72,231

IN THE SUPREME COURT OF FLORIDA

MARVIN EDWIN JOHNSON,

Petitioner,

v. CASE NO. _____

RICHARD L. DUGGER,
Secretary, Department of
Corrections, State of
Florida,

Respondent.

_____/

RESPONSE TO PETITION FOR
EXTRAORDINARY RELIEF, HABEAS
CORPUS AND STAY OF EXECUTION

Introduction

At 1 a.m. on April 10, 1988, Marvin Johnson filed a petition for extraordinary relief and habeas corpus with the Supreme Court. The State received notice of the filing at 10:30 a.m. on April 10, 1988 and was not served on April 9, 1988, as represented by CCR in its certificate of service.

The late filing is, in our opinion, a typical abusive tactic subject to the sanctions recently mentioned in Washington v. State, 13 F.L.W. 853 (Fla. 2nd DCA 1988) (speaking to abuse of Rule 3.850). We further suggest that the late filing is indicative of the petition's lack of merit, as well as Johnson's reliance upon time-tactics calculated to frustrate the State's ability to respond and this Court's ability to review the case. Oral argument, of course, is set for tomorrow morning at 9 a.m. on this petition. The State will be served with a "3.850" petition, and appeal, later today.

We seek this Honorable Court's protection from this continuing abuse. We note that the tactic never varies no matter whether CCR receives 30, 40 or 60 days notice of a pending warrant. A mere finding of "abuse" does not dissuade them. Washington v. State, supra, suggests a remedy, if a remedy is possible.

We will not belabor this issue.

Statement of the Case and Facts

On June 7, 1978, Marvin Edwin Johnson robbed the Warrington Pharmacy, murdering the pharmacist, Woodrow Moulton in the process. Johnson was convicted on December 8, 1978 and sentenced to death on January 12, 1979.

Johnson appealed to the Supreme Court of Florida, raising the following claims:

1. Improper cross examination (of the Appellant) by the prosecutor.

2. "Cumulative error" stemming from improper cross examination.

3. "Improper" admission of photographic evidence.

4. Exclusion of testimony of a defense "expert", Dr. Miller.

5. The propriety of the death sentence as the result of a jury override.

Johnson lost his appeal on December 11, 1980. Johnson v. State, 393 So.2d 1069 (Fla. 1980).

Johnson petitioned for certiorari review in the United States Supreme Court, challenging the legality of jury overrides under six (6) different theories.

Certiorari was denied on November 30, 1981. See 102 S. Ct. 364, 70 L.Ed.2d 191 (1981).

While his appeal was pending, Johnson joined with 122 death row inmates in an application for extraordinary relief and petition for habeas corpus known as Brown v. Wainwright, 392 So.2d 1327 (Fla.), cert. denied, 454 U.S. 1000 (1981).

A death warrant was signed setting Johnson's execution for May of 1982. Eschewing state collateral attacks, Johnson filed a federal habeas corpus (§2254) petition and request for stay of execution on May 14, 1982, raising the following claims:

A. A renewal of the Brown claim.

B. A challenge to jury overrides.

C. A challenge to the "Tedder" standard for reviewing overrides.

D. The Supreme Court's failure to remand the case after striking a single aggravating factor (risk of death to many persons) although finding three valid aggravating factors and no mitigating factors.

E. Rejection of nonstatutory mitigating factors by the sentencer in violation of Lockett v. Ohio, 438 U.S. 586 (1978).

F. Exclusion of expert testimony on the reliability of eyewitness testimony.

G. Prosecutorial misconduct.

H. Admission of photographs into evidence.

Each claim was analyzed and rejected on its merits.

Johnson appealed the decision to the Eleventh Circuit Court of Appeals, raising seven claims; to-wit:

1. Exclusion of "expert" testimony.

2. Prosecutorial misconduct.

3. Error in determining "aggravating v. mitigating" evidence.

4. Trial court refusal to allow argument (penalty phase) re: "lingering doubt".

5. Trial court "refusal" to consider nonstatutory mitigating factors.

6. Denial of discovery in District Court.

7. Legality of jury overrides.

Relief was denied as to all claims, prompting Johnson to petition anew for certiorari; claiming:

1. "Failure to consider" nonstatutory mitigating factors.

