FILED
SID J. WHITE
JAN 25 1993
CLERK, SUPREME COURT
By
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

NO. 81121

LARRY JOE JOHNSON,

Petitioner,

v.

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

Respondent.

PETITION FOR EXTRAORDINARY RELIEF AND FOR A WRIT OF HABEAS CORPUS

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INTRODUCTION

There can be no question that Mr. Johnson's death sentence stands in violation of the Eighth and Fourteenth Amendments.[1] The only question is whether this Court will face up to the fundamental constitutional error and address it before dispatching Mr. Johnson to his death. Certainly, in the past, Florida has executed individuals whose death sentences were tainted by as-of-then-unrecognized constitutional error only later to be advised by the United States Supreme Court of a systemic constitutional defect. E.g., Straight v. Wainwright, 422 So. 2d 827 (Fla. 1982)(instruction to jury limiting its consideration to statutory mitigating factors was not error). However, in Mr. Johnson's case, this Court is already on notice of a systemic defect which was present in Mr. Johnson's trial and raised in Mr. Johnson's direct appeal. Espinosa v. Florida, 112

'As explained herein, Mr. Johnson's jury was given unfettered discretion to return a death sentence. The jury was instructed on eight aggravating circumstances, all without the narrowing constructions necessary to narrow and channel the sentencing discretion. Had the jury known the law as the judge knew the law, at least four "thumbs" would have been removed from the death side of the scale. "[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." Stringer v. Black, 112 S. Ct. 1130, 1137 (1992). Nevertheless in this case, the tainted jury recommendation was presumed by this Court on direct appeal to be free from "any improper prejudice," and therefore, was entitled to great weight.

Substantial statutory and nonstatutory mitigation was presented at Mr. Johnson's penalty phase. As Justice McDonald noted in dissent on direct appeal, "[a] sympathetic jury could logically have recommended life." Johnson v. State, 442 So. 2d 185, 191 (Fla. 1983)(McDonald, J., concurring in part and dissenting in part, in an opinion in which Overton, J., concurs).

112 S. Ct. 2926 (1992), has issued advising this Court that its prior reasoning as to the non-applicability of the Godfrev v. Georgia/Maynard v. Cartwright line of cases was erroneous. Espinosa holds that in Florida, the judge sentencing does not preclude the existence of harmful Maynard error before the jury because the great weight given the jury's recommendation bleeds through and taints the judge's decision. This Court's resolution of Mr. Johnson's direct appeal was wrong.

Mr. Johnson argued on direct appeal to this Court that the jury did not have sufficient guidance as to how to apply the facially vague and overbroad statutory language setting forth aggravating circumstances. The jury was given the heinous, atrocious or cruel aggravating factor without the narrowing constructions which rendered the factor inapplicable despite Mr. Johnson's request at trial that the jury be instructed that the factor was inapplicable. The jury received no guidance as to what "avoiding arrest" meant, again despite Mr. Johnson's request to instruct the jury that this Court's narrowing construction rendered the factor inapplicable. Espinosa establishes that Mr. Johnson's direct appeal complaint was well taken: the jury should have been advised that as a matter of law "heinous, atrocious or cruel" was not to be weighed, and "avoiding arrest" required high proof that the sole purpose of the homicide was witness elimination. It is now up to this Court to own up to its error in rejecting Mr. Johnson's appeal as meritless.

This is Mr. Johnson's third habeas corpus petition in this

Court. It is premised upon the presence of fundamental error. State v. Johnson (Cecil), 18 Fla. L. Weekly 55 (Fla. 1993). Recent decisions by the United States Supreme Court have established that Mr. Johnson is entitled to habeas corpus relief, and that the prior dispositions of Mr. Johnson's claims by this Court were in error. Mr. Johnson previously challenged his death sentence, including the jury's death recommendation. On direct appeal, he argued that the jury instruction on the "avoiding arrest" aggravating factor was insufficient, that as a matter of law the jury should have been instructed that the "heinous, atrocious or cruel" aggravating factor was not applicable, and that the felony murder aggravating factor constituted an unconstitutional automatic aggravating factor.

The United States Supreme Court's decisions in Espinosa v. Florida, 112 S. Ct. 2926 (1992), and Richmond v. Lewis, 113 S. Ct. 528 (1992), establish that fundamental error occurred at Mr. Johnson's penalty phase when the jury was given unbridled, unguided discretion to return a death sentence. Fundamental error occurs when the error is "equivalent to the denial of due process." State v. Johnson [Cecil), 18 Fla. L. Weekly at 56. Fundamental error includes facial invalidity of a statute due to "overbreadth" which impinges upon a liberty interest. Trushin v. State, 425 So. 2d 1126, 1129 (Fla. 1983). Florida's statutory list of aggravating circumstances is facially[2] vague and

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[2]The word "facially" is used to denote the statutory language stripped of this Court's narrowing constructions. The (continued...)

overbroad. This is so because the aggravating circumstances as listed in the statute "fail[] adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman V. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed.2d 346 (1972)." Maynard V. Cartwright, 406 U.S. 356, 361-62 (1988).[3]

This vagueness and overbreadth can be cured by limiting constructions which define the statutory language. However, the limiting construction must actually be communicated to and relied upon by the sentencer. Richmond, 113 S. Ct. at 535.[4] Espinosa

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[2](...continued)
language used in the statute has been repeatedly held to be vague and overbroad by the United States Supreme Court. See Richmond V. Lewis.

[3]This Court has recognized innumerable times that Florida's statutory language on aggravating factors requires further refinement in order to avoid vague and overbroad application. See, e.g., Clark v. State, 17 Fla. L. Weekly 655 (Fla. 1992) ("heinous, atrocious or cruel" aggravating factor applies only "where the murder is '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'"); Robinson V. State, 17 Fla. L. Weekly 635, 636 (Fla. 1992) ("avoiding arrest" aggravating factor applies only where there exists "very strong" proof of "the requisite intent"); Small v. State, 533 So.2d 1137, 1142 (Fla. 1988) ("pecuniary gain" aggravating factor applies only where pecuniary gain is shown to be the primary motive for the murder); Porter v. State, 564 So. 2d 1060, 1063-64 (Fla. 1990) (where an aggravator merely repeats an element of the crime of first degree murder, the aggravator is vague and overbroad, and thus must be further defined); Provence v. State, 337 So. 2d 783 (Fla. 1976) (two separate aggravating factors may not be based upon a single set of facts).

[4]Florida has adopted narrowing constructions which may be sufficient to cure the defect in the statutory language. But as (continued...)

and Richmond establish that Florida's vague and overbroad list of aggravating factors has not been cured in this manner. For example, in Essinosa, the United States Supreme Court held that Florida's "heinous, atrocious or cruel" aggravating factor is unconstitutionally vague and overbroad. Essinosa further held that it violates the Eighth Amendment for a Florida capital sentencing jury to be instructed on a vague and overbroad aggravating factor.[5] Richmond v. Lewis explained that although the vague and overbroad statutory language listing an aggravating factor may be cured by a limiting construction, that limiting construction must actually be employed by the sentencer. The upshot of Espinosa and Richmond is that in Florida, the vague and overbroad statutory language listing aggravating factors can only be cured by providing the jury with definitions limiting the application of the aggravating factors and informing the jury regarding how these factors are to be applied. Failing to cure the vague and overbroad statutory language, as occurred in Mr. Johnson's case, constitutes fundamental error.

This fundamental error must now be corrected in Mr. Johnson's case. In State v. Johnson (Cecil), 18 Fla. L. Weekly

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[4](...continued)
explained in Richmond, the cure only works if it is received by the sentencer so that the sentencer considers and applies the narrowing construction in reaching its decision.

[5]This reasoning, of course, applies to any aggravating factor whose statutory language is vague and overbroad, not just to the "heinous, atrocious or cruel" aggravating factor. See Hodges v. Florida, 113 S. Ct. 33 (1992) (remanding for reconsideration in light of Espinosa where only aggravating factor at issue was "cold, calculated and premeditated").

55 (Fla. 1993), this Court held that fundamental error is error which is "basic to the judicial decision under review and equivalent to a denial of due process." 18 Fla. L. Weekly at 56. In Johnson, this Court determined that a statute which "affects a quantifiable determinant of the length of sentence that may be imposed on a defendant" involves "fundamental 'liberty' due process interests." Id. This Court thus held that a facial challenge to the statute's constitutional validity constituted fundamental error. Id. In Johnson, the statute at issue affected whether the defendant would receive a maximum sentence of twenty-five years or a maximum sentence of three and one half years. Id. In this case, the statute at issue affects whether Larry Joe Johnson will live or die. Clearly, the facial constitutionality of the capital sentencing statute constitutes fundamental error which must now be considered.[6]

On June 8, 1992, the United States Supreme Court reversed this Court's longstanding jurisprudence and held Maynard v. Cartwright, 486 U.S. 356 (1988), is applicable in Florida. Sochor v. Florida, 112 S. Ct. 2114 (1992). Thus, Eighth Amendment error before either of the constituent sentencers (in Florida the constituent sentencers are the judge and the jury) requires application of the harmless-beyond-a-reasonable-doubt standard. Specifically, the Supreme Court held:

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[6]Additionally, as in Johnson (Cecil), the challenge presented herein to the capital sentencing statute "falls within the definition of fundamental error as a matter of law and does not involve any factual application." 18 Fla. L. Weekly at 56.

> In a weighing State like Florida, there is Eighth Amendment error when the sentencer weighs an **"invalid"** aggravating circumstance in reaching the ultimate decision to impose a sentence. See Clemons v. Mississippi, **494** U.S. **738, 752, 110 S.** Ct. **1441,** 1450, 108 L.Ed.2d **725 (1990).** Employing an invalid aggravating factor in the weighing process "creates the possibility **...** of randomness," Stringer v. Black, **503** U.S. ____, ____, **112 S.** Ct. **1130,** 1139, 117 L.Ed.2d 367 (1992), by placing a "thumb [on] death's side of the scale," **id.,** at ___, **112 S.** Ct., at **1137,** ____ (slip op., at 8), thus **"creat[ing]** the risk [of] treat[ing] the defendant as more deserving of the death penalty," **id.,** at ___, 112 S. Ct., at **1139.** Even when other valid aggravating factors exist as well, merely affirming a 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, supra, **494** U.S., at **752, 110 S.** Ct., at **1450** (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. ____, ____, **111 S. Ct. 731, 739, 112** L.Ed.2d **812 (1991).** While federal law does not require the state appellate court to remand for resentencing, it must, short of remand, either itself reweigh without the invalid aggravating factor or **determine** that weighing the invalid factor was harmless error. **Id.,** at ____, 111 S. Ct., at **738.**

Sochor, 112 S. Ct. at 2119.

