IN THE
SUPREME COURT OF FLORIDA

JACOB JOHN DOUGAN, JR.,

Petitioner,

v. Case No._____

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

Respondent.

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**PETITION FOR WRIT OF HABEAS CORPUS
AND EXTRAORDINARY RELIEF**

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

PROCEDURAL HISTORY

On March 5, 1975, Mr. Dougan was convicted of first degree murder for the death of Stephen Orlando and was sentenced to death on April 10, 1975.

Mr. Dougan's direct appeal was consolidated with that of his codefendant, Elwood Barclay. After the appeal was initially denied, Barclay v. State, 343 So. 2d 1266 (Fla. 1977), cert. denied, 439 U.S.

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892 (1978), this Court remanded both cases for a hearing pursuant to Gardner v. Florida, 430 U.S. 349 (1977). Barclay v. State, 362 So. 2d 657 (Fla. 1978). A sentence of death was reimposed, and this Court again affirmed it on appeal. Dougan v. State, 398 So. 2d 439 (Fla.), cert. denied, 454 U.S. 882 (1981).

On an original habeas corpus petition thereafter, this Court granted Mr. Dougan a new direct appeal on the basis of appellate counsel's ineffective assistance and conflict of interest in representing both Mr. Dougan and Mr. Barclay in the original appeal. Dougan v. Wainwright, 448 So. 2d 1005 (Fla. 1984). In the new appeal, this Court affirmed Mr. Dougan's conviction but vacated his death sentence and remanded for a new sentencing hearing before a new jury. Dougan v. State, 470 So. 2d 697 (Fla. 1985).

At Mr. Dougan's resentencing, the state produced evidence concerning the murder and argued that the evidence supported the finding of three aggravating circumstances: that the murder was (1) heinous, atrocious or cruel; (2) cold, calculated and premeditated without a pretense of moral or legal justification; and (3) committed during the commission of a kidnapping. Mr. Dougan presented extensive evidence in mitigation related to four areas: (1) positive character traits; (2) contribution of racial oppression to the homicide; (3) potential for rehabilitation; and (4) inequality between his sentence and those of his co-defendants. During the course of its deliberations, the jury asked several questions. One concerned the definition of the words used in the court's instructions on the

"heinous, atrocious or cruel" aggravating factor, T. 1760,[1] and another concerned whether the jury could recommend a life sentence even if it found that the aggravating circumstances outweighed the mitigating circumstances. T. 1778.

On September 23, 1987, at the conclusion of its deliberations, the jury recommended nine to three that Mr. Dougan be sentenced to death. R. 681. On December 4, 1987, Judge Olliff entered findings of fact and sentenced Mr. Dougan to death. R. 1075-1171.

Mr. Dougan again appealed to this Court, arguing among other claims that the instruction to the resentencing jury on the "especially heinous, atrocious or cruel" aggravating circumstance was unduly vague, in violation of the Eighth Amendment. This Court rejected that argument, and Mr. Dougan's other claims, affirming his death sentence by a vote of 4-3. Dougan v. State, 595 So. 2d 1 (Fla.), cert. denied, 113 S. Ct. 383 (1992).

This is Mr. Dougan's first application for a writ of habeas corpus with respect to the sentence imposed on resentencing in 1987. Mr. Dougan has not filed a Rule 3.850 motion to vacate the judgment and sentence. As a matter of judicial economy, Mr. Dougan believes

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[1]References to the trial court record will be as follows: "R." will refer to the seven volumes of pleadings and orders, sequentially numbered from pages 1-1199; "T." will refer to the thirty volumes of transcript, sequentially numbered from pages 1-1951, comprising the transcribed record of pretrial and trial proceedings.

that this petition is the most efficient and expeditious way to resolve his case.[2]

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Florida Rule of Appellate Procedure 9.100(a). This Court has jurisdiction, pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, Section 3(b)(9) of the Florida Constitution. The petition presents constitutional errors which directly concern the judgment of this Court during the appellate process, and the legality of Mr. Dougan's conviction and sentence of death. Jurisdiction over this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein involve the appellate review process. See Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969). See also Johnson (Paul) v. Wainwright, 498 So. 2d 938 (Fla. 1987). Cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981).

This Court has long held that "habeas corpus is a high prerogative writ" which "is as old as the common law itself and is an integral part of our own democratic process." Anglin v. Mayo, 88 So. 2d 918, 919 (Fla. 1955). Because it enjoys such historical

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[2]Amended Rule 3.851(b)(2) of the Florida Rules of Criminal Procedure, which would require that any petition for writ of habeas corpus be filed simultaneously with the appeal of the order on the Rule 3.850 motion, does not apply because Mr. Dougan's conviction and sentence became final before January 1, 1994. See In re: Rule of Criminal Procedure 3.851, 18 Fla. L. Weekly S553 (Fla., Oct. 21, 1993).

stature, the writ of habeas corpus encompasses a broad range of claims for relief:

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

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

This Court has also consistently exercised its habeas jurisdiction to correct errors which occurred in the direct appeal process. When this Court is presented with an issue raised on direct appeal, and its disposition of the issue is shown to be fundamentally erroneous, the Court will not hesitate to correct such errors in habeas corpus proceedings. As this Court has explained, the Court will "revisit a matter previously settled by the affirmance," if what

is involved is a claim of "error that prejudicially denies fundamental constitutional rights . . . ." Kennedy v. Wainwright, 483 So. 2d 424, 426 (Fla. 1986). Further, this Court has addressed, pursuant to its habeas jurisdiction, claims premised on retroactive changes in the law. In particular, this Court has addressed claims under Espinosa v. Florida, 112 S. Ct. 2926 (1992). See, e.g., Occhicone v. Singletary, 618 So. 2d 730 (Fla. 1993). As set out in detail below, Espinosa and other recent United States and Florida Supreme Court decisions demonstrate that the disposition of Mr. Dougan's appeal was fundamentally erroneous. In light of these circumstances, Mr. Dougan respectfully urges this Honorable Court to "issue such appropriate orders as will do justice." Anglin, 88 So. 2d at 919.

INTRODUCTION

This was undoubtedly a close case at penalty phase. Three jurors voted for life; three members of this Court believed that a death sentence in this case was disproportionate. Compelling mitigating evidence was presented at the resentencing proceeding. That evidence was summarized by Justice McDonald in his dissenting opinion on direct appeal:

> Dougan's mother was white and his father, whom he never knew, was black. After Dougan's birth, his mother returned to an all white community where she abandoned her son. Although as much white as black, Dougan was rejected by his white relatives and the white population. Ultimately he was adopted by an understanding and compassionate family which also came from a biracial background. An intelligent person, Dougan was well educated and became a leader in the black community, but throughout his life was confronted with a perception of injustice in race relations. Within the black community he was respected. He taught karate and counseled

black youths. When blacks were refused service at a lunch counter, he participated in a sit-down strike in defiance of a court order and was held in contempt of court therefor. This was the only blemish, if it can be called one, on his police record until this homicide.

The events of this difficult case occurred in tumultuous times. During the time of the late sixties and early seventies, there was great unrest throughout this country in race relations. Duval County, where this homicide occurred, did not escape and was also a place of such unrest. I mention these facts not to minimize what transpired, but, rather, to explain the environment in which the events took place and to evaluate Dougan's mind-set.