2. Preclusion of "lingering doubt" argument.

3. Exclusion of evidence.

4. Legality of jury overrides.

5. Denial of discovery (on §2254).

Certiorari was denied on October 5, 1987.

Facts: "Hitchcock" Claim

Johnson contends he is entitled to relief pursuant to Hitchcock v. Dugger, 481 U.S. ____, 95 L.Ed.2d 347 (1987). In addition to being disproved by the record, this claim has been reviewed on its merits and rejected by the federal district court and the Eleventh Circuit Court of Appeals. Certiorari review of this issue was denied post-Hitchcock by the Supreme Court.

The record on appeal shows that prior to Johnson's December 1978 trial his attorneys (R 1590-94) argued to the trial judge that, at trial, he would be required to consider nonstatutory mitigating evidence due to the Lockett decision. (This, again, disproves the theory that "Hitchcock is a new law"). The trial judge agreed.

During the sentencing phase of the trial (R 1567), the judge changed the standard instruction to expand the jury's consideration of mitigating factors, stating that the statutory factors were simply "among" those they could consider.

At sentencing, due to the Court's decision which tracked the statute, defense counsel raised a Lockett argument. The trial judge stated (R 1767) that he considered all statutory and nonstatutory mitigating evidence.

Again, the federal district court found no "Lockett" error. The Eleventh Circuit found that all nonstatutory evidence was considered, see Johnson v. Wainwright, 806 F.2d 1479 (11th Cir. 1986) and, despite heavy reliance upon Hitchcock v. Dugger, 107 S.Ct. 1821 (1987), certiorari was denied in October of 1987.

Facts: Appellate Counsel

Counsel for Mr. Johnson filed a persuasive brief which resulted in a narrow (4-3) defeat on appeal.

Johnson, relying upon new law, has falsely accused appellate counsel of ineffectiveness in what is a poorly concealed request for "resentencing" based upon perceived 1988 standards and personnel changes on the Court.

Facts: Exclusion of Venirewomen

This issue was never preserved by contemporaneous objection at trial, never raised on appeal and never raised in Johnson's federal litigation.

ARGUMENT

THE PETITIONER IS NOT ENTITLED TO HABEAS CORPUS RELIEF.

After reading Mr. Johnson's petition, which is replete with emotional appeals regarding the "closeness" of the preceding decisions as well as references to "new law", it is plain to see that Johnson is not really arguing "ineffective assistance" of counsel at all. What Johnson is really doing is asking this Court to grant a new "direct appeal" and review Johnson's sentence without regard to finality or the "law of the case". If successful, Johnson will create the ultimate perversion of justice, "de novo" appellate review of every Florida capital case every few years and/or every time new justices appear on the Court. This would, of course, destroy "finality," procedural bars, the time bars created by Rule 3.850 and our crucial Wainwright v. Sykes, 433 U.S. 72 (1977) barrier to federal intrusion.

Habeas corpus, of course, is neither a vehicle for a "second" appeal nor a substitute for appeal. Messer v. Wainwright, 439 So.2d 875 (Fla. 1983); McCrae v. Wainwright, 439 So.2d 868 (Fla. 1983); Steinhorst v. Wainwright, 477 So.2d 537 (Fla. 1985). Given legislative and judicial efforts over the past decade to curb abusive, repetitive, last minute death penalty litigation and establish firm procedural protections, see Wainwright v. Sykes, supra; Engle v. Isaac, 456 U.S. 107 (1982), it would be counterproductive (if not suicidal), to open the floodgates to unwarranted collateral attack by expanding habeas corpus to restore avenues closed by Rule 3.850's time and subject matter restrictions.

(A) "Hitchcock" Issue

Marvin Johnson contends that the trial judge erred under Lockett v. Ohio, 438 U.S. 586 (1978) by failing to consider

nonstatutory mitigating evidence and under Hitchcock v. Dugger, 481 U.S. ____, 95 L.Ed.2d 347 (1987), in instructing the jury regarding mitigating factors it could consider. At (page 2) of the petition, Johnson alleges that appellate counsel was ineffective in arguing Lockett.

Johnson's petition egregiously twists and distorts the facts so as to shamelessly argue the exact opposite of what happened at (and before) trial.

