IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,936

NORMAN PARKER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests that the Court allow oral argument in this capital appeal.

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STATEMENT OF THE CASE

This is an appeal of a trial court's denial of relief in a proceeding under Rule 3.850, Fla. R. Crim. P. Appellant was tried for first degree murder before a jury in Dade County, Florida. After conviction, the jury voted for death and the trial court imposed a death sentence.

This Court affirmed on direct appeal. Parker v. State, 456 So.2d 436 (Fla. 1984). Appellant thereafter sought state habeas corpus relief, which this Court denied, Parker v. Dugger, 537 So.2d 969 (Fla. 1989), and Rule 3.850 relief, which was also denied. Parker v. State, 611 So.2d 1224 (Fla. 1992).

In light of the United States Supreme Court's decision in Espinosa v. Florida, 112 S.Ct. 2926 (1992), and this Court's subsequent decision in Jackson v. State, 648 So.2d 85 (Fla. 1994), Appellant then urged that the trial court grant Rule 3.850 relief. These and other recent decisions, Appellant submitted, demonstrated that Appellant was correct in his constitutional challenges to the aggravation (and instructions thereon) used by the prosecution at capital sentencing. The trial court denied relief without a hearing. A timely notice of appeal was filed.

Appellant also moved for habeas corpus relief in the United States District Court for the Southern District of Florida. The District Court held the federal proceedings in abeyance pending this Court's decision.

INTRODUCTION

The trial court instructed the jury on the "cold, calculated, premeditated" aggravating circumstance in bare terms, without any of the limiting constructions that this Court has found constitutionally necessary in order for the aggravator to be valid. Appellant's trial took place before this Court's decision in Jackson v. State and the United States Supreme Court's decision in Espinosa v. Florida.

This Court has now condemned the same vague and overbroad "cold, calculated, premeditated" instruction that was provided to this jury, finding that it infects the sentencing proceedings with constitutional error. Jackson v. State, 648 So.2d 85 (Fla. 1994). Where, as here, mitigating evidence is presented to the jury, the error should not be found harmless. Finally, this Court has held that trial counsel must object to the improper instruction and that if trial counsel does not, the claim will be deemed "procedurally barred." Jackson, 648 So.2d at 87-88; James v. State, 615 So.2d 668, 669 n.3 (Fla. 1993).

This Court's objection requirement, of necessity, is grounded on the view that defense lawyers had a legitimate legal basis for making the objection before Espinosa and Jackson. If the defense lawyer did not have a legal basis for making an objection, then it is a violation of due process to apply a procedural bar. Due process does not countenance a trap for the unwary which holds that a lawyer must object, even if there is no legal basis, and that if the lawyer does not, the claim will be barred when, later, there is a legal basis. This Court expressly rejected such a view in numerous cases after the United States Supreme Court's decision in Hitchcock v. Dugger, 481 U.S. 393 (1987). See Hall v. State, 541 So.2d 1125, 1126 (Fla. 1989) ("[A]s we have stated on several occasions, Hitchcock is a significant change in law, permitting defendants to raise a claim under that case in a

postconviction proceeding."); Thompson v. Dugger, 515 So.2d 173 (Fla. 1987) (same); Delap v. Dugger, 513 So.2d 659 (Fla. 1987) (trial court objection unnecessary for post-conviction review of a claim grounded on the recent decision in Hitchcock); Downs v. Dugger, 514 So.2d 1069 (Fla. 1987) (same).[2]

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[2]The view that there was a legal basis for defense counsel to make a trial court objection to improper, vague instructions on the "cold, calculated, premeditated" aggravator is supported by the issuance of Godfrey v. Georgia in 1980, Zant v. Stephens in 1982, and opinions from this Court limiting the scope of the aggravator.

On the other hand, there is also no question that Espinosa and Jackson overruled a formidable body of precedent from this Court upholding Florida's standard jury instructions on aggravation, holding that constitutional vagueness/overbreadth analysis did not apply in Florida, and holding that the post-jury judge-sentencing proceeding cures aggravation jury instruction error. See Smalley v. State, 546 So.2d 720, 722 (Fla. 1989). See also Cooper v. State, 336 So.2d 1133, 1140-41 (Fla. 1976) (ruling that there was no error in allowing the jury to rely on a challenged aggravator because "the trial judge read the jury the interpretation of that term which we gave in Dixon. No more was required."); Smalley v. State, 546 So.2d 720, 722 (Fla. 1989) (stating, "[T]here are substantial differences between Florida's capital sentencing scheme and Oklahoma's...," in rejecting a constitutional vagueness challenge to instructions on aggravation; Occhicone v. State, 570 So.2d 902, 906 (Fla. 1990) (ruling that federal constitutional cases regarding vagueness in jury instructions on aggravation "did not make Florida's penalty instructions unconstitutionally vague"); Brown v. State, 565 So.2d 304, 308 (Fla. 1990) ("We have previously found [federal vagueness analysis] inapposite to Florida's death penalty sentencing [hearing]"); Mendyk v. State, 545 So.2d 846, 849 n.3 and 850 (Fla. 1989) (ruling that "the standard jury instructions adequately cover the definitions of aggravation"); Smith v. Dugger, 565 So.2d 1293, 1295 n.3 and 1297 n.7 (Fla. 1990) (same); Trotter v. State, 576 So.2d 691, 694 (Fla. 1991) (same); Randolph v. State, 562 So.2d 331, 338-39 (Fla. 1990) (affirming trial court's finding on aggravation and finding meritless the challenge to jury instructions on aggravation under the "state and federal constitutions"); Vaught v. State, 410 So.2d 147, 151 (Fla. 1982) (trial court finding on "heinous, atrocious, cruel" affirmed because the offense was "cold and calculated" without analysis of jury instruction error); Henry v. State, 586 So.2d 1033, 1038 (Fla. 1991) (holding that the law is "adequately set out in the standard jury instructions"); Roberts v. State, 568 So.2d 1255, 1258 (Fla. 1990) (federal vagueness standard "is not applicable under Florida's death sentencing procedure."); Porter v. Dugger, 559 So.2d 201, 203 (Fla. 1990) (federal vagueness standard "does not affect Florida's death sentencing procedures."); Clark v. Dugger, 559 So.2d 192, 194 (Fla. 1990) ("We have held that Maynard does not affect Florida's death sentencing procedures").

To be sure, this Court's cases informed defense lawyers that vagueness/overbreadth challenges to jury instructions on the "cold, calculated, premeditated" aggravator did not present a

If defense counsel at trial did not have a legal basis for a good faith objection -- for example, because precedent would not support an objection to the instruction as erroneous -- then this Court does not apply a procedural bar. Hall; Thompson; Delap; Downs. Indeed, the Court cannot apply a procedural bar in such cases -- to do so would be to require trial lawyers to make bad faith objections, and would penalize the clients of lawyers who sought to follow the law in good faith when deciding whether to object.

If defense counsel did have a legal basis to make an objection to an instruction and to litigate the constitutional issue, and failed to do so, Sixth Amendment law holds that counsel's assistance is ineffective when the instruction at issue is erroneous.[3] The same holds true for appellate counsel --

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valid claim and thus informed counsel that there was no good faith legal basis for objecting. This now-rejected view of the law was the view in effect at the time of the sentencing and direct appeal in Norman Parker's case. This view held that jury instructions on the "cold, calculated, premeditated" aggravator did not provide a valid claim because of the statutory requirement of "independent" findings from the trial judge. Accordingly, before the change in law, capital defense lawyers often would challenge the trial court's findings on the aggravator, but not the jury instructions.

The Espinosa court expressly rejected the "State Supreme Court's reasoning . . . [that] there was no need to instruct the jury with the specificity our cases have required where the jury was the final sentencing authority, because, in the Florida scheme, the jury is not 'the sentencer' for Eighth Amendment purposes." Espinosa, 112 S.Ct. at 2928. The Espinosa court held: "[I]f a weighing State decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances." Espinosa, 112 S.Ct. 2929.

The law now recognizes that the State of Florida had failed to constitutionally apply Godfrey v. Georgia, 446 U.S. 420 (1980), and its progeny to aggravation in its capital sentencing scheme. This Court also so held in Jackson v. State. As Jackson and Espinosa demonstrate, the view that constitutional vagueness/overbreadth law "does not affect Florida's death sentencing procedures," Clark v. Dugger, 559 So.2d 192, 194 (Fla. 1990), has now been expressly rejected.

[3]Starr v. Lockhart, 23 F.3d 1280, 1286-87 (8th Cir. 1994) (counsel's failure to raise objection to error at capital sentencing constituted ineffective assistance of counsel); Nero v. Blackburn, 597 F.2d 991, 994 (5th Cir. 1979) (counsel's failure to object and raise a point of law at trial constituted ineffective assistance); Lyons v. McCotter, 770 F.2d 529, 534 (5th Cir. 1985) (failure to raise objection to error constitutes ineffective assistance of counsel); Vela v. Estelle, 708 F.2d 954, 965-66

if there is no good faith basis for a constitutional claim, because the relevant law holds that relief will not be granted, appellate counsel should not raise the claim and the client will not be penalized ("procedurally barred") from bringing the claim later if the law subsequently changes. On the other hand, if there is a legal basis for a claim of constitutional error, counsel should raise the claim and the failure to do so is appellate ineffective assistance. See note 2, supra; see also Wilson v. Wainwright, 474 So.2d 1163 (Fla. 1985).

In Norman Parker's case, trial defense counsel appears to be stating an objection to the instruction on the "cold, calculated, premeditated" aggravator (R. Vol. 24, p. 51). The transcript depicts a break in counsel's statement and then a comment from the trial court (Id.) The defense also had filed a pretrial written motion objecting to the aggravator on the basis of its overbreadth and vagueness (R. Vol. 1 pp. 163-66). On appeal, a challenge to the aggravator was raised. The Court discussed the trial judge's sentencing order, without reference to the jury instructions, and denied relief. Parker, 456 So.2d at 444.

This Court has now held that the "cold, calculated, premeditated" aggravation instruction provided to Mr. Parker's jury is constitutionally erroneous. Jackson. This Court has also held that

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(5th Cir. 1983) (ineffective assistance where counsel failed to raise legal objection to error); Atkins v. Attorney General, 932 F.2d 1430, 1432 (11th Cir. 1991) (failure to properly present claim of error of law constituted ineffective assistance); Harrison v. Jones, 880 F.2d 1279, 1282 (11th Cir. 1989) (same); Murphy v. Puckett, 893 F.2d 94, 95 (5th Cir. 1990) (same); Huynh v. King, 95 F.3d 1052 (11th Cir. 1996) (same); Tomlin v. Myers, 30 F.3d 1235 (9th Cir. 1994) (same). See also Claudio v. Scully, 982 F.2d 798, 803-05 (2d Cir. 1992) (ineffective assistance of counsel where appellate counsel failed to raise an arguable issue); Boliek v. Delo, 912 F. Supp. 1199, 1216 (W.D. Mo. 1995) (appellate counsel provided ineffective assistance because she failed to raise a claim of constitutional error on direct appeal); Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1987) (the failure to raise a valid issue of law on appeal constituted ineffective assistance of counsel); Orazio v. Dugger, 876 F.2d 1508, 1513 (11th Cir. 1989) (same).

it will review such errors when there is a trial court objection. Kearse v. State, 662 So.2d 677, 686 (Fla. 1995).

In Mr. Parker's case, this Court must determine if the error was preserved by trial counsel. If it was, then review and relief herein are appropriate. Jackson; Kearse. If it was not, then counsel's failure to properly object and preserve the issue constituted ineffective assistance of counsel -- this Court's holdings requiring an objection are grounded on the understanding that defense counsel had a legal basis for objecting. If this Court concludes that counsel did not then have a legal basis for objecting, then the change in law available now (Jackson, Espinosa and their progeny) requires that the claim be heard on its merits -- in such circumstances, no bar can be applied in a manner comporting with the fundamental fairness due process requires. The same analysis applies to appellate counsel.

Thus, Mr. Parker's claim cannot be defeated in a principled way through assertions that counsel did not have a valid basis for objecting before cases such as Espinosa and Jackson, and that the claim is at the same time "procedurally barred." The "procedural bar" analysis that imposes a duty on counsel to object is grounded on the understanding that there was a legal basis before these cases. If, on the other hand, counsel did not have that basis, and thus was not ineffective, the intervening change in law requires that the claim be heard now. Hall; Thompson; Delap; Downs. The same holds true for appellate counsel's litigation of this issue.

This Court has held that "[f]undamental fairness" should override the interest in finality. See Moreland v. State, 582 So.2d 618, 619 (Fla. 1991). "The doctrine of finality should be abridged when a more compelling objective appears, such as ensuring fairness." Witt v. State, 387 So.2d 922, 925 (Fla. 1980). "Consideration of fairness and uniformity make it very difficult to justify depriving

a person of his liberty or his life, under [a] process no longer considered acceptable and no longer applied to indistinguishable cases." Id. In light of the circumstances described herein, this concern for fundamental fairness requires that Appellant's claim must be considered either directly or via ineffective assistance of counsel.

In short, if what counsel did is construed as insufficient to preserve the issue, counsel provided ineffective assistance. There is no conceivable tactic or strategy for a failure by counsel to appropriately object and preserve error in capital sentencing instructions where, as here, the court allows objections to be made outside the jury's presence[4] and the defense's own written pretrial motion has already raised a constitutional challenge to the aggravator.

At the least, an evidentiary hearing is necessary on the effectiveness of counsel's representation (did counsel have a tactic for not properly objecting, if the error was not preserved?) and on preservation (since the current record is somewhat ambiguous). The same holds true for ineffective assistance of counsel on appeal.

[4]No "I did not want to antagonize the jury" strategy holds up in this situation.

ARGUMENT

(I)

THE JURY WAS ALLOWED TO WEIGH A VAGUE AND INVALID AGGRAVATING CIRCUMSTANCE (COLD, CALCULATED, PREMEDITATED) DEPRIVING MR. PARKER OF HIS RIGHT TO AN INDIVIDUALIZED AND RELIABLE CAPITAL SENTENCING PROCEEDING, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, SECTIONS 9 AND 17 OF THE FLORIDA CONSTITUTION.

Addressing aggravation in Florida, the United States Supreme Court held:

> Our cases establish that, in a State where the sentencer weighs aggravating and mitigating circumstances, the weighing of an invalid aggravating circumstance violates the Eighth Amendment. . . . Our cases further establish that an aggravating circumstance is invalid in this sense if its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor. . . .

