IN THE SUPREME COURT OF FLORIDA

NO. 95,336

FILED
SID J. WHITE
APR 15 1999
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

JOHNNY L. ROBINSON,

Petitioner,

v.

MICHAEL W. MOORE,
Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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PRELIMINARY STATEMENT

This is Mr. Robinson's first habeas corpus petition in this Court. Art. 1, Sec. 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, claims demonstrating that Mr. Robinson was deprived of the right to a fair, reliable, and individualized sentencing proceeding and that the proceedings resulting in his conviction and death sentences violated fundamental constitutional imperatives.

Citations shall be as follows: The record on appeal concerning the original court proceedings shall be referred to as "R1. ____" followed by the appropriate page number. The record on appeal after resentencing shall be referred to as "R2. ____". The postconviction record on appeal will be referred to as "PC-R. ____". The appendix of Mr. Robinson's 3.850 motion will be referred to as "App. ____". References to the record of Clinton Fields' trial are denoted by "CFR. ____".

The Florida Supreme Court's opinion on Mr. Robinson's initial direct appeal will be referred to as Robinson I. The Court's opinion on his appeal of the resentencing will be referred to as Robinson II. Finally, the Court's opinion on Mr. Robinson's postconviction appeal will be referred to as Robinson

III. All other references will be self-explanatory or otherwise explained herein.

INTRODUCTION

Significant errors which occurred at Mr. Robinson's capital trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. For example, appellate counsel raised no issue regarding the prosecutor's deliberate injection of racial prejudice at the guilt phase of Mr. Robinson's trial. Clinton Fields, Mr. Robinson's codefendant, testified on direct examination that Mr. Robinson said that he would have to "go ahead and kill the bitch." (R1. 504). Shortly thereafter, the prosecutor, James Alexander, then asked a leading question that deliberately distorted Fields' testimony and insinuated that the killing was racially motivated:

> Q. Now are you sure that Mr. Robinson used those exact words about shooting the "white bitch"?

(R1. 505).

Also, in his closing argument, Mr. Alexander continued his appeals to racial prejudice by suggesting that a white woman would not voluntarily accompany a black man and commit "immoral" acts with him.[1] Mr. Alexander's actions, which injected racial prejudice into a capital trial, violated Mr. Robinson's

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[1]Mr. Robinson's defense, consistent with the statement that he gave to the police, was that the victim voluntarily accompanied him and consented to have sex with him, but that they got into a scuffle after having sex and he accidentally shot her.

fundamental rights to a fair trial. Appellate counsel failed to present this and other significant matters to this Court on direct appeal. Had counsel done so, Mr. Robinson would have received a new trial.

Appellate counsel's failure to present the meritorious issues discussed in this petition demonstrates that his representation of Mr. Robinson involved "serious and substantial deficiencies." Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986). The issues which appellate counsel neglected demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr. Robinson. "[E]xtant legal principles...provided a clear basis for ... compelling appellate arguments[s]." Fitzpatrick, 490 So. 2d at 940. Neglecting to raise fundamental issues such as those discussed herein "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985). Individually and "cumulatively," Barclay v. Wainwright, 444 So. 2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So. 2d at 1165 (emphasis in original).

Additionally, this petition presents questions that were ruled on on direct appeal but that should now be revisited in light of subsequent caselaw or in order to correct error in the appeal process that denied fundamental constitutional rights. As

this petition will demonstrate, Mr. Robinson is entitled to habeas relief.

PROCEDURAL HISTORY

The Circuit Court of the Seventh Judicial Circuit, St. Johns County, Florida, entered the judgments and sentences. On September 5, 1985, a Grand Jury indicted Mr. Robinson for first degree murder, kidnapping, armed robbery, and sexual battery (R1. 2). A new indictment issued on November 6, 1985, charging the same four offenses (R1. 10-11). Mr. Robinson pled not guilty.

Mr. Robinson's trial was held on May 27, 28, and 29, 1986. The jury found him guilty as charged (R1. 75-78, 702). A penalty phase was held on May 30, 1986, after which the jury recommended death by a nine to three vote (R1. 81, 841). Mr. Robinson was given consecutive life sentences on counts two, three and four on June 6, 1986 (R1. 70, 75, 872), and was sentenced to death on count one on June 19, 1986 (R1. 144-48, 893-99).

On direct appeal, Mr. Robinson's conviction was confirmed but his sentences were vacated. Robinson v. State, 520 So. 2d 7 (Fla. 1988). The noncapital offenses were vacated because of an improper guideline departure. The death sentence was remanded for a new penalty phase because the State had injected improper racial evidence in the first trial.

A new penalty phase was held on February 13, 14, and 15, 1989. The jury recommended death by a vote of eight to four (R2. 69, 713). On April 3, 1989, the court imposed concurrent life sentences on the other offenses (R2. 115-20, 731-32), and sentenced Mr. Robinson to death on count one (R2. 109-14, 732-38). Mr. Robinson's sentences were affirmed, Robinson v. State,

574 So. 2d 108 (Fla. 1991), and his certiorari petition was denied on October 7, 1991. Robinson v. Florida, 112 S. Ct. 131 (1991).

In May, 1993, Mr. Robinson filed his motion under Rule 3.850, Fla. R. Crim. P. On June 22, 1994, the court heard argument on Mr. Robinson's motion (PC-R. 6036, et seq.). On July 14, 1994, the court issued an order summarily denying some claims and ordering an evidentiary hearing on other claims (PC-R. 1222-28). The evidentiary hearing was conducted on August 29-31, 1994. On June 9, 1995, the court issued an order denying relief (PC-R. 5763-86). On appeal, this Court affirmed the circuit court's denial of Rule 3.850 relief. Robinson v. State, 707 So. 2d 688 (Fla. 1998), reh'g denied (April 1, 1998). Presently, Mr. Robinson has prepared and filed this petition seeking habeas corpus relief.

JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). See Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process, and the legality of Mr. Robinson's sentence of death.

Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein arise in the

context of a capital case in which this Court heard and denied Mr. Robinson's direct appeal. See Wilson, 474 So. 2d at 1163; Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). A petition for a writ of habeas corpus is the proper means for Mr. Robinson to raise the claims presented herein. See, e.g., Way v. Dugger, 568 So. 2d 1263 (Fla. 1990); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Wilson, 474 So. 2d at 1162.

This Court has the inherent power to do justice. The ends of justice call on the Court to grant the relief sought in this case, as the Court has done in similar cases in the past. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965); Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984). The Court's exercise of its habeas corpus jurisdiction, and of its authority to correct constitutional errors such as those herein pled, is warranted in this action. As the petition shows, habeas corpus relief would be more than proper on the basis of Mr. Robinson's claims.

GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Robinson asserts that his capital conviction and sentence of death were obtained and then affirmed during this Court's appellate review process in violation of his rights as guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United State Constitution and the corresponding provisions of the Florida Constitution.

CLAIM I

APPELLATE COUNSEL FAILED TO RAISE ON DIRECT APPEAL THE FUNDAMENTAL ERROR CAUSED BY THE STATE ATTORNEY'S DELIBERATE INJECTION OF RACIAL PREJUDICE AT THE GUILT PHASE OF MR. ROBINSON'S TRIAL.

In its opinion affirming the circuit court's denial of postconviction relief, this Court held that, as a matter of law, this claim was procedurally barred because it could have been raised on direct appeal. Robinson v. State, 707 So. 2d 688, 698 (Fla. 1998). Appellate counsel was ineffective in failing to raise this claim on direct appeal.

As the Florida Supreme Court acknowledged in its decision on Mr. Robinson's initial appeal, this case involves the kind of facts that create the greatest risk that the proceedings will be infected by racial prejudice: "The situation presented here, involving a black man who is charged with kidnapping, raping and murdering a white woman, is fertile soil for the seeds of racial prejudice." Robinson v. State, 520 So. 2d 1, 7 (Fla. 1988). At both the original trial and the resentencing proceeding, then

Assistant State Attorney James S. Alexander deliberately injected racial issues into the proceeding. As a result, there is an unacceptable risk that Mr. Robinson's conviction and death sentence were influenced by racial prejudice, in violation of his rights to equal protection, due process and a fair trial.

The first significant instance occurred during the testimony of Clinton Fields, Mr. Robinson's codefendant and the State's key witness. On direct examination, Fields testified that Mr. Robinson said that he would have to "go ahead and kill the bitch." (R1. 504). After asking Fields several other questions, Mr. Alexander then asked a leading question that deliberately distorted Fields' testimony and insinuated that the killing was racially motivated:

> Q. Now are you sure that Mr. Robinson used those exact words about shooting the "white bitch"?
>
> A. Yes, yes.

(R1. 505). Mr. Alexander knew perfectly well that Fields had not testified to any statement concerning a "white bitch." He also knew that Fields would likely agree to anything he asked. Fields was testifying pursuant to a grant of immunity and an agreement by the State Attorney's office that if Fields testified, the State would drop other pending charges, recommend that all of Fields' sentences be concurrent, and write a letter to the parole board informing them of Fields' cooperation (App. 2, pp. 4-7). Moreover, Mr. Alexander was aware of testimony by an expert clinical psychologist, Dr. Jack Merwin, that Fields is of below

normal intelligence and tends to do what he's told (CFR. 251). Thus, Alexander used a compliant witness to create out of whole cloth a suggested racial motivation for the crime. The only possible purpose for this egregious misconduct was to inflame the passions and emotions of the all-white jury.

Mr. Alexander returned to his appeals to racial prejudice in closing argument. Mr. Robinson's defense, consistent with the statement that he gave to the police, was that the victim voluntarily accompanied him and consented to have sex with him, but that they got into a scuffle after having sex and he accidentally shot her. Mr. Alexander argued that this defense could not be believed, because a white woman would not voluntarily accompany a black man and commit "immoral" acts with him:

> I would suggest if you accept Mr. Robinson's version, not even James Bond, 007, could do it like that, not even James Bond could entice a lady at midnight on Interstate 95 out of her car, a white woman into the car with a black man who was obviously possessing a gun whether he's displaying it in his belt or holding it to her head and go out and party with him. I mean I can't believe I'm even hearing it's possible, the possible idea that might have happened. I mean it's bad that might have happened. I mean it's bad enough that Mrs. St. George had her, a terrible, terrible, tragic murder take place to her, but then to suggest on top of all that she was totally immoral --bologna!

