

IN THE SUPREME COURT OF FLORIDA

NO. SC00-1533

JAMES FLOYD,

Petitioner,

v.

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

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

This petition for habeas corpus relief is being filed to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth amendments to the United States Constitution. These claims demonstrate that Mr. Floyd was deprived of effective assistance of counsel on direct appeal and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives.

Significant errors that occurred at Mr. Floyd's capital trial and sentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. In his initial direct appeal, appellate counsel limited his appeal to a total of seven issues, only two concerning the guilt phase of Mr. Floyd's trial. Floyd v. State, 497 So.2d 1211 (Fla. 1986). After obtaining resentencing relief from this Court, Mr. Floyd was again sentenced to death and that sentence was upheld on direct appeal. Floyd v. State, 569 So. 2d 1225 (Fla. 1990).

Without explanation, appellate counsel omitted guilt and penalty phase issues from the direct appeals. Appellate counsel's failure to present the meritorious issues discussed in this petition demonstrates that his representation of Mr. Floyd involved "serious and substantial deficiencies." Fitzpatrick v. Wainwright, 490 So.2d 938, 940 (Fla. 1986).

The issues that appellate counsel neglected show that counsel's performance was deficient and that the deficiencies

prejudiced Mr. Floyd. "[E]xtant legal principles...provided a clear basis for ... compelling appellate argument[s]." Fitzpatrick, 490 So.2d at 940. The issues were preserved at trial and available for presentation on appeal. Neglecting to raise fundamental issues such as those discussed here "is far below the range of acceptable appellate performance and must undermine confidence in the fairness and correctness of the outcome." Wilson v. Wainwright, 474 So. 2d 1162, 1164 (Fla. 1985). Appellate counsel's omissions demonstrate appellate counsel's "failure to grasp the vital importance of [his] role as a champion of [his] client's cause." Wilson, 474 So. 2d at 1164. Individually and "cumulatively," Barclay v. Wainwright, 444 So. 2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "confidence in the correctness and fairness of the result has been undermined." Wilson, 474 So.2d at 1165(emphasis in original). In Wilson, this Court said:

[O]ur judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an art, not a science.

Wilson, 474 So.2d at 1165.

Appellate counsel in Mr. Floyd's case failed to act as a "zealous advocate," and Mr. Floyd was deprived of his right to the

effective assistance of counsel by the failure of direct appeal counsel to raise the issues presented here. Mr. Floyd is entitled to a new direct appeal.

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.030(a)(3) and Article V, § 3(b)(9), Fla. Const.

The Florida Constitution guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const. Its constitutional guarantee imbues habeas corpus with special status, which this Court has long recognized:

The writ of habeas corpus is a high prerogative writ of ancient origin designed to obtain immediate relief from unlawful imprisonment without sufficient legal reason. . . . The writ is venerated by all free and liberty loving people and recognized as a fundamental guaranty and protection of

their right of liberty.

Allison v. Baker, 11 So. 2d 578, 579 (1943). Habeas corpus is a centuries-old right, deserving more protection than a constitutional right.

The great writ has its origins in antiquity and its parameters have been shaped by suffering and deprivation. It is more than a privilege with which free men are endowed by constitutional mandate; it is a writ of ancient right.

Jamason v. State, 447 So. 2d 892, 894 (Fla. 4th DCA 1983), approved 455 So. 2d 380 (Fla. 1984), cert. denied, 469 U.S. 1100 (1985).

Regarding the application of procedural rules to petitions seeking the writ, this Court has explained:

[H]istorically, habeas corpus is a high prerogative writ. It is as old as the common law itself and is an integral part of our own democratic process. The procedure for the granting of this particular writ ***is not to be circumscribed by hard and fast rules or technicalities which often accompany our consideration of other processes.*** If it appears to a court of competent jurisdiction that a man is being illegally restrained of his liberty, it is the responsibility of the court to brush aside formal technicalities and issue such appropriate orders as will do justice. ***In habeas corpus the niceties of the procedure are not anywhere near as important as the determination of the ultimate question as to the legality of the restraint.***

Anclin v. Mayo, 88 So. 2d 918, 919-20 (Fla. 1956) (emphasis added).

The fundamental guarantees enumerated in Florida's Declaration of Rights should be available to all through simple and direct means, without needless complication or impediment, and should be fairly administered in favor of justice and not bound by technicality.

Haag v. State, 591 So. 2d 614, 616 (Fla. 1992).

PROCEDURAL HISTORY

Mr. Floyd was convicted and sentenced to death in Pinellas County, Florida. On direct appeal, the Florida Supreme Court affirmed Mr. Floyd's convictions, but overturned his sentence of death because: (a) the trial court improperly found the cold, calculated and premeditated aggravating factor; (b) the trial court improperly found the murder to prevent arrest aggravating factor; and (c) the trial court failed to instruct the jury adequately about nonstatutory mitigating factors. Floyd v. State, 497 So. 2d 1211 (Fla. 1986).¹

Mr. Floyd's second sentencing hearing was held on January 12-14, 1988 before Circuit Court Judge Richard A. Luce. On January 14, 1988, the jury by a vote of eight (8) to four (4) returned an advisory recommendation of death (RS. 1039).