Espinosa v. Florida, 112 S.Ct. 2926, 2928 (1992) (citations omitted). The Supreme Court then vacated death sentences in eight (8) Florida cases within a three month period. See Hodges v. Florida, No. 92-5228, 1992 U.S. LEXIS 4950 (Oct. 5, 1992); Ponticelli v. Florida, No. 91-8584, 1992 U.S. LEXIS 4948 (Oct. 5, 1992); Hitchcock v. Florida, 112 S.Ct. 3020 (1992); Beltran-Lopez v. Florida, 112 S.Ct. 3021 (1992); Henry v. Florida, 112 S.Ct. 3021 (1992); Davis v. Florida, 112 S.Ct. 3021 (1992); Gaskin v. Florida, 112 S.Ct. 3022 (1992); Espinosa v. Florida, 112 S.Ct. 2926 (1992).

With respect to the "cold, calculated, premeditated" aggravator, this Court thereafter held that specific limiting instructions must be provided to the jury -- when they are not, the capital sentencing proceedings are unconstitutionally infected with vagueness, overbreadth and error.

> Without legal guidance that the coldness element is only present when the killing involves "calm and cool" reflection . . . or when the murder is "more cold-blooded, more ruthless, and more plotting than the ordinarily reprehensible crime of premeditated first-degree murder" . . . the average juror may automatically characterize all premeditated murders as CCP. This Court has also explained that calculation must involve a "careful plan or prearranged design" . . . Yet, the jury receives no instruction to illuminate the meaning of the terms "cold," "calculated," or "premeditated."

Jackson v. State, 648 So.2d 85, 89 (Fla. 1994) (citations omitted).

> In order to find the CCP aggravating factor under our case law, the jury must determine that the killing was the product of cool and calm reflection and not an act prompted by emotional frenzy, panic or a fit of rage (cold) . . .; and that the defendant had a careful plan or prearranged design . . . (calculated) . . .; and that the defendant exhibited heightened premeditation (premeditated) . . . Otherwise, the jury is likely to apply CCP in an arbitrary manner, which is the defected cited by the United States Supreme Court [in Godfrey v. Georgia, 446 U.S. 420, 428-29 (1980)]. . .

Jackson, 648 So.2d at 89-90 (some citations omitted); see also id. at 90 n.8 (outlining a proper instruction on the limiting constructions which Mr. Parker's jury never received).

This Court has expressly recognized that the bare "cold, calculated, premeditated" instruction is vague, overbroad, allows for arbitrary results and is unconstitutional. Jackson. The "cold,calculated, premeditated" instruction provided to Mr. Parker's jury suffered from these flaws and renders this death sentence constitutionally invalid. Stringer v. Black, 112 S.Ct. 1130 (1992) (the death sentence is invalidated when the state employs an aggravator that fails to properly guide the jury as to what it needs to find); Maynard v. Cartwright, 486 U.S. 356 (1988) (same); Godfrey v. Georgia, 446 U.S. 420 (1980) (same).

"When 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." Stringer, 112 S.Ct. at 1137. "If a weighing state decides to place capital-sentencing

authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances." Espinosa v. Florida, 112 S.Ct. 2926, 2929 (1992). There was thus aggravation error in Appellant's case, and it warrants relief. See Jackson; Maynard v. Cartwright, 486 U.S. 356 (1988); Godfrey v. Georgia, 446 U.S. 420 (1980).

The transcript in this case reflects that trial defense counsel appears to be stating an objection to the instruction on the "cold, calculated, premeditated" aggravator (R. Vol. 24, p. 51). The transcript depicts a break in counsel's statement and then a comment from the trial court (Id.). The defense also filed a pretrial written motion objecting to the aggravator on the basis of its overbreadth and vagueness (R. Vol. 1 pp. 163-66). If what counsel did is construed as insufficient to preserve the issue, then counsel rendered ineffective assistance. There is no conceivable tactic or strategy for a failure by counsel here to appropriately object and preserve the issue (counsel's own written motion challenging the aggravator reflects as much). In addition, to the extent appellate counsel failed to appropriately and fully litigate the claim, Appellant was deprived of effective assistance of counsel on appeal. An evidentiary hearing (at which Appellant can call former defense counsel as witnesses) is appropriate.

The instruction provided by the trial court on the "cold, calculated, premeditated" aggravator was devoid of any of the necessary definitions or limiting constructions. The instruction was unconstitutionally vague and overbroad. As defense counsel's written motion (R. Vol. 1, pp. 162-66) had stated, the instruction made this aggravator applicable to any and all first-degree murder cases. The trial court's instruction, in its entirety, was:

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

(R. Vol. 24, p. 83).

The need for correction by this Court is especially acute in light of the aggravating factor at issue: the jury's application of such a vague, overbroad and unconstitutional aggravator presents error which "invalidates" the death sentence:

> 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.

Stringer v. Black, 112 S.Ct. 1130, 1139 (1992) (emphasis added). See also Walton v. Arizona, 110 S.Ct. 3047, 3057 (1990) (When a jury is called upon to determine whether a capital sentence is appropriate, "it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face. That is the import of our holdings in Maynard and Godfrey.").

The instruction provided to Mr. Parker's jury was "unconstitutionally vague on its face," Jackson; Kearse, and the "weighing process [was] infected with [the] vague factor." Stringer.

The kind of vagueness involved in Mr. Parker's case was condemned by the United States Supreme Court in Godfrey, where the Court found Georgia's "outrageously or wantonly vile, horrible and inhuman" aggravating factor unduly vague because an ordinary person "could fairly characterize almost every murder" in that fashion. Godfrey v. Georgia, 446 U.S. 420, 428-29 (1980). See also Maynard v. Cartwright, 486 U.S. 356, 364 (1988) (aggravating factor unduly vague because "an

ordinary person could honestly believe that every unjustified, intentional taking of human life is 'especially heinous.'").

In Jackson, this Court considered this very issue and held that the conclusion that the instruction was unduly vague was compelled by Espinosa, Godfrey and Maynard:

> Florida's standard CCP jury instruction suffers the same constitutional infirmity as the HAC-type instructions which the United States Supreme Court found lacking in Espinosa, Maynard, and Godfrey -- the description of the CCP aggravator is "so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." Espinosa, ___ U.S. at ___, 112 S.Ct. at 2928.

Jackson, 648 So.2d at 90.

The court reasoned that this was so because in the absence of additional guidance concerning this aggravating factor, jurors may well believe the aggravating factor is present in every case of first-degree murder. Where that is true, Espinosa, Godfrey and Maynard compel the conclusion that the aggravating factor is unduly vague:

> The premeditated component of Florida's standard CCP instruction poses the same problem [as in Godfrey and Maynard]. . . .
>
> * * *
>
> Without the benefit of an explanation that some "heightened" form of premeditation is required to find CCP, a jury may automatically characterize every premeditated murder as involving the CCP aggravator.
>
> It would also be reasonable for the general public to consider premeditated first-degree murder as "cold-blooded murder." Without legal guidance that the coldness element is only present when the killing involves "calm and cool reflection," or when the murder is "more cold-blooded, more ruthless, and more plotting than the ordinarily reprehensible crime of premeditated first-degree murder," the average juror may automatically characterize all premeditated murders as CCP.

Id. at 89 (citations omitted). As this Court's decision in Jackson shows, the only conclusion in this case is that the "cold, calculated and premeditated" instruction failed to limit the jury's discretion.

The vagueness and invalidity of the "cold, calculated, premeditated" aggravator provided to Appellant's jury is further demonstrated by the prosecutor's argument. Not only was no "limiting construction" followed in the State's argument, the prosecutor invited the jury to apply their own definitions when evaluating the applicability of the aggravator: "We all know what cold, calculated and pre-meditated means. . ."; "You don't need any lawyers to tell you what those three words mean. . . " (R., Vol 24, p. 65) (emphasis supplied).