By pretrial motion, Johnson challenged the general constitutionality of section 921.141, Fla.Stat. on, among other grounds, the basis of its restriction of "consideration of nonstatutory mitigating evidence" in lieu of Lockett. (R 1587-1594). The specific finding of the trial judge was that he felt that the statute was constitutional as written and allowed consideration of all relevant evidence whether delineated or not. The judge expressly stated that any evidence desired by Johnson could be admitted (R 1593) and considered (R 1593-1594) because the statute allowed it.

This reading of the Florida statute was in strict accord with Proffitt v. Florida, 428 U.S. 242 (1976) and with Lockett itself.

The trial judge did not give the standard instruction condemned in Hitchcock but told the advisory jury that the statutory factors were simply "among" those they could consider.

At sentencing, when asked why his written order seemed to violate Lockett, the judge expressly stated that he considered all nonstatutory mitigating evidence.

It is easy to see why the federal courts rejected Johnson's "Lockett-Hitchcock" claim on the merits. The issue is not one of "harmless error" because there was no error at all.

If Hitchcock refers only to an erroneous jury instruction, as Chief Justice McDonald has stated in his dissent in Zeigler v. Dugger, Case 71,463 (Fla. April 7, 1988), then clearly the absence of the Hitchcock instruction precludes review.

If Hitchcock encompasses all Lockett error, then this case clearly establishes that Lockett error was being raised in the trial courts, successfully, in 1979 (prior to our amendment of 921.141 and our standard jury instructions) and thus, under Woodson v. North Carolina, 428 U.S. 280 (1976) and Witt v. State, 387 So.2d 922 (Fla. 1980). Hitchcock is not and never has been "new law".

The Eleventh Circuit, the federal district courts, the defense bar (see petition for Hitchcock relief in Foster v. State, 12 F.L.W. 598 (Fla. 1987) for example), and the State all have recognized that Hitchcock was not new law but rather (as Witt, supra, [and the Foster petition] states it), stands as an "evolutionary outgrowth" of Lockett.

Since this issue was known, argued, appealed and then raised in the federal system, there is no excuse for its sudden appearance in an eleventh hour habeas petition. It comes before this Court as nothing more than a factually baseless, abusive, "second appeal".

Finally, to the extent "appellate counsel" was "ineffective", we submit that appellate counsel was bound by the truth and could not overcome it. If, however, the "new law" error is still to be perpetuated, then we submit that appellate counsel in 1980 cannot be condemned for failing to anticipate Hitchcock ("new law") in 1987.

(B) "Tedder Argument" and
Ineffective Assistance of Trial Counsel

It is well established that an appellate attorney is not obliged to raise every colorable issue on appeal, Hardwick v. Wainwright, 496 So.2d 796 (Fla. 1986), nor is counsel obliged to give up his right to decide which issues should or should not be briefed. Davis v. Wainwright, 498 So.2d 857 (Fla. 1986).

In reviewing the effectiveness of appellate counsel the test if more severe than that used to judge trial counsel, and is therefore much more difficult to prove. Watson v. United States, 39 Cr.L. 2070 (D.C. Cir. 1986).

Mr. Carres is one of the best defense (appellate) attorneys in this state. His credentials are impeccable and unchallenged.

In deciding how to approach this appeal, Mr. Carres was confronted with Tedder v. State, 322 So.2d 908 (Fla. 1975), and with a record containing four established aggravating factors, a fifth vulnerable aggravating factor, no mitigating factors and a client whose criminal history was so bad that his "character" could not stand close scrutiny.[1]

At the time, and given the record at bar, the most logical approach clearly would have involved a request for "mandatory acceptance" of any life recommendation from the jury. Why? Obviously because "mandatory acceptance" would prevent sentencers from looking behind lawless "mercy verdicts" and would add the danger of "caprice" necessary to sustain a subsequent challenge to the constitutionality of capital justice.

[1]Indeed, it was defense counsel that wanted to limit consideration of Johnson's "character".

Mr. Carres, of course, was working in harmony with other defense counsel who, not long after this appeal was decided, obtained certiorari review on this very issue in Spaziano v. Florida, 104 S.Ct. 3154 (1984). Can Mr. Carres be faulted for briefing a cert-worthy claim while not pursuing a weak claim? Of course not.

