IN THE SUPREME COURT OF FLORIDA

CASE NO. 8806 2 ~~77,865~~

TODD MICHAEL MENDYK

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF
THE FIFTH JUDICIAL CIRCUIT, IN
AND FOR HERNANDO COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Mendyk's amended motion for post-conviction relief following remand for the purpose of obtaining public records. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court denied Mr. Mendyk an evidentiary hearing on his claim that he had been denied Mr. Mendyk's motion to compel access to public records pursuant to Chapter 119 of the Florida Statutes without an evidentiary hearing on the basis of affidavits and the substantive assertions of counsel for the State and thereafter summarily denied Mr. Mendyk's Rule 3.850 motion. This appeal follows.

Citations in this brief shall be as follows: the record on appeal concerning the original court proceedings shall be referred to as "R. ___" followed by the appropriate page number. The record on appeal from the Rule 3.850 proceedings following remand shall be referred to as "PC ___." All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

Mr. Mendyk has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue.

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STATEMENT OF THE CASE

The Circuit Court of the Fifth Judicial Circuit, Hernando County, entered the judgments of conviction and sentence under consideration. Mr. Mendyk was indicted by a grand jury for first degree murder on April 16, 1987. On May 4, 1987, an information was filed charging Mr. Mendyk with related crimes. Mr. Mendyk entered pleas of not guilty to all charges. On October 8, 1987, Mr. Mendyk's trial commenced before the Honorable L. R. Huffstetler, Jr. Pursuant to a motion for a change of venue, the case was tried in Lake County, Florida. A guilty verdict was entered on October 19, 1987. The penalty phase was conducted on October 20, 1987. At the conclusion of the penalty phase, Mr. Mendyk's sentencing jury was instructed on three aggravating factors--that the crime for which he was convicted was "heinous, atrocious and cruel," "cold, calculated and premeditated," and based upon an underlying felony. Mr. Mendyk's jury was never instructed on the limiting constructions of these aggravating factors. Trial counsel made no objection to these instructions on the grounds of vagueness. The jury returned a death recommendation. Mr. Mendyk was sentenced to death on November 10, 1987, and the judge's sentencing order was entered on the same day. Mr. Mendyk appealed. His conviction and sentence were affirmed. Mendvk v. State, 545 So. 2d 846 (Fla. 1989). On November 27, 1989, certiorari was denied by the United States Supreme Court. Mendvk v. Florida, 110 S. Ct. 520 (1989). On October 19, 1990, Mr. Mendyk's petition for clemency was denied when his death warrant was signed. Mr. Mendyk's execution was stayed by the Florida Supreme Court on November 26, 1990; the

Court then ordered that Mr. Mendyk's post-conviction pleadings be filed on or before January 25, 1991. Mr. Mendyk timely filed his motion to vacate in circuit court. Pursuant to a defense motion to disqualify filed January 31, 1991, the Honorable Richard Tombrink, Jr., entered his recusal on February 8, 1991. On March 11, 1991, the Honorable Victor J. Musleh entered an order summarily denying Mr. Mendyk's motion to vacate; a motion for rehearing was denied April 18, 1991. Mr. Mendyk's Notice of Appeal was timely filed April 29, 1991. On May 30, 1991, Mr. Mendyk filed his initial brief on appeal to the Florida Supreme Court. On November 7, 1991, the Florida Supreme Court heard oral argument in this case. In its opinion of January 2, 1992, the Court affirmed the order of the trial court denying Mr. Mendyk's motion to vacate, excepting Mr. Mendyk's public records claims. The Court ordered full disclosure of previously withheld public records in the custody of the Florida Parole Commission, the Hernando County Sheriff, and the Pasco County Sheriff. The Court extended the two-year filing time for Mr. Mendyk's motion to vacate, ordering within sixty (60) days of a full public records disclosure, he could amend his motion to vacate.

Pursuant to a defense motion to disqualify, the Honorable Victor J. Musleh entered his order of recusal on July 14, 1992. Mr. Mendyk filed an amended Rule 3.850 motion containing two claims; the first, to compel disclosure of public records pursuant to Chapter 119 of the Florida Statutes; and the second, that Mr. Mendyk's sentencing jury was improperly instructed and that its invalid recommendation had tainted the decision of his sentencing judge. The State filed a response to Mr.

