

TOPICAL INDEX TO BRIEF

	<u>PAGE NO.</u>
STATEMENT OF THE CASE	1
STATEMENT OF THE FACTS	2
ARGUMENT	
APPLICATION OF <u>ESPINOSA v. FLORIDA</u> SHOWS THAT APPELLANT'S DEATH SENTENCE WAS IMPOSED IN VIOLATION OF THE EIGHTH AMENDMENT BECAUSE THE PENALTY JURY WAS INSTRUCTED IN THE BARE STATUTORY LANGUAGE OF AN UNCONSTITUTIONALLY VAGUE AGGRAVATING CIRCUMSTANCE.	3
A. The Bare Statutory Language of the Section 921.141(5)(i) Aggravating Circumstance Violates the Eighth Amendment Requirement that Aggravating Circumstances Not be too Vague to Guide the Capital Sentencer's Discretion	4
B. A Florida Capital Penalty Jury Must be Instructed With an Adequate Definition of Aggravating Circumstances Because the Jury Exerts Great Influence on the Ultimate Sentence Imposed	7
C. The Invalid Penalty Instruction Was Not Harmless Error	11
CONCLUSION	14
CERTIFICATE OF SERVICE	14

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE NO.</u>
<u>Amoros v. State,</u> 531 So. 2d 1236 (Fla. 1988)	7
<u>Banda v. State,</u> 536 So. 2d 221 (Fla. 1988)	7
<u>Blair v. State,</u> 406 So. 2d 1103 (Fla. 1981)	13
<u>Brawn v. State,</u> 565 So. 2d 304 (Fla. 1990)	3, 7
<u>Brown v. Wainwrisht,</u> 392 So. 2d 1327 (Fla. 1981)	10
<u>Christian v. State,</u> 550 So. 2d 450 (Fla. 1989)	7
<u>Clemons v. Mississippi,</u> 494 U.S. 738 (1990)	10
<u>Cochran v. State,</u> 547 So. 2d 928 (Fla. 1989)	8
<u>Copeland v. Wainwrisht,</u> 505 So. 2d 425 (Fla. 1987)	9
<u>Douglas v. State,</u> 575 So. 2d 165 (Fla. 1991)	6
<u>Elledge v. State,</u> 346 So. 2d 998 (Fla. 1977)	10
<u>Enmund v. Florida,</u> 458 U.S. 782 (1982)	9
<u>Espinosa v. Florida,</u> 505 U.S. ___, 112 S.Ct., 120 L. Ed. 2d 554 (1992)	1, 3, 4, 8, 10
<u>Garron v. State,</u> 528 So. 2d 353 (Fla. 1958)	7
<u>Godfrey v. Georgia,</u> 446 U.S. 420 (1980)	4
<u>Grossman v. State,</u> 525 So. 2d 833 (Fla. 1385)	8

TABLE OF CITATIONS (continued)

<u>Hamblen v. State,</u> 527 So. 2d 800 (Fla. 1988)	7
<u>Herring v. State,</u> 446 So. 2d 1049 (Fla. 1984)	5, 12
<u>Hodges v. State,</u> 535 So. 2d 929 (Fla. 1992)	1
<u>Holton v. State,</u> 573 So. 2d 284 (Fla. 1990)	6
<u>Jackson v. State,</u> 502 So. 2d 409 (Fla. 1986)	9
<u>Jemt v. State,</u> 408 So. 2d 1024 (Fla. 1981)	5
<u>Jones v. Dugger,</u> 533 So. 2d 290 (Fla. 1988)	3
<u>Maynard v. Cartwright,</u> 486 U.S. 356 (1988)	3-5, 7
<u>Mills v. Maryland,</u> 486 U.S. 367 (1988)	10
<u>Mitchell v. State,</u> 527 So. 2d 179 (Fla. 1988)	7
<u>Nibert v. State,</u> 574 So. 2d 1059 (Fla. 1990)	11
<u>Occhicone v. Stab,</u> 570 So. 2d 902 (Fla. 1990)	3
<u>Parker v. Dugger,</u> 498 U.S. ____, 112 L. Ed. 2d 812 (1991)	10
<u>Phillips v. State,</u> 18 Fla. L. Weekly S 26 (Fla. Sept. 24, 1992)	9
<u>Porter v. State,</u> 564 So. 2d 1060 (Fla. 1990)	6
<u>Rhodes v. State,</u> 547 So. 2d 1201 (Fla. 1989)	7

TABLE OF CITATIONS (continued)

<u>Richardson v. State,</u> 604 So. 2d 1107 (Fla. 1992)	6
<u>Rivera v. State,</u> 561 So. 2d 536 (Fla. 1990)	7
<u>,Rivera v. State,</u> 545 So. 2d 864 (Fla. 1989)	7
<u>Rogers v. State,</u> 511 So. 2d 526 (Fla. 1987)	5, 6, 12
<u>Santos v. State,</u> 591 So. 2d 160 (Fla. 1991)	6
<u>Schafer v. State,</u> 537 So. 2d 988 (Fla. 1989)	7
<u>Smalley v. State,</u> 546 So. 2d 720 (Fla. 1989)	3, 8
<u>Smith v. State,</u> 515 So. 2d 182 (Fla. 1987)	8
<u>Sochor v. State,</u> 580 So. 2d 595 (Fla. 1991)	6
<u>Sochor v. Florida,</u> 504 U.S. ____, 119 L. Ed. 2d 326 (1992)	10
<u>Songer v. State,</u> 544 so. 2d 1010 (Fla. 1389)	11
ate, 583 so. 2d 323 (Fla. 1991)	12
<u>Tedder v. State,</u> 322 so. 2d 908 (Fla. 1975)	8
<u>Thompson v. State,</u> 565 So. 2d 1311 (Fla. 1990)	6
<u>Trotter v. State,</u> 576 So. 2d 691 (Fla. 1991)	10
<u>Walton v. Arizona,</u> 497 U.S. ____, 110 S.Ct. 3047, 111 L. Ed. 2d 511 (1990)	8

TABLE OF CITATIONS (continued)

Wright v. State,
586 So. 2d 1024 (Fla. 1991) 9

Zant v. Stephens,
462 U.S. 862 (1983) 6

OTHER AUTHORITIES

U.S. Const. amend. VIII 3, 4, 6
U.S. Const. amend. XIV 4
§ 921.141(5)(i), Fla. Stat. 3, 4, 6, 7, 13

STATEMENT OF THE CASE

This Court affirmed Appellant's conviction for first-degree murder and sentence of death in Hodges v. State, 595 So. 2d 929 (Fla. 1992). Rehearing was denied on April 20, 1992. On October 5, 1992, the united States Supreme Court granted certiorari and remanded this case to this Court for further consideration in light of Espinosa v. Florida, 505 U.S. ___, 112 S.Ct., 120 L. Ed, 2d 854 (1992).

STATEMENT OF THE FACTS

Appellant will rely upon the Statement of the Facts as presented in his initial brief.

ARGUMENT

APPLICATION OF ESPINOSA v. FLORIDA
SHOWS THAT APPELLANT'S DEATH SEN-
TENCE WAS IMPOSED IN VIOLATION OF
THE EIGHTH AMENDMENT BECAUSE THE
PENALTY JURY WAS INSTRUCTED IN THE
BARE STATUTORY LANGUAGE OF AN UNCON-
STITUTIONALLY VAGUE AGGRAVATING CIR-
CUMSTANCE.