On June **29, 1992,** in Espinosa v. Florida, **112 S.** Ct. **2926 (1992),** the United States Supreme Court again reversed this Court and held that this Court had previously failed to correctly apply Maynard and Godfrey v. Georgia, **446** U.S. **420 (1980):**

> 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, **435** 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.
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> 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 Johnson **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.

112 S. Ct. at 2928.[7]

Espinosa and Sochor represent a change in Florida law which must now be applied to Mr. Johnson's claims. They establish that fundamental error occurred at Mr. Johnson's sentencing when his

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[7]In light of Sochor and Espinosa, the United **States** Supreme Court granted certiorari review and reversed eight other Florida Supreme Court decisions. **See** Beltran-Lopez v. Florida, **112 S.** Ct. **3021** (1992); Davis v. Florida, **112 S. Ct. 3021 (1992);** Gaskin v. Florida, **112 S.** Ct. **3022** (1992); **Henry v. Florida, 112 S.** Ct. **3021 (1992);** Hitchcock v. Florida, **112 S.** Ct. **3020 (1992);** Hodses v. Florida, **113** S. Ct. **33 (1992);** Ponticelli v. Florida, **113 S.** Ct. **32** (1992); Happ v. Florida, **113 S.** Ct. **399 (1992).**

jury was allowed to consider facially vague and overbroad aggravating circumstances. See Trushin v. State, 425 So. 2d 1126, 1129 (Fla. 1983)(facial invalidity of a statute constitutes fundamental error). In Thompson V. Dugger, 515 So. 2d 173, 175 (Fla. 1987), this Court held Hitchcock v. Dugger, 481 U.S. 393 (1987), to be a change in Florida law because it "represent[ed] a sufficient change in the law that potentially affect[ed] a class of petitioners, including Thompson, to defeat the claim of a procedural default." The same can be said for Espinosa and Sochor. The United States Supreme Court demonstrated this proposition by reversing a total of eight additional Florida death cases on the basis of the error outlined in Espinosa and Sochor. Moreover, the United States Supreme Court has further emphasized the importance of this line of cases in its recent decision in Richmond v. Lewis, 113 S. Ct. 528 (1992). There, the Supreme Court held that, where the statutory language on an aggravating circumstance is facially vague and overbroad, the error may be cured by the application of an adequate narrowing construction during the "sentencing calculus." 113 S. Ct. at 535.

An examination of this Court's jurisprudence demonstrates that Espinosa overturned two longstanding positions of this Court. First, this Court's belief that Proffitt v. Florida, 428 U.S. 242 (197), insulated Florida's "heinous, atrocious or cruel" circumstance from Maynard error was soundly rejected. Espinosa, 112 S. Ct. at 2928 ("The State here does not argue that the

'especially wicked, evil, atrocious, or cruel' instruction given in this case was any less vague than the instructions we found lacking in Shell, Cartwright or Godfrey"). As explained in Richmond v. Lewis, "'there is no serious argument that [this factor] is not facially vague.'" 113 S. Ct. at 534, quoting, Walton v. Arizona, 110 S. Ct. 3047, 3057 (1990). Thus, contrary to this Court's previously expressed view, the Florida statutory language on aggravating factors is facially vague and overbroad. To cure this Eighth Amendment defect, an adequate narrowing construction must be applied during a "sentencing calculus." Richmond,

Second, this Court's precedent that eighth amendment error before the jury was cured or insulated from review by the judge's sentencing decision was also specifically overturned. Espinosa, 112 S. Ct. at 2929 ("We merely hold that, if a weighing State decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances"); Richmond, 113 S. Ct. at 535 ("Where the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the state appellate court or some other state sentencer must actually perform a new sentencing calculus, if the sentence is to stand").

The first proposition was discussed at length in Smalley v. State, 546 So. 2d 720 (Fla. 1989). There, this Court held that, because of Proffitt, Florida was exempted from the scope of Maynard:

> It was because of this narrowing construction that the Supreme Court of the United States upheld the aggravating circumstance of heinous, atrocious, or cruel against a specific eighth amendment vagueness challenge in Proffitt V. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Indeed, this Court has continued to limit the finding of heinous, atrocious, or cruel to those conscienceless or pitiless crimes which are unnecessarily torturous to the victim. E.g., Garron v. State, 528 So.2d 353 (Fla. 1988); Jackson v. State, 502 So.2d 409 (Fla. 1986), cert. denied, 482 U.S. 920, 107 S.Ct. 3198, 96 L.Ed.2d 686 (1987); Teffeteller v. State, 439 So.2d 840 (Fla. 1983), cert, denied, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984). That Proffitt continues to be good law today is evident from Maynard v. Cartwrisht, wherein the majority distinguished Florida's sentencing scheme from those of Georgia and Oklahoma. See Maynard v. Cartwright, 108 S.Ct. at 1859.

546 So. 2d at 722. However, Espinosa clearly held that Proffitt did not insulate Florida's standard jury instruction from compliance with the Eighth Amendment. The statutory language is unconstitutionally vague and overbroad, and must be cured in each case by the application of adequate narrowing constructions.

The second longstanding rule of law overturned by Espinosa was the view that the judge's sentencing process somehow cured error before the jury. In Breedlove v. State, 413 So. 2d 1, 9 (Fla. 1982), this Court held that impermissible prosecutorial argument to the jury regarding aggravating circumstances was neither prejudicial nor reversible because the judge was not misled and did not err in his sentencing order. Under Espinosa, this conclusion was erroneous. Similarly, in Deaton v. State, 480 So. 2d 1279, 1282 (Fla. 1985), this Court held that the

prosecutor's jury argument in favor of improper doubling of aggravating factors was, in essence, cured when the judge properly merged the aggravating circumstances in his sentencing order. Under Espinosa, this conclusion was erroneous. In Suarez v. State, 481 So. 2d 1201, 1209 (Fla. 1985), this Court rejected a challenge to the jury instructions which failed to advise the jury of the prohibition against improper doubling. There, this Court concluded improper doubling was only error if the judge doubled up aggravators in his sentencing order ("it is this sentencing order which is subject to review vis-a-vis doubling"). Espinosa specifically rejects this reasoning. In Smalley, this Court distinguished Maynard on this basis: "In Oklahoma the jury is the sentencer, while in Florida the jury gives an advisory opinion to the trial judge, who then passes sentence." 546 So. 2d at 722. Espinosa clearly overturns this distinction ("neither actor must be permitted to weigh invalid aggravating circumstances," 112 S. Ct. at 2929).

Espinosa clearly rejected both of this Court's prior lines of reasoning. Florida juries must actually apply the narrowing constructions of the otherwise facially vague and overbroad aggravating factors. Further, the judge's awareness of the narrowing construction does not cure the overbroad statutory language where the judge is also required to give great weight to the jury's recommendation.

This Court has steadfastly held for many years that Maynard and Godfrey did not affect Florida's capital jury instructions

regarding aggravating circumstances. This Court repeatedly held that those cases and their progeny had no application in Florida. See Porter v. Dugger, 559 So. 2d 201, 203 (Fla. 1990)("Maynard does not affect Florida's death sentencing procedures"); Brown v. State, 565 So. 2d 304, 308 (Fla. 1990)("We have previously found Maynard inapposite to Florida's death penalty sentencing"); Occhicone v. State, 570 So. 2d 902, 906 (Fla. 1990)("Maynard [citation] did not make Florida's penalty instructions on cold, calculated, and premeditated and heinous, atrocious, or cruel unconstitutionally vague"); Mills v. Dugger, 574 So. 2d 63, 65 (Fla. 1990) (Maynard is "inapplicable to Florida, [does] not constitute such change[] in law as to provide post conviction relief").

This Court has specifically and repeatedly upheld the standard jury instructions against any Eighth Amendment challenge. In Cooper v. State, 336 So. 2d 1133, 1140-41 (Fla. 1976), this Court found that the trial court erred in finding the "heinous, atrocious or cruel" aggravating factor, but found no error in allowing the jury to rely on the aggravator because "the trial judge read the jury the interpretation of that term which we gave in Dixon. No more was required." In Vaught v. State, 410 So. 2d 147, 150 (Fla. 1982), Vaught argued "that the trial court failed to provide the jury with complete instructions on aggravating and mitigating circumstances." The contention was found to be "without merit. The trial court gave the standard jury instruction on aggravating and mitigating circumstances."

Similarly, in Valle v.State, 474 So. 2d 796 (Fla. 1985), this Court concluded, "the standard jury instructions on aggravating and mitigating circumstances, which were given in this case, are sufficient and do not require further refinements." 474 So. 2d at 805.[8]

The failure to advise the jury of the narrowing construction of **heinous,atrocious and cruel" was upheld by this Court in Smallev v. State.' However, as noted, Espinosa specifically and pointedly rejected this Court's reasoning in Smallev (when the sentencing judge gives great weight to the jury recommendation, he "indirectly weigh[s] the invalid aggravating factor we must presume the jury found.** 112 S. Ct. at 2928). This Court relied upon Smalley to reject Mavnard claims in a multitude of cases.[10]

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[8]In Valle, this Court cited Demps v. State, 395 So. 2d 501, 505 (Fla. 1981), for the proposition that the standard jury instructions "are sufficient and do not require further refinements." At issue in Demps was the failure to instruct the jury regarding nonstatutory mitigating factors. When the United States Supreme Court subsequently disagreed with the standard jury instructions on that point, it was held to be a substantial change in law which "defeat[ed] a claimed procedural default." Demps v. Dugger, 514 So. 2d 1092, 1093 (Fla. 1987).

'This Court had relied on Smallev in rejecting the identical claim made in Espinosa. See Espinosa v. Florida, 112 S. Ct. at 2928.

[10]Porter v. Dugger, 559 So. 2d 201, 203 (Fla. 1990); Clark v. Dugger, 559 So, 2d 192, 194 (Fla. 1990); Randolsh v. State, 562 So. 2d 331, 339 (Fla. 1990); Freeman v. State, 563 So. 2d 73, 76 (Fla. 1990); Brown V. State, 565 So. 2d 304, 308 (Fla. 1990); Smith v. Dusser, 565 So. 2d 1293, 1295 n.3 (Fla. 1990); Roberts v. State, 568 So. 2d 1255, 1258 (Fla. 1990); Occhicone v. State, 570 So. 2d 902, 906 (Fla. 1990); Robinson v. State, 574 So. 2d 108, 113 (Fla. 1991); Trotter v. State, 576 So. 2d 691, 694 (Fla. 1990); Engle v. Dugger, 576 So. 2d 696, 704 (Fla. 1991); Hitchcock v. State, 578 So. 2d 685, 688 (Fla. 1990); Shere v.

(continued...)

This Court recognized Hitchcock was a change in law because the Court found that the jury instructions given prior to Lockett failed to cure the Eighth Amendment error found in the Florida death penalty statute. Hitchcock further held that judge sentencing did not cure the constitutional defect before the jury. In addition, it rejected the notion that mere presentation of the nonstatutory mitigation somehow cleansed the statutory defect's taint. After Hitchcock, this Court recognized that the facial invalidity of the Florida death penalty statute constituted fundamental error where the jury had not been receiving a curing instruction. This Court held that habeas corpus petitions could be presented containing "Hitchcock" claims. Downs v. Duqqer, 514 So. 2d 1069, 1071 (1987). So too here, Espinosa establishes fundamental error where the sentencing jury does not receive the narrowing construction which is necessary to cure the facially vague and overbroad aggravating factors. State v. Johnson (Cecil), 18 Fla. L. Weekly at 56 (fundamental error occurs when the error is "equivalent to the denial of due process"); Trushin v. State, 425 So. 2d at 1129 (fundamental error includes facial invalidity of a statute due to "overbreadth").

"Fundamental fairness" may override the State's interest in finality. Moreland v. State, 582 So. 2d 618, 619 (Fla. 1991). "The doctrine of finality should be abridged only when a more

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[10](...continued)
State, 579 So. 2d 86, 95 (Fla. 1991); Davis v. State, 586 So. 2d 1038, 1040 (Fla. 1991).

compelling objective appears, such as ensuring fairness." Witt v. State, 387 So. 2d 922, 925 (Fla. 1980). "Considerations of fairness and uniformity make it very 'difficult to justify depriving a person of his liberty or his life, under process no longer considered acceptable and no longer applied to indistinguishable cases." Id. Facially vague and overbroad statutes which implicate a "liberty" interest and violate due process raise fundamental error questions which are cognizable even though not objected to at trial. State v. Johnson (Cecil). This Court held in Witt "that only major constitutional changes of law" as determined by either this Court or the United States Supreme Court are cognizable in post-conviction proceedings. 387 So. 2d at 929-30. Here, the decisions at issue have emanated from the United States Supreme Court. Espinosa; Richmond. Obviously, the decisions qualify under Witt to be changes in law.[11] The question is whether the decisions amount to a change of "fundamental significance." Witt, 387 So. 2d at 931.

According to the United States Supreme Court, Florida has been in violation of the Eighth Amendment since 1980, the year Godfrey was decided. The standard jury instructions which have

[11]In Witt, this Court cited Gideon v. Wainwright, 372 U.S. 335 (1963), as an example of a change in law which defeated any procedural default. As a result of Gideon, it was necessary "to allow prisoners the opportunity and a forum to challenge those prior convictions which might be affected by Gideon's law change." Witt, 387 So. 2d at 927.

been followed explicitly by this Court throughout that time period failed to cure the facially vague and overbroad statute.[12]

This was the precise situation this Court faced in Thompson v. Dugger, Downs v. Dugger, and Delap v. Dugger, wherein this Court ruled finality must give way to fairness. It is only fair that this Court give those with Espinosa and Richmond claims a forum. The error was perpetuated by this Court in repeatedly denying the precise Eighth Amendment challenge found meritorious in Espinosa and Richmond. The error in many ways is the same error at issue in Hitchcock, i.e., does the judge sentencing insulate fundamental errors before the jury from review. It was this Court's erroneous answer to that question which now taints Mr. Johnson's sentence of death.

Furthermore, this Court has held fundamental error can be raised at any time. To qualify as fundamental error, "the error must be basic to the judicial decision under review and equivalent to a denial of due process." State v. Johnson (Cecil), 18 Fla. L. Weekley 55, 56 (Fla. 1993). "The facial validity of a statute, including an assertion that the state is infirm because of overbreadth, can be raised for the first time on appeal ...." Trushin v. State, 425 So. 2d 1126, 1129 (Fla.

[12]In Gideon, it was determined by the federal courts that the new rule applied retrospectively. Linkletter v. Walker, 381 U.S. 618, 628 n.13 (1965). Thus, there as here, the question was whether those affected by the new rule have a state forum for presenting their claims. This Court must do as it did in Gideon and provide the forum.

1983).[13] Fundamental error may be raised in a petition for writ of habeas corpus. Way v. Dugger, 568 So. 2d 1263 (Fla. 1990); Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965).

Espinosa and Richmond establish that fundamental error occurred at the penalty phase proceedings leading to Mr. Johnson's sentence of death. Thus, Mr. Johnson files this petition representing his claims which were initially presented in his direct appeal.

I. PROCEDURAL HISTORY

Mr. Johnson was convicted of first-degree murder and robbery in the circuit court of the Third Judicial Circuit, in and for Madison County, Florida.[14] At the penalty phase, defense counsel moved for a judgment of acquittal on certain aggravating factors, arguing that the jury should be instructed that the "avoiding arrest" and "heinous, atrocious or cruel" aggravating factors did not apply because under the narrowing constructions adopted by this Court those factors were unsupported by the evidence (R. 930-31). The defense explained that it was requesting that the jury be instructed under this Court's case law the aggravating circumstances were not applicable. The objection and instruction request were overruled (R. 931), and

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[13] Here, the issue was raised on direct appeal and decided on the merits. Mr. Johnson seeks to raise the issue again in collateral proceedings in light of new decisions which are of "fundamental significance." Witt v. State, 387 So. 2d at 931.

[14] In this petition, the record from Mr. Johnson's direct appeal will be designated as "R. ___," with the appropriate page number.

the jury was instructed on aggravating circumstances in pertinent part as follows:

> The aggravating circumstances which you may consider are limited to such of the following as may be established by the evidence: ....
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> Four - that the crime for which the defendant is to be sentenced was committed while the defendant was engaged in the commission of any robbery, arson, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb; Five - that the crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting as escape from custody; Six - that the crime for which the defendant is to be sentenced was committed for pecuniary gain; Seven - that the crime for which the defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; and Eight - that the crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel.
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> Heinous means extremely wicked or shockingly evil.
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> Atrocious means outrageously wicked and vile.
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> Cruel means designed to inflict a high degree of pain; utter indifference to, or enjoyment of, the suffering of others; pitiless.

(R. 955-56).[15] Thus, the jury was allowed to consider

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[15]The instruction on "heinous, atrocious or cruel" was insufficient under Godfrey v. Georgia and Maynard v. Cartwright. In Maynard, the jury received this instruction:

> [T]he term "heinous" means extremely wicked or shockingly evil; "atrocious" means outrageously wicked and vile, "cruel" means pitiless, or designed to

(continued...)

aggravating factors which on the basis of law the jury knew nothing about, did not apply. **See** Stringer v. Black, 112 S. Ct. 1130 (1992). Having eight aggravating circumstances to weigh against the mitigation presented on Mr. Johnson's behalf, the jury recommended that Mr. Johnson be sentenced to death. Of course, the judge subsequently ruled only three aggravating circumstances actually applied.

The trial court gave great weight to the jury's recommendation and imposed a death sentence. However, the trial court determined that the "heinous, atrocious or cruel" aggravating factor did not apply because **"the** capital felony does not fit within the definition of 'especially heinous, atrocious,

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[15] (...continued)
inflict a high degree of pain, utter indifference to, or enjoyment of, **the** suffering of others.

Cartwright v. Maynard, **822** F.2d 1477, 1488 (10th Cir. 1987)(in banc), affirmed, **486** U.S. 356 (1988). In Shell v. Mississippi, 111 S. Ct. 313 (1990), the jury **was** instructed:

> [T]he ward heinous means extremely wicked or shockingly evil; atrocious means outrageously wicked **and** vile; and cruel means designed to inflict a high degree of pain with indifference to, or even enjoyment of the suffering of others.

111 S. Ct. at 313 (Marshall, J., concurring). The Supreme Court found these instructions insufficient: "Although the trial court in this case used a limiting instruction to define the 'especially heinous, atrocious, or cruel' factor, that instruction is not constitutionally sufficient." Shell, 111 s. Ct. at 313. The instruction **provided** Mr. Johnson's jury **is** similarly infirm; it is virtually identical to the instructions in Maynard and Shell.

or cruel', as defined by the Supreme Court of Florida" (R. 1133).[16] The trial court found both the "avoiding arrest" and "hindering law enforcement" aggravating factors, but found that the facts supporting these aggravators were "duplicative, and are therefore considered as one aggravating circumstance" (R. 1133).[17] Likewise, the trial court found both the "committed during a felony" and "pecuniary gain" aggravating factors, but found, "Because the same underlying facts give rise to [both of these aggravators], the Court considers them to be duplicative and thus considers both as one aggravating circumstance" (R. 1133).[18]

Mr. Johnson appealed his conviction and death sentence. Regarding the avoiding arrest aggravating factor, Mr. Johnson's direct appeal brief argued, "To establish that the killing of a person who is not a law enforcement officer was for the purpose of avoiding arrest or detection the proof must be 'very strong'" (Johnson v. State, Fla. Sup. Ct. Case No. 58,713, Initial Brief of Appellant, p. 30), and contended, "the jury was not instructed

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[16]The jury was unaware of this Court's definition that the homicide must include the "pitiless or conscienceless infliction of torture." Richardson v. State, 17 Fla. L. Weekly 614, 615 (Fla. 1992)("the crime must be both conscienceless or pitiless and unnecessarily torturous to the victim").

