IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Appellant,

vs.

McARTHUR BREEDLOVE,

Appellee.

CASE NO. 82,731

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

INITIAL BRIEF OF APPELLANT

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

RICHARD B. MARTELL
CHIEF, CAPITAL APPEALS
FLORIDA BAR NO. 0300179

DEPARTMENT OF LEGAL AFFAIRS
THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLANT

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STATEMENT OF THE CASE AND FACTS

This appeal is from the circuit court's granting of Breedlove's third motion for postconviction relief, filed pursuant to Fla.R.Crim.P. 3.850. Portions of the original record on appeal, filed in Breedlove v. State, Florida Supreme Court Case No. 56,811, are relevant to this proceeding, and will be cited as (OR ____); the instant record on appeal, generated on Breedlove's most recent collateral attack will be cited as (3 PCR ____).

McArthur Breedlove was indicted for the murder of Frank Budnick, and tried in the Circuit Court of the Eleventh Judicial Circuit on February 28, 1978, through March 5, 1978. Prior to trial, counsel for Breedlove filed, on February 21, 1979, a motion to declare §921.141 unconstitutional, arguing, inter alia, that the aggravating circumstances were impermissibly vague and overbroad; in pertinent part, the motion read:

> Aggravating circumstance (h) applies where the capital felony is especially cruel, heinous or atrocious. Almost any capital felony would appear especially cruel, heinous and atrocious to the layman, particularly any felony murder. Examination of the widespread application of the circumstance indicates that reasonable and consistent application is impossible (OR 49-55).

The motion also asserted that the statute violated Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), as limiting the mitigating circumstances which could be considered (OR 51-3). The motion was denied the next day (OR 55A).

At trial, the state established that the victim, Frank Budnick, had recently moved into the home of Carol Meoni (OR 715-16). According to Ms. Meoni, the two went to bed at midnight on

the night in question, and Ms. Meoni testified that she later woke up with a severe pain on the side of her head (OR 726). The witness stated that she felt Mr. Budnick get over on top of her, and that when she asked him what was wrong, he replied, "I am bleeding." (OR 726). Ms. Meoni stated, at this point, she looked up and saw a shadow go out of the bedroom door, such shadow followed by Mr. Budnick; turning on the light, she found that the bed was covered with blood (OR 726). Running out of the room, the witness saw a bloody knife by the front door and the victim's nude body lying face down by the street (OR 727). The witness stated that Budnick, who was bleeding, was still alive and making sounds at this point (OR 726-7). Going back into the house, Ms. Meoni noted that she had blood on her face and a cut above her eye (OR 731); she stated that this wound required nine (9) stitches (OR 737). Ms. Meoni recognized the knife as one from her kitchen (OR 739). She also noted that her purse was missing from the living room, where she had left it (OR 733). The witness stated that she later determined that she was missing a gold pocket watch and a pair of earrings, which she believed to have been in her purse or on the bureau dresser, as well as some cash, which had been in her purse (OR 734-5).

Officers who reported to the scene testified that they were dispatched at 3:00 A.M. in the morning, and that, upon arrival, found the victim's body by the street (OR 612-13). Officer Roper testified that there was quite a bit of blood on the front step, as well as in the living room and bedroom (OR 614). The officer found that the door between the kitchen and utility room was open, and that Ms. Meoni's purse was in the backyard, with the

contents scattered on the ground (OR 615-16). Officer Weiss testified that he had retrieved the murder weapon, which turned out to be an 8 3/4 inch kitchen knife (OR 633). He also retrieved a pillow from the bed which had slash marks across it (OR 641-2); he described the pillow as "heavily bloodstained" (OR 647). A pair of blue jeans was found in the living room, with an empty wallet nearby (OR 661-3). Officer Weiss testified that he observed pry marks on the door between the kitchen and the utility room (OR 663-4); Weiss also noted that two of the kitchen drawers were open (OR 664-6).

The medical examiner, Dr. Kessler, testified that he had been called to the scene, and had observed a great deal of blood throughout the front rooms of the residence (OR 758); the witness specifically stated that there was a trail of bloody footprints leading through the living room, "going over to a pair of jeans with the wallet next to it" (OR 759). Dr. Kessler stated that he had autopsied the victim, and that the victim had died as the result of a stab wound to the left upper chest (OR 766). The doctor testified that the wound was 1 1/2 inches wide, 3 inches long and 5 1/2 inches deep, extending through the clavicle, the subclavian vein, the chest cavity, the lung and all the way to the shoulder blade in the back (OR 769, 771). Dr. Kessler stated that the wound could have been inflicted from "above", when the victim was lying down in bed (OR 771). The witness stated that the wound had been inflicted with a great deal of force, because it had broken the collar bone (OR 771, 779, 781). Dr. Kessler noted the presence of defensive wounds on the victim's hands, which were consistent with an attempt to ward

off the knife blow (OR 772-3); he also examined a photograph of Ms. Meoni and observed the presence of similar defensive wounds on her hands (OR 764).

On the night of the murder, a neighbor observed a man pedal off on a blue bicycle (OR 591-4). It was later determined that a blue bicycle had been stolen from a home two houses away from the victim's residence (OR 784-7). The bicycle was later discovered at Breedlove's residence, and a screwdriver was found under the cushions of the sofa where he slept (OR 832, 897); Breedlove lived nine blocks from the victim's home (OR 883). Breedlove gave two statements to the police. In the first, he denied knowing anything about the bicycle, later changing his story to claim that he stolen it when he had become tired while walking back from the liquor store (OR 922-5). Likewise, Breedlove originally claimed that he had been wearing long pants at this time, but later changed his story and stated that he had cut off the legs of the pants after they had become bloody in a fight which he had gotten into (OR 927-930). When the officers indicated that they did not believe Breedlove, he responded that the police were simply trying to frame him, and that he supposed that they were going to say that the blood on his pants "came from the man inside the house." (OR 939). Breedlove then said that the police could not prove that he had been inside the house, because none of his fingerprints would be found therein (OR 940); when asked why his fingerprints would not be found therein, Breedlove replied that he had been "wearing socks" (OR 941-2).