At the outset, Appellant must acknowledge that the issue raised in his initial **brief** (Issue V) is not a new one for this Court. Similar issues were previously rejected by this Court in Brown v. State, 565 So. 2d 304 (Fla. 1990); Jones v. Dugger, 533 So. 2d 290 (Fla. 1988) and Occhicone v. State, 570 So. 2d 902 (Fla. 1990). When this **Court** rejected the claim that a Florida penalty jury cannot be instructed in the bare statutory terms of the section 921.141(5)(i) aggravating circumstance ("committed in a cold, calculated, **and** premeditated manner without any pretense of moral or legal justification"), it wrote in Brown:

Based on Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988), Brown also argues that the standard instruction on the cold, calculated, and premeditated aggravating circumstance is unconstitutional. In Maynard, the Court held the Oklahoma instruction on heinous, atrocious, and cruel unconstitutionally vague because it did not adequately define that aggravating factor for the sentencer (in Oklahoma, the jury). We have previously found Maynard inapposite to Florida's death penalty sentencing regarding this state's heinous, atrocious, and cruel aggravating factor. Smalley v. State, 546 So.2d 720 (Fla. 1989). We find Brown's attempt to transfer Maynard to this state and to a different aggravating factor misplaced.

565 So. 2d at 308.

However, the United States Supreme Court's decision in Espinosa scrapped the rationale that Maynard v. Cartwright is "inapposite" to the Florida capital sentencing scheme. Implicit also in the Court's remand of this case is the suggestion that the standard instruction on the cold, calculated, and premeditated aggravating circumstance is as unconstitutionally vague as the jury instruction on the especially **heinous**, atrocious or cruel **aggravating** circumstance invalidated in Espinosa.

A. The Bare Statutory Language of the Section 921.141(5)(i) Aggravating Circumstance Violates the Eighth Amendment Requirement that Aggravating Circumstances Not be too Vague to Guide the Capital Sentencer's Discretion

It **is** well established that the Eighth and Fourteenth Amendments prohibit the imposition of the death penalty "under sentencing procedures that create a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner." Godfrey v. Georgia, 446 U.S. at 427, 64 L. Ed. 2d at 406; U.S. Const. amends. VIII and XIV. The State "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" Id., 446 U.S. at 428, 64 L. Ed. 2d at 406 (footnotes omitted).

In Godfrey, the United States Supreme Court held that an aggravating circumstance applicable on a finding that the offense was "outrageously or wantonly vile, horrible, and inhuman" was unconstitutionally vague. The Godfrey court found "nothing in these few words, standing alone, that implies any inherent

restraint on the arbitrary and capricious infliction of a death sentence." Id., 446 U.S. at 428-429; 64 L. Ed. 2d at 406. Similarly, in Maynard v. Cartwright, supra, the Court held that Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance was too vague and overbroad to sufficiently guide the sentencing jury's discretion. The defect was not cured by the state appellate court's finding that specific facts supported the aggravating factor. Id., 486 U.S. at 363-364, 100 L. Ed. 2d at 382.

The cold, calculated and premeditated aggravating circumstance implicated at bar suffers from the same infirmity. The ordinary person might **suppose** that all premeditated murders could qualify for the "cold, calculated and premeditated" aggravating circumstance. This Court has insisted that such is not the case although definition of this aggravating factor has proved elusive.

In Jent v. State, 408 So. 2d 1024 (Fla. 1981), cert.den., 457 U.S. 1111 (1982), the court noted that the level of premeditation required for the aggravating circumstance to apply was higher than that needed for a first-degree murder conviction. 408 So. 2d at 1032. Then, in Herring v. State, 446 So. 2d 1049 (Fla.), cert.den., 469 U.S. 989 (1984), the court approved a finding of the cold, calculated, and premeditated aggravating Circumstance where a robber first shot the **store** clerk in response to a show of resistance and then shot him again after the clerk had fallen to the floor. Later, this Court receded from Herring in Rogers v. State, 511 So. 2d 526 at 533 (Fla. 1987), cert.den., 484 U.S. 1020

(1988). The Rogers court limited application of the section 921.141(5)(i) aggravating factor to murders committed in accord with a "careful plan or prearranged design" to kill.