[17]The jury was unaware that "doubling" was impermissible. Further, the jury did not know that "avoiding arrest" required "very strong" proof of "the requisite intent" -- witness elimination. Robinson v. State, 17 Fla. L. Weekly 635, 636 (Fla. 1992).

"Again, the jury was unaware that these aggravating circumstances could not be "doubled" and counted as two circumstances on the death side of the scale.

on this requirement, although it should have been in order to assess correctly whether there was sufficient evidence" (Id. at 30 n.3). Regarding the "heinous, atrocious or cruel" aggravating factor, Mr. Johnson argued:

> The jury was allowed to consider as an aggravating circumstance that the murder was especially heinous, atrocious or cruel (TR-956). The gruesome photograph could have been understood (as almost any lay person would) to be evidence of this aggravation even though the trial judge later correctly ruled that the instantaneous killing was not heinous. Cooper v. State, 336 So.2d 1133 (Fla. 1976). As requested by appellant's counsel the jury should not have been allowed to consider heinous, atrocious or cruel because the facts would not support that finding. (TR-930, 931). Maggard v. State, ___So.2d___, Case No. 51,614 (Fla. May 7, 1981); contra, Cooper v. State, supra.

(Id. at 29) (footnote omitted). Mr. Johnson further argued, "By not culling these ... improper influences from the jury the trial judge failed to insure a reliable verdict. The penalty phase should be retried before a new jury which has not been exposed to inadmissible evidence, argument and instruction" (Id.). Additionally, Mr. Johnson argued that "automatically annexing an aggravating circumstance to a crime would violate the Eighth Amendment" (Id. at 54), and that use of the felony murder aggravating factor "converts robbery murder into a crime for which death is mandated, in violation of the Eighth and Fourteenth Amendments" (Id. at 55). The direct appeal brief concluded, "Errors in the penalty phase trial require a new jury proceeding" (Id. at 58). This Court affirmed the sentence of death. Johnson v. State, 442 So. 2d 185 (Fla. 1983). Regarding

the claims of error before the penalty phase jury, the Court held, "Since none of the reasons mentioned establish any improper prejudice, we find that the jury was not improperly influenced in reaching its recommendation." 442 So. 2d at 188.[19] The United States Supreme Court denied a petition for a writ of certiorari. Johnson v. Florida, 466 U.S. 963 (1984).

On January 21, 1985, Mr. Johnson filed a motion to vacate judgment and sentence pursuant to Fla.R.Crim.P. 3.850 in the Circuit Court of the Third Judicial Circuit, in and for Madison County, Florida, That motion was denied on January 23, 1985. Mr. Johnson appealed to this Court, which affirmed. Johnson v. State, 463 So. 2d 207 (Fla. 1985). This Court also denied a state habeas corpus petition which had been filed on January 22, 1985. Id.

A petition for writ of habeas corpus was filed in the United States District Court for the Northern District of Florida, Tallahassee Division. That court denied the petition, and the Eleventh Circuit Court of Appeals affirmed. Johnson v. Wainwriaht, 778 F.2d 623 (11th Cir. 1985). A petition for writ of certiorari was denied.

A second state habeas corpus petition filed in this Court was denied on February 24, 1988. Johnson v. Dugger, 520 So. 2d 565 (Fla. 1988). A second Rule 3.850 motion filed on March 3,

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[19]This holding clearly violates Stringer v. Black, 112 S. Ct. at 1136 ("a reviewing court in a weighing state may not make the automatic assumption that such a factor has not infected the weighing process"). Under Strinser, the State bears the burden of proving the error is harmless beyond a reasonable doubt.

1988, was denied, and the denial was affirmed. Johnson v. State, 522 So. 2d 356 (Fla. 1988).

Mr. Johnson filed a second federal habeas corpus petition on March 7, 1988. The district court denied habeas corpus relief. The Eleventh Circuit affirmed the denial of relief. Johnson v. Dugger, 932 F.2d 1360 (11th Cir. 1991). The United States Supreme Court denied a petition for writ of certiorari. Johnson v. Singletary, 112 S. Ct. 427 (1991).

Mr. Johnson reinitiated clemency proceedings before The Honorable Lawton Chiles, Governor of Florida. Mr. Johnson submitted a clemency petition on October 8, 1991. Mr. Johnson's clemency application was heard by the Clemency Board on June 9, 1992. Indicating that clemency was still being considered, the Florida Governor's Office requested additional information which was provided in December, 1992. However, without indicating that a death warrant was imminent, Florida's Governor issued a death warrant on January 7, 1993. Mr. Johnson's execution is now scheduled for 7:00 a.m., February 3, 1993. On January 21, 1993, Mr. Johnson filed a motion pursuant to Rule 60(b), Fed. R. Civ. P., in the federal district court. That motion is still pending.

II. JURISDICTION TO ENTERTAIN PETITION AND GRANT HABEAS CORPUS RELIEF

This is an original action under Fla. R. App. P. 9.100(a). 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. Johnson'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 involve the appellate review process. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); 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. Johnson 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.

This Court has consistently maintained an especially vigilant control over capital cases, exercising a special scope of review, see Elledge v. State, 346 So. 2d 998, 1002 (Fla. 1977); Wilson v. Wainwright, 474 So. 2d at 1165, and has not hesitated in exercising its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital trial and sentencing proceedings. Way; Wilson; Downs; Riley. This petition presents substantial constitutional questions which go to the heart of the fundamental fairness and reliability of Mr. Johnson's sentence of death, and of this Court's appellate review. Mr. Johnson's claims are therefore of the type classically considered by this Court pursuant to its habeas corpus jurisdiction. 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. See, e.g., Riley; Downs; Wilson, Way. 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 petition includes claims predicated on significant, fundamental and retroactive changes in constitutional law. See, e.g., Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Tafero v. Wainwriaht, 459 So. 2d 1034, 1035 (Fla. 1984); Edwards v. State, 393 So. 2d 597, 600 n.4 (Fla. 3d DCA), petition denied, 402 So. 2d 613 (Fla. 1981); cf. Witt v. State, 387 So. 2d 922 (Fla. 1980). These and other reasons demonstrate that 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. Johnson's claims.

This Court therefore has jurisdiction to entertain Mr. Johnson's claims and to grant habeas corpus relief. This and other Florida courts have consistently recognized that the writ must issue where fundamental error occurs on crucial and dispositive points, or where a defendant received ineffective assistance of appellate counsel. see, e.g., Wilson V. Wainwright, supra, 474 So. 2d 1163; McCrae v. Wainwright, 439 So. 2d 768 (Fla. 1983); State v. Wooden, 246 So. 2d 755, 756 (Fla. 1971); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969);

Ross v. State, 287 So. 2d 372, 374-75 (Fla. 2d DCA 1973); Davis v. State, 276 So. 2d 846, 849 (Fla. 2d DCA 1973), affirmed, 290 So. 2d 30 (Fla. 1974). The proper means of securing a hearing on such issues in this Court is a petition for writ of habeas corpus. Baggett, 287 So. 2d 374-75; Powell V. State, 216 So. 2d 446, 448 (Fla. 1968).

Mr. Johnson's claims are presented below. They demonstrate that habeas corpus relief is proper in this case. The claims Mr. Johnson presents are no less substantial than those involved in the cases cited above. He therefore respectfully urges that the Court grant habeas corpus relief.

III. GROUNDS FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Petitioner asserts that his sentence of death was obtained and then affirmed during the Court's appellate review process in violation of his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, and the corresponding provisions of the Florida Constitution, for each of the reasons set forth herein. In Mr. Johnson's case, substantial and fundamental errors occurred in his capital trial. These errors were uncorrected by the appellate review process. As shown below, relief is appropriate.

CLAIM I

FLORIDA'S STATUTE SETTING FORTH THE AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED IN A CAPITAL CASE IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. THE FACIAL INVALIDITY OF THE STATUTE WAS NOT CURED IN MR. JOHNSON'S CASE WHERE THE JURY DID NOT RECEIVE ADEQUATE NARROWING CONSTRUCTIONS. A8 A RESULT, MR. JOHNSON'S SENTENCE OF DEATH IS PREMISED UPON FUNDAMENTAL ERROR WHICH MUST BE CORRECTED NOW IN LIGHT OF NEW FLORIDA LAW, EBPINOSA V. FLORIDA.

On direct appeal, Mr. Johnson challenged the application of the facially vague and overbroad Florida death penalty statute as to him since the jury was instructed on aggravating factors which were not applicable and since the jury was without guidance so as to know that the inapplicable aggravators should not be weighed against the mitigation presented.[20] At the time of Mr. Johnson's trial, sec. 921.141, Fla. Stat., provided in pertinent part:

> **(5) AGGRAVATING CIRCUMSTANCES.--** Aggravating circumstances shall be limited to the following:
>
> (a) The capital felony was committed by a person under sentence of imprisonment.
>
> (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
>
> (c) The defendant knowingly created a great risk of death to many persons.
>
> (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing

[20] At trial, Mr. Johnson had sought to have the jury instructed that certain aggravating circumstances should not be considered because under this Court's narrowing constructions they were inapplicable (R. 930-31).

or attempting to commit, any robbery, sexual battery, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious or cruel.

The United States Supreme Court recently said, "'there is no serious argument that [the language "especially heinous, cruel or depraved"] is not facially vague.'" Richmond v. Lewis, 113 S. Ct. 528, 534 (1992). Clearly, Florida's statutory language ("especially heinous, atrocious, or cruel") is facially[21] vague and overbroad in violation of the Eighth and Fourteenth Amendments. Espinosa v. Florida, 112 S. Ct. 2926 (1992). Additionally, this Court has held that in order to prevent "mechanical application" of aggravating factors, the "avoiding arrest" aggravating factor applies only where it is proven beyond a reasonable doubt that the dominant or only motive for the

[21]Perhaps it goes without saying that word "facially" refers to the statute itself without narrowing constructions as adopted in case law. Proffitt v. Florida approved Florida's statute only because the narrowing construction adopted in State v. Dixon was sufficient to comport with the Eighth Amendment. However, it is now clear that simply adopting a narrowing construction is not enough. Where the statute is on its face vague and overbroad (which is the case in Florida), the narrowing constructions must be applied by the sentencer in order to cure the "facial" defect. Richmond V. Lewis, 113 S. Ct. at 535.

murder was the elimination of a witness. Menendez v. State, 368 So. 2d 1278, 1282 (Fla. 1979). Without this limitation, the "avoiding arrest" aggravating factor is facially vague and overbroad.[22] The same analysis applies to the "hindering law enforcement" aggravating factor. This Court has also held that the "pecuniary gain" aggravating factor applies only where pecuniary gain is shown to be the primary motive for the murder. Peek v. State, 395 So. 2d 492, 499 (Fla. 1981): Small v. State, 533 So. 2d 1137, 1142 (Fla. 1988). Without this limitation, the statute setting forth the "pecuniary gain" aggravating factor is facially vague and overbroad because it fails to adequately inform the sentencer what must be found for the aggravator to be present.

Further, this Court has held that two aggravating factors may not be based upon a single set of facts. Provence v. State,

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[22] As the United States Supreme Court explained in Maynard v. Cartwright, 486 U.S. 356, 361-62 (1988):

> Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed.2d 346 (1972).

In the words of the Supreme Court, the statutory language setting forth the "avoiding arrest" aggravating factor "fails to adequately inform juries what they must find," and thus results in "open-ended discretion." The statutory language is therefore facially vague and overbroad. Thus, the sentencer must know of the narrowing construction.

337 So. 2d 783 (Fla. 1976).[23] Thus, the "committed during a robbery" and "pecuniary gain" aggravating factors may not be found and weighed as two separate aggravating factors. Id. Likewise, the "avoiding arrest" and "hindering law enforcement" aggravating factors may not be found and weighed as two separate aggravating factors when they are based upon a single set of facts. White v. State, 403 So. 2d 331, 338 (Fla. 1981). To allow the sentencer to consider an extra improper aggravating circumstance violates the Eighth and Fourteenth Amendments by allowing an extra "thumb" to be placed on the death side of the scale. Strinser, 112 S. Ct. at 1137. Without this prohibition against "doubling," the capital sentencing statute is facially vague and overbroad because it fails to adequately inform the sentencer how to determine what aggravators to weigh. Maynard, 486 U.S. at 362 (juries must be informed "what they must find"). Finally, this Court has said that where an aggravator merely repeats an element of the crime of first degree murder the aggravator is facially vague and overbroad. Porter v. State, 564 So. 2d 1060, 1063-64 (Fla. 1990). This is because such an aggravator provides the sentencer "open-ended discretion." Maynard, 486 U.S. at 362. Since Mr. Johnson's conviction could rest on the felony murder rule, the "in the course of a felony" aggravating factor was facially vague and overbroad.

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[23]The Court's reasoning in Provence parallels the logic of Stringer v. Black, 112 S. Ct. 1130 (1992), that it violates the Eighth and Fourteenth Amendments to place an extra "thumb" on the death side of the scale.

"[I]n a 'weighing' State [such as Florida], where the aggravating and mitigating factors are balanced against each other, it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor, even if other, valid aggravating factors obtain." Richmond, 113 S. Ct. at 534. A facially vague and overbroad aggravating factor may be cured where "an adequate narrowing construction of the factor" is adopted and applied. Id. However, in order for the violation of the Eighth and Fourteenth Amendments to be cured, "the narrowing construction" must be applied during a "sentencing calculus" free from the taint of the facially vague and overbroad factor. Id. at 535.[24] In Mr. Johnson's case, the jury instructions did not cure the facially vague and overbroad statute. The jury did not receive instructions as to the narrowing constructions, also known as the elements, of the aggravating circumstances. The jury was left with "open-ended discretion" in violation of Maynard, the Eighth and Fourteenth Amendments, and in violation of due process.

In Florida, great weight is given to a jury's recommendation of death. "By giving 'great weight' to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found." Espinosa v. Florida, 112

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[24]This is the problem with Mr. Johnson's sentence of death. This Court has adopted narrowing constructions to cure the "facial" defect with the statute. Unfortunately for Mr. Johnson, his jury never knew of these "narrowing constructions" and thus could not have applied them in order to cure the facially vague and overbroad language.

S. Ct. 2926, 2928 (1992).[25] This indirect weighing of the facially vague and overbroad aggravator violates the Eighth and Fourteenth Amendment. Id. Therefore, the jury's sentencing calculus must be free from facially vague and overbroad aggravating factors. Id. at 2929. Thus, in order to cure the facially vague and overbroad statutory language, the jury must receive the adequate narrowing constructions. Id. at 2928. In other words, the jury must receive guidance "channeling and limiting" its discretion so as to "minimize the risk of wholly arbitrary and capricious action." Maynard, 486 U.S. at 362.

Espinosa was a repudiation of this Court's prior reasoning that the judge's consideration of the narrowing construction cured the facially vague and overbroad statutory language. See Smallev v. State, 546 So. 2d 720 (Fla. 1989); Suarez V. State, 481 So. 2d 1201 (Fla. 1985); Deaton v. State, 480 So. 2d 1279 (Fla. 1985); Breedlove V. State, 413 So. 2d 1 (Fla. 1982). Espinosa was a change of "fundamental significance." Witt v. State, 387 So. 2d 922, 931 (Fla. 1980). It held that a Florida capital jury must be treated as a sentencer for Maynard and Eighth Amendment purposes.

Moreover, Richmond and Espinosa, taken together, have established that Mr. Johnson's sentence of death rests on fundamental error. Fundamental error occurs when the error is

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[25]Prior to the decision in Esainosa, this Court repeatedly refused to apply Maynard, reasoning, "Maynard does not affect Florida's death sentencing procedures." Porter v. Dusser, 559 So. 2d 201, 203 (Fla. 1990).

"equivalent to the denial of due process." State v. Johnson, 18 Fla. L. Weekly 55, 56 (Fla. 1993). Fundamental error includes facial invalidity of a statute due to "overbreadth" which impinges upon a liberty interest. Trushin V. State, 425 So. 2d 1126, 1129 (Fla. 1983). The failure to instruct on the necessary elements a jury must find constitutes fundamental error. State v. Jones, 377 So. 2d 1163 (Fla. 1979).

Under Florida law, aggravating circumstances "must be proven beyond a reasonable doubt." Hamilton v. State, 547 So. 2d 630, 633 (Fla. 1989). In fact, Mr. Johnson's jury was so instructed. Florida law also establishes that narrowing constructions of the aggravating circumstances are "elements" of the particular aggravating circumstance. "[T]he State must prove [the] element[s] beyond a reasonable doubt." Banda v. State, 536 So. 2d 221, 224 (Fla. 1988).[26] Unfortunately, Mr. Johnson's jury received no instructions regarding the elements of the aggravating circumstances submitted for the jury's consideration. The jury did not know that in order to consider the "heinous, atrocious or cruel" aggravator, it must find the "pitiless or conscienceless infliction of torture." Richardson v. State, 17 Fla. L. Weekly 614, 615 (Fla. 1992). See Clark v. State, 17 Fla. L. Weekly 655 (Fla. 1992) ("We have defined this aggravating

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[26]At issue in Banda was the "cold, calculated and premeditated" aggravator. However, this Court's use of the word "element" there applies with equal force to all other aggravators. The narrowing constructions constitute the elements which must be proven to be satisfied before the aggravator can be weighed against the mitigation.

factor to be applicable where the murder is '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'"). Without this limitation, i.e., this element of the aggravator, "we must presume," Espinosa, 112 S. Ct. at 2928, that the jury placed this extra, improper "thumb" on the death side of the scale.

The jury did not know that in order to consider the "avoiding arrest" aggravating factor that it had to find that the dominant or only motive for the murder was the elimination of a witness. Robinson v. State, 17 Fla. L. Weekly 635, 636 (Fla. 1992) (there must be "very strong" proof of "the requisite intent"). Just as a jury must be advised of the intent element of first degree murder, so must it be advised of the intent element of "avoiding arrest." Without this guidance, the jury is given "open-ended discretion" which violates the Eighth and Fourteenth Amendments. Maynard, 486 U.S. at 362.

Similarly, the jury received no guidance regarding the elements of the "hindering law enforcement" or "pecuniary gain" aggravating factors. The jury was not advised of the elements, let alone of the fact that under this Court's prohibition against "doubling," neither of these aggravators could be placed on the death side of the scale. Again, the facially vague and overbroad statute gave the jury "open-ended discretion." Maynard, 486 U.S. at 362.

This failure to instruct the jury on the "elements" of the aggravating factors was fundamental error. Robles v. State, 188 So, 2d 789, 793 (Fla. 1966) ("We hold that since proof of these elements was necessary in order to convict appellant under the felony-murder rule, the court was obligated to instruct the jury concerning them, whether or not requested to do so."). "It is essential to a fair trial that the jury be able to reach a verdict based upon the law and not be left to its own devices to determine what constitutes the underlying felony." State v. Jones, 377 So. 2d 1163 (Fla. 1979). Clearly, the logic of this rule applies with equal force to Mr. Johnson's penalty phase where the jury was clearly left to "its own devices" to decide what aggravating factors to place on the death side of the scale.

Without instructions regarding the elements of the aggravating factors, the statute is facially vague and overbroad in violation of the Eighth and Fourteenth Amendments. It impinges upon a liberty interest. Thus, the application of the statute violated due process and constituted fundamental error. State v. Johnson, 18 Fla. L. Weekly at 56. Accordingly, this fundamental error is cognizable in habeas corpus proceedings since Espinosa and Richmond are decisions of "fundamental significance" revealing fundamental error. Witt v. State, 387 So. 2d at 931.

This fundamental error cannot be found to be harmless beyond a reasonable doubt. A wealth of mitigation was presented to this jury. This mitigation is set out in Claim 11, infra. It was

present on the life side of the scale and was of such weight and character that, had a life recommendation resulted, an override would have been precluded. Duest v. Singletary, 967 F.2d 472, 482 n.11 (11th Cir. 1992). Absent the extra "thumbs" on the death side of the scale, the State cannot prove beyond a reasonable doubt that the jury would have still recommended death. Therefore, a resentencing must be ordered. Mr. Johnson's unconstitutional death sentence must be vacated.

CLAIM II

THE JURY'S DEATH RECOMMENDATION WHICH WAS ACCORDED GREAT WEIGHT BY THE TRIAL COURT WAS TAINTED BY CONSIDERATION OF INVALID AGGRAVATING CIRCUMSTANCES, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

In Mr. Johnson's case, the jury's death recommendation was tainted by Eighth Amendment error. The jury received constitutionally inadequate instructions regarding the ''avoiding arrest" and "heinous, atrocious or cruel" aggravating factors. The instructions were erroneous, and the jury considered invalid aggravating circumstances, as Espinosa v. Florida and Shell v. Mississippi, 111 S. Ct. 313 (1990), make clear. Under Espinosa, it must be presumed that the erroneous instructions tainted the jury's recommendation with Eighth Amendment error. Under these circumstances, it must be presumed that the judge's death sentence was tainted with Eighth Amendment error as well. Esainosa v. Florida.

The jury instructions provided inadequate guidance regarding the "heinous, atrocious or cruel" aggravating circumstance.

The jury was instructed over objection:

> Eight - that the crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel.
>
> Heinous means extremely wicked or shockingly evil.
>
> Atrocious means outrageously wicked and vile.
>
> Cruel means designed to inflict a high degree of pain; utter indifference to, or enjoyment of, the suffering of others; pitiless.

(R. 955). The United States Supreme Court has held that this instruction is unconstitutionally vague. Shell v. Mississippi, 111 S. Ct. 313 (1990). The trial judge found that this aggravating factor did not apply because "the capital felony does not fit within the definition of 'especially heinous, atrocious, or cruel,' as defined by the Supreme Court of Florida" (R. 1133).

Further, the jury also received over objection the standard instruction regarding the "avoiding arrest" aggravating factor: "Five - that the crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody" (R. 1133). However this Court has held that this factor applies only where the State proves beyond a reasonable doubt that the dominant or only motive for the homicide was witness elimination. Menendez v. State, 368 So. 2d 1278 (Fla. 1979); Riley v. State, 366 So. 2d 19 (Fla. 1978). Mr. Johnson's jury was not informed of this limitation. In Espinosa, the Supreme Court explained that "an aggravating circumstance is invalid . . . if its description is so vague as

to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." 112 S. Ct. at 2928. Mr. Johnson's jury was left "without sufficient guidance for determining the presence or absence" of the "avoiding arrest" aggravator.

At the conclusion of the penalty phase, before the jury was instructed, defense counsel moved for a judgment of acquittal on the "heinous, atrocious or cruel" and "avoiding arrest" aggravating factors (R. 930-31). Counsel argued that the facts did not support these aggravators and asked the court to find so as a matter of law and to instruct the jury that these aggravators could not be considered (R. 930-31). Ultimately, in his sentencing order, the judge found that the "heinous, atrocious or cruel" aggravating factor did not apply because the facts did not satisfy this Court's limiting construction of that factor. Unfortunately, the judge failed to grant the defendant's motion before the jury was instructed. The judge further found "avoiding arrest" merged with hindering law enforcement. Thus, the jury was given aggravating factors which on the basis of law unknown to the jury did not apply.

On direct appeal, appellate counsel argued, "As requested by appellant's counsel the jury should not have been allowed to consider heinous, atrocious or cruel because the facts would not support that finding. (TR-930, 931). Massard v. State, [399 So. 2d 973 (Fla. 1981); contra, Cooper v. State, [336 So. 2d 1133 (Fla. 1976)]" (Johnson v. State, Fla. Sup. Ct. Case No. 58,713,

Initial Brief of Appellant, p. 29). The cases cited by counsel demonstrate that counsel was arguing that the jury should not have been permitted to consider "heinous, atrocious or cruel" because the limiting construction of that factor had not been proved. In Cooper, this Court stated, "Of course, a proper instruction defining the terms 'especially heinous, atrocious or cruel,' or any other listed circumstance, must be given. Here the trial judge read the jury the interpretation of that term which we gave in Dixon. No more was required." 336 So. 2d at 1140. In Masgard, this Court found the "heinous, atrocious or cruel" aggravator inapplicable because "[t]he record does not reveal that this capital felony 'was accompanied by such additional acts as to set it apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily torturous to the victim.'" 399 So. 2d at 977, quoting state V. Dixon, 283 So. 2d 1, 9 (Fla. 1973).

Regarding the "avoiding arrest" aggravating factor, appellate counsel pointed out this Court's definition of this aggravator in Riley V. State, 366 So. 2d 19, 22 (Fla. 1979), and argued, "the jury was not instructed on this requirement, although it should have been in order to assess correctly whether there was sufficient evidence" (Initial Brief of Appellant, p. 30 and n. 3). Clearly, appellate counsel was arguing that the jury could not determine whether or not an aggravating factor had been established unless the jury knew the definition of the factor.

Appellate counsel further argued, "The penalty phase should be retried before a new jury which has not been exposed to inadmissible . . . instruction. Elledge v. State, [346 So. 2d 998 (Fla. 1977)" (Initial Brief of Appellant, p. 29). Appellate counsel's reliance upon Elledge is significant. In Elledae, this Court determined that the trial court erred in considering and in allowing the penalty phase jury to consider evidence of an impermissible aggravating factor. Although trial counsel had not objected to this improper consideration, this Court ordered a new penalty phase because "regardless of the existence of other authorized aggravating factors we must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death." 346 So. 2d at 1003. This Court emphasized:

> Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial at which the [impermissible aggravating] factor . . . shall not be considered. See Miller v. State, 332 So. 2d 65 (Fla. 1976); Messer v. State, 330 So. 2d 137 (Fla. 1976). This result is dictated because, in order to satisfy the requirements of Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed.2d 346 (1972), the sentencing authority's discretion must be "guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." (Emphasis supplied) Proffitt v. Florida, 428 U.S. 242, 258, 96 S. Ct. 2960, 2969, 49 L.Ed.2d 913.

Elledse, 346 So. 2d at 1003.[27] Appellate counsel's citation to Elledse clearly indicated that counsel was arguing that the weighing process by Mr. Johnson's jury was skewed because the jury's decision-making process had not been properly guided and channeled.

Mr. Johnson's jury was not told about the limitations on the "heinous, atrocious or cruel" and "avoiding arrest" aggravating factors but presumably found these aggravators present. Espinosa, 112 S. Ct. at 2928. It must be presumed that the erroneous instructions tainted the jury's recommendation, and in turn the judge's death sentence, with Eighth Amendment error. Espinosa, 112 S. Ct. at 2928. Mr. Johnson was sentenced to death. Again, Espinosa clearly holds that because Florida law requires great weight be given to the jury's death recommendation, the Eighth Amendment errors before the jury infected the judge's imposition of death. Thus, a reversal is required unless the errors were harmless beyond a reasonable doubt. Stringer v. Black.

The errors were not harmless beyond a reasonable doubt. Here, it cannot be contested that substantial mitigating circumstances were present which would have constituted a reasonable basis for a life recommendation. Duest v. Singletary, 967 F.2d 472, 482 n.11 (11th Cir. 1992). At the penalty phase,

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[27]This reasoning should be compared to the language contained in Stringer V. Black, 112 S. Ct. 1130 (1992), finding the sentencer's consideration of an invalid or inapplicable aggravating factor was Eighth Amendment error.

Mr. Johnson's biography was etched by his aunt and uncle, the Mortons, and by his sister. Mr. Johnson's grandmother raised him in Livermore, Kentucky, near the Mortons' home in Owensboro (R. 811). When he was five or six, his mother (whom he never knew [R. 889]) was killed in a car accident; his father later died of tuberculosis (R. 812). As a school boy, petitioner was "normal", not "different from other boys" (R. 812). He "didn't make real fine grades" (R. 812), but had no "discipline problem[s]" (R. 812, 809, 887). School records verified these recollections (R. 888; Defense Ex. 12).

Petitioner grew up next to the local National Guard Headquarters. As a boy, he "looked up to [the] military, he wanted to be in the military" (R. 893). At age 16, he convinced someone that he was older, and joined the National Guard (R. 809, 813). After basic training, he returned to Livermore but soon was called for active duty (R. 813). Released after a year and back in Livermore, he worked as a cook and then as an iron worker constructing buildings and bridges (R. 814). Petitioner married, and lived and worked in the Livermore-Owensboro area until 1967 or 1968, when he joined the Navy (R. 815). He was sent to Vietnam, returned, and was sent back for a second tour (R. 816).

After his release from the Navy, he and his second wife returned to Kentucky and lived with the Mortons (R. 816, 817). Mr. Morton explained that petitioner's "personality [had] changed. He was despondent at times, quick tempered" (R. 816). Mrs. Morton "could see a big difference" in petitioner (R. 891).

Petitioner rejoined the Livermore National Guard (R. 817). There, Malcolm Brown became well acquainted with him (R. 828). Due to his prior service, petitioner "moved up quicker" than Brown, eventually becoming a sergeant and Brown's tank commander (R. 829, 830). Petitioner was considered "one of the group" and was "well liked" by the men in the company, who were "pretty tight, stuck together" (R. 831). All that changed after night maneuvers of September 1, 1974. A smoke grenade hit petitioner's head, dropping him to the tank deck (R. 832, 833). Petitioner was bleeding and screaming for help; "there was blood all over the front deck of the tank" (R. 833). Evacuated to a hospital, he never attended drills again while Brown was in the Guard (R. 833, 834). Until that injury, petitioner had been "well regarded" in the community (R. 833).