* * *

This case is not simply a homicide case, it is also a social awareness case. Wrongly, but rightly in the eyes of Dougan, this killing was effectuated to focus attention on a chronic and pervasive illness of racial discrimination and of hurt, sorrow, and rejection. Throughout Dougan's life his resentment to bias and prejudice festered. His impatience for change, for understanding, for reconciliation matured to taking the illogical and drastic action of murder. His frustrations, his anger, and his obsession of injustice overcame reason. [Footnote omitted]. The victim was a symbolic representative of the class causing the perceived injustices.

In comparing what kind of person Dougan is with other murderers in the scores of death cases that we have reviewed, I note that few of the killers approach having the socially redeeming values of Dougan. In comparison to Dougan's usual constructive practices, this homicide was indeed an aberration. He has made and, if allowed to live, can make meaningful contributions to society.

I ask again the question, is this one of the most aggravated and least mitigated cases reserved for the ultimate penalty of death? When considering the totality of the circumstances, but with compassion for and, hopefully, understanding from the family of the victim, I

> think not. A life sentence makes this penalty more proportionate to what has existed in emotional or other racially caused homicides.

Dougan v. State, 595 So. 2d 1, 7-8 (Fla. 1992) (McDonald J., dissenting).

Against this significant and substantial mitigation, the jury was instructed to consider and weigh three aggravating circumstances -- that the crime was especially heinous, atrocious or cruel; that it was committed during the course of a kidnapping; and that it was cold, calculated and premeditated. T. 1749.[3] With respect to the "especially heinous" aggravating factor, the jury was instructed merely to consider whether the crime was "especially wicked, evil, atrocious or cruel." Id. As we now know, that instruction violated the eighth and fourteenth amendments of the United States Constitution. Espinosa v. Florida, 112 S.Ct. 2926 (1992).

In the instant case, it is also unquestionable that the instruction confused the jury. Thirty minutes into the jury's deliberations, the jury sent a note out requesting some dictionaries. T. 1757. When the jury was brought into the courtroom, a juror indicated that they wanted definitions of the terms "heinous" and "atrocious." T. 1760. After a lengthy debate between the trial

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[3]On direct appeal, Mr. Dougan argued that the instructions on all of these aggravating factors were improper, and that all of them were improperly found by the trial court. See Appellant-'s Initial Brief at 71-80, 89-96, Dougan v. State, 595 So.2d 1 (Fla. 1992) (No. 71,755). All of those arguments were rejected on direct appeal by this Court. While Mr. Dougan does not concede that this Court's decision was correct, he raises now only the constitutional error in instructing the jury on the "especially heinous" aggravating factor, as established by Espinosa v. Florida, 112 S.Ct. 2926 (1992).

court, the State, and the defense, the trial court responded to the jury's inquiry by explaining that "heinous" was no longer a part of the charge, and by providing the following definitions of "atrocious" and "cruel":

> [A]trocious means outrageously wicked and vile[;] cruel means designed to inflict a high degree of pain with utter indifference to or enjoyment of the suffering ... of others.

T. 1766, see T. 1770-1. That instruction, like the original instruction, failed to give the jury the guidance concerning the application of the aggravating circumstance that is required by the eighth amendment. Espinosa, supra; Shell v. Mississippi, 498 U.S. 1 (1990); Atwater v. State, 626 So. 2d 1325, 1328-29 (Fla. 1993).

There is no question that Mr. Dougan's objection to the instruction was preserved at trial and raised on appeal. Mr. Dougan filed a pretrial motion in which he asked for a limiting instruction based on Dixon v. State, 283 So. 2d 1 (Fla. 1973). R. 668. At the charge conference, counsel argued that the requested instruction was necessary "in order to adequately instruct the jury as to what atrocious murder is or a particular cruel murder is. Otherwise, to the average layman any murder seems that way." T. 1637. The trial court denied the instruction requested by the defense. T. 1636-38. After the court received the question from the jury, counsel again requested the previously filed Dixon instruction and objected to the instruction actually given by the court. T. 1763-66. The objection was thus even more thoroughly preserved than in Atwater, supra, and the constitutionality of the issue was exhaustively briefed on direct

appeal. See Appellant's Initial Brief at 72-76, Dougan v. State, 595 So. 2d 1 (Fla. 1992) (No. 71,755). Accordingly, as in James v. State, 615 So. 2d 668, 669 (Fla. 1993), "it would not be fair to deprive [Mr. Dougan] of the Espinosa ruling."

When this claim is reviewed on the merits, it is clear that the instructions given on the "especially heinous" aggravating factor violated Espinosa. It is equally clear that that violation was not harmless beyond a reasonable doubt. As set forth above, this was a case in which the aggravation and mitigation were closely balanced. This Court has recognized that the "especially heinous" aggravating factor can only properly be found in cases that can be characterized as a "conscienceless or pitiless crime which is unnecessarily torturous to the victim." Dixon v. State, 283 So. 2d 1, 9 (Fla. 1973). The jurors were never told of this limitation, but rather were set free to find the crime "especially heinous" based on any of the facts of the case, such as the evidence and argument that Mr. Dougan and his codefendants had decided to kill a white person at random as a means of starting a race war. In fact, it is highly likely that they did so, as that was one of the reasons relied on by Judge Olliff. See R. 1100-1101. We must presume that the jurors weighed the invalid aggravating circumstance, Espinosa v. Florida, 112 S.Ct. at 2928. Weighing of an invalid aggravating circumstance skews the weighing process, tipping the scales in favor of death. See Stringer v. Black, 112 S.Ct. 1130, 1137-39 (1992). Where the scales were already so evenly balanced, it would be impossible to

find that the error was harmless beyond a reasonable doubt. Hitchcock v. State, 614 So. 2d 483 (Fla. 1993).

When the jurors met to make the most difficult and delicate decision required by our system of laws, the scales that they used were defective. This Court "may not assume it would have made no difference if the thumb had been removed from death's side of the scale." Stringer, 112 S.Ct. at 1137. Mr. Dougan is entitled to a new sentencing proceeding in which the scales are fairly balanced.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Dougan asserts that his convictions and sentence of death were obtained and subsequently affirmed during this Court's appellate review process in violation of his rights as guaranteed by the eighth and fourteenth amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution, for each of the reasons set forth herein. In Mr. Dougan's case, substantial and fundamental errors occurred in his capital trial. These errors were uncorrected by the appellate review process. As demonstrated below, relief is appropriate.

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

At the resentencing proceeding, Mr. Dougan established that this homicide was a tragic aberration and the result of a complex set of

racial factors which included historical racial oppression and bias in Jacksonville, Mr. Dougan's own background, and his efforts and commitment to improve the lot of black people in his community. The instruction given to Mr. Dougan's jury concerning the "especially heinous" aggravating circumstance, however, placed a "thumb [on] death's side of the scale," Stringer, 112 S.Ct. at 1137, all but ensuring that Mr. Dougan would be sentenced to death. The erroneous instruction was objected to at trial and raised on direct appeal. This Court must therefore consider the effect of the error on Mr. Dougan's sentencing proceeding. Because that error was not harmless beyond a reasonable doubt, Mr. Dougan is entitled to a new sentencing proceeding.

A. The Trial Court Instructed the Jury to Weigh a Vague and Invalid Aggravating Circumstance, in Violation of the Eighth Amendment

The instructions the trial court gave the jury on the "especially heinous, atrocious or cruel" aggravating circumstance were "so vague as to leave the [jury] without sufficient guidance for determining the presence or absence of the factor[s]." Espinosa v. Florida, 112 S.Ct. 2926, 2928 (1992). Concerning the aggravating circumstance, Mr. Dougan's jury was first instructed:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence, ... that the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel....