Mendyk's motion. The State also filed affidavits from the records custodians of the agencies in question. (PC 68-78). Based upon the affidavits, the circuit court denied Mr. Mendyk's claim that public records had not been disclosed without a hearing and directed Mr. Mendyk to file an amended Rule 3.850 motion. (PC 179-180). Mr. Mendyk filed his amended motion on February 22, 1996. Because Mr. Mendyk had received no records following remand, and the circuit court had refused to allow him an evidentiary hearing on his claim that such records had not been disclosed, he was unable to materially amend his motion. (PC 183-2020. The State filed a response to the amendment. (PC 205-211). The circuit court summarily denied Mr. Mendyk's Rule 3.850 motion. (PC 212-214). Mr. Mendyk sought rehearing because of the trial court's failure to conduct a Huff hearing (PC 215-218), which was granted. Following a Huff hearing, the trial court again denied Mr. Myndyk's motion. (PC 288-290). This appeal follows.

SUMMARY OF ARGUMENTS

1. The trial court erred in summarily denying Claim I of Mr. Mendyk's Rule 3.850 motion (Mr. Mendyk's public records claim) based upon non-record evidence, i.e., the affidavits of public records custodians submitted by the State.

2. Mr. Mendyk's death sentence was tainted by unconstitutionally vague and overbroad instructions to the jury and by improper application of the statutory aggravators contrary to the holdings in Espinosa v. Florida and Richmond v. Lewis, and in violation of the Eighth and Fourteenth Amendments. Trial counsel was

ineffective for failing to properly preserve this issue so that it could be raised by appellate counsel.

I. THE TRIAL COURT ERRED IN SUMMARILY DENYING MR. MENDYK'S PUBLIC RECORDS CLAIM.

A. The Trial Court Erred In Denying Mr. Mendyk An Evidentiary Hearing On His Public Records Claim.

The trial court refused to grant Mr. Mendyk a hearing on the public records claim presented in his Second Amended Motion to Vacate Judgement and Sentence. Mr. Mendyk asserted in that claim that certain state agencies had still failed to disclose public records to which he was entitled, in violation of the mandate of this Court, Chapter 119, Fla. Stat., the due process and equal protection clauses of the Fourteenth Amendment, the Eighth Amendment of the U.S. Constitution, and the corresponding provisions of the Florida Constitution. Mr. Mendyk identified both the public agencies which had withheld public records and the nature of the records withheld. (PC 88-91).

This Court has repeatedly found that capital post-conviction defendants are entitled to public records disclosure. Ventura v. State, 673 So.2d 479 (Fla. 1996); Walton v. Duaaer, 634 So.2d 1059 (Fla.1993); State v. Kokal, 562 So.2d 324 (Fla. 1990); Provenzano v. Duager, 561 So.2d 541 (Fla. 1990). Where a defendant's prior request for disclosure of public records has been denied, such a request may properly be made as part of a motion for post-conviction relief. Mendvk v. State, 592 So.2d 1076 (Fla. 1992). An evidentiary hearing is required. Walton. Furthermore, this Court has determined that a defendant should be allowed to amend a previously

filed rule 3.850 motion after requested public records are finally furnished. Ventura; Muehleman v. Dugger, 623 So.2d 480 (Fla.1993).

The circuit court's error in summarily denying Mr. Mendyk's public records claim is particularly egregious in this case. This Court remanded this matter to the circuit court because it had summarily denied this claim when it was initially presented. Mendvk, 592 So.2d at 1082. Notwithstanding the fact that this Court found that decision to be in error, the circuit court followed the same course of action on remand. A circuit court is not free to ignore the mandate of this court. Hoffman v. State 613 So. 2d 405 (Fla. 1992)

Even if this Court's prior decision is not construed as to mandate an evidentiary hearing on Mr. Mendyk's public record claim, such a hearing is required under the facts of this case. Whether state agencies have complied with Mr. Mendyk's public records claim is a factual matter. The law strongly favors full evidentiary hearings in death row post-conviction cases, especially where a claim is grounded in factual as opposed to legal matters. "Because the trial court denied the motion without an evidentiary hearing . . . our review is limited to determining whether the motion conclusively shows on its face that [the defendant] is entitled to no relief." Gorham v. State, 521 So. 2d 1067, 1069 (Fla. 1988). See also LeDuc v. State, 415 So. 2d 721 (Fla. 1982); See also Harrich v. State, 484 So. 2d 1239 (Fla. 1986); See also Mills v. State 559 So. 2d 578 (Fla. 1990); See also O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984).