Mr. Johnson cannot satisfy Watson or even the two part test of Strickland v. Washington, 466 U.S. 688 (1984). First, Johnson cannot establish "error" by counsel for choosing to use the most viable argument available in 1979. Second, even if Johnson could establish "error", he cannot show that the Supreme Court, as composed in 1979 or 1980, would have ruled differently "but for" counsel's error and despite their own independent review of the evidence.

There is, in fact, no mystery regarding what Mr. Johnson really wants. Mr. Johnson does not seriously believe that Mr. Carres was ineffective or that the England Court would have ruled differently. What Mr. Johnson does believe is that a strong emotional appeal to what is perceived as a more "liberal" court can result in "resentencing by habeas corpus". Unless this Court is prepared to abandon stare decisis or the law of the case, and is prepared to resentence all 288 people on death row every year or so, based upon "new decisions", we strongly suggest that Mr. Johnson should not be indulged. Again, habeas corpus was not created for the purpose of periodic resentencing.

In closing, we note that Spaziano, supra, rejects the notion that jury overrides must be upheld any time a reviewing judge agrees with the advisory jury. We further note that Johnson's impoverished youth cannot overcome the aggravating factors at bar.

Indeed, by taking the Spaziano approach and attacking "overrides" in general while avoiding the evidence at bar, appellate counsel made a logical strategic choice.

Again, we stress that a claim of "ineffective counsel" is not a vehicle for a second "Tedder" appeal. The issue is counsel's performance only.

(C) Appellate Counsel's "Failure" to Effectively Challenge the Aggravating Factors at Bar

Mr. Johnson's attorney was not "ineffective" for "failing" to contest statutory aggravating factors. The petition at bar falsely accuses Mr. Carres merely as a ruse to reopen Johnson's appeal, on the merits, to discuss the impact of some recent caselaw. Again, this is an abuse of the writ.

For the record, the trial court found five statutory aggravating factors; to-wit:

1. Johnson was under sentence of imprisonment at the time. This factor is undisputed.
2. Johnson had prior convictions involving the threat or use of violence. This is undisputed.
3. Johnson created a risk of death to many persons. This was challenged by Johnson and disallowed.
4. The murder took place in the course of a robbery. This is undisputable.
5. The murder was atrocious or cruel but not especially heinous. Four justices expressed disagreement with this but the factor was upheld.

The length of counsel's argument on "risk of death" is irrelevant since the factor was stricken, thus eliminating "prejudice" as a factor even if counsel "erred".

The petition's argument regarding "heinous, atrocious and cruel" relies on Zant v Stevens, 103 S.Ct. 2733 (1983), without stating how counsel could have cited Zant in 1979.

Before discussing the effectiveness of counsel, however, we would refer this Court to Darden v. Dugger, 13 F.L.W. 196 (Fla. 1988). Darden attempted to obtain habeas corpus relief in much the same way as Mr. Johnson. Darden contended that the finding of heinous, atrocious and cruel in his case (which is similar to ours), was unsupported by the evidence. In support of his claim he cited what this Court called "a litany of decisions interpreting section 921.141(5)(h)". This Court said that Darden's appellate counsel was not ineffective for failing to raise a challenge to this factor on direct appeal and that because the claim itself was procedurally barred this Court would not address it on the merits. We submit that if Darden's appellate lawyer was not ineffective then Johnson's wasn't either. Furthermore, if the issue of heinous, atrocious and cruel was procedurally barred for Darden then it is procedurally barred for Mr. Johnson.

Mr. Johnson's appellate counsel had to contend with State v. Dixon, 283 So.2d 1 (Fla. 1973), which upheld this factor for "conscienceless" or "pitiless" murders as well as "torturous" killings. The crime at bar indeed met that criteria. In addition, the "swift" nature of the actual "act" is offset by caselaw recognizing the victim's mental anguish. See Clark v. State, 443 So.2d 973 (1983); Cooper v. State, 492 So.2d 1059 (Fla. 1986); Francis v. State, 473 So.2d 672 (Fla. 1985), especially where, as in these cases, a victim about to be executed pleads for his life. Thus, there is no guarantee, even today, that this factor would not (be or have been) upheld.