T. 1749.

Thirty minutes into the jury's deliberations, the vagueness of this instruction became clear when the jury sent a note out requesting

dictionaries. T. 1757. When the jury was brought back into the courtroom, the reason for requesting the dictionary was put on the record:

> JUROR: When we were reviewing the aggravating circumstances for the crime, two of the terms used were heinous and atrocious and we were looking for the definition of those two.
>
> THE COURT: Are those the only ones you are looking for?
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> JUROR: Those were the two definitions that had come up during the discussion, yes?
>
> JUROR: Atrocious, I think?
>
> JUROR: Heinous was also in the law.
>
> THE COURT: All right. At this point what you want defined is heinous and atrocious, is that correct?
>
> JUROR: Yes.

T. 1760.

After a lengthy debate between the trial court, the State, and the defense, the trial court responded to the jury's inquiry by explaining that "heinous" was no longer a part of the charge, and by providing the following definitions of "atrocious" and "cruel":

> [A]trocious means outrageously wicked and vile[;] cruel means designed to inflict a high degree of pain with utter indifference to or enjoyment of the suffering ... of others.

T. 1766, see T. 1770-1, R. 668. Together with the initial instruction, this instruction was essentially identical to that held to be inadequate by the United States Supreme Court in Shell v. Mississippi, 498 U.S. 1 (1990), and by this Court in Atwater v. State, 626 So. 2d 1325, 1328-29 (Fla. 1993).

It is clear, therefore, that the instruction violated Espinosa. As the Court noted in Espinosa, the weighing of an aggravating circumstance violates the eighth amendment if the description of the circumstance "is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." Espinosa, 112 S. Ct. at 2928. The Court further noted that it had previously held "instructions more specific and elaborate" than Florida's "heinous, atrocious, or cruel" instruction to be unconstitutionally vague. Id. The Court also found that the error in Espinosa was not cured by any trial court "independent" weighing of aggravation and mitigation:

> It is true that, in this case, the trial court did not directly weigh any invalid aggravating circumstances. But, we must presume that the jury did so, see Mills v. Maryland, 486 U.S 367, 376-77 (1988), just as we must further presume that the trial court followed Florida law, cf. Walton v. Arizona, 497 U.S. 639, 653 (1990), and gave "great weight" to the resultant recommendation. By giving "great weight" to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found. This kind of indirect weighing of an invalid aggravating factor creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor, cf. Baldwin v. Alabama, 472 U.S. 372, 382 (1985), and the result, therefore, was error.

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

Espinosa makes it undeniable, therefore, that where a Florida jury recommends death after receiving either the standard "heinous, atrocious or cruel" jury instruction or any instruction that suffers from similar defects, see Maynard v. Cartwright, 486 U.S. 356 (1988), and Shell, supra, the verdict is infected with eighth amendment error.

In such cases, the death sentence is tainted because the jury presumably weighed an invalid aggravating factor, thus placing a thumb on "death's side of the scale." Stringer v. Black, 112 S. Ct. 1130, 1137 (1992). That rule is fully applicable here.

B. Mr. Dougan Is Entitled to Retroactive Application of the Espinosa Decision

This Court has held that it will retroactively apply new rules of law in post-conviction proceedings where those new rules signify major constitutional changes in the law. Witt v. State, 387 So. 2d 922 (Fla. 1980). On its face, Espinosa represents such a major constitutional change in the law, as it overturned a large number of decisions of this Court holding that Espinosa's precursor, Maynard v. Cartwright, 486 U.S. 356 (1988), did not apply to Florida. See, e.g., Smalley v. State, 546 So. 2d 720, 722 (Fla. 1989).[4] Recognizing that fact, this Court held in James v. State, 615 So. 2d 668 (Fla.

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[4]Espinosa overrules precedent finding the "heinous, atrocious, cruel" instruction constitutionally appropriate, Cooper v. State, 336 So. 2d 1133, 1140-41 (Fla. 1976); and Smalley v. State, 546 So. 2d 720, 722 (Fla. 1989) (ruling that the standards of Godfrey v. Georgia, 446 U.S. 420 (1980), and Maynard v. Cartwright, 486 U.S. 356 (1988), are inapplicable to Florida's instruction on "heinous, atrocious, or cruel"). It overrules precedent rejecting challenges to the vagueness of the "heinous, atrocious, or cruel" instruction, Occhicone v. State, 570 So. 2d 902, 906 (Fla. 1990) (finding challenge to the jury instruction on the aggravator meritless because "Maynard v. Cartwright ... did not make Florida's penalty instructions on ... heinous, atrocious, or cruel unconstitutionally vague."); and Brown v. State, 565 So. 2d 304, 308 (Fla. 1990) (same). It overrules precedent evaluating the effect of error on the "heinous, atrocious, cruel" aggravator solely on the basis of the judge's findings. Cooper; Smalley; Robinson v. State, 574 So. 2d 108, 112-113 and n.6 (Fla. 1991).

Indeed, this Court evidently relied on one of more of these rationales in rejecting Mr. Dougan's challenge to the adequacy of the instruction on appeal. See Dougan, 595 So.2d at 3 n.3.

1993), that Espinosa must be retroactively applied where the instruction was objected to at trial and the issue was raised on appeal:

> 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. James, however, objected to the then-standard 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.

Id. at 669 (footnote and citation omitted).

Mr. Dougan, like Davidson James, objected to the instruction at trial and raised the issue on appeal. As in Atwater, supra, Mr. Dougan requested that a Dixon instruction be given prior to the sentencing proceeding. R. 668; see Atwater, 626 So. 2d at 1328 and n.3. At the charge conference, defense counsel objected to the instruction on the "especially heinous" aggravating factor, T. 1615-16, and argued that the requested instruction was necessary in order to provide the jury with sufficient guidance concerning the aggravator:

> Well we feel that it's an important instruction consistent with -- consistent with the law that is necessary in order to adequately instruct the jury as to what atrocious murder is or a particular (sic) cruel murder is. Otherwise, to the average layman any homicide seems to be that way.

T. 1637 (emphasis supplied). The trial court denied the requested instruction. T. 1637-38.

After the jury asked for a definition of the words "heinous" and "atrocious," the trial court again refused to give the requested

Dixon instruction. Instead, the trial court gave only a portion of the Dixon instruction. T. 1761-62; R. 668. The defense strenuously argued that if the court was going to give that additional instruction that it should give the entire Dixon instruction, which included the crucial limiting language contained in the second sentence of the Dixon definition. T. 1763 and 1765. The second sentence provided:

> 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 conscience-less or pitiless crime which is unnecessarily torturous to the victim.

Dixon v. State, 283 So. 2d 1, 9 (Fla. 1973). The State objected to the Dixon limiting language, stating that limiting instructions were not required and that the court should answer only the question asked. T. 1766. Over defense counsel's objections, the trial court refused to give the entire Dixon instruction. T. 1766. Without the additional Dixon limiting language, the instruction given suffers from the same defects identified by the United States Supreme Court in Espinosa v. Florida, 112 S.Ct. 2926 (1992), Shell v. Mississippi, 498 U.S. 1 (1992), Maynard v. Cartwright, 486 U.S. 356 (1988), and Godfrey v. Georgia, 446 U.S. 420 (1980).