Some fact-based post-conviction claims by their nature can only be considered after an evidentiary hearing. Heinev v. State, 558 So. 2d 398, 400 (Fla. 1990). "The need for an evidentiary hearing presupposes that there are issues of fact which cannot be conclusively resolved by the record. When a determination has been made that a defendant is entitled to such an evidentiary hearing (as in this case), denial of that right would constitute denial of all due process and could never be harmless." Holland v. State, 503 So. 2d 1250, 1252-53 (Fla. 1987). "The movant is entitled to an evidentiary hearing unless the motion or files and records in the case conclusively show that the movant is entitled to no relief." State v. Crews, 477 So. 2d 984, 984-985 (Fla. 1985). "Accepting the allegations. . . at face value, as we must for purposes of this appeal, they are sufficient to require an evidentiary hearing." Lightbourne v. Duaaer, 549 So. 2d 1364, 1365 (Fla. 1989).

Mr. Mendyk allegations that the Pasco County Sheriff's Department and the Hernnado County Sheriff's Department had failed to produce certain public records were clearly fact based. Both the circuit court and counsel for the State were well aware of the specific documents sought by Mr. Mendyk. (PC 88-91). Moreover, the State opposed Mr. Mendyk's claim not based upon the insufficiency of the pleading, but because they had submitted affidavits which allegedly disproved the allegations made by Mr. Mendyk. (PC 92). The trial court's order relied upon these affidavits in determining that Mr. Mendyk was not entitled to an evidentiary hearing. (PC 165-166).

B. The Trial Court's Reliance On Affidavit's Submitted By One Party In Lieu Of An Evidentiary Hearing Violated Mr. Mendyk's Rights To Procedural And Substantive Due Process.

As noted, on April 29, 1994, the State filed affidavits given by employees of the Hernando County and Pasco County Sheriff's Offices. These affidavits basically indicated that both of the Sheriff's Offices had turned over everything to Mr. Mendyk. At a status conference held on October 13, 1994, the State, based on these affidavits, asked the trial court to make a finding that the Sheriff's Offices had complied. Counsel requested that Mr. Mendyk be given the opportunity to examine these witnesses. Specifically, counsel for Mr. Mendyk requested either a Chapter 119 hearing or authority from the court to depose the affiants. (PC 92). The trial court denied Mr. Mendyk's request. The Court then found that, based upon the affidavits, the Pasco and Hernando County Sheriff's Departments had fully complied with Chapter 119.

This Court specifically addressed this very issue in Johnson v. Sinaletary, 647 So. 2d 106 (Fla. 1994). There this Court observed:

> While Johnson's motion was puraortedlv denied as a matter of law, the trial judge permitted the State to introduce evidence from a rap sheet showing that Pruitt was much shorter and lighter than the description given by Summitt. Under these circumstances, it is difficult to see whv Johnson should have been precluded from also putting on evidence.

Johnson, 647 So.2d at 111, footnote 3.

Here the State was allowed to present affidavit evidence from outside of the files and records in this matter to dispute factual allegations made by Mr. Mendyk.

It was error for the trial court to refuse to allow post-conviction counsel to present evidence supporting Mr. Mendyk's allegations, or even challenge the credibility of the State's affiants. Teffeteller v. Dugger, 676 So. 2d 369 (Fla. 1996). At the urging of the State, the court below not only ignored the express mandate of this court, it ignored over ten years of decisions from this Court. As in Hoffman, this Court should remand this matter with specific instructions that it has no choice but to conduct an evidentiary hearing on Mr. Mendyk's public records claim and, if that hearing results in the production of records which give rise to a claim, or claims, cognizable in post-conviction proceedings, that Mr. Mendyk be allowed to amend his Rule 3.850 motion to include the same.