Charles Miller, responsible for the daily administration of the Livermore unit (R. 838, 837), discussed petitioner's military record: petitioner's service included the Army National Guard, the Army Reserve, and the Navy, totalling over twelve years. Fifteen months of that duty was overseas (R. 838, 839). After the September, 1974, injury, petitioner received emergency treatment at a civilian hospital, and then had out-patient care for several months at the Fort Campbell Army Hospital (R. 842). Petitioner was later hospitalized in a psychiatric ward for "weeks or months" (R. 843). The Army eventually discharged him for the medical disability resulting from the injury (R. 843,

844). Petitioner did not like being discharged from the service; he "wanted to make a career of it" (R. 893).

Mr. Miller described the change in petitioner's personality. Before the injury, the other men liked him "real well"; afterward he was "a little more nervous, more serious about everything" as if "he was mad at the world" (R. 845). After discharge from the hospital, petitioner phoned Mr. Miller, saying he was going to re-enlist in the Guard. He claimed "the general" assured him he could return to duty and that he was promoted and "on jump status" while in the hospital (R. 846). Miller knew all this was impossible (R. 846).

The Mortons, who saw petitioner frequently, described the effects of the head injury. Mrs. Morton had observed changes when he returned from Vietnam, but "the most difference was after he was hit on the head with the smoke bomb" (R. 892). He complained of "headaches and dizziness," started "passing out" and was "a little harder to get along with" (R. 818). Defense exhibits included a letter from an ambulance worker describing an episode when petitioner suddenly and unexplainedly was unconscious for several hours. Petitioner had nightmares in which he would "wake up screaming" (R. 818). His behavior was characterized as despondent and short-tempered (R. 821); he became irritated because of "those bad headaches" (R. 897). After his wife's brother "jumped on him one night at his home," petitioner began openly carrying a gun strapped to his belt "like a cowboy**(R. 821, 893). He impersonated a police officer (R.

894). Whether by accident or otherwise, petitioner shot and injured his wife. He was indicted and ultimately convicted of a lesser offense, the only criminal offense on his record.

The Mortons testified that petitioner was mentally ill and needed help (R. 821, 895). Petitioner sought psychiatric treatment not only at Fort Campbell, but at a V.A. clinic in Evansville (R. 820). The sheriff and others in Ohio County were contacted, but said they could do nothing "till he hurt somebody" (R. 894). Petitioner's sister had him committed to a hospital in Murfreesburo, Tennessee, for two or three weeks (R. 822, 895). Other efforts to have him hospitalized failed because "his wife had the say-so about that" (R. 895).

Petitioner was evaluated by clinical psychologist and neuropsychologist Dr. Elizabeth McMahon. She examined petitioner, reviewed his medical records, and administered tests measuring intelligence, neurological function, and personality (R. 900-908). Petitioner was of borderline intelligence with an I.Q. in the 70's (R. 901), had brain damage, described as generalized bilateral cortical dysfunction (R. 904), and was an anxious, emotionally immature individual who lost control under stress (R. 907, 908). Dr. McMahon explained that his reactions during the robbery were "very compatible with his general state, general condition" (R. 912); because of his "cognitive deficiencies," he lacked the "ability to think [and] reason"; "[u]nder stress he tends to break down and lose control and simply react" (R. 911).

Because of low mental ability, cognitive deficiencies, brain damage, and lack of personality development, petitioner was under extreme mental or emotional disturbance, extreme duress, and "beyond any choice to conform his behavior to the requirements of the law" at the time of the offense (R. 912-14). Dr. McMahon additionally described a number of factors relevant to petitioner's background, make-up, character, and the circumstances of the offense.

Psychologist Dr. Charles R. Figley, a respected authority on post-traumatic stress among Vietnam veterans (R. 850-55), also examined Mr. Johnson, Petitioner had been exposed to several "life-threatening situations over there and . . . subsequent to that time, he did re-experience those life-threatening experiences following military service" (R. 858, 859). The stress in Vietnam was "[s]ignificant in that it would have a long-lasting effect." It affected petitioner "after he came back" and "years later" (R. 860). Although traumatized by his Vietnam experiences, he was beginning to adjust until the smoke grenade incident "resurrected a lot of fears he experienced in Vietnam" (R. 866). Petitioner wanted to make a career of the military "until he found out what war was like" in Vietnam (Id.). Until hit by the smoke canister, he had begun to forget the details of his traumatization in Vietnam; the injury "brought back the fact that the war was still with him, there was a potential of him being killed" (R. 866). He became unusual, and

desperately attempted "to control the amount of threat to him" (R. 867).

Dr. Figley, like Dr. McMahon, reviewed statements of witnesses and discussed with petitioner the details of the offense. Petitioner told him that after he and Ms. Burks held up the station attendant, petitioner believed "he was under threat. He thought the guy was reaching for a gun and immediately shot him" (R. 868). Petitioner was under the influence of **extreme mental disturbance" (R. 868). Dr. Figley also testified:

> In terms of his reactions to the stress, in other, his fear that the man was going to kill him, he immediately reacted very, very quickly without thinking.

(R. 868).

> After he was in the station and ready to leave, I think because of his Vietnam experience, because of the post-traumatic stress he was experiencing there, he was definitely impaired in that he acted without thinking, on impulse.

(R. 882). Dr. Figley additionally described a number of factors relevant to petitioner's impaired capacity, character, make-up, background, and the circumstances of the offense. This evidence provided a reasonable basis upon which the jury could have based a life recommendation. See Hall v. State, 541 So. 2d 1125 (Fla. 1989)(question whether constitutional error was harmless is whether properly instructed jury could have recommended life). However, the jury was given erroneous instructions which resulted in improper aggravation to weigh against the mitigation.

As Judge Tjoflat recently stated:

> I cannot conceive of a situation in which a pure reviewing court would not be acting arbitrarily in affirming a death sentence after finding a sentencing error that relates, as the error does here, to the balancing of aggravating and mitigating circumstances. It is simply impossible to tell what recommendation a properly instructed jury would have made or the decision the sentencing judge would have reached.

Booker v. Dusser, 922 F.2d 633, 644 (11th Cir. 1991)(Tjoflat, C.J. specially concurring).

Mr. Johnson's jury was given legally invalid circumstances to apply and weigh, and the jury recommended death. No constitutionally adequate limiting constructions were given to the jury as to "heinous, atrocious or cruel" or "avoiding arrest."[28] The jury's death recommendation was clearly tainted by invalid aggravating circumstances. See Maynard v. Cartwright; Shell v. Mississippi; Stringer v. Black; Sochor v. Florida; Espinosa V. Florida. In Clemons v. Mississippi, 110 S. Ct. 1441, 1451 (1990), the Supreme Court explained, "it would require a detailed explanation based upon the record for us possibly to agree that the error in giving the invalid 'especially heinous' instruction was harmless." Similarly, harmless error analysis

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[28]The Jury also was not informed of this Court's caselaw prohibiting the "doubling" of aggravating factors. Thus, although the judge determined that the "felony murder" and "pecuniary gain" aggravators constituted not two but one aggravating circumstance and that the "avoiding arrest" and "hindering law enforcement" aggravators constituted not two but one aggravating circumstance, the jury was unaware of the law which prohibited weighing each of these factors separately.

must be conducted as to the jury's consideration of the "avoiding arrest" aggravating factor upon which the jury was inadequately instructed. However, no analysis of the Eighth Amendment errors before the jury has been conducted. This Court has failed to comply with Eighth Amendment jurisprudence based upon its erroneous understanding outlined in Smalley, which was overturned in Espinosa. The decision in Espinosa was of "fundamental significance." Witt v. State, 387 So. 2d at 931. It requires this Court to revisit this issue which was raised on direct appeal.

Under Espinosa, the jury's death recommendation is tainted by Eighth Amendment errors. The jury received inadequate instructions which must be presumed to have affected the consideration of aggravating circumstances and resulted in extra thumbs on the death side of the scales. Espinosa; Strinser. The jury had unfettered discretion by virtue of this error. The Eighth and Fourteenth Amendments were violated. Maynard; Shell; Strinser; Espinosa. In light of the mitigation before the jury, the errors cannot be harmless beyond a reasonable doubt, and a new jury sentencing must be ordered.

CLAIM III

MR. JOHNSON'S SENTENCE RESTS UPON *AN* UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

This issue was presented on direct appeal. See Johnson v. State, Fla. Sup. Ct. Case No. 58713, Initial Brief of Appellant,

pp. 46-47, 54-55). See also Johnson v. State, 522 So. 2d 356, 357-58 (Fla. 1988)(recognizing that identical claim "was raised on direct appeal"). The issue should be reconsidered on the basis of Strinser v. Black and Espinosa v. Florida. In prior post-conviction proceedings, Mr. Johnson represented this direct appeal claim, relying upon Sumner v. Shuman, 483 U.S. 66 (1987). This Court refused to reconsider the claim because "Johnson was afforded a full and fair sentencing hearing. while his sentence was proper, it was by no means automatic." Johnson v. State, 522 So. 2d at 358. Strinser v. Black, 112 S. Ct. 1130 (1992), has now rejected the analysis which was previously applied to Mr. Johnson's automatic aggravating factor argument. Specifically, Stringer holds that Lowenfield v. Phelps, 484 U.S. 231 (1988), which addressed Louisiana's capital sentencing scheme, does not apply in states where capital sentencers weigh aggravating factors against mitigating factors in determining the sentence. Stringer, 112 S. Ct. at 1138. "Florida . . . is a weighing State." Id. at 1137. "[I]n Louisiana the jury is not required to weigh aggravating against mitigating factors." Id. at 1138. Thus, Strinser explicitly indicates that the analysis of Lowenfield does not apply to weighing states like Florida.

