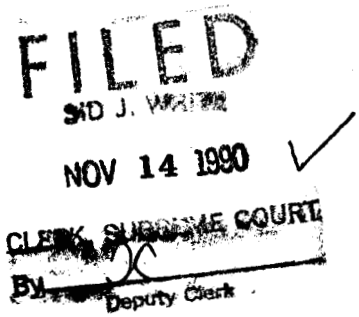
IN THE SUPREME COURT OF FLORIDA



DAVID EUGENE JOHNSTON,

Petitioner,

v. CASE NO. 73,362

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

Respondent.
_____/

RESPONSE TO PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF HABEAS CORPUS, REQUEST FOR STAY OF EXECUTION, AND APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

Respondent, Richard L. Dugger, hereby files a response in the above-styled cause urging this honorable court to deny any and all requested relief at its earliest opportunity, and in support thereof states as follows:

CLAIM I

THE CLAIM THAT THE COURT AND PROSECUTOR MISINFORMED THE JURY THAT THEIR SENTENCING VERDICT CARRIED NO INDEPENDENT WEIGHT, DIMINISHING THE JURY'S SENSE OF RESPONSIBILITY FOR ITS SENTENCING DECISION, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS IS DUPLICITOUS OF THE CLAIM RAISED ON APPEAL FROM THE DENIAL OF POST CONVICTION RELIEF AND, FURTHERMORE, IS PROCEDURALLY BARRED.

This claim should be stricken as duplicitous to the same claim raised on appeal from the denial of post conviction relief.

Trial in the present case took place May 14, 1984 through

May 16, 1984. No objections were made to comments regarding the roles of the jury and judge during voir dire, nor was any request made by defense counsel for an instruction that the jury's recommendation is entitled to great weight. No objection was made to the instruction of the court at the outset of the trial (R 15). No objection was made to the instructions at the beginning and close of the penalty phase (R 1098-1099), or to the jury charge itself, or to the state's closing argument (R 1187-1188) in which the prosecutor further stated "Also remember the recommendation you make to Judge Powell will carry great weight and consideration." (R 1188). Such objections could have been made on state law grounds. Dugger v. Adams, 109 S.Ct. 1211, 1216 (1989). The issue was not raised on direct appeal. Caldwell v. Mississippi, 472 U.S. 320 (1985), was decided on June 11, 1985 and this court did not issue the opinion on direct appeal in this case until November 13, 1986, so that supplemental briefing could certainly have been requested. The issue is, therefore, barred. Caldwell is not such a change in the law as to give relief in post conviction proceedings or to overcome a procedural bar. Woods v. State, 531 So.2d 79 (Fla. 1988); Foster v. State, 518 So.2d 901 (Fla. 1987); Demps v. State, 515 So.2d 196 (Fla. 1987).

Couching such a barred claim in terms of ineffective assistance of counsel will not revive such a claim. See, Woods v. State, supra; Sireci v. State, 469 So.2d 119 (Fla. 1985). If this were so, no claim would ever be procedurally barred and the dictates of Wainwright v. Sykes, 433 U.S. 72 (1977) would be meaningless. Kimmelman v. Morrison, 106 S.Ct. 2574 (1986), does

not command such a result. Kimmelman involved a claim of deficient representation in the actual litigation of a preserved fourth amendment issue. It is quite clear that this is different than eschewing a claim altogether then later seeking a belated merits determination in the guise of an ineffective assistance of counsel claim. Ineffective assistance of counsel claims can be waived if not timely raised, see, Clark v. State, 467 So.2d 699, 702 (Fla. 1985), and there is no reason why such waiver should not apply when an opportunity for a determination on the merits has been forfeited, which determination would dispose of the issue initially without inquiry into counsel's actions, especially when Caldwell error has been held to be neither fundamental nor retroactive. To the extent that ineffective assistance of trial counsel is being proffered as "cause" for the failure to raise the claim under Sykes, this court should rule as a matter of law that in the absence of case law establishing either the retroactivity of a claim or fundamental error, counsel will be considered per se effective and no cause will be found to excuse such default. Such ruling would provide guidance to the trial court considering duplicitous claims in the context of a straight ineffective assistance of counsel claim and cut down on unnecessary "prejudice" analyses, opening the door to unwarranted federal review. In any event, appellate counsel cannot be considered ineffective for not raising such claim when the issue is not preserved for appeal. See, Suarez v. Dugger, 527 So.2d 190 (Fla. 1988).

CLAIM II

THE CLAIM THAT THE "HEINOUS, ATROCIOUS OR CRUEL" AGGRAVATING CIRCUMSTANCE WAS APPLIED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS IS DUPLICITOUS OF THE CLAIM RAISED ON APPEAL FROM THE DENIAL OF POST CONVICTION RELIEF AND, FURTHERMORE, IS PROCEDURALLY BARRED.