Breedlove gave a subsequent statement on November 21, 1978, in which he admitted committing the instant offense (OR 1037-1055). In this statement, Breedlove admitted breaking into the victim's residence, stating that he had entered through the back door into the utility room and kitchen (OR 1043-4). He then went into the living room and took Ms. Meoni's purse; he took the purse over to the back porch and dumped out its contents (OR 1043-5). Breedlove admitted taking some money and a watch from the purse (OR 1045); he stated that he had later sold the watch to a junkie in Hallandale (OR 1051). Breedlove stated that he had then entered the bedroom, where he had begun going through the dresser drawers; he stated that he gotten a knife from the kitchen which he used to pry open the jewelry box (OR 1046-7). According to Breedlove, the victim had woken up, just as the jewelry box "popped open", and Budnick had "jumped up" and asked the defendant what he was doing (OR 1048). Breedlove stated that he "panicked" when Budnick grabbed his shirt, and had "swung back" with a knife (OR 1046, 1048). Breedlove only "swung" once with the knife, and did not recall striking Ms. Meoni (OR 1048). He then dropped the knife and ran out, first, however, grabbing the victim's jeans and going through them (OR 1048). Breedlove admitted stealing the blue bicycle and riding off (OR 1049).

The defense rested without calling any witnesses, and the jury convicted Breedlove of first-degree murder, burglary of a dwelling with an assault, grand theft and petit theft, acquitting him of the attempted murder of Carol Meoni (OR 154-8). The penalty phase was conducted on March 5, 1979 (OR 1273-1483; 3PCR

6-216).[1] Prior to the testimonial phase, a conference was held at which the parties discussed various legal matters (3PCR 7-22). During this conference, defense counsel stated, without elaboration, that he renewed all prior motions to dismiss the statute, "that would provide for these instructions as being unconstitutional"; he added that the instructions "unconstitutionally limit the mitigating circumstances involved" (3PCR 17). Defense counsel then argued in favor of various defense-requested instructions (3PCR 17-21); apparently there were fifteen (15) such requested instructions, and ruling was deferred until later in the proceeding (3PCR 19-22). During a subsequent break in the proceedings, the matter was revisited (3 PCR 119-124). At this time, the judge indicated that he would give two of the requested instructions - that in regard to the lack of limitation of mitigating circumstances and that precluding "doubling" of aggravating circumstances (3PCR 120-2). The court announced that it would deny other requested instructions, including requested instruction #5, as being "covered in the charge" (3PCR 119); this requested instruction read:

> 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 felony - - - the consciousness [sic] or pitiless crime which is unnecessarily torturous to the victim (3PCR 543).

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[1] The transcript of the penalty phase is also contained in the instant postconviction appeal record, and, for convenience, citations will be made to the record in this cause.

During the evidentiary portion of the penalty phase, the state called two witnesses (3PCR 24-56). George Blishak of the Los Angeles Police Department testified that in 1968 he had arrested Breedlove for burglary and assault with intent to commit rape (3PCR 31). He testified that, in that case, Breedlove had gotten into a woman's apartment and had begun to choke her, while attempting sexual intercourse (3PCR 27-31). Authorities discovered that Breedlove had committed another assault with intent to commit rape, in which he had attacked a woman in her own home, stuffing a handkerchief into her mouth and getting on top of her, before running off (3PCR 31-2). Breedlove was convicted of these charges (3PCR 33-4). The state called Dr. Ronald Wright, the Deputy Chief Medical Examiner (3PCR 47). Dr. Wright testified that he had reviewed the autopsy file, and that in his opinion, the victim had literally drowned in his own blood (3PCR 52-3). He also stated that the fracture of the clavicle and the puncture of the pleural lining had been "associated with considerable pain" (3 PCR 53). Dr. Wright opined that Budnick had still been conscious at the time that he had stepped outside and fallen down (3PCR 54-5).

The defense called three mental health experts at the penalty phase (3PCR 57-119). Dr. Center, a psychologist, testified that he had examined Breedlove and had performed various psychological tests. The witness stated that the test results suggested that Breedlove fell within the dull-normal range of intellectual functioning, and that he suffered from brain dysfunction (3PCR 60-1). When asked, however, whether the statutory mitigating circumstances relating to mental state

applied, Dr. Center testified that he inferred that Breedlove had "emotional problems" and "definite impairment" (3PCR 61-2). On cross-examination, the witness stated that he had found no evidence that Breedlove suffered from brain damage (3PCR 63-4). Dr. Levy, another psychologist, similarly testified that he had performed various tests (3PCR 72-3). The witness stated that, based upon the results of these tests, he found that Breedlove was suffering from neurological impairment (3PCR 76). Levy stated that Breedlove had related to him that had a history of drug usage, and the witness stated that this was consistent with his belief that the defendant suffered from schizophrenia (3PCR 77); Levy likewise stated Breedlove had told him that he had received psychiatric treatment in California (3PCR 78). When asked about the statutory mitigating circumstances, Dr. Levy stated that Breedlove's schizophrenia was in remission (3PCR 79-82); Dr. Levy stated that Breedlove had told him that he had no recollection of the murder (3PCR 97). Dr. Miller, a psychiatrist, testified that, in his opinion, Breedlove suffered from chronic paranoid schizophrenia (3PCR 102). When asked whether a person with this condition would suffer from an extreme mental or emotional disturbance, the doctor replied that a schizophrenic would "suffer from an extreme mental condition"; when asked whether Breedlove's capacity to conform his conduct to the requirements of the law had been substantially impaired, Dr. Levy stated that Breedlove had seemed capable of adhering to the requirements of the law at the time he had seen him (3PCR 104-5). On cross-examination, the expert acknowledged that Breedlove's inability to recall the circumstances of the offense made it

difficult, if not impossible, to assess his mental condition at that time (3PCR 116-118).

The state called two psychiatrists in rebuttal, Drs. Jaslow and Mutter (3PCR 126-150). Dr. Jaslow testified that he had examined Breedlove and had also reviewed his records from California; the doctor testified that he found nothing to indicate that Breedlove was "seriously disturbed" or that he suffered from organic brain damage (3PCR 126-131). Jaslow suggested that Breedlove's behavior was consistent with that of a sociopath, and stated that he found no evidence of a major mental disorder or psychosis (3PCR 131-2). Likewise, the state expert testified that, in his opinion, neither statutory mental mitigating factor - extreme mental or emotional disturbance or substantial impairment to capacity - applied (3PCR 133). Dr. Mutter similarly testified that he found neither statutory mitigating circumstances relating to mental state to apply (3PCR 144), and also stated that he found no evidence of psychosis, brain damage or paranoid schizophrenia (3PCR 143). Dr. Mutter stated that Breedlove fit the definition of a sociopath, and acknowledged that he had a problem with drugs and/or alcohol (3PCR 140-1). On redirect, Dr. Mutter stated that he had felt that Breedlove was malingering and had tried to manipulate him during the interview (3PCR 149).