Finally, even if counsel erred in arguing this factor, no prejudice can be established since three other valid aggravating factors and no mitigating factors are present.

The entire purpose of Johnson's petition is not to question counsel but rather to use an "ineffective counsel" claim to argue Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987). This is clearly improper. For the record, however, we would note:

Florida's statutory aggravating factor of "heinous, atrocious and cruel" was refined and limited in State v. Dixon, 283 So.2d 1 (Fla. 1973), so as to pass constitutional muster in Proffitt v. Florida, 428 U.S. 242 (1976).

Recently, the Supreme Court agreed to review Cartwright v. Maynard, 822 F.2d 1477 (10th Cir. 1987), wherein the Tenth Circuit found that Oklahoma did not apply this factor in a constitutional manner.

We would note that the Tenth Circuit went to great lengths to distinguish the Oklahoma law (and its application) from Florida's law, quoting Proffitt, and stating:

> "In Proffitt, the trial judge found that the murder was "especially heinous, atrocious, or cruel". See Fla.Stat.Ann. §921.141(5)(h) (West 1985). The Florida courts had construed that provision to apply only to "the conscienceless or pitiless crime which is unnecessarily torturous to the victim". State v. Dixon, 283 So.2d 1, 9 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). The Supreme Court held that by so limiting the statutory description, the state provided adequate guidance to the sentencer".

Id., at 1486.

and:

> "The Oklahoma Court of Criminal Appeals has never held that this language is mandatory, however,

> thus rejecting part of the narrowing construction approved in Proffitt and seemingly adopted in Eddings".

Id., at 1488.

In Chaney v. Lewis, 801 F.2d 1191 (9th Cir. 1986), cert. denied, 95 L.Ed.2d 516 (1987) and in Jeffers v. Ricketts, 832 F.2d 476 (9th Cir. 1987), the federal court again distinguished Florida law while finding incorrect "application" of a facially constitutional aggravating factor of "heinous, cruel or depraved".

The existence of litigation in other federal circuits or even the Supreme Court involving statutes similar to, but distinguished from, Florida's statute does not compel either relief for Mr. Johnson or a stay of execution.

The law of this state is governed by Proffitt, not the Ninth or Tenth Circuit.

We submit, of course, that this issue is not properly presented by habeas corpus in any event.

Johnson also wants to use a claim against counsel to reargue the aggravating factor of "robbery", contesting its "automatic" nature. The argument is baseless. Darden precludes relief on this ground as well.

Mr. Johnson, relying upon Sumner v. Shuman, ____ U.S. ____, 107 S.Ct. 2716 (1987), contends that capital punishment for "felony murder" is unconstitutional because it is "mandatory".

While Sumner indeed outlawed (again) mandatory death penalties, the situation at bar, if properly before the court, is controlled by Lowenfield v. Phelps, ____ U.S. ____, 1 F.L.W. Fed. S 1230 (1988).

We submit that "mandatory death penalty" claims could and should have been argued on direct appeal but was not. The issue could also have been raised by petition pursuant to Fla.R.Crim.P. 3.850, if properly preserved, but was not. Therefore, this issue is not properly before the Court on habeas corpus as noted before.

In Lowenfield,[2] the Supreme Court explained the difference between an "aggravating factor" and a statute. The Court held that an aggravating factor is merely a directory device designed to channel and limit the sentencer's discretion. While agreeing that duplication exists, the Court noted that this did not create a "constitutionality" problem because the sentencer was in fact still possessed of discretion.

We note, of course, that not every felony murder in Florida is punished by death and that the totality of each case is considered. See e.g., Livingston v. State, 13 F.L.W. 187 (Fla. 1988); Perry v. State, 13 F.L.W. 189 (Fla. 1988).

Marvin Johnson committed premeditated murder as much as felony murder. Mr. Moulton was defenseless, Johnson (with ample time to reflect or flee), walked up to Moulton, wise-cracked to him, smiled and executed him. Johnson, even if correct on his felony murder theory, cannot show that the theory would apply to him.

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[2]In Louisianna, §14:30.1(3), La.Stat.Ann. (1986), defines as a separate category of capital murder that in which harm to more than one person is intended. This statutory "class" happens to duplicate a statutory aggravating factor.