Thus, there can be no question that Mr. Dougan specifically objected to the vagueness of the jury instruction on the "especially heinous" aggravating factor at the resentencing proceeding. Indeed, the objection was far more thoroughly made and preserved than in Atwater, supra, where this Court nevertheless held the objection to be sufficiently preserved:

> Prior to the penalty phase of the trial, defense counsel requested that a Dixon instruction be given. After a lengthy discussion between the defense, prosecution and trial judge regarding the merits of the Dixon instruction, the judge decided to give only the first half of the instruction, defining the terms "heinous, atrocious or cruel." The instruction, which was essentially the same as the one held to be inadequate in Shell v. Mississippi, 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990). 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 1328-29.

Moreover, the constitutionality of the instruction on the "especially heinous" aggravating factor was clearly, explicitly and extensively argued on direct appeal. Mr. Dougan argued at length on appeal that the instruction violated the principles of Maynard v. Cartwright, 486 U.S. 356 (1988), the same principles that Espinosa held apply to the instructions given to a Florida penalty phase jury. See Appellant's Initial Brief at 72-76, Dougan v. State, 595 So. 2d 1 (Fla. 1992) (No. 71,755).

Thus, the objection to the constitutionality of the instruction was preserved at trial and raised on appeal. Under James, Mr. Dougan is entitled to retroactive application of Espinosa and merits review of his claim.

C. The Constitutional Error That Infected the Jury's Weighing Process Is Not Harmless Beyond a Reasonable Doubt

1. The Appropriate Standard for Harmless Error Review

The effect on the resulting death sentence of jury weighing of an invalid aggravating factor has been discussed by the United States

Supreme Court in a number of cases, most recently Espinosa and Stringer v. Black, 112 S. Ct. 1130 (1992). In Stringer, the Court held that relying on such an aggravating factor, particularly in a weighing state, invalidates the death sentence:

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

Id. at 1139 (emphasis supplied).

Stringer makes clear that consideration of an invalid aggravating factor distorts the entire weighing process, adding improper weight to death's side of the scale, depriving the defendant of the right to an individualized sentence, and presumptively invalidating any death sentence:

> [W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale.

Id. at 1137. The "weighing process" in Mr. Dougan's case was "skewed" in the same way that the process was skewed by the invalid aggravators in Stringer and Espinosa.

This Court, in its earlier decisions in this cause, has not conducted any review of the effect of the error in the instructions to Mr. Dougan's jury on the "heinous, atrocious, or cruel," aggravating factor. Rather, on direct appeal, this Court never acknowledged that there was any error in the jury instructions and simply reviewed the trial court's findings of the aggravating factors. Dougan, 595 So. 2d at 3 n.3, 5. However, it is now clear that Mr. Dougan's jury was presented with an invalid instruction on this aggravating factor. That error requires resentencing in this case before a new jury.

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

is especially difficult because of the discretion afforded the jury. Satterwhite v. Texas, 486 U.S. 249, 258 (1988); Stringer v. Black, 112 S. Ct. 1130 (1992).

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

Under Stringer and Sochor v. Florida, 119 L.Ed.2d 326 (1992), the appropriate harmless error analysis is that set out in Chapman v. California, 386 U.S. 18 (1967). Sochor, 119 L.Ed.2d at 341-42. This Court, of course, has recognized and adopted the Chapman standard. See State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986). In several recent cases, however, while purporting to apply the Chapman standard, this Court has in fact significantly strayed from that standard. In its harmless error analysis in all of these cases, this Court, rather than asking whether the state has established beyond

a reasonable doubt that the erroneous instruction did not contribute to the sentencing verdict, has asked whether, given the evidence, the aggravating factor would have been found if the jury had been properly instructed. See, e.g., Davis v. State, 620 So. 2d 152 (Fla. 1993); Foster v. State, 614 So. 2d 455 (Fla. 1993); Thompson v. State, 619 So. 2d 261 (Fla. 1993); Slawson v. State, 619 So. 2d 255 (Fla. 1993). In all of these cases, then, this Court has essentially attempted to determine whether the outcome would have been different had the jury been properly instructed.

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

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

Sullivan v. Louisiana, 124 L.Ed.2d 182, 189 (1993) (emphasis supplied). Under this standard, the errors in this case cannot be found harmless beyond a reasonable doubt absent the type of "speculation" which the Eighth Amendment and the Florida Constitution forbid. See Stringer, 112 S. Ct. at 1137.

Thus, this Court must abandon its attempt to determine what the outcome would have been had the jury been properly instructed and

instead ask what impact the erroneous instruction actually given had upon the jury. Using that standard, it is clear that the unconstitutionally vague "heinous, atrocious or cruel" instruction freed Mr. Dougan's jury to find this aggravating factor based on anything about the crime they found to be "very bad."[5] Once the unguided jury has found the crime as a whole, and the defendant, to be especially bad, it would defy common sense to suppose that that determination could have no effect on their sentencing determination. We must presume, see Espinosa, that the jury improperly weighed this aggravator, "creat[ing] the risk that the jury . . . treat[ed] [Mr. Dougan] as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance." Stringer, 112 S. Ct. at 1137. In light of the entire record, it would be impossible for this Court to find "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained," Chapman, 386 U.S. at 24.

However, even under this Court's erroneous standard it is clear that the error was not harmless. A review of the evidence shows that it is impossible to say beyond a reasonable doubt that a properly instructed jury would have found that Mr. Dougan either intentionally inflicted great pain on the victim or that the murder was torturous.

2. The Unconstitutional Instruction Was Not Harmless Beyond a Reasonable Doubt

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[5]As we demonstrate in the next section of the argument, a jury freed to view any aspect of the crime as supporting this aggravating circumstance would be able to rely on numerous improper factors.

The trial court found the "especially heinous" aggravating factor, R. 1100-01, and this Court affirmed on direct appeal. Dougan, 595 So. 2d at 5. As set forth above, however, those findings do not resolve the question whether the failure to provide the jury with any guidance concerning the "especially heinous" aggravating factor was harmless beyond a reasonable doubt. This is particularly so in a case like Mr. Dougan's, where the finding could have rested on various factors that would have been inappropriate under the principles articulated by this Court -- and imposed by the Constitution -- limiting the application of this aggravating circumstance. As shown below, facts that are irrelevant to the "especially heinous" aggravator, as properly limited, were presented and argued to Mr. Dougan's jury. As a result, the jury's death recommendation was irretrievably tainted, for we must presume that the jury relied on those inappropriate facts in weighing the aggravator and recommending death.[6] Moreover, if the aggravating factor had been appropriately limited, a reasonable jury could well have found that the aggravator did not apply. The jury instruction error was clearly prejudicial.

If the jury had been properly instructed, as requested by Mr. Dougan, they would have been told that they could only find the murder

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[6]By contrast, in evaluating the trial court's findings, this Court can determine whether the court relied on proper facts to a sufficient extent to support the finding of the aggravator, even if it also relied on improper facts. Indeed, that is precisely what occurred here, when this Court affirmed the trial court's finding of the "especially heinous" aggravator even though it also relied on improper facts. Compare Dougan, 595 So.2d at 5, with trial court findings, infra.

to be "especially heinous" if they found it to be a "conscienceless or pitiless crime which is unnecessarily torturous to the victim." Dixon v. State, 283 So. 2d 1, 9 (Fla. 1973). Thus, the first question that must be considered is whether it can be said beyond a reasonable doubt that a jury whose discretion to find the aggravating circumstance was limited in this fashion would have found that the circumstance had been proven beyond a reasonable doubt. A review of the circumstances of the offense demonstrates the impossibility of making such a finding.