In its closing argument, the state argued that four aggravating circumstances applied - that in regard to prior conviction, that in regard to commission of the homicide during a burglary, that in regard to the homicide having been committed to avoid arrest and that in regard to the homicide having been

especially heinous, atrocious, or cruel (3PCR 156-164); in regard to the last circumstance, the prosecutor referred the jury to the definitions of those terms which the judge would subsequently give them, and particularly drew their attention to the pitiless nature of the homicide (3PCR 163-4). In his closing argument, counsel for Breedlove, after a rather lurid description of the electrocution process, contested the application of a number of the aggravating circumstances; in arguing against the application of the heinous, atrocious or cruel factor, defense counsel specifically contended that the crime did not fit the definitions which the court would subsequently supply, in that Breedlove had not intended to "inflict a high degree of pain" (3PCR 182-3). Following these arguments, the judge delivered the jury instructions, and advised them, inter alia,

> 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 to designed to inflict a high degree of pain, utter indifference to, or enjoyment of, the suffering of others, pitiless (3PCR 194).

Following the instructions, defense counsel moved for a mistrial in regard to certain portions of the state's closing argument, and stated that the court had "permitted [him] to renew [his] motions." (3PCR 199-200).

The jury subsequently returned an advisory recommendation of death, and, on March 30, 1979, Judge Fuller, sentenced Breedlove

to death (OR 182-190). The court found the existence of three (3) aggravating circumstances - that Breedlove had prior convictions for crimes of violence, §921.141(5)(b) Fla. Stat. (1977); that the homicide had been committed during the course of a burglary, §921.141(5)(d), Fla. Stat. (1977) and that the homicide had been especially heinous, atrocious or cruel, §921.141(5)(h), Fla. Stat. (1977). The judge made detailed findings as to this latter factor:

> The murder was especially heinous, atrocious or cruel. The victim, Frank Budnick, was asleep in bed along with Carol Meoni when the defendant entered the bedroom with a large butcher knife. The evidence indicated that the defendant approached the bed and began stabbing and slashing with the knife at Frank Budnick. There was a large slash tear found in the pillow slip where the victim had been sleeping. Carol Meoni, who was sleeping next to the victim, was stabbed in the face (Ms. Meoni survived the attack). Both the victim and Ms. Meoni sustained 'defensive' wounds on their hands. The victim's right hand had five (5) distinct wounds. The fatal blow resulted when the defendant plunged the knife into the victim's upper chest with tremendous force. The knife fractured the clavicle (collar bone) as it entered the body and proceeded to sever the subclavin vein. The knife punctured the left lung and came to rest in the muscles of the shoulder blade. The medical examiner described the injury as a penetrating knife wound approximately five and one half (5 1/2) inches deep, which would result in considerable pain. The victim got out of bed, stated 'I'm bleeding,' and walked outside into the front yard where he tried to call for help and collapsed. The medical examiner stated that while he was conscious the victim would have experienced the additional sensation of drowning as blood flowed into his lung. The mechanism of death was that the victim drowned in his own blood. (OR 186).

After a lengthy analysis, the court concluded that no mitigating circumstances, statutory or otherwise, applied (OR 186-9).

Breedlove appealed his convictions and sentence of death to this court, and the appeal was styled Breedlove v. State, Florida Supreme Court Case No. 56,811. In the Initial Brief, filed on or about June 16, 1980, counsel for Breedlove raised six (6) primary claims for relief (3PCR 217-322). In the point on appeal regarding the death sentence, counsel attacked the aggravating circumstances found, and specifically contended that the heinous, atrocious or cruel aggravating circumstance had been improperly found (3PCR 294-9). Appellate counsel maintained that, as a matter of law, the factor had been improperly found as a part of the death sentence, in that the homicide had not been accompanied by the "additional acts" required; appellate counsel cited to Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 624 L.Ed.2d 398 (1980). Appellate counsel contended that the trial court should not have admitted Dr. Wright's expert testimony as to the victim's suffering, and stated that such error was exacerbated by the court's denial of Breedlove's special requested instruction on heinous, atrocious or cruel (3PCR 296-8). The matter was repeated in the Reply Brief (3PCR 416-7).

In its opinion, Breedlove v. State, 413 So.2d 1 (Fla.), cert. denied, 459 U.S. 882, 103 S.Ct. 184, 74 L.Ed.2d 149 (1982), this court affirmed Breedlove's convictions and sentence of death in all respects. This court found that there was sufficient evidence to sustain the conviction under either the felony murder or premeditation theory, and, as to the latter, observed the evidence included, "Breedlove's arming himself with a butcher knife before entering the bedrooms and the defensive wounds suffered by both victims." Breedlove, 413 So.2d at 8 n.12. As to the heinous, atrocious or cruel factor, this court found:

> Although death resulted from a single stab wound, there was testimony that the victim suffered considerable pain and did not die immediately. While pain and suffering alone might not make this murder heinous, atrocious, and cruel, the attack occurred while the victim lay asleep in his bed. This is far different than norm of capital felonies and sets the crime apart from murder committed in, for example, a street, a store, or other public area. Id. at 9.

Breedlove subsequently filed a motion for postconviction relief in 1982, raising issues unrelated to this cause; the denial of that postconviction motion was affirmed in Breedlove v. State, 580 So.2d 605 (Fla. 1991). Breedlove subsequently filed another motion for postconviction relief in the circuit court, and a petition for writ of habeas corpus in this court; Breedlove raised seven (7) issues in the latter case, including an allegation that the jury instruction on the heinous, atrocious or cruel aggravating circumstance had been unconstitutional and that the factor should not have applied. This court found such claim procedurally barred, noting:

> Breedlove's appellate counsel . . . questioned applying the heinous, atrocious, or cruel aggravator to Breedlove, and this Court fully considered the [ ] issue [ ]. Therefore, that current counsel argues other grounds or facts than appellate counsel did does not save issue [ ]...2. . . from being barred procedurally.
>
> Breedlove v. Singletary, 595 So.2d 8, 10 (Fla. 1992).