This claim should be stricken as duplicitous to the same claim raised on appeal from the denial of post conviction relief.

This court has long held that a petition for habeas corpus is not to be used as a vehicle for obtaining a second appeal. Steinhorst v. Wainwright, 477 So.2d 537 (Fla. 1985); McCrae v. Wainwright, 439 So.2d 868 (Fla. 1983). Claims regarding jury instructions are, in general, not cognizable collaterally because they should be raised on appeal. See, Raulerson v. State, 420 So.2d 567 (Fla. 1982); Merrill v. State, 364 So.2d 42 (Fla. 1st DCA 1978). In the present case, there was neither an objection to the instructions as given, nor a request for additional instructions. On direct appeal, Johnston claimed that "section 921.141(5)(h), Florida Statutes (1983), states that an aggravating circumstance may result if the capital felony was especially cruel, heinous and atrocious. Almost any felony would appear especially cruel, heinous and atrocious to the layman, particularly any felony murder. Examination of the widespread application of this circumstance, especially where no other circumstances are available with which to render a death sentence, indicates that reasonable and consistent application is impossible." (Initial Brief of Appellant, p. 17). It was also argued that the aggravating factor that the crime was heinous,

atrocious and cruel was improperly found and applied in this case. (Initial Brief of Appellant, p. 97-99). Thus, the essence of this claim has been presented to and been ruled upon by this court. Johnston v. State, 497 So.2d 863 (Fla. 1986). At that time, it certainly could and should have additionally been argued that the lack of a definitive instruction contributed to the unconstitutional application of this factor. Henderson v. Dugger, 522 So.2d 835, 836, n.1 (Fla. 1988); Maxwell v. Wainwright, 490 So.2d 927 (Fla. 1986). This court found that the aggravating circumstance was properly applied in this instance. Johnston v. State, 497 So.2d 863, 871 (Fla. 1986).

Revisiting this issue in the context of a Maynard v. Cartwright, 108 S.Ct. 1853 (1988), claim is not warranted. Use of a different argument in collateral proceedings to relitigate the same issue is inappropriate. Quince v. State, 477 So.2d 535 (Fla. 1985). Maynard is not a change in the law so as to allow initial or repetitious review collaterally. Oklahoma had no provision for curing on appeal a sentencer's consideration of an invalid aggravating circumstance as does Florida. 108 S.Ct. at 1857. Therefore, it was necessary to consider the vagueness challenge. It is not in this case where three aggravating circumstances were found (the capital felony was committed while the defendant was engaged in the commission of a burglary; previous conviction of a felony involving the use of violence; heinous atrocious and cruel), and no mitigating factors were found, and the same was upheld on appeal and even striking the aggravating factor in question would not result in a sentence

less than death. Maynard, further established no new constitutional principles and the instant challenge could have been more comprehensively made at trial and on direct appeal on the basis of such pre-existing precedents as Godfrey v. Georgia, 447 U.S. 420 (1980), which the Court actually found controlling in Maynard, 108 S.Ct. at 1859, Proffitt v. Florida, 428 U.S. 242 (1976) and Furman v. Georgia, 408 U.S. 238 (1972). Since Furman, the cases have insisted that the 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. 108 S.Ct. at 1858.

Couching such a barred claim in terms of ineffective assistance of counsel should not revitalize such a claim especially when an attack on the finding of such factor was made on appeal and rejected and the circumstances of this crime fit the very definition of "heinous, atrocious and cruel" and two other aggravating factors support the sentence of death.

CLAIM III

THE CLAIM THAT THE STATE'S REMARKS AND ARGUMENT TO THE JURY AT SENTENCING AND THE COURT'S INSTRUCTIONS SHIFTED THE BURDEN OF PROOF TO PETITIONER TO ESTABLISH THAT MITIGATING CIRCUMSTANCES OUTWEIGHED AGGRAVATING CIRCUMSTANCES THEREBY DEPRIVING HIM OF A RELIABLE AND INDIVIDUALIZED CAPITAL SENTENCING AND TO DUE PROCESS IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS IS DUPLICITOUS OF THE CLAIM RAISED ON APPEAL FROM THE DENIAL OF POST CONVICTION RELIEF AND, FURTHERMORE, IS PROCEDURALLY BARRED.

This claim should be stricken as duplicitous to the same claim raised on appeal from the denial of post conviction relief.