Finally, in Porter v. State, 564 So. 2d 1060 (Fla. 1990), cert.den., 112 L. Ed. 2d 1106 (1991), this Court squarely addressed the Eighth Amendment problem:

To avoid arbitrary and capricious punishment, this aggravating circumstance "must genuinely narrow the class of persons eligible **far** the death penalty and must reasonably **justify** the imposition of a more severe **sen-**tence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983) (footnote omitted). Since premeditation already is an element of capital murder in Florida, (footnote omitted) section 921.141(5)(i) must have a different meaning; otherwise, it would apply *to* every premeditated murder. Therefore, section 921.141(5)(i) must **apply to** murders more cold-blooded, more ruthless, and more plotting than the ordinarily reprehensible crime of premeditated first-degree murder. (Footnote omitted)

564 So. 2d at 1063-4.

Yet, in spite of this Court's herculean efforts to adopt a constitutionally adequate limited construction of the cold, calculated, and premeditated aggravating circumstance, Florida trial courts routinely misapply it. An incomplete list of capital decisions in the past five years where this Court has reversed sentencing judge findings of the aggravating factor includes: Richardson v. State, 604 So. 2d 1107 (Fla. 1992); Santos v. State, 591 So. 2d 160 (Fla. 1991); Sochor v. State, 580 So. 2d 595 (Fla. 1991); Douglas v. State, 575 So. 2d 165 (Fla. 1991); Holton v. State, 573 So. 2d 284 (Fla. 1993); Thompson v. State, 565 So. 2d

1311 (Fla. 1990); Rivera v. State, 561 so. 2d 536 (Fla. 1990); Christian v. State, 550 so. 2d 450 (Fla. 1389); Rhodes v. State, 547 so. 2d 1201 (Fla. 1989); Rivera v. State, 545 So. 2d 864 (Fla. 1989); Schafer v. State, 537 So, 2d 988 (Fla. 1989); Banda v. State, 536 so. 2d 221 (Fla. 1988); Amoros v. State, 531 So. 2d 1236 (Fla. 1988); Garron v. State, 528 so. 2d 353 (Fla, 1988); Hamblen v. State, 527 So. 2d 800 (Fla. 1988); and Mitchell v. State, 527 so. 2d 179 (Fla. 1388).

The question is posed whether a jury could possibly understand when to apply the cold, calculated, and premeditated aggravating factor when judges can't. Bear in mind that the sentencing judges have the benefit of this Court's attempts to limit the definition of the aggravating factor while juries are instructed only in the bare statutory language. The only reasonable conclusion is that Florida penalty juries don't limit the scope of the aggravating factor, and probably weigh the section 921.141(5)(i) aggravating circumstance in every case of premeditated murder where an instruction on the factor is given.

B. A Florida Capital Penalty Jury Must be Instructed With an Adequate Definition of Aggravating Circumstances Because the Jury Exerts Great Influence on the Ultimate Sentence Imposed

Central to this Court's prior refusal to find error in the cold, calculated, and premeditated jury instruction was the premise that the judge, not the jury, was the final sentencer under Florida capital procedure. Brown, supra reiterated this Court's holding that Maynard v. Cartwright, 486 U.S. 356 (1988) did not apply in

@ Florida because of the differences between Oklahoma's capital sentencing scheme and Florida's. See, Smalley v. State, 546 So. 2d 720 (Fla. 1983). Indeed, the United States Supreme Court in Walton v. Arizona, 437 U.S. ___, 110 S.Ct. 3047, 111 L. Ed. 2d 511 (1990) distinguished between judge and jury capital sentencing with regard to the effect of unconstitutionally vague aggravating circumstances on a capital sentence. **When the jury is the sentencer**, it is constitutional error "to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face," Walton, 111 L. Ed. 2d at 528.

Espinosa v. Florida, 505 U.S. ___, 120 L. Ed. 2d 554 (1992) rejected the notion that Florida capital juries play a minor role in the eventual sentence imposed. The Espinosa court concluded that in Florida, both the jury and **the judge share capital sentencing** authority. Consequently, neither the jury nor the judge may be allowed to give weight to an invalid aggravating circumstance.