On February 29, 1988, the trial court imposed a sentence of death, stating that his personal belief was that the Florida Supreme Court incorrectly prevented him from doubling aggravators (RS. 1066); the Florida Supreme Court was incorrect in specifically finding that the murder to prevent arrest aggravating factor was not present in this case (RS. 1066); and that the Florida Supreme Court was incorrect in finding that the cold, calculated and premeditated aggravating factor was not present in this case (RS.

¹ References to the record from Mr. Floyd's first trial will be referred to as (R. and page #). References to the record from Mr. Floyd's second sentencing will be referred to as (RS. and page #). All other citations will be self-explanatory or will otherwise be explained.

1068-1069). The trial judge said he would ignore these aggravating factors, notwithstanding his personal opinions. The trial court then said that although he found that Mr. Floyd demonstrated some remorse, a desire to live within the rules of his current prison sentence, and a desire to establish a rapport with his children, these did not qualify as the type of mitigation contemplated (RS. 1071).² This Court affirmed Mr. Floyd's second sentence of death. Floyd v. State, 569 So. 2d 1225 (Fla. 1990); cert. denied, 111 S.Ct. 2912 (1991). Mr. Floyd filed an amended 3.850 motion on November 13, 1998. That motion was summarily denied without an evidentiary hearing on July 21, 1999.

GROUND FOR HABEAS CORPUS RELIEF

By his petition for a writ of habeas corpus, Mr. Floyd asserts that his capital conviction and sentence of death were obtained and then affirmed during the Court's appellate review process in violation of his rights guaranteed by the Fifth, Sixth, Eighth, and Fourteenth amendments to the United States Constitution, and the corresponding provision of the Florida Constitution, for each of the reasons set forth herein.

²The trial court failed to mention the non-statutory mitigation that this Court found to exist in Mr. Floyd's first case - the death of Mr. Floyd's father a year earlier; his childhood with an alcoholic mother; the fact that he was a parent of two small children; and the plea for mercy from the victim's daughter. Floyd v. State, 497 So. 2d 1211, 1212 (Fla. 1986).

CLAIM I

APPELLATE COUNSEL FAILED TO RAISE THE ISSUE OF THE INTRODUCTION OF GRUESOME AND CUMULATIVE PHOTOGRAPHS DURING TRIAL, TO MR. FLOYD'S PREJUDICE.

The prosecution was permitted to introduce into evidence numerous gruesome photographs that were inflammatory, cumulative, and prejudicial, and admitted solely to inflame the passion of the jurors based on impermissible factors. These included photographs of the victim's body taken at the scene of the crime, pictures of the victim's internal organs and the victim's stab wounds (R. 396, 452-53, 459-461). The state's purpose in offering these photographs was to appeal solely to the emotions of the jurors by shocking and disgusting them with graphic bloody pictures.

Defense counsel objected to the admission of autopsy photographs when photographs of the body at the crime scene had already been admitted (R. 412-413, 459-460).

MR. MURRY: Judge, I have lumped these exhibits into packets-not packets, but groups. There are numerous pictures of various internal organs and I'm going to let the Court take a look at these. These are basically pictures of internal organs and they don't serve to identify the body at all.

They're nothing that's going to help the jury in this particular case. They are just more or less, I don't know how to say it, they are just gory pictures of the internal organs of the body.

MR. GRATE: One photograph in particular shows the injury to the heart how the knife actually went through. The Doctor said the penetrating wound went inside the heart and out the other side.

THE COURT: He's testified to that. I think they are inflammatory. I'm going to sustain the objection.

MR. MURRY: Now, they have also got numerous pictures of the stab wounds of Mrs. Anderson. And my basic objection is we don't need all of those. We have pictures of the stab wounds of Mrs. Anderson. Maybe there are some in there that is all right but I think we have one. It's kind of overkill.

THE COURT: Of course, these depict the same thing as the larger one.

MR. GRATE: I think we need one of those.

THE COURT: Okay, pick one of those and the rest I will sustain it.

* * *

MR. MURRY: I'm just objecting to all of them. I think they are cumulative.

(R. 459-460).

The one photograph chosen by the state was a graphic and open depiction of the open chest of the victim during the autopsy. The trial court should have sustained the objection as to all of the autopsy photographs because many photographs of the victim's body had already been admitted into evidence. The medical examiner testified to the ten stab wounds to the chest and pointed them out in the photographs for emphasis to the jury (R. 460). Then, the state attorney had the medical examiner describe the wound to the upper chest. For emphasis, the state attorney asked to "walk these in front of the jury" and the trial court allowed him to do it (R. 462). After "walking" the photographs to the jury, the state brought out the bloody white sweater the victim had been wearing and had the medical examiner identify the sweater (R. 463). All of these theatrics were specifically calculated to infuriate the jury

against Mr. Floyd. There was no other purpose. The sweater was already in evidence. The crime scene photographs were already in evidence. The police officers and medical examiner had already testified to the wounds and the crime scene. The cause of death was not in dispute. Inexplicably, appellate counsel failed to raise this claim even though it was properly preserved for appeal. This was prejudicial.

The probative value of these photographs was not only outweighed by their prejudice, but these photographs were cumulative to each other. Their graphic content was further emphasized through the parading of the photographs in front of the jury and the testimony of state's witnesses. The prejudicial effect of the photographs undermined the reliability of Mr. Floyd's conviction and death sentence. The photographs themselves did not independently establish any material part of the state's case nor were they necessary to corroborate a disputed fact. The manner of death was not in dispute. The trial court's error in admitting these photographs cannot be considered harmless beyond a reasonable doubt. Chapman v. California, 87 S. Ct. 824 (1967); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

Use of these gruesome photographs, which were cumulative, inflammatory, and appealed improperly to the jury's emotions, denied Mr. Floyd a fair trial in violation of Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Appellate counsel's failure to raise this issue on direct appeal

constituted prejudicially deficient performance. Habeas relief is proper and warranted in this case.

CLAIM II

APPELLATE COUNSEL FAILED TO RAISE INSTANCES OF PROSECUTORIAL MISCONDUCT. THE PROSECUTORS' MISCONDUCT DURING THE COURSE OF MR. FLOYD'S CASE RENDERED MR. FLOYD'S CONVICTION AND DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The prosecutors' misconduct during the initial trial and resentencing proceeding both individually, and cumulatively, deprived Mr. Floyd of his rights under the Sixth, Eighth, and Fourteenth Amendment. Mr. Floyd raised this issue in his postconviction motion. The trial court held it to be procedurally barred for failure to raise it on direct appeal. Order Denying Relief, March 2, 1999 at 12-13.

During Mr. Floyd's initial trial, the prosecutor referred not only to cumulative, inflammatory photographs (see Claim I, supra), he also made reference to irrelevant and prejudicial information in an effort to inflame the passions of the jury.

The State elicited information about irrelevant vaginal washings taken from the victim, implying that a sexual crime had occurred when there was no evidence to indicate a sex crime (R. 465-466).

MR. MURRY: Judge, at this point I'm going to move for a mistrial and the grounds are basically that this guy has brought up vaginal washings twice. There is no suggestions of a rape or anything like that and I think it's excessively prejudicial and I'm going to move for a mistrial.

MR. GRATE: We haven't gone into that area and we aren't going to go into anything.

THE COURT: Just leave it at that and don't go into it any further. Stick to the blood and not get into that any further.

MR. GRATE: I'm not, sir.

THE COURT: I don't think that's sufficient grounds for mistrial and I'm going to deny it. Stick to what we have as relevant. (R. 466).

This was improper, particularly in light of the previous gross photographs that had just been "walked" in front of the jury. The trial court acknowledged that the mention of the "vaginal washings" was irrelevant, yet it failed to give the jury a curative instruction to disregard the state's implication that Mr. Floyd had been involved in an uncharged collateral crime that did not exist.

The State continued to interject inappropriate factors into the jury's consideration. Even after the judge sustained the objections to the photographs and ruled that the "vaginal washings" were irrelevant, the prosecutor continued to ask about collateral uncharged acts. The prosecutor asked about Mr. Floyd's reaction to being booked on the forgery charge, i.e. testimony that "[Mr. Floyd] kept looking at [the officer] and just staring like he should be charged with something else." (R. 509). The State also asked inappropriate questions as to whether Mr. Floyd was "cooperative" when blood and hair samples were taken (R. 443). All of these irrelevant and improper questions were aimed at implying to the jury that Mr. Floyd had something to hide and that he was responsible for other crimes.

The State continued to illicit responses to interject irrelevant testimony into the record. For example, the prosecutor asked for a witness to speculate as to why fingerprints were not found at the crime scene (R. 585-586).

MR. GRATE: Did you often find fingerprints?

A: It's not a common thing to find fingerprints in burglaries.

Q. Based on your investigations, why is that?

A. Well, in- -

MR. MURRY: I object. This has got to be sheer speculation on this detective's part.

MR. EPISCOPO: Three and a half years speculation?

MR. MURRY: He can't generalize that down into one set of circumstances such as here. He just can't make general blanket statements about evidence or about what's happened here.

MR. EPISCOPO: He questioned the fingerprint technician on general statements.

THE COURT: I'll overrule the objection.

A. By talking with people who have been involved in these types of crimes, they have indicated that --

MR. MURRY: I'll object to hearsay.

THE COURT: I don't see the relevance. I'm going to sustain that.

(R. 585-586).

The detective then testified that burglars commonly wear socks or gloves over their hands to avoid leaving fingerprints (R. 586-87). This speculative testimony was improper, and it was error to allow the testimony before the jury. Even though the issue was

properly preserved for appellate review, appellate counsel did not raise the issue.

The State also asked for expert opinions from unqualified lay witnesses (R. 677-679). Defense counsel objected to all of these instances (R. 443, 466, 509, 585-86, 677, 679), yet appellate counsel failed to raise them on direct appeal. The cumulative effect of all of these errors rendered the outcome unreliable because the jury was exposed to irrelevant opinions about Mr. Floyd's appearance, to testimony about collateral crimes that were never charged and to gory autopsy photographs that were cumulative and irrelevant. The state then argued all of these things to the jury in closing.

During closing argument, the State argued improper non-statutory aggravating factors:

Let's think about the actual act of killing and murdering and stabbing an eighty-six year-old woman, let's think about what other choices in that split second that James Floyd had to think about. He is in the bedroom and she comes meandering in the house. He has a choice to make right then. He knows the victim's old. He has a choice, and he had other choices available, he chose to stab her and take her life. The defendant could easily have knocked Annie Anderson down. She was eighty-six years old. She's probably got bad hearing and bad eyesight. He had other choices available. He made his choice then.

That decision that James Floyd made on January 16 of 1984 tells you a lot about him, a lot about his soul and what's in him. January 16th he made the decision to kill an eighty-six year old lady, senselessly. Think of the options. He is doing a burglary, an old lady walks in on him. He could have

thrown her down. He could have knocked her glasses off and thrown her down. He could have run out the door, but he made a decision then. That give's you insight as to him, what he's all about. He made the decision to take her life.

Now the stabbing of an eighty-six year old woman and then going to the bank and cashing her check, **does that show some type of remorse over there?** He stabs a lady, leaves her bleeding in her bed and goes to the bank and cashes her check, or does that all seem like it's all in a day's work?

(RS. 992-993)(emphasis supplied).

Lack of remorse is not a statutory aggravating factor. The prosecution is prohibited from arguing non-statutory aggravators, yet the state openly argued lack of remorse as aggravating. The jury was never instructed that lack of remorse could not be considered as an aggravating circumstance in the case.

Appellate counsel was ineffective for failing to raise this constitutional issue on appeal. This issue was raised in Mr. Floyd's motion for postconviction relief. The trial court found it to be procedurally barred on the basis that the claim could have been raised on direct appeal. Order Denying Relief, March 2,1999 at 6. Appellate counsel's performance was deficient in failing to raise this claim. Mr. Floyd is entitled to relief from this Court.

CLAIM III

**MR. FLOYD'S SENTENCING JURY WAS MISLED BY
COMMENTS AND INSTRUCTIONS THAT
UNCONSTITUTIONALLY AND INACCURATELY DILUTED
ITS SENSE OF RESPONSIBILITY FOR SENTENCING IN
VIOLATION OF THE EIGHTH AND FOURTEENTH
AMENDMENTS.**

Mr. Floyd's jury was repeatedly instructed by the court and the prosecutor that its role was merely "advisory." (See, e.g. (RS. 554, 555, 559, 560, 681, 691, 692, 1022, 1023). Great weight is given the jury's recommendation because the jury is co-sentencer. The jury's sense of responsibility was diminished by the misleading comments and instructions about its role. The jury was not told it was a co-sentencer. This diminution of the jury's sense of responsibility violated the Eighth Amendment. Caldwell v. Mississippi, 472 U.S. 320 (1985). To the extent that defense counsel, without a tactic or strategy, failed to object to these repeated violations, he rendered prejudicially deficient performance. Failure to raise this issue on direct appeal was ineffective assistance of appellate counsel.

Mr. Floyd's Sixth, Eighth, and Fourteenth amendment rights were violated by other erroneous and misleading instructions at the sentencing phase. These instructions told the jury that seven or more members must agree on a recommendation of life imprisonment before declining to impose a sentence of death. The effect of these erroneous instructions was to render Mr. Floyd's death sentence fundamentally unfair.

The trial judge gave this erroneous instruction:

In these proceedings it is not necessary that the advisory sentence of the jury be unanimous. Your decision may be made by a majority of the jurors. The fact that the determination of whether a majority of you recommend a sentence or life sentence, of life imprisonment in this case, can be reached by a single ballot -- can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings.

(RS. 2704-05). However, the judge did read part of the correct standard jury instruction, which advised the jury that if six or more jurors recommends life, they have made a life recommendation (RS. 1028, 29). This brief statement of the law was rendered moot by the previous instruction that misled the jury. Jurors were left with the erroneous impression that they could not return a valid sentencing verdict if they were tied six to six.

The trial court repeated this erroneous instruction in summarizing its charge to the jury:

Ladies and gentlemen, you will now retire to consider your recommendation. When seven or more are in agreement as to what sentence should be recommended to the Court, that form of recommendation should be signed by your foreman and returned to the Court.

(RS. 1030, 31)(emphasis added).

Trial counsel objected to this erroneous instruction during the charge conference.

MR. LOVE: Judge, I do have -- I am not sure, you might want to clarify this on the one recommending death. It says, the jury -- the jury, by a vote of to-do-do post death. The other one goes, the jury impose and

recommend life in prison without possibility of parole. It says, so say we all. The problem I may have is where they may infer -- even without those other instructions, they are going to infer it's going to be unanimous to do that.

(RS. 956)(emphasis added). Trial counsel renewed his objection after this erroneous instruction was read to the jury:

MR. LOVE: I hate to come up one more time. In listening to the last things it says reaching a majority, meaning the last things you are saying to them. I am not sure if that's going to be confusing to them. They still have to be -- before it happened it was explained to them as six.

(RS. 1032)(emphasis added).

Mr. Floyd was prejudiced by the State's improper conduct. Just as a criminal defendant has a right to effective assistance of counsel at trial, a defendant also has a right to counsel to aid in the direct appeal of his or her criminal conviction. Jones v. Heath, 941 F.2d 1126, 1130 (11th Cir. 1991). see Evitts v. Lucey, 469 U.S. 387 (1985). The right to counsel is violated when appellate counsel is ineffective. Id. In the instant case, Mr. Floyd's fundamental constitutional rights were violated by the prosecutor's use of irrelevant, inflammatory, and prejudicial material to obtain his conviction and death sentence. Appellate counsel was ineffective for failing to raise these issue on direct appeal. Relief is warranted.

CLAIM IV

MR. FLOYD'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY

INSTRUCTIONS SHIFTED THE BURDEN TO MR. FLOYD TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE SENTENCING JUDGE USED THIS IMPROPER STANDARD IN SENTENCING MR. FLOYD TO DEATH. FAILURE TO RAISE THIS ISSUE ON DIRECT APPEAL WAS INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

Under Florida law, a capital sentencing jury must be:

[T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .

[S]uch a sentence could be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). This standard was never applied at the penalty phase of Mr. Floyd's capital proceedings. To the contrary, the court shifted to Mr. Floyd the burden of proving whether he should live or die. In Hamblen v. Dugger, 546 So. 2d 1039 (Fla. 1989), a capital post-conviction action, the Florida Supreme Court said these claims should be addressed on a case-by-case basis. Mr. Floyd urges this Court to assess this significant issue and grant him relief. Mr. Floyd raised this issue in his postconviction motion, on the basis that defense counsel rendered prejudicially deficient assistance in failing to object to the errors. See Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990). The trial court summarily denied this claim, asserting that this issue was procedurally barred since appellate counsel failed to raise it on direct appeal. Order Denying Relief, March 2, 1999 at 4-5.

Shifting the burden to the defendant to establish that

mitigating circumstances outweigh aggravating circumstances conflicts with Mullaney v. Wilbur, 421 U.S. 684 (1975), and Dixon. Such instructions unconstitutionally shift to the defendant the burden of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, violating Caldwell v. Mississippi, 472 U.S. 320 (1985), Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), and Maynard v. Cartwright, 108 S. Ct. 1853 (1988).

The judge instructed the jurors in Mr. Floyd's penalty phase that they were required to impose death unless mitigation was not only produced but outweighed the aggravation. See Zeigler v. Dugger, 524 So. 2d 419 (Fla. 1988)(trial court is presumed to apply the law in accord with manner in which jury was instructed). This shifted the burden to Mr. Floyd to establish that life was the appropriate sentence. This standard also limited consideration of mitigating evidence to only those factors proven sufficient to outweigh the aggravation. The standard given to the jury violated state law. According to this standard, the jury could not "full[y] consider[]" and "give effect to" mitigating evidence. Penry, 109 S. Ct. 2934, 2951 (1989). This burden-shifting standard "interfered with the consideration of mitigating evidence." Boyde v. California, 110 S. Ct. 1190, 1196 (1990). Since "[s]tates cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the [death] penalty," McCleskey v. Kemp, 481 U.S. 279, 306 (1987), the argument

and instructions given to Mr. Floyd's sentencing jury, as well as the standard used by the trial court, violated the Eighth amendment's "requirement of individualized sentencing in capital cases [which] is satisfied by allowing the jury to consider all relevant mitigating evidence." Blystone v. Pennsylvania, 110 S. Ct. 1078, 1083 (1990). See also Lockett v. Ohio, 438 U.S. 586 (1978); Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821 (1987). The instructions gave the jury inaccurate and misleading information about who bore the burden of proof as to whether a death recommendation should be returned.

The judge's instruction violated Florida law and Eighth Amendment principles. See McKoy v. North Carolina, 110 S. Ct. 1227, 1239 (1990) (Kennedy, J., concurring) (a death sentence arising from erroneous instructions "represents imposition of capital punishment through a system that can be described as arbitrary or capricious"). Mr. Floyd was required to establish (prove) that life was the appropriate sentence, and the jury's and judge's consideration of mitigating evidence was limited to mitigation "sufficient to outweigh" aggravation.

In his penalty phase instructions, the judge instructed the jurors that it was their job to determine if the mitigating circumstances outweighed the aggravating circumstances:

It is now your duty to advise the Court as to what punishment should be imposed upon the defendant for his crime of murder in the first degree. As you have been told, the final decision as to what punishment shall be imposed is the responsibility of myself,

however, it is your duty to follow the law that will now be given to you by myself and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.

(RS. 1022,23). This erroneous standard was again repeated to the jury:

Should you find sufficient aggravating circumstances exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

(RS. 1025).

These instructions violated Florida law and the Eighth and Fourteenth Amendments because they shifted the burden of proof to Mr. Floyd on the central sentencing issue of whether he should live or die. Under Mullaney, this unconstitutional burden-shifting violated Mr. Floyd's due process and Eighth Amendment rights. See also Sandstrom v. Montana, 442 U.S. 510 (1979); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). The jury was not instructed in conformity with the standard set forth in Dixon.

In being instructed that mitigating circumstances must outweigh aggravating circumstances before the jury could recommend life, the jury was effectively told that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances were sufficient to outweigh the aggravating circumstances. Cf. Mills v. Maryland,

108 S. Ct. 1860 (1988); Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821 (1987). The jury was precluded from considering mitigating evidence, Hitchcock, and from evaluating the "totality of the circumstances" in considering the appropriate penalty. State v. Dixon, 283 So. 2d at 10. According to the instructions, jurors would reasonably have understood that only mitigating evidence that rose to the level of "outweighing" aggravation need be considered.

Because of appellate counsel's ineffectiveness, this issue was not addressed. See, Order Denying Relief, March 2, 1999 at 4-5. Mr. Floyd is entitled to a new direct appeal.

CLAIM V

MR. FLOYD'S SENTENCE WAS TAINTED BY IMPROPER INSTRUCTIONS IN VIOLATION OF ESPINOSA V. FLORIDA, STRINGER V. BLACK, SOCHOR V. FLORIDA, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS. NO MEANINGFUL HARMLESS ERROR ANALYSIS WAS PERFORMED.

During Mr. Floyd's resentencing, The jury was instructed on three aggravating factors:

The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence. One, the crime for which the defendant is to be sentenced was committed by the defendant while he was engaged in the commission of a burglary. Two, the crime for which the defendant is to be sentenced was committed for financial gain.