This court also found, however, that Breedlove had been entitled to an evidentiary hearing on his claim of ineffective assistance of counsel, and, accordingly, remanded to the circuit court for such purpose. Id. at 12. Such hearing was held, and the circuit court denied all relief; Breedlove appealed such order, and the

case was styled Breedlove v. State, Florida Supreme Court Case No. 80,161.

During the pendency of that appeal, however, Breedlove filed a third motion for postconviction relief in the circuit court (3PCR 427-457); after the court had indicated that it lacked jurisdiction to proceed, counsel for Breedlove successfully moved this court for relinquishment of jurisdiction (3PCR 475-9). In the motion, counsel raised a single claim for relief - that, under, inter alia, Espinosa v. Florida, ___ U.S.___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), Breedlove's jury had received an unconstitutional jury instruction on the heinous, atrocious or cruel aggravating circumstance, and that such instruction had tainted the recommendation and the resulting death sentence (3PCR 429-445). Collateral counsel contended that, under James v. State, 615 So.2d 668 (Fla. 1993), Breedlove had properly preserved the issue, such that collateral review was proper and that the error was not harmless (3PCR 434-445). Collateral counsel argued that this court noted in its direct appeal opinion that "the State conceded at the trial that this was a case of felony murder rather than premeditated murder, and that Mr. Breedlove did not intend to kill the victim" (3PCR 442), and further suggested that the circuit court had "to presume an error was harmful unless and until the state proves that there is no possibility that the jury's death vote would have changed but for the extra 'thumbs' on the death side of the scale. Brown v. Dugger, 831 F.2d 1547 (11th Cir. 1987)." (3PCR 445). Collateral counsel insisted that James and Hitchcock v. State, 614 So.2d 483 (Fla. 1993) "dictate that the error resulting from a jury that

received an unconstitutionally vague instruction on an aggravating factor cannot be harmless beyond a reasonable doubt." (3PCR 445).

On April 15, 1993, the State filed its response (3PCR 459-474), in which it specifically contended that Breedlove's Espinosa claim was not cognizable on 3.850, in that, inter alia, the issue had not been sufficiently preserved at trial; counsel for the state specifically contended that there had been no specific contemporaneous objection to the wording of the jury instruction actually given, on constitutional or vagueness grounds (3PCR 465-9). Counsel for the state also argued that any error had been harmless beyond a reasonable doubt, and cited to a number of Florida Supreme Court precedents in which Espinosa error had been deemed harmless, such as Thompson v. State, 619 So.2d 261 (Fla. 1993), Turner v. Dugger, 614 So.2d 1075 (Fla. 1992) and Melendez v. State, 612 So.2d 1366 (Fla. 1993) (3PCR 469-473). Counsel for Breedlove filed a Reply on June 11, 1993 (3 PCR 481-502).

Circuit Judge Levenson held a hearing on the motion on June 18, 1993 (T1-89)[2]. During the argument, counsel for the state acknowledged that, under Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) and Shell v. Mississippi, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990), the instruction given Breedlove's jury on this aggravating factor had been "inadmissible" (T 13). After counsel for Breedlove had contended

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[2] (T__) represents a citation to the transcript of proceedings of June 18, 1993, presently contained in the postconviction record on appeal.

that the jury instruction error had, in fact, been adequately preserved at trial, Judge Levenson announced that she agreed, unless, in essence, the state could "persuade [her] otherwise" (T 16); counsel for the state then pointed out that the trial court had not been presented with the specific contention that the standard jury instruction given had been unconstitutional (T 17-21). Judge Levenson then stated that it was her "observation" that, "very often", courts were "rushed" and "very often cut off lawyers" (T 21-2); counsel for the state then pointed out that the record did not reflect that counsel for Breedlove had ever been "cut off" in this regard, and that in fact, Judge Fuller had given two of the instructions requested by the defense (T 22-7). Counsel for the state also argued that the instruction requested by the defense had not been a correct statement of the law, in that it contained no definition of the statutory terms, and was, in fact, not the complete statement of the law set forth in State v. Dixon, 283 So.2d 1, 9 (Fla. 1973) (T 27-8). In response, counsel for Breedlove stated that the correctness of the proposed instruction was "not the question" and did not matter, adding, "You can throw that out." (T 30, 33). According to collateral counsel, the Florida Supreme Court in James had stated that the parties were to "put ourselves back in that time with Espinosa in hand." (T 32).

Turning to the merits of the claim, counsel for Breedlove argued that the applicable harmless error standard was that set forth in Hall v. State, 541 So.2d 1125 (Fla. 1989) - "whether a jury which was properly instructed would have had a reasonable basis for a life recommendation" (T 60); counsel insisted that

the record contained mitigating evidence concerning Breedlove's mental state. Counsel next argued that the error was not harmless, because the aggravating circumstance itself had been wrongfully applied, and stated that the only perspective to look at was that of the jury, "And we have to look at this from the jury's perspective, and not from the trial judge's perspective, not from the Florida Supreme Court's perspective, and not from this Court's perspective." (T 62-3). Counsel for Breedlove argued that the factor had been improperly found because the facts involved "a single stab wound during a felony murder." (T 66). Counsel also argued that the presence of other aggravation was irrelevant (T 66-7).

Counsel for the state disagreed with the harmless error standard set forth by collateral counsel, and drew the court's attention to Henderson v. Singletary, 617 So.2d 313 (Fla.), cert. denied, ___ U.S. ___, 113 S.Ct. 1891, 123 L.Ed.2d 507 (1993); counsel disputed that this standard involved any consideration of whether the jury would have had a reasonable basis for a life recommendation (T 67-8). Counsel for the state also pointed out that the actual instruction given, as well as the arguments of both counsel, had drawn the jury's attention to whether the homicide was cruel or "pitiless", considerations which were valid under Shell (T69-73). As to the facts of the case, and the applicability of the factor, counsel for the state pointed out that the victim had had six defensive wounds on his hands, as he had tried to fend off the blows; likewise, the wound which had killed him had been administered with such force that it had broken his collar bone, and had caused great pain (T 75-76).

Counsel for the State argued that, even with a proper definition, the jury would have still recommended the same sentence (T 77-84).