II. MR. MENDYK'S DEATH SENTENCE IS IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Mr. Mendyk was sentenced to death on the basis of three aggravating factors--that the crime for which he was convicted was "heinous, atrocious and cruel," "cold, calculated and premeditated," and based upon an underlying felony. The trial court, relying upon a presentation of only one out of many available mitigating factors, found one statutory mitigating factor. Mr. Mendyk's jury was never instructed on the limiting constructions of these aggravating factors. Consequently, the aggravating factors were improperly applied to Mr. Mendyk's case by the jury. Furthermore, the sentence pronounced by the trial court is also unconstitutional in that the trial court was required to give great weight to a jury recommendation tainted by consideration of invalid aggravating circumstances.

A. Mr. Mendyk's Sentencing Jury's Recommendation of Death Was Tainted by Their Consideration of Unconstitutionally Vague and Overbroad Aggravating Factors.

Mr. Mendyk's jury was given unconstitutionally vague instructions. on the "heinous, atrocious and cruel" and "cold, calculated and premeditated" factors; and "murder during the course of a felony." The trial judge simply read a list of the aggravators to the jury. (R. 1285-86). The jury's death recommendation was tainted by Eighth Amendment error. Under Florida law, a penalty phase jury is a sentencer for Eighth Amendment purposes and, accordingly, must be properly instructed. Mr. Mendyk's jury was not instructed of the limitations which the Florida Supreme Court had placed upon these aggravating factors, limitations which were essential to their constitutionality. Proffitt v. Florida, 428 U.S. 242 (1976). Notwithstanding the fact that it has been clear for more than two decades that the penalty phase jury in Florida is a sentencer for Eighth Amendment purposes, see, generally, Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975); Smith v. State, 515 So. 2d 182, 185 (Fla. 1987), cert. denied, 435 U.S. 971 (1988); Grossman v. State, 525 So. 2d 833, 839 n.1 (Fla. 1988), cert. denied, 489 U.S. 1071-1072 (I 989), trial counsel failed to properly preserve this error so that it could be raised on direct appeal. Even if this Court chooses not to consider the merits of this claim, it must consider whether trial counsel was ineffective for his failure to preserve this issue.

1. The Felony Murder Aggravator.

Mendyk's jury was improperly instructed that it could rely on the same underlying felony, i.e., kidnapping, both to justify finding Mendyk guilty of murder in

the first degree as well as to justify the imposition of death. In Strinaer v. Black, 112 S. Ct. 1130 (1992), the Supreme Court held that Lowenfield v. Phelps, 484 U.S. 231 (1988), which addressed Louisiana's capital sentencing scheme, does not apply in states where capital sentencers weigh aggravating factors against mitigating factors in determining the sentence. Stringer, 112 S. Ct. at 1138. "Florida . . . is a weighing State." Id. at 1137. "[I]n Louisiana the jury is not required to weigh aggravating against mitigating factors." Id. at 1138. Thus, Stringer explicitly indicates that the analysis of Lowenfield does not apply to weighing states like Florida.

The Stringer Court emphasized, "if a State uses aggravating factors in deciding who shall be eligible for the death penalty or who shall receive the death penalty, it cannot use factors which as a practical matter fail to guide the sentencer's discretion." Id. at 1139. The Supreme Court then explained that use of an improper aggravating factor in a weighing scheme (like Florida's) has the potential for creating greater harm than it does in an eligibility scheme (like Louisiana's):

> 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 upon 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.**

Stringer, 112 S. Ct. at 1139. Stringer also teaches that in a weighing state, reliance upon an invalid aggravating factor is constitutional error requiring a harmless error analysis, even if other aggravating factors exist.

In Arave v. Creech, 113 S. Ct. 1534 (1993), the Supreme Court held, "If the sentencer fairly could conclude that an aggravating circumstances applies to every defendant eligible for the death penalty the circumstance is constitutionally infirm." 113 S. Ct. at 1542 (emphasis in original), The constitutional infirmity arises because the function of aggravating factors is to "genuinely narrow the class of defendants eligible for the death penalty." Id., quoting Zant v. Steshens, 462 U.S. 862, 877 (1983). Thus, an aggravating circumstance "must provide a principled basis" for determining who deserves capital punishment and who does not. Arave, 113 S. Ct. at 1542.