Where the same aspect of the offense at issue gives rise to two or more aggravating circumstances, that aspect can only be considered as one aggravating circumstance.

If you, the jury, find the State has proved beyond a reasonable doubt both aggravating circumstances number one and two, this may only be regarded as one aggravating circumstance for the purposes of the recommendation.

The third potentially aggravating circumstance is the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel. In order that you might better understand and be guided concerning the meaning of aggravating circumstance, the Court hereby instructs you that what is intended to be included in the category of wicked, evil, atrocious or cruel are those capital crimes where the actual commission of the capital felony was accompanied by such additional facts as to set the crime apart from the norm of capital felonies, the conscienceless or pitiless crime which is unnecessarily tortuous to the victim.

(RS. 1024-25).

Aggravating circumstances "must be proven beyond a reasonable doubt." Hamilton v. State, 547 So. 2d 528 (Fla. 1989). Mr. Floyd's jury was so instructed. Florida law also establishes that limiting 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). Mr. Floyd's jury received no instructions on the elements of the aggravators. Appellate counsel failed to address this issue on direct appeal. Mr. Floyd raised this issue in his postconviction motion, only to have it summarily denied by the trial court as being procedurally barred. Order Denying Relief, March 2, 1999 at 5.

Under Florida law, the sentencing jury may reject or give little weight to any particular aggravating circumstance. A binding life recommendation may be returned because the aggravators are insufficient. Hallman v. State, 560 So. 2d 223 (Fla. 1990). The jury's understanding and consideration of aggravating factors may lead to a life sentence. Yet, Mr. Floyd's jury was not given adequate guidance as to what was necessary to establish the presence of an aggravator. This left the jury with unbridled discretion and violated the Eighth amendment.

The jury was simply told "the crime . . . was committed by the defendant while he was engaged in the commission of a burglary" and "was committed for financial gain" (RS. 1024). The jury was not told that these aggravating factors standing alone were insufficient to support a death sentence. Proffitt v. State, 510 So. 2d 896 (Fla. 1987). The penalty phase instruction on this aggravating circumstance "fail[ed] adequately to inform [Mr. Floyd's] jur[y] what [it] must find to impose the death penalty." Maynard v. Cartwright, 108 S. Ct. at 1858. This factor must be stricken.

"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." Stringer v. Black 112 S. Ct. 1130, 1139 (1992). Using an improper aggravating factor in a weighing scheme like Florida has the potential for creating greater

harm than it does in an eligibility scheme:

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. In a weighing state like Florida, relying on an invalid aggravating factor is constitutional error requiring a harmless error analysis, even if other aggravating factors exist.

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

Stringer and Arave establish the validity of Mr. Floyd's claim that the felony murder aggravating factor is an unconstitutional automatic aggravating factor that does not provide the requisite narrowing. Under Florida law, capital sentencers may reject or 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. Floyd was convicted of one count of first-degree murder, with burglary being the underlying felony. The jury was instructed on both premeditated and felony murder and returned a general verdict. The death penalty in this case was predicated on unreliable automatic findings of statutory aggravating circumstances -- the very felony underlying the conviction.

As to the aggravator of "pecuniary gain," it does not apply unless it is the primary or sole motive for the crime. The Florida Supreme Court struck the lower court's finding of this aggravator because "[t]here was not, however, sufficient evidence to prove a pecuniary motivation for the murder itself beyond a reasonable doubt." Peek v. State, 395 So. 2d 492 (Fla. 1980)(quoted in Initial Brief of Appellant on Direct Appeal at 48-9); Simmons v. State, 419 So. 2d 316, 318 (Fla. 1982)(followed in Rogers v. State, 511 So. 2d 526 (Fla. 1987)); Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988)("[I]t has not been shown beyond a reasonable doubt

that the primary motive for this killing was pecuniary gain").

Mr. Floyd's jury failed to receive any limiting instructions on pecuniary gain. The instruction on this aggravator "fail[ed] adequately to inform [Mr. Floyd's] jur[y] what [it] must find to impose the death penalty." Maynard v. Cartwright, 486 U.S. at 361-62. Mr. Floyd's jury must be presumed to have relied on this vague jury instruction. Stringer v. Black 112 S. Ct. 1130 (1992). This was Eighth Amendment error and was not harmless beyond a reasonable doubt.

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). The sentencer was entitled automatically to return a death sentence upon a finding of first degree felony murder. Every felony murder would involve, by necessity, the finding of a statutory aggravating circumstance, a fact which, under the particulars of Florida's statute, violates the Eighth amendment. Arave v. Creech. This is so because an automatic aggravating circumstance is created, one which does not "genuinely narrow the class of persons eligible for the death penalty," Zant v. Stephens, 462 U.S. 862, 876 (1983), and one which therefore renders the sentencing process unconstitutionally unreliable. Id. "Limiting the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Maynard v. Cartwright, 486 U.S. 356, 362 (1988). If Mr.

Floyd was convicted of felony murder, he then automatically faced statutory aggravation for felony murder. These aggravating factors were "illusory circumstance[s]" that "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. 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). The Florida Supreme 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 and did not apply this limitation in imposing death.

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"). In this case, the jury was instructed on this aggravating circumstance and told that it was sufficient for a recommendation of death unless the mitigating circumstances outweighed the aggravating circumstance. The jury

did not receive an instruction explaining the limitation contained in Rembert and Proffitt. It is impossible to know whether the jury relied on this aggravating circumstance in returning its death recommendation.