(R1. 610-11). This argument -- that no white woman would ever voluntarily commit "immoral" acts with a black man -- gives off the unmistakable odor of lynch mob justice.

Mr. Alexander capped off this performance at penalty phase by asking the questions that led the Florida Supreme Court to vacate Mr. Robinson's death sentence and remand for resentencing:

> Q. Would you say, Doctor, that it's a fair statement that the Defendant, Mr. Robinson, is prejudiced towards white people, specifically, women?
>
> * * * *
>
> Q. In regard to one of the answers you gave Mr. Pearl, you noted the Defendant had told you about several victims in the past in regard to sexual encounters. Are you familiar with the gender and the race of those particular victims?
>
> * * * *
>
> Q. And you know the victim in this case also was a white female, do you not?

(R1. 787-88). Mr. Alexander's conduct at the initial penalty phase is in a sense collateral in the instant proceedings, but it serves to shed light on his motivation for the earlier incidents, because it shows that those were not isolated or accidental, but part of a deliberate campaign to make the race of the defendant and the victim a primary feature of the proceedings.

The Florida Supreme Court's comments with respect to the prosecutor's infection of the sentencing proceedings with racial prejudice are equally applicable to his conduct during the guilt phase of the trial:

> Racial prejudice has no place in our system of justice and has long been condemned by this court. Nonetheless, race discrimination is an undeniable fact of this nation's history. As the United States Supreme Court recently noted, the risk that the factor of race may enter the criminal

> process has required its unceasing attention. We cannot, however, by rule of law so quickly eradicate attitudes long held and deeply entrenched. Thus, despite "unceasing" efforts, discrimination on the basis of race still persists....
>
> The situation presented here, involving a black man who is charged with kidnapping, raping, and murdering a white woman, is fertile soil for the seeds of racial prejudice. We find the risk that racial prejudice may have influenced the sentencing decision unacceptable .... Our cases also have long recognized that improper remarks to the jury may in some instances be so prejudicial that neither rebuke nor retraction will destroy their influence, and a new trial should be granted despite the absence of an objection below or even in the presence of a rebuke by the trial judge.

Robinson I, 520 So. 2d at 7 (emphasis added) (citations omitted). In this case, the State Attorney, Mr. Alexander, watered the "seeds of racial prejudice." As a result, Mr. Robinson's conviction is ineradicably tainted.

Appellate counsel was ineffective in failing to raise this issue, even in the absence of an objection by defense counsel at the guilt phase of Mr. Robinson's trial. Egregious prosecutorial misconduct -- like that which occurred here -- that injects racial prejudice into a capital trial constitutes fundamental error. Robinson I, 520 So. 2d at 7; Pait v. State, 112 So. 2d 380, 385 (Fla. 1959). An issue involving fundamental error, error that goes to the heart of the integrity of the judicial process, may be reviewed even in the absence of an objection at trial. Robinson I, 520 So. 2d at 7; Pait v. State, 112 So. 2d 380, 385 (Fla. 1959); see also Johnson v. State, 460 So. 2d 954,

958 (Fla. 5th DCA 1984); Kennedy v. Wainwright, 483 So. 2d 424, 426 (Fla.) cert. denied, 107 S. Ct. 291 (1986). No tactical or strategic reason can be reasonable as a matter of law for appellate counsel's failure to raise this issue on Mr. Robinson's direct appeal. Appellate counsel's failure to raise this issue constitutes deficient performance which prejudiced Mr. Robinson. Habeas relief is warranted.

CLAIM II

APPELLATE COUNSEL FAILED TO RAISE ON DIRECT APPEAL THE ISSUE OF RACE DISCRIMINATION PERMEATING THE JUSTICE SYSTEM IN ST. JOHNS COUNTY AND AFFECTING THE PREPARATION AND PROSECUTION OF THIS CASE AT EVERY STAGE.

For many years in St. Johns County the murder of a black person has not been treated as seriously as the murder of a white person. Because black-victim homicides are not treated with the same seriousness as white-victim homicides, every decision about any particular homicide case is significantly skewed by racial bias. Every white-victim homicide is measured on a scale tilted toward capital prosecution; every black-victim homicide is measured on a scale tilted away from harsh sentencing.

Racial discrimination affects more than just the charging decision and whether, and how vigorously, the prosecution seeks the death penalty. Race discrimination also affects the court's selection of grand jury members and forepersons. Finally, prosecutors are prone to remind juries, as if they needed reminding, of the races of the victims and the defendants, as

occurred here, requiring reversal on Mr. Robinson's original direct appeal.

Discrimination in all these forms pervades the justice system in St. Johns County. It also pervaded the pretrial and trial proceedings against Mr. Robinson. Mr. Robinson is a black man; the victim in this case was white. Those facts were decisive factors in the way the case was prosecuted. This Court has made it plain that "[r]acial prejudice has no place in our system of justice and has long been condemned by this Court." Robinson I, 520 So. 2d at 7.

A similar claim was presented to this Court in Foster v. State, 614 So. 2d 455 (Fla. 1992). The Court rejected the claim, holding that Foster had failed to meet the burden, imposed by McCleskey v. Kemp, 481 U.S. 279 (1987), of showing that the State acted with purposeful discrimination in seeking the death penalty. Three dissenting justices argued that at least under the Florida Constitution a defendant may make a prima facie showing that the death sentence is imposed in a discriminatory manner by presenting evidence that racial "discrimination exists and that there is a strong likelihood it has influenced the state to seek the death penalty." Foster, 614 So. 2d at 468. Johnny Robinson makes such a showing herein.

The influence of race on the imposition of the death penalty in St. Johns County is starkly revealed by numerous quantitative measures. Between 1976 and 1987, 59 criminal homicides were

committed in St. Johns County.[2] Thirty-three of the victims were white; twenty-five were black; and the race of one victim was unknown. Thus, 43% of the homicide victims were black. In this same period, three death sentences were imposed in homicide cases.[3] None of these death sentences was imposed in a case where the victim was black. In terms of percentages, the death sentence was imposed in 9% of the homicide cases where the victim was white, whereas it was never imposed in a case with a black homicide victim.

Recently compiled data from the entire Seventh Judicial Circuit also show that the odds of a death sentence are much higher in cases in which a black is accused of killing a white than in other homicide cases. Almost one-fourth (24%) of the cases in which blacks have killed whites resulted in a death sentence compared to 6.9% of the cases in which whites have killed whites and 0.7% of the cases in which blacks have killed blacks. Homicides with white victims in the Seventh Judicial Circuit are roughly 13 times more likely to result in a penalty of death when the victim is white than when the victim is black,

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[2]Postconviction counsel obtained the raw data for these figures from Michael Radelet, who co-authored a study on race and the death penalty in Florida. Radelet and Pierce, Choosing Those Who Will Die: Race and the Death penalty in Florida, 43 Fla. L. Rev. 1 (1991). One homicide was excluded because the race of the victim was not reported.

[3]These figures were drawn from death sentences imposed in St. Johns County between 1977 and 1988, assuming that sentencing takes place approximately one year after the offense on average.

and a black who kills a white is 35.7 times more likely to be sentenced to death than a black who kills a black. (See App. 24).

The disparities in treatment of homicide cases in St. Johns County, based on the race of the victim, are consistent with disparities well documented across the State of Florida as a whole. A recent study describes in detail these overwhelming disparities. Radelet and Pierce, Choosing Those Who Will Die: Race and the Death Penalty in Florida, 43 Fla. L. Rev. 1 (1991). Radelet and Pierce studied death sentences imposed in Florida between 1976 and 1987. Id. at 18. They found that a death sentence was almost six times more likely in a case with a white victim; that those killing whites in felony murders were about five times as likely to receive death sentences as those killing blacks in felony murders; that blacks killing whites in a multiple murder have a high death sentence rate of 22.9%, while the death sentence rate is only 2.8% in homicides where blacks kill more than one black; and that a black suspected of killing a white woman is 15 times more likely to be condemned than a black who is suspected of killing a black woman. Id. at 22-25. Taking all of the variables into account, Radelet and Pierce concluded that a defendant suspected of killing a white was 3.42 times more likely to receive the death penalty than a defendant suspected of killing a black. Id. at 28.

The pattern of race-of-victim discrimination revealed by these numbers cannot be explained by any qualitative differences between the murders committed against black people and the

murders committed against white people. Black-victim murders are just as varied in their severity as white-victim murders. Black-victim and white-victim murders that are similar in every other respect are treated differently by the State Attorney's office: the white-victim murders are plainly treated as if they were more serious crimes.[4]

The data relating to the Seventh Judicial Circuit and specifically to St. Johns County, together with the broader data concerning the imposition of the death penalty in Florida as a whole, raise a strong inference that decisions made by the State Attorney's office which determine whether homicide suspects receive the death sentence or a lesser sentence are made on the basis of race. That inference is strengthened further by the State Attorney's conduct in the instant case and part of which this Court described as a "deliberate attempt to insinuate that appellant had a habit of preying on white women and thus constituted an impermissible appeal to bias and prejudice." Robinson I, 520 So. 2d at 6.

It may be that a prosecutor who made race-neutral decisions about the cases in which to seek the death penalty would still have decided to seek the death penalty against Mr. Robinson.

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[4]Here again, broader studies of the exercise of prosecutorial discretion have found that decisions concerning how to charge homicides, which relate directly to the ultimate outcome, are closely associated with both the victim's and the defendant's races, and are not explained by other variables, so that "race, in effect, functions as an implicit aggravating factor in homicide cases." Radelet and Pierce, Race and Prosecutorial Discretion in Homicide Cases, 19 Law & Society Rev. 587, 615 (1985).

Because the St. Johns County prosecutor's decisions were not race-neutral, however, it is impossible to tell. Thus, Mr. Robinson's death sentence must be stricken.