To prove the circumstances of the offense, the State relied primarily upon the testimony of one of Mr. Dougan's co-defendants, William Hearn, who, before the original trial in 1975, pled guilty to second degree murder in exchange for a sentence of fifteen years. T. 944-45, 948. Mr. Hearn served only four years of this sentence before he was released on early parole on the recommendation of the prosecutor. T. 948. His period of parole was then reduced as well, for he was released from parole in 1985. Id. In establishing the events which occurred after the murder, the State relied not only on Mr. Hearn but also on three other persons involved in those events: Otis Bess, Edred Black, and James Mattison.

According to Hearn and the others, in the evening of June 16, 1974, Jacob Dougan, Elwood Barclay, William Hearn, Dwyne Crittenden, and Brad Evans gathered at Elwood Barclay's house. T. 906-909. William Hearn brought his .22 caliber automatic pistol with him to this gathering. T. 908. Brad Evans had a knife. T. 908-909. At Mr. Dougan's request, Mr. Hearn gave Mr. Dougan the .22 pistol, and

he kept it. T. 910. Thereafter, all five men got into Mr. Hearn's car and drove off. T. 909.

As the men were riding in Mr. Hearn's car, Mr. Hearn saw Mr. Dougan writing a note, which he then showed to Mr. Hearn and the others. T. 911. The note read as follows:

> [W]arning to the oppressive state. No longer will your atrocities and brutalizing of black people be unpunished. The black man is no longer asleep. We must destroy our enemy, therefore you must die. The revolution has begun. And the oppressed will be victorious. The revolution will end when we are free.

T. 911-12. On the other side of the note were the words, "Black Revolutionary Army, all power to the black people." T. 911. After some discussion, Mr. Dougan "said he was going to go out and kill [a] white devil." T. 916. Mr. Hearn understood this to mean that Mr. Dougan was going to kill somebody. Id.

In the Jacksonville Beach area, the men in Mr. Hearn's car saw a young white hitchhiker, and Mr. Barclay said, "[H]ere's our chance, pick him up ...." T. 934. The young man was then offered, and accepted, a ride. T. 919. The young man, whose name was Stephen Orlando, T. 921, started talking about "reefer" and said he wanted a ride to a place where he could get some. T. 920. When the car got to the street where Mr. Orlando wanted to go, Mr. Dougan told Mr. Hearn to keep going. Id. Mr. Dougan then directed Mr. Hearn to a dirt road. During this time, Mr. Orlando was a part of a general conversation about where the best place was to purchase drugs. T. 936-37, 938-39. After Mr. Hearn had driven down the dirt road, Mr. Dougan directed him to stop, and Mr. Dougan, Mr. Barclay, Mr.

Crittenden, Mr. Evans, and Mr. Orlando got out. T. 921. When they were out of the car, Mr. Dougan said, "[T]his is it, sucker." Mr. Orlando tried to run, but Mr. Dougan hit him. T. 922. Mr. Orlando was thrown to the ground only two or three feet from the car, and Mr. Barclay stabbed him "a few times." T. 923. Mr. Orlando said he would give them a bag of "reefer," and Mr. Dougan shot him twice, killing him instantly. T. 924. Brad Evans tried to pin the note (which Mr. Dougan had written earlier) on Mr. Orlando's body with the knife, but had trouble, so Mr. Barclay did it. T. 925.

The unconstitutional instruction can only be harmless if it can be said beyond a reasonable doubt that the jury would have found these facts "especially heinous" if they had been properly instructed. Put another way, the error was harmless only if no reasonable jury would have declined to find the properly limited aggravating factor. On these facts, such a finding cannot be made. In determining whether to find the aggravating factor with respect to Mr. Dougan, the jury was entitled to consider only Mr. Dougan's conduct, and not that of his codefendants. As the United States Supreme Court has held, the capital sentencer must determine:

> the validity of capital punishment for [the defendant's] own conduct. The focus must be on his culpability, not on that of those who committed the robbery and shot the victims, for we insist on individualized consideration as a constitutional requirement in imposing the death sentence.

Enmund v. Florida, 458 U.S. 782, 798 (1982).

In light of this, a properly instructed jury could have appropriately decided that Mr. Dougan could not be held accountable

for the multiple stabbing of Mr. Orlando, for only Mr. Barclay committed those acts. See T. 923. The acts for which Mr. Dougan was solely responsible are twofold: (1) the revelation to the victim that he was in danger when Mr. Orlando, Mr. Dougan, Mr. Barclay, Mr. Crittenden, and Mr. Evans got out of the car on the dirt road, and Mr. Dougan said, "This is it, sucker," and knocked him down to prevent him from running away; and (2) the two shots fired into the victim's head.

Based only on the acts for which Mr. Dougan was responsible, the jury need not have found the killing to be "especially heinous, atrocious or cruel." Killing someone by gunshot wounds to the head, causing instantaneous loss of consciousness, does not produce the kind of suffering that supports this circumstance. See Amoros v. State, supra; Lloyd v. State, 524 So. 2d at 402-03 (Fla. 1988); Oats v. State, 446 So. 2d 90 (Fla. 1984). Further, even though the victim certainly apprehended danger when Mr. Dougan threatened him and prevented him from running off, this occurred only moments before Mr. Dougan shot him, and Mr. Dougan cannot bear responsibility for any momentary mental anguish the victim suffered as a result of the stabbing by Mr. Barclay. The mere apprehension of danger, even of death, that accompanies nearly every murder is not sufficient to sustain a finding of "especially heinous, atrocious or cruel." See Amoros v. State, 531 So. 2d 1256, 1260 (Fla. 1988) ("the victim made a futile attempt to save his life by running to the rear of the apartment, only to find himself trapped at the back door," but this did not establish sufficient mental anguish); Lewis v. State, 377

So. 2d 640, 646 (Fla. 1979) (same). To sustain the finding of the circumstance, the apprehension of death must be greater, as, for example, through a slow and painful infliction of death, Hildwin v. State, 531 So. 2d 124 (1988) (strangulation); the infliction of death only after several failed attempts, of which the victim was "acutely aware," Cooper v. State, 492 So. 2d 1059, 1062 (Fla. 1986); or the infliction of death after extended physical abuse, Scott v. State, 494 So. 2d 1134, 1137 (Fla. 1986).[7]

A properly instructed jury, therefore, could very well on the facts of this case reject the "heinous, atrocious or cruel" aggravating circumstance. Surely, this murder was not committed in a manner which invariably set it apart from other capital murders as unnecessarily torturous. The finding of this circumstance by the trial court, affirmed on direct appeal by this Court, is not to the contrary. In fact, the trial court's findings -- based in part on clearly improper facts -- illustrate the likelihood that Mr. Dougan's

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[7] If this circumstance is sustainable for this murder, it is only sustainable against Mr. Barclay, for Mr. Barclay is the person who inflicted the physical abuse and the acute mental anguish. Significantly, the State conceded this very point in the oral argument before the Florida Supreme Court in Barclay v. State, No. 64,765, on April 2, 1984. As the Assistant Attorney General explained:

> [V]iewing these two men, Barclay is the most reprehensible of the two. And I'll tell you why. Because he's the one that tortured Stephen Orlando. Dougan merely killed him ... and he died an instantaneous death ... But Barclay was just as much his executioner as Dougan was.