An objection is required to preserve error in instructions in a criminal trial. Darden v. State 475 So.2d 214 (Fla. 1985). Habeas corpus is not a vehicle for obtaining additional appeals of issues which were raised or should have been raised on direct appeal, which were waived at trial, or which could have, should have, or have been raised in post-conviction proceedings. White v. Dugger, 511 So.2d 554 (Fla. 1987). In the present case, no objection was made at trial to the preliminary instructions at the penalty phase (R 1099), the prosecutor's closing argument at the penalty phase (R 1195, 1201), the final charge at the penalty hearing (R 1215, 1217) or the findings of the court (R 1251). The issue is, therefore, collaterally barred as the alleged error is not fundamental. In the absence of objection or fundamental error, no valid claim of ineffective assistance of appellate counsel is presented, Darden v. State, 475 So.2d 214 (Fla. 1985), and such claim is set forth only to revive the barred merits claim. Moreover, presentation of this claim has been found to be meritless in the past as such instructions were in conformity with State v. Dixon, 283 So.2d 1 (Fla. 1973). Kennedy v. State, 455 So.2d 351 (Fla. 1984); Thomas v. Wainwright, 421 So.2d 160 (Fla. 1982), see, also, Francois v. State, 423 So.2d 357 (Fla. 1982). Thus, there is no fundamental error.

The present case does not even fit within the ambit of Arango v. State, 411 So.2d 172 (Fla. 1982) as the jury was also instructed:

> Now, each aggravating circumstance must be established beyond a reasonable doubt before it may be considered by you in arriving at your decision. If one or more aggravating circumstances are established, you should consider all the evidence tending to establish one or more mitigating circumstance, and give that evidence such weight as you feel it should receive in reaching your conclusion as to the sentence that should be imposed.
>
> A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.
>
> The sentence that you recommend to the Court must be based upon the facts as you find them, from the evidence and the law. You should weigh the aggravating circumstances against the mitigating circumstances. And your advisory sentence must be based on these considerations.

(R 1218-1219).

Under this instruction, the jury can decide to give enormous weight to mitigating circumstances which, ab initio, would tilt the weighing process in favor of life and no instruction was given as to which circumstances must outweigh the other. Even the jury instruction discussed in Arango, that the jury had "the duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances" presents no burden shifting problem under Mullaney v. Wilbur, 421 U.S. 684 (1975). Complaining about what must outweigh what is like arguing whether a glass is half full or half empty, since it is the weight ascribed to each individual factor that ordains the result. Moreover, weighing is a sentencer's function not even involving burdens of proof.

CLAIM IV

THE CLAIM THAT PETITIONER'S DEATH SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE IS DUPLICITOUS OF THE CLAIM RAISED ON APPEAL FROM THE DENIAL OF POST CONVICTION RELIEF AND, FURTHERMORE, IS PROCEDURALLY BARRED.

This claim should be stricken as duplicitous to the same claim raised on appeal from the denial of post conviction relief.

On direct appeal petitioner contended that:

> Section 921.141(5)(d), Florida Statutes (1983), states that an aggravating circumstance may result if the person is involved in a felony murder. This circumstance is factually overbroad in that a capital felony committed during the enumerated felonies contained within this section automatically produces an aggravating circumstance and thus carries with it a presumption of death without regard to the individual facts surrounding each case. Consideration of this aggravating circumstance could lead to a sentence of death which is totally disproportionate to the defendant's conduct. As stated in Coker v. Georgia, 433 U.S. 584 (1977), "A punishment is excessive and unconstitutional if it is grossly out of proportion to the severity of the crime." Pursuant to this circumstance, a "wheelman" whose codefendant accidentally kills someone during the commission of an enumerated felony would presumptively and automatically be considered for a death sentence, while a cold-blooded premeditated murderer could conceivably be exempt from an aggravating circumstance. The arbitrariness of the circumstance is self-evident.

(Initial Brief of Appellant, p. 16).

This court found that no relief was merited. Johnston v. State, 497 So.2d 863, 865 (Fla. 1986).

Characteristically, petitioner again fails to note the long and consistent line of state case law holding that habeas corpus is not a proper vehicle for obtaining a second appeal, Suarez v. Dugger, 527 So.2d 190 (Fla. 1988); Blanco v. Wainwright, 507 So.2d 1377 (Fla. 1987), particularly on this issue. See, Gorham v. State, 521 So.2d 1067, 1070 (Fla. 1988). The claim that a death sentence is predicated upon an automatic aggravating circumstance is an issue for direct appeal and is procedurally barred in habeas corpus proceedings, Darden v. State, 521 So.2d 1103, 1104 (Fla. 1988), especially in the context of a burglary as an aggravating factor. See, Blanco v. Wainwright, 507 So.2d 1377, 1380 (Fla. 1980). As noted in Bertolotti v. State, 534 So.2d 386, 387 n.3 (Fla. 1988), not only is this claim procedurally barred in collateral proceedings, but it has been rejected by the United States Supreme Court in Lowenfield v. Phelps, 108 S.Ct. 546 (1988), and in any event, no court has held that Phelps is a fundamental change in law entitled to retroactive application. The United States Supreme Court's holding in Sumner v. Sherman, 107 S.Ct. 2716 (1987), that automatic death penalties violate the Eighth and Fourteenth Amendments to the United States Constitution is not new law rendering this issue open for further review. While it is true that the Sumner opinion does represent new law, it is in no way applicable to the present case. Sumner involves the automatic, non-discretionary imposition of the death penalty in any situation. Johnston was afforded a full and fair sentencing hearing. While his sentence was proper, it was by no means