Racially-biased prosecutorial decision-making distorts the prosecution of death cases in St. Johns County to such a degree that there is a palpable risk that the decision to seek the death penalty against Mr. Robinson is as much the product of racial bias as of appropriate considerations. Neither the Constitution of the United States nor that of the State of Florida can tolerate such a risk, for prosecutorial decisions may not be "'deliberately based on [the] unjustifiable standard...[of] race.'" Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978), quoting Oyler v. Boles, 368 U.S. 448, 456 (1962).

Mr. Robinson clearly has standing to raise a claim that the State bases its enforcement of the laws on an "unjustifiable standard," such as race, whether the discrimination is on the basis of his own race or of the race of the victim. McCleskey v. Kemp, 481 U.S. 279, 291 n.8 (1987). The standard of review for such a case under the Florida Constitution has never been determined but should be the standard proposed by Justice Barkett in her dissent in Foster v. State, supra. The Florida constitution is the primary source of rights of Florida citizens; accordingly, Florida courts may, and in an appropriate case like this one should, grant their citizens more protection than is afforded by the United States Constitution. Traylor v. State, 596 So. 2d 957 (Fla. 1992). At least in their more recent

history, the courts in Florida have been at least as vigilant as the federal courts in seeking to remove the vestiges of discrimination from the judicial process. See, e.g., State v. Neil, 457 So. 2d 481 (Fla. 1984). Indeed, the Florida Supreme Court's Racial and Ethnic Bias Study Commission has already recognized the fact that "defendants who kill Whites are more likely to be sentenced to death than defendants who kill African-Americans," Bias Study Commission Report, 48.

Therefore, this Court should adopt one of the more reasonable standards for proving discriminatory intent proposed by the dissenters in McCleskey and Foster, supra. See McCleskey, 481 U.S. at 324-25, 336 (Brennan, J., dissenting) (proof that race "more likely than not" affects the willingness to impose the death penalty sufficient to show that the "risk that race influenced [the defendant's] sentence" was "intolerable"); id. at 352-53 (Blackmun, J., dissenting) (defendant must make a prima facie showing that he is a member of a cognizable class, that he received a "substantial degree of differential treatment," and that the "allegedly discriminatory procedure is susceptible to abuse or is not racially neutral").

Even without reliance on the statistical disparities, a capital defendant can establish intentional discrimination through "evidence specific to his own case that would support an inference that racial considerations played a part in his sentence." McCleskey, 481 U.S. at 292-93. In rejecting McCleskey's claim, based wholly on statewide statistical

disparities, the Court made it clear that "evidence [of racial influence] specific to his own case" could have been established by indirect proof.

The right to be indicted for a capital crime by a properly impaneled grand jury is a constitutionally provided, fundamental right. Article I, § 15 (a), Fla. Const. In addition, discrimination in the appointment of a grand jury foreperson denies a defendant the right to due process of law and equal protection under both the Florida and Federal Constitutions. Guice v. Fortenberry, 661 F.2d 496 (5th Cir. 1981)(en banc). See also Rose v. Mitchell, 443 U.S. 515, 99 S. Ct. 2993, 2998 n.4 (1979).

Blacks have long been recognized as a distinct class subject to different treatment under the law. See Hernandez v. Texas, 347 U.S. 475 (1954); United States v. Perez-Hernandez, 672 F.2d 1380 (11th Cir. 1982). Johnny Robinson, a black man, was indicted by the Spring Term 1985, St. Johns County grand jury (R1. 1, 10). The foreperson of this grand jury, William Vanmarter, was a white male. Of the 18 grand jurors impaneled to consider the State's case against Mr. Robinson, seventeen were white, and the race of the other grand juror cannot be determined (see App. 27).[5]

According to the 1980 census, blacks constituted 15% of the population of St. Johns County. These figures establish that

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[5]The race of one of the grand jurors was not evident from a review of the voter registration lists. (R1. 1, 10).

blacks constitute a significant percentage of the St. Johns County population and that they were grossly underrepresented on the grand jury that indicted Johnny Robinson. U.S. Census Data (1980).

Both the systematic nonrepresentation of blacks as grand jury forepersons and the systematic underrepresentation of blacks on the grand juries occurred over a significant period of time. For the grand jury term included in this time period, no blacks were chosen as forepersons of any St. Johns County grand jury. These statistics highlight the gross underrepresentation of a substantial citizen group. Although statistics may be misleading, "nothing is as emphatic as zero. . . ." Guice, 661 F.2d at 505. Mr. Robinson has met his burden of showing disproportionate treatment of blacks in the selection of grand jury forepersons and in the composition of the grand juries.

Thus far this Court has rejected claims of discrimination respecting the selection of grand jurors and grand jury forepersons, see Andrews v. State, 443 So. 2d 78 (Fla. 1983); see also Jackson v. State, 498 So. 2d 406, 409 (Fla. 1986); Valle v. State, 474 So. 2d 796, 800 (Fla. 1985); Burr v. State, 466 So. 2d 1051, 1053 (Fla. 1985). Those decisions were based, however, on the lower courts' finding that the selection of grand jurors and grand jury foremen was random and non-discriminatory. See, e.g., Andrews, supra (each of the circuit judges who testified represented they used specific criteria in choosing a foreman, one of which was never race).

In light of the significant underrepresentation of blacks on grand juries and as grand jury forepersons in St. Johns County, the State bears the burden of demonstrating that the manner in which grand jurors are chosen in St. Johns County is truly race-neutral. See Valle v. State, 474 So. 2d at 799 ; Pitts v. State, 307 So. 2d 473, 477 (Fla. 1st DCA 1975).

This Court has noted that racial discrimination in the context of a Florida criminal jury trial is "most pernicious," State v. Slappy, 522 So. 2d 18, 20 (Fla. 1988), and unconstitutional. Slappy dealt with racial discrimination by the prosecutor, a member of the executive branch of state government. By comparison, racial discrimination in the Florida grand jury process involving the constitutional guarantee of accusation by grand jury indictment in capital cases under Article I, § 15(a) is equally, if not more, pernicious and unconstitutional.

The prosecuting attorney in this case, James S. Alexander, repeatedly and deliberately injected the issue of the defendant's race into Mr. Robinson's trial proceedings. This Court found that his questioning of Mr. Robinson's expert witness concerning a possible bias on the defendant's part against white women, was a "deliberate attempt to insinuate that appellant had a habit of preying on white women" that amounted to an "impermissible appeal to bias and prejudice." Robinson I, 520 So. 2d at 6. Moreover, the prosecutor also elicited, distorted and manufactured testimony from Mr. Robinson's codefendant that Mr. Robinson had talked about killing the "white bitch" (R1. 503-05), and argued

that the victim could not have consented because of the races of the defendant and the victim (R1. 610-11).

On all of these occasions, the purpose of the testimony and argument was not to prove that Mr. Robinson had committed first degree murder, nor to establish any of the statutory aggravating factors, but simply to remind the jurors that the victim was a white woman and the defendant was a black man. As this Court noted, the facts of this case made it "fertile soil for the seeds of racial prejudice," Robinson I, 520 So. 2d at 7, and the prosecutor exploited that fact to the utmost. The fact that the prosecutor did so is further evidence of the way that racial bias infects the State Attorney's office in the Seventh Judicial Circuit and its decisions concerning the prosecution of potentially capital cases. The deliberate injection of race into the proceedings encouraged the jury to convict Johnny Robinson and sentence him to death on the basis of racial discrimination, rather than on the basis of the evidence.

Based on all of the ground set forth above, it is clear that Mr. Robinson was deprived of a fair trial and sentencing proceeding by discrimination on the basis of his race and the race of the victim, in violation of his rights to equal protection of the laws and to be free from cruel or unusual punishments, as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. This issue constitutes fundamental error. Therefore, Appellant counsel's failure to raise this issue on direct appeal, even in the absence

of an objection by trial counsel, constitutes deficient performance which prejudiced Mr. Robinson. Habeas relief is warranted.

CLAIM III

THE STATE'S KNOWING PRESENTATION OF FALSE EVIDENCE AND FAILURE TO DISCLOSE EXCULPATORY INFORMATION VIOLATED MR. ROBINSON'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL.

In its opinion affirming the circuit court's denial of postconviction relief, this Court noted that this issue appeared to be procedurally barred since it should have been raised on direct appeal.[6] Robinson III, 707 So. 2d at 707. Appellate counsel was ineffective for failing to raise this claim on direct appeal.

The testimony of Clinton Bernard Fields was the key to the State's case at both the guilt/innocence phase of the original trial and the penalty phase at resentencing. Fields testified falsely concerning the extent of his contacts with the prosecutor, and concerning the terms of his agreement with the State, facts surely known to the State. Moreover, the State failed to disclose to the defense prior inconsistent statements by Fields that were consistent with Mr. Robinson's statement and

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[6]Petitioner acknowledges that, following its statement regarding the procedural bar, this Court proceeded to address the merits of this issue. Robinson III, 707 So. 2d at 693. Petitioner raises this issue in good faith for preservation purposes should in fact this claim be considered procedurally barred in a postconviction motion.

would have both provided material with which to impeach Fields, as well as directly exculpatory information. All of these actions by the State were violations of Brady v. Maryland, 373 U.S. 83 (1963) and were materially prejudicial to Mr. Robinson.

In response to defense discovery requests, the State provided to the defense the written and taped statements of Clinton Fields (see R1. 3-4). In addition to those statements, Fields also gave oral statements concerning matters not contained therein to Captain Robert Porter (App. 6, at pp. 26 - 33). In a number of respects, Fields' statement to Porter was inconsistent with his later testimony and could have been used at Mr. Robinson's trial for purposes of impeachment. Most importantly--and consistent with Mr. Robinson's statement -- Fields told Captain Porter that the victim was shot during a struggle between Mr. Robinson and the victim, not as the result of a premeditated decision to shoot her that was communicated to Fields.