The Espinosa holding is well **supported** by this Court's previous assertions about the penalty jury's role in capital sentencing. A jury's recommendation of life cannot be overridden by the trial **judge** unless the facts suggesting death are **so** clear and convincing that no reasonable person could differ. Tedder v. State, 322 So. 2d 908 (Fla. 1975); Cochran v. State, 547 So. 2d 928 (Fla. 1983). Conversely, a jury recommendation of death is entitled to "great weight." Smith v. State, 515 So. 2d 182 at 185 (Fla. 1987), cert. den., 485 U.S. 971 (1988); Grossmaa v. State, 525 So. 2d 833 at 333, n.1 (Fla. 1988), cert. den., 489 U.S. 1071 (1989). Therefore,

the jury recommendation is a critical factor not only in the judge's imposition of sentence but also in whether the appellate court will affirm a death sentence. Phillips v. State, 18 Fla. L. Weekly § 26 at 28 (Fla. Sept. 24, 1992); Copeland v. Wainwright, 505 So. 2d 425 at 427 (Fla. 1987).

This Court **has** also given significance to the penalty jury's role in other aspects of capital sentencing. In Jackson v. State, 502 So. 2d 409 (Fla. 1986), this Court held that the jury must be instructed on the Enmund¹ principle that a non-triggerman cannot be sentenced to death unless he intended that lethal force be used. In Wright v. State, 586 So. 2d 1024 (Fla. 1991) it was held that a reasonable jury recommendation of life imprisonment acts **as** an acquittal of the death penalty under the double jeopardy provision of the Florida Constitution, Art. I, § 9. Clearly, the jury's role in capital sentencing is more than advisory.

Applying the foregoing to the facts at bar, Appellant argued that the cold, calculated and premeditated aggravating circumstance **was** unconstitutionally vague and that the penalty jury should not receive the standard jury instruction as it (R705-6). The court overruled the objection and instructed the jury **as a** possible aggravating circumstance:

The crime for which the defendant is to be sentenced was committed in cold, calculated and premeditated manner without any pretense of moral or legal justification.

¹ Enmund v. Florida, 453 U.S. 782 (1982).

(R726) This was error under Espinosa because the jury must be presumed to have weighed an invalid aggravating circumstance in reaching their penalty recommendation. Espinosa, 120 L. Ed. 2d at 853; Mills v. Maryland, 486 U.S. 367 (1988).

The question now becomes whether this error mandates that Appellant's death sentence be vacated and a new penalty proceeding conducted with a new jury. In ~~Clemens v. Mississippi~~, 494 U.S. 738 (1990), the United States Supreme Court held that a death sentence **based** in part upon the weighing of a constitutionally invalid aggravating circumstance could be reviewed by a state appellate court. However, the appellate court must either reweigh the aggravating and mitigating circumstances absent the invalid aggravating factor or conduct a harmless error analysis. 494 U.S. at 754.

Florida case law indicates that this Court **docs** not reweigh penalty evidence. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981); Parker v. Dugger, 498 U.S. ____, 112 L. Ed. 2d 812 at 825 (1991). When an improper aggravating circumstance has been weighed against some mitigating circumstances, this Court has traditionally remanded for a new penalty proceeding. Elledge v. State, 346 So. 2d 998 (Fla. 1977); Trotter v. State, 576 So. 2d 631 (Fla. 1991). However, if this Court conducts a harmless error review on the death recommendation, it must make clear findings on the record. Sochor v. Florida, 504 U.S. ____, 119 L. Ed. 2d 326 (1992).

C. ~~The Invalid Penalty Instruction Was Not Harmless Error~~

The jury was instructed on **and** the court found only one **aggra-** vating circumstance in addition to the cold, calculated, and pre- meditated factor: "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" (R726,906). If the cold, calculated, and premeditated factor is removed from the weighing process, there remains only one aggravating circum- stance to be weighed against the mitigating factor that Hodges was a dedicated father who had a good relationship with his wife and stepson (R907-8). Although not found by the sentencing judge, there **was** also mitigating evidence that Hodges was a good worker (R697).