On October 22, 1993, the circuit court rendered its order, granting the motion (3PCR 530-3). Judge Levenson found that, under James, the jury instruction had been preserved at both trial and appeal (3PCR 532). As to the effect of any jury instruction error, the court held:

> 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 (3 PCR 532-3).

This appeal follows (3PCR 537).

SUMMARY OF ARGUMENT

This cause comes before the court on the state's appeal from the circuit court's granting of Breedlove's third motion for postconviction relief. The circuit court found that Breedlove had, under the standards set forth in James v. State, 615 So.2d 668 (Fla. 1993), preserved his claim for review under Espinosa v. Florida, ___ U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), and subsequently granted relief, after concluding that it was "impossible" to determine the effect of the jury instruction error. Appellant contends that this ruling was error, and should be reversed, for at least three reasons.

Initially, it is the State's contention that the Espinosa claim was not preserved at Breedlove's 1978 trial, because no contemporaneous objection was made to the wording of the jury instruction actually given on the heinous, atrocious or cruel aggravating factor, on constitutional or vagueness grounds. The fact that defense counsel filed a pretrial motion attacking the constitutionality of the aggravating circumstance itself is plainly insufficient to preserve this point, and, similarly, the fact that defense counsel submitted a proposed instruction (to whose denial he did not object), which was likewise incomplete, cannot be said to satisfy James.

Assuming any claim was cognizable, the jury instruction error was harmless beyond a reasonable doubt, because, inter alia, in accordance with this court's many precedents on the subject, this murder was heinous, atrocious and cruel, under any definition of the terms. The victim in this case literally drowned in his own blood, after being stabbed in the chest so

forcefully that his collar bone was broken; the presence of defensive wounds on his hands indicated that he fought for his life, and he did not immediately expire, in that he forced himself out of bed and through the house, in an unsuccessful quest for aid. Furthermore, when this court approved the finding of this aggravating circumstance in Breedlove's 1982 direct appeal, it expressly found that this homicide was "set apart" from other murders, and "far different from the norm of capital felonies." The circuit court's granting of relief was, quite literally, error in every respect, and the instant sentence of death should be reinstated.

ARGUMENT

THE CIRCUIT COURT'S GRANTING OF BREEDLOVE'S SUCCESSIVE MOTION FOR POST-CONVICTION RELIEF, BASED UPON AN ALLEGED VIOLATION OF ESPINOSA v. FLORIDA, ___ U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992), WAS ERROR; NO ERROR WAS PRESERVED AT TRIAL, AND ANY ERROR WAS HARMLESS BEYOND A REASONABLE DOUBT

The circuit court granted Breedlove's third motion for postconviction relief, finding that, under the standards set forth in James v. State, 615 So.2d 668 (Fla. 1933), the claim based upon Espinosa v. Florida, ___ U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992) was cognizable for review; the court found that a new sentencing was mandated, because it was "impossible" to know what effect the invalid instruction had upon the jury's consideration of the case, and because it was likewise impossible to know whether the jury's recommendation would have been different, had they received "the expanded instruction which was requested" (3PCR 532-3). Appellant contends that this ruling constitutes error in a number of respects.

Contrary to the finding of the circuit court, the jury instruction claim was not cognizable on collateral attack, given the fact that no contemporaneous objection was made to the wording of the instruction actually given, on constitutional grounds; accordingly, the circuit court should have denied Breedlove's motion on the grounds of procedural bar. Secondly, even if the issue were cognizable, the circuit court erred in finding that relief was appropriate; it is clear from the order itself that the court below conducted no meaningful analysis of the effect of any error, and failed to apply the standard of review set forth in such cases as Henderson v. Singletary, 617

So.2d 313 (Fla.), cert. denied, ___ U.S. ___, 113 S.Ct. 1891, 123 L.Ed.2d 507 (1993). For all the reasons set forth below, the order granting 3.850 relief should be reversed.

(A) Breedlove's Claim For Relief, Under Espinosa v. Florida, Was Not Cognizable On Collateral Attack, Because No Jury Instruction Error Was Preserved At Trial

Collateral counsel argued below that Breedlove had complied with the standards set forth in James, because, inter alia, he had "objected to the vagueness of the instruction and requested an expanded instruction" (3PCR 435-7, 485-9; T14-16); Judge Levenson apparently accepted this argument, because she found:

> In the instant case, Breedlove's counsel objected to Florida Statute §921.141 in a pretrial 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 (3PCR 532).

This finding is erroneous in several respects.[3]

First of all, it is clear, under precedent both from this court, and the Supreme Court of the United States, that Breedlove's pretrial motion, attacking the constitutionality of the statute, did not preserve any issue as to the standard jury instruction on this aggravating factor. The pretrial motion attacked the application of the aggravating factor, and made no mention whatsoever of the jury instruction thereupon; at most, the motion suggested that to a layman "any felony murder" would appear to be heinous, atrocious or cruel, such legal maxim not the basis for the Court's holding in Espinosa. Accordingly, to

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[3] The State, at this juncture, does not contest the circuit court's finding that the jury instruction claim was adequately presented on direct appeal. Of course, under James, both trial and appellate preservation is required.

the extent that the circuit court relied upon the existence of the pretrial motion to "preserve" Breedlove's Espinosa claim, error has been demonstrated. See Sochor v. Florida, ___ U.S. ___, 112 S.Ct. 2114, 2119-2120, 119 L.Ed.2d 326 (1992) (recognizing Florida law to the effect that filing a pretrial motion attacking vagueness of aggravating factor itself insufficient to preserve alleged jury instruction error); Beltran-Lopez v. State, 626 So.2d 163 (Fla. 1993) (defendant's pretrial motion in limine, seeking to preclude jury's consideration of heinous, atrocious or cruel aggravating factor, due to constitutional vagueness, insufficient to preserve attack upon wording of jury instruction; Espinosa v. State, 626 So.2d 165 (Fla. 1993) (same); Ferguson v. Singletary, 19 Fla. L. Weekly S101 (Fla. February 24, 1994).