Transcript from tape of oral argument, at 18-19 (excerpt attached as Appendix A).

jury, without the benefit of the guidance required by the eighth amendment, relied on improper factors in finding the aggravating circumstance, weighing it, and recommending that Mr. Dougan die.[8]

In its findings of fact concerning this aggravating circumstance, the trial court stated as follows:

> Dougan, together with the other defendants, premeditatedly and deliberately stalked their victim and brutally murdered him.
>
> The victim's only crime was that he was of a different racial group than his murders (sic). He in no way offended them - except by being white - nor did he even know them before that fatal evening.
>
> The victim, Stephen Anthony Orlando, was knocked to the ground and repeatedly stabbed, taunted, tortured. As he writhed in pain and begged for mercy, Dougan placed his foot on the 18-year-old boy's head and shot him dead.
>
> This was an unprovoked, premeditated murder and a declaration of war against a racial group -- with the promise of more violence, death, and revolution to come.

R. 1100-1101. Much of what the trial court (and presumably the jury also) relied upon to support the aggravating circumstance was inappropriate under Florida law and a proper Eighth Amendment analysis. Moreover, the trial court's findings justifying the application of this aggravating circumstance track the State's closing

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[8]Mr. Dougan does not attempt here to reargue the issue whether the trial court could properly find the "especially heinous" aggravating factor. While Mr. Dougan does not concede this issue, for purposes of the instant proceeding, that issue has been settled by this Court's affirmance of the trial court's finding. Dougan, 595 So.2d at 5. Neither the trial court's finding nor this Court's affirmance, however, resolves the issues whether irrelevant issues tainted the jury's weighing of the aggravating factor and whether a properly instructed jury would have found the aggravator beyond a reasonable doubt.

argument to Mr. Dougan's jury concerning the evidence presented, which the State believed established this aggravating circumstance. See T. 1689-92.[9]

The trial court found that Mr. Dougan "premeditatedly and deliberately stalk[ed]" Mr. Orlando. Presumably, the jury also relied on that evidence, although it was irrelevant to the aggravating factor as limited by Dixon.[10] Similarly, the fact that this was an "unprovoked, premeditated murder" that was racially-motivated and part of a plan for revolutionary warfare is irrelevant. None of these facts had any effect on the degree of the victim's physical suffering or mental anguish,[11] but there was no way for Mr. Dougan's jury to know that that was the crucial inquiry.

Thus, the only facts which could properly be relied upon in finding and weighing the "especially heinous" circumstance are the facts concerning the murder itself. But as we have seen, those facts do not establish that Mr. Dougan was responsible for a torturous murder set apart from other murders, but rather one whose facts are

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[9]The State also improperly emphasized the race of the defendants in arguing that the murder was "especially heinous." T. 1690.

[10]"Stalking" can be relevant if the victim is aware of being stalked and experiences the anguish of anticipating death as a result. See Phillips v. State, 476 So. 2d 194 (Fla. 1985). There is absolutely no evidence that Mr. Orlando was aware of being stalked.

[11]If the jury, like the trial court, relied on the call for a black revolution in finding the aggravating factor, that reliance was at odds with this Court's opinions in both Dougan v. State, 470 So. 2d at 702 and Barclay v. State, 470 So. 2d at 695. As this Court explained in Barclay, the call for black revolution is no more than "[a] prediction of future conduct or events ... [which] will not support finding an aggravating factor." Id.

similar to those in cases found not to justify the "especially heinous" aggravator. See, e.g., Amoros, supra; Lewis, supra. A reasonable and properly instructed jury could well find that this was a case in which the victim's death was instantaneous, that the victim was not aware of impending death for more than a short time, and that Mr. Dougan was not responsible for any torture or infliction of unnecessary pain on the victim. Such a jury, unlike Mr. Dougan's jury, would not find and weigh the aggravating circumstance.

Clearly, it could not be said beyond a reasonable doubt that this was a case in which the jury would have recommended death even without weighing the "especially heinous" aggravating factor. At Mr. Dougan's resentencing, a wealth of compelling mitigating evidence was presented which put the homicide for which he was previously convicted in the proper context. That context was summarized by Justice McDonald in his dissenting opinion on direct appeal. Dougan v. State, 595 So. 2d 1, 7-8 (Fla. 1992) (McDonald J., dissenting). The mitigating evidence presented included extensive and unrebutted testimony concerning Mr. Dougan's positive character traits, as revealed by his contributions to the community, and was established by the testimony of twenty witnesses. See T. 1327-1525. Second, Mr. Dougan offered evidence of the contribution of racial oppression to the homicide. Every public or private utterance attributed to Mr. Dougan about the murder demonstrated that the murder was committed for the sole purpose of freeing black people from white racist oppression. See T. 911-12 (note left on the body); T. 1077 (testimony of Eldred Black about making tapes); T. 1173-77 (tapes sent to media).

Third, there was unrebutted testimony concerning Mr. Dougan's "excellent" potential for rehabilitation. T. 1260-61, 1277-78, 1289.

When poised against this powerful mitigation, even the slightest improper weight added to death's side of the scales is likely to have tipped the balance. Allowing the jury to weigh the "especially heinous" aggravating circumstance without the guidance required by the eighth amendment was no light weight, but rather an extremely heavy one. The "especially heinous" aggravating factor is uniquely powerful. See Maxwell v. State, 603 So. 2d 490, 493 and n.4 (Fla. 1992). It cannot be assumed that its weight did not affect the outcome.

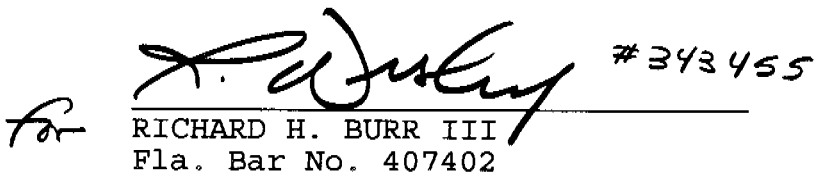
This is precisely the type of case in which it is least possible to make a finding of harmless error. In the absence of any meaningful guidance from the trial court, the jury was set free to find the "especially heinous" aggravator based on anything about the crime that they found to be "very bad," including such clearly irrelevant factors as the races of the defendant and the victim (a fact which the prosecutor emphasized to the jury, T. 1690). It is a case in which the jurors themselves notified the trial court of their confusion concerning the proper application of the aggravator. It is a case in which a properly instructed jury might well decide not to find and weigh the aggravating factor. And it is a case in which the mitigation was so substantial that three members of this Court believed that the execution of Mr. Dougan would be disproportionate to the offense. If any constitutional error in the sentencing process is prejudicial, if the harmless error doctrine has not totally

eviscerated the protections conferred by the United States and Florida Constitutions, then the error here requires reversal. The only way to know whether a properly instructed jury would recommend that Mr. Dougan die is to conduct a new sentencing proceeding before such a jury. Mr. Dougan is entitled to relief.

CONCLUSION

Petitioner respectfully requests that this Court grant this Petition for Writ of Habeas Corpus and order that he be resentenced before a jury.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail to Richard B. Martell, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, FL 32399-1050, this 23rd day of March, 1994.

Attorney

APPENDIX A

The other mitigating circumstances that are conceivable are Barclay's younger age, and again we all know that it is possible to find nonstatutory mitigating circumstances under Lockett, and it's entirely possible that the jury in observing Barclay made the decision as the jury's entitled to do under Lockett, that here is a young man who does not deserve the ultimate penalty, and who can sometime return to life and be a useful citizen. And that - we have to respect the jury's ability to make that decision with the person in front of them. So, I cannot say to you all the mitigating circumstances they found, I think it would have been reasonable for the jury to have found any or all of these. And if that is reasonable, then under Tedder we respectfully submit that this decision should be reversed.

I'll save the balance of my time for rebuttal.

WA: May it please the court, I'm Wally Allbritton, representing the appellee in this case. With respect to the prior decision in this case let me say that I clearly understand that this is a new appeal. However, since facts do not change, the law does change, I will of course refer to the prior times this case has been before the court. In the appellant's answer brief, he makes the point that the trial judge stated no conclusion about any mitigating factors. The reason he didn't was because there were none about which to state a conclusion. There was no Lockett error in this case. Our statute provides that a defendant can submit anything he desires, almost, as a mitigating

factor at the sentencing hearing. He had an abundant opportunity to do this. The court can check and see there was no evidence of a mitigating nature that was offered that was rejected by the trial judge. He simply didn't have any to offer. Now the thrust of Lockett is that the defendant should not be precluded from offering any mitigating evidence. And he was not precluded in the instant case. As to the meaning of that case, as to the weight to be given anything that may be offered by the defendant, I'll refer to the court Chief Justice Burger's dissenting opinion in Eddings v. Oklahoma. Of course, Justice Burger wrote the Lockett opinion, and he says in there quite clearly that the Supreme Court of the United States does not dicatate what weight if any a state court should assign any mitigating evidence. And as a matter of fact, he points out that before evidence can rise to the dignity of being viewed as a mitigating factor, he said that the evidence must rise to a certain level of persuasiveness. That's the word he used.

Now, as to Barclay being a follower, I would like to comment on this. There's no question but what Dougan was a personality, no question about that. But the trial judge pointed out, so was Barclay. Now, let's see what he did. He enumerated certain things that indicated that Dougan was the leader and the rest of them were simply in a servile position and they followed everything that Dougan said. They were slaves to him, so to speak. That simply

is not true. First, they met at Barclay's house, where Barclay went in and got the pocket knife, I believe. And then on the trip it was Barclay who first said, Here, ther's a car, there's people, let's kill him. But there was too many people in the car. And after Dougan wrote the note, he passed it on to Barclay for his approval. And then they went on out to where the boy, Stephen Orlando, was killed. They got him out of the car, and Barclay was the first one to initiate the attack which culminated in the death of Stephen Orlando. And then subsequently, after the boy had been shot, I believe it was Evans, who, or Hearn, one, I'm not sure, I believe it was Evans, who had the knife, and was trying to pin the note into the skin of Stephen Orlando, but he didn't get the job very - he was unable to do this, and Barclay jumped in, and he showed him how to do it, and then Barclay verbally reprimanded, I believe it was Evans, for using an old rusty knife. And then where did they go when they all left the scene of the accident? They returned to Barclay's house, is where they returned to. And in the making of the tapes, the man Barclay was in a supervisory job, I believe it was, and even this is tacitly admitted in the brief of appellant. That he told Dougan that a little more ought to be here, a little more should be on this or certain ways to do it. Now I'm not saying that Barclay was the leader, and all of them were following him. I don't maintain that to the court. I do maintain that he was a leader, just the same as Dougan was a leader,

and that Dougan did not exercise any dominance over him. For example, counsel referred to the 1980 sentencing order. I'll refer you to the transcript of hearing that was made at that time, and you can find in there the testimony of a police officer showing that Barclay was a leader just as well as Dougan was.

THE COURT: I thought the police officer testified that Barclay was second in command and that Dougan led all of them --

WA: I believe that was the words, yes.

THE COURT: That Barclay was second in command.

WA: Now, does that make him a follower in the sense that he follows ipso facto per se the instructions of Dougan if Dougan says jump he jumps? Absolutely not. He was present on the scene and took the lead in the murder. Actually, viewing these two men, Barclay is the most reprehensible of the two. And I'll tell you why. Because he's the one that tortured Stephen Orlando. Dougan merely killed him --

THE COURT: Let me ask you this --

WA: and he died an instantaneous death.

THE COURT: You've come to that conclusion, but the jury had heard these two cases together, came to the opposite conclusion, am I correct?

WA: Yes, they did, Judge, and this court as well as the trial judge rejected --

THE COURT: This was not two different juries.

WA: Yeah, I understand that --

THE COURT: This was the same jury.

WA: True, that's true.

THE COURT: And they felt that the dominant individual, the one that was most responsible for this killing was Dougan, without question?

WA: I don't know whether they felt that or not. I don't know how they felt.

THE COURT: They imposed the death penalty on Dougan.

WA: If we second guess what the jury thought in imposing the death penalty on Dougan, I would surmise that it was the fact that he fired the fatal shot. But Barclay was just as much his executioner as Dougan was. And now the trial judge rejected Barclay's recommendation as being unreasonable. And this court did too. They used the word the jury's verdict was unreasonable. And the Supreme Court of the U.S. agreed with that.

THE COURT: That's why we made that finding on that first appeal, of course, we've given another appeal because he was inadequately represented at that time. But is the factual situation exactly the same in this situation as it was in the other? This was a different jury wasn't it, or was it the same jury? Did he have - he had - he didn't have another hearing, did he?

WA: He had another hearing, but not another jury.

THE COURT: Not another jury, he had a hearing before the Judge.

WA: Yes, sir.

THE COURT: He handed down a new order and now we have that appeal.

WA: Yes, sir.

THE COURT: So actually we took the same facts before --

WA: Right --

THE COURT - and found --

WA: You did --

THE COURT: that the jury verdict was unreasonable.

WA: Right, you certainly did. Now there were four aggravating factors that the trial judge found --

THE COURT: That finding of ours is not entitled to any weight now, though, is it?

WA: Well, let me say this, you're not bound by it. But the facts are the same and you said that the aggravating factors were well established and I quote, "in the record." And you have the same record before you now as you did at that time. So, if they were in there then, they're in there now. Now, he says that there was no kidnapping. Simply stated, the trial judge did not cite the controlling statute in his 1975 order whereas he did in the 1980 order. If you'll read the applicable statute in 1975 you'll find that it contains the word "inveighled." And there was an enticement - what the enticement was was if they offered the boy a ride, that was the enticement. And those aggravating factors have been sustained by the U.S. Supreme Court, and he says that they didn't have the record - I'm not at all sure about that - I'm not at all sure that the U.S. Supreme Court reviews a capital case without having the record before it. Now would the boy have

gotten in the car if he had known they were going to kill him? I think not.