Mr. Floyd 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.

Stringer, 112 S. Ct. at 1137. In Mr. Floyd's case, substantial mitigating evidence, establishing both statutory and nonstatutory mitigating factors, was presented at the penalty phase. 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. An "extra thumb" was placed on the death side of the scales, Stringer. Without that "extra thumb," 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.

Mr. Floyd's jury was instructed that "the crime . . . was especially wicked, evil, atrocious, or cruel" (RS. 1025) and

"wicked, evil, atrocious and cruel are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts . . . which is unnecessary torturous to the victim" (RS. 1025). The trial court never instructed the jury that it was required to find that the defendant "intended" to inflict unnecessary torture to the victim. Stein v. State, 632 So. 2d 1361 (Fla. 1994); Santos v. State, 591 So. 2d 160, 163 (Fla. 1991).

In Stein v. State, 632 So. 2d 1361 (Fla. 1994), the Florida Supreme Court struck a finding of heinous, atrocious or cruel because "no evidence was presented to demonstrate any intent on Stein's part to inflict a high degree of pain or to otherwise torture the victims." The narrowing construction of heinous, atrocious or cruel requires that the defendant intended "to inflict a high degree of pain or to otherwise torture." This narrowing construction is repeatedly found in Florida law. Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1993); Santos v. State, 591 So. 2d 160, 163 (Fla. 1991); Omelus v. State, 584 So. 2d 563, 566 (Fla. 1991); Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990); Rhodes v. State, 547 So. 2d 1201, 1208 (Fla. 1989); Amoros v. State, 531 So. 2d 1256, 1260 (Fla. 1988); Lewis v. State, 377 So. 2d 640, 646 (Fla. 1979). See also Scull v. State, 533 So. 2d 1137 (Fla. 1988).

The Supreme Court approved this Court's limiting construction of the "heinous, atrocious, or cruel" aggravating circumstance:

[The Florida Supreme Court] has recognized that while it is arguable "that all killings are atrocious, . . . [s]till, we believe that the Legislature intended something

'especially' heinous, atrocious or cruel when it authorized the death penalty for first degree murder." Tedder v. State, 322 So. 2d, at 910. As a consequence, the court has indicated that the eighth statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So. 2d, at 9. See also Alford v. State, 307 So. 2d 433, 445 (1975); Halliwell v. State, [323 So. 2d 557], at 561 [Fla. 1975]. We cannot say that the provision, as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases.

Proffitt v. Florida, 428 U.S. 242, 255-56 (1976)(footnote omitted)(emphasis added). The limitation approved in Proffitt was not used at any stage of Mr. Floyd's proceedings.

Mr. Floyd's jury was never guided or channeled in its sentencing discretion. No constitutionally sufficient limiting construction, as construed in Dixon and approved in Proffitt, was ever applied to the "heinous, atrocious, or cruel" aggravating circumstance before this jury. Moreover, this aggravator only applies where evidence shows beyond a reasonable doubt that the defendant knew or intended the murder to be especially heinous, atrocious or cruel. Omelus v. State, 584 So. 2d 563, 566 (Fla. 1991)(this "aggravating factor cannot be applied vicariously"); Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990)(heinous, atrocious or cruel aggravator does not apply when the crime was "not a crime that was meant to be deliberately and extraordinarily painful")(emphasis in original).

In Mr. Floyd's case, the jury did not receive an instruction

regarding the limiting construction of "heinous, atrocious and cruel." The judge relied upon the jury's death recommendation; in fact, he gave it great weight. However, the jury's death recommendation was tainted by its erroneous consideration of this aggravator. As a result, the penalty phase instructions on this aggravating circumstance "fail[ed] adequately to inform [Mr. Floyd's] jur[y] what [it] must find to impose the death penalty." Maynard v. Cartwright, 108 S. Ct. at 1858. Accordingly, this instruction was erroneous and prejudicial to Mr. Floyd.

"[T]here 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). Florida's statutory language ("especially heinous, atrocious, or cruel") is facially³ vague and overbroad in violation of the Eighth and Fourteenth Amendments.

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. Stringer, 112 S. Ct. at 1137. Without this prohibition against "doubling," the capital sentencing statute is

³ The 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, 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.

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"). 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. Floyd's conviction could rest on the felony murder rule, the "in the course of a felony" aggravating factor was facially vague and overbroad.

"[T]he channeling and limiting of 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, 108 S. Ct. at 1858. There must be a "principled way to distinguish [the] case, in which the death penalty was imposed, from the many cases in which it was not." Id. at 1859, quoting, Godfrey v. Georgia, 446 U.S. 420, 433 (1980).

The judge's failure to instruct on the limitations left the jury free to ignore how to distinguish Mr. Floyd's case from others in which the limitations were applied and death was not imposed.

A properly instructed jury would have had no more than two aggravating circumstances (and probably less) to weigh against the mitigation offered by the defense. Where improper aggravating

circumstances are weighed by the jury, "the scale is more likely to tip in favor of a recommended sentence of death." Valle v. State, 502 So. 2d 1225 (Fla. 1987). The jury was left with open-ended discretion found invalid in Furman v. Georgia, 408 U.S. 238 (1972), and Maynard v. Cartwright. Since, the jury in Florida is a co-sentencer, prejudice is manifest. Espinosa.