A state cannot use aggravating "factors which as a practical matter fail to guide the sentencer's discretion." Strinner v. Black, 112 S. Ct. 1130 (1992). The sentencer was entitled automatically to return a death sentence upon a finding of first degree felony murder. Every felony murder would involve, by necessity, the finding of a statutory aggravating circumstance, a fact which, under the particulars of Florida's statute, violates the Eighth Amendment. Arave v. Creech. This is so because an automatic aggravating circumstance is created, one which does not "genuinely narrow the class of persons eligible for the death penalty," Zant v. Stephens, 462 U.S. 862, 876 (1983), and one which therefore renders the sentencing

process unconstitutionally unreliable. Id. "Limiting the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Mavnard v. Cartwright, 486 U.S. 356, 362 (1988). If Mendyk was convicted of felony murder, he then automatically faced statutory aggravation for felony murder. This aggravating factor was an "illusory circumstance" which "infected" the weighing process; this aggravator did not narrow and channel the sentencer's discretion as it simply repeated elements of the offense. Stringer, 112 S. Ct. at 1139.

The Wyoming Supreme Court addressed this issue in Engberg v. Meyer, 820 P.2d 70, 89-90 (Wyo. 1991), finding the use of an underlying felony both as an element of first-degree murder and as an aggravating circumstance to violate the Eighth Amendment. Wyoming, like Florida, provides that the narrowing occur at the penalty phase. See Stringer v. Black.

In State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992), the Tennessee Supreme Court followed the decision in Engberg:

> Automatically instructing the sentencing body on the underlying felony in a felony murder case does nothing to aid the jury in its task of distinguishing between first-degree homicides and defendants for the purpose of imposing the death penalty. Relevant distinctions dim, since all participants in a felony murder, regardless of varying degrees of culpability, enter the sentencing stage with at least one aggravating factor against them.
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> A comparison of the sentencing treatments afforded first-degree-murder defendants further highlights the impropriety of using the underlying felony to aggravate

> felony-murder. The felony murderer, in contrast to the premeditated murderer, enters the sentencing stage with one aggravating circumstance automatically against him. The disparity in sentencing treatment bears no relationship to legitimate distinguishing features upon which the death penalty might constitutionally rest.

Middlebrooks, 840 S.W.2d at 342, citing Enabern v. State, 686 P.2d 541, 560 (Wyo. 1984)(Rose, J., dissenting).

This Court has recognized that aggravating factors do not perform the necessary narrowing if they merely repeat elements of the offense. Porter v. State, 564 So. 2d 1060, 1063-64 (Fla. 1990). Accordingly, it has held that the aggravating circumstance of "in the course of a felony" is not sufficient by itself to justify a death sentence in a felony-murder case. Rembert v. State, 445 So. 2d 337, 340 (Fla. 1984)(no way of distinguishing other felony murder cases in which defendants "receive a less severe sentence"); Proffitt v. State, 510 So. 2d 896, 898 (Fla. 1987)("To hold, as argued by the State, that these circumstances justify the death penalty would mean that every murder during the course of a burglary justifies the imposition of the death penalty"). However, here, the jury was instructed on this aggravating circumstance and told that it was sufficient for a recommendation of death. The jury did not receive an instruction explaining the limitation contained in Rembert and Proffitt. There is no way at this juncture to know whether the jury relied on this aggravating circumstance in returning its death recommendation. "[I]t [was] constitutional error to give weight to an unconstitutionally vague aggravating factor, even if other, valid aggravating factors exist." Richmond v. Lewis, 113 S. Ct. 534 (1992).

2. **The "Heinous, Atrocious And Cruel" Aggravator.**

The instruction given to Mendyk's sentencing jury on the "heinous, atrocious, or cruel" aggravating circumstance was almost identical to the instruction struck down in Espinosa v. Florida, 112 S. Ct. 2926 (1992). There it was held that language contained in the instruction failed to give the jury meaningful guidance in determining when the aggravator applied. The jury was never instructed that this aggravator applied only to the conscienceless or pitiless crime which is unnecessarily torturous to the victim. State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), cert. denied sub nom., Hunter v. Florida, 416 U.S. 943 (1974); see also Alford v. State, 307 So. 2d 433, 445 (1975), cert. denied, 428 U.S. 912; Halliwell v. State, 323 So. 2d 557, 561 (Fla. 1975); Herzog v. State, 439 So. 2d 1372 (Fla. 1983). See Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990).