(D) Ineffective Assistance of Appellate Counsel: Photo Lineup Suppression

The record at bar shows us (at R 998-99) that trial counsel did, in fact, obtain a ruling on their motion to suppress (it was denied). The record also shows that there is no likelihood of misidentification and that the witness (Gary Summitt) was able to describe Johnson before seeing any photographs of him. Indeed, bur for Summitt's detailed description of Johnson he would not have been shown Johnson's photo.

We also note that Johnson's petition confesses he was the robber and argues as a "mitigating factor" the fact that Johnson was shot by Mr. Moulton. Thus, Johnson himself has proved that the two prong test of Neil v. Biggers, 409 U.S. 188 (1972), so Manson v. Braithwaite, 432 U.S. 98 (1977), cannot be met.

We, however, must view the issue from the shoes of appellate counsel "at the time". Given the need to utilize his allotted fifty (50) pages for his strongest arguments, this issue was not so compelling as to warrant full briefing. Counsel had to decide which issues were to be raised, Davis v. Wainwright, 498 So.2d 857 (Fla. 1986) and he was not required to brief every colorable claim. Hardwick v. Wainwright, 496 So.2d 796 (Fla. 1986). Johnson has neither alleged nor shown the requisite "error" or "prejudice" (probability of reversal) to carry this claim.

We again note that the writ of habeas corpus is not a vehicle for a second appeal. Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985); Steinhorst v. Wainwright, 477 So.2d 537 (Fla. 1985).

(E) "Automatic" Discharge of Venirewomen

The issue of whether women with small children should have been required to remain on the jury is an issue which, if preserved, was available for direct appeal.

Johnson is procedurally barred from raising this claim under several rationales, none of which are seriously addressed in his petition.

First, the writ of habeas corpus is not a substitute for direct appeal, nor is it a vehicle for a second appeal as noted above.

Second, this issue is not cognizable by or under habeas corpus. White v. Dugger, 12 F.L.W. 432 (Fla. 1987).

Third, habeas corpus is not a vehicle for circumventing the time bar created by Rule 3.850.

Johnson makes no effort to justify this abuse of the writ. Compounding the affront, he goes on to substantially misstate the holding in Alachua County Court Executive v. Anthony, 418 So.2d 264 (Fla. 1982). The Anthony decision does not outlaw the so-called "automatic excusal of women" on any ground intimated by Johnson. The Anthony court merely stated that men who were similarly situated had to receive the same privilege as women. Johnson cannot relate the Anthony decision to his case. He cannot show that "but for" Anthony any woman would have been forced to remain or any man would have been excused.

Of course, if such a woman was forced to remain as an unwilling juror, worried more about her child than the case,

Johnson cannot contend she would have been a friendly juror or favorable disposed towards him. Indeed, most trial lawyers strike jurors who, for health or personal reasons, will not be attentive or willing to "hold out" during deliberations so as to create a possible hung jury. Thus, in addition to its procedurally barred nature, the argument posed by Johnson is specious.

Johnson disingenuously argues he can see no difference between mothers of small children and childless women. He cannot be serious. Johnson, after all, has an IQ of 113.

Conclusion

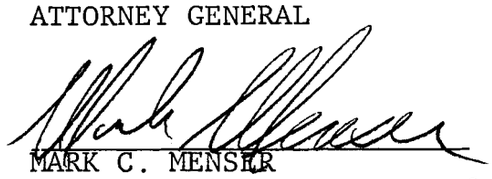
Johnson has filed a petition for habeas corpus which, in fact, is merely a successive appellate brief filed under the rubric of "ineffective counsel". The petition fails to allege or show error by counsel so serious that he was not functioning as "counsel guaranteed by the Sixth Amendment" nor does it allege or show resulting prejudice.

Johnson, relying upon his interpretation of "new law", simply hopes to provoke an emotional response from a new panel of the Florida Supreme Court so as to obtain a "second appeal" without regard to "finality" or the law governing habeas corpus.

The petition should be denied.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to Mr. Mark Evan Olive, Esq., Office of the Capital Collateral Representative, by hand delivering said copy to the Florida Supreme Court as agreed by counsel, this 10th day of April, 1988.

MARK C. MENSER
Assistant Attorney General

OF COUNSEL