The jury was misled by the instructions and the prosecutor's argument as to what was necessary to establish the presence of the aggravating circumstance and support death. The jury was given no instruction limiting the construction placed upon "heinous, atrocious or cruel." The instruction given here provided even less guidance than the one given in Maynard v. Cartwright. See Coleman v. Saffle, 869 F.2d 1377, 1384 n.7 (10th Cir. 1989). The Eighth Amendment was violated.

The jury instructions in Mr. Floyd's case did not cure the facially vague and overbroad statute. The jury did not receive instructions as to the narrowing constructions 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.

"[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. 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.

In Mr. Floyd'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. As stated in the trial court's order denying postconviction relief, it is due to appellate counsel's failure to raise this issue on direct appeal that the issue is now procedurally barred. Mr. Floyd is entitled to relief.

CLAIM VI

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. FLOYD'S CASE WHERE THE JURY DID NOT RECEIVE ADEQUATE NARROWING CONSTRUCTIONS. MR. FLOYD'S SENTENCE OF DEATH IS PREMISED UPON FUNDAMENTAL ERROR THAT MUST BE CORRECTED NOW IN LIGHT OF ESPINOSA V. FLORIDA AND RICHMOND V. LEWIS.

At the time of Mr. Floyd's trial, Sec. 921.141, Fla. Stat., provided in part:

(5) AGGRAVATING CIRCUMSTANCES.--
Aggravating circumstances shall be limited to the following:

* * *

(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 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.

* * *

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

* * *

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

Richmond v. Lewis, 113 S.Ct. 528 (1992) and Espinosa v. Florida, 112 S. Ct. 2926 (1992) held that the Florida statute establishing the aggravating factor of "heinous, atrocious or cruel" is vague and overbroad under the Eighth Amendment. Richmond entitles Mr. Floyd a resentencing before a new jury. This issue was raised in Mr. Floyd's postconviction motion, where it was held to be procedurally barred. Order Denying Relief, March 2, 1999 at 5.

Mr. Richmond's death sentence was vacated and his case was remanded for a new sentencing. The same result is required in Mr. Floyd's case. The Florida Statute defined the aggravating factor as: "[t]he capital felony was especially, heinous, atrocious or cruel." Fla. Stat. section 121.141(5)(h) (1981). The statute did not further define this aggravating factor. This statutory language is and was facially vague. Richmond, 113 S. Ct. at 535; Espinosa v. Florida, 112 S. Ct. 2926 (1992)(jury instruction identical to Fla. Stat. section 121.141(5)(h) unconstitutionally vague).

While the Supreme Court adopted a narrowing construction of the statutory provisions, the United States Supreme Court held in Richmond that a state must also "an adequate narrowing construction," but that construction must also be applied either by the sentencer or by the appellate court in a reweighing in order to cure the facial invalidity. Richmond, 113 S. Ct. at 535.

In Mr. Floyd's case, the narrowing construction was not

applied. His penalty phase jury was not given "an adequate narrowing construction," but instead was simply instructed on the facially vague statutory language. Following the death recommendation, the sentencing judge imposed death. Under Florida law, the judge was required to give great weight to the jury's verdict.

A sentencing judge in a Florida capital case is required to give the jury's verdict "great weight." It must be presumed that a sentencing judge in Florida followed the law and gave "great weight" to the jury's recommendation. Nothing in Mr. Floyd's case warrants setting aside that presumption. Florida law requires that where evidence exists to support the jury's recommendation, it must be followed. Scott v. State, 603 So. 2d 1275 (Fla. 1992). Here, the judge considered, relied on, and gave great weight to the tainted jury recommendation. A "new sentencing calculus" free from the taint, as required by Richmond, had not been conducted. The judge was not free to ignore the tainted death recommendation. Scott.

Mr. Floyd was denied his Eighth Amendment rights. His jury was permitted to consider "invalid" aggravation because the aggravating factor specified by Fla. Stat. § 921.141 (5) (h) was unconstitutionally vague. The jury was not given the proper narrowing construction so the facial unconstitutionality of the statute was not cured. Relief is required because the jury is a sentencer:

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.

Espinosa, 112 S. Ct. at 2928.

Even if "the trial court did not directly weigh any invalid aggravating circumstances," it must be "presume[d] that the jury did so." Id. In imposing death, the trial court presumably considered the jury recommendation, also presumably giving it the "great weight" required by Florida law. Id. The errors resulting from the unconstitutional instruction on the "heinous, atrocious or cruel" aggravating circumstance and the "cold, calculated and premeditated" circumstance provided to Mr. Floyd's jury were not harmless beyond a reasonable doubt. "[W]hen the weighing process has been infected with a vague factor the death sentence must be invalidated." Stringer, 112 S. Ct. at 1139.

Mr. Floyd's jury must be presumed to have considered invalid statutory provisions and to have weighed these factors against the mitigation. Unless the State can establish beyond a reasonable doubt that the consideration of the invalid statutory provisions had no effect upon the weighing process, the errors cannot be considered harmless. The substantial mitigation in the record establishes that the errors were not harmless beyond a reasonable doubt. Appellate counsel failed to raise this issue on direct appeal, resulting in a finding by the trial court that the issue is

now procedurally barred. Mr. Floyd is entitled to relief.

CONCLUSION

For all of the reasons discussed here, Mr. Floyd respectfully urges the Court to grant habeas corpus relief.

CERTIFICATE OF SERVICE

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 July 21, 2000.

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