The Strinser Court emphasized, "if a State uses aggravating factors in deciding who shall be eligible for the death penalty or who shall receive the death penalty, it cannot use factors which as a practical matter fail to guide the sentencer's discretion." Id. at 1139. The Supreme Court then explained that

use of an improper aggravating factor in a weighing scheme (like Florida's) has the potential for creating greater harm than it does in an eligibility scheme (like Louisiana's):

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

Stringer, 112 S. Ct. at 1139.[29] Stringer thus also teaches that in a weighing state, reliance upon an invalid aggravating factor is constitutional error requiring a harmless error analysis, even if other aggravating factors exist.

Stringer establishes the validity of Mr. Johnson's claim that the felony murder aggravating factor is an unconstitutional automatic aggravating factor which does not provide the requisite narrowing. Under Florida law, capital sentencers may reject or

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[29] Lockhart v. Fretwell, 112 S. Ct. 1935 (1992)(order granting certiorari), which was argued in the United States Supreme Court on November 3, 1992, should directly address whether the felony murder aggravating factor performs the narrowing function required by the Eighth Amendment.

give little weight to any particular aggravating circumstance. A jury may return a binding life recommendation because the aggravators are insufficient. Hallman v. State, 560 So. 2d 233 (Fla. 1990). The sentencer's understanding and consideration of aggravating factors may lead to a life sentence.

Mr. Johnson was convicted of one count of first-degree murder, with robbery being the underlying felony. The jury was instructed on both premeditated and felony murder (R. 741-43), and returned a general verdict (R. 764). At the penalty phase, the jury was instructed on both the "felony murder" aggravating circumstance as well as the ''pecuniary gain" aggravator (R. 955). The death penalty in this case was predicated upon unreliable automatic findings of statutory aggravating circumstances -- the very felony underlying the conviction.

A state cannot use aggravating "factors which as a practical matter fail to guide the sentencer's discretion." Stringer V. Black, 112 S. Ct. 1130 (1992). Stringer is new law which has been articulated since Mr. Johnson's prior proceedings. The sentencer was entitled automatically to return a death sentence upon a finding of first degree felony murder. Every felony murder would involve, by necessity, the finding of a statutory aggravating circumstance, a fact which, under the particulars of Florida's statute, violates the eighth amendment. This is so because an automatic aggravating circumstance is created, one which does not "genuinely narrow the class of persons eligible for the death penalty," Zant v. Stephens, 462 U.S. 862, 876

(1983), and one which therefore renders the sentencing process unconstitutionally unreliable. Id. "Limiting the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Maynard v. Cartwright, 486 U.S. 356, 362 (1988). If Mr. Johnson was convicted of felony murder, he then automatically faced statutory aggravation for felony murder. These aggravating factors were "illusory circumstance[s]" which "infected" the weighing process; these aggravators did not narrow and channel the sentencer's discretion as they simply repeated elements of the offense. Stringer, 112 S. Ct. at 1139. This Court has recognized that aggravating factors do not perform the necessary narrowing if they merely repeat elements of the offense. Porter v. State, 564 So. 2d 1060, 1063-64 (Fla. 1990). In fact, this Court has held that the felony murder aggravating factor alone cannot support the death sentence. Rembert v. State, 445 So. 2d 337 (Fla. 1984). Yet the trial court did not instruct the jury on and did not apply this limitation in imposing the death sentence.

Recently the Wyoming Supreme Court addressed this issue in Engbers v. Meyer, 820 P.2d 70 (Wyo. 1991). In Engberg, the Wyoming court found the use of an underlying felony both as an element of first degree murder and as an aggravating circumstance to violate the eighth amendment:

> In this case, the enhancing effect of the underlying felony (robbery) provided two of the aggravating circumstances which led to Engberg's death sentence: (1) murder during

commission of a felony, and (2) murder for pecuniary gain. As a result, the underlying robbery was used not once but three times to convict and then enhance the seriousness of Engberg's crime to a death sentence. All felony murders involving robbery, by definition, contain at least the two aggravating circumstances detailed above. This places the felony murder defendant in a worse position than the defendant convicted of premeditated murder, simply because his crime was committed in conjunction with another felony. This is an arbitrary and capricious classification, in violation of the Furman/Gregg narrowing requirement.

Additionally, we find a further Furman/Gregg problem because both aggravating factors overlap in that they refer to the same aspect of the defendant's crime of robbery. While it is true that the jury's analysis in capital sentencing is to be qualitative rather than a quantitative weighing of aggravating factors merely because the underlying felony was robbery, rather than some other felony. The mere finding of an aggravating circumstance implies a qualitative value as to that circumstance. The qualitative value of an aggravating circumstance is unjustly enhanced when the same underlying fact is used to create multiple aggravating factors.

When an element of felony murder is itself listed as an aggravating circumstance, the requirement in W.S. 6-5-102 that at lest one "aggravating circumstance" be found for a death sentence becomes meaningless. Black's Law Dictionary, 60 (5th ed. 1979) defines aggravation as follows:

> "Any circumstance attending the commission of a crime or tort which increases its guilt or enormity or adds to its injurious consequences, but which is above and bevond the essential constituents of the crime or tort itself." (emphasis added).

As used in the statute, these factors do not fit the definition of "aggravation." The

> aggravating factors of pecuniary gain and commission of a felony do not serve the purpose of narrowing the class of persons to be sentenced to death, and the Furman/Gregg weeding-out process fails.

820 P.2d at 89-90.

Wyoming, like Florida, provides that the narrowing occur at the penalty phase. See Stringer v. Black. The use of the "in the course of a felony" aggravating circumstance is unconstitutional. As the Engberg court held:

> [W]here an underlying felony is used to convict a defendant of felony murder only, elements of the underlying felony may not again be used as an aggravating factor in the sentencing phase. We acknowledge the jury's finding of other aggravating circumstances in this case. We cannot know, however, what effect the felony murder, robbery, and pecuniary gain aggravating circumstances found had in the weighing process and in the jury's final determination that death was appropriate.

820 P. 2d at 92. In State v. Middlebrooks, 840 S.W. 2d 317 (Tenn 1992), the Tennessee Supreme Court followed the decision in Engberg. In a decision remanding for a new sentencing a case involving the torture murder of a fourteen year old boy, the Tennessee Supreme Court adopted the rationale expressed by Justice Rose of the Wyoming Supreme Court seven years before the majority of that court adopted his reasoning and granted Mr. Engberg a new sentencing hearing in Ensbers v. Meyer:[30]

> Automatically instructing the sentencing body on the underlying felony in a felony murder case does nothing to aid the jury in its task

[30]At that new sentencing hearing Mr. Engberg received a life sentence.

> of distinguishing between first-degree homicides and defendants for the purpose of imposing the death penalty. Relevant distinctions dim, since all participants in a felony murder, regardless of varying degrees of culpability, enter the sentencing stage with at least one aggravating factor against them.
>
> * * *
>
> A comparison of the sentencing treatments afforded first-degree-murder defendants further highlights the impropriety of using the underlying felony to aggravate felony-murder. The felony murderer, in contrast to the premeditated murderer, enters the sentencing stage with one aggravating circumstance automatically against him. The disparity in sentencing treatment bears no relationship to legitimate distinguishing features upon which the death penalty might constitutionally rest.

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

Compounding this error is the fact that this Court has held that the aggravating circumstance of "in the course of a felony" is not sufficient by itself to justify a death sentence in a felony-murder case. Rembert v. State, 445 So. 2d 337, 340 (Fla. 1984)(no way of distinguishing other felony murder cases in which defendants "receive a less severe sentence"); Proffitt v. State, 510 So. 2d 896, 898 (Fla. 1987)("To hold, as argued by the State, that these circumstances justify the death penalty would mean that every murder during the course of a burglary justifies the imposition of the death penalty"). However here, the jury was instructed on this aggravating circumstance and told that it was sufficient for a recommendation of death unless the

mitigating circumstances outweigh the aggravating circumstance. The jury did not receive an instruction explaining the limitation contained in Rembert and Proffitt. There is no way at this juncture to know whether the jury relied on this aggravating circumstance in returning its death recommendation. The sentencing judge clearly indicated that he found the felony murder aggravating factors the weightiest factors supporting the death sentence:

> This Court placed the greatest weight upon the facts supporting Aggravating Circumstance (5)(d) [felony murder]. Had this been the only aggravating circumstance . . . this Court would have concluded that the death sentence would have nevertheless been appropriate in this case.

(R. 1136)(Sentencing Order). "[I]t is constitutional error to give weight to an unconstitutionally vague aggravating factor, even if other, valid aggravating factors obtain." Richmond, 113 S. Ct. at 534. In Maynard v. Cartwrisht, 486 U.S. at 461-62, the Supreme Court held that the jury instructions must "adequately inform juries what they must find to impose the death penalty." Espinosa v. Florida held that Florida sentencing juries must be accurately and correctly instructed regarding aggravating circumstances in compliance with the eighth amendment. This claim is cognizable in these proceedings on the basis of Stringer v. Black and Espinosa v. Florida.

Mr. Johnson was denied a reliable and individualized capital sentencing determination, in violation of the sixth, eighth, and

fourteenth amendments. The error cannot be harmless in this case:

> [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. When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.

Strinser, 112 S. Ct. at 1137. In Mr. Johnson's case, substantial mitigating evidence, establishing both statutory and nonstatutory mitigating factors, was presented at the penalty phase. **See** Claim 11. In light of the weight given the felony murder aggravator and the evidence of mitigation, the erroneous consideration of the felony murder aggravating factors cannot be held harmless beyond a reasonable doubt. In the words of Strinser, an "extra thumb" was placed upon the death side of the scales. Without that **"thumb,"** the weightiest one according to the trial judge, a binding life recommendation may have been returned **by** the jury. The State cannot meet its burden to prove the error harmless beyond a reasonable doubt.

This claim is cognizable in these proceedings on the basis of Strinser v. Black and Espinosa v. Florida. Mr. Johnson was denied a reliable and individualized capital sentencing determination, in violation of the sixth, eighth, and fourteenth amendments. Relief is proper at this time.

CONCLUSION

For each of the foregoing reasons, Petitioner asks this Court to vacate his unconstitutional death sentence, and grant all other relief which is just and equitable.

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by United States Mail, first class postage prepaid, to all counsel of record on January 25. 1993.

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