At his deposition, Captain Porter testified concerning Fields' statement to him as follows:

> Q: All Right. When it came to the time when she was actually shot, did you have any impression that she was basically talking back to Robinson?
>
> A: Yes sir. According to what Mr. Fields told me, I got that impression.
>
> Q: All Right. At any point, did you get access to what Robinson had said?
>
> A: Fields said something to the effect of, somehow or another in the conversation that Robinson had called her a bitch and at that point, she either pushed him or slapped at him or something like that and in turn, he

> slapped at her or used his gun to threaten her with and that's when he shot her. That's when Robinson shot her.

(App. 6, at p. 33).

This statement by Fields was obviously far more exculpatory of Mr. Robinson than Fields' written statement, and was inconsistent with Fields' testimony at trial (see R1. 504) (Mr. Robinson told Fields that he had to kill the victim because she could identify him; Mr. Robinson then walked up to her and shot her). It was exculpatory information in itself, as to both the guilt and penalty phases, and it was also exculpatory through its usefulness for impeaching Fields. See Giglio, supra, 405 U.S. at 154 - 55 (Brady applies to evidence relating to credibility of State witnesses). There is also no question that this information was material for purposes of Brady. It went to the heart of the State's case with respect to the key issues of premeditation and the applicability of multiple aggravation factors, as well as to the credibility of the State's case key witness.

Howard Pearl, Petitioner's trial counsel, confirms that this point was crucial to his defense of Mr. Robinson:

> If, on cross-examination of Mr. Fields, I had been able to show the jury that Mr. Fields had corroborated the explanation made by Mr Robinson concerning the accidental nature of the shooting, I am of the opinion that the verdict would have been more favorable to my client in either the guilt phase or the penalty phase.

(App. 7).

The State knowingly presented false testimony and failed to disclose crucial exculpatory information to the defense. As a result, the proceedings in which Mr. Robinson was convicted and sentenced to death violated his rights to due process and fair trial, and are incompatible with "rudimentary demands of justice." See Mooney v. Holohan, 294 U.S. 103 (1935).

To the extent that appellate counsel was or should have been aware of the State's improper actions, appellate counsel was ineffective for failing to raise this claim on direct appeal. Habeas relief is proper.

CLAIM IV

THE PROSECUTOR'S IMPROPER CLOSING ARGUMENTS AT PENALTY PHASE RENDERED MR. ROBINSON'S DEATH SENTENCE UNRELIABLE, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS CLAIM ON DIRECT APPEAL.

In its opinion affirming the circuit court's denial of postconviction relief, this Court held that, as a matter of law, this claim was procedurally barred because it could have been raised on direct appeal. Robinson III, 707 So. 2d at 698. Appellate counsel was ineffective in failing to raise this claim on direct appeal.

A prosecutor's concern in a criminal prosecution "is not that it shall win a case, but that justice shall be done." United States v. Modica, 663 F. 2d 1173, 1181 (3d Cir. 1981), cert. denied, 450 U.S. 989 (1982). While a prosecutor "may strike hard blows, he is not at liberty to strike foul ones." Id.

These principles are fully applicable to the closing argument at penalty phase. In Teffeteller v. State, 439 So. 2d 840 (Fla. 1983), the Florida Supreme Court remanded the case for a new sentencing hearing where the prosecutor's closing remarks "were patently and obviously made for the express purpose of influencing the jury to recommend the death penalty" on the basis of an improper argument. 439 So. 2d at 845. In such cases, the court noted, "the only safe rule appears to be that unless [it] can be determine[d] from the record that the conduct or improper remarks of the prosecutor did not prejudice the accused, the . . . [sentence] must be reversed." Id. In the instant case the prosecutor made several improper arguments. These arguments deprived Mr. Robinson of a fair and reliable sentencing hearing, in violation of his right to due process and the prohibition against cruel or unusual punishments. Thus, appellant counsel was ineffective in failing to raise this issue on appeal, notwithstanding counsel's failure to object at trial.

A. THE PROSECUTOR MISSTATED THE EVIDENCE.

In arguing that the murder of Beverly St. George was especially wicked, evil, atrocious, or cruel, the prosecutor purported to recount for the jury what Fields had testified about the victim's statements in the cemetery:

> She wanted to know, "Am I going to live? Am I going to live?" She did everything, did everything, "Just spare me. I've got to get up to Virginia, got to be at that custody hearing. Just spare me my life. I'll do anything."

> Mr. Fields said that during the course of this -- when she was saying it, "Are you going to kill me? Are you going to take me back to my car," at one time Mr. Fields stated she said that she was going to see her kids, that's where she was going. Last thing on her mind. Here she is being plundered and sexually battered repeatedly and hand cuffed, all of these things, and she's still talking about where she was going.

(R2. 626-27). That is not what Fields said. It is a dressed-up version of what Fields said, dressed up so as to make an emotional appeal to the jury.

An examination of Fields' testimony (see R2. 299-300) shows that the victim did not say "Just spare me. I've got to get up to Virginia, got to be at that custody hearing. Just spare me my life. I'll do anything." The statements Fields attributed to her were these: "Is you-all going to do anything to me? . . . Is you-all going to take me back to my car? Is you-all going to kill me or what?" (R2. 299). Nor did Fields testify that she said she was going to see her kids. Here is the actual testimony:

> Q. Did she tell you why she was -- where she was going?
>
> A. Well, she told me, you know, she had some kids, you know, somewhere. You know, I don't know where it was. You know, I forgot.

(R2. 300).

It was, of course, much more emotional for the prosecutor to argue that her children were the last thing on the victim's mind, and she was begging to be allowed to go to her children. However, the evidence did not support those statements. That the

victim at some point in the encounter mentioned she had children is more consistent with a consensual conversation preceding an accidental murder than with the inflammatory scenario concocted by the prosecutor.

In arguing that the murder was especially wicked, evil, atrocious, or cruel, the prosecutor also misrepresented the time it took for the kidnapping and killing of the victim. Although there was nothing in the record to support it, the prosecutor suggested that the victim was terrorized over a period of "an hour, maybe? Maybe it was longer than that . . . maybe it was two hours." (R2. 627).

In arguing that the murder took place during a kidnapping, the prosecutor stated: "The defendant suggests there was partying going on, during his statement that he gave to Detective West. I will suggest there was no partying going on in this abduction. Her blood alcohol was zero-point-zero. That means she hadn't had anything to drink. Dr. McConaghie was clear on that." (R2. 623). That argument misrepresents Mr. Robinson's statement to Detective West. Mr. Robinson told West that he and Fields had been at a party at a joint in Orange Mills before driving to I-95, but Mr. Robinson did <u>not</u> refer to any "partying" in the cemetery or any drinking by the victim. The argument was a culmination of the words the <u>prosecutor</u> put into the case during his leading questions on direct examination of Clinton Bernard Fields (R2. 304). It was a continuation of the closing argument in guilt phase when he had incorrectly attributed to

Pearl a promise that the evidence would show drinking by the victim (R2. 621). The prosecutor built a straw man in the case by saying that Mr. Robinson had used the word "partying" and Pearl had promised proof of the victim's drinking, just so the prosecutor could then disprove it, in the process making Mr. Robinson out to be a liar and appealing to the emotions of the jury. Mr. Robinson never claimed that the victim had anything to drink, but the prosecutor's argument calls him a liar for saying that she did, again without objection.

B. THE PROSECUTOR MADE AN IMPERMISSIBLE DISTINCTION BETWEEN STATUTORY AND NON-STATUTORY MITIGATING FACTORS.

The prosecutor set up a distinction between statutory and non-statutory mitigation. The prosecutor made that a theme of his argument for death. The prosecutor introduced his discussion of aggravation in this way:

> Now, the Judge is going to explain to you, when I am through and Mr. Pearl is through, what the aggravated factors are for the death penalty and what the mitigating factors are for the death penalty.
>
> Now, you've heard Dr. Krop state yesterday that there are no statutory mitigating factors. There are going to be statutory aggravating factors. I will submit to you there will be actually six statutory aggravating factors, I would submit, which call for the death penalty in this case.
>
> One of those factors -- and the Judge will read each one of these statutory factors to you -- I would submit call for the death penalty.

(R2. 617) (emphasis added). Later the prosecutor continued that theme when he said:

> There are four remaining aggravating factors the Judge will tell you, statutory aggravating factors.

(R2. 620).

When the prosecutor made that argument, he knew that the Judge would be instructing the jury on the aggravators because all of them, necessarily, were statutory. He also knew that the judge would not be explaining any mitigating factors other than the "any other factor" mitigator in Section 921.141. By emphasizing that his aggravating factors were statutory and the mitigating factors were non-statutory, he suggested that all of his aggravating factors were important while the mitigating factors were not. Such an argument would be impermissible if it were made explicitly, because the sentencer must not be precluded from considering any mitigating evidence that might convince a jury to recommend life rather than death. Hitchcock v. Dugger, 481 U.S.393 (1987); Eddings v. Oklahoma, 455 U.S. 104 (1982). It is just as impermissible if the argument is made implicitly as was the case here.

C. THE PROSECUTOR ARGUED A NON-STATUTORY AGGRAVATING CIRCUMSTANCE AND IMPROPERLY APPEALED FOR REVENGE.

It is axiomatic that a jury and judge in a Florida Capital case may consider in aggravation only those factors that are expressly set out in the capital sentencing statute. Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977). It is also obvious from a review of the statute that it does not constitute an aggravating circumstance that the victim was compliant or cooperative. However, the prosecutor in the instant case plainly

argued that the death penalty was appropriate because the victim "didn't do anything wrong . . . she did everything by the textbook. Went along with the whole ball of wax, submitted herself to the ultimate humiliation. For what? To be given the ultimate punishment." (R2. 636-37). The prosecutor argued that because the victim was compliant and was killed anyway, Robinson "deserves the ultimate punishment and nothing less." (R2. 637). It is appropriate for the prosecutor to argue that aggravating circumstances justify the death penalty. It is not appropriate for the prosecutor to argue that some other factor justifies the death penalty. However, that is exactly what the prosecutor did. In the same argument, the prosecutor cried out for revenge when he said that Robinson deserved the ultimate punishment because that is what he gave the victim. The entire improper argument went like this:

> She paid the ultimate penalty with her life. She didn't do anything wrong, I would suggest to you. She did everything by the textbook. Went along with the whole ball of wax, submitted herself to the ultimate humiliation. For what? To be given the ultimate punishment.
>
> I would suggest Mr. Robinson, as a result of this, deserves the ultimate punishment and nothing less. He deserves -- he is responsible for his actions. Persons are responsible for their actions. He is solely responsible for killing her, for snuffing out her life. The last thing in her mind was get to the kids, get to that hearing, the hearing she wasn't going to make. She suffered the ultimate punishment. I would suggest Mr. Robinson deserves no less.

(R2. 637).

The law clearly provides that when a victim suffers "the ultimate punishment" by a first degree murder, the law provides for two different punishments. Which of those two is appropriate is determined by the weighing of aggravating and mitigating circumstances. Emotion, revenge, and the cooperation or not of the victim play no part in that balance. For the prosecutor to argue that they control the balance was improper.

The cumulative effect of the improper prosecutorial arguments was to deprive Mr. Robinson of his fundamental right to a fair sentencing hearing, in violation of due process and the prohibition against cruel or unusual punishments. See DeFreitas v. State, 701 So. 2d 593, 596 (Fla. 4th DCA 1997), quoting Peterson v. State, 376 So. 2d 1230, 1234 (Fla. 4th DCA 1979) ("When the prosecutorial argument taken as a whole is 'of such a character that neither rebuke nor retraction may entirely destroy their sinister influence...a new trial should be granted, regardless of the lack of objection or exception'"). Here, such improper conduct constitutes fundamental error that requires reversal of the death sentence, even in the absence of proper objections by Mr. Robinson's trial counsel. See Pate v. State, 112 So. 2d 380, 385 (Fla. 1959). However, in the instant case, appellant counsel inexplicably failed to raise these issues, thereby prejudicing Mr. Robinson. Habeas relief is warranted.

CLAIM V

DURING THE COURSE OF VOIR DIRE, TRIAL, AND SENTENCING, THE COURT AND PROSECUTOR IMPROPERLY ASSERTED THAT SYMPATHY AND MERCY WERE IMPROPER CONSIDERATIONS FOR THE JURY, DEPRIVING MR. ROBINSON OF A RELIABLE AND INDIVIDUALIZED SENTENCING DETERMINATION.

During voir dire, the prosecutor told all of the prospective jurors that they must not consider sympathy or emotion toward Mr. Robinson with respect to their penalty phase determination (R2 214, 247-48).

At penalty phase, the court instructed the jury as follows:

> This case must not be decided for or against anyone because you feel sorry for anyone or are angry at anyone.
>
> * * * *
>
> Feelings or prejudice, bias, or sympathy are not legally reasonable doubts and they should not be discussed by any of you in any way.

(R2. 694)[7] (emphasis added).

In a capital sentencing proceeding, the United States Constitution requires that a sentencer not be precluded from "considering, as a mitigating factor, any aspect of defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978); Hitchcock v. Dugger, 481 U.S. 393 (1987). Furthermore, the Eighth Amendment requires "particularized

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[7]While this instruction may be appropriate in the guilt phase of a capital case, it is clearly not appropriate at penalty phase and is not part of the standard penalty phase jury instructions.

consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." Woodson v. North Carolina, 428 U.S. 280, 303 (1976). These principles require that the jury be free to consider feelings of sympathy and mercy in making its sentencing recommendation.

The prosecutor's statements during voir dire and the jury instructions that the jurors must disregard any sympathy they may have felt for Mr. Robinson undermined the jury's ability to weigh and evaluate all of the mitigating evidence. Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988) (en banc), rev'd on other grounds sub. nom. Saffle v. Parks, 494 U.S. 484 (1990). The jury's role in the penalty phase is to evaluate the circumstances of the crime and the character of the offender before deciding whether death is an appropriate punishment. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). A demand to disregard the consideration of emotions improperly suggests to the sentencer "that it must ignore the mitigating evidence about the [petitioner's] background and character." California v. Brown, 479 U.S. 538 (1987) (O'Connor, J., concurring).

By foreclosing the jury from considering emotion, sympathy or mercy toward the defendant, the prosecutor and the court prevented the jury from properly considering the mitigating evidence about the defendant. The jury instruction "carries with it the danger of leading the jury to ignore sympathy that is based on the mitigating evidence." Parks, 860 F.2d at 1553. The

Parks court noted that mitigating evidence must include compassion, understanding, and mercy, since the jury understands the defendant's personality in human terms. Id. at 1555. Parks recited the long line of Supreme Court cases recognizing the constitutional right of a defendant to have the jury consider these issues. See Gregg v. Georgia, 428 U.S. 153 (1976) (court can consider mercy in determining death penalty); Woodson v. North Carolina, 428 U.S. 280 (1976) (mitigating evidence is allowed during sentencing to provide for the consideration of "compassionate or mitigating factors stemming from the diverse frailties of human kind"); Eddings v. Oklahoma, 455 U.S. 104 (1982) (sentencer may not refuse to consider, as a matter of law, any relevant mitigating evidence); Caldwell v. Mississippi, 472 U.S. 320 (1985) (it is improper to shift sentencing responsibility to the appellate court because appellate court is not equipped to consider "the mercy plea [which] is made directly to the jury.").

Intertwined with sympathy are considerations of mercy, humane treatment, and compassion for the defendant. Parks, 860 F.2d at 1555-56.

> Therefore, the instruction that absolutely precluded the jury from considering any sympathy for [defendant] improperly undermined the jury's ability to consider fully petitioner's mitigating evidence. Furthermore, if a juror is precluded from responding with sympathy to the defendant's mitigating evidence of his own unique humanness, then there is an unconstitutional danger that his counsel's plea for mercy and compassion will fall on deaf ears."

Id. at 1556. The statements during voir dire and the instruction to the jury that they must disregard any sympathy for Mr. Robinson created an impermissible risk that the jury did not fully consider Mr. Robinson's mitigating factors in making the sentencing decision. Id.

The Supreme Court reversed Parks without reaching the merits of the petitioner's claim because the petitioner was precluded from seeking the benefit of a "new rule" in a habeas corpus proceeding under the doctrine of Teague v. Lane, 489 U.S. 288 (1989). Saffle v. Parks, 494 U.S. 484 (1990). Therefore, the en banc opinion of the Tenth Circuit in Parks stands as the most thorough, reasoned and persuasive discussion on this issue of emotion, sympathy and mercy instructions. The last Supreme Court decision to comment on an issue similar to this was California v. Brown, 479 U.S. 538 (1987). In Brown, the Court analyzed an instruction stating that the jury could not be swayed by "mere sentiments, conjecture, sympathy, passion, prejudice, public opinion or public feeling." In a five-to-four decision, the Court upheld the instruction because of the modifier "mere." Id. at 542. The Parks court distinguished Brown because of its "crucial" reliance on the modifier "mere." Parks, 860 F.2d at 1553. As in Parks, Mr. Robinson did not benefit from any qualifier during the voir dire, jury instructions, or argument by the State.

This Court should adopt the reasoning of Parks as a matter of Florida constitutional law, and grant Mr. Robinson habeas

relief. There was much in Mr. Robinson's life and background that evokes sympathy. Telling the jury to disregard such feelings in effect told them to disregard what they had heard in mitigation.

CLAIM VI

MR. ROBINSON'S JURY WEIGHED INVALID AND UNCONSTITUTIONALLY VAGUE AGGRAVATING CIRCUMSTANCES, IN VIOLATION OF HIS RIGHT TO AN INDIVIDUALIZED AND RELIABLE SENTENCING PROCEEDING, AS GUARANTEED BY THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Mr. Robinson's death sentence resulted from multiple errors in the instructions to his jury concerning the proper Eighth Amendment weighing of aggravating and mitigating circumstances. That there was fundamental constitutional error in the instructions to the jury is a matter which is now not open to debate. Espinosa v. Florida, 112 S. Ct. 2926, 120 L.Ed.2d 854 (1992). Nor is there any question that in an appropriate case, those errors require that a new sentencing proceeding be conducted. James v. State, 615 So. 2d 668 (Fla. 1993). In James, the Florida Supreme Court held that Espinosa must be retroactively applied to cases where the Espinosa error was preserved at trial and raised on direct appeal. Id. This is such a case.

A. "INVALID" AGGRAVATING CIRCUMSTANCES WERE PRESENTED TO MR. ROBINSON'S JURY.

In Sochor v. Florida, 112 S. Ct. 2114, 119 L.Ed.2d 326 (1992), the Supreme Court made clear that the Eight Amendment is violated whenever the sentencer in a "weighing" state, like

Florida, considers an "invalid" aggravating circumstance. An aggravating circumstance may be invalid either because it does not apply as a matter of law, Sochor, 119 L.Ed.2d at 341, or because it is so undefined that it fails to offer adequate guidance to the sentencer. As the Court noted in Sochor, either type of error tilts the weighing process in favor of death:

> In a weighing State like Florida, there is Eighth Amendment error when the sentencer weights an "invalid" aggravating circumstance in reaching the ultimate decision to impose a sentence. See Clemons v. Mississippi, 494 U.S. 738, 752 (1990). Employing an invalid aggravating factor in the weighing process "creates the possibility ... of randomness," Stringer v. Black, 503 U.S. __, __ (1992) (slip op. at 12), by placing a "thumb [on] death's side of the scale," id., thus "creat[ing] the risk of treat[ing] the defendant as more deserving of the death penalty." Id. Even when other valid aggravating factors exist as well, merely affirming a death sentence reached by weighing an invalid aggravating factor deprives a defendant of "the individualized treatment that would result from actual reweighing of the mix of mitigating factors and aggravating circumstances." Clemons, 494 U.S. at 752 (citing Lockett v. ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982)); see Parker v. Dugger, 498 U.S. ___, __ (1991) (slip op. at 11).

Sochor, 119 L.Ed.2d at 336-37.

In the instant case, the trial court instructed the jury to consider the "especially heinous, atrocious or cruel" aggravating factor, which the Florida Supreme Court later struck. Robinson v. State, 574 So. 2d 108, 112 (Fla. 1991). Moreover, the instruction given to Mr. Robinson's jury was unconstitutionally vague and encouraged the jury to find the aggravator for improper

reasons. Although the Florida Supreme Court has noted that if the "especially heinous" aggravating factor were applied to cases of this type, it would violate the requirement that aggravating factors genuinely narrow the class of defendants eligible for the death penalty, see Cannady v. State, 620 So. 2d 165, 169 (Fla. 1993), "we must presume, " Espinosa, 112 S. Ct. at 2928, that the jury did weigh the factor in this case. Moreover, the jury also received unconstitutionally vague instructions on the "cold, calculated and premeditated" and "avoid arrest" aggravating factors, and was allowed to consider "doubled" aggravating circumstances, based on identical facts, without being given a limiting instruction. Mr. Robinson's jury weighed multiple invalid aggravating circumstances, as discussed below. That fact requires that his death sentence be invalidated. Stringer v. Black, 112 S. Ct. 1130 (1992).

The Florida Supreme Court upheld the trial court's findings of the "cold, calculated and premeditated," and "avoid arrest" aggravating factors. Espinosa makes clear, however, that the analysis does not end with the trial court findings concerning aggravating circumstances, but must extend to the jury's weighing process also:

> Our examination of Florida case law indicates, however, that a Florida trial court is required to pay deference to a jury's sentencing recommendation, in that the trial court must give "great weight" to the jury's recommendation, whether that recommendation be life, see Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), or death, see Smith v. State, 515 So.2d 182, 185 (Fla. 1987), cert. denied, 485 U.S. 971 (1988);

> Grossman v. State, 525 So.2d 833, 839, n. 1 (Fla. 1988), cert. denied, 489 U.S. 1071-1072 (1989). Thus, Florida has essentially split the weighing process in two. Initially, the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances.
>
> It is true that, in this case, the trial court did not directly weigh any invalid aggravating circumstances. But, we must presume that the jury did so, see Mills v. Maryland, 486 U.S. 367, 376-377 (1988), just as we must further presume that the trial court followed Florida law, cf. Walton v. Arizona, 497 U.S. 639, 653 (1990), and gave "great weight" to the resultant recommendation. By giving "great weight" to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found. This kind of indirect weighing of an invalid aggravating factor creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor, cf. Baldwin v. Alabama, 472 U.S. 372, 382 (1985), and the result, therefore, was error.

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

1. "Heinous, atrocious, or cruel" aggravating circumstance

Espinosa specifically holds that Florida's standard jury instructions on the "especially heinous, atrocious or cruel" aggravating factor, see, e.g., Florida Standard Jury Instructions (Criminal) (1981), violate the Eighth Amendment. As the Court noted in Espinosa, the weighing of an aggravating circumstance violates the Eighth Amendment if the description of the circumstance "is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." Espinosa, 112 S. Ct. at 2928. The Court further

noted that it previously held "instructions more specific and elaborate" than Florida's "heinous, atrocious, or cruel" instruction to be unconstitutionally vague. Id.

After concluding that, in every sense meaningful to the Eighth Amendment, the Florida jury sentences, the Supreme Court had no difficulty in concluding that the provision of the Florida "heinous, atrocious, or cruel" instruction violated the Eighth Amendment. The error in Espinosa was not cured by any trial court "independent" weighing of aggravation and mitigation, even though in Espinosa, unlike the instant case, the trial court did not improperly weigh the "especially heinous" aggravator:

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

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

Espinosa makes it undeniable, therefore, that where a Florida jury recommends death after receiving either the standard jury instruction or any similar instruction that suffers from the defects identified by the Supreme Court in Godfrey, Maynard or

Shell, the verdict is infected with Eight Amendment error. In such cases, the death sentence is tainted because the jury presumably weighed an invalid aggravating factor, thus placing a thumb on "death's side of the scale." Stringer v. Black, 112 S. Ct. 113, 1337 (1992).

In the instant case, the court did not give the standard jury instruction on the "especially heinous" aggravating circumstance. The instruction actually given by the court, however, over the defendant's objection, suffered from the same defects as the standard jury instruction and virtually ensured that the jury would find and weigh the "especially heinous" aggravating factor, despite the fact that such a finding would violate both Florida law and the United States Constitution.

Prior to the resentencing proceeding, Mr. Robinson's trial counsel filed a motion to declare the statute unconstitutional, on the grounds that the "especially heinous" and "cold, calculated" aggravating circumstances were unduly vague (R2. 44-64). The court denied the motion, but requested counsel for Mr. Robinson to prepare proposed jury instructions on both factors, noting that in doing so, Mr. Robinson would not be waiving his objection (R2. 165-66). At the close of the evidence, co-counsel Quarles duly presented the court with proposed instructions (R2. 100, 554). The court noted its own difficulties with construing the two aggravating factors:

> The conscienceless or pitiless crime which is unnecessarily torturous to the victim. Well, I think that would be true in every case. If they live at all beyond the first blow; or

> even if there's any prior intimidation before, such as begging for your life and being fearful that they're going to kill you. And if it means all of that, how is the jury supposed to know that when you only tell them heinous, atrocious or cruel.

(R2. 556) (emphasis added). In a similar vein, the court asked, "And then you go over to cold, calculated. Do you know what that means?" The prosecutor replied, "I have an idea, but I'm probably wrong." (R2. 557).

At the penalty phase charge conference the next day, a lengthy discussion ensued over what instruction to give the jury. The court proposed modifying the requested instruction, (R2. 566), to which defense counsel objected (R2. 586). After noting again that the instructional issue had been fully preserved, (R2. 573, 606), the court again questioned whether it was possible to give the jury an appropriate limiting instruction:

> Well, if I tell them, according to you, that heinous means extremely wicked or shockingly evil, have I really told them anything other than what I told them when I said "heinous."
>
> If I tell that atrocious means outrageously wicked and vile, would anybody on the Jury know what that meant?
>
> Or cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others.
>
> I would imagine that the ordinary layman would assume that anytime you shoot somebody with a gun that's probably true.

(R2. 586-87).

Accordingly, the trial court proceeded to give, over the clearly preserved objection of Mr. Robinson, a modified version of the instruction proposed by the defense:

> The crime for which the Defendant is to be sentenced was especially wicked, evil, atrocious or cruel. To a lay person every first degree murder may appear to be heinous, atrocious or cruel, however the aggravating circumstance of an especially heinous, atrocious or cruel murder is, in Florida, intended to apply to those cases where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies, the conscienceless or pitiless crime which is unnecessarily torturous to the victim.
>
> As used in this aggravating factor, heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile. Cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others.
>
> This aggravating factor can be supported by evidence of actions of the offender preceding the actual killing.

(R2. 696-97) (emphasis added).

This instruction suffers from at least two fatal defects under Espinosa and the United States Supreme Court's other cases regarding the definition of aggravating factors. First, the instruction allows the jury to find and weigh the aggravating factor if they determine that the crime was either "heinous" or "atrocious" or "cruel," and then provides definitions of those terms that themselves provide no guidance to the jury, but merely "pejorative adjectives" that "describe the crime as a whole." See Arave v. Creech, 113 S. Ct. 1534, 1541 (1993). As a result,

even assuming arguendo that the definition of "cruel" or the "unnecessarily torturous" language was adequate, the definitions of "heinous" and "atrocious" permitted the lay jury to apply the aggravating factor to virtually any first degree murder. This is precisely the same defect that the Supreme Court found in the Mississippi jury instruction struck down in Shell v. Mississippi, 498 U.S. 1 (1990). See id. (Marshall, J., concurring).

Second, and perhaps more fundamentally, the last sentence of the instruction permitted the jury to find and weigh the aggravating factor based on anything at all that Mr. Robinson did prior to the homicide that the jury found to be "heinous" or "atrocious." This removed any conceivable limiting effect of the remainder of the instruction and gave the jury full, unlimited discretion to find the aggravating factor based on any of the facts of the case. Condemnation of such unchanneled discretion is the very heart of the holding in Espinosa. Moreover, the instruction allowed the jury to rely on the very facts that the Florida Supreme Court held on direct appeal could not be used in support of the aggravating factor. Robinson II, 574 So. 2d at 112.

In Espinosa, the Court held that where an improper instruction is given, it may be presumed that the jury weighed the invalid aggravating factor. 112 S. Ct. at 2928. In the instant case, in addition to this presumption, we can be virtually certain that the jury weighed the factor improperly. In closing argument, the prosecutor seized on the facts preceding

the homicide -- which the instruction allowed the jury to consider, but the Florida Supreme Court subsequently held could not be considered -- in arguing vehemently that the aggravating factor applied and that Mr. Robinson should be put to death.

The prosecutor then began his argument concerning the "especially heinous" aggravating, relying specifically on the instruction given by the court:

> The fourth aggravating factor, Judge Watson will tell you about, is the crime for which the Defendant was to be sentenced, talking about the murder charge, when we say the crime was especially wicked, evil atrocious or cruel.
>
> Now, the Judge is going to give you an instruction on this particular one, as far as defining what that means....
>
> One of the things he's going to tell you is this aggravating factor can be supported by evidence of actions of the offender, in this case Mr. Robinson, preceding the actual killing -- preceding the actual killing. That means facts, things that occurred leading up to her killing -- can prove whether or not this was especially wicked, evil, atrocious or cruel.

(R2. 625). The prosecutor then proceeded to list some of the myriad "actions of the offender . . . preceding the actual killing" that could be relied on to find that the crime was "especially heinous." These included the facts that the victim was handcuffed; that she was ordered to take off her clothes and raped; that Mr. Robinson "had the gun constantly"; that she begged for her life; that she was on her way to a custody hearing and wanted to see her children; and that the defendants were "partying." (R2. 625-27). The prosecutor then concluded his

argument with respect to the "especially heinous" factor by reminding the jury of the instruction they would receive:

> I would suggest to you that when a person is placed in that position, begging for her life, being terrorized and then a person takes a firearm and coldly puts it up to her cheek -- and you will see the photographs here -- and tightly puts it up there, squeezes the trigger, I would suggest that's <u>especially wicked, evil, atrocious or cruel</u>.
>
> And like I said, Judge Watson will tell you that part of that definition that this factor can be supported by <u>evidence of actions of the offender preceding the actual killing</u>. That's number four.

(R2. 628) (emphasis added).

Almost any juror, hearing this passionate plea or considering the facts recited by the prosecutor, in light of the instruction given by the court, would find that the murder was "especially heinous." Moreover, we can be virtually certain that the jury did in fact weigh the aggravator, because the trial judge who gave the instruction himself weighed it. The trial judge, who presumably interpreted the "especially heinous" aggravating factor in the same manner as he instructed the jury, found that the following facts supported it:

> Defendant jammed the pistol into the face of Beverly St. George and fired. Prior to her execution she had begged Defendant not to harm her. She was obviously terrorized -- having been taken out of her automobile at gun point in the middle of the night by two strange men, handcuffed, taken to a remote cemetery, sexually assaulted three times and shot. Robinson discussed the necessity of killing her in her presence. Her fear of harm or death during the commission of the crimes and prior to her death was proved

> beyond and to exclusion of reasonable doubt. Swafford v. State, 533 So.2d 270 (Fla. 1988).
>
> This murder was especially wicked, evil, atrocious and cruel. This aggravating circumstance was proved.

(R2. 110-11). These were the very facts that the Florida Supreme Court held could not be relied on to find the aggravating factor, given the additional facts that the victims' death was instantaneous or nearly so, and that the defendants assured the victim that they did not plan to kill her, but intended to release her. Robinson II, 574 So. 2d at 112 (finding "heinous, atrocious" aggravator inapplicable to the facts of this case). Indeed, the Florida Supreme Court has subsequently held that weighing the factor in these circumstances would be unconstitutional:

> We find that neither of these murders complies with the definition of heinous, atrocious or cruel as defined in Robinson, Williams, and Dixon. If we applied this aggravating factor under these circumstances, we would in effect be applying it to most, if not all, first-degree murders. Such a holding could result in a constitutional challenge to section 921.141 (5) (6), Florida Statutes (1989).

Cannady, 620 So. 2d at 169. There can be no question that the trial court's erroneous instruction and the prosecutor's argument urged the jury to apply an invalid aggravating factor, and it must be presumed that they did so. The constitutional error is apparent.

2. "Cold, calculated and premeditated" aggravating circumstance

As with the "heinous, atrocious, or cruel" aggravating circumstance, Mr. Robinson objected to the vagueness of the "cold, calculated, and premeditated" aggravating factor and requested a special instruction to the jury on the aggravating circumstance (R2. 44-64, 101, 554). Mr. Robinson continued to object to, and preserved, his objection to the instruction (R2. 572-73). Once again, the court gave the jury a modified version of the instruction:

> The crime for which the Defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of legal or moral justification.
>
> Florida law requires that before a murder can be deemed cold, calculated and premeditated, it must be committed without any pretense of legal or moral justification. The State must prove this last element beyond a reasonable doubt in addition to the other element of this particular aggravating factor.
>
> This aggravating circumstance is not to be utilized in every premeditated murder prosecution. Rather, this aggravating circumstance applies in those murders which are characterized as execution or contract murders or witness elimination murders.
>
> The cold, calculated and premeditated murder committed without any pretense of legal or moral justification <u>can also be indicated by circumstances such as advance procurement of a weapon, lack of resistance and the appearance of a killing carried out as a matter of course.</u>

(R2. 697-98) (emphasis added).

Like the instruction on the "especially heinous" aggravating factor, this instruction set the jury free to rely on virtually any of the facts of the case in finding the aggravating factor, and failed to convey to the jury the limiting construction placed on the aggravator by the Florida Supreme Court. In the absence of a limiting construction, the "cold, calculated" aggravating factor is unconstitutionally vague and fails to narrow the class of defendants eligible for the death penalty, see Arave v. Creech, 113 S. Ct. at 1542, because it conveys to the jury the notion that simple premeditation is sufficient for the aggravating factor to apply. An aggravating factor that would apply to every first degree murder would violate the Eighth Amendment. Id.; Cannady v. State, 620 So. 2d at 169.

The Florida Supreme Court has discussed the "cold calculated" aggravating factor on numerous occasions. See, e.g., McCray v. State, 416 So. 2d 804, 807 (Fla. 1982); Combs v. State, 403 So. 2d 418 (Fla. 1981). The court has further defined "cold, calculated, and premeditated" to require proof of "heightened premeditation":

> 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). The Court's subsequent decisions have plainly recognized that cold, calculated and premeditated requires proof beyond a reasonable doubt of a "careful plan or prearranged design." Mitchell v. State, 527 So. 2d 179, 182 (Fla. 1988) ("the cold, calculated and premeditated factor [ ] requir[es] a careful plan or prearranged design."). The Florida Supreme Court requires trial courts to apply these limiting constructions and consistently rejects this aggravator when these limitations are not met. See, e.g., Gore v. State, 599 So. 2d 978, 986-7 (Fla. 1992); Jackson v. State, 599 So. 2d 103, 109 (Fla. 1992); Green v. State, 583 So. 2d 647, 652-3 (Fla. 1991); Sochor v. State, 580 So. 2d 595, 604 (Fla. 1991); Holton v. State, 573 So. 2d 284, 292 (Fla. 1990); Bates v. State, 465 So. 2d 490, 493 (Fla. 1985).

Although the Florida Supreme Court has attempted to require more for this aggravating circumstance than simple premeditation, the jury was not told that in Mr. Robinson's case. Instead, the jury was given a confusing melange of an instruction that left them free to find the aggravating circumstance on the basis of a host of factors other than the required heightened premeditation.

For example, they were told that they could find the factor if they determined that the crime was a "witness elimination" murder (R2. 697). Obviously, this instruction encouraged the jury to improperly "double" the "cold, calculated" and "avoid arrest" aggravating factors.[8] Moreover, the only evidence to support the conclusion that this was a "witness elimination" murder was from Clinton Fields, to the effect that Mr. Robinson told Fields that he had to kill the victim because she could identify him as a witness, immediately before he shot the victim (R2. 300). Had the jury been properly instructed that the aggravating factor requires a "careful plan or prearranged design," however, they could well have rejected the factor, even if they believed that the crime was a witness elimination murder. Additionally, the jury was also told that they could find the factor if they believed that the crime was an "execution" murder (R2. 697). The fatal wound was a contact wound (R2. 433). The jury may well have believed that the homicide was an "execution" murder on that basis, and therefore that they were required to find and weigh the factor, even in the absence of proof beyond a reasonable doubt of heightened premeditation. Finally, the instruction allowed the jury to find the aggravating factor based on facts like "advance procurement of a weapon" and lack of resistance by the victim (R2. 698). Neither the victim's lack of resistance nor the fact that Mr. Robinson had a gun with him (in the obvious absence of any evidence of a preconceived plan on Mr. Robinson's

[8]See the discussion of this improper doubling, below.

part to kill either the victim or anybody else) had anything to do with heightened premeditation. Yet the instruction invited the jury to find and weigh the aggravating circumstance, based on precisely such facts.

The State was quick to emphasize this invitation to the jury in closing argument. The State repeatedly urged the jury to find the circumstance, pursuant to the instruction, based on facts that either have nothing to do with heightened premeditation or at best are consistent with the degree of premeditation required for first degree murder. For example, the State began its argument on this factor as follows:

> The judge again, will give you another instruction that explains this, and he will go through different factors that help to prove whether or not a murder case is cold and calculated and done in a premeditated manner, without any pretense of legal or moral justification.
>
> The judge will tell you that it can be indicated by circumstances showing such facts as advance procurement of a weapon. Did Mr. Robinson have a weapon before he approached Mrs. St. George that evening? Of course he did. Lack of resistance or provocation. She certainly lacked any resistance, I would suggest to you that.

(R2. 628). Obviously, the facts that Mr. Robinson had a gun before he approached the victim, and that the victim offered no resistance, are fully consistent with a variety of mental states, including the defense theory of negligent homicide or accidental homicide during the commission of a felony. They do nothing to prove heightened premeditation. Yet the instruction and argument urged the jury to find and weigh the "cold, calculated"

aggravating circumstance on the basis of those facts alone. Similarly, the State argued at length that because the facts were inconsistent, in its view, with Mr. Robinson's accidental homicide theory, the crime was cold and calculated (R2. 629-34). Even if true, this argument invited the jury, consistent with the instruction, to find the "cold, calculated" aggravating factor based solely on evidence that the crime was premeditated, not that it involved heightened premeditation.

Espinosa, and Sochor now make clear that the instruction to the jury was Eighth Amendment error. In Sochor, the Supreme Court held that the Florida Supreme Court's striking of the "cold, calculated and premeditated" aggravating factor meant that Eighth Amendment error had occurred. The aggravating factor was "invalid in the sense that the Supreme Court of Florida had found [it] to be unsupported by the evidence . . . It follows that Eighth Amendment error did occur when the trial judge weighed the coldness factor in the instant case." Sochor, 119 L.Ed.2d at 341.[9] Failure to provide a limiting instruction concerning the aggravating circumstance likewise renders it invalid. Espinosa; Hodges v. Florida, 113 S. Ct. 33, 121 L.Ed.2d 6 (1992) (remanding

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[9]In Sochor, the court struck the "cold, calculated and premeditated" aggravating factor because the evidence did not satisfy the limiting construction requiring "heightened" premeditation. Sochor v. State, 580 So. 2d 595, 603 (Fla. 1991). Although the trial court found this aggravator and the Florida Supreme Court upheld it, Mr. Robinson does not concede that the aggravator applies to his case. Mr. Robinson argued at trial and on direct appeal that this aggravator did not apply. Mr. Robinson contends that a properly instructed jury would have rejected this aggravator in light of this evidence.

in light of Espinosa a case raising the constitutionality of the "cold, calculated" jury instruction; cf. Hodges v. State, No. 74,671 (Fla., April 15, 1993) (refusing to address the issue on procedural grounds).

Mr. Robinson's jury was not instructed about these limitations and presumably found this aggravator present. Espinosa, 112 S. Ct. at 2928. Under these circumstances, the erroneous instruction tainted the jury's recommendation, and in turn the judge's death sentence, with Eighth Amendment error. Id.

3. "Avoid arrest" aggravating circumstance

In cases, like the instant case, where a person other than a police officer is killed, the Florida Supreme Court has required proof beyond a reasonable doubt that the dominant or only motive of the killing was to eliminate a witness in order for this aggravating factor to apply. Perry v. State, 522 So. 2d 817 (Fla. 1988); Herzog v. State, 439 So. 2d 1372 (Fla. 1983). Mr. Robinson's jury was never informed of this limiting construction. Instead, the trial court instructed the jury on this aggravating circumstance in the bare language of the statute:

> The crime for which the Defendant is to be sentenced was committed for the purpose of avoiding a lawful arrest.

(R2. 696).

In the absence of a limiting instruction, the jury was left with virtually no guidance other than that provided by the State in its closing argument concerning the application of this

aggravating factor. The State argued that they could rely on a variety of facts to find the aggravating factor, including the fact that Mr. Robinson allegedly destroyed evidence and committed other acts after the homicide in an attempt to avoid detection (R2. 635-36). Such acts, of course, do nothing to prove that the homicide was committed in order to eliminate a witness, but there was no way for the jury to know that that was the critical inquiry. Moreover, the fact that a defendant kidnaps a victim and takes her to a secluded place to rape her does not in itself support a finding that the murder was committed to avoid arrest. Bates v. State, 465 So. 2d 490, 492-93 (Fla. 1985). Accordingly, the instruction on the "avoid arrest" aggravating factor failed to offer the jury any meaningful guidance, and thus violated the Eighth Amendment.

4. "Doubling of the "cold, calculated and premeditated" and "avoid arrest" instructions

The exact same evidence was used to support the aggravating factors that the homicide was "cold, calculated and premeditated" and that it was committed to avoid arrest. That evidence was Clinton Fields' testimony that immediately before shooting the victim, Mr. Robinson told Fields that Mr. Robinson had to kill the victim because she could identify him (R2. 300). There is no other evidence to support beyond a reasonable doubt the presence of either heightened premeditation or the intent to eliminate a witness. Indeed, in the instant case, the two aggravating factors are one and the same -- according to the State's theory, Mr. Robinson made a conscious decision to kill the victim because

she could be a witness against him (See the State's closing argument, at R2. 630-34) (crime was "cold, calculated" in that Mr. Robinson shot the victim because she could be a witness against him); and (R2. 635-36) (crime was committed to avoid arrest, on same basis).

It has long been the law of this State that two aggravating factors that are both based on the same facts cannot be separately weighed against the defendant. Provence v. State, 337 So. 2d 783 (Fla. 1976); Thomas v. State, 456 So. 2d 454 (Fla. 1984). Accordingly, counsel for Mr. Robinson filed a requested jury instruction, seeking to inform the jury that they should not weigh separately any two aggravating circumstances that were both based on the same facts (R2. 94-95, 564). The court expressly noted that the filing of the requested instructions preserved the issues raised therein (R2. 600, 606).

On direct appeal, Mr. Robinson raised this issue, which was rejected by the Florida Supreme Court, relying on Suarez v. State, 481 So. 2d 1201 (Fla. 1985), cert. denied, 476 U.S. 1178 (1986); Robinson II, 574 So. 2d at 113 n.7. The next year, however, in Castro v. State, 597 So. 2d 259 (Fla. 1992), the Florida Supreme Court held that the same instruction requested by Mr. Robinson should have been given to Castro's jury. Id. at 261; (see R2. 94-95). Clearly, it was error to deny giving the requested instruction to Mr. Robinson's jury.

That error involved Mr. Robinson's fundamental constitutional rights. As the Supreme Court made clear in

Espinosa, the Florida penalty phase jury sentences. Espinosa, 112 S. Ct. at 2928. Where the jury sentences, "it is essential that the jurors be properly instructed regarding all facets of the sentencing process." Walton v. Arizona, 497 U.S. 639, 653 (1990). In the instant case, the failure to give the doubling instruction left the jury free to improperly give separate weight to the "cold, calculated" and "avoid arrest" aggravating factors. Denial of the instruction was Eighth Amendment error, which invalidates the death sentence. Stringer v. Black, 112 S. Ct. 1130 (1992).

B. THE EIGHTH AMENDMENT ERROR WHICH INFECTED THE JURY'S WEIGHING PROCESS IS NOT HARMLESS BEYOND A REASONABLE DOUBT.

The effect of jury weighing of an invalid aggravating factor on the resulting death sentence has been discussed by the United States Supreme Court in a number of cases, notably Espinosa and Stringer v. Black, 112 S. Ct. 1130 (1992). In Stringer, the Court held that relying on such an aggravating factor, particularly in a weighing state, invalidates the death sentence;

> Although our precedents do not require the use of aggravating factors, they have not permitted a state in which aggravating factors are decisive to use factors of vague or imprecise content. A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying on the existence of an illusory circumstance. Because the use of a vague aggravating factor in the weighing

> process creates the possibility not only of randomness but also of bias in favor of the death penalty, we cautioned in Zant that there might be a requirement that when the weighing process has been infected with a vague factor the death sentence must be invalidated.

Id. at 1139 (emphasis added).

Consideration of an invalid aggravating factor distorts the entire weighing process, adding improper weight to death's side of the scales and depriving the defendant of the right to an individualized sentence:

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

Id. at 1137. The jury's "weighing process" in Mr. Robinson's case was "skewed" in the same way that the process was skewed by the invalid aggravator in Espinosa.

The Florida Supreme Court did not conduct any review of the effect of the error in the instructions to Mr. Robinson's jury on the "heinous, atrocious, or cruel," "cold, calculated and premeditated," or the "avoid arrest" aggravating factors. On direct appeal, the Court never acknowledged that there was any error in the jury instructions. Robinson II, 574 So. 2d at 113 n.6. Mr. Robinson's jury was presented with three aggravating factors that were invalid under Espinosa. The State argued with equal furor that these three aggravating factors were applicable and justified a sentence of death. None were emphasized more or

less than the other. Any one of the errors standing alone requires a resentencing in this case before a new jury.

The instructional errors in this case were similar, but even more prejudicial to Mr. Robinson, than the error that the Florida Supreme Court held required reversal in James, 615 So. 2d at 668. On direct appeal, the Florida Supreme Court struck the "especially heinous" aggravating factor, leaving four valid aggravating factors and no mitigating factors. James v. State, 453 So. 2d 786, 792 (Fla. 1984), cert. denied, 469 U.S. 1098 (1984). The court determined that the trial court's error in finding the aggravating factor was harmless. James, 453 So. 2d at 792. However, on postconviction appeal, when the court considered the effect of the Espinosa error in instructing James' jury on the invalid aggravating factor, it could not say that the error was harmless:

> In closing argument the state attorney argued forcefully that the murder was heinous, atrocious or cruel. On appeal, on the other hand, we held that the facts did not support finding that aggravator. James, 453 So. 2d at 792. Striking that aggravator left four valid ones to be weighed against no mitigators, and we believe that the trial court's consideration of the invalid aggravator was harmless error. We cannot say beyond a reasonable doubt, however, that the invalid instruction or that its recommendation would have been the same if the requested expanded instruction had been given.

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

In the instant case, as in James, the Florida Supreme Court struck the "especially heinous" aggravating factor. Robinson II,

574 So. 2d at 112. Here, too, the State Attorney "argued forcefully" that the aggravator applied. Five purportedly valid aggravating factors were left after the "especially heinous" aggravator was struck, but in contrast to James, the trial court here found three significant mitigating factors: that Mr. Robinson had a difficult childhood; that he was subject to physical and sexual abuse as a child; and the absence of his mother (R2. 112). The defense psychologist also testified as to four additional mitigating circumstances rejected by the court; that Mr. Robinson was incarcerated in an adult facility as a child; that he was intoxicated at the time of the offense; that he suffers from a psychosexual disorder; and that he functions well in prison (R2. 516-20) (see generally R2. 509-16). While the court rejected those mitigators, the jury may well have accepted one or more of them. Moreover, four jurors voted for life even after having been instructed to weigh the invalid aggravating factor (R2. 713). Thus, since the error was not harmless in James, the error with respect to the "especially heinous" aggravating factor alone cannot be harmless here. When the effect of the additional unconstitutional instructions on the "cold, calculated" and "avoid arrest" aggravating factors is considered as well, there can be no question that the multiple jury instruction errors prejudiced Mr. Robinson.

Mr. Robinson's jury voted for death by the narrow margin of eight to four. Had just two more jurors found the scales tipped in favor of mitigation, Mr. Robinson would have been sentenced to

life -- not death. This Court cannot assume that the sentence would have been death if "the thumb" of an invalid aggravating circumstance -- not to mention two other fingers -- "was removed from death's side of the scale." Stringer, 112 S. Ct. at 1137. This Court cannot find "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Chapman v. California, 386 U.S. 18, 24 (1967). Petitioner urges this Court to reconsider this claim in light of the aforementioned changes in the law subsequent to its denial of Mr. Robinson's direct appeal.[10] Habeas relief is warranted.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Robinson respectfully urges this Court to grant habeas corpus relief.

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[10]Petitioner also notes that the vagueness of the aforementioned aggravators was properly objected to and preserved at trial and raised on direct appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing **PETITION FOR WRIT OF HABEAS CORPUS** has been furnished by United States Mail, first-class postage prepaid, to all counsel of record on April 12, 1999.

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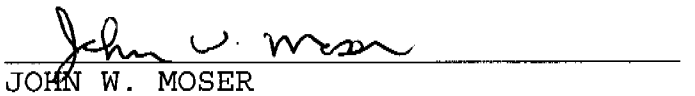

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