automatic. Therefore, this court is not required to reconsider an issue raised and disposed of on direct appeal. Johnson v. State, 522 So.2d 356 (Fla. 1988).

The line of cases cited by petitioner for the proposition that contemporaneous convictions cannot be used as aggravating circumstances is inapposite as such cases involve the aggravating circumstance of prior conviction of a violent felony.

This claim should further not be presented on habeas in the guise of an ineffective assistance of trial counsel claim. To the extent such is alleged to demonstrate "cause" under Sykes, in the absence of case law establishing either the retroactivity of a claim or fundamental error, counsel should be considered per se effective. Moreover, the allegation is particularly ill-taken since the issue was raised on direct appeal and any error would be harmless, at best, considering that two other aggravating circumstances were found and nothing in mitigation. See, Elledge v. State, 346 So.2d 998 (Fla. 1977).

CLAIM V

THE CLAIM THAT PETITIONER WAS DEPRIVED OF AN INDIVIDUALIZED SENTENCING DETERMINATION AND WAS DENIED HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE SENTENCING COURT FAILED TO PROVIDE CONSTITUTIONALLY REQUIRED CONSIDERATION TO NONSTATUTORY MITIGATING FACTORS IS DUPLICITOUS OF THE CLAIM RAISED ON APPEAL FROM THE DENIAL OF POST CONVICTION RELIEF AND, FURTHERMORE, IS PROCEDURALLY BARRED.

This claim should be stricken as duplicitous to the same claim raised on appeal from the denial of post conviction relief.

In Hitchcock v. Dugger, 107 S.Ct. 1821 (1987), the United

States Supreme Court found reversible error where the jury was instructed to consider only statutorily enumerated mitigating circumstances and where the trial judge did not consider nonstatutory mitigating circumstances. This court has previously held that Hitchcock represents a significant change in the law which defeats the suggestion of procedural default. Jackson v. Dugger, 529 So.2d 1081 (Fla. 1988); Thompson v. Dugger, 513 So.2d 173 (Fla. 1987); Downs v. Dugger, 514 So.2d 1069 (Fla. 1987). This ruling, however, presumes that a true Hitchcock claim is actually presented. It is not in this case and, therefore, the claim should be procedurally barred.

Since the Hitchcock decision, a favored claim has been that because facts proffered to support mental statutory mitigating factors did not result in the finding of such factors there has been ipso facto, a preclusion from consideration of nonstatutory mitigating factors in violation of Hitchcock. This is not a Hitchcock claim at all, and it is time to lay such claim to rest. The statutory mitigating factors that a defendant was acting under the influence of extreme mental or emotional disturbance at the time of the murder; acted under extreme duress or was unable to appreciate the criminality of his conduct or to conform his conduct to the requirements of law are comprehensive. They show a state of mind at the time of the murder in justification of a sentence less than death. Facts are proffered to show such state of mind. The facts in a vacuum mean nothing if they had no affect upon the defendant, especially when no nonstatutory mental state is alleged to have been mitigating. Except for the history

of mental disorder, none of these facts went to either family background or capacity for rehabilitation (clearly nonstatutory mitigating factors) as in Hitchcock, or the character of the defendant. (Moreover, in Hitchcock defense counsel made clear that he wanted such historical facts in support of mitigating circumstances considered in a nonstatutory context as well).

The sentencing order, in any event, reflects that Johnston's history of mental disturbance was considered as a nonstatutory mitigating factor:

> 8. I have considered the other evidence offered relating to the character of the defendant. Mrs. Corrine Johnston, his stepmother, testified in essence that defendant was the product of a broken home; he was abused, neglected and rejected by his natural mother and several times physically abused by his father; that his father's death when defendant was 18 greatly affected him; that defendant has a very low IQ, did not do well in school and was mentally disturbed despite the mental health treatment he had received.

(R 2413-14) (Emphasis added). The remaining facts, (the only facts petitioner proffers are those set out in the sentencing order), thus, cannot even be considered "mitigating."

As is freely admitted by petitioner and supported in the record "Johