death:

> 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., thus "creat[ing] the risk of treat[ing] the defendant as more deserving of the death penalty." Id. Even when other valid aggravating factors exist as well, merely affirming a death 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, 494 U.S. 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).

Sochor, 119 L.Ed.2d at 336-37.

In the instant case, the trial court instructed the jury to consider five aggravating circumstances: that Mr. Lambrix was under sentence of imprisonment; that the murder was committed during a robbery; that the murder was committed for financial gain; that the crime was "especially wicked, evil, atrocious or cruel"; and that the crime was committed in a "cold, calculated and premeditated" manner. R. 2663. The jury instructions on the "especially heinous," "cold, calculated," and "pecuniary gain" aggravating factors were unconstitutionally vague. Moreover, the "committed during a robbery" aggravating factor did not apply as a matter of law. Thus, multiple "invalid" aggravating factors were presented to and weighed by the sentencing jury.

The trial court found five aggravating circumstances, those instructed upon with one difference -- it deleted the circumstance that the murder was committed during a robbery, and found instead that Mr. Lambrix had a prior conviction of a capital felony (each murder conviction serving to support the

aggravating factor with respect to the death of the other victim). R. 2701.[2] This Court affirmed the trial court's findings with respect to the aggravating factors. Lambrix v. State, 494 So. 2d 1143 (Fla. 1986).

Espinosa makes clear, however, that the constitutional propriety of Mr. Lambrix's death sentences does not end with the trial court findings concerning aggravating circumstances, but must extend to the jury's weighing process also. Espinosa, 112 S. Ct. at 2928. Because the jury's weighing process was "infected" by invalid aggravating factors, Mr. Lambrix's death sentences "must be invalidated." Stringer v. Black, 112 S. Ct. 1130, 1139 (1992); Espinosa, supra; Hitchcock, supra; and James, supra.

1. "Heinous, atrocious, or cruel" aggravating circumstance

Espinosa specifically holds that Florida's standard jury instructions on the "especially heinous, atrocious or cruel" aggravating factor, see, e.g., Florida Standard Jury Instructions (Criminal) (1981), violate the eighth amendment. As the Court noted in Espinosa, the weighing of an aggravating circumstance violates the eighth amendment if the description of the circumstance "is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." Espinosa, 112 S. Ct. at 2928. The Court further noted that it had previously held "instructions more specific and

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[2]The trial court found this aggravating factor despite the fact that the State specifically waived reliance on it before the sentencing jury. R. 2645.

elaborate" than Florida's "heinous, atrocious, or cruel" instruction to be unconstitutionally vague. Id.

After finding that the Florida jury is a co-sentencer for eighth amendment purposes, the United States Supreme Court had no difficulty in Espinosa in concluding that giving the standard Florida "heinous, atrocious, or cruel" instruction to the jury violated the eighth amendment. The Court also found that the error in Espinosa was not cured by any trial court "independent" weighing of aggravation and mitigation, even though the trial court did not improperly weigh the "especially heinous" aggravator:

> 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, 376-77 (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.

Espinosa, 112 S. Ct. at 2928 (emphasis added).

Espinosa makes it undeniable, therefore, that where a Florida jury recommends death after receiving either the standard "heinous, atrocious or cruel" jury instruction or any instruction that suffers from similar defects, see Godfrey, Maynard or Shell,

the verdict is infected with eighth amendment error. In such cases, the death sentence is tainted because the jury presumably weighed an invalid aggravating factor, thus placing a thumb on "death's side of the scale." Stringer v. Black, 112 S. Ct. 1130, 1137 (1992).

In Mr. Lambrix's case, as in Espinosa, the jury received no guidance concerning the application of the "especially heinous" aggravating factor. The trial court simply instructed them, in the language of the then standard instruction, that they could weigh the aggravating circumstance if they found that the murder was "especially wicked, evil, atrocious or cruel." R. 2663. Espinosa holds that this instruction is unconstitutionally vague. Espinosa v. Florida, 112 S. Ct. at 2928.

Importantly, given this Court's precedents subsequent to Espinosa, see James, supra, at the penalty phase charge conference, the defense requested that the court provide one or more limiting instructions for the "especially heinous" aggravating circumstance, based on the definition of the circumstance contained in Dixon v. State, 283 So. 2d 1 (1973). R. 1342-44, 1346; 2630, 2632. The State argued that the standard instruction adequately defined the circumstance, R. 2630-32, and the Court denied all of the requested instructions. R. 1342-44, 2633. By requesting specific instructions providing definition for the aggravating circumstance, and having those instructions denied, Mr. Lambrix clearly preserved his objection to the instructions. See Sochor v. Florida, 119 L.Ed.2d at 338 n.*,

citing State v. Heathcoat, 442 So. 2d 955, 957 (Fla. 1983); Buford v. Wainwright, 428 So. 2d 1389, 1390 (Fla.), cert. denied, 464 U.S. 956 (1983); De Parias v. State, 562 So. 2d 434, 435 (Fla. 3rd DCA 1990).

The State also requested an additional instruction on the "especially heinous" aggravating factor, to the effect that the aggravator could be weighed if it was proved that death was "caused by one or more of numerous wounds to the decedent." R. 1307, 2668. The defense objected to the instruction, in part on the grounds that it could allow the jury to find the factor on the basis of the number of blows, despite the fact that the evidence showed that the male victim (the only one struck by numerous blows) was unconscious after the first blow and did not suffer any defensive wounds. R. 2634-35. The court rejected that argument, R. 2635, and gave the instruction. R. 2668. This instruction only compounded the error of the standard instruction. First, it in no way cured the vagueness problem which permitted the jury to find the circumstance based on any facts it considered to be "especially wicked, evil, atrocious, or cruel." Second, it injected the likelihood that the jury could find the circumstance based on actions that took place after the victim was unconscious or even dead, in spite of the fact that consideration of such facts is improper. Cochran v. State, 547 So. 2d 928, 931 (Fla. 1989) ("Nor can the defendant's acts after the victim is unconscious support the especially heinous aggravating circumstance."), citing Jackson v. State, 451 So. 2d

458 (Fla. 1984); Clark v. State, 443 So. 2d 973 (Fla. 1983), cert. denied, 467 U.S. 1210 (1984). See also Rhodes v. State, 547 So. 2d 1201, 1208 (Fla. 1989) (strangulation of semiconscious victim not especially heinous); Herzog v. State, 439 So. 2d 1372 (Fla. 1983) (same).

With no meaningful guidance from the trial court, then, Mr. Lambrix's jury was told by the prosecution that the "heinous, atrocious, or cruel" aggravating circumstance applied to this case and justified a death sentence. R. 2649. There is no question that the instruction and argument prejudiced Mr. Lambrix, given this Court's precedents as to when a killing is "heinous, atrocious or cruel". There was no compelling evidence that either murder was "especially heinous" in the sense of being torturous -- there was no direct evidence as to how the female victim died, and the male victim lost consciousness immediately after the first blow, which evidently took him by surprise, as there were no defensive wounds, R. 2093. The instruction and the prosecutor's argument were clearly prejudicial since the jury was told to find the crime "especially heinous" based simply on the facts of the crime as a whole, including events that took place after the victims died or lost consciousness. Indeed, the trial court itself relied on the facts of the case as a whole in finding the presence of the "especially heinous" aggravating factor, R. 2701, making it all the more likely that the jury did also. Allowing the sentencer to decide if a crime is "especially heinous," based solely on a subjective decision as to how "bad"

the crime is, is not only inconsistent with Espinosa but is the type of standardless sentencing discretion that has been prohibited since Godfrey. See Arave v. Creech, 113 S. Ct. 1534, 1541 (1993) (distinguishing Idaho aggravating factor from aggravators described by "pejorative adjectives such as 'especially heinous, atrocious or cruel' . . . -- terms that describe a crime as a whole and that this Court has held to be unconstitutionally vague."). Instructing Mr. Lambrix's jury that they could sentence him to death if they found that the murders were "very bad" violated the Eighth Amendment and Article I, sections 9 and 17 of the Florida Constitution.[3]

2. "Cold, calculated and premeditated" aggravating circumstance

As with the "heinous, atrocious, and cruel" aggravating circumstance, the trial court instructed Mr. Lambrix's jury in the language of the standard instruction:

> Next, that the crime for which the Defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

R. 2663. Mr. Lambrix challenged the vagueness of this aggravating factor by pretrial motions, R. 22, 24; 87, 88-89, which the trial court denied. R. 1400-01; 1431-32.[4] The jury

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[3]For reasons discussed more fully below, even standing alone this error could not properly be found harmless. See Hitchcock v. State, 614 So. 2d 483 (Fla. 1993).

[4]Although Mr. Lambrix specifically requested that a transcript of the hearing at which these motions were denied be prepared, R. 1402, no such transcript appears in the record. To the extent that there is any question whether this issue was adequately preserved, this Court should remand to the trial court

did not receive any of the Florida Supreme Court's limiting constructions regarding this aggravating circumstance.

Like the instruction on the "especially heinous" aggravating factor, this instruction set the jury free to rely on virtually any of the facts of the case in finding the aggravating factor, and failed to convey to the jury the limiting construction placed on the aggravator by the Florida Supreme Court. In the absence of a limiting construction, the "cold, calculated" aggravating factor is unconstitutionally vague, Espinosa, and further fails to narrow the class of defendants eligible for the death penalty, see Arave v. Creech, 113 S. Ct. at 1542, because it conveys to the jury the notion that simple premeditation is sufficient for the aggravating factor to apply. An aggravating factor that would apply to every first-degree murder would violate the Eighth Amendment. Id.; Cannady v. State, 18 FLW S277 at 279 (Fla. 1993).

This Court has discussed the "cold, calculated" aggravating factor on numerous occasions. See, e.g., McCray v. State, 416 So. 2d 804, 807 (Fla. 1982); Combs v. State, 403 So. 2d 418 (Fla. 1981), cert. denied, 456 U.S. 984 (1982). In Jent v. State, 408 So. 2d 1024, 1032 (Fla.), cert. denied, 457 U.S. 1111 (1982), the court held that the "cold, calculated" aggravating factor requires proof beyond a reasonable doubt of a higher degree of premeditation than is required for first-degree murder. In King v. State, 436 So. 2d 50 (Fla. 1983), cert. denied, 466 U.S. 909

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for reconstruction of the record.

(1984), the court summarized the limitation on the "cold, calculated" aggravator:

> We do, however, question the finding that this murder was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification, as we have now defined this aggravating factor. The trial judge in this case did not have the benefit of our recent decisions in McCray[]; Jent[]; and Combs[]. Although premeditation was proven, we do not think that the evidence was sufficient to establish that this crime was committed in a cold and calculated manner. As we have stated, this "aggravating circumstance ordinarily applies in those murders which are characterized as executions or contract murders, although that description is not intended to be all-inclusive." McCray, 416 So. 2d at 807. We conclude that this was not a proper aggravating circumstance under the facts of this case.

King, 436 So. 2d at 55 (citations omitted).[5]

This Court has repeatedly confirmed that the "cold, calculated and premeditated" aggravator requires proof of "heightened premeditation":

> There is an utter absence of any evidence that Rogers in this case had a careful plan or prearranged design to kill anyone during the robbery. While there is ample evidence to support simple premeditation, we must conclude that there is insufficient evidence to support the heightened premeditation described in the statute, which must bear the indicia of "calculation."

Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987). This Court's decisions regarding this aggravator have emphasized that the

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[5]The evidence in King showed that the defendant had hit the woman he lived with in the head with a pipe; he then retrieved a gun from another room and shot her in the head. Id. at 51-52.

aggravating factor requires proof beyond a reasonable doubt of a "careful plan or prearranged design."[6] See Mitchell v. State, 527 So. 2d 179, 182 (Fla. 1988) ("the cold, calculated and premeditated factor [] require[es] a careful plan or prearranged design."); Hamblen v. State, 527 So. 2d 800, 805 (Fla. 1988) (factor refers to a "heightened form of premeditation which is greater than the premeditation required to establish first-degree murder."). This Court now requires trial courts to apply these limiting constructions and consistently rejects this aggravator when these limitations are not met. See, e.g., Waterhouse v. State, 596 So. 2d 1008 (Fla. 1992); Gore v. State, 599 So. 2d 978 (Fla. 1992); Jackson v. State, 599 So. 2d 103 (Fla. 1992); Green v. State, 583 So. 2d 647, 652-3 (Fla. 1991); Sochor v. State, 580 So. 2d 595, 604 (Fla. 1991); Holton v. State, 573 So. 2d 284, 292 (Fla. 1990).

Although this Court has required more for this aggravating circumstance to apply than simple premeditation, the jury was not told that in Mr. Lambrix's case.[7] Rather, it was instructed in terms as vague as those found constitutionally inadequate in Espinosa. The only definition of "premeditation" the jury ever received was the one that was given at the guilt phase regarding

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[6]In the instant case, there was no such proof, as Mr. Lambrix met the victims by chance in a bar. The lack of evidence of this factor is set out more fully below and in Claim IV.

[7] Although the trial court found this aggravator and this Court upheld it, Mr. Lambrix does not concede that the aggravator applies to his case. Mr. Lambrix contends that a properly instructed jury would have rejected this aggravator in light of the evidence. See Claims II and IV, infra.

what was necessary to establish guilt of first-degree murder. There was no instruction whatsoever on what it means for a killing to be cold and calculated, but as this Court has repeatedly held, the fact that a killing may be premeditated does not establish the "cold, calculated, and premeditated" aggravating circumstance. Moreover, it cannot be ignored that Mr. Lambrix's jury had found him guilty of premeditated murder. 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.

Moreover, as to the effect of this error, it is important to note that the State argued strenuously that this aggravating factor applied, R. 2650-51, because of the defendant's alleged actions after the offense -- eating a bowl of spaghetti; burying the bodies; and appearing "just normal, calm, no problem" to a witness who saw him not long after the offense. R. 2650. None of these alleged facts proved that Mr. Lambrix acted with heightened premeditation. Yet, because the jury was given no guidance concerning the application of the aggravating factor, there was no way for the jury to know that. The jury was set free to rely on "pejorative adjectives . . . that describe a crime as a whole," Arave v. Creech, 113 S. Ct. at 1541, in sentencing Mr. Lambrix to death. The Eighth Amendment and Article I, sections 9 and 17 of the Florida Constitution were violated thereby.

3. "Committed During a Robbery" and "Pecuniary Gain"[8]

The trial court instructed the jury that they could consider both the aggravating factor that the murder was committed during the course of a robbery and the factor that the murder was committed for pecuniary gain. R. 2663. The defense requested, R. 1312, and the court gave, R. 2668, an instruction that they should not consider the underlying conduct as supporting more than one aggravating circumstance.[9] In response to a defense objection concerning the State's argument, the State conceded that there was no evidence that either murder was committed during a robbery. R. 2648. The trial court also declined to find that the murder was committed during a robbery. R. 1354-55, 2701. Since the felony (robbery) aggravating factor did not apply as a matter of law, it was eighth amendment error to instruct the jury on it. Sochor, 119 L.Ed.2d at 341; Espinosa, 112 S. Ct. at 2928, see also Omelus v. State, 584 So. 2d 563 (Fla. 1991).

As was the case with the "heinous, atrocious or cruel" and "cold, calculated" aggravating circumstances, the trial court

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[8]Because Espinosa is premised on the sentencing jury's role as "a co-sentencer under Florida law," Johnson v. Singletary, No. 80,121, slip op. at 2 (Fla., Jan. 29, 1993), citing Sochor and Espinosa, thereby requiring that the jury be adequately instructed with respect to each potentially applicable aggravating factor, this Court should also review the merits of Mr. Lambrix's claims that these aggravating factors were invalid.

[9]Confusingly, however, the instruction referred to aggravating circumstances "eight" and "nine" although the jury was only instructed with respect to five aggravating circumstances.

instructed the jury on the pecuniary gain aggravating factor in the bare language of the statute: "the crime for which the Defendant is to be sentenced was committed for financial gain." R. 2663. The jury was never informed of any limiting construction of the aggravating factor. Given Espinosa, this was error.

This Court has repeatedly limited the pecuniary gain aggravating factor to cases where there is proof beyond a reasonable doubt that the motive for the murder was pecuniary gain, not where some property of the victim was taken as an afterthought after the murder. See, e.g., Peek v. State, 395 So. 2d 492 (Fla. 1980), cert. denied, 451 U.S. 964 (1981) (factor does not apply where car taken to facilitate escape); Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988), cert. denied, 490 U.S. 1037 (1989); Hardwick v. State, 521 So. 2d 1071, 1076 (Fla.), cert. denied, 488 U.S. 871 (1988). Moreover, where the evidence of a pecuniary motive is circumstantial, proof of the aggravator beyond a reasonable doubt requires that the evidence be "inconsistent with any reasonable hypothesis other than the existence of the aggravating circumstance." Simmons v. State, 419 So. 2d 316, 318 (Fla. 1982).

No limiting instruction constitutionally channelling the sentencer's discretion regarding the circumstance was ever provided to the jury. Over the defendant's objection, R. 2648, the State argued that this aggravator applied based on actions and statements allegedly made by Mr. Lambrix after the offense.

R. 2648-49. However, none of this evidence proved beyond a reasonable doubt that the motive for the murder was financial gain. It was equally consistent with the taking of the victims' property as an afterthought and, where the victim's car was concerned, as a means of escape. There was no evidence of prior planning of the offense (Mr. Lambrix met the victims in a bar the night of the offense) and no direct evidence of any pecuniary motivation. On these facts, under Simmons and Peek the pecuniary gain aggravating factor did not apply as a matter of law.[10]

But the jury was never told that any of this mattered. The jury was instead instructed to consider the pecuniary gain aggravating factor, without any guidance as to how to do so. Given the prosecutor's urging that they find this aggravator, we must presume that they did so. Espinosa, 112 S. Ct. at 2928. The failure to constitutionally channel the sentencer's discretion violated the Eighth Amendment and Article I, sections 9 and 17 of the Florida Constitution.

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[10]Indeed, this Court held that there was no basis to find the pecuniary gain aggravating factor with respect to the murder of the female victim. Lambrix v. State, 494 So. 2d at 1148. The jury was instructed, however, that they could weigh the aggravating factor with respect to both victims. R. 2663. This was eighth amendment error also.

B. **The Federal and State Constitutional Error Which Infected the Jury's Weighing Process Is Not Harmless Beyond A Reasonable Doubt.**

The effect on the resulting death sentence of a jury weighing invalid aggravating factors has been discussed by the United States Supreme Court in a number of cases, most recently Espinosa and Stringer v. Black, 112 S. Ct. 1130 (1992). In Stringer, the Court held that relying on such an aggravating factor, particularly in a weighing state, invalidates the death sentence:

> Although our precedents do not require the use of aggravating factors, they have not permitted a state in which aggravating factors are decisive to use factors of vague or imprecise content. A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying on the existence of an illusory circumstance. Because the use of a vague aggravating factor in the weighing process creates the possibility not only of randomness but also of bias in favor of the death penalty, we cautioned in Zant that there might be a requirement that when the weighing process has been infected with a vague factor the death sentence must be invalidated.

Id. at 1139.

Stringer makes clear that consideration of an invalid aggravating factor distorts the entire weighing process, adding improper weight to death's side of the scale depriving the

defendant of the right to an individualized sentence, and presumptively invalidating any death sentence:

> [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.

Id. at 1137. The "weighing process" in Mr. Lambrix's case was "skewed" in the same way that the process was skewed by the invalid aggravator in Espinosa.

This Court, in its earlier decisions in this cause, has not conducted any review of the effect of the error in the instructions to Mr. Lambrix's jury on the "heinous, atrocious, or cruel," "cold, calculated and premeditated," "during the commission of a robbery" or "pecuniary gain" aggravating factors. Rather, on direct appeal, this Court never acknowledged that there was any error in the jury instructions and simply reviewed the trial court's findings of the aggravating factors. Lambrix v. State, 494 So. 2d at 1148. However, it is now clear that Mr. Lambrix's jury was presented with four aggravating factors that were invalid under Espinosa. The state argued with equal fervor that these four aggravating factors were applicable and justified a sentence of death. None were emphasized more or less than the other. Any one of the errors standing alone requires a resentencing in this case before a new jury.

This is particularly true with respect to the instruction on the "especially heinous" aggravating factor, because of the uniquely powerful nature of that aggravator, see Maxwell v.

State, 603 So. 2d 490, 493 and n.4 (Fla. 1992). The "especially heinous" aggravating factor uses "pejorative adjectives" to "describe a crime as a whole." Arave v. Creech, 113 S. Ct. at 1541. Once the unguided jury has found the crime as a whole, and the defendant, to be especially bad, it would defy common sense to suppose that that determination could have no effect on their sentencing determination.

This Court's review of the trial court's findings on direct appeal regarding the aggravating factors present cannot be a substitute for a constitutionally proper harmless error analysis. Harmless error analysis with respect to capital sentencing jury instructions is fundamentally different from determining whether evidence is sufficient to support an aggravator. This Court has recognized this principle in the context of Hitchcock jury instruction error. As this Court has explained, "It is of no significance that the trial judge stated that he would have imposed the death penalty in any event," Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989), for jury harmless error review is quite different from the review involved when a trial judge's sentencing findings are at issue. Moreover, harmless error analysis of juror capital sentencing error is especially "difficult" because of the discretion afforded the sentencers. Satterwhite v. Texas, 486 U.S. 249, 258 (1988); Stringer v. Black, 112 S. Ct. 1130 (1992).

That is why this Court has noted that where, as here, mitigation is present, it would be "speculative" to find jury

sentencing error harmless. Hall, 541 So. 2d at 1128; see also Preston v. State, 564 So. 2d 120, 123 (Fla. 1990) (Juror sentencing error not harmless because "[t]here was mitigating evidence introduced, even though no statutory mitigating circumstances were found [by the trial judge]."). And that is why this Court, in a strangulation case, reversed a death sentence for Espinosa error, noting, "We cannot tell what part the instruction played in the jury's consideration of its recommended sentence." Hitchcock v. State, 614 So. 2d 483, 484 (Fla. 1993). Because errors such as those involved in Mr. Lambrix's case firmly press a thumb on "death's side of the scale," Stringer v. Black, 112 S. Ct. at 1137, such errors can rarely properly be found harmless beyond a reasonable doubt.

Under Sochor and Stringer, the appropriate harmless error analysis is that set out in Chapman v. California, 386 U.S. 18 (1967). Sochor, 119 L.Ed.2d at 341-42. This Court, of course, has recognized and adopted the Chapman standard. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). In several recent cases, however, while purporting to apply the Chapman standard, this Court has in fact significantly strayed from that standard. In its harmless error analysis in all of these cases, this Court, rather than asking whether the state has established beyond a reasonable doubt that the erroneous instruction did not contribute to the sentencing verdict, has asked whether, given the evidence, the aggravating factor would have been found if the jury had been properly instructed. See, e.g., Davis v. State,

No. 70,551 (Fla., April 8, 1993); Foster v. State, 614 So. 2d 455 (Fla. 1993); Thompson v. State, 18 FLW S212 (Fla. 1993); Slawson v. State, 18 FLW S209 (Fla. 1993). In all of these cases, then, this Court has essentially attempted to determine whether the outcome would have been different had the jury been properly instructed.

Chapman, however, mandates a different inquiry. Chapman requires that this Court determine "beyond a reasonable doubt that the error complained of did not contribute to the [sentence] obtained." Chapman, 386 U.S. at 24 (emphasis supplied). As the Supreme Court has recently explained, this means that the issue is not whether the outcome would have been different if the error had not occurred, but rather what effect the error actually had on the jury:

> The inquiry in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error.

Sullivan v. Louisiana, 1993 U.S. LEXIS 3741, at *9 (U.S., June 1, 1993). Under this standard, the errors in this case cannot be found harmless beyond a reasonable doubt in this case absent the type of "speculation" which the Eighth Amendment and the Florida Constitution forbid. See Stringer, 112 S. Ct. at 1137.

As discussed above, it is clear that the unconstitutionally vague "heinous, atrocious or cruel" instruction freed Mr. Lambrix's jury to find this aggravating factor based on anything about the crime they found to be "very bad." We must presume,

see Espinosa, that the jury improperly weighed this aggravator, "creat[ing] the risk that the jury . . . treat[ed] [Mr. Lambrix] as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance." Stringer, 112 S. Ct. at 1137. In light of the entire record, it would be impossible for this Court to find "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained," Chapman, 386 U.S. at 24.

The same can be said for the unconstitutionally vague instruction on the "cold, calculated and premeditated" aggravating circumstance. The jury was given no guidance as to the meaning of this aggravator. The only basis that the jury was instructed on and that was argued to the jury for the first-degree murder convictions was premeditation. See R. 2499, 2533. In such a case, it would be pure speculation to find that the jury did not automatically "assume" that this aggravating circumstance was established, given the absence of any further instruction on the words "cold, calculated" and "premeditated." Espinosa dictates that this Court presume that the jury applied the invalid aggravating circumstance. Espinosa, 112 S. Ct. at 2928. The same presumption applies to the invalid "during a robbery" and "pecuniary gain" aggravating circumstances. Under Espinosa, this Court must presume that the jury did rely on the invalid aggravating factors. This Court cannot say that the errors "did not contribute to the verdict [of death] obtained." Chapman, 386 U.S. at 24, or that the sentence "was surely

unattributable to the error." Sullivan, 1993 U.S. LEXIS 3741 at *9.

Of the five aggravating factors on which the jury was instructed, then, four were invalid. The only arguably valid aggravating factor was that Mr. Lambrix was under a sentence of imprisonment. The testimony revealed, however, that that sentence of imprisonment was a two-year sentence, which had nearly expired, on a bad check charge. R. 2582-3, 2587. For those reasons, the jury would have been entitled to consider that this aggravating factor was entitled to little weight. See Hallman v. State, 560 So. 2d 223, 227 (Fla. 1990). Moreover, when only one valid aggravating circumstance is present, a death penalty is only rarely warranted. See, e.g., DeAngelo v. State, No. 78,499, slip op. at 8 (Fla., April 8, 1993); Songer v. State, 544 So. 2d 1010, 1011 (Fla. 1989). Indeed, to argue that a bad check conviction, alone, is sufficient to transform a case into a death penalty case is without credibility.

Finally, in addressing whether the jury instruction errors were harmless, this Court must also look at the mitigation in the entire record. While the trial court did not find any mitigation, the record in this case contains a wealth of mitigation evidence that the jury could have relied on to recommend life and that led four jurors to vote for life with respect to the male victim. R. 1348. Given the wealth of statutory and non-statutory mitigating evidence, it can not be

said "beyond a reasonable doubt that the errors complained of did not contribute to the verdict."

Specifically, the jury was instructed to consider the statutory mitigating factor of no significant history of prior criminal activity. R. 2664. Mr. Lambrix's only prior conviction was a bad check charge. R. 2587. The jury was certainly entitled to consider this as a highly significant mitigating factor, particularly in light of Mr. Lambrix's youth. Also, there was abundant non-statutory mitigation. Mr. Lambrix's father, Donald Sr., testified that his wife left when Cary Michael Lambrix was a young child, that she put Cary Michael in a foster home, and that Donald Sr. had to get him out of the foster home. R. 2601-02. His stepmother testified that for a time Cary Michael had been left on the streets of San Francisco. R. 2610. Despite this traumatic early childhood, all of his family members testified that Cary Michael was a good, quiet, gentle boy who was in Boy Scouts, the choir and was an altar boy. R. 2592; 2605; 2611; 2617. Cary Michael served in the Army and was honorably discharged after an accident in which he sustained head injuries. R. 2593; 2603; 2618. While there had been no problems with Cary Michael as a boy, he started having some problems after the head injury. R. 2605.

The statutory and non-statutory mitigating evidence presented to the jury is surely sufficient to support a jury's verdict of life under Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). Had the jury been properly instructed on the aggravating

circumstances and voted for a life sentence, it is quite apparent that the trial court could not have overridden that recommendation.

It is no more possible for a reviewing court to determine here, without speculation, that the jury instruction error was harmless than it was in Omelus v. State, 584 So. 2d 563 (Fla. 1991), or in Hitchcock, supra. The instructions on the "heinous, atrocious, or cruel," "cold, calculated and premeditated," "during a robbery," and "pecuniary gain" aggravating circumstances violated Mr. Lambrix's rights under Article I, Section 17, of the Florida Constitution and under the eighth amendment. That error was not harmless beyond a reasonable doubt. Mr. Lambrix is entitled to a new sentencing proceeding before a properly instructed jury.

CLAIM II

THIS COURT HAS FAILED TO ADHERE TO A CONSISTENT LIMITING CONSTRUCTION OF THE "ESPECIALLY HEINOUS" AGGRAVATING FACTOR, AND THE TRIAL COURT FAILED TO APPLY ANY LIMITING CONSTRUCTION. MR. LAMBRIX'S RESULTING DEATH SENTENCE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 9, 16 AND 17 OF THE FLORIDA CONSTITUTION.[11]

In Florida, the sentencing authority is divided between the jury and the sentencing judge. Espinosa, 112 S. Ct. at 2928-29. There is no question that, like the penalty phase jury, the trial judge "is at least a constituent part of 'the sentencer'. . . ."

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[11]Because of its obvious relationship to petitioner's Espinosa claim, this claim is presented in this petition.

Sochor, 119 L.Ed.2d at 341. Thus, the trial judge's sentencing discretion, like the jury's, must be limited by "clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death." Godfrey v. Georgia, 446 U.S. 420, 428 (1980).

In his Maynard claims, both in state and federal court, Mr. Lambrix has asserted that there was inadequate guidance for both the sentencing jury and the sentencing judge. Recent United States Supreme Court decisions, notably Sochor and Arave v. Creech, 113 S. Ct. 1534 (1993), have made clear that those contentions were correct. Accordingly, this Court should exercise its habeas jurisdiction to revisit this claim.

In Arave v. Creech, 113 S. Ct. 1534 (1993), the Court applied a three part test for determining whether an aggravating circumstance adequately channels a trial court's sentencing discretion. Id. at 1540-41. The first question is whether the statutory definition of the aggravator "'is itself too vague to provide any guidance to the sentencer.'" Id. at 1541, quoting Walton v. Arizona, 497 U.S. 639, 654 (1990). Assuming the statutory language is vague, the second and third questions are whether the state courts have adopted a limiting construction of the aggravator, and if so, whether that limiting construction is constitutionally sufficient. Creech, 113 S. Ct. at 1541.

Under this analysis, there is no question that the language of Florida's "especially heinous, atrocious or cruel" aggravating

circumstance by itself does not provide any guidance to the sentencer, and thus fails to meet the first test.[12] In Creech, the Court further held that in order for a state limiting construction to be constitutionally sufficient, the state must "adhere[] to a single limiting construction," Creech, 113 S. Ct. at 1544, of an otherwise vague aggravating factor. As demonstrated below, the Florida Supreme Court does not have a "single limiting construction" of the heinousness aggravating factor, but rather a menu of constructions from which it chooses, constructions that give the trial courts and this Court sufficient latitude to find that virtually any first-degree murder is "especially heinous."

Florida's failure to "adhere[] to a single limiting construction" renders the heinousness aggravating factor useless as a means of genuinely narrowing the "'class of defendants eligible for the death penalty.'" Creech, 113 S. Ct. at 1542, quoting Zant v. Stephens, 462 U.S. 862, 877 (1983). Reliance on the aggravating factor therefore violates the Eighth Amendment. "If the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is infirm." Creech, 113 S. Ct. at 1542 (emphasis added) (citations omitted). Florida's heinousness aggravator is "infirm" for that very reason. Further, this Court has failed to provide and apply a constitutionally sufficient

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[12]Espinosa v. Florida, 112 S. Ct. 2926, 2628 (1992); Shell v. Mississippi, 498 U.S. 1 (1990); Maynard v. Cartwright, 486 U.S. 356, 364 (1988).

limiting construction of the "especially heinous" aggravating factor. Rather, the aggravator has been defined solely in terms of "pejorative adjectives such as 'especially heinous, atrocious or cruel'" that "describe a crime as a whole". Id. at 1541. Specifically, this Court has explicitly relied on the use of "pejorative adjectives" and particularly on descriptions of the "crime as a whole" in discussing the heinousness factor, rather than on any attempt to provide objective definition to the factor. See, e.g., Dixon v. State, 283 So. 2d 1, 9 (Fla. 1973) ("heinous means extremely wicked or shockingly evil" and "atrocious means outrageously wicked and vile"); Magill v. State, 428 So. 2d 649 (Fla.), cert. denied, 464 U.S. 865 (1983) (relying on the "entire set of circumstances surrounding the killing"). Perhaps not surprisingly, both the sentencing court and the Florida Supreme Court in this case followed this pattern by simply citing the facts of the "crime as a whole" to find heinousness, rather than applying any objective limiting construction whatsoever. Given Creech, this was constitutional error.

A. The Trial Court Failed to Apply Any Limiting Construction to the Aggravating Circumstance.

The trial court's entire finding with respect to the "especially heinous" aggravating factor reads as follows:

> 4. The capital felonies were especially heinous and atrocious. The facts speak for themselves.

R. 1355. The finding speaks for itself. The court cites no standards that it relied on, and recites no specific facts to

support the finding. The trial court relied entirely on the characterization of the offense by use of "pejorative adjectives such as 'especially heinous, atrocious or cruel' . . . that describe a crime as a whole and that this Court has held to be unconstitutionally vague." Creech, 113 S. Ct. at 1541. Clearly, there is no indication from the trial court sentencing order that it was applying any constitutionally sufficient limiting construction.

B. At the Time of Mr. Lambrix's Trial, this Court Had Failed to Adopt or Adhere to a Single Limiting Construction of the "Especially Heinous" Aggravating Factor.

Central to the United States Supreme Court's capital punishment jurisprudence is the principle that an aggravating circumstance must "genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S. 862, 877 (1983); Creech, supra. To do this, the aggravator must "provide a principled basis" for distinguishing those who deserve death from those who do not. "If the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm." Arave v. Creech, 113 S. Ct. at 1542. For a limiting construction of an otherwise vague aggravating factor to be constitutionally sufficient, it is obvious that there must be a single, consistently applied formulation of the limiting construction which truly narrows the class of those eligible for the death penalty. Without such a consistent formulation, the sentencer is left free to apply the aggravating

factor to virtually any case.[13] At the time of Mr. Lambrix's trial, the Florida Supreme Court had no single, consistent formulation of the aggravating factor. The trial court was free to apply -- and did in fact apply -- unfettered discretion in finding and weighing the invalid aggravating factor.

In Proffitt v. Florida, 428 U.S. 246 (1976), the Supreme Court approved Florida's heinousness aggravating factor on the understanding that the factor was limited to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." Proffitt, 428 U.S. at 255-56; see also Lewis v. Jeffers, 110 S. Ct. 3092, 3099 (1990). The Proffitt Court's understanding of the aggravator was based on its reading of Dixon v. State, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). After Sochor, this Court has apparently recognized that without the Dixon/Proffitt limiting language, the heinousness aggravating factor is invalid. See Elledge v. State, 613 So. 2d 434 (Fla. 1993) (disapproving jury instruction that omitted the "unnecessarily torturous to the victim" language); Cannady v. State, 18 F.L.W. S277 (Fla., May 6, 1993) (holding that the heinousness aggravating factor applies only to "torturous"

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[13]For example, if there are three available formulations, "A," "B," and "C," that together make up the entire universe of death eligible cases, then all that the sentencer has to do is pick the formulation that applies to the particular case. In no way does the aggravator narrow the class of those eligible for the death penalty. Or if "A" genuinely does so, but "B" is an available formulation that could be applied to any death eligible case, then the sentencer can simply apply "B" to find any case death eligible. Again, the aggravator does not meet constitutional minimums.

murders, and that if applied to sudden murder by gunshot it would apply to most, if not all first-degree murders, and could therefore be subject to constitutional challenge).

Prior to Sochor, and at the time of Mr. Lambrix's direct appeal, however, this Court failed to apply consistently the Dixon/Proffitt "unnecessarily torturous" limiting construction, or any other limiting construction, to the heinousness aggravating factor. In numerous cases, the Florida Supreme Court approved findings of the aggravator because the crime was "evil," "wicked," "atrocious," or some similarly vague term standing alone. See, e.g., Johnson v. State, 393 So. 2d 1069, 1073 (Fla.), cert. denied, 454 U.S. 882 (1981) (robbery victim had gun battle with robber, then raised his arms; robber cursed him and shot him to death; murder was "atrocious and cruel and was committed to seek revenge" on victim); Hargrave v. State, 366 So. 2d 1, 5 (Fla.), cert. denied, 444 U.S. 919 (1979) (crime was extremely wicked and shockingly evil). Further, in 1982, this Court disapproved use of the Dixon construction, Vaught v. State, 410 So. 2d 147, 151 (Fla. 1982) (specifically rejecting claim, based on Dixon, that the circumstance focuses on infliction of physical pain or mental anguish), and in 1983, it removed the constitutionally approved construction altogether. Pope v. State, 441 So. 2d 1073, 1077-78 (Fla. 1983) (disapproving requirement that murder be "conscienceless or pitiless": "No further definitions of the terms are offered, nor is the defendant's mindset ever at issue."). Thus, in Pope, this Court

expressly repudiated any reliance on the limiting construction that was approved by the Supreme Court in Proffitt as essential to a constitutional application of this aggravator.

After casting itself adrift from the Dixon/Proffitt limiting construction, this Court failed to adopt any consistent formulation of the heinousness factor that, by actually narrowing the scope of the aggravator would meet constitutional minimums. At times, it has relied on an alternative "definition" of heinousness set forth in Dixon. That definition is as follows:

> It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others.

Dixon, 283 So. 2d at 9. However, this "definition" was not approved by the Court in Proffitt, see 428 U.S. at 255-56, and was found constitutionally insufficient by the U. S. Supreme Court in Shell v. Mississippi, 498 U.S. 1 (1990). See id. (Marshall, J., concurring). This formulation, which this Court had approved on several occasions prior to Mr. Lambrix's trial, see, e.g., Hargrave, supra, Johnson, supra, allows the sentencing judge and this Court to find virtually any first-degree murder "especially heinous."

Also, at times this Court has relied on another formulation of heinousness derived from Dixon: that a crime "accompanied by additional acts setting it apart from other capital felonies," Dixon, 283 So. 2d at 9, is "especially heinous." See, e.g.,

Harvard v. State, 414 So. 2d 1032 (Fla. 1982), cert. denied, 459 U.S. 1128 (1983), where the victim was killed instantly by a single shotgun blast in circumstances that would not otherwise have satisfied any definition of the "especially heinous" factor, but the court held that previous stalking and harassment of the victim "constitute sufficient 'additional acts' to justify application of the heinous, atrocious or cruel aggravating factor." Id. at 1036. See also Breedlove v. State, 413 So. 2d 1, 9 (Fla.), cert. denied, 459 U.S. 882 (1982) (crime heinous because victim asleep in bed). Given Harvard and Breedlove and other similar applications, this formulation removes all boundaries from the circumstance since the nature of the "additional acts" that can be used to find heinousness is completely undefined and open-ended.

None of these formulations provide constitutionally sufficient guidance to the sentencer; together, they allow the sentencer to find virtually any first-degree murder "especially heinous." In addition, at times this Court has even expressly abandoned the very concept of a limiting construction, leaving it to the sentencer to rely on any aspect of the crime to find heinousness. For example, in Magill v. State, 428 So. 2d 649 (Fla.), cert. denied, 464 U.S. 865 (1983), the court rejected a contention that it had so expanded the "especially heinous" aggravator as to render it unconstitutional. But its justification for doing so illustrates that in light of Creech,

it has not provided any constitutionally sufficient limiting construction:

> It is not merely the specific and narrow method in which a victim is killed which makes a murder heinous, atrocious, and cruel; rather it is the entire set of circumstances surrounding the killing . . . .
>
> There can be no mechanical, litmus test established for determining whether this or any aggravating factor is applicable. Instead, the facts must be considered in light of prior cases addressing the issue and must be compared and contrasted therewith and weighed in light thereof. Then, if the killing and its attendant circumstances do not warrant the finding of heinousness, atrociousness and cruelty, it will be stricken. Otherwise, assuming that it is warranted in light of earlier cases and that the trial judge used the reasoned judgment which is so necessary, the finding will not be disturbed.

Id. at 651.

Magill is in direct conflict with Creech. The trial court could not exercise reasoned judgment to sentence a man to die when the only direction given by the statute, as this Court had interpreted it, was to look at all the circumstances of the crime. Relying on all the circumstances of the crime allows the sentencer uncontrolled discretion to impose death based solely on the sentencer's subjective reactions, and does not allow for a constitutional narrowing of the class of those eligible for a death sentence. As the Tenth Circuit Court of Appeals explained:

> We agree that all of the circumstances surrounding a murder must be examined to determine whether the murder was "especially heinous, atrocious or cruel," but there must be some objective standard that specifies which circumstances support such a

> determination. Consideration of all the circumstances is permissible; reliance upon all the circumstances is not . . . . No objective standards limit that discretion.

Cartwright v. Maynard, 822 F.2d 1477, 1491 (10th Cir. 1987) (en banc), aff'd, 486 U.S. 356 (1988). This Court's conclusory statements that courts should rely on all the circumstances of the crime directly conflict with the holdings of Cartwright, Godfrey and Creech.[14]

Given that this Court has relied on multiple, inconsistent and sometimes completely unlimited definitions of the "especially heinous" aggravator, it is not surprising that the aggravator has been arbitrarily and inconsistently applied to cases with materially identical fact patterns. In fact, this Court has been unable to apply the factor consistently in the same case. In Raulerson v. State, 358 So. 2d 826 (Fla.), cert. denied, 439 U.S. 959 (1978) (Raulerson I), the defendant shot to death a policeman who had interrupted a felony. This Court rejected a claim that the victim's instantaneous death meant that the crime was not heinous, citing the facts that the murder was committed during the course of a robbery and rape, and that the deceased was aware that his life was in danger during an exchange of gunshots before the fatal shot. Raulerson I, 358 So. 2d at 834. In Raulerson v.

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[14]See also Cherry v. State, 544 So. 2d 184, 187 (Fla. 1989), cert. denied, 110 S. Ct. 1835 (1990) ("no mechanical litmus test" for the aggravator); Jennings v. State, 453 So. 2d 1109, 1115 (Fla. 1984), vacated, 470 U.S. 1002, rev'd on other grounds, 473 So. 2d 204 (Fla. 1985) (court relies on totality of circumstances to approve "especially heinous" aggravator, despite the fact that the victim may have been unconscious during the entire incident).

State, 420 So. 2d 567 (Fla. 1982), cert. denied, 463 U.S. 1249 (1983) (Raulerson II), after a resentencing proceeding, the court, however, held precisely the opposite, citing cases in which it struck the heinousness factor because death was quick. Raulerson II, 420 So. 2d at 572.[15] In many other instances, the court has arrived at contradictory results on virtually indistinguishable facts. For example, compare Breedlove v. State, 413 So. 2d 1, 9 (Fla.), cert. denied, 459 U.S. 882 (1982) (crime especially heinous even though victim suffered little, because victim was attacked at home), with Simmons v. State, 419 So. 2d 316, 319 (Fla. 1982) (crime not especially heinous where victim died instantaneously, even though victim murdered in his own home).[16]

Because this Court has never exclusively adopted a single constitutionally sufficient limiting construction of this aggravator, a sentencer could choose among the Court's various formulations to find virtually any murder to be "especially heinous." For example, it might be assumed, based on the

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[15]Shortly after Raulerson II was decided, this Court cited Raulerson I as an example of a case in which a finding of the heinousness factor was appropriate, Magill v. State, 428 So. 2d 649, 651 (Fla. 1983), apparently unaware that it had just struck down the factor in Raulerson II.

[16]For additional examples, see Mello, Florida's "Heinous, Atrocious or Cruel Aggravating Circumstance: Narrowing the Class of Death-Eligible Cases Without Making it Smaller, 13 Stetson L. Rev. 523, 537-40 (1984); Rosen, The "Especially Heinous" Aggravating Circumstance in Capital Cases -- The Standardless Standard, 64 N.C.L. Rev. 941 (1986); Skene, Review of Capital Cases: Does the Florida Supreme Court Know What It's Doing?, 15 Stetson L. Rev. 263, 318-320 (1986); Petitioner's Brief at 44-47; Sochor v. Florida, 112 S. Ct. 2114 (1992).

Dixon/Proffitt language, that a homicide in which the victim was not in fear of death prior to the killing and died without prolonged suffering (as was the case here, at the very least with respect to the male victim's death) could not be considered especially heinous. However, paradoxically, this Court has affirmed heinousness findings in such cases based on the cold and calculating mental state of the defendant. See, e.g., Harvard v. State, 375 So. 2d 833 (Fla. 1977), cert. denied, 441 U.S. 956 (1979); Alvord v. State, 322 So. 2d 533, 540 (Fla. 1975), cert. denied, 428 U.S. 923 (1976). Yet the absence of an especially culpable mental state on the part of the defendant -- whether one of cold calculation or one of intent to cause suffering -- does not preclude a finding of heinousness either. See, e.g., Hitchcock v. State, 578 So. 2d 685, 692 (Fla. 1990) (defendant's lack of intent to cause suffering irrelevant), vacated, 112 S. Ct. 3020 (1992), rev'd, 614 So. 2d 483 (Fla. 1993); Pope v. State, 441 So. 2d 1073 (Fla. 1984) (defendant's mindset never at issue). Among the broad and varied menu of formulations of heinousness approved by this Court, there is at least one that can be applied to virtually any first-degree murder. As a result, the heinousness factor fails to narrow the class of death eligible defendants, and therefore fails to satisfy the Eighth Amendment, Zant v. Stephens, supra, or relevant provisions of the Florida Constitution.

The only conclusion that can be reached in light of the multiple, inconsistent formulations of the aggravating factor and

the flatly contradictory results of factually indistinguishable cases is that trial courts decide whether this aggravator has been established and this Court reviews those decisions based on the totality of the circumstances. That is not enough, however; such an approach fails to give the sentencer any meaningful guidance in making the decision whether to allow life or impose death, and does not constitutionally narrow the class of death-eligible individuals. As a result, it permits the kind of arbitrary and capricious decisions concerning the ultimate penalty that were condemned by the United States Supreme Court over twenty years ago in Furman v. Georgia, 408 U.S. 238 (1972), and as recently as the past year in a string of cases concerning the proper application of aggravating factors. Richmond v. Lewis, 506 U.S. ___, 113 S. Ct. 528 (1992); Espinosa; Sochor; Stringer v. Black, 112 S. Ct. 1130 (1992). In the absence of a clear, objective limit on the vague words of Florida's heinousness aggravator, Mr. Lambrix's death sentences, imposed in reliance on that aggravator, are unconstitutional.

C. Imposition of the Death Penalty Based on the Unlimited "Especially Heinous" Aggravating Factor Was Cruel and Unusual.

For the reasons set forth above, the "especially heinous" aggravating factor was "invalid" in the sense that it failed to provide any meaningful guidance to the sentencing judge. Creech, 113 S. Ct. at 1540-41; see Stringer v. Black, 112 S. Ct. at 1136-37 (insufficiently defined aggravating factor is "invalid" and consideration of such an aggravating factor is eighth amendment

error). The trial court's weighing of that aggravating factor therefore placed a "thumb . . . [on] death's side of the scale" and also "created the possibility not only of randomness but also of bias in favor of the death penalty," thereby requiring that the "death sentence must be invalidated." Id. at 1137, 1139.

The trial court's weighing of the invalid "especially heinous" aggravating factor was clearly prejudicial to Mr. Lambrix. It is impossible to know whether a trial judge whose discretion was properly limited would have imposed the death sentence, particularly since there was no direct evidence of the manner in which the victims met their deaths, and there was evidence that the male victim was intoxicated and that he would have lost consciousness immediately after the first blow. R. 2093, 2202.

The trial court weighed an invalid aggravating factor, and Mr. Lambrix was sentenced to death in reliance on that aggravating factor. Mr. Lambrix is entitled to a new sentencing proceeding.

CLAIM III

TO THE EXTENT THAT THIS COURT MIGHT BELIEVE THAT EITHER CLAIM I OR CLAIM II TO BE PROCEDURALLY BARRED BECAUSE OF THE FAILURE OF APPELLATE COUNSEL TO RAISE THOSE CLAIMS ON DIRECT APPEAL, APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF MR. LAMBRIX'S RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, §§ 2, 9, 16 AND 17 OF THE FLORIDA CONSTITUTION

On direct appeal to this Court, counsel for Mr. Lambrix failed to present any issues regarding the propriety of the death sentence. As this Court noted, see Lambrix v. State, 494 So. 2d at 1148, appellate counsel effectively conceded that all of the aggravating circumstances were valid, that there were no mitigating circumstances, and therefore that the death penalty was appropriate. Thus, with regard to his death sentences, Mr. Lambrix received not just ineffective assistance; he received no assistance from counsel whatsoever.

Mr. Lambrix has previously presented a claim of ineffective assistance of counsel on appeal to this Court. That claim was rejected by this Court, Lambrix v. Dugger, 529 So. 2d 1110 (Fla. 1988), and is now pending before the Eleventh Circuit. Mr. Lambrix does not seek to relitigate that claim in its entirety before this Court.[17] To the extent, however, that this Court

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[17]Mr. Lambrix suggests, however, that this would be an appropriate case for this Court to revisit its prior ruling. As is clear from Claims I and II above, there were a host of meritorious issues concerning the death sentences imposed on Mr. Lambrix that competent counsel would have raised. Mr. Lambrix's counsel raised none of those issues. Counsel's failure deprived this Court of the "careful, partisan scrutiny of a zealous

might find any part of Claims I or II to be procedurally barred because of appellate counsel's failure to raise them, then the Court should consider whether that bar should be excused because it resulted from a violation of Mr. Lambrix's constitutional right to the effective assistance of counsel on appeal. Murray v. Carrier, 477 U.S. 478 (1986).

All of the issues raised in Claims I and II are derived from the United States Supreme Court's decision in Godfrey v. Georgia, 446 U.S. 420 (1980). Godfrey held that in order for a state to impose the death penalty, the state is required to "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" Id. at 428 (footnotes omitted). Godfrey thus requires that sentencing juries receive appropriate limiting instructions concerning otherwise vague aggravating circumstances. Id. at 428-29; Maynard v. Cartwright, 486 U.S. 356, 363 (1988) (noting that "Godfrey controls this case."); Espinosa v. Florida, 112 S. Ct. 2926, 2928 (1992), citing Godfrey. Similarly, Godfrey requires that a state sentencing court's discretion to impose death on the basis of an otherwise vague aggravating circumstance

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advocate," Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985), that is so necessary for this Court to perform meaningful appellate review, particularly in the context of a sentence of death. Counsel thereby effectively deprived Mr. Lambrix of his right to meaningful appellate review of his death sentence. Parker v. Dugger, 498 U.S. 308 (1991); Proffitt v. Florida, 428 U.S. 242 (1976). Where such a deprivation of a fundamental right has occurred, particularly in a capital case, it is appropriate for this Court to revisit its prior rulings.

be limited. Lewis v. Jeffers, 497 U.S. 764, 774 (1990), quoting Godfrey; Creech v. Arave, 113 S. Ct. 1534, 1540 (1993), quoting Godfrey. Thus, it is no surprise that in Stringer v. Black, 112 S. Ct. 1130, 1135-36 (1992), the Supreme Court found that its decision in Maynard was dictated by the Godfrey decision. Id. at 1136.

All the tools for constructing the claims presented in Claims I and II were therefore in appellate counsel's hands at the time of Mr. Lambrix's direct appeal of his 1984 convictions and death sentences. Yet, counsel nevertheless failed to raise a single issue concerning Mr. Lambrix's death sentence. We now also know that counsel's failure to do so was not a result of any determination regarding the merits of the issue, but was solely a result of his ignorance. Appellate counsel James LeGrande had never previously filed an appellate brief in a death penalty case, and in his entire career has only filed two other appellate briefs. Appendix 2, Deposition of James LeGrande, at 9-11, 14. Mr. Lambrix's appellate counsel has acknowledged that any issue that was not frivolous should be raised on appeal in a death penalty case, but simply thought that there were no viable issues. Id. at 20-22. Counsel, however, had never heard of the Godfrey decision and could not recall the name of a single death penalty decision of either the United States Supreme Court or of this Court. Id. at 32-33.

Former Associate Justice and Chief Justice Alan Sundberg testified as an expert witness regarding this claim at the

evidentiary hearing conducted before the federal district court. While on this Court, Mr. Sundberg participated in hundreds of first-degree murder cases that involved the death penalty and the district court recognized him as an expert in death penalty appeals before this Court. Appendix 3, Testimony of Alan Sundberg, at 18. In former Justice Sundberg's opinion, Mr. Lambrix did not receive effective assistance of counsel in his direct appeal to the Florida Supreme Court, in part because there was a valid basis to challenge the aggravating factors of pecuniary gain, especially heinous, atrocious or cruel, and cold, calculated and premeditated. Appendix 3, at 22-29.

From his years on the Florida Supreme Court, Justice Sundberg could remember only one death penalty case where appellant's counsel did not raise any penalty phase issues, and in that case the court sua sponte ordered counsel to brief issues on the death sentence. Appendix 3, at 35. Concerning the prejudice to Mr. Lambrix, given appellate counsel's failings, Justice Sundberg testified that the integrity of the process of the Florida Supreme Court's review of the sentence was lost, because "nothing can take the place of advocacy to bring to the attention of the court, and the Florida Supreme Court has said, that our independent review can't take the place of advocacy. It points out possible error to us to review." Appendix 3, at 36.

Clearly, counsel's failure to raise any penalty phase issues on appeal, and particularly counsel's failure to raise any issues regarding either the jury instructions or the trial court's

findings on the aggravating factors, was deficient performance. The trial court's findings were obviously subject to challenge on appeal, and at the very least the challenge to the jury instruction on the "especially heinous" aggravating factor was thoroughly preserved at trial. See Claim I, supra. A reasonably competent appellate attorney would have raised the Godfrey claims set forth above.

Petitioner submits that this Court's rejection of a similar claim in Henderson v. Singletary, Nos. 81,603, 81,604 (Fla., April 19, 1993), does not preclude relief here. First, the argument that it is not deficient performance to fail to raise a meritorious and correct constitutional claim because that claim would have been, as it turns out, mistakenly rejected by this Court cannot withstand scrutiny, particularly in a death case. Competent counsel in capital cases know that it is necessary to preserve federal constitutional issues for review by the U.S. Supreme Court or the lower federal courts in habeas proceedings, and that it is their duty to raise such issues in order to preserve them for federal review, irrespective of state court precedent on those claims. That this Court was wrong about the law, as the Supreme Court held in Espinosa, hardly excuses counsel's failure to take the necessary steps to preserve his client's claims and ultimately his life. The United States Supreme Court has overruled prior decisions of this Court, including some that involve systemic death penalty issues, see, e.g., Espinosa, supra; Hitchcock v. Dugger, 481 U.S. 393 (1987).

A defendant can obtain relief only if such a claim was properly preserved by competent counsel. If, however, rejection of a claim by this Court insulates counsel's failure to raise such a claim from being found ineffective, then this Court should excuse any bar to the defendant's presenting the claim in post-conviction proceedings on the ground that raising the claim would have been futile.

Prejudice is also shown. Regardless of how this Court would have ruled on the claim on an initial appeal, petitioner is prejudiced if he is deprived of the opportunity he would otherwise have to obtain relief from his sentence of death in these proceedings. See James v. State, 615 So. 2d 668 (Fla. 1993) (petitioner entitled to merits review of Espinosa claim if claim was properly preserved). Moreover, it is now clear beyond any doubt that Godfrey error occurred at Mr. Lambrix's trial. Had that error been raised on appeal, this Court would have been required by the Eighth and Fourteenth Amendments to the United States Constitution to acknowledge that error and determine whether it was harmless beyond a reasonable doubt. Sochor; Stringer.

In determining whether Mr. Lambrix was prejudiced by his appellate counsel's failure to raise the Godfrey/Espinosa errors presented in Claim I and II on direct appeal, this Court should also consider the impact of counsel's ineffective failure to raise any other issues concerning sentencing on appeal. The trial court's findings of three aggravating factors --

"especially heinous"; "cold, calculated and premeditated"; and "committed for financial gain" -- were also subject to meritorious challenges on appeal. In addition, counsel should have raised on appeal the trial court's failure to find both statutory (lack of a significant criminal history) and non-statutory mitigation (difficult childhood, abandonment by mother). It is for these reasons that former Justice Sundberg has concluded that Mr. Lambrix was prejudiced by his appellate counsel's total failure to represent him with respect to sentencing issues on appeal. Appendix 3, at 33-36. See also the discussion of harmless error in Claim I, supra.

If counsel had performed with a minimal level of competence on direct appeal, there can be little doubt of the proper outcome. There was clear Godfrey/Espinosa error at trial. That error meant that Mr. Lambrix's death sentences would have had to be "invalidated." Stringer, 112 S. Ct. at 1139. Moreover, there were numerous other errors both in the instructions to the jury and in the trial court's findings with respect to aggravating and mitigating factors. Although the trial court found no mitigation, the uncontroverted evidence showed that Mr. Lambrix had a minimal criminal history, no history of violent crime, and suffered a pathetically deprived childhood. If all of those errors had been properly raised on appeal, it would have been impossible for this Court, as in Hitchcock, to "tell what part the [Godfrey error] played in the jury's consideration of its recommended sentence." Hitchcock v. State, 614 So. 2d 483, 484

(Fla. 1993). Mr. Lambrix is entitled to a new sentencing proceeding before a properly instructed jury.

CLAIM IV

THE STATE FAILED TO PROVE PREMEDITATED MURDER BEYOND A REASONABLE DOUBT, AND COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL, IN VIOLATION OF MR. LAMBRIX'S RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, §§ 2, 9, 16 AND 17 OF THE FLORIDA CONSTITUTION[18]

Mr. Lambrix was convicted of first-degree murder solely on the basis that the murders were premeditated. R. 2499 (State waives reliance on felony murder); R. 2533 (instructions on premeditated murder only). There was, however, very little direct evidence as to how the homicides were committed. The medical examiner's testimony established only that Clarence Moore died of severe crushing injuries to his head, inflicted by a blunt instrument, R. 2056, while the medical examiner concluded, based on the lack of any physical evidence as to the manner in which Aleisha Bryant died, that some form of asphyxia, probably strangulation, was the "most likely" cause of death. R. 2076.

In attempting to prove premeditation, the State relied on the testimony of Frances Smith. Ms. Smith, who was living with Mr. Lambrix at the time, testified that she and Mr. Lambrix met Moore and Bryant by chance at a bar and spent the evening

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[18]Although not related to the claims which the Eleventh Circuit directed Mr. Lambrix to address on remand, Mr. Lambrix raises this claim because of the fundamental nature of the error and to avoid an unnecessary expenditure of time, judicial resources and the parties' resources that would be created by raising it in a separate proceeding.

drinking together at that bar and another bar. R. 2190-2204; 2290-2301. At that time, it is clear that Mr. Lambrix could not have contemplated killing anyone, since he twice confronted a police officer in one of the bars, thereby drawing everyone's attention to himself (and risking apprehension as an escapee). See R. 2155, 2161. Moreover, the fact that Mr. Lambrix had consumed a large amount of alcohol, R. 2201, 2204, 2290, and "acted high," R. 2300, militated against the existence of a prearranged plan to kill.

Ms. Smith testified that the two couples left the second bar with a bottle of whiskey and went together to the trailer she and Mr. Lambrix shared. They planned to have some food. R. 2204. After some friendly conversation, Mr. Lambrix asked Moore to go outside. R. 2205. After about twenty minutes, Mr. Lambrix returned. Ms. Smith did not notice anything unusual about him -- he was not excited, sweaty or disheveled, did not look as though he had been in a fight and did not have any blood on him. R. 2207-08; 2303. Mr. Lambrix then went outside again with Ms. Bryant. He was gone for about 45 minutes. When he returned there was blood on his shirt, face and arms, and he said that Moore and Bryant were both dead. R. 2209-10.

The State's theory of premeditation was that Mr. Lambrix enticed Moore outside, beat him to death with a tire iron, and then enticed Bryant outside, strangling her to death. R. 2505. That was the theory adopted by the trial court in finding that the crimes were "cold, calculated and premeditated." R. 1355.

But that theory was based entirely on circumstantial evidence that was equally consistent, indeed more consistent, with other reasonable inferences.

When Mr. Lambrix first returned to the trailer, the State's own evidence showed that there was no blood on him, and that he was neither "excited or sweaty or disheveled or anything." R. 2207. Yet the injuries to Moore were likely to have splattered blood. R. 2093. In contrast, when Mr. Lambrix returned to the trailer the second time, there was blood on him, although there was no evidence of any injuries to Bryant that would have resulted in bleeding. R. 2090. Thus, it is far more consistent with the physical evidence that Moore was still alive when Mr. Lambrix and Bryant went outside. This fact destroys the State's theory as a basis for finding that either premeditation or, a fortiori, the "cold, calculated and premeditated" aggravating factor was proved beyond a reasonable doubt.

In Hoefert v. State, 18 FLW S149 (Fla. 1993), this Court recently summarized as follows its law regarding proof of premeditation by circumstantial evidence:

> Premeditation is the essential element which distinguishes first-degree from second-degree murder. Premeditation may be proven by circumstantial evidence. However, "[w]here the element of premeditation is sought to be established by circumstantial evidence, the evidence relied upon by the state must be inconsistent with every other reasonable inference." Cochran v. State, 547 So. 2d 928, 930 (Fla. 1989). Where the State's proof fails to exclude a reasonable hypotheses (sic) that the homicide occurred other than by premeditated design, a verdict of first-degree murder cannot be sustained.

Id., slip op. at 5 (citations omitted).

Under Hoefert and Cochran, the State failed to prove its theory of premeditated murder. Once it is acknowledged that it is equally and indeed more plausible that Moore was still alive when Mr. Lambrix and Bryant went outside, a host of reasonable inferences inconsistent with premeditation become apparent. It is quite reasonable to suppose that there was some sort of altercation between Mr. Lambrix and Moore, who was clearly intoxicated. R. 2202, 2300 (testimony of Frances Smith); R. 2087-88 (testimony of medical examiner that Moore had bile alcohol level of .27). In such an altercation, it is reasonably likely that Mr. Lambrix killed Moore either in self-defense,[19] or in circumstances consistent with a finding of depraved mind second-degree murder. Similarly, in the absence of direct evidence as to how Bryant died, the circumstantial evidence is insufficient to prove premeditation. See Hoefert, supra, slip op. at 6.

A claim that a defendant was convicted of first-degree murder and sentenced to death on the basis of insufficient evidence to establish premeditation is a claim of fundamental error. As such, this Court should consider petitioner's claim regardless of any otherwise applicable procedural default. See Murray v. Carrier, 477 U.S. 478, 496 (1986) (in order to prevent

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[19]Mr. Lambrix has stated in a sworn affidavit that he did indeed kill Moore in self-defense, after Moore had fatally injured Bryant. Appendix 4.

miscarriage of justice, court will consider otherwise defaulted colorable claim of actual innocence).

To the extent that this Court might find this claim procedurally barred as a result of appellate counsel's failure to raise it on direct appeal, any default should be excused since it resulted from appellate counsel's constitutionally ineffective assistance to petitioner. The sufficiency of the evidence issue was fully preserved at trial. R. 2461 (motion for judgment of acquittal). Trial counsel also raised this issue by motion for new trial, R. 1351, 1352, and in the statement of judicial acts to be reviewed. R. 1400. In a case like this, in which there is a valid claim regarding the sufficiency of the evidence, it is virtually per se ineffective to fail to raise the issue on direct appeal. Wilson v. Wainwright, 474 So. 2d 1162, 1163-64 (Fla. 1985). That is precisely what took place here. As in Wilson, appellate counsel was grossly ineffective, and Mr. Lambrix was clearly prejudiced. This Court should grant Mr. Lambrix a new appeal and, having done so, should either remand the case for a new trial or reverse his first-degree murder conviction, vacate his death sentence, and remand to the trial court to enter a judgment of second-degree murder and sentence Mr. Lambrix accordingly. See Hoefert, slip op. at 10.

DATED this 16th day of June, 1993.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the Petition for Writ of Habeas Corpus and for Extraordinary Relief has been furnished by U.S. Mail to Robert P. Krauss, Department of Legal Affairs, Assistant Attorney General, 2002 North Lois Avenue, Westwood Center, Seventh Floor, Criminal Division, Tampa, Florida 33607, this 16th day of June, 1993.

Steven Malatesta
Attorney