This court has consistently held, in accordance with James, that trial preservation of this claim requires a specific contemporaneous objection to the wording of the jury instruction, on constitutional or vagueness grounds; simply objecting to the fact that the jury has been instructed on this aggravating factor is not enough. See e.g., Kennedy v. Singletary, 602 So.2d 1285 (Fla.), cert. denied, ___ U.S. ___, 113 S.Ct.2, 120 L.Ed.2d 931 (1992); Turner v. Dugger, 614 So.2d 1075, 1081, (Fla. 1992) ("Turner failed to object on constitutional or vagueness grounds and thus deprived the trial court of an opportunity to rule on the issue,"); Marek v. Singletary, 626 So.2d 160 (Fla. 1993); Roberts v. Singletary, 626 So.2d 168 (Fla. 1993). The purpose of the contemporaneous objection rule is, of course, to put the trial court on notice that an error may have been committed, and

to provide the court with an opportunity to correct it at an early stage of the proceedings. In order to effectuate these purposes, any objection must be sufficiently precise both to apprise the trial judge of the putative error and to preserve the issue for intelligent review. See Castor v. State, 365 So.2d 701, 703 (Fla. 1978).

Although at the penalty phase charge conference, defense counsel stated, without elaboration, that he "renewed" all of his pretrial motions to dismiss the statute "that would provide for these instructions as being unconstitutional", the only specific complaint levied against the instructions at this time was that "they unconstitutionally limit the mitigating circumstances involved" (3PCR 17); this concern, of course, was later set to rest when the circuit court granted defense counsel's request for a special jury instruction on the mitigating circumstances. It is, of course, well-established that objections pertaining to the giving or denial of jury instructions must be made with specificity. See e.g., Courson v. State, 414 So.2d 207, 209-20 (Fla. 3rd DCA 1982); Wenzel v. State, 459 So.2d 1086, 1088 (Fla. 2nd DCA 1984). Here, no fair reading of the trial record could lead one to the conclusion that Judge Fuller was ever on notice that Breedlove felt that the standard jury instruction on the heinous, atrocious or cruel aggravating factor was unconstitutionally vague. Accordingly, it was error for Judge Levenson to have found this claim cognizable, and this matter should have been ruled procedurally barred, based upon such precedents as Kennedy and Turner.

The 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 circumstances; in the order granting relief, Judge Levenson found that Breedlove had, inter alia, "requested an enlarged instruction which was denied." (3PCR 532). Under the facts and circumstances of this case, as well as under appellant's view of the law, see below, the State would contend that Breedlove's mere submission of an alternate instruction on this aggravating circumstance cannot constitute an adequate substitute for a contemporaneous objection on constitutional grounds to the jury instruction actually given.

First of all, this court's earliest case involving Espinosa, Kennedy v. Singletary, says nothing of the proposal of an alternate jury instruction as a means of preserving claims of this nature; in Kennedy, the defendant's claim based upon Espinosa was found procedurally barred, due to the absence "an objection at trial made to the wording of the instruction on heinous, atrocious or cruel." Id. at 1285. Although this court noted in James that the defendant therein had "asked for an expanded instruction", James also had "objected to the then-standard instruction at trial, . . ., and argued on appeal against the constitutionality of the instruction his jury received." James, 615 So.2d at 669. This court found adequate preservation in James, because under Melendez v. State, James had made a specific objection at trial and pursued such on appeal. James, 615 So.2d at 669. James does not stand for the proposition that the mere fact that, for whatever reason, defense

counsel may propose a different jury instruction obviates the need for specific objection to the instruction actually given. Such law as can be said to exist on this subject would seem to be against Breedlove's position in this regard. See e.g., Griffin v. State, 372 So.2d 991-2 (Fla. 1st DCA 1979) (defendant failed to preserve claim that standard jury instruction was fatally defective, where, although counsel unsuccessfully proposed alternate instruction, he failed to articulate basis for objection to instruction given; "general objection" to court's failure to give proposed instruction insufficient to preserve claim that instruction given failed to sufficiently set forth essential elements of crime).[4]

Furthermore, it would be inequitable to find that counsel's proposal of the alternate jury instruction at issue sub judice preserved any Espinosa claim; it should be remembered that, in closing argument, defense counsel, without great hesitation or distaste, argued the definitions of this aggravating factor to the jury, which would later be set forth in the judge's charge

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[4] To the extent that such precedents as Hitchcock v. State, 614 So.2d 483 (Fla. 1993) or Atwater v. State, 626 So.2d 1325 (Fla. 1993) could be said to suggest that contemporaneous objection is unnecessary, when the defense submits a proper expanded instruction on this aggravating factor, the State would simply note that such are direct appeal opinions, and that James sets forth the requirements for an Espinosa claim to be cognizable on collateral attack, years after finality of conviction and sentence. It is entirely proper to have different standards of review for direct appeal and collateral proceedings. Cf. Witt v. State, 387 So.2d 922 (Fla. 1980); Brecht v. Abrahamson, ___ U.S. ___, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). Additionally, as will be argued above, Hitchcock and Atwater are distinguishable, because Breedlove's proposed instruction was neither proper nor "expanded". Finally, in contrast to Hitchcock, Breedlove's counsel did not formally object to the court's denial of his requested instruction on this aggravating factor.

(3PCR 182-3). Contrary to the arguments of Breedlove's counsel below and the findings of the circuit court, Breedlove did not propose an "expanded" instruction on the heinous, atrocious, or cruel aggravating factor. Although Breedlove's proposed instruction did draw from this court's opinion in State v. Dixon, it was not a complete statement of that case's holding, in that, the proposed instruction contained absolutely no definition of any of the statutory terms; the proposed instruction simply advised the jury that the capital felony had to be accompanied by "additional acts", so as to set it apart from the norm of capital felonies, and had to be conscienceless, pitiless and unnecessarily torturous to the victim (3PCR 543).

While there is no doubt that this language is properly a part of any instruction on this aggravating circumstance, there is absolutely no caselaw to support the proposition that this language, standing alone, constitutes a complete, and constitutional, jury instruction on this aggravating circumstance. Cf. Atwater v. State, 626 So.2d 1325, 1328 n.3 (Fla. 1993) (setting forth complete "Dixon instruction"). Although collateral counsel assured the court below that it did not matter whether Breedlove's proposed instruction was a correct statement of the law (T 30, 33), such contention is nonsense. Cf. Street v. State, ___ So.2d ___, (Fla. March 31, 1994). Because there has been no showing that the instruction proposed by the defense was any more "constitutional" than that actually given, and because Breedlove's trial counsel never specifically objected to the instruction actually given on constitutional or vagueness grounds, the district court erred in declining to impose a procedural bar. Reversal is mandated.