3. **The "Cold, Calculated, And Premeditated" Aggravator.**

The jury instruction on the cold, calculated and premeditated aggravating circumstance, which tracks the statutory language, violates the Eighth Amendment because its description "is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." Jackson v. State, 19 Fla. L. Weekly S215 (Fla. Apr. 21, 1994)(quoting Esninosa, 112 S. Ct. at 2928). Mendyk's sentencing jury was not told about the constitutionally-required limitations on the factor, but presumably found the factor present, Espinosa, and thus its sentencing verdict was infected with Eighth Amendment error. His instruction identically tracked the statutory language. Fla. Stat. § 921.141(5)(i). This

instruction, however, is unconstitutionally vague, and the jury did not receive the required limiting constructions of the factor. Jackson v. State.

Mendyk's jury was given unconstitutionally vague aggravating circumstances to apply and weigh. No limiting constructions adopted by the Florida Supreme Court were given to the jury. See State v. Dixon, 283 So. 2d 1 (Fla. 1973); Robert v. State, 611 So. 2d 1228 (Fla. 1993). The jury's death recommendation was tainted by the invalid aggravating circumstances. See Esninosa; Mavnard v. Cartwriaht, 486 U.S. 356 (1988). In Mavnard v. Cartwriaht, 486 U.S. at 461-62, the Supreme Court held that jury instructions must "adequately inform juries what they must find to impose the death penalty." Essinosa v. Florida held that Florida sentencing juries must be accurately and correctly instructed regarding aggravating circumstances in compliance with the Eighth Amendment. Mendyk was denied a reliable and individualized capital sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments. Mendyk has indisputably established that Espinosa error occurred in his sentencing.

B. Mr. Mendyk's Trial Counsel was Ineffective for Failing to Properly Preserve this Issue for Appeal.

It is beyond dispute that had trial counsel properly preserved this issue, he would have been entitled to relief both on direct appeal and in a successive motion for post-conviction relief. This Court will consider the merits of an Esainosa claim after the two year deadline if the issue was preserved at trial and raised on direct appeal. James v. State, 615 So. 2d 668 (Fla. 1993). This Court has held that, even when it will not consider the merits of a jury instruction claim, it will consider whether

trial counsel was ineffective for failing to properly preserve such a claim. Ventura v. State, 673 So.2d 479 (Fla. 1996)

In Starr v. Lockhart, 23 F.3d 1280 (8th Cir. 1994), cert denied sub nom Norris v. Starr, 115 S.Ct. 499 (1994), the Eighth Circuit Court of Appeals addressed the very question of whether failure to object to unconstitutionally vague aggravating factors constitutes deficient performance under Strickland.

> Starr was entitled to effective assistance of counsel at his trial, sentencing, and at his appeal of right. Starr alleges that his counsel's failure to object to either the "pecuniary gain" or the "heinous, atrocious, or cruel" aggravating circumstance instruction at sentencing stage constituted deficient performance. We agree.

Id., at 1284. Citations omitted. It initially observed:

> Since Furman v. Georgia, constitutional concern has been directed toward whether the aggravating circumstance used by the states in death penalty proceedings adequately prevent the substantial risk of arbitrary and capricious imposition of the death penalty prohibited by the Eighth Amendment. Failure to investigate the constitutionality of the aggravating circumstances under which one's client is to be put in jeopardy of the death penalty falls well below the standard of representation required for capital defendants.

Id., at 1285. Citations omitted. Addressing the district court's conclusion that trial counsel was not deficient because the vagueness argument was a new rule that counsel could not have reasonably anticipated, the court held:

> Subsequently, the Supreme Court addressed whether Mavnard's invalidation of the "heinous, atrocious, or cruel" aggravating circumstance created a new rule for the purposes of habeas review. Strinaer v. Black, ___ U.S. ___, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992). New rules, with few exceptions, are not available to those defendants