The jury was then instructed by the court, in a vague and overbroad way, that it could apply this aggravator. The jury also heard some evidence in mitigation (R. Vol. 24). Invalid aggravation such as this infects the weighing not only on the aggravation side of the scales, but also infects the weighing (balancing) of mitigation. Cf. Stringer, supra (discussing why a vague aggravating factor "invalidates" the death sentence).

This Court has discussed this aggravator on a number of occasions. In McCray v. State, 416 So.2d 804 (Fla. 1982), the Court noted:

> That aggravating circumstance [(5)(i)] ordinarily applies in those murders which are characterized as executions or contract murders,. . .

Id. at 807. In Rogers v. State, this Court held:

> We also find that the murder was not cold, calculated and premeditated, because the state has failed to prove beyond a reasonable doubt that Rogers' actions were accomplished in a "calculated" manner. In reaching this conclusion, we note that our obligation in interpreting statutory language such as that used in the capital sentencing statute, is to give ordinary words their plain and ordinary meaning. See Tatzel v. State, 356 So.2d 787, 789 (Fla. 1978). Webster's Third International Dictionary at 315 (1981) defines the word "calculate" as "[t]o plan the nature of beforehand: think out . . . to design, prepare or adapt by forethought or careful plan." There is an utter absence of any evidence that Rogers in this case had [a] careful plan or prearranged design to kill anyone during the robbery. While there is ample evidence to support simple premeditation, we must conclude that there is insufficient

> evidence to support the heightened premeditation described in the statute, which must bear the indicia of "calculation."

Rogers v. State, 511 So.2d 526, 533 (Fla. 1987)(emphasis added). The Court's decisions also recognize that the "cold, calculated and premeditated" aggravator requires proof beyond a reasonable doubt of a "careful plan or prearranged design." See Mitchell v. State, 527 So.2d 179, 182 (Fla. 1988) ("the cold, calculated and premeditated factor . . . require[s] a careful plan or prearranged design."). Although this aggravating circumstance requires more than the simple level of premeditation necessary for conviction in a murder case and a "careful plan or prearranged design" to kill, this jury was in no way informed of such limiting constructions. Although "cold" is defined as "calm" and "cool" reflection, Santos v. State, 591 So.2d 160 (Fla. 1991), the jury was never told this.

In order to find that the offense was committed in a "cold, calculated, premeditated" manner, a jury is required to first find a careful plan or prearranged design to kill formed through calm and cool reflection. The jury not only was not instructed on these limiting constructions in Appellant's case, the trial court's instructions -- compounded by the prosecutor's argument that the jurors should apply their own definitions -- allowed the jury to apply this aggravator in an absolutely unbridled way.

An aggravating circumstance is constitutionally invalid if "its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." Espinosa v. Florida, 120 L.Ed.2d 854, 858 (1992). See Walton v. Arizona, 111 L.Ed.2d 511, 528 (1990) ("It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face."). On its face, the aggravating circumstance provided here was unconstitutionally vague. Because the jury did not receive any limiting instruction on the

aggravating circumstance, the aggravating factor was invalid. In turn, the jury's consideration of this invalid aggravating factor renders Mr. Parker's death sentence invalid. See Richmond v. Lewis, 113 S.Ct. 528, 535 (1992); Stringer; Espinosa. While this Court has adopted narrowing instructions, not only must a state adopt "an adequate narrowing construction," but that construction must also be applied by the sentencer. Richmond v. Lewis, 113 S.Ct. at 535. In Mr. Parker's case, a constitutionally adequate sentencing calculus was not performed.

An aggravating circumstance that fails to adequately channel the sentencing decision allows for "a pattern of arbitrary and capricious sentencing like that found unconstitutional in Furman." Zant v. Stephens, 462 U.S. 862, 877 (1963). In this case, the aggravating circumstance was provided to the jury in an unconstitutional manner, and this warrants relief -- either directly or through an ineffective assistance of counsel analysis if the Court finds that the issue was not properly preserved or litigated at trial and direct appeal.

Appellant also submits that the aggravator was improperly applied and found by the trial court. In Harmon v. State, 527 So.2d 182 (Fla. 1988), this Court held that substantial reflection is necessary for the aggravator to apply. The Court then held that the cold, calculated and premeditated aggravating circumstance was improperly applied in Harmon, where the murder occurred in the course of a robbery and was susceptible to conclusions other than finding it was committed in a cold, calculated, and premeditated manner. The testimony at that trial was that the two co-defendants did not discuss killing anyone prior to the robbery, and Harmon's cellmate testified that Harmon told him that when during the course of the robbery the victim spoke his name, he was killed. Similarly, there was no testimony in Mr. Parker's trial that a killing was planned, and the shot occurred quickly after Mr. Chavez spoke to the robbers. Under the vague and overbroad instruction and argument the jury

heard, however, the jury was not allowed to consider such a limiting application of the aggravator, and the finding by the trial court was inappropriate.

Relief is justified in Mr. Parker's case. At a minimum, the case should be remanded for an expeditious evidentiary hearing on ineffective assistance of counsel.

(II)

THE JURY'S AND TRIAL COURT'S CONSIDERATION OF THE COLD, CALCULATED, PREMEDITATED AGGRAVATING FACTOR VIOLATED THE FEDERAL AND STATE CONSTITUTIONAL PROHIBITION AGAINST EX POST FACTO APPLICATION OF LAWS AND DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO APPROPRIATELY LITIGATE THE ISSUE.

At the time of the offenses committed herein, the cold, calculated and premeditated aggravating circumstance, F.S. Section 921.141(5)(i), was not in existence. Its application in this case therefore violated Mr. Parker's constitutional rights.

A. The History of Section 921.141(5) and the Court Decisions Interpreting It.

Section 921.141(5)(i), as enacted, states the following:

> The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner.

Sec. 921.141(5)(i), Fla. Stat. The addition of this factor to Florida's capital sentencing statute occurred when the Florida Legislature enacted Chapter 79-353, Laws of Florida. This law became effective on July 1, 1979, after the offenses herein. The Senate Staff Analysis and Economic Impact Statement explains the reason that the Legislature enacted this provision:

> Senate Bill 523 amends subsection (5) of s.921.141, Florida Statutes, by adding a new aggravating circumstance to the list of enumerated ones. The effect of the new aggravating circumstance would be to allow the jury to consider the fact that a capital felony (homicide) was committed in a cold, calculated and premeditated manner without any pretense of moral and legal justification.

The staff report explained that in two cases, Riley v. State, 366 So.2d 19 (Fla. 1978) and Menendez v. State, 368 So.2d 1278 (Fla. 1979), this Court found that a trial court determination that a murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification did not constitute an aggravating factor under Florida's capital sentencing statute as it then existed.

Additionally, just after the enactment of the statute, this Court revised its opinion in Magill v. State, 386 So.2d 1188 (Fla. 1980)(revised opinion). In its revised opinion, the Court specifically deleted its prior statement that a "cold, calculated design to kill constitutes an especially heinous, atrocious, or cruel murder." The change made by the Court in response to a motion for rehearing on that very point demonstrates that such evidence never supported independently the finding of any of the original eight aggravating factors.