(B) Any Espinosa Error In This Case Was Harmless Beyond A Reasonable Doubt, Under The Precedents Of This Court

Of course, even if Breedlove's Espinosa claim were recognized as properly cognizable, relief would not be appropriate unless the error in jury instruction was not harmless. 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. See e.g., Ragsdale v. State, 609 So.2d 10, 14 (Fla. 1992); Sims v. Singletary, 622 So.2d 980, 981 (Fla. 1993). Most often, however, this court has found vagueness in the jury instruction on this aggravating circumstances to be harmless, based upon a determination that the manner in which the victim was murdered "was heinous, atrocious or cruel under any definition of the terms." Thompson v. State, 619 So.2d 261, 267 (Fla.), cert. denied, ___ U.S. ___, 114 S.Ct. 445, 126 L.Ed.2d 378 (1993); Henderson, supra; Foster v. State, 614 So.2d 455, 462 (Fla. 1992); Marek, supra; Atwater, supra; Gorby v. State, 630 So.2d 544, 548 n.6 (1993); Jackson v. Dugger, 18 Fla. L. Weekly S485, 486 (Fla. Sept. 9, 1993); Chandler v. Dugger, 19 Fla. L. Weekly S95 (Fla. February 24, 1994).[5] Applying this analysis, which the circuit court did not, clearly indicates that the jury instruction error in this case was harmless beyond a reasonable doubt, under State v. DiGuilio, 491 So.2d 1129 (Fla.

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[5] This court has also, on occasion, found Espinosa error to be harmless, even when the aggravating circumstance itself was not applicable. See e.g., Kennedy v. Singletary, 602 So.2d 1285 (Fla.), cert. denied, ___U.S___, 113 S.Ct.2, 120 L.Ed.2d 931 (1992); Johnson v. State, 608 So.2d 4, 13 (Fla. 1992); Occhicone v. Singletary, 618 So.2d 730, 731 (Fla. 1993).

1986) and Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

The murder of Frank Budnick was heinous, atrocious or cruel, under any definition of the terms, because, inter alia, it was conscienceless, pitiless, and unnecessarily torturous to the victim; indeed, as will be argued more fully infra, when this court affirmed this aggravating circumstance in the 1982 direct appeal, it specifically found that this murder was "far different from the norm of capital felonies" and "set apart" from other murders. Breedlove, 413 So.2d at 9. It would be misleading in the extreme to suggest that this murder simply involved "a single stab wound during a felony murder" (T 66). Regardless of the number of times that the 8 3/4 inch knife penetrated Mr. Budnick's body, it is clear that he fought for his life, given the presence of defensive wounds on his hands; the surviving victim also had defensive wounds on her hands, as well as a wound above her eye (OR 731, 764, 772-3), such facts noted by this court on direct appeal. Id. at 8, n.12. Furthermore, the stab wound in this case was inflicted with great force, and resulted in great pain. The blow was administered with such force that it fractured or broke the collar bone and drove the knife all the way through the victim's body to the shoulder blade in the back; the puncture of the pleural lining of the victim's lung was "associated with great pain" (3PCR 53). The victim literally drowned in his own blood, and was unquestionably conscious of not only his pain, but also his ultimate fate, as he desperately lunged through the house, leaving a trail of blood behind, before finally collapsing, and dying outside. The mental, emotional and

physical pain and trauma which the victim suffered more than supports this aggravating circumstances, and, as this court noted when affirming it, this murder was truly outside the norm of capital felonies, in that it occurred in the home, at the dead of night, when the victim was the most vulnerable. Id. at 9.

The State respectfully suggests that when this court found that the victim's murder was "far different from the norm of capital felonies", and that the crime had been "set apart" from other murders, id., this court essentially applied the language from Dixon missing from the instruction given Breedlove's jury.[6] The murder of Frank Budnick was heinous, atrocious and cruel under any definition of the terms, and any Espinosa error was harmless beyond a reasonable doubt. See e.g., Foster, supra; Atwater, supra; Henderson. supra; Davis v. State, 620 So.2d 152, 153 (Fla. 1993) (Espinosa error harmless where, given facts of case, jury would have recommended, and judge imposed, same sentence, under any instruction). This court has not only upheld the application of this aggravating factor in comparable factual situations, see e.g., Mason v. State, 438 So.2d 374, 379 (Fla. 1983) (woman chokes on her own blood after being stabbed through the heart, while sleeping in bed), but has also expressly relied upon its application of this factor in Breedlove in affirming other sentences of death. See e.g., Bundy v. State, 455 So.2d 330, 350 (Fla. 1984) (Breedlove cited in support of affirmance of aggravating circumstance of heinous, atrocious or cruel); Davis

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[6] Appellant's arguments in this vein with regard to Clemons v. Mississippi, 449 U.S. 738, 755, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990), and related cases, will be set forth in Part C, infra.

v. State, 461 So.2d 67, 72 (Fla. 1984) (same); Perry v. State, 522 So.2d 817, 820-1 (Fla. 1988) (same). The state has met its burden under DiGuilio in demonstrating that any vagueness in the jury instruction sub judice was harmless beyond a reasonable doubt.

The State would also contend that, 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. In this case, there were two other valid aggravating circumstances, which weighed heavily against Breedlove. Breedlove, obviously, was an experienced burglar, and did not hesitate to assault, or in this case, murder, those persons unfortunate enough to be in his proximity. Likewise, while there was mitigation presented, the evidence as to Breedlove's mental state and alleged mental problems was speculative and contradictory. None of the defense experts expressly testified that the statutory mitigating circumstances pertaining to mental state applied, and, to the contrary, the state's rebuttal experts expressly testified that they did not. (3PCR 133, 134). Although the defense experts opined that Breedlove had psychological problems, such as schizophrenia, the state experts expressly testified that they found no evidence of organic brain damage, psychosis or schizophrenia (3PCR 126-132; 143); both state experts stated that Breedlove, was, at most, a sociopath, and Dr. Mutter expressly testified that Breedlove had been malingering and trying to manipulate him during the interview (3PCR 131-2; 140-1,

149). Because, inter alia, there was other valid aggravation and minimal mitigation, the jury instruction error sub judice was harmless. See Ragsdale, supra.

Further, Appellant does find it relevant that the jury was not given the same instruction invalidated in Espinosa itself, which contained no definition of the statutory terms. Here, the jury was given some guidance, and the specific definition given as to the term, "cruel", drew their attention to the "pitiless" nature of the homicide (3PCR 194). Although this instruction did not contain certain additional language from Dixon, such language is, to an extent, redundant, in that the "additional acts" identified are those which evince a conscienceless or "pitiless" crime. Dixon, 283 So.2d at 9. Appellant would respectfully contend that Breedlove's jury was sufficiently focused upon valid narrow and constitutional construction of this aggravating circumstance, by virtue of the instruction given, such that the lack of any further elaboration of the terms was harmless. Further, contrary to the representations below, (T 85), it is also relevant that, in their closing arguments, both attorneys specifically drew the jury's attention to such valid concerns as whether the homicide at issue had been "pitiless" (3PCR 63-4; 182-3); in any event, it cannot be said that this aggravating circumstance, or arguments relating to it, constituted the primary focus of the penalty proceeding. Cf. Occhicone v. Singletary, 618 So.2d 730, 731 (Fla. 1993) (arguments of counsel considered as part of harmless error analysis of Espinosa claim). Given all these factors, especially the unquestionably correct application of the aggravating circumstance itself, the jury was

not misled by the inadequate instruction, see Foster, supra, such that relief was appropriate.

The circuit court granted relief in this case because it concluded that it was "impossible" to determine the effect of the jury instruction error on the ultimate sentence imposed (3PCR 532-3). The court may have reached this impasse, because of the inapposite caselaw cited by counsel for Breedlove, i.e., Hall v. State, 541 So.2d 1125 (Fla. 1989) (which involved a violation of Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1321, 95 L.Ed.2d 346 (1987) or Brown v. Dugger, 831 F.2d 1547 (11th Cir. 1987) (which involved the wrongful admission of a confession, and whose analysis has later been superceded by Brecht v. Abrahamson, ___ U.S. ___, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (3PCR 445; T 60). While it is true, as recognized in Satterwhite v. Texas, 486 U.S. 249, 259, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988), that the evaluation of the consequences of an error in the sentencing phase of a capital case may be difficult, given the discretion vested in the sentencer, such task is merely difficult, not impossible. This court has set forth a substantial amount of guiding precedent involving Espinosa error, which was cited by the state below. The circuit court's refusal to apply this precedent, and to conduct any valid form of harmless error analysis, was clear error, and, as in State v. Bolender, 503 So.2d 1247 (Fla. 1987), this court should reverse the lower court's granting of relief, and order reinstatement of the death sentence.

(C) This Court, In Breedlove's 1982 Direct Appeal, Already Cured Any Jury Instruction Error

As a final basis for reversal, Appellant would contend that the circuit court erred in granting relief sub judice, because, in 1982, this court had already "cured" any jury instruction error when it affirmed Breedlove's sentence of death. As previously noted, this court, in approving the finding of the heinous, atrocious or cruel aggravating circumstance, expressly found that the murder of Frank Budnick was "far different from the norm of capital felonies", and "set apart" from other murders. Breedlove, 413 So.2d at 9. This language is not only consistent with that in State v. Dixon, supra, but also with Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) and Sochor v. Florida, ___ U.S. ___, 112 S.Ct. 2114, 2119-2120, 119 L.Ed.2d 326 (1992), and clearly indicates that, in affirming Breedlove's sentence of death, this court applied the constitutional narrowing construction of this aggravating circumstance demanded by the Eighth Amendment. The United States Supreme Court has repeatedly held that a state reviewing court may cure, or render harmless, jury instruction error of this type. See, e.g., Clemons v. Mississippi, 449 U.S. 738, 755, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990); Stringer v. Black, ___ U.S. ___, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992); Richmond v. Lewis, ___ U.S. ___, 113 S.Ct. 528, 534, 121 L.Ed.2d 411 (1992) (". . . a state appellate court may rely upon an adequate narrowing construction of the factor in curing this error [the weighing of an unconstitutionally vague aggravating factor]"). Because the circuit court entirely failed to appreciate this fact, the order on appeal should be reversed in all respects.

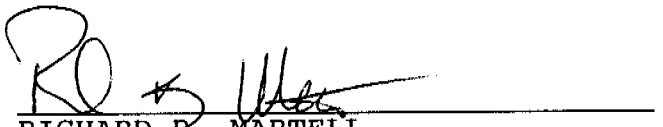
The State would also contend that Judge Fuller's sentencing order, setting forth the detailed facts in support of this aggravating factor (OR 186), likewise indicates beyond peradventure that he applied the constitutional narrowing construction of this aggravating circumstance, cf. Walton v. Arizona, 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), and that the United State Supreme Court's elevation of the jury to the role of "co-sentencer" is not only erroneous, but also contrary to Florida precedent. See, Combs v. State, 525 So.2d 853, 857 (Fla. 1988) ("Clearly, under our process, the court is the final decision-maker and sentencer - not the jury"). The result below well illustrates the essential fallacy of Espinosa. Despite uncontroverted evidence that the state appellate court and statutory sentencer applied the appropriate constitutional narrowing construction of this aggravating factor, the instant sentence of death, which was valid for some fifteen (15) years, has now been set aside solely because the least important participant in the capital sentencing structure - the advisory jury - did not receive two extra sentences detailing one of the aggravating circumstances submitted to them for their general verdict. In addition to being a miscarriage of justice, this would seem to be a perfect example of the "tail wagging the dog." The order on appeal should be reversed in all respects.

CONCLUSION

WHEREFORE, for the aforementioned reasons, the order granting Breedlove's third motion for postconviction relief should be reversed in all respects, and the sentence of death in this cause reinstated.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



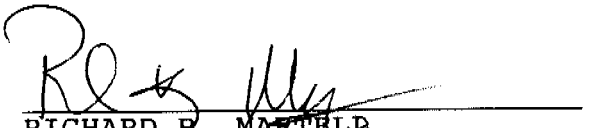
RICHARD B. MARTELL
Chief, Capital Appeals
Florida Bar No. 0300179

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL 32399-1050
(904) 488-0600

COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Ms. Gail E. Anderson, Esq., Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 1st day of April, 1994.



RICHARD B. MARTELL
Chief, Capital Appeals