And then there's an argument about inflammatory argument of the prosecutor. In my brief under this point, I've cited Cumby v. State (?). At the time I did I well knew that Cumby v. State had expanded the holding of this court in Clark. Clark holds that the objection must be made at the time the inflammatory remarks are made. Cumby says that if the judge gives you an opportunity to do this, at the close of the arguments, that's okay. Now, let's look at his objection and it's the record is referred to in my brief. He stated the basis of his objection as to the inflammatory argument was that almost the entire argument of the prosecutor was inflammatory. Now is a defense attorney required to sit still while a prosecutor makes an hour argumentwhich according to him was almost entirely inflammatory, and not stand up? I think not. And what was the basis - if you'll read this you'll find that the basis for the inflammatory argument was One that the prosecutor made references to the victim's mother. You know, Barclay sent these tapes to Orlando's mother. And Two, prosecutor used gestures and that is the basis of his argument that the prosecutor's argument was inflammatory, and I submit to you that it was not. A prosecutor isn't required to stand still, the tapes were sent to the boy's mother, and the prosecutor had every right to comment on that. And of course the very nature of the crime is inflammatory in itself - if

you just recite the details of it - that's enough to inflame anyone. Now about the Tedder standard, that's interesting because the trial judge did not have Tedder at the time he wrote his 1975 sentencing order, but this court did.

THE COURT: He had it in 1980, though.

WA: He had it in 1980, true.

THE COURT: We had already vacated the death sentence once.

WA: That's true, he did, but as counsel argues, this is the only appeal, every thing else he says is done away with, we're appealing from a 1975 order, that's what we're appealing from.

THE COURT: No, the last time the death penalty was imposed in this case was 1980. That's the one that puts him in the chair if it's affirmed, not the '75 one, because it's already been vacated by this court.

WA: Yeah, well, the - he was put in the chair in the 1980 order - that's true, but it was my understanding that this was a new direct appeal. That's exactly what I understood the court to hold.

THE COURT: That's right.

WA: All right. Now this court had the benefit of Tedder when it first passed on this case. And this court found, beyond doubt, that the Tedder standard had been met, there was no question in this court's mind about that. And not only that --

THE COURT: Counsel, I recognize that in that particular

opinion ther's a footnote that cites Tedder. Was there any argument by counsel representing Mr. Barclay at that time, concerning the appropriateness of the death penalty or concerning Tedder?

WA: No, sir, there was not, but this court went into it. Irrespective of whether counsel argued it, this court went into it and there's no question, and I don't think that this court can deny that they found that the Tedder standard had been met. There's no doubt about it, and the U.S. Supreme Court agreed. Now, I quite appreciate, as Justice Shaw pointed out some time ago, this court is not bound by the U.S. Supreme Court holding in this, that's true, but I submit to you since they put its unmistakeable stamp of approval on two decisions of this court, that it would be a good precedent to follow.

THE COURT: Why do you think that seven people put their signature on this verdict? Which is, as counsel says, somewhat unusual, recommending a life sentence, and finding that the - specifically finding that there were not sufficient aggravating circumstances and there was sufficient mitigating circumstances.

WA: I don't know why they did, and the trial judge didn't either, but to answer your question, Your Honor, if we're going to look into the minds of the jurors, I submit to you that the only difference or distinction they would have made is the fact that Dougan was the triggerman. That's all. And if - now that's - I hope answers your - you know, what you asked me, because that's the only thing I can come

up with, but --

THE COURT: Did they also know what had occurred with the other codefendants?

WA: Yes, they certainly did, but that should not mitigate Barclay's sentence at all, and the case of White v. State, which is in my brief, is a complete answer to that. And also Dobbert, I want to point out, Dobbert was 10 - 2 recommending life imprisonment. The trial judge overrode it, this court affirmed the jury override, and the Supreme Court of the U.S. affirmed it too, and that was 10 - 2 in favor of life imprisonment. Now there's --

THE COURT: (Inaudible) As I read the other opinion, we said that Barclay was entitled to a new appeal from judgment and sentence.

WA: Right.

THE COURT: Was there any testimony at all taken before the judge prior to the entry of the 1980 sentencing order?

WA: Yes, sir, although this court did not require it in the Gardner remand. There was testimony indeed. Absolutely.

THE COURT: I'm talking about 1980, the last time it went down there.

WA: Yes, there was, there was, yes sir, there was testimony, there sure was. He got to present everything, and more than he was entitled to present. He got to present it absolutely. Now, there's some discrepancy - counsel, I'm sure, at least I would, if I was in his place, argue that

Orlando never begged for mercy. Well, that comes from the tapes, to say that he did comes from the tapes, and that comes from the mouths of the people who perpetrated the crime. But now Hearn at the sentencing hearing testified that no, that he did not beg for mercy. But now if you're going to view that in the context that Orlando did not say have mercy on me, please don't kill me, that's true. But now if you'll noteHearn's testimony, which is recited in my brief, [TAPE BEING TURNED HERE; WORDS ARE MISSING] give you a bag of reefer. And I submit to you he was begging for his life at that time. But it was to no avail.

THE COURT: Counsel, did I understand you to say that the jury could not consider as a nonmitigating factor the fact that Crittendon and Evans were convicted of second degree or lesser?

WA: No, sir, you did not understand me to say that. Absolutely not. I'm pointing out in answer to Justice Overton's question that they knew that they had found Evans and the other man guilty of second degree murder. They knew that. Now whether that was a motivating factor in their recommending life for Barclay I don't know. But I do know --

THE COURT: Would that be a legitimate factor for them to consider?

WA: Yes, yes, absolutely, they - they can view anything they want to. Absolutely.

THE COURT: Well, would this form a reasonable basis for

them to recommend life as opposed to death?

WA: Well, let's put it this way. The trial judge didn't think so, I don't think so either, this court didn't think so, and a complete answer to that is in White v. State, where this court held the fact that someone else got off with third degree was no basis for mitigating White's punishment. That is as clear a holding as I've ever seen this court come out with.

THE COURT: Counsel, we didn't say there was no basis. We said we did not - it did not require reduction of the sentence. We did not say it was no basis. Isn't that correct?

WA: I would have to read the case, but I'm inclined to agree with you. And it doesn't require it here. It doesn't require it here.

THE COURT: Didn't in Malloy we said that it was a basis?

WA: I'm sorry, Judge, I don't know. I can remember so many cases, and that's about it.

THE COURT: Well, it's on this particular issue. All right.

WA: Now, one last thing, counsel has urged that this court apply the law as exists today. Well, I know the court does that, and I knew it when I asked that the court decide it based on the law in 1975 citing the Witt case, which holds in a collateral attack context that subsequent refinements in case law do not have a retroactive application. And counsel come back in his answer brief, or reply brief. I believe it is, and was - he was somewhat up in arms that I would urge that. And he urged the court to apply the law

as it exists today. Well, I'm very happy to join him in that argument. That this court should apply the law as it exists today. And based on his request, that the court apply the law as it exists today, the trial judge did not have an opportunity to do so, because - excuse me, subparagraph 5, small i, "the capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification." That wasn't before the trial judge. He didn't have an opportunity to apply that. But this court does. This court can apply it. And I say to the court that the court should apply it. And I also say that under Combs v. State, it is not ex post facto for the court to do so, and the Supreme Court in Proffitt v. Florida, - not Proffitt - Dobbert v. Florida, clearly held that under their reasoning, this would not be an ex post facto application. So I say to you this should be applied to this case. If you can think of any more reprehensible crime, that's up to you, I can't. That this man should get the punishment that the judge meted out to him because he so richly deserves it in every sense of the word. Thank you.

TD: May it please the court, I'd like to first of all comment on counsel's argument which seems to be in many respects both in his brief and in his oral presentation that this case has already been decided by this court which had at the time of its review had decided Tedder, and therefore the court having reviewed the record this matter