> seeking habeas relief whose convictions were final (i.e., who had exhausted all direct appeals) before the new rule was announced. Teaae v. Lane, 489 U.S. 288, 311, 109 S.Ct. 1060, 1075-76, 103 L.Ed.2d 334 (1 989); see also Penrv v, Lvnauah, 492 U.S. 302, 314, 109 S.Ct. 2934, 2944, 106 L.Ed.2d 256 (I 989). A decision is a new rule "if the result was not dictated by precedent existing at the time the defendant's conviction became final." Teaaue, 489 U.S. at 301, 109 S.Ct. at 1070. Precedent does not dictate the result in a given case when it is "susceptible to debate among reasonable minds." Butler v. McKellar, 494 U.S. 407, 415, 110 S.Ct. 1212, 1217, 108 L.Ed.2d 347 (I 990). Applying this "new rule" standard, the Supreme Court held that Mavnard's invalidation of the "heinous, atrocious, or cruel" aggravating circumstance did not state a new rule. Strinaer; U.S. at ___, 112 S.Ct. at 1135.
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> Thus, the Supreme Court has determined that, after the 1980 Godfrev decision, reasonable minds could not fail to realize that the "heinous, atrocious, or cruel" aggravating circumstance was unconstitutionally vague. We must therefore reject the district court's determination that counsel was not ineffective for failing to make this "novel" argument at trial. . . . To be effective, counsel in capital cases must at least recognize and object to those sentencing factors which cannot reasonably be argued to be valid under existing law. We can conceive of no trial strategy that iustifies a contrary approach, and therefore reaffirm our findina that Starr's counsel performed deficiently in failing to object to this aaaravating circumstance.

Id., at 1286. Emphasis supplied.

Starr also resolves the issue of whether Strickland prejudice flows from counsel's deficient performance. Starr, 23 F.3d at 1286 ("We now consider whether Starr suffered Strickland prejudice from counsel's deficient performance.") It does.

> To amount to prejudice, counsel's errors must have rendered the outcome of the preceding (sic) unreliable. Fretwell, --- U.S. at ---, 113 S.Ct. at 842. The Supreme Court has held that in weighing state such as Arkansas, the

> consideration of an invalid aggravating sentencing factor is fatal to the reliability of the sentence. Stringer, --- U.S. at ---, 112 S.Ct. at 1137. Use of one invalid aggravating factor is fatal to a death sentence in a "weighing" state, even where the jury has found other valid aggravating circumstances, because the invalid factor operates as an impermissible "thumb" on death's scale. Id. Such a result is dictated by existing precedent and is not a new rule unavailable to habeas petitioners. Id. Starr's counsel's deficient performance therefore resulted in Starr being subjected to an unreliable determination that he should receive the death penalty. Such unreliability easily suffices to establish the Strickland prejudice.

Starr, 23 F.3d at 1285. Citations omitted. See also, Hollis. No reasonable person could have concluded that Godfrev and Mavnard did not apply in Florida. Glock. The aggravating circumstance instructions given to Mendyk's sentencing jury were clearly unconstitutionally vague. Mavnard; Godfrev; Thomoson v. State, 19 Fla. L. Weekly S655 (December 15, 1994); Rembert v. State, 445 So. 2d 337 (Fla. 1984); Proffitt v. State, 510 So. 2d 896 (Fla. 1987) Counsel's performance in failing to recognize and object to those sentencing factors was clearly deficient performance, while the resultant unreliable death sentence was clearly prejudice under Strickland, Starr; Hollis, as well as under Murrav v. Carrier, 477 U.S. 478, 106 S. Ct. 2639 (1986). Holllis. Accordingly, even if this Court chooses not to consider the merits of Mr. Mendyk's jury instruction claim, this Court must reach the merits of his ineffective assistance of counsel claim. In either event, he is entitled to a new sentencing before a properly instructed sentencing jury.

C. Mr. Mendyk's death sentence was tainted by the improper application of the statutory aggravators.

Mr. Mendyk's jury failed to receive complete and accurate instructions defining aggravating circumstances in a constitutionally narrow fashion. Consequently, the jury's death recommendation (which was given great weight by the trial court) was tainted by consideration of invalid aggravating circumstances, and Mr. Mendyk's death sentence is unconstitutional.

In Richmond v. Lewis, 113 S. Ct. 528 (1992), the United States Supreme Court addressed whether a particular Arizona aggravating factor was constitutional as applied in Mr. Richmond's case. In that case, the trial court had found three (3) aggravating factors, including the "especially heinous, atrocious, cruel or depraved" factor, determined that these factors outweighed the mitigation which the defendant had presented, and sentenced him to death. On direct appeal, the five member Supreme Court of Arizona affirmed the defendant's sentence with two (2) justices finding that the "especially heinous, atrocious, cruel or depraved" aggravating factor was properly applied, two (2) justices finding that the factor was not properly applied but concluding that the sentence of death appropriate even absent the factor, and one (1) justice dissenting. The United States District Court for the District of Arizona denied habeas corpus relief. The United States Court of Appeals for the Ninth Circuit affirmed, finding that the Arizona Supreme Court had applied a valid narrowing construction of the "especially heinous, atrocious, cruel or depraved" factor, or, in the alternative, that the case was distinguishable from Clemons v. Mississippi, 494 U.S. 738 (1990)(requiring either appellate reweighing or a valid harmless error analysis

after an appellate court strikes an aggravating factor). Under the statute at issue in Clemons the invalidation of an aggravating circumstance necessarily rendered any evidence of mitigation 'weightier' or more substantial in a relative sense, while the same could not be said under the terms of the Arizona statute. Challenging the latter determination, Mr. Richmond petitioned the United States Supreme Court for certiorari, arguing that the statute in question was unconstitutionally vague and that the Supreme Court of Arizona failed to cure that invalidity during the appellate process.

In analyzing the issue, the United States Supreme Court stated:

> The relevant Eighth Amendment law is well defined. First, a statutory aggravating factor is unconstitutionally vague if it fails to furnish principled guidance for the choice between death and a lesser penalty. See e.g., Mavnard v. Cartwrisht, 486 U.S. 356, 361-364 (1988); Godfrev v. Georaia, 446 U.S. 420, 427-433 (1980). Second, in a "weighing" State, where the aggravating and mitigating factors are balanced against each other, it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor, even if other valid aggravating factors obtain. See e.g., Stringer v. Black 503 U.S. ___, ___ (1992) (slip op., at 6-9); Clemons v. Mississiooi, supra, at 748-752. A state appellate court may rely upon an adequate narrowing construction of the factor in curing this error. See Lewis v. Jeffers, 497 U.S. 764 (1990); Walton v. Arizona, 497 U.S. 639 (1990). Finally, in federal habeas corpus proceedings, the state court's application of the narrowing construction should be reviewed under the "rational factfinder" standard of Jackson v. Virainia, 443 U.S. 307 (1979). See Lewis v. Jeffers, supra, at 781.

Richmond, 113 S. Ct. at 535.

Reasoning that a majority of the Arizona Supreme Court had found that the trial court had applied the "heinous, atrocious, cruel or depraved" aggravating circumstance contrary to that court's narrowing construction, but had thereafter failed to apply that narrowing construction through an appellate reweighing or to conduct any meaningful harmless error analysis, the United States Supreme Court vacated Mr. Richmond's sentence of death and remanded for a new sentencing.

While the Florida Supreme Court has adopted narrowing constructions, the United States Supreme Court held in Richmond that, not only must a state adopt "an adequate narrowing construction," but that construction must also be applied either by the sentencer or by the appellate court in a reweighing in order to cure the facial invalidity. Richmond, 113 S.Ct. at 535 (Where the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the state appellate court or some other state sentencer must actually perform a new sentencing calculus, if the sentence is to stand.). In Mr. Mendyk's case, that narrowing never occurred. The Florida Supreme Court does not reweigh aggravating factors. Freeman v. State, 563 So. 2d 73, 77 (Fla. 1990) ("It is not this Court's function to reweigh these circumstances."). The State cannot point to any portion of Mr. Mendyk's sentencing proceeding where a constitutionally adequate sentencing calculus was performed. Mr. Mendyk is entitled to relief.

CONCLUSION

The circuit court improperly dismissed Mr. Mendyk's Second Amended Rule 3.850 motion. It's decision must be reversed and this matter remanded for an evidentiary hearing.

I HEREBY CERTIFY that a true copy of the foregoing brief has bean furnished by United States Mail, first class postage prepaid, to all counsel of record on November 27, 1996.

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