Similarly, in Lewis v. State, 398 So.2d 432, 438 (Fla. 1981), the Court, consistent with its statements in Riley and Menendez, and the revision of Magill, observed that premeditation, which was "cold and calculated and stealthily carried out," was not evidence relevant to any of the original eight aggravating factors in the statute and that an aggravating factor based on that finding was invalid under Florida law. It is therefore clear that prior to the enactment of Chapter 79-353, Laws of Florida, the Court would not allow an aggravating factor based solely on facts showing "a cold, calculated design to kill" to stand as the foundation for any of the original eight aggravating factors.

In Miller v. Florida, 107 S.Ct. 2446, 2451 (1987), the Supreme Court set out the test for determining whether a criminal law is ex post facto. In so doing, the Court, for the first time,

harmonized two prior court decisions, Dobbert v. Florida, 432 U.S. 282, 97 S.Ct. 2290 (1977) and Weaver v. Graham, 450 U.S. 24, 101 S.Ct. 960 (1981):

> [A]s was stated in Weaver, to fall within the ex post facto prohibition, two critical elements must be present: First, the law "must be retrospective, that is, it must apply to events occurring before its enactment" and second, it must disadvantage the offender affected by it." Id., at 29. We have also held in Dobbert v. Florida, 432 U.S. 282, that no ex post facto violation occurs if a change does not alter "substantial personal rights," but merely changes "modes of procedure which do not affect matters of substance." Id., at 293.

Miller, supra, at 2451. Under the resulting new analysis, it is now clear that sec. 921.141(5)(i) operated as an ex post facto law in Mr. Parker's case.

B. Section 921.141(5)(i) Is Retrospective.

A law is retrospective if it "appl[ies] to events occurring before its enactment." Weaver v. Graham, 101 S.Ct. at 964. The relevant "event" is the crime, which in Mr. Parker's case occurred prior to the legislatively enacted change to sec. 921.141(5). As Miller explained, retrospectivity concerns address whether a new statutory provision changes the "legal consequences of acts completed before its effective date." Miller v. Florida, 107 S. Ct at 2451 (citations omitted). The relevant "legal consequences" include the effect of legislative changes on an individual's punishment for a crime. See Miller v. Florida, 107 S.Ct. at 2451 (citations omitted).

The change in the sentencing statute in this instance did change the legal consequences at sentencing: Mr. Parker's jury and judge became empowered to consider and apply an additional statutory aggravating factor. As the Court demonstrated in its Riley, Menendez, and Lewis decisions, and the revision of its opinion in Magill, under the prior statute, facts demonstrating heightened premeditation would never have supported the finding on the original aggravating factors. Only after

enactment of Chapter 79-353 did such facts take on an independent legal consequence. Section 921.141(5)(i) is therefore retrospective.

C. Section 921.141(5)(i) Substantially Disadvantaged Mr. Parker.

Combs v. State, 403 So.2d 418 (Fla. 1981), held that the addition of sec. 921.141(5)(i) to the capital sentencing procedure did not constitute an ex post facto law because it did not disadvantage the defendant:

> What, then, does the paragraph add to the statute? In our view, it adds the requirement that in order to consider the elements of a premeditated murder as an aggravating circumstance, the premeditation must have been "cold, calculated and . . . without any pretense of moral or legal justification." Paragraph (i) in effect adds nothing new to the elements of the crime for which petitioner stands convicted but rather adds limitations to those elements for use in aggravation, limitations which inure to the benefit of a defendant.

Id. at 421. In arriving at this decision, the Combs court erred because it never conducted a complete and proper analysis of the new law. Contrary to its prior decisions, the Combs court believed that the new aggravator limited the use of premeditation at the penalty phase. The court, however, did not examine the challenged provision to determine whether it operated to the disadvantage of a defendant as the Miller decision now clearly requires. See Miller v. Florida, 107 S.Ct. at 2452. In Miller, the Supreme Court examined both the purpose for enactment of the challenged provision and the change that the challenged provision brought prior to the statute to determine whether the new provision operated to the disadvantage of the defendant. Id. In applying that analysis to the challenged provision at issue here, it is clear that the new provision is "more onerous than the prior law" (Dobbert v. Florida, 97 S.Ct. at 2299) because it substantially disadvantages a capital defendant. Id. The Combs decision is inconsistent with the United States Supreme Court's holding in Miller, and it should be revisited.

1. The Legislature Intended To Disadvantage Capital Defendants By Enacting A Law Creating A New Aggravating Factor.

When the legislature enacted Chapter 79-353, it expressly intended to add to Florida's capital sentencing statute an additional statutory aggravating factor. Specifically, the drafters of the legislation wanted to address concerns created by this Court in its decisions in Menendez and Riley. They expressly intended for the new provision to enhance the probability of imposing death on a capital defendant by adding an aggravating factor which could be found by a jury and judge based on facts showing that a murder was committed in a cold, calculated and premeditated manner.

As explained above, prior to enactment of this legislation, this Court had refused to allow such facts to justify the finding of any of the eight original aggravating factors. Id. Thus, the purpose of the new legislation was expressly aimed at enhancing the probability of a death sentence and thereby disadvantaging a capital defendant.

2. The Change Which Sec. 921.141(5)(i) Imposed On The Sentencing Statute In Effect At The Time Of The Offense Operates To The Disadvantage Of The Capital Defendant.

The change which the new law brought to the sentencing statute operated to the disadvantage of the capital defendant. In Mr. Parker's case, the jury and judge applied the new aggravating factor and gave it weight in sentencing Mr. Parker to death.

Under the law in effect at the time of the offense in this case, the jury and judge would not have been empowered to increase the probability of a death sentence in this manner because Florida sentencing law strictly limits consideration of aggravating factors to those enumerated in the statute. See e.g. sec. 921.141 (5). The Combs court recognized this principle, but failed to give it proper significance for purposes of ex post facto analysis. See Combs v. State, 403 So.2d at 421. The

weight given to an aggravating factor greatly affects the determination of whether a capital defendant receives life or death, as does the cumulative weight accorded all aggravating factors found in imposing a death sentence (see e.g. Section 921.141), but the Combs decision did not address this. Under Miller, this omission is error.

If a disadvantage caused by the effect of a new law is purely speculative, it is not onerous for purposes of ex post facto analysis. But, the increased exposure to a death sentence identified above is demonstrably not speculative under Florida's capital sentencing procedures. In Miller, the Supreme Court rejected the state's argument that a change in the sentencing statute for non-capital defendants was not disadvantageous simply because a defendant could not demonstrate "definitively that he would have gotten a lesser sentence." Miller v. State, 107 S.Ct. at 2452.

Similar to the Miller defendant, Mr. Parker was subjected to the probability of a more enhanced sentence at trial because of the new law. In this instance, however, the more severe, enhanced sentence was death. He was therefore "substantially disadvantaged" by a retrospective law.

D. The Change to the Capital Sentencing Statute Alters a Substantial Right.

The third part of the Miller analysis requires examination of the sec. 921.141(5)(i) to determine whether it alters a substantial right. Miller v. Florida, 107 S.Ct. at 2452. As explained previously, Florida law limits the consideration of aggravating factors to those enumerated in the capital sentencing statute. This limitation affects the "quantum of punishment" that a capital defendant can receive because a jury and judge must determine whether or not statutory aggravating circumstances outweigh any mitigating circumstances before arriving at a verdict of death. The right to limitation was altered when the jury and judge, by operation of the new law, applied an additional statutory aggravating factor.