This Court has held that a death sentence supported by a single aggravating circumstance can be affirmed **only** in **cases** where there is "either nothing or very little in mitigation." Nibert v. State, 574 So. 2d 1059 at 1063 (Fla. 1990); Songer v. State, **544 So. 2d** 1010 (Fla. 1989). Clearly, the sentence of death imposed on Appellant relies upon the cold, calculated, and premeditated factor to a degree that the error in weighing this unconstitutional factor cannot be deemed harmless.

There was harmful error also present in the prosecutor's argu- ment to the jury on the cold, calculated and premeditated aggravat- ing circumstance. In urging the jury to find that the aggravating circumstance was **proved**, the prosecutor stated:

you shoot at her from a distance away, and then you walk up to her, and you shoot her again. That aggravating circumstance has been proven beyond a reasonable doubt. That's [sic] by itself would warrant the imposition of the death penalty.

(R715)

This is an improper legal theory upon which to ground the cold, calculated, and premeditated aggravating circumstance. While this Court approved evidence of shooting the victim more than one time as proof of the cold, calculated, and premeditated aggravating circumstance in Herring v. State, 446 So. 2d 1049 (Fla. 1984), the aggravating circumstance was subsequently limited (as noted previously in this brief) to specifically exclude more than one shot as a proper basis. Rogers v. State, 511 So. 2d 526 (Fla. 1387). Thus, the jury at bar was misled into considering irrelevant evidence in determining whether the cold, calculated, and premeditated aggravating circumstance applied and how much weight to give it.

This in itself is not harmless error, But, in addition, this Court should also reconsider the prosecutor's improper argument about the suitability of life imprisonment found to be reversible error in Taylor v. State, 583 So. 2d 323 (Fla. 1991), but harmless in this Court's original opinion in the case at bar. 595 So. 2d at 933-4. Adding the error in arguing the aggravating circumstance to the error in arguing the appropriate penalty results in a clear realization that the jury's death recommendation may well have been tainted. Therefore, there is no harmless error in the presentation of evidence and argument to the jury either.

Finally, this Court should consider the totality of the circumstances of this case in determining whether a death sentence would necessarily **have** been imposed regardless of the cold, calculated, and premeditated aggravating circumstance. In this Court's original opinion, Justice Barkett dissented from the majority's opinion **that** death **was** a proportionate sentence. Moreover, the facts at bar are less egregious than **those** in Blair v. State, 406 So. 2d 1103 (Fla. 1981), a proportionality reversal which occurred prior to the effective date of the section 921.141(5)(i) aggravating factor.

In Blair, the defendant's wife had threatened to report her husband's molestation of her daughter to the police. Blair purchased a gun and ammunition. He had a hole dug in the back yard and arranged for the children to go to the Dairy Queen while he murdered his wife. He put the body in the backyard hole and had a concrete slab poured over it. Justice Adkins, writing for a unanimous court, concluded that "comparing this **case** with others, we remand it for imposition of a life sentence." 406 So. 2d at 1109.

While one might question whether Blair would have been decided the same way if the cold, calculated, and premeditated aggravating circumstance had been applicable, this only highlights the important role **which this** aggravating circumstance played in the case at bar. If this Court **agrees** that instructing the jury in the bare statutory language of the cold, calculated, **and** premeditated aggravating circumstance was error, then this error cannot be harmless as to Appellant's death sentence.


CONCLUSION

Based upon the foregoing argument, reasoning and authorities, George Hodges, Appellant, respectfully requests this Court to vacate his death sentence and to order a new penalty proceeding before a new jury.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Candance Sunderland, Suite 700, 2002 N. Lois Ave., Tampa, FL 33607, (813) 873-4730, on this 6th day of January, 1993.

Respectfully submitted,



DOUGLAS S. CONNOR
Assistant Public Defender
Florida Bar Number 350141
P. O. Box 9000 Drawer PD
Bartow, FL 33830

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(813) 534-4200

DSC/ddv