IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,731

STATE OF FLORIDA,

Appellant,

v.

MCARTHUR BREEDLOVE,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR DADE COUNTY, STATE OF FLORIDA

ANSWER BRIEF OF APPELLEE

MICHAEL J. MINERVA
Capital Collateral Representative
Florida Bar No. 092487

GAIL E. ANDERSON
Assistant CCR
Florida Bar No. 0841544

TODD G. SCHER
Assistant CCR
Florida Bar No. 0899641

TERRI L. BACKHUS
Assistant CCR
Florida Bar No. 0946427

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

COUNSEL FOR APPELLEE

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's granting of Mr. Breedlove's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court granted Mr. Breedlove's motion after hearing argument and receiving evidence.

For consistency purposes, Mr. Breedlove's brief will use the same symbols as Appellant's brief to designate references to the record in this instant cause:

"OR." -- record on direct appeal to this Court;

"Supp. OR." -- supplemental record on direct appeal to this Court;

"1PCR." -- record on first 3.850 appeal to this Court;

"2PCR." -- record on second 3.850 appeal to this Court;

"3PCR." -- record on third and instant 3.850 appeal to this Court;

"T" -- transcript of June 18, 1993, hearing on third 3.850.

All other citations will be self-explanatory or will be otherwise explained.

REQUEST FOR ORAL ARGUMENT

The resolution of the issues involved in this action will determine whether Mr. Breedlove lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes

at issue. Mr. Breedlove, through counsel, accordingly urges that the Court permit oral argument.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

The instant appeal arises from the circuit court's granting of Mr. Breedlove's third motion for postconviction relief, filed pursuant to Fla. R. Crim. P. 3.850, on October 22, 1993 (3PCR. 530-533), and premised on this Court's decision in James v. State, 615 So. 2d 668 (Fla. 1993). In her written order, Circuit Court Judge Barbara Levenson found that Mr. Breedlove's jury had been unconstitutionally instructed on the heinous, atrocious, or cruel aggravating circumstance, that the issue had been properly and adequately preserved both at trial and on direct appeal, that the State was unable to prove beyond and to the exclusion of any reasonable doubt that the jury's recommendation would not have been affected absent the constitutional error, and that, under James and Espinosa v. Florida, 112 S. Ct. 2926 (1992), Mr. Breedlove was entitled to a new jury sentencing proceeding.

McArthur Breedlove was convicted of first-degree murder and the underlying felony of burglary in Dade County, Florida, in March, 1978. Prior to trial, defense counsel filed a "Motion to Declare Florida Statute Section 941.141 Unconstitutional" (OR. 49-58). In that motion, counsel argued, inter alia, that the aggravating circumstances listed in Florida's capital sentencing statute were "impermissibly vague and overbroad," (OR. 49), and therefore were violative of the Eighth and Fourteenth Amendments. Id. Because "[a]lmost any capital felony would appear especially cruel heinou[s] and atrocious to the layman," (OR. 50), counsel argued that "[e]xamination of the legislative history of

§ 921.141 clearly shows that the intent of the legislature was to limit both aggravating and mitigating circumstances so as to avoid the purely discretionary and arbitrary sentencing standards condemned in Furman v. Georgia, 408 U.S. 238 (1972)" (OR. 51). The trial judge denied this motion (OR. 55(a)).

During the charge conference regarding the penalty phase instructions to be provided to the jury, defense counsel argued:

> MR. LEVINE: We would renew all our pre-trial motions to dismiss the statute, that would provide for these instructions as being unconstitutional, and that they unconstitutionally limit the mitigating circumstances involved; in addition to renewing all our other arguments.

(OR. 1284) (emphasis added). Mr. Breedlove's defense counsel also submitted a proposed expanded instruction on the heinous, atrocious, or cruel aggravating circumstance for the trial court's consideration. The proposed expanded instruction provided:

> The aggravating circumstances that the capital felony was especially heinous, atrocious, or cruel, applies only where the actual commission of the capital felony was accomplished by such additional acts as to set the crime apart from the norm of capital felonies -- the consciousless or pitiless crime which is unnecessarily tortuous to the victim.

(Supp. OR. 8). This proposed instruction was denied after the trial judge determined that defense counsel's proposed expansion of the then-standard jury instruction was "covered in the charge" (OR. 1386).

At the penalty phase, the State presented the testimony of medical examiner Dr. Ronald Wright, then of the Dade County Medical Examiner's Office. Prior to this testimony, defense counsel first objected to Dr. Wright being called as a witness because he had not been the medical examiner who conducted the autopsy of the victim, nor had he reviewed any of the evidence in the case with the exception of the original autopsy report (OR. 1311-12). In addition, defense counsel objected to the admission of Dr. Wright's testimony as irrelevant to any aggravating circumstance because he would not be testifying that the murder was accompanied by such additional acts to set the crime apart from the norm, the proper limiting construction of the heinous, atrocious or cruel aggravator:

> Furthermore, I would cite 322 So. 2d 557, in which the Court held that a killing is not especially heinous, atrocious, or cruel simply because it is unnecessary, and Cooper v. State, which says that the standard of the aggravating circumstances is whether the horror of the murder is accompanied by such additional acts to set the crime apart from the norm; so even, if the doctor were to testify as to the amount of pain and suffering, it is totally irrelevant to any aggravating circumstance.

(OR. 1312-13)(emphasis added). The trial court overruled the objection (OR. 1313).[1]

---

[1]In his objection, defense counsel cited to this Court's opinion in Cooper v. State, 336 So. 2d 1133 (Fla. 1976). In Cooper, this Court held that "a proper instruction defining the terms 'especially heinous, atrocious, or cruel,' . . . must be given [to the jury]. Here the trial judge read the jury the interpretation of that term which we gave in Dixon. No more was required." Cooper, 336 So. 2d at 1140. The Dixon definition, (continued...)

In mitigation, defense counsel presented the testimony of three qualified mental health experts. Dr. Benjamin Center, a neuropsychologist whose credentials as an expert were stipulated to by the prosecution (OR. 1325), testified that he examined Mr. Breedlove for seven (7) hours (OR. 1320). Dr. Center explained that, as a part of his examination, he administered several psychological tests, including an intelligence test, an educational achievement test, and a Rorschach (Id). Dr. Center also administered the Bender-Gestalt test, the purpose of which was to screen for perceptual difficulties, intellectual function, and neurological difficulties (OR. 1326-27). Dr. Center testified that the intelligence testing revealed that Mr. Breedlove fell in the dull-normal range of intelligence, and that "he had difficulty with manipulation of thought patterns, concepts; difficulty in remote memory and grasping concepts" (OR. 1327). These findings "suggested that there was something wrong in [Mr. Breedlove's] understanding what was going on, insight as to the particular moment" (Id.).

Dr. Center also testified to the results of the neuropsychological test battery administered to Mr. Breedlove. On the Halstead test, Dr. Center explained that Mr. Breedlove "earned what we call a Halstead impairment of .8, which means eighty percent of the test scores fell in the brain dysfunction

---

[1](...continued)
approved of in Cooper and repeatedly cited to by defense counsel, was in fact the expanded instruction that counsel requested in Mr. Breedlove's case.

range" (OR. 1328). As a result of these scores, Dr. Center's expert opinion was that Mr. Breedlove suffered from brain damage (Id.).

Dr. Center testified that, due to the brain damage and intellectual deficits, Mr. Breedlove was suffering from an extreme mental or emotional disturbance at the time of the crime, and that he was substantially impaired in his ability to conform his conduct to the requirements of the law (OR. 1328-29). See Fla. Stat. § 921.141 (6)(b), (6)(f). Mr. Breedlove could not be classified as a sociopath because it was the organic impairment which would cause Mr. Breedlove to act inappropriately under stress situations, not a sociopathic personality (OR. 1335-36). Dr. Center also told the jury that if Mr. Breedlove were to receive psychiatric treatment in prison, his prognosis for rehabilitation would be favorable (OR. 1329).

Dr. Eli Levy, a forensic psychologist, also testified at the penalty phase on behalf of Mr. Breedlove. Dr. Levy performed a battery of psychological tests on Mr. Breedlove, including the Wexler Adult Intelligence Scale and the Bender-Gestalt (OR. 1339-1340). Based upon the results of the testing, Dr. Levy concluded that Mr. Breedlove suffered from neurological impairment (OR. 1343). Dr. Levy explained to the jury what brain damage means:

> A. Neurological impairment -- reminding you that the brain is the center of all our life up here. We feel, we see, we touch, we smell, the whole of all our being and existence is in the mind and the brain. When the brain is damaged, meaning that some portions of the brain, meaning the cells, have been damaged.

> In other words, certain parts of the brain are not functioning as well as they could function if that damage did not exist.
>
> As a result of that damage -- it depends on where it is, too -- the person would be affected by this impairment.
>
> For example, if a person is or has damaged a certain part of his brain, he would be unable to abstract. A person damaged in the abstract part of his brain would find it very difficult to grasp something abstract.
>
> Other parts of the brain might be damaged where the person would have a difficult time copying simple geometric designs. From what he sees and what he does, you see a great discrepancy. They don't look the same. Okay.

(OR. 1343-1344).

Dr. Levy concluded that, in addition to the organic brain damage, Mr. Breedlove suffered from schizophrenia (OR. 1344). Dr. Levy explained that, as a result of this mental disturbance, Mr. Breedlove "is split i[n] his thinking, feeling, and acting level. In other words, the three are not synchronized together" (OR. 1344). The way that Mr. Breedlove feels and the way that he acts are not congruent as a result of the schizophrenia (OR. 1345). Dr. Levy explained that the flat affect exhibited by Mr. Breedlove illustrated and corroborated his diagnosis (OR. 1348-49). Dr. Levy reminded the jury that Mr. Breedlove was being medicated with Stelazine and Mellaril at the time of his examination, and that, even under medication his mental disturbances were apparent (OR. 1347). Dr. Levy added that "if [Mr. Breedlove] was not under medication, I believe I would have seen a much greater example of his pathology" (OR. 1347).

Dr. Levy also testified to Mr. Breedlove's history of abuse of "the whole gamut of drugs" (OR. 1344), and that, on the night of the crime, Mr. Breedlove was abusing cocaine and mescaline (Id.). Dr. Levy explained to the jury that the longstanding drug abuse was consistent with his diagnosis:

> A person who is feeling very lonely, a person who feels rejected, a person who feels persecuted by the external environment, given these kinds of feelings perceived, the person will be using drugs to try to somehow or another cope with his feelings of inadequacy, poor perception of themselves, and their basic inability to do well with their lives, but to use such drugs coincides with my diagnosis of him.

(OR. 1345). Dr. Levy further indicated that Mr. Breedlove "is a person who is basically a loner; a person who is afraid to get involved with other people" (OR. 1345), and that he "has a very inadequate self-perception . . . [and] [h]e basically doesn't think he is worthy of other human's companionship" (OR. 1340). Given these findings, Dr. Levy explained to the jury how Mr. Breedlove would react in a highly stressful situation:

> Q. Could you tell us how a person who exhibited these symptoms that the defendant has exhibited would react to a stress situation.
>
> A. Well, I find my experience with this population is that unless they are on medication, I find them to be very fragile, even when on medication.
>
> It doesn't take very much stress to get them decompensated, meaning to get them acting bizarre and irrational.
>
> I find Mr. Breedlove a person who is emotionally unstable, and I do not believe that under stress conditions, he can stand up

> very well. He would be unable to cope with it, given my understanding of where he is at.

(OR. 1348). Dr. Levy later reiterated that "when [Mr. Breedlove] has been pushed or has been threatened or he has been coerced to do certain things, because of his emotions, he will lose all form of any kind of judgment and he won't make the right decisions" (OR. 1363). As did Dr. Center, Dr. Levy emphasized that Mr. Breedlove was not a sociopath, but rather was suffering from organic brain damage as well as paranoid schizophrenia (OR. 1356). Moreover, due to his mental condition, Mr. Breedlove "possessed young traits," and the fact that he was 31 years old "does not make him an adult psychologically" in Dr. Levy's opinion (OR. 1358). Dr. Levy also noted that Mr. Breedlove was not openly reacting to the stress of his trial in the courtroom because he was being medicated with Stelazine and Mellaril at the time (OR. 1364).

The defense also presented the testimony of Dr. Lloyd Miller, a practicing psychiatrist in Dade County (OR. 1365). Because the prosecutor knew Dr. Miller personally and stipulated to his qualifications and expertise, Dr. Miller was admitted as an expert in the field of psychiatry (OR. 1366). Dr. Miller testified that he examined Mr. Breedlove on two different occasions, at which times Mr. Breedlove was being administered Trilafon by the jail personnel (OR. 1367). Trilafon is an anti-psychotic medication used for the treatment of conditions such as schizophrenia (Id.). Dr. Miller explained that, during his visits with Mr. Breedlove, Mr. Breedlove "had a sad expression on

his face" and his affect was "blunted" due to the medication (OR. 1368).

Dr. Miller testified that during his first examination of Mr. Breedlove, he "wanted to get into his past medical background, legal involvements, general growing up, childhood growth and development, things like this -- how far did he go in school, generally an overall view of his life up to this date" (OR. 1369). On the second visit, Dr. Miller conducted a mental status examination (Id.). Based upon his examinations, Dr. Miller testified that Mr. Breedlove suffered from chronic paranoid schizophrenia "of some long standing" (Id.). Dr. Miller explained to the jury how this mental illness affected Mr. Breedlove:

> The diagnosis of paranoid schizophrenia is simply a label we put on people, that is to be differentiated from a basic character structure, which is also important. A person can be raised in two different ways and still be diagnosed as a paranoid schizophrenic in their adult years; so, it is a little difficult to tease out the personality from the specific psychiatric illness.
>
> Basically a paranoid schizophrenic is a person with difficulty in interpersonal relationships.
>
> The person's general mode of dealing with the world at large is one of mistrust of others and some isolation.
>
> The person may suffer from auditory hallucinations, that is, hearing voices or delusions; false beliefs. With their illness, they may have false beliefs that persons are persecuting them or they have some understanding with God or they may identify with the president of the United States in a positive sense or in a negative

> sense. People like this may wish to harm someone like an authority figure.

(OR. 1369-70). Dr. Miller acknowledged that records from the Dade County Jail also revealed that Mr. Breedlove had been previously diagnosed with schizophrenia, as well as narcolepsy (OR. 1377).

Based upon his examinations of Mr. Breedlove and the diagnosis of schizophrenia, Dr. Miller testified that Mr. Breedlove was suffering from an extreme mental or emotional disturbance at the time of the crime (OR. 1371). Dr. Miller noted nothing in this case which would suggest that the schizophrenia was a recent development (Id.). While Dr. Miller testified that Mr. Breedlove was capable of adhering to the requirements of the law at the time he conducted his examinations, this finding was based upon the fact that Mr. Breedlove was being administered anti-psychotic medication (OR. 1372). If Mr. Breedlove had not been taking anti-psychotic medication at the time of the offense, Dr. Miller concluded that Mr. Breedlove "more likely than not" would have been psychotic (Id). The fact that Mr. Breedlove was not taking medication at the time of the offense "means that what it would take to get him [psychotic] would not be very great" because unmedicated paranoid schizophrenics react with a "paranoid response; that is, mistrust and potential hostility" (OR. 1372-73). Overall, Dr. Miller testified that Mr. Breedlove's prognosis would be good if he were to continue to receive the appropriate treatment and medication (OR. 1373).

In rebuttal, the prosecution called Dr. Albert Jaslow and Dr. Charles Mutter. Dr. Jaslow testified that he had only been appointed to examine Mr. Breedlove in order to determine his competency and sanity, not for the purpose of determining the existence of mitigating circumstances (OR. 1394). Dr. Jaslow recognized that Mr. Breedlove's history revealed prior psychiatric hospitalizations, as well as alcohol and drug abuse (OR. 1397). Dr. Jaslow testified that he believed that Mr. Breedlove was a sociopath, but acknowledged that, in Mr. Breedlove's history and test results "[t]here were certain little features that can suggest some [organic] difficulties, such as his inability to retain recall, specific numbers or to calculate well" (OR. 1398). Dr. Jaslow also testified that Mr. Breedlove was of borderline intelligence (Id.).

On cross-examination, Dr. Jaslow indicated that, at the time of his evaluation, the county jail had prescribed Trilafon, "a strong anti-psychotic drug" (OR. 1401). The purpose of the drug is to "alleviate psychotic symptoms . . . [and to] help the person re-adjust so he is no longer a psychotic" (Id.). Dr. Jaslow confessed that he had never seen Mr. Breedlove when he was not on medication (Id.). Dr. Jaslow performed no neuropsychological testing on Mr. Breedlove, but recognized that there were tests that would evaluate for organic impairment, for example, the Bender-Gestalt (OR. 1402). In fact, the purpose of administering the Bender-Gestalt is to detect organic impairment (OR. 1403). With respect to the statutory mitigating factor of

whether Mr. Breedlove's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, Dr. Jaslow opined that "there was a certain amount of impairment" (OR. 1400). Dr. Jaslow also acknowledged that Mr. Breedlove suffered from "long-standing extensive psychological problems" (Id).

Finally, the prosecution presented the testimony of Dr. Charles Mutter. As with Dr. Jaslow, Dr. Mutter testified that he had been retained only to evaluate Mr. Breedlove in terms of competency to be tried and sanity, not mitigating factors (OR. 1407). Regarding Mr. Breedlove's mental state, Dr. Mutter "felt it might be possible that he had a diminished capacity, as a result of drugs and alcohol intoxication . . . and he had this type of problem over a prolonged period of time" (Id.). Regarding the existence of statutory mitigating factors, Dr. Mutter explained that Mr. Breedlove "has had emotional problems for a prolonged period of time, from childhood or adolescence, which has been manifested by his misuse of drugs. I think he is probably in need of some form of psychiatric treatment for a prolonged period of time" (OR. 1409). Dr. Mutter acknowledged that, in terms of whether Mr. Breedlove was under an extreme mental or emotional disturbance at the time of the crime, Mr. Breedlove "always had difficulty" (OR. 1411).

On cross-examination, Dr. Mutter acknowledged that Mr. Breedlove had been prescribed Trilafon, a "major" tranquilizer "used for anxiety in low doses and may be used for what we call a

psychotic, severely disturbed mental state, in high doses" (OR. 1412). Dr. Mutter indicated that Mr. Breedlove's medication had been changed many times, and for a while Mr. Breedlove had been receiving Mellaril and Haldol (Id.). Mellaril and Haldol are "the same type of drugs as Thorazine" -- anti-psychotic drugs (Id.). The administration of anti-psychotic drugs in Mr. Breedlove's case was not only consistent with the treatment of schizophrenia, but also consistent with people who have severe drug addiction problems (OR. 1413). Regarding drug abuse, Dr. Mutter testified that Mr. Breedlove had used heroin intravenously and that he had had at least fifty (50) LSD trips (OR. 1414). The effect of these numerous LSD trips would range from "minor aberrations, distortions of things they see, to hallucinations or delusions. Some people jump off buildings. It can be very severe" (Id.). Dr. Mutter conducted no psychological tests in terms of assessing organic brain damage, (id.), but opined that Mr. Breedlove's judgment was "grossly impaired" in terms of his lifestyle (OR. 1415). Dr. Mutter likewise conducted no intelligence testing in Mr. Breedlove's case, (id.), and recognized that Mr. Breedlove's insight was "nil" (Id.).

During the closing arguments before the jury, the heinous, atrocious, or cruel aggravating circumstance was a hotly contested issue argued by both the prosecution and defense counsel. The State's case for death relied heavily on the applicability of the heinous, atrocious, or cruel aggravating

circumstance, as evidenced by the prosecutor's penalty phase argument:

> No. 8: "That the crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel."
>
> A definition of what is heinous, atrocious, or cruel will be given to you by Judge Fuller when he gives you the instructions on the law applicable to this case.
>
> Judge Fuller will tell you that heinous and atrocious mean outrageously wicked, and that cruel means designed to inflict a high degree of pain or utter indifference to or the enjoyment of the suffering of others or pitiless, and I ask you whether or not the defendant in this case has shown complete and utter indifference about the suffering of Frank Budnick.
>
> You heard about the suffering of Frank Budnick. You must decide for yourself whether you believe this crime to be heinous, atrocious, or cruel.
>
> You must decide whether the act of plunging this instrument into the body of Frank Budnick to the point of the hilt of the knife was heinous, atrocious, or cruel, was something completely and totally pitiless and without regard and indifferent to the suffering of others.
>
> * * *
>
> Think about the break this man gave to Frank Budnick. The only break this guy gave to Frank Budnick was the break he gave to Frank Budnick's collarbone when he stabbed him. Look at this thing [indicating]. Have you ever seen anything more outrageous in your life?
>
> * * *
>
> Ask yourself this, members of the jury: "At any time, has the defendant in this case shown the slightest bit of remorse for what

> happened? At any time has he shown the slightest bit of remorse whatsoever?" Not at all. You have never heard one word about how sorry he is for the pain and suffering of Frank Budnick and for what he did on this occasion. Not the slightest word at all of remorse, and if you think that the one minute that the pain and suffering that Frank Budnick may have suffered is not a big deal, when I sit down, watch the second hand of that clock as it goes around on sixty separate ticks, and you think about the pain and suffering this man had when this knife was plunged into him.

(OR. 1430-31; 1439; 1441) (emphasis added).

In his closing argument, defense counsel reminded the jurors that the prosecution had conceded that the State was not arguing that Mr. Breedlove intended to kill the victim, but rather that this was a case of felony murder (OR. 1447). Defense counsel argued, "If he did not premeditate the death, then there was no purpose in his mind for the death. It occurred in the instantaneous reaction of a sick mind, in a flash, and the State concedes that by telling you it is not premeditated" (OR. 1448). Defense counsel continued this line of argument with respect to the applicability of heinous, atrocious, or cruel, arguing that this factor was not proven beyond a reasonable doubt because there was no intent to kill on part of Mr. Breedlove:

> What about the last circumstance--that it is especially cruel, heinous, and atrocious, or as the Judge will instruct you, "Heinous, and atrocious and cruel."
>
> The Judge is going to instruct you that heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile, and cruel means designed to inflict a high degree of pain.

> How can they stylize this crime as extremely wicked or shockingly evil when they tell you he never had a premeditated design to kill? What does "evil" imply? Doesn't "evil" imply evil intent, planned premeditation? Isn't that what evil means?
>
> I think the fact that they admit there was no premeditated murder negates that circumstance. I am not saying this is not a horrible crime. This is a horrible crime, but what you are to consider is, "Is there anything about this crime that sets it apart from other murders," and these guideline, I have to concede to you, say, Heinous and atrocious," but "cruel" is a little more specific, because the instruction they will read to you on cruel says, "Designed to inflict a high degree of pain."
>
> Now, if he never intended to do this, if there was never any premeditated design to kill, how can there be a design on his part to inflict pain? He never had a design to even kill at all. How can the State look you in the eye and tell you that this was designed to inflict a high degree of suffering, when in their opening and closing statements, they tell you that it is not premeditated? They cannot. They cannot.
>
> There is nothing to indicate here that he enjoyed it. There is nothing to indicate anything other than this was the panic-stricken act of a sick mind, and we will get into what I mean by a sick mind when we get to the mitigating circumstances.

(OR. 1449-50).

Following the closing arguments of counsel, the jury received their instructions. The jury was instructed on eight (8) aggravating circumstances, and received the following instruction on the heinous, atrocious, or cruel aggravating factor:

> H, that the crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel.
>
> Now, "heinous" means extremely wicked or shockingly evil.
>
> "Atrocious" means outrageously wicked and vile.
>
> "Cruel" means designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others, pitiless.

(OR. 1461). The jury did not receive the expanded definition of this aggravating factor requested by defense counsel. After the jury returned its death recommendation, the trial court imposed the death penalty on Mr. Breedlove, finding in aggravation that the murder was heinous, atrocious, or cruel (OR. 186).

On direct appeal, Mr. Breedlove argued that the jury had been improperly instructed on the heinous, atrocious or cruel aggravating factor:

> In State v. Dixon, this Court interpreted subsection (5)(h) as including crimes which are "outrageously wicked and vile," 283 So.2d at 9,; under Godfrey, this [is] no limitation at all. The critical limitation on the application of this aggravating circumstance is therefore the provision in Dixon which purports to narrow its scope:
>
> > . . . What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the consciousless or pitiless crime which is unnecessarily tortuous to the victim. 283 So.2d at 9.
>
> * * *

> Any application of subsection (5)(h) beyond this limited scope renders that aggravating circumstance unconstitutionally vague and overbroad. Godfrey v. Georgia, supra. This, this circumstance must be limited to those cases in which the method by which the homicide was perpetrated was unnecessarily tortuous or depraved -- the "additional facts" must be the focus. Godfrey v. Georgia, supra. The trial court in this case allowed the State to deviate from this strictly demarcated aggravating circumstance, and to introduce irrelevant and inflammatory testimony in this guise of proving its applicability.

(3PCR. 294-295) (footnote omitted) (emphasis in original). Appellate counsel went on to address the trial court preservation of the issue, arguing that counsel had requested an expanded instruction according to the Dixon standard, and that the trial court erroneously denied counsel's request:

> [C]ounsel requested the court to instruct the jury, pursuant to the express language of Dixon, that subsection (5)(h) applies "only where the actual commission of the capital felony was accomplished by such additional acts as to set the crime apart from the norm of capital felonies" (SR 8). The court refused to give this instruction (SR. 8; Tr. 1386-87), in direct contravention of the rule announced by this Court in Cooper v. State, supra:
>
> > Of course, a proper instruction defining the terms "especially heinous, atrocious or cruel", or any other listed circumstance, must be given. Here the trial judge read the jury the interpretation of that term which we gave in Dixon. No more was required. 336 So.2d at 1140.
>
> It would have been inappropriate, in any case, for the trial court to refuse to give an instruction which tracks the definition announced by this Court in Dixon -- but in

> this case, where such an instruction was absolutely essential to protect against improper considerations being insinuated into the delicate weighing process to be performed by the jury, it was clearly error. See Godfrey v. Georgia, ___ U.S. ___, 27 Cr.L. 3115, 3118 (1980), opinion filed May 19, 1980.

(3PCR. 297-298). In its Answer Brief, the State raised no argument that the issue regarding the heinous, atrocious or cruel jury instruction had not been preserved in the trial court (See 3PCR. 370-373).

The Reply Brief filed by Mr. Breedlove's counsel on direct appeal also addressed the issue regarding the heinous, atrocious or cruel jury instruction:

> [R]eversal for a new jury-sentencing proceeding is nonetheless mandated for three reasons: 1) the improper admission of the testimony of the medical examiner before the jury, the blatantly prejudicial effect of which skews the jury recommendation of death (a recommendation upon which the State relies heavily, see Answer Brief at 56); 2) the insufficiency of the jury instructions defining this circumstance under the recent decision in Godfrey v. Georgia, ___ U.S. ___, 100 S.Ct. 1759, 1765 (1980); and 3) the great weight given to testimony of the medical examiner by the trial court (R. 186). Godfrey establishes that if this aggravating circumstance is applied in an overly broad manner at trial, that error "cannot be cured" on appellate review. 100 S.Ct. at 1765.

(3PCR. 416-417) (emphasis added).

During oral argument before this Court, direct appeal counsel specifically discussed the jury instruction issue:

> More importantly, in the recent decision by the Supreme Court of the United States in Godfrey v. Georgia, and under well-settled Florida law, the jury wasn't given

> appropriate guidance for applying this particular [heinous, atrocious, or cruel] aggravating circumstance. And this is exacerbated by the admission of the medical examiner's testimony, not the medical examiner who, by the way, performed the autopsy, but another medical examiner who came in, read the autopsy notes, and decided that the individual had suffered great pain before he died. Whether or not an individual does suffer such pain can be relevant when the acts of the defendant are designed to inflict such pain, in a torture murder, for example. But as the Tedder decision teaches us, the mere fact that a victim may languish does not necessarily make a homicide heinous, atrocious, or cruel. What we have here is a single knife stab, uncontroverted evidence, and only theories to the contrary, that the individual intended to cause the type of great pain consistent with a torture murder and the death of the victim.
>
> Now, where that type of testimony is admitted, we would submit that the instruction which was requested in this case, the instruction taken directly from this Court's decision in Dixon, that there must be additional acts to find a homicide heinous, atrocious, or cruel, should have been given. Godfrey establishes that just telling the jury that it has to be shockingly evil or words to that effect which are almost identical to the Georgia statute does not limit the application of that aggravating circumstance. That alone, we submit, warrants reversal, we submit, warrants reversal for a new sentencing hearing.

(Breedlove v. State, Fla. Sup. Ct. No. 56,811, Tape of Oral Argument).

Following the issuance of the direct appeal opinion, Mr. Breedlove's appellate counsel filed a motion for rehearing which reiterated the jury instruction issue. Counsel noted that Mr. Breedlove had "challenged the application of subsection (5)(h) [the heinous, atrocious, or cruel factor] in the trial court on

several grounds," including "the insufficient instructions on this factor which failed to properly define it for the jury" (Breedlove v. State, Fla. Sup. Ct. No. 56,811, Motion for Rehearing at 24).[2] Counsel then pointed out that the direct appeal opinion

> overlooked or failed to consider the inadequate instructions of the Court, which refused to instruct the jury in accordance with State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), and the consequent unconstitutional application of subsection (5)(h) in the trial court. See Godfrey v. Georgia, ___ U.S. ___, 100 S.Ct. 1759 (1980).

(Motion for Rehearing at 25). Again, this argument clearly raised the jury instruction issue. The Motion for Rehearing was subsequently denied.

On November 30, 1982, a motion for post-conviction relief on Mr. Breedlove's behalf was filed in Dade County Circuit Court. The motion was summarily denied on January 4, 1991. This Court affirmed the trial court's order. Breedlove v. State, 580 So. 2d 605 (Fla. 1991). On November 18, 1991, a death warrant was signed by the Governor. Undersigned counsel began representation of Mr. Breedlove on November 25, 1991, after volunteer counsel could not be located. On December 18, 1991, Mr. Breedlove's second postconviction motion was filed. The motion was summarily denied by the circuit court (2PCR. 324), and this Court affirmed the denial of the guilt phase ineffectiveness claims and reversed

---

[2]The direct appeal motion for rehearing was admitted as Exhibit L in the lower court (T. 12), but is not included in the record on appeal. The motion is, however, in this Court's file on the direct appeal (Case No. 56,811).

and remanded for an evidentiary hearing regarding penalty phase ineffective assistance of counsel. Breedlove v. Singletary, 595 So. 2d 8 (Fla. 1992). In that opinion, this Court provided the following summary regarding the offense:

> [I]t must be remembered that Breedlove's victim died from a single stab wound inflicted during the course of a burglary and that Breedlove acquired the weapon only after entering the house. The State conceded at the trial that this was a case of felony murder rather than premeditated murder.

Breedlove, 595 So. 2d at 12. The evidentiary hearing took place in May, 1992, and the circuit court denied relief (2PCR. 822-824). A timely appeal was filed in this Court.

During the pendency of that appeal,the Espinosa and James decisions were handed down. In Espinosa, the United States Supreme Court held that a Florida penalty phase jury must receive constitutionally adequate instructions on aggravating factors and that Florida's standard jury instruction on heinous, atrocious, or cruel was unconstitutionally vague and therefore violative of the Eighth Amendment. In James, this Court recognized that fairness dictated that Espinosa be applied in cases where the jury instruction issue had been preserved both at trial and on direct appeal. Based upon Espinosa and James and upon the fact that the issue had been properly preserved in Mr. Breedlove's case, Mr. Breedlove filed a third postconviction motion raising an Espinosa/James claim (3PCR. 427-457).

Judge Levenson heard argument from counsel and received documentary evidence at a hearing conducted on June 18, 1993.

Counsel for Mr. Breedlove argued that there was no question that the instruction given Mr. Breedlove's jury was unconstitutional (T. 13). When Judge Levenson asked if the State admitted that the instruction was unconstitutional, the State responded, "Unfortunately, yes, Your Honor, I must admit that" (T. 13).

Counsel for Mr. Breedlove argued that the issue regarding the jury instruction on heinous, atrocious or cruel was preserved at trial by a pretrial motion arguing that the factor was unconstitutionally vague and overbroad and by the submission of a proposed jury instruction on the factor (T. 14-15). Judge Levenson stated that she believed the issue was properly preserved by the defense's submission of the proposed jury instruction and by the defense arguments at the penalty phase charge conference (T. 16). When the State argued that these matters did not sufficiently preserve the issue (T. 17-18), Judge Levenson stated, "If the motion [for a jury instruction] is made and there is evidence of it, I don't think we can deny that. And the fact that this jury instruction was produced and denied . . . [i]s evident" (T. 22). Counsel for Mr. Breedlove further argued that the issue was also preserved by the defense pretrial motion arguing that the heinous, atrocious or cruel aggravating factor was vague and overbroad because the objection to the statutory language is also an objection to the jury instruction which is based upon the statutory language, "particularly when you follow it with a request for a specific jury instruction" (T. 29). Judge Levenson inquired, "Would that be because the jury

instruction is supposed to track the statute when you advise the jury so they understand what the statute is? . . . . I mean, what else is a jury instruction except, in all honesty, the way that we impart to the jury the definition of the statute under which they must find the violation" (T. 29-30).

Mr. Breedlove's counsel also argued that the proposed instruction requested at trial was correct because "[t]hat instruction tracked the language of State versus Dixon, which had defined when this aggravator was to be applied" (T. 15). Mr. Breedlove's counsel explained that the proposed instruction "is the proper language to narrow this aggravating factor, and we have cited several cases in our pleadings to the Court . . . in which the Florida Supreme Court has held that the consciousless or pitiless and unnecessarily tortuous standard is the standard for applying heinous, atrocious and cruel" (T. 33).

Mr. Breedlove's counsel argued that the issue was also properly raised on direct appeal (T. 35-36), and noted that on direct appeal the State had not contended that the issue had not been preserved at trial (T. 34). Judge Levenson concurred that her review of the direct appeal briefs and opinion had revealed no contention that the claim was not preserved at trial: "[N]obody argued that it was not preserved in the briefs. . . . Or that the opinion from the Supreme Court stated that it wasn't preserved so it did not have to be addressed" (T. 34). Earlier, Judge Levenson had inquired of the State, "I wondered to myself how would the court in hearing the direct appeal have . . .

allowed it to be addressed and not thrown it out as an issue if it wasn't preserved in the trial court. They would have said that, wouldn't they?" (T. 7).

Early in the hearing, the State was forced to agree that the issue had been raised on direct appeal: "I understand your feeling that perhaps it was preserved on appeal, and we have a slight argument to that. But I can understand, after hearing the reply and hearing the tape too . . . why you may come to that conclusion" (T. 6). Later, the State argued that the issue was not adequately raised on direct appeal because it was raised in an argument which contained several arguments (T. 37-38). The State also relied upon this Court's prior ruling on Mr. Breedlove's state habeas corpus petition (T. 38, 40-41). In that petition, filed before Espinosa and James, Mr. Breedlove's Claim 2 relied upon Maynard v. Cartwright, 486 U.S. 356 (1988), to raise an issue regarding the heinous, atrocious or cruel jury instruction. This Court denied relief on the claim, stating, "that current counsel argues other grounds or facts than appellate counsel did does not save issues 1, 2, and 4 from being barred procedurally." Breedlove v. Singletary, 595 So. 2d at 10. Before Judge Levenson, the State relied upon this statement to argue that this Court "felt that [direct appeal counsel] in burying that issue the way he did did not adequately apprise the Florida Supreme Court of the issue" (T. 41). However, the State also conceded, "I understand it looks like perhaps maybe [direct appeal counsel] did [raise the issue] and maybe, maybe the

[Florida Supreme] [C]ourt was wrong. I mean, I heard the tape and it sure sounded like he did raise it" (T. 41). Mr. Breedlove's counsel responded that the issue was clearly raised on direct appeal, that direct appeal counsel cited the facts and law supporting the issue, and that this Court's state habeas opinion does not say that the issue was not raised, but that the Court had previously considered the issue and would not reconsider it (T. 42). Mr. Breedlove's counsel also pointed out that in Mr. Breedlove's case, direct appeal counsel presented an argument virtually identical to the direct appeal argument presented in James (T. 46-47).

Turning to the question whether the error was harmless, Mr. Breedlove's counsel pointed out that when constitutional error occurs, the State has the burden of showing beyond a reasonable doubt that the error was harmless (T. 59). Mr. Breedlove's counsel argued that there were several aspects to the harmless error analysis (Id.). The first consideration was whether there was mitigation in the record such that a jury which was properly instructed would have had a reasonable basis for a life recommendation (T. 60). Mr. Breedlove's counsel argued that the mitigation in the record would have supported a life recommendation had the jury been properly instructed and recommended life (T. 60-62). The second consideration was the possible effect of a proper instruction on the jury's consideration of the aggravator and whether the aggravator would have been found anyway, regardless of what instruction was used

(T. 62). Mr. Breedlove's counsel argued that the question whether the facts supported this aggravator was hotly disputed at trial and that in such circumstances the erroneous instruction cannot be considered harmless (T. 62-66). Mr. Breedlove's counsel further explained that the evidence in front of the jury regarding the crime must be considered in analyzing whether the failure to provide the proposed instruction on the unnecessarily tortuous language was harmless beyond a reasonable doubt:

> We need to remember that the Defense requested that the jury be instructed that heinous, atrocious and cruel applies only when the crime is accompanied by such additional acts as to set it apart from the norm. That is, that it is a consciousless or pitiless crime which is unnecessarily tortuous.
>
> The Defense wanted the jury to know that to prove this aggravator the State had to prove beyond a reasonable doubt that the murder was accomplished in an unnecessarily tortuous manner. And that limitation is what would set a crime apart from the normal capital felony, if there is such a thing, that would, that the defendant would commit acts above and beyond what was necessary to commit murder, acts which resulted in torture.
>
> Now, to consider if the proper instruction regarding the unnecessarily tortuous language would have had no effect on the jury, we need to consider with what, what is the evidence in front of the jury about Mr. Breedlove's acts.
>
> That evidence came from Mr. Breedlove's statement in which he said that he went into the victim's home to burglarize. He did not have a weapon with him. He did not intend to kill anyone when he went in there.
>
> As he went though the house, he picked up a knife from the kitchen and he went into

the bedroom and he was attempting to open the jewelry box when the victim awakened, lunged at him and said: What are you doing? Mr. Breedlove lunged at the victim and stabbed him once and ran away.

This confession is consistent with the medical evidence. The victim had small wounds on his hands consistent with having tried to grab the knife. The victim had a single stab wound, and the depth of the wound was consistent with the victim running at Mr. Breedlove while Mr. Breedlove was stabbing him.

It is also significant to consider that the jury acquitted Mr. Breedlove of attempted first degree murder on the victim's female companion. We, of course, don't know the basis of the acquittal, but we can think about what does this mean about what the jury thought of the evidence.

THE COURT: It was a complete acquittal and not a, not a conviction on a lesser.

MS. ANDERSON: It was an acquittal. Not guilty.

THE COURT: Okay.

MS. ANDERSON: I think one very reasonable inference to draw from the acquittal on the other person in the room, the woman who was in the bed with the male victim, is that the jury accepted Mr. Breedlove's explanation that he didn't mean to do, to kill anyone; that he reacted when the victim awoke and then ran away.

* * *

Considering this evidence, the question for Your Honor, one of the questions on harmless error is whether it can be said beyond a reasonable doubt that the jury's consideration of this aggravating factor, heinous, atrocious and cruel, would not have been affected if the jury had been told that the State had to prove that Mr. Breedlove, the manner in which Mr. Breedlove committed the murder was unnecessarily tortuous.

> Mr. Hitchcock, in which the Florida Supreme Court granted relief on an Espinosa claim, the Florida Supreme Court could not say the error was harmless, but -- and the facts in Hitchcock are that the defendant raped the victim and when the victim threatened to tell her mother and started to yell, the defendant choked her, carried her outside her home and then choked her and beat her until she was quiet.
>
> With facts like those the Florida Supreme Court still could not say that the erroneous instruction in Hitchcock was harmless beyond a reasonable doubt.
>
> Clearly the facts in Mr. Breedlove's case involving a single stab wound during a felony murder likewise cannot support a finding that the instructional error was harmless beyond a reasonable doubt.

(T. 63-66). Finally, Mr. Breedlove's counsel also argued that the error could not be found harmless based on the fact that two other aggravating factors remain (T. 66-67).

The State argued that the error was harmless because the correct definition of the aggravator was presented in closing arguments at the penalty phase (T. 69-72), which caused Judge Levenson to inquire, "Don't you agree that whatever the lawyers say in closing argument is not the law that the jury is to consider, and they're told that a number of times, they're told that by the court that this is only argument" (T. 73). The State then disputed Mr. Breedlove's counsel's description of the facts of the offense and whether those facts support the aggravator regardless of the instruction (T. 74-76). The State argued that the jury would still have found the aggravator "even under a proper jury instruction" (T. 77). The State further contended

that the existence of two other aggravating factors renders the error harmless (T. 78-80). Finally, the State argued that the mitigation presented by the defense at the penalty phase was weak and was contradicted by the State's evidence (T. 81).

Mr. Breedlove's counsel replied to the State's arguments:

> The standard requires the State to establish beyond a reasonable doubt that the error didn't affect the jury's deliberations.
>
> In Hitchcock the Florida Supreme Court stated the standard as follows: "We cannot tell what part the instruction played in the jury's consideration of its recommended sentence."
>
> In James the Florida Supreme Court said "We cannot say beyond a reasonable doubt that the invalid instruction did not affect the jury's consideration or that its recommendation would have been the same if the requested expanded instruction had been given."
>
> So the standard requires the State to establish beyond a reasonable doubt that the error had no affect.
>
> The State -- and I can stand up here all afternoon and argue facts. We can argue the facts of the crime, we can argue the evidence presented in mitigation.
>
> What Your Honor has to do is assume that the error was harmful until the State can establish it was harmless. And just by the very fact that we're up here arguing the facts show this about whether Mr. Breedlove should get life or death, and the State argues the other side of that question, demonstrates that there was a big dispute.
>
> The trial judge found three aggravating factors, heinous, atrocious, cruel being one of them. In James the trial judge found five aggravating factors; and in that case the Florida Supreme Court couldn't say the error was harmless beyond a reasonable doubt.

> Regarding the State's argument that harmlessness occurs when the State and Defense argue the proper definition, first of all, as Your Honor correctly noted, the arguments of attorneys are not instructions to the jury, and the jury is told that.
>
> Additionally, we need to consider would it have made -- can we say it would have made no difference if the jury had known that the State had to prove that Mr. Breedlove committed this crime in an unnecessarily tortuous manner? The purpose of a penalty phase, a capital penalty phase is, in a sense, to compare crimes and to compare defendants. It is to decide which defendant has the level of culpability that would warrant a death sentence.
>
> So as odd as it seems, one of the questions the jury has to decide is this particular murder, is it one of the really bad murders that we give death for, and that is why the unnecessarily tortuous, why the Florida Supreme Court has said that that language must be used to determine if heinous, atrocious and cruel apply. Because that is what sets the crime apart from the so-called normal capital felony.
>
> * * *
>
> What matters is the whole picture. It's not just number of aggravators. It's not just whether the facts support this particular aggravator. It's everything. Considering the whole picture, can Your Honor say beyond a reasonable doubt that the error was harmless. Considering the number of aggravators, considering the mitigation presented, considering the facts as they relate to the aggravator; and whether the definition would have made a difference in how the jury considered that aggravator. All those things together go into the harmless error question.

(T. 84-87).

Judge Levenson granted the motion on October 22, 1993 (3PCR. 530-533). In her order, Judge Levenson wrote:

In the instant case, Breedlove's counsel objected to Florida Statute § 921.141 in a pre-trial motion to declare the statute unconstitutional. He later objected to the standard jury instruction which flows from the statute and requested an enlarged instruction which was denied. (See Defendant's Exhibit C in evidence at evidentiary hearing on this motion, attached hereto).

Appellate counsel for Breedlove argued this issue in Appellant's Brief (pages 59-65) and at oral argument. (See tape recording, Defendant's Exhibit J in evidence at evidentiary hearing on this motion).

Breedlove has met the requirements established in James to allow him to raise this issue in a new motion for post conviction relief.

The final question before this Court is whether the giving of the constitutionally vague instruction was harmless error or was error of such magnitude as to require a new sentencing hearing. Put another way, can this Court find beyond a reasonable doubt that the invalid instruction did not affect the jury's decision to recommend the death penalty?

Two other aggravating factors were established in this case. The Court rejected defense testimony as to mitigating factors. However, because a jury's recommendation must be given great weight by the sentencing court, and because it is impossible to know beyond a reasonable doubt that the invalid instruction did not affect the jury's consideration, the error created by the incomplete instruction cannot be deemed harmless.

Would the recommendation of this jury have been different if they had received the expanded instruction which was requested? Because that question cannot be answered negatively or affirmatively beyond a reasonable doubt, the motion is granted for a new sentencing hearing.

(3PCR. 541-42). The State then filed a notice of appeal from the circuit court's granting of a jury resentencing to Mr. Breedlove (3PCR. 537).

SUMMARY OF THE ARGUMENT

It is indisputable that Mr. Breedlove's sentencing jury received an unconstitutionally vague instruction on the heinous, atrocious, or cruel aggravating circumstance under Espinosa v. Florida, 112 S. Ct 2629 (1992), and, therefore, his sentencing proceeding was infected with Eighth Amendment error. The State does not contest that Mr. Breedlove's sentencing jury received the same instruction found to be constitutionally defective in Shell v. Mississippi, 111 S. Ct 313 (1990). Fairness dictates that Mr. Breedlove is entitled to the benefit of Espinosa because the issue was preserved both at trial and on direct appeal. James v. State, 615 So. 2d 668 (Fla. 1993). The lower court correctly found that Mr. Breedlove's defense counsel adequately preserved the issue at trial by objecting to the jury instructions as being unconstitutional and by proposing an expanded definition of the aggravating circumstance to comport with the correct definition found in State v. Dixon, 283 So.2d 1 (Fla. 1973). The lower court also correctly found that Mr. Breedlove's appellate counsel, recognizing that the issue had been preserved at trial, raised the jury instruction issue on direct appeal. Finally, the lower court properly ordered a new jury sentencing because the State had failed to prove beyond a reasonable doubt that the unconstitutionally vague jury

instruction played no part in the jury's consideration of its recommended sentence. The circuit court's order should be upheld in all respects, and a new jury sentencing proceeding should be ordered.

ARGUMENT

MR. BREEDLOVE'S SENTENCING JURY RECEIVED AN UNCONSTITIONALLY VAGUE JURY INSTRUCTION ON THE HEINOUS, ATROCIOUS, OR CRUEL AGGRAVATING CIRCUMSTANCE IN VIOLATION OF ESPINOSA V. FLORIDA, AND THE LOWER COURT CORRECTLY ORDERED A NEW JURY SENTENCING PROCEEDING BECAUSE THE ISSUE WAS PROPERLY PRESERVED AT TRIAL AND ON DIRECT APPEAL AND THEREFORE COGNIZABLE IN A SUCCESSIVE POST-CONVICTION MOTION UNDER JAMES V. STATE, AND THE STATE FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT THE UNCONSTITUTIONAL INSTRUCTION PLAYED NO PART IN THE JURY'S CONSIDERATION OF ITS RECOMMENDED SENTENCE.

Mr. Breedlove's sentencing jury unquestionably received an unconstitutionally vague instruction on the heinous, atrocious, or cruel aggravating circumstance under Espinosa v. Florida, 112 S. Ct 2629 (1992), and, therefore, his sentencing proceeding was infected with Eighth Amendment error. The State does not contest that Mr. Breedlove's sentencing jury received the same instruction found to be constitutionally defective in Shell v. Mississippi, 111 S. Ct 313 (1990). Fairness dictates that Mr. Breedlove is entitled to the benefit of Espinosa because the issue was preserved both at trial and on direct appeal. James v. State, 615 So. 2d 668 (Fla. 1993).

In Mr. Breedlove's case, the jury's death recommendation was tainted by Eighth Amendment error. The jury received constitutionally inadequate instructions regarding the "heinous,

atrocious, or cruel" aggravating factor. James; Espinosa; Shell. See also Maynard v. Cartwright, 486 U.S. 356 (1988). Because a Florida penalty phase jury is a co-sentencer under Florida law, see Espinosa; Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993), the Eighth Amendment prohibition against weighing invalid aggravating circumstances applies with equal vigor to what the jury weighs in its deliberations. Johnson. Cf. Jackson (Andrea Hicks) v. State, 19 Fla. L. Weekly S215 (Fla. April 21, 1994). See also Sochor v. Florida, 112 S.Ct. 2114, 2119 (1992) (there is Eighth Amendment error when the sentencer weighs an invalid aggravating circumstance in reaching the ultimate decision to impose a death sentence).

Mr. Breedlove's jury was provided the following instruction regarding the "heinous, atrocious, or cruel" aggravating circumstance:

> H, that the crime for which the defendant is to be sentenced was especially heinous, atrocious, or cruel.
>
> Now, "heinous" means extremely wicked or shockingly evil.
>
> "Atrocious" means outrageously wicked and vile.
>
> "Cruel" means designed to inflict a high degree of pain, utter indifference to, or enjoyment or, the suffering of others, pitiless.

(OR. 1461). This instruction on the "heinous, atrocious, or cruel" aggravating circumstance was the exact instruction struck down by the United States Supreme Court in Shell v. Mississippi, 111 S.Ct 313 (1990). The Shell instruction provided as follows:

> [T]he word heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others.

Shell, 111 S.Ct at 313. The Court in Shell found that based upon Maynard v. Cartwright, 486 U.S. 356 (1988), the above instruction was violative of the Eighth Amendment. In Maynard, the Supreme Court struck as unconstitutionally vague the following instruction:

> [T]he term 'heinous' means extremely wicked or shockingly evil; 'atrocious' means outrageously wicked and vile; 'cruel' means pitiless, or designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others.

Shell, 111 S.Ct. at 314 (quoting Cartwright v. Maynard, 822 F.2d 1477, 1488 (10th Cir. 1987)(en banc)). The Maynard Court held that this instruction could not be squared with the dictates of Godfrey v. Georgia, 446 U.S. 420 (1980) and Furman v. Georgia, 408 U.S. 238 (1972). Both the Shell and Maynard instructions were identical to the definition of "heinous, atrocious, or cruel" provided to Mr. Breedlove's jury.

The Shell Court detailed the fatal vagueness problem with the "heinous, atrocious, or cruel" instruction given to Mr. Breedlove's jury:

> Obviously, a limiting instruction can be used to give content to a statutory factor that "is itself too vague to provide any guidance to the sentencer" only if the limiting instruction's own "definitions are constitutionally sufficient," that is, only if the limiting instruction itself "provide[s] some guidance to the sentencer."

> Walton v. Arizona, 497 U.S. ___, 110 S.Ct. 3047, 3057, 111 L.Ed.2d 511 (1990). The trial court's definitions of "heinous" and "atrocious" in this case (and in Maynard) clearly fail this test; like "heinous" and "atrocious" themselves, the phrases "extremely wicked or shockingly evil" could be used by "[a] person of ordinary sensibility [to] fairly characterize almost every murder." Maynard v. Cartwright, supra, 486 U.S. at 363, 108 S.Ct. at 1859 (quoting Godfrey v. Georgia, 446 U.S. 420, 428-429, 100 S.Ct. 1759, 1764-65, 64 L.Ed.2d 398 (1980 (plurality opinion)). Indeed, there is no meaningful distinction between these latter formulations and the "outrageously or wantonly vile, horrible, and inhuman" instruction expressly invalidated in Godfrey v. Georgia.

Shell, 111 S.Ct. at 314 (emphasis in original). The Shell Court concluded that "[t]here is no legally tenable distinction, in sum, between this case and Maynard v. Cartwright." Id.

In Espinosa v. Florida, 112 S.Ct. 2926 (1992), the United States Supreme Court held:

> Our examination of Florida case law indicates, however, that a Florida trial court is required to pay deference to a jury's sentencing recommendation, in that the trial court must give "great weight" to the jury's recommendation, whether that recommendation be life, see Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975), or death, see Smith v. State, 515 So. 2d 182, 185 (Fla. 1987), cert. denied, 435 U.S. 971 (1988); Grossman v. State, 525 So. 2d 833, 839 n.1 (Fla. 1988), cert. denied, 489 U.S. 1071-1072 (1989). Thus, Florida has essentially split the weighing process in two. Initially, the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances.
>
> It is true that, in this case, the trial court did not directly weigh any invalid

> aggravating circumstances. But, we must presume that the jury did so, see Mills v. Maryland, 486 U.S. 367, 376-377 (1988), just as we must further presume that the trial court followed Florida law, cf. Walton v. Arizona, 497 U.S. 639, 653 (1990), and gave "great weight" to the resultant recommendation. By giving "great weight" to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found. This kind of indirect weighing of an invalid aggravating factor creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor, cf. Baldwin v. Alabama, 472 U.S. 372, 382 (1985), and the result, therefore, was error.

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

In James, this Court held that claims made pursuant to Espinosa v. Florida were cognizable in post-conviction proceedings. The Court premised this result upon notions of fairness: "Because of this it would not be fair to deprive him of the Espinosa ruling." James, 615 So. 2d at 669. Clearly, principles of fairness govern Mr. Breedlove's case as well. In James, relief was granted in successor Rule 3.850 proceedings, precisely the posture in which Mr. Breedlove finds himself. The Court wrote:

> While this appeal was pending, the United States Supreme Court declared our former instruction on the heinous, atrocious, or cruel aggravator inadequate. Espinosa v. Florida, 112 S.Ct 2926, 120 L.Ed. 854 (1992). Claims that the instruction on the heinous, atrocious, or cruel aggravator is unconstitutionally vague are procedurally barred unless a specific objection on that ground is made at trial and pursued on appeal. Melendez v. State, no. 75,081 (Fla. Nov. 12, 1992). James, however, objected to the then-standard instruction at trial, asked for an expanded instruction, and argued on

> appeal against the constitutionality of the instruction his jury received. Because of this it would not be fair to deprive him of the Espinosa ruling.

James, 615 So. 2d at 669 (footnote omitted) (emphasis added).

Recently, in Jackson (Andrea) v. State, 19 Fla. L. Weekly S215 (Fla. April 21, 1994), the Court, in holding that the standard jury instruction on the cold, calculated, and premeditated aggravating circumstance was unconstitutionally vague, reiterated its understanding of Espinosa:

> The first rationale [that Maynard is inapposite to Florida's death penalty sentencing scheme] was discredited in Espinosa where the Supreme Court noted that it has held "instructions more specific and elaborate than [Florida's standard heinous, atrocious, or cruel instruction] unconstitutionally vague." 112 S. Ct at 2928. The Supreme Court rejected the State's argument that there is no need to instruct the jury with specificity because the jury is not the sentencer under Florida's sentencing scheme. Instead, the Supreme Court noted that under Florida's sentencing scheme,, which requires the trial court to give "great weight" to the jury's recommendation, "the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found." Id. Because "[t]his kind of indirect weighing of an invalid aggravating factor creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor," the result was error. Id.

Jackson, 19 Fla. L. Weekly at S216. The Jackson Court further explained:

> A vagueness challenge to an aggravating circumstance will be upheld if the provision fails to adequately inform juries what they must find to recommend the death penalty and as a result leaves the jury and the appellate courts with the kind of open-ended discretion

> which was held invalid in Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed.2d 346 (1972). Maynard, 486 U.S. at 361-62. The Supreme Court has found HAC-type instructions unconstitutionally vague because "[a] person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible, and inhuman.'" Godfrey v. Georgia, 446 U.S. 420, 428-29, 100 S. Ct. 1759, 64 L.Ed.2d 398 (1980); see also Maynard, 486 U.S. at 364 ("an ordinary person could honestly believe that every unjustified, intentional taking of life is 'especially heinous'").

Id.

James and Jackson make clear that trial and appellate court preservation of the jury instruction issue make Espinosa claims cognizable in Rule 3.850 motions. In Mr. Breedlove's case, the State has conceded that the issue was raised on direct appeal. Further, trial court preservation occurred when defense counsel objected to the instructions as being unconstitutional and requested an expanded instruction "which essentially mirrored this Court's case law explanations of the terms." Jackson, 19 Fla. L. Weekly at S217. As the lower court properly found in the order granting the postconviction motion, Mr. Breedlove has satisfied all of the James pre-requisites, and is entitled to similar relief.

The lower court correctly found that this claim was cognizable under Espinosa and James because Mr. Breedlove's defense counsel adequately preserved the issue at trial by objecting to the jury instructions as being unconstitutional, and by proposing an expanded definition of the aggravating circumstance to comport with the correct definition found in

Dixon. The lower court also correctly found that Mr. Breedlove's appellate counsel, recognizing that the issue had been preserved at trial, raised the jury instruction issue on direct appeal. Finally, the lower court properly ordered a new jury sentencing because the State had failed to prove beyond a reasonable doubt that the unconstitutionally vague jury instruction played no part in the jury's consideration of its recommended sentence.

I. THE LOWER COURT CORRECTLY DETERMINED THAT THE ESPINOSA/JAMES CLAIM WAS COGNIZABLE AS IT HAD BEEN ADEQUATELY AND PROPERLY PRESERVED AT TRIAL AND, AS THE STATE HAS CONCEDED, ON DIRECT APPEAL.

The lower court correctly found that the jury instruction issue had been properly preserved at trial by virtue of the submission of a proposed expanded instruction on the heinous, atrocious, or cruel aggravating circumstance. In her order, Judge Levenson wrote that defense counsel objected to the then-standard jury instruction which inadequately defined the aggravating circumstance and submitted an expanded instruction for the trial court's consideration (3PCR. 541). Because, under James, this is adequate preservation of the issue, Judge Levenson correctly determined that the issue had been preserved at trial. Cf. Jackson (Andrea Hicks) v. State, 19 Fla. L. Weekly at S217 ("[Jackson] asked for an expanded instruction which essentially mirrored this Court's case law explanations of the terms").

Despite the defense's pretrial objection, the objection at the charge conference, the objection prior to the medical examiner's testimony, and the submission of the proposed instruction--and despite the lower court's clear findings

regarding the sufficiency of these objections[3]--the State contends that the issue was not adequately preserved at trial. The State contends that individually neither the pretrial motion nor the proposed instruction was sufficient to preserve the claim. The State never addresses the other objections which were raised at the charge conference and prior to the medical examiner's testimony. Further, the State never once considers that the combination of all of these objections was more than sufficient to preserve the issue.

Prior to trial, defense counsel filed a "Motion to Declare Florida Statute Section 941.141 Unconstitutional" (OR. 49-58). In that motion, counsel argued, inter alia, that the aggravating circumstances listed in Florida's capital sentencing statute were "impermissibly vague and overbroad," (OR. 49), and therefore were violative of the Eighth and Fourteenth Amendments. Id. Because "[a]lmost any capital felony would appear especially cruel heinou[s] and atrocious to the layman," (OR. 50), counsel argued that "[e]xamination of the legislative history of § 921.141 clearly shows that the intent of the legislature was to limit both aggravating and mitigating circumstances so as to avoid the purely discretionary and arbitrary sentencing standards condemned in Furman v. Georgia, 408 U.S. 238 (1972)" (OR. 51). The trial judge denied this motion (OR. 55(a)).

---

[3]It is significant that a trial court judge has found as a matter of fact that the objections raised at Mr. Breedlove's trial were sufficient to apprise the trial judge of the issue and to preserve the claim.

During the charge conference regarding the penalty phase instructions to be provided to the jury, defense counsel argued:

> MR. LEVINE: We would renew all our pre-trial motions to dismiss the statute, that would provide for these instructions as being unconstitutional, and that they unconstitutionally limit the mitigating circumstances involved; in addition to renewing all our other arguments.

(OR. 1284) (emphasis added). Mr. Breedlove's defense counsel also submitted a proposed expanded instruction on the heinous, atrocious, or cruel aggravating circumstance for the trial court's consideration. The proposed expanded instruction provided:

> The aggravating circumstances that the capital felony was especially heinous, atrocious, or cruel, applies only where the actual commission of the capital felony was accomplished by such additional acts as to set the crime apart from the norm of capital felonies -- the consciousless or pitiless crime which is unnecessarily tortuous to the victim.

(Supp. OR. 8). This proposed instruction was denied after the trial judge determined that defense counsel's proposed expansion of the then-standard jury instruction was "covered in the charge" (OR. 1386).[4]

---

[4]The State argues that the issue was not preserved at the trial level because "any objection must be sufficiently precise both to apprise the trial judge of the putative error and to preserve the issue for intelligent review" (Initial Brief of Appellant at 24). Yet the State does not and cannot explain how the trial judge was not "apprised" of or "was ever on notice" of defense counsel's contention that the standard jury instruction was vague in that it failed to adequately define the aggravating circumstance when the record explicitly reveals that defense counsel proposed the expanded instruction according to Dixon, and (continued...)

At the penalty phase, the State presented the testimony of medical examiner Dr. Ronald Wright, then of the Dade County Medical Examiner's Office. Prior to his testimony, defense counsel first objected to Dr. Wright being called as a witness because he had not been the medical examiner who conducted the autopsy of the victim, nor had he reviewed any of the evidence in the case with the exception of the original autopsy report (OR. 1311-12). In addition, defense counsel objected to the admission of Dr. Wright's testimony as irrelevant to any aggravating circumstance because he would not be testifying that the murder was accompanied by such additional acts to set the crime apart from the norm:

> Furthermore, I would cite 322 So. 2d 557, in which the Court held that a killing is not especially heinous, atrocious, or cruel simply because it is unnecessary, and Cooper v. State, which says that the standard of the aggravating circumstances is whether the horror of the murder is accompanied by such additional acts to set the crime apart from the norm; so even, if the doctor were to testify as to the amount of pain and suffering, it is totally irrelevant to any aggravating circumstance.

---

[4](...continued)
the trial court determined that the requested instruction was "covered in the charge" (OR. 1386). It is clear that not only did the request for an expanded instruction apprise the court of the issue, but the record reveals that the court in fact ruled on the issue by denying the instruction because the court believed the defense proposed instruction was "covered in the charge." Finally, as noted earlier, the court below found as a matter of fact that the objections raised at trial by defense counsel were sufficient to apprise the trial judge of the issue and preserve the claim.

(OR. 1312-13) (emphasis added). The trial court overruled the objection (OR. 1313).

As noted above, in this objection, defense counsel cited to this Court's opinion in Cooper v. State, 336 So. 2d 1133 (Fla. 1976). In Cooper, this Court held that "a proper instruction defining the terms 'especially heinous, atrocious, or cruel,' . . . must be given [to the jury]. Here the trial judge read the jury the interpretation of that term which we gave in Dixon. No more was required." Cooper, 336 So. 2d at 1140. Clearly, trial counsel, by proposing the expanded instruction in accordance with Dixon, and citing to Cooper, preserved the issue at trial. Cf. Jackson (Andrea Hicks) v. State, 19 Fla. L. Weekly at S217 (Jackson "asked for an expanded instruction which essentially mirrored this Court's case law explanations of the terms"). Despite counsel's efforts, the trial court read an unconstitutionally vague jury instruction to Mr. Breedlove's sentencing jury.

The State's complaints regarding the lower court's finding that the issue was preserved at trial are two-fold. First, the State argues that Judge Levenson erred in finding the claim cognizable because "attacking the constitutionality of the statute [] did not preserve any issue as to the standard jury instruction on this aggravating factor" (Initial Brief at 22). The State has mischaracterized Judge Levenson's findings. Judge Levenson's order does note that defense counsel filed a motion to declare § 921.141 unconstitutional, but the order also finds that

defense counsel "later objected to the standard jury instruction which flows from the statute and requested an enlarged instruction which was denied" (3PCR. 541). See Jackson (Andrea Hicks) v. State, 19 Fla. L. Weekly at S217 (upholding constitutional vagueness challenge to cold, calculated, and premeditated aggravator when the standard jury instruction "simply mirrors the words of the statute"). Thus, Judge Levenson correctly determined that the proper inquiry was "if the accused objected at trial to the constitutionally vague standard jury instruction on the aggravator of heinous, atrocious, or cruel, and requested an expanded instruction, and argued the constitutionality of the instruction on appeal, then this issue could be raised in a subsequent post-conviction relief motion" (3PCR. 541-42).[5]

The State's second complaint is that the "mere submission of an alternate instruction on this aggravating circumstance" in Mr. Breedlove's case is somehow insufficient to preserve the issue (Initial Brief at 25). The State does recognize that "[t]he only manner in which trial preservation could, conceivably, be said to have occurred would be through Breedlove's submission of a proposed instruction on this aggravating circumstance; in the order granting relief, Judge Levenson found that Breedlove had,

---

[5]The issue of the standard jury instruction tracking the statutory language also arose during the argument below. Judge Levenson clearly understood that filing the pre-trial motion was relevant because "the jury instruction is supposed to track the statute when you advise the jury so they understand what the statute is" (T. 29).

inter alia, 'requested an enlarged instruction which was denied.'" (Initial Brief at 25). Because defense counsel in this case did submit a proposed instruction which, in the words of the State, preserved the issue, the State has resorted to relying on obfuscation and unsupported legal propositions.[6] In the face of the submission of the proposed expanded jury instruction, as well as counsel's objection to the unconstitutionality of the jury instructions and his reference to the Cooper opinion, the State complains that "it would be inequitable to find that counsel's proposal of the alternate jury instruction at issue sub judice preserved any Espinosa claim" (Initial Brief at 26). James, however, indicates that, when the procedural prerequisites have been met, fairness dictates that Espinosa be applied to Mr. Breedlove.

---

[6] For example, as authority for its assertion that the proposal of the instruction in this case did not preserve the issue, the State provides a discussion of the Court's opinion in Kennedy v. Singletary, 602 So. 2d 1285 (Fla. 1992). The State argues that the proposed instruction in Mr. Breedlove's case is insufficient because Kennedy "says nothing of the proposal of an alternate jury instruction as a means of preserving claims of this nature" (Initial Brief at 25). Notwithstanding the fact that Kennedy predates this Court's opinion in James, the State fails to point out that the primary basis for rejecting the jury instruction claim in Kennedy was because Mr. Kennedy's petition for a writ of certiorari was denied by the Supreme Court on the same day that the Court issued its opinion in Espinosa, and this Court wrote that it "could not conceive that the United States Supreme Court would have denied certiorari had it found a valid Espinosa claim in this case." Kennedy, 602 So. 2d at 1285. Additionally, when Kennedy was decided, this Court had not yet issued James. The Court should therefore not be persuaded by the State's reliance on Kennedy, which did not address the issue before the Court in Mr. Breedlove's case. James clearly holds that submission of an alternate proposed instruction preserves the issue. 615 So. 2d at 669. See also Jackson (Andrea), 19 Fla. L. Weekly at S217.

The State simply ignores the fact that the proposal of the correct expanded instruction was sufficient to preserve the issue. In Atwater v. State, 626 So. 2d 1325 (Fla. 1993), this Court was faced with the exact same situation as in Mr. Breedlove's case. In Atwater, defense counsel, prior to the penalty phase, requested that the Court instruct the jury on the heinous, atrocious, or cruel aggravating factor pursuant to Dixon. Atwater, 626 So. 2d at 1328. The trial court decided to give only the part of the requested instruction which defined the terms heinous, atrocious, or cruel. This Court noted that the instruction eventually given to the jury was essentially the same as the one held to be unconstitutionally inadequate in Shell v. Mississippi, the identical instruction given to Mr. Breedlove's jury. In holding that the claim had been properly preserved in the trial court, this Court wrote:

> While the defense made no further objection to the instruction as given, we believe the point was sufficiently preserved for appeal by virtue of the prior request for a legally proper instruction.

Atwater, 626 So. 2d at 1329 (emphasis added).[7] In a footnote, the Court reaffirmed the fact that the Dixon instruction, which Mr. Breedlove's counsel included in the requested expanded instruction, is the correct standard for applying heinous, atrocious, or cruel. Id. at 1328 n.3. See also Hitchcock v. State, 614 So. 2d 483 (Fla. 1993).

The State argues that the proposed instruction did not preserve the issue because the proposed instruction was incorrect (Initial Brief at 27). However, the State fails to acknowledge, as was argued in the lower court, that the proposed instruction tracked the definition found in Dixon and, when combined with the then-standard instruction, would have provided the jury with the entire Dixon definition. In Dixon, this Court provided the following definition of heinous, atrocious or cruel:

> 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. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set

---

[7]The State argues that the jury instruction issue was not preserved at trial because trial counsel did not object to the denial of the proposed instruction (Initial Brief at 19). However, it is clear under cases such as Atwater that Florida law does not require a defendant to "take exception" to the denial of a motion. Indeed, under Florida law, the submission of a proposed instruction preserves an objection to a jury instruction regardless of whether the defendant makes any further objection after the proposed instruction is denied. State v. Heathcoat, 442 So. 2d 955, 957 (Fla. 1983); Buford v. Wainwright, 428 So. 2d 1389, 1390 (Fla. 1983); DeParias v. State, 562 So. 2d 434, 435 (Fla. 3rd DCA 1990).

> the crime apart from the norm of capital felonies--the conscienceless or pitiless crime which is unnecessarily torturous to the victim.

State v. Dixon, 283 So. 2d at 9. Mr. Breedlove's jury was instructed on the first sentence of the Dixon definition (OR. 1461). The proposed instruction is identical to the second sentence of the Dixon definition (Supp. OR. 8). Together, the then-standard instruction and the proposed instruction would have given the jury the full definition.

Moreover, as argued in the lower court, the proposed instruction was correct because it is the definition which renders the aggravator constitutional and upon which this Court relies in narrowing the application of this aggravator. The first sentence of the Dixon definition is unconstitutionally vague and overbroad. Shell v. Mississippi. Under this Court's case law, the second sentence of the Dixon definition is the most significant part, as that is the part of the definition requiring that the defendant have intended to torture the victim. See Stein v. State, 19 Fla. L. Weekly 532, 534 (Fla. 1994) (finding of heinous, atrocious or cruel struck because "no evidence was presented to demonstrate any intent on Steins' part to inflict a high degree of pain or to otherwise torture the victims"). The narrowing construction of heinous, atrocious or cruel, which requires that the defendant intended to inflict a high degree of pain or to otherwise torture the victim, can be found repeatedly in this Court's opinions. Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1993)("absent evidence that [the defendant] intended

to cause the victims unnecessary and prolonged suffering we find that the trial judge erroneously found that the murders were heinous, atrocious or cruel"); Santos v. State, 591 So. 2d 160, 163 (Fla. 1991)("A murder may fit this description if it exhibits a desire to inflict a high degree of pain, or an utter indifference to or enjoyment of the suffering of another"); Omelus v. State, 584 So. 2d 563, 566 (Fla. 1991)("where there is no evidence of knowledge of how the murder would be accomplished, we find that the heinous, atrocious, or cruel aggravating factor cannot be applied vicariously"); Chesire v. State, 568 So. 2d 908, 912 (Fla. 1990)("The factor of heinous, atrocious or cruel is proper only in torturous murders -- those that evidence extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another") Huckaby v. State, 343 So. 2d 29, 34 (Fla. 1977)(the presence of a mental or emotional disturbance may explain and negate heinous, atrocious, or cruel aggravating circumstances).

In Mr. Breedlove's case, defense counsel submitted a proposed instruction which provided an expanded definition of heinous, atrocious, or cruel which tracked the language in Dixon, and the trial court denied the instruction as "covered in the charge." The jury was then instructed on the constitutionally inadequate Shell instruction. As in Atwater, "the point was sufficiently preserved for appeal by virtue of the prior request

for a legally proper instruction." Atwater, 626 So. 2d at 1329.[8]

The State also argues that it would be "inequitable" to find that the proposed instruction preserved the claim because in closing argument defense counsel argued the heinous, atrocious or cruel aggravator according to the definitions which were provided in the jury instruction (Initial Brief at 26). Apparently, the State would have this Court rule that when a trial court denies a motion and counsel then complies with the court's ruling, counsel has somehow waived the objection raised by the motion. In Mr. Breedlove's case, counsel simply tailored his argument to the instructions the judge would be giving the jury. Counsel could do nothing else, unless the State is now advocating that in order to preserve an objection, counsel must argue to the jury that the judge's instructions are wrong.

The preservation at trial of the jury instruction issue in Mr. Breedlove's case could not be clearer. Counsel proposed an expanded definition of the then-standard jury instruction on heinous, atrocious, or cruel, in order to comport with the proper and complete definition found in Dixon. The trial court

---

[8]In a desperate attempt to deter the Court from applying the clear language of Atwater and James, the State pulls out of thin air the novel proposition that this Court should impose a different manner of preserving issues for purposes of direct appeal as opposed to preserving issues for collateral attack (Initial Brief at 26 n.4). Such a proposition is unworthy of any meaningful discussion, and Mr. Breedlove would simply point out that this Court's decisions in James, Hitchcock, and Atwater recognize that preserving the issue by submission of a proposed expanded instruction is sufficient whether the case arises on direct appeal or on collateral attack.

unquestionably was apprised of the nature of defense counsel's objection to the instruction and had the opportunity to rule on the issue when he denied the requested expanded instruction because it was "covered in the charge." Defense counsel also objected to the court's denial of prior objections "that would provide for these instructions as being unconstitutional." Counsel further objected to the testimony of the medical examiner, citing this Court's decision in Cooper, which held that the jury must receive instructions on heinous, atrocious, or cruel, which comport with the Court's definition in Dixon. Judge Levenson correctly found this issue preserved at trial.

The fact that this issue was adequately preserved at trial is also evidenced by the fact that the issue was explicitly and decidedly raised on direct appeal. Not only did appellate counsel raise the issue that § 921.141 was violative of the Eighth and Fourteenth Amendments, see 3PCR. 283, but counsel also specifically addressed the unconstitutional vagueness of the instruction provided to Mr. Breedlove's jury (3PCR. 294-299). Appellate counsel went on to address the trial court preservation of the issue, arguing that counsel had requested an expanded instruction according to the Dixon standard, and that the trial court erroneously denied counsel's request:

> [C]ounsel requested the court to instruct the jury, pursuant to the express language of Dixon, that subsection (5)(h) applies "only where the actual commission of the capital felony was accomplished by such additional acts as to set the crime apart from the norm of capital felonies" (SR 8). The court refused to give this instruction (SR. 8; Tr.

1386-87), in direct contravention of the rule announced by this Court in Cooper v. State, supra:

> Of course, a proper instruction defining the terms "especially heinous, atrocious or cruel", or any other listed circumstance, must be given. Here the trial judge read the jury the interpretation of that term which we gave in Dixon. No more was required. 336 So.2d at 1140.
>
> It would have been inappropriate, in any case, for the trial court to refuse to give an instruction which tracks the definition announced by this Court in Dixon -- but in this case, where such an instruction was absolutely essential to protect against improper considerations being insinuated into the delicate weighing process to be performed by the jury, it was clearly error. See Godfrey v. Georgia, ___ U.S. ___, 27 Cr.L. 3115, 3118 (1980), opinion filed May 19, 1980.

(3PCR. 297-298). The Reply Brief filed by Mr. Breedlove's counsel on direct appeal also reveals that the issue was preserved at trial and raised on appeal (3PCR. 416-417). During oral argument before this Court, appellate counsel also specifically discussed the jury instruction issue (Breedlove v. State, Florida Supreme Court, No. 56,811, Tape of Oral Argument). Following the issuance of the direct appeal opinion, Mr. Breedlove's appellate counsel filed a motion for rehearing which reiterated the jury instruction issue.

The State conceded below and in its Initial Brief on the instant appeal that the issue had been raised on direct appeal. In addition to the fact that appellate preservation satisfies the requisites of James, the manner in which the issue was raised on

direct appeal further emphasizes the fact that the issue was clearly preserved in the trial court. Despite the clarity of counsel's substantial argument in the direct appeal briefs and oral argument raising the jury instruction issue, the State never objected to appellate counsel's raising of an issue which now according to the State was not preserved at trial. The State certainly does not hesitate to point out to the Court when issues have been inappropriately raised due to procedural reasons. Since the issue was explicitly raised on direct appeal, as the State has conceded, and the State failed to assert any procedural bar, the State must be deemed to have waived any reliance on a procedural default argument. See Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993).

It is entirely proper for the Court to examine the direct appeal brief in order to ascertain whether the issue was properly preserved for appellate review by trial counsel. In Mr. Breedlove's case, the issue was clearly raised on direct appeal, as the State has conceded. The State's concession that the issue was raised on direct appeal must also be taken as a concession that the issue was raised at trial, given the fact that issues may not be properly raised on appeal unless they have been preserved at trial. Judge Levenson's finding that the issue was raised at trial and on appeal should be upheld. Mr. Breedlove's claim is undoubtedly cognizable on collateral attack at this time. James.

II. THE LOWER COURT APPLIED THE CORRECT HARMLESS ERROR ANALYSIS IN ASSESSING THE CONSTITUTIONAL ERROR WHICH INFECTED MR. BREEDLOVE'S CAPITAL SENTENCING PROCEEDINGS, AND CORRECTLY FOUND THAT THE STATE HAD NOT PROVEN BEYOND A REASONABLE DOUBT THAT THE CONSTITUTIONAL ERROR DID NOT AFFECT THE JURY'S CONSIDERATION OF ITS RECOMMENDED SENTENCE OF DEATH.

As Mr. Breedlove has indisputably established that Espinosa error occurred, the State must establish beyond a reasonable doubt that the error was harmless. This Court has set forth the proper analysis with respect to the harmless error determination that must be undertaken:

> We cannot say beyond a reasonable doubt, however, that the invalid instruction [on the heinous, atrocious, or cruel aggravator] did not affect the jury's consideration or that its recommendation would have been the same if the requested expanded instruction had been given.

James, 615 So. 2d at 669. See also Jackson (Andrea Hicks) v. State, 19 Fla. L. Weekly at S217. Therefore, the State must prove beyond a reasonable doubt that "the invalid instruction did not affect the jury's consideration or that its recommendation would have been the same if the requested expanded instruction had been given." James. As in James, Espinosa, Jackson, and Hitchcock v. State, 614 So. 2d 483 (Fla. 1993), it is impossible in this case to gauge the effect that the erroneous jury instruction had on Mr. Breedlove's sentencing jury. Judge Levenson applied the correct harmless error analysis, and found that the State had not met its burden of proving beyond a reasonable doubt "that the invalid instruction did not affect the jury's consideration" (3PCR. 542). "Because that question cannot be answered negatively or affirmatively beyond a reasonable

doubt," (id.), Judge Levenson ordered a resentencing. The order below should be affirmed because the State cannot meet its burden of establishing harmlessness.

Regarding harmless error analysis, the State contends that Judge Levenson applied an incorrect standard (Initial Brief at 28, 33). The State accuses Mr. Breedlove's counsel and Judge Levenson of ignoring this Court's precedent, although all of that precedent was thoroughly argued below. However, the State does not once mention the proper harmless error standard itself, never discussing the standard enunciated in James and Hitchcock. Further, the State has grossly misrepresented the record and the arguments presented below. Judge Levenson considered all arguments presented, applied the proper harmless standard, and her order should be affirmed.

This Court's harmless error test was enunciated in State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). The harmless error test "places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction." Id. at 1138. The Court further explained:

> The test is not a sufficiency-of-the-evidence, a correct result, a not clearly wrong, a substantial evidence, a more probable than not, a clear and convincing, or even an overwhelming evidence test. Harmless error is not a device for the appellate court to substitute itself for the trier-of-fact by simply weighing the evidence. The focus is on the effect of the error on the trier-of-fact. The question is whether there is a

> reasonable possibility that the error affected the verdict. The burden to show the error was harmless must remain on the state. If the appellate court cannot say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmful.

Id. at 1139. This is the test which this Court has applied in cases such as James, Hitchcock, and Jackson.

In Hitchcock v. State, the Court granted relief based on Espinosa error, finding that, despite the fact that the Court had previously upheld the applicability of heinous, atrocious, or cruel, the jury instruction error was not harmless beyond a reasonable doubt and required resentencing because "[w]e cannot tell what part the instruction played in the jury's consideration of its recommended sentence." Hitchcock, 614 So. 2d at 484. In dissent, Justice Grimes wrote that the error should be found harmless because four (4) aggravating factors had been found, as well as mitigation, and because the heinous, atrocious, or cruel factor properly applied. Id. Nonetheless, a majority of the Court ordered a resentencing because the Court could not "tell what part the instruction played in the jury's consideration of its recommended sentence." Id. Furthermore, in Jackson, the Court remanded for a resentencing because, while the aggravator was not stricken as inapplicable, the Court ruled that the jury instruction provided to the jury was unconstitutionally vague, and the Court "[could not] say beyond a reasonable doubt that the invalid CCP instruction did not affect the jury's consideration or that its recommendation would have been the same if the

if the invalid factor was harmless error as to the jury's

requested expanded instruction had been given." Jackson, 19 Fla. L. Weekly at S217.

The Court engaged in a similar analysis in James. Noting that it had struck the heinous, atrocious, or cruel aggravating factor on appeal, it found that the trial court's consideration of the invalid factor was harmless error. As to the jury's consideration of the invalid factor, however, the Court could not say beyond a reasonable doubt "that the invalid instruction did not affect the jury's consideration or that its recommendation would have been the same if the requested expanded instruction had been given." James, 615 So. 2d at 669. See Johnson v. Singletary, 612 So. 2d 575, 576-77 (Fla. 1993) ("under Sochor and Espinosa, an error would exist if the jury was instructed improperly on the heinous, atrocious, or cruel factor, whether or not the trial court in its written findings found the same factor to be present").

The standard enunciated in Hitchcock, Jackson and James is precisely the standard applied by Judge Levenson in Mr. Breedlove's case.[9] In her order, Judge Levenson stated that the

---

[9]The State complains that Judge Levenson did not apply the standard enunciated in Henderson v. Singletary, 617 So. 2d 313 (Fla. 1993)(Initial Brief at 21-22). While it is not clear what the State believes the Henderson standard is, that case relies on DiGuilio and states:

> [W]e agree with the trial court that any error in connection with these instructions was harmless beyond a reasonable doubt. State v. DiGuilio, 491 So.2d 1129 (Fla.1986). On this record, there is no reasonable possibility the giving of the challenged
>
> (continued...)

harmless error question was "can this Court find beyond a reasonable doubt that the invalid instruction did not affect the jury's decision to recommend the death penalty?" (3PCR. 541). Compare James, 615 So. 2d at 669 (Court could not say beyond a reasonable doubt "that the invalid instruction did not affect the jury's consideration"). Judge Levenson determined that the error was not harmless "because it is impossible to know beyond a reasonable doubt that the invalid instruction did not affect the jury's consideration" and because the question whether the jury's recommendation would have been different if a proper instruction had been given "cannot be answered negatively or affirmatively beyond a reasonable doubt" (3PCR. 541-542). Again, this analysis is fully in accord with this Court's precedent. See Hitchcock, 614 So. 2d at 484 ("[w]e cannot tell what part the instruction played in the jury's consideration of its recommended sentence"); James, 615 So. 2d at 669 (Court could not say beyond a reasonable doubt "that the invalid instruction did not affect the jury's consideration or that its recommendation would have been the same if the requested expanded instruction had been given"); Jackson, 19 Fla. L. Weekly at S217 (Court "cannot say beyond a reasonable doubt that the invalid CCP instruction did not affect the jury's consideration or that its recommendation would have been the same

---

[9](...continued)
instructions contributed to the jury's recommendations of death. DiGuilio.

617 So. 2d at 315. This is the same standard applied by Judge Levenson.

if the requested expanded instruction had been given"). Judge Levenson clearly applied the proper harmless error standard.

The State also accuses Mr. Breedlove's counsel of misleading Judge Levenson regarding the appropriate factors to consider in conducting a harmless error analysis. However, the record clearly reflects that Mr. Breedlove's counsel argued that numerous factors must enter into the harmless error analysis:

> What matters is the whole picture. It's not just number of aggravators. It's not just whether the facts support this particular aggravator. It's everything. Considering the whole picture, can Your Honor say beyond a reasonable doubt that the error was harmless. Considering the number of aggravators, considering the mitigation presented, considering the facts as they relate to the aggravator; and whether the definition would have made a difference in how the jury considered that aggravator. All those things together go into the harmless error question.

(T. 87; see also T. 59-67). Indeed, despite its accusations, the State recognizes that all of these matters must enter into the harmless error analysis (See Initial Brief at 28 ["In looking to the effect of any error of this type, this court has, on occasion, looked to the existence of other aggravating factors, and the absence, or relative weakness, of mitigation"]; Id. at 31 ["in looking to the harmlessness of any error of this sort, it is relevant to consider, inter alia: (a) the existence of other aggravation; (b) the existence (or absence) of mitigation and (c) the actual deficiency in the jury instruction given"]). These were all matters argued to and thoroughly considered by Judge Levenson.

As in James and Hitchcock, the State cannot prove beyond a reasonable doubt that the invalid factor had no effect on the jury's decision to sentence Mr. Breedlove to death. In its attempt to so prove, the State first argues that this murder "was heinous, atrocious, or cruel under any definition of the terms" (Initial Brief at 29). The State bases this assertion on the argument that "[t]he mental, emotional and physical pain and trauma which the victim suffered more than supports this aggravating circumstance," (Initial Brief at 29-30), and that this Court affirmed the aggravator based on these factors. A review of the Court's direct appeal opinion reveals otherwise. While the Court did uphold the trial court's finding of heinous, atrocious, or cruel, it was not because of any mental, emotional, or physical pain and trauma suffered by the victim. In fact, the Court expressly found that "pain and suffering alone might not make this murder heinous, atrocious, and cruel." Breedlove, 413 So. 2d at 9.

In the instant case, it must be remembered that defense counsel's proposed instruction requested that the jury be instructed that this aggravating circumstance applied only when the crime was accompanied by such additional acts as to set it apart from the norm, that is, a conscienceless or pitiless crime that is unnecessarily tortuous to the victim. Defense counsel wanted the jury to know that, in order to prove this aggravator beyond a reasonable doubt, the State had to prove that the crime was accomplished in an unnecessarily tortuous manner, that Mr.

Breedlove intended to torture the victim, and that Mr. Breedlove committed acts above and beyond what was necessary, acts which resulted in torture. This is the standard that was enunciated by the Court in Dixon, and which has consistently been announced as the proper standard to be applied in assessing the applicability of heinous, atrocious, or cruel. See Stein v. State, 19 Fla. L. Weekly 532, 534 (Fla. 1994) (finding of heinous, atrocious or cruel struck because "no evidence was presented to demonstrate any intent on Steins' part to inflict a high degree of pain or to otherwise torture the victims"). The narrowing construction of heinous, atrocious or cruel, which requires that the defendant intended to inflict a high degree of pain or to otherwise torture the victim, can be found repeatedly in this Court's opinions. Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1993)("absent evidence that [the defendant] intended to cause the victims unnecessary and prolonged suffering we find that the trial judge erroneously found that the murders were heinous, atrocious or cruel"); Santos v. State, 591 So. 2d 160, 163 (Fla. 1991)("A murder may fit this description if it exhibits a desire to inflict a high degree of pain, or an utter indifference to or enjoyment of the suffering of another"); Omelus v. State, 584 So. 2d 563, 566 (Fla. 1991)("where there is no evidence of knowledge of how the murder would be accomplished, we find that the heinous, atrocious, or cruel aggravating factor cannot be applied vicariously"); Chesire v. State, 568 So. 2d 908, 912 (Fla. 1990)("The factor of heinous, atrocious or cruel is proper only

in torturous murders -- those that evidence extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another"); Huckaby v. State, 343 So. 2d 29, 34 (Fla. 1977)(the presence of a mental or emotional disturbance may explain and negate heinous, atrocious, or cruel aggravating circumstance).

In Mr. Breedlove's case, not only did the State fail to adduce any evidence that Mr. Breedlove intended to inflict a high degree of torture to the victim, but the evidence established otherwise. For example, the State cannot prove beyond a reasonable doubt that Mr. Breedlove consciously intended to inflict a high degree of torture to the victim when, as this Court noted in its most recent post-conviction opinion, the State has previously conceded that this was a case of felony murder rather than premeditated murder, and that Mr. Breedlove did not intend to kill the victim. Moreover, the Court recognized, as the jury could have, that the victim died from a single stab wound inflicted during the course of a burglary and that Mr. Breedlove acquired the weapon only after entering the house. Breedlove v. Singletary, 595 So. 2d 8, 12 (Fla. 1992). Indeed, the State's Initial Brief cites to no evidence even suggesting that Mr. Breedlove intended to torture the victim, much less to evidence establishing an intent to torture beyond a reasonable doubt.

As Mr. Breedlove's counsel argued below, the evidence in front of the jury regarding the crime must be considered in analyzing whether the failure to instruct on the unnecessarily tortuous language was harmless beyond a reasonable doubt:

> That evidence came from Mr. Breedlove's statement in which he said that he went into the victim's home to burglarize. He did not have a weapon with him. He did not intend to kill anyone when he went in there.
>
> As he went though the house, he picked up a knife from the kitchen and he went into the bedroom and he was attempting to open the jewelry box when the victim awakened, lunged at him and said: What are you doing? Mr. Breedlove lunged at the victim and stabbed him once and ran away.
>
> This confession is consistent with the he medical evidence. The victim had small wounds on his hands consistent with having tried to grab the knife. The victim had a single stab wound, and the depth of the wound was consistent with the victim running at Mr. Breedlove while Mr. Breedlove was stabbing him.
>
> It is also significant to consider that the jury acquitted Mr. Breedlove of attempted first degree murder on the victim's female companion. We, of course, don't know the basis of the acquittal, but we can think about what does this mean about what the jury thought of the evidence.
>
> THE COURT: It was a complete acquittal and not a, not a conviction on a lesser.
>
> MS. ANDERSON: It was an acquittal. Not guilty.
>
> THE COURT: Okay.
>
> MS. ANDERSON: I think one very reasonable inference to draw from the acquittal on the other person in the room, the woman who was in the bed with the male victim, is that the jury accepted Mr.

> Breedlove's explanation that he didn't mean to do, to kill anyone; that he reacted when the victim awoke and then ran away.

(T. 64-65). Although the State's Initial Brief recites its view of the evidence regarding the manner in which the murder occurred (Initial Brief at 29-30), the fact that there is a dispute about what the evidence shows establishes that the erroneous jury instruction was not harmless. The additional jury instruction requested at trial would have assisted the jury in resolving the factual dispute.

The State also argues that it is "relevant" to consider the "existence of other aggravation" (Initial Brief at 31). The State's argument completely ignores this Court's harmless error analysis in other cases. See James; Hitchcock. For example, in Hitchcock, where this Court granted relief on the same issue, the dissent in Hitchcock argued that the error was harmless beyond a reasonable doubt because the aggravating circumstance had not been struck on direct appeal and a total of four aggravators had been sustained. Hitchcock, 614 So. 2d at 484 (Grimes, J., dissenting). However, despite the existence of three other valid aggravating factors, the majority determined that the error was not harmless beyond a reasonable doubt. Moreover, in James, despite the existence of four other valid aggravating circumstances to be weighed against no mitigation, this Court also recognized that the jury's consideration of the unconstitutionally vague instruction compelled reversal of the death sentence. See also Jackson (Andrea Hicks) v. State, 19

Fla. L. Weekly at S217 (constitutional instructional error not harmless beyond a reasonable doubt where trial judge found only two aggravating factors and statutory and nonstatutory mitigating factors presented). In those cases, as in Mr. Breedlove's case, the State simply has not met its burden of proving harmlessness beyond a reasonable doubt.

In addition to the aforementioned evidence which establishes that the State cannot prove beyond a reasonable doubt that the instructional error played no part in the jury's decision to sentence Mr. Breedlove to death, the State cannot establish that the jury instruction was harmless beyond a reasonable doubt given the mitigation presented to the jury. See Hall v. State, 541 So. 2d 1125 (Fla. 1989) (question of harmlessness of constitutional error is whether properly instructed jury could have recommended life). The State argues, "while there was mitigation presented, the evidence as to Breedlove's mental state and alleged mental problems was speculative and contradictory" (Initial Brief at 31). This is so, according to the State, because in the State's view the mental health experts presented by the State contradicted the testimony of the defense mental health experts. The State has grossly mischaracterized the penalty phase testimony. Moreover, the State fails to recognize the Hall standard -- that is, if a properly instructed jury had recommended life, the mitigation in the record would have provided a reasonable basis to sustain that life recommendation. Under such circumstances, the State cannot meet its burden of

establishing beyond a reasonable doubt that the jury instruction error was harmless.

In mitigation, defense counsel presented the testimony of three qualified mental health experts. As detailed in the Statement of the Case and Facts, supra, all three experts presented by defense counsel testified that Mr. Breedlove suffered from organic brain damage, as well as schizophrenia. The experts also noted that the county jail had prescribed various anti-psychotic medications for Mr. Breedlove, including Mellaril, Stelazine, and Haldol, and that he had been medicated during the trial. The experts explained their opinions that the statutory mental health mitigating factors applied to Mr. Breedlove, as well as numerous nonstatutory mitigating factors, including alcohol and drug abuse. Even the experts presented by the State acknowledged that Mr. Breedlove had longstanding psychiatric problems and that, at the time of the crime, Mr. Breedlove's capacity was diminished as a result of alcohol and drug intoxication. There was clearly a wealth of mitigating circumstances, statutory and nonstatutory, presented to the jury which would have provided a reasonable basis to sustain a life recommendation. Given these mitigating factors, the State cannot prove the instructional error harmless beyond a reasonable doubt in Mr. Breedlove's case.

It is clear that the mental health testimony was not conclusively in the State's favor, as the State would now have it. The defense experts expressly testified to the existence of

mitigation based upon Mr. Breedlove's mental illness, brain damage, and history of substance abuse. The State experts did not even evaluate for mitigation, conceded that Mr. Breedlove had a history of substance abuse, conceded that Mr. Breedlove has low intelligence, conceded that Mr. Breedlove had been prescribed anti-psychotic medication, recognized that neuropsychological tests such as those conducted by the defense experts would determine whether Mr. Breedlove suffered from organic brain damage, agreed that Mr. Breedlove suffered at least some impairment of his ability to conform his conduct to the requirements of law, and agreed that Mr. Breedlove suffered from long-standing mental and emotional problems. All of these matters establish valid mitigation. In light of this mitigation, the State has not established beyond a reasonable doubt that the erroneous jury instruction was harmless.

The State's brief misrepresents the testimony of the mental health experts, stating, "None of the defense experts expressly testified that the statutory mitigating circumstances pertaining to mental health applied" (Initial Brief at 31). To the contrary, the experts testified that the statutory mental health mitigating factors did apply. Dr. Center told the jury that the statutory mental health mitigating factors applied to Mr. Breedlove:

> Q. [by Mr. Levine] Doctor, comparing all of the tests and taking into consideration your interview with the defendant over those seven hours, did you come to an opinion, to a medical certainty, as to whether or not the defendant suffers

from an extreme mental or emotional disturbance?

MR. GODWIN: Objection.

He said, "Based upon a medical certainty."

Q. [by Mr. Levine] A psychological certainty.

THE COURT: Go ahead, with that change.

A. Yes. I feel that the information that I have infers that he has emotional problems.

Q. [by Mr. Levine] All right, Doctor. Did you also form an opinion, to a psychological certainty, as to whether or not the defendant has the capacity to conform his conduct substantially to the requirements of the law?

Do you want me to repeat the question, Doctor?

A. Yes. I am having trouble understanding it.

Q. Did you reach an opinion, to a psychological certainty, as to whether or not the defendant was substantially impaired in his ability to conform his conduct to the requirements of the law?

A. He has definite impairment.

(OR. 1328-29) (emphasis added).[10]

---

[10]The State's brief misrepresents Dr. Center's testimony in a significant manner which must be corrected. The State's brief indicates that Dr. Center "found no evidence that Breedlove suffered from brain damage (3PCR. 63-4)." (Initial Brief at 8). The discussion between Dr. Center and the prosecutor, which is misrepresented in the State's brief, is reproduced below and accurately represents Dr. Center's testimony in this regard:

(continued...)

Dr. Levy also testified to his opinions regarding statutory mental health mitigating factors:

> Q. [by Mr. Levine] Based upon your evaluation of the defendant, are you able to reach an opinion, to a reasonable degree of psychological certainty, as to whether or not the defendant is suffering from an extreme mental or emotion[al] disturbance?
>
> A. Yes.
>
> Q. And what is that opinion?
>
> A. I think Mr. Breedlove is a paranoid schizophrenic in remission, meaning that at the present time, he is not acting out his illness.
>
> I would like to remind the Court that during the time I examined him, he was under drugs, under medication, and even under medication, his personality decompensation came through; so, left alone, if he was not under medication, I believe I would have seen a much greater example of his pathology.

---

[10](...continued)

> Q Well, we agree you have no evidence Mr. Breedlove suffers from brain damage, correct?
>
> A I have evidence that he has brain dysfunction.
>
> Q But you have no medical evidence that he suffers from brain damage. Is that correct?
>
> A No. That's correct.

(3PCR. 64) (emphasis added). Of course, Dr. Center testified that he had no medical evidence of brain damage because he was a neuropsychologist, not a physician. Dr. Center's opinion that Mr. Breedlove's neuropsychological test results established that he suffered from organic brain damage could not have been more clear.

(OR. 1346-47). While Dr. Levy believed that Mr. Breedlove's ability to appreciate the criminality of his conduct and conform his conduct to the requirements of the law was not substantially impaired during his interview, this finding was based on the fact that Mr. Breedlove was being heavily medicated with antipsychotic medication. Regarding Mr. Breedlove's impairment at the time of the crime, however, Dr. Levy testified:

> Q. Could you tell us how a person who exhibited these symptoms that the defendant has exhibited would react to a stress situation?
>
> A. Well, I find my experience with this population is that unless they are on medication, I find them to be very fragile, even when on medication.
>
> It doesn't take very much stress to get them decompensated, meaning to get them acting bizarre and irrational.
>
> I find Mr. Breedlove a person who is emotionally unstable, and I do not believe that under stress conditions, he can stand up very well. He would be unable to cope with it, given my understanding of where he is at.

(OR. 1348) (emphasis added).

Dr. Miller also testified to the application of the statutory mental health mitigating factors to Mr. Breedlove's case:

> Q. [by Mr. Levine] Considering everything that you know about the defendant, taking into consideration all of the interviews from the time that you spent with him, do you have an opinion, to a reasonable psychiatric and medical certainty, as to whether or not the defendant suffers from a n extreme mental or emotional disturbance?

MR. STELZER: That is not the test. The test is, was he suffering from it at the time.

THE COURT: Sustained.

Q. [by Mr. Levine] Is a paranoid schizophrenic suffering from an extreme mental or emotional disturbance?

MR. STELZER: Objection.

He has not specified as to when.

THE COURT: Overruled.

He is asking a general question as to whether or not a person with this is.

You may answer.

A. Yes. I'll try. I think a person with a diagnosis of schizophrenia would suffer from an extreme mental condition, yes.

Q. [by Mr. Levine] Is there anything that you noted in your examination to suggest that this schizophrenia was a recent development?

A. No.

(OR. 1370-71) (emphasis added). As with Dr. Levy, Dr. Miller believed that Mr. Breedlove's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was not impaired at the time he examined him; however, Dr. Miller indicated that a different conclusion would obtain with respect to Mr. Breedlove's impairment at the time of the crime:

Q. Let me ask you a hypothet: If someone is suffering from a condition you noted the defendant to be suffering from, and was removed from psychotropic medication, what would be the result?

A. One would expect that within a period of one to two months, an exacerbation, that is, a new phase of psychotic symptomatology. This person would amount to being more sick.

Q. Doctor, assuming the hypothet that the person was not on psychotropic medication at the time of this incident, what would his mental status have been at that time?

A. If he were not on this medication for several months, it's more likely than not he would be capable or potentially psychotic.

The fact that he was not means that what it would take to get him there would not be very great.

* * *

Q. [by Mr. Levine] Doctor, assuming the hypothet that this man was not under medication at the time of this incident, is it still your opinion that he was suffering from an extreme mental disturbance at the time?

A. Well, my opinion that he has an extreme mental disturbance is based upon my examination of him, and believing him to suffer from paranoid schizophrenia. Treated or untreated, in his best medical condition or on no medications, it is a rather extreme situation.

Q. What do you mean by an "extreme situation"? Do you mean an extreme mental disturbance?

A. Yes.

(OR. 1372-73; 1385-86) (emphasis added).

Even Dr. Mutter, the expert who testified for the State at the penalty phase, testified favorably regarding the statutory mental health mitigators:

Q. [by Mr. Godwin] And one of the questions that the Court or the jury is

concerned with is whether, at the time Mr. Breedlove committed this crime, he was under the influence of an extreme mental or emotional disturbance, and another question is, whether the capacity of Mr. Breedlove to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired. Are you aware of those two questions?

A. Yes, sir.

Q. Concerning those two questions and based upon your own examination of Mr. Breedlove, can you tell the jury the most favorable things you can say on Mr. Breedlove's behalf in connection with these questions?

A. I think this man has had emotional problems for a prolonged period of time, from childhood or adolescence, which had been manifested by his misuse of drugs.

I think he is probably in need of some form of psychiatric treatment for a prolonged period of time.

(OR. 1408-09) (emphasis added). Specifically regarding whether or not Mr. Breedlove was suffering from an extreme mental or emotional disturbance and whether his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, Dr. Mutter concluded that, while he would not characterize Mr. Breedlove's condition as "extreme" of his capacity "substantially" impaired, Mr. Breedlove "always had difficulty" in these areas (OR. 1411).

As its final harmless error argument, the State offers the rather curious proposition that the error was harmless because Mr. Breedlove's jury did not receive the instruction condemned in Espinosa, but, according to the State, "was given some guidance"

and "was sufficiently focused upon valid narrow and constitutional construction of this aggravating circumstance" (Initial Brief at 32). Mr. Breedlove's jury received the instruction condemned in Shell v. Mississippi. Indeed, the State has conceded that the instruction given Mr. Breedlove's jury violated Shell (Initial Brief at 15; T. 13).[11] The State does not explain how this unconstitutional instruction provided "guidance" or a "narrow and constitutional construction" of the aggravator. As the Supreme Court explained in Shell, vague definitions of a vague aggravating factor do not provide guidance to the sentencer. Shell, 111 S. Ct. at 314. A vague definition is no better than no definition at all.[12]

Finally, the State contends that this Court's affirmance on direct appeal of the heinous, atrocious or cruel aggravating factor has "cured" the jury instructional error (Initial Brief at 34). This is so, according to the State, because on direct appeal this Court applied a narrowing construction to the aggravator and because cases such as Clemons v. Mississippi, 110

---

[11]This Court has repeatedly noted that the Shell instruction on the heinous, atrocious, or cruel aggravating factor is constitutionally defective in Florida. See, e.g., Street v. State, 19 Fla. L. Weekly S159 (Fla. Mar. 31, 1994); Ferguson v. Singletary, 632 So. 2d 53 (Fla. 1994); Atwater v. State, 626 So. 2d 1325 (Fla. 1993).

[12]As a corollary to this argument, the State argues that the Dixon language omitted from the instruction given Mr. Breedlove's jury is "redundant" (Initial Brief at 32). Presumably, the State believes that the omitted Dixon language is unnecessary. However, as numerous opinions of this Court demonstrate, the omitted Dixon language is the key definition of heinous, atrocious or cruel, for it is the language requiring an intent to torture in order to establish this aggravator.

S. Ct. 1441 (1990), permit such a "cure." The State's argument must fail. First, this argument was not raised in the lower court and therefore has been waived. See Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993)(procedural rules "apply not only to defendants, but also to the State"). Second, as the State has conceded, constitutional error occurred before Mr. Breedlove's jury. This Court's direct appeal opinion does not discuss whether or not this error was harmless. Rather, the direct appeal opinion simply discusses the facts the Court believed supported application of heinous, atrocious or cruel. That is, the direct appeal opinion basically conducted a sufficiency of the evidence review. The opinion does not address the question whether the jury instructional error did or did not contribute to the jury's recommendation. A review for sufficiency of the evidence is vastly different from a review to determine whether constitutional error was harmless. In Mr. Breedlove's case, as in James, Hitchcock and Jackson, this Court must conduct a harmless error analysis.

Second, the State's contention that a state appellate court may cure jury instruction error by simply affirming the finding of an aggravating factor is incorrect. In Clemons, the Supreme Court held that a state appellate court may affirm a death sentence despite the existence of constitutional error if the state appellate court conducts either a harmless error analysis or a reweighing. Clemons, 110 S. Ct. at 1446, 1451. The harmless error analysis or reweighing may be conducted either by

disregarding the erroneous aggravating factor or by considering a proper limiting construction of the aggravating factor. Id. at 1451. Thus, consideration of the limiting construction of and facts relevant to an aggravating factor is only part of either the harmless error analysis or reweighing, not the totality of the analysis. This Court does not reweigh. Sochor v. Florida, 112 S. Ct. at 2122. Thus, this Court must conduct a harmless error analysis.

The State finally complains that "the United State[s] Supreme Court's elevation of the jury to the role of 'co-sentencer' is not only erroneous, but also contrary to Florida precedent" and that the jury is "the least important participant" in capital sentencing (Initial Brief at 35). As ample precedent from this Court establishes, the State's complaints are unfounded. The State completely ignores Johnson v. Singletary, 612 So. 2d 575, 576 (Fla. 1993), in which this Court plainly stated, "the Florida penalty-phase jury is a co-sentencer under Florida law." The importance of the Florida jury in capital sentencing has been repeatedly stressed since the present statute was enacted. See, e.g., Lamadline v. State, 303 So. 2d 17, 20 (Fla. 1974) ("Both the trial judge, before imposing a sentence, and this Court, when reviewing the propriety of the death sentence, consider as a factor the advisory opinion of the sentencing jury. In some instances it could be a critical factor in determining whether or not the death penalty should be imposed"); Messer v. State, 330 So. 2d 137, 142 (Fla. 1976) (the

legislature "sought to devise a scheme of checks and balances in which the input of the jury serves an integral part"); Riley v. Wainwright, 517 So. 2d 656, 659 (Fla. 1987) ("If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure"). Clearly, under Florida law, the jury is an essential part of the capital sentencing process and the procedure by which it reaches a verdict must therefore comport with the Constitution.

In Mr. Breedlove's case, the jury's verdict was tainted by an unconstitutional instruction on an aggravating factor. As the lower court correctly found, this error was preserved at trial and on direct appeal and therefore is cognizable under James. As the lower court also correctly found, the error was not harmless, for it cannot be said beyond a reasonable doubt that the erroneous jury instruction did not contribute to the jury's verdict. The lower court correctly granted Mr. Breedlove a jury resentencing and should be affirmed.

CONCLUSION

The lower court properly found that the jury instruction issue was preserved at trial and raised on direct appeal, thus making the claim cognizable in the instant proceedings. On this record, the State cannot meet its burden of proving beyond and to the exclusion of every reasonable doubt that the invalid instruction did not affect the jury's consideration in sentencing Mr. Breedlove to death. Based upon the foregoing discussion, Mr.

Breedlove respectfully requests that this Court affirm the lower court's order in all respects, and remand this case to the circuit court for a resentencing proceeding.

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on May 16, 1994.

MICHAEL J. MINERVA
Capital Collateral Representative
Florida Bar No. 092487

GAIL E. ANDERSON
Assistant CCR
Florida Bar No. 0841544

TODD G. SCHER
Assistant CCR
Florida Bar No. 0899641

TERRI L. BACKHUS
Assistant CCR
Florida Bar No. 0946427

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

By: 
Counsel for Appellee

Copies furnished to:

Richard Martell
Assistant Attorney General
Department of Legal Affairs
The Capitol
Tallahassee, FL 32399-1050