E. Conclusion.

For the foregoing reasons, the law as applied to Mr. Parker at his sentencing hearing was ex post facto, and his sentence of death is therefore improper. To the extent that trial and appellate counsel inadequately litigated these errors, those counsel provided ineffective assistance. An evidentiary hearing and relief are appropriate.

(III)

THE JURY WEIGHED A VAGUE AND INVALID AGGRAVATING CIRCUMSTANCE (WHILE UNDER SENTENCE OF IMPRISONMENT) DEPRIVING MR. PARKER OF HIS RIGHT TO AN INDIVIDUALIZED AND RELIABLE SENTENCING PROCEEDING, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, §§ 9 AND 17 OF THE FLORIDA CONSTITUTION.

The Court erred in finding and instructing the jury on subsection (5)(a) aggravation, in that there was no proof that Mr. Parker was under a sentence of imprisonment.[5] The prosecution merely showed that the Defendant had been convicted in Florida (R. Vol. 24). During the guilt phase of the trial, the prosecution did not present any evidence that Mr. Parker was under a sentence of imprisonment at the time he committed the offense. During the penalty phase, the State's evidence showed that Mr. Parker had prior sentences, but did not even attempt to demonstrate Mr. Parker's status at the time of the offense. There was no showing that Mr. Parker was on parole, as was proved in Hitchcock v. State, 413 So.2d 714 (Fla. 1982), and White v. Sate, 403 So.2d 331 (Fla. 1981). Nor did the State prove that Mr. Parker escaped from a lawful sentence of imprisonment.

In Peek v. State, 395 So.2d 492, 499 (Fla.), cert denied, 451 U.S. 964, 101 S.Ct. 2036 (1981), this Court held that:

> Persons who are under an order of probation and are not at the time of the commission of the capital offense incarcerated or escapees from incarceration do not fall within the phrase "person under sentence of imprisonment" as set forth in section 921.141 (5)(a).

Ferguson v. State, 417 So.2d 613, 636 (Fla. 1982).

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[5]This factor, unlike (5)(b), requires that the defendant be under a sentence of imprisonment at the time of the offense. E.g., Hitchcock v. State, 413 So.2d 714 (Fla. 1982); White v. State, 403 So.2d 331, 337 (Fla. 1981). Thus, the Washington D.C. sentence in this case is inapplicable to this factor.

Without proof and, as to the jury, limiting constructions in the jury instructions, neither the jury, the trial court, nor the Florida Supreme Court can speculate on the defendant's status. This aggravating factor was improper.

Notwithstanding the Florida Supreme Court's case law, the jury was instructed that it could apply this aggravator. The instructions and prosecutor's argument invited the jurors to speculate in applying this aggravator -- to speculate about what under sentence of imprisonment meant, how it could be applied to this case, and what factors the jurors could rely upon to find the aggravator. The instruction on this aggravator was vague and invalid. See Espinosa; Stringer; Walton, supra.[6]

To the extent that trial and appellate counsel may be deemed to have failed to adequately litigate the claim, Appellant submits that he was deprived of his constitutional rights to effective assistance of counsel. Appellant respectfully requests that an evidentiary hearing be held on his claim.

Taking away these and any of the other unwarranted circumstances (see supra and infra), it cannot be said that the death penalty is proper. The evidence presented in Appellant's favor showed that he was a military veteran and that while in prison he regularly spoke to juveniles at schools in an effort to warn them about the dangers of drugs and crime. This information shows a side of Norman Parker that is deserving of mitigation. The death sentence imposed in this case must be vacated.

(IV)

THE TRIAL COURT FAILED TO MEANINGFULLY CONSIDER MITIGATING EVIDENCE, IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

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[6]To say, as this Court did on appeal, that the defendant did not introduce evidence of a pardon is to shift the burden from the State to the defense. Such burden shifting violates the sixth, eighth and fourteenth amendments to the United States Constitution. The burden for fully establishing aggravation is, after all, solely with the State.

In sentencing Mr. Parker to death, the trial court ruled that "there is no evidence of any mitigating circumstances set forth in the statute or of mitigating circumstances of any nature whatsoever." (ROA, Vol. 2, p. 446). However, there was evidence regarding mitigating circumstances. The circumstances included letters submitted respecting Mr. Parker's behavior as a model prisoner; his military service; the testimony of a family member; residual doubt about guilt; Mr. Parker's unswerving position that he was innocent; and the inherent contradictions in the State's case.

The United States Supreme Court has held that in order to comply with the eighth and fourteenth amendments, a capital sentencing scheme should seek to eliminate "arbitrariness and capriciousness in [the] imposition" of death sentences. Proffitt v. Florida, 428 U.S. 242, 258 (1976). When a capital sentencer flatly rejects mitigation that is present in the record, a capital defendant is "sentenced to death without proper attention to the capital sentencing standards required by the Constitution." Magwood v. Smith, 791 F.2d 1438, 1449 (11th Cir. 1986). As the Supreme Court has explained:

> Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence. . . . The sentencer, and the [state appellate court] on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Eddings v. Oklahoma, 455 U.S. 104, 113-14 (1982) (footnote omitted) (emphasis supplied). A sentencer in a capital case thus may not limit his or her consideration of mitigating circumstances. In Mr. Parker's case, the sentencing court found no mitigation, although mitigation was present in the record.

Where there is "any legitimate basis for finding ambiguity concerning factors actually considered by the trial court," resentencing is required. Eddings, 455 U.S. at 119 (O'Connor, J.,

concurring). At a capital penalty phase, the sentencer must provide "full consideration" to mitigating evidence and must "give effect" to that evidence. See, e.g., Parker v. Dugger, 111 S.Ct. 731 (1991); Clemons v. Mississippi, 110 S.Ct. 1441 (1990).

The presentation of mitigating evidence is constitutionally meaningless if the judge refuses to give it credit. As Eddings, 455 U.S. at 114-15, noted, "[t]he sentencer ... may not give [relevant mitigating evidence] no weight by excluding such evidence from ... consideration." Unrestricted sentencer consideration of "compassionate or mitigating factors stemming from the diverse frailties of humankind" is the "constitutionally indispensable part of the process of inflicting the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 304 (1976)(emphasis supplied).

Florida's statutory scheme for determining who is to be sentenced to death requires written findings regarding aggravating and mitigating factors, and a reliable weighing of those factors. §921.141(3), Fla. Stat. Consequently, the Florida Supreme Court held in Campbell v. State, 571 So.2d 415 (Fla. 1990), that "when addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant." Id. at 419. The trial court here, however, summarily found no mitigation. The Florida Supreme Court further held that trial courts are required to find as a mitigating factor each proposed factor that is "mitigating in nature and has been reasonably established..." Id. at 419. Here, however, although there was evidence that was "mitigating in nature," the trial court did not make findings on the evidence.

It is a fundamental precept of modern eighth amendment law that in a capital case, "the sentencer may not refuse to consider or be precluded from considering 'any mitigating evidence.'" Skipper v. South Carolina, 476 U.S. 1, 4 (1986), quoting Eddings v. Oklahoma, 455 U.S. 104, 114

(1982). In Mr. Parker's case, this precept was violated. As a result, the sentencing proceeding failed to afford Mr. Parker the "individualized consideration," Lockett v. Ohio, 438 U.S. 586, 605 (1978); Parker v. Dugger, 111 S.Ct. at 740, of his "'character and record ... and the circumstances of the particular offense'" which is "'constitutionally indispensable' ... in order to ensure the reliability, under Eighth Amendment standards, of the determination" that death was the appropriate punishment. Id. at 601, quoting Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

Under Florida law, the trial court is required to enter its sentence of life or death only "after weighing the aggravating and mitigating circumstances." § 921.141(3), Fla. Stat. After completing the weighing process, "In each case in which the court imposes the death sentence, the determination of the court shall be supported by written findings of fact ...." Fla. Stat. § 921.141(3). These requirements seek to ensure that a death sentence is imposed only on reasoned judgment by the trial court after careful weighing of the applicable aggravating and mitigating circumstances. Patterson v. State, 513 So.2d 1257 (Fla. 1987); Lucas v. State, 417 So.2d 250 (Fla. 1982). Moreover, this requirement seeks to ensure compliance with the standards of the eighth and fourteenth amendments to the United States Constitution and Article I, § 17 of the Florida Constitution so as to ensure that a death sentence is not arbitrary, capricious, or unreliable, and so as to guarantee meaningful appellate review of death sentences. See Proffitt v. Florida, 428 U.S. 242, 251 (1976); Campbell v. State, 571 So.2d 415, 419 (Fla. 1990), Parker v. Dugger, supra.

In Proffitt v. Florida, 428 U.S. 242 (1976), the United States Supreme Court upheld Florida's death penalty statute, under which the judge acts as the final sentencer, on the basis that under it:

> ... trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life. Moreover, their decisions

> are reviewed to ensure that they are consistent with other sentences imposed in similar circumstances.

Id. at 253.

A sentencing proceeding in which the judge declines to give effect to unrebutted mitigation presented by the defendant is one in which the defendant has not received the "individualized determination on the basis of the character of the individual and the circumstances of the crime," Zant v. Stephens, 462 U.S. 862, 879 (1983), and which deprives the defendant "of the individualized treatment to which he is entitled under the Constitution." Parker, 111 S.Ct. at 740, citing Clemons v. Mississippi. And when the trial court fails to make specific findings on the mitigation, the Florida Supreme Court is prevented from carrying out its "crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally." Parker v. Dugger, 111 S.Ct. 731, 112 L.Ed.2d 812, 826 (1991); Campbell v. State, 571 So.2d 415, 420 (Fla. 1990) (trial court must make findings concerning mitigation in order to facilitate meaningful appellate review).

The trial court here failed to carry out its constitutional role. It declined to give effect to the unrebutted mitigation presented by Mr. Parker. It thus failed to provide him with an "individualized determination" of whether he deserved a death sentence or a life sentence; and it failed to make findings necessary for Mr. Parker to receive meaningful appellate review.

This Court has acknowledged that uncontested evidence which is mitigating in nature must be given weight. Campbell v. State, 570 So.2d 415, 420 (Fla. 1990). Because the trial court refused to credit the mitigating factors in this case, and because the Florida Supreme Court on appeal did not make independent findings but simply reviewed the trial court's order, Mr. Parker has not received

meaningful trial sentencer or appellate review of his "actual record." Parker v. Dugger, 111 S.Ct. at 740, 112 L.Ed.2d at 826.

Mr. Parker submits that he was deprived of effective assistance of counsel to the extent that trial counsel failed to properly litigate the constitutional issue. And, to the extent the issue was inadequately litigated on direct appeal, appellate counsel's failure to adequately litigate the issue constituted ineffective assistance. An evidentiary hearing is appropriate, as is relief.

(V)

MR. PARKER'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE TRIAL COURT'S FAILURE TO INSTRUCT THE JURY THAT THE COURT COULD IMPOSE CONSECUTIVE SENTENCES ON THE OFFENSES ON WHICH MR. PARKER WAS CONVICTED, WHICH COULD HAVE BEEN ORDERED TO BE SERVED CONSECUTIVELY TO EACH OTHER AND TO MR. PARKER'S EARLIER FLORIDA AND WASHINGTON, D.C., CONVICTIONS, AND THAT THIS WAS A LEGITIMATE, PROPER, AND LAWFUL THIRD ALTERNATIVE TO A SENTENCE OF DEATH OR LIFE IMPRISONMENT, THUS MISINFORMING AND MISLEADING THE JURY IN FAVOR OF VOTING FOR DEATH, AND VIOLATING MR. PARKER'S RIGHTS TO AN INDIVIDUALIZED AND RELIABLE CAPITAL SENTENCING DETERMINATION UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Mr. Parker's jury was misled and misinformed. The trial court instructed the jury that the alternative to a sentence of death would be "life imprisonment, without possibility of parole for 25 years." (See, e.g., ROA, Vol. 24, p.83). The jury, however, was never informed that that was not the only available alternative to a sentence of death -- i.e., that the Court could sentence Mr. Parker to consecutive sentences of imprisonment for the murder and the underlying felonies, and that these sentences could have been ordered to be served consecutively to the two previous convictions for which Mr. Parker was serving life sentences. The Court, eventually, did sentence Mr. Parker consecutively to the maximum available terms [ROA, Vol. 25, p.19]).

Defense counsel did in fact request that the Court provide the jury with such an instruction (ROA, Vol. 22, p. 1152). The Court declined. The prosecutor then vehemently argued to the jury that the "life sentence" alternative to death did not mean that "[h]e's not getting out" (ROA, Vol. 24, pp.66-68), and that "if life meant life" there would have been no homicide in this case.

Petitioner submits that in failing to fully and properly object and to fully and effectively litigate this claim, trial counsel rendered prejudicially ineffective assistance. In failing to appropriately litigate it on appeal, appellate counsel rendered ineffective assistance. Petitioner respectfully requests an evidentiary hearing on these claims.

The trial court's failure to instruct on the "consecutive sentences" alternative made the misleading prosecutorial arguments quoted above abundantly credible to the jury. The jury was thus misinformed as to the alternatives to a death sentence, and misled into voting death -- i.e., the trial court's failure to instruct provided credence to the prosecutor's misleading arguments for death. In fact, the court's failure to appropriately instruct the jury on the option of consecutive sentencing (an option that was exercised in this case) was itself misleading: facing sentencing in a case involving a defendant with a serious record, the jury was led to believe that only two options were open -- death or a twenty-five year minimum. In failing to instruct, as requested, on the lawful, legitimate "third option," the trial court unconstitutionally skewed the jury towards death. Cf. Beck v. Alabama, 447 U.S. 633 (1980). The jury deciding whether Norman Parker should live or die was misinformed. Cf. California v. Ramos, 463 U.S. 992 (1983).

Nothing was told to the jury with regard to the third option (consecutive sentences). As the United States Supreme Court has held in a related context, failing to provide a capital jury with the information necessary to properly and fairly render a verdict, "inevitably [] enhance[s] the risk" of an unwarranted sentence of death. Beck v. Alabama, 447 U.S. 633, 637 (1980). The "risk" of an unwarranted death sentence under such circumstances is as intolerable as the risk of an unwarranted conviction which the Supreme Court discussed in Beck. Id. at 633.

The erroneous failure to instruct undeniably placed "artificial alternatives" before the jury, California v. Ramos, 463 U.S. 992, 1007 (1983), and served to mislead and misinform the jury in violation of the sixth, eighth and fourteenth amendments. See Caldwell v. Mississippi, 105 S. Ct. 2633 (1985). Doubtless, the flawed instructions provided the jurors with misinformation of constitutional magnitude, cf. Caldwell, supra, a risk which, in a capital case, is intolerable. Beck, supra; Caldwell.

Moreover, such an instruction interfered with the jury's ability to properly assess whether death was an appropriate penalty for Mr. Parker -- it interfered with the jurors' ability to properly assess both aggravation and mitigation. Cf. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). Courts have made clear that accurate instructions are a prerequisite to the constitutional validity of any sentence of death. See, e.g., Floyd v. State, 497 So.2d 1211, 1215-16 (Fla. 1986); Garcia v. State, 492 So.2d 360, 367 (Fla. 1986). Here, the instructions were inaccurate, and when compounded by the prosecutor's argument, cf. Caldwell, supra, misled the jury.

The jury was not provided with the information needed to make a reliable and rational decision on the issue of whether a sentence of death was appropriate in this case. See Caldwell v. Mississippi, 105 S. Ct. 2633 (1985). Consequently, the trial court's refusal to instruct on consecutive sentences may well have persuaded the jury to sentence Mr. Parker to death in order to avoid setting him free. See Beck v. Alabama, 447 U.S. 625, 643 (1980). A death sentence obtained as a result of such misinformation simply does not comport with the reliability requirements mandated in capital cases. Beck, supra; see also Caldwell, supra; Adams, supra; Hitchcock, supra.

This situation -- inserting future dangerousness into a capital sentencing proceeding, while the jury is not fully informed about the extent of the sentence the defendant may serve -- was

condemned by the United States Supreme Court in Simmons v. South Carolina, 114 S.Ct. 2187 (1994).

Mr. Parker's sentence of death is not reliable or individualized. Accordingly, because Mr. Parker's sixth, eighth and fourteenth amendment rights to a reliable capital jury verdict, and to a reliable and individualized capital sentencing determination have been violated, he is entitled to the relief he seeks. The United States Supreme Court precedents discussed previously in this pleading (Espinosa, Stringer, etc.) hold that accurate instructions to a capital sentencing jury is a constitutionally required prerequisite if the death penalty imposed is to be deemed valid. The issue herein discussed demonstrates that the instructions were not accurate, that constitutional error is involved, and that relief is appropriate.

(VI)

THE JURY WEIGHED A VAGUE AND INVALID AUTOMATIC AGGRAVATING CIRCUMSTANCE (FELONY MURDER), DEPRIVING MR. PARKER OF HIS RIGHTS TO AN INDIVIDUALIZED AND RELIABLE SENTENCING PROCEEDING, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND ARTICLE I, §§ 9 AND 17 OF THE FLORIDA CONSTITUTION.

In Florida, the "usual form" of indictment for first-degree murder under sec. 783.04, Fla. Stat. (1987), is to "charg[e] murder . . . committed with a premeditated design to effect the death of the victim." Barton v. State, 193 So.2d 618, 624 (Fla. 2d DCA 1968). The absence of felony murder language is of no moment: when a defendant is charged with a killing through premeditated design, he or she is also charged with felony-murder, and the jury is free to return a verdict of first-degree murder on either theory. Blake v. State, 156 So.2d 511 (Fla. 1963); Hill v. State, 133 So.2d 68 (Fla. 1961); Larry v. State, 104 So.2d 352 (Fla. 1958).

Mr. Parker was charged with first-degree murder in the following manner: murder from a premeditated design to effect the death of the victim, or while engaged in the perpetration of or in an attempt to perpetrate sexual battery and robbery, in violation of Florida Statute 782.04. Section 782.04 is the felony murder statute in Florida. Lightbourne v. State, 438 So.2d 380, 384 (Fla. 1983).

In this case, much of the State's case for guilt involved felony murder. The jury then returned a general verdict of guilt.

If felony murder was the basis of Mr. Parker's conviction, as it could not but have been, then the subsequent death sentence is unlawful. This is so because the death penalty in this case was predicated upon an unreliable automatic finding of a statutory aggravating circumstance -- the very felony murder finding that formed the basis for conviction. Automatic death penalties upon

conviction of first-degree murder violate the eighth and fourteenth amendments, as was clarified by the United States Supreme Court in Sumner v. Shuman, 107 S. Ct. 2716 (1987). In this case, felony murder was submitted to the jury and found by the trial court as an aggravating circumstance. R.445. The sentencer was entitled automatically to return a death sentence upon a finding of guilt of first degree (felony) murder. Under such circumstances, 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: an automatic aggravating circumstance is created which does not narrow. "[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty . . . ." Zant v. Stephens, 462 U.S. 862, 876 (1983). In short, if Mr. Parker was convicted for felony murder, he then faced statutory aggravation for felony murder. This is too circular a system to meaningfully differentiate between who should live and who should die, and it violates the eighth and fourteenth amendments.

The United States Supreme Court's decision in Lowenfield v. Phelps, 108 S.Ct. 546 (1988) illustrates the constitutional shortcoming in Mr. Parker's capital sentencing proceeding. In Lowenfield, the defendant was convicted of first degree murder under a Louisiana law which required a finding that he had "a specific intent to kill to inflict great bodily harm upon more than one person," and aggravation was then based on a similar factor. The United States Supreme Court found that the definition of first degree murder under Louisiana law provided the narrowing necessary for eighth amendment reliability:

> To pass constitutional muster, a capital-sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983); cf. Gregg v. Georgia, 428 U.S. 153 (1976). Under the capital sentencing laws of most States, the jury is

> required during the sentencing phase to find at least one aggravating circumstance before it may impose death. Id., at 162-164 (reviewing Georgia sentencing scheme); Proffitt v. Florida, 428 U.S. 242, 247-250 (1976) (reviewing Florida sentencing scheme). By doing so, the jury narrows the class of persons eligible for the death penalty according to an objective legislative definition. Zant, supra, at 878 ("[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty").
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> * * *
>
> It seems clear to us . . . that the narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase. See also Zant, supra, at 876, n. 13, discussing Jurek and concluding, "in Texas, aggravating and mitigating circumstances were not considered at the same stage of the criminal prosecution."

Id. at 4075 (emphasis added).

Thus, if narrowing occurs either in the conviction stage (as in Louisiana and Texas) or at the sentencing phase (as in Florida and Georgia), then the statute may satisfy the eighth amendment as written. However, as applied, the operation of Florida law in this case did not provide constitutionally adequate narrowing at either phase, because, unlike the statute at issue in Lowenfield, conviction and aggravation in Mr. Parker's case were predicated upon a non-legitimate narrower -- felony-murder.

The conviction-narrower state schemes require something more than felony-murder at guilt/innocence. Louisiana requires intent to kill. Texas requires intentional and knowing murders. This narrows. Here, however, Florida allows a first-degree murder conviction based upon a finding that does not legitimately narrow -- felony murder. Mr. Parker's conviction and sentence required

only a finding that he committed a felony during which a killing occurred, and no finding of intent was necessary.

Clearly, "the possibility of bloodshed is inherent in the commission of any violent felony, and . . . is foreseen," Tison v. Arizona, 107 S. Ct. 1676, 1684 (1987), but armed robbery and sexual battery are offenses "for which the death penalty is plainly excessive." Id. at 1683. With felony-murder as the "narrower," the aggravating circumstance does not meet constitutional requirements.

To the extent trial and appellate counsel inadequately litigated this error, those counsel provided ineffective assistance. In addition, the previously unavailable United States Supreme Court decisions outlined above warrant reconsideration of the error and relief.

CONCLUSION

An evidentiary hearing is appropriate and Appellant's death sentence should be vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was served by first class mail, postage prepaid on Fariba Komeily, Assistant Attorney General, Department of Legal Affairs, 444 Brickell Avenue, Suite 950, Miami, Florida 33131 this 27th day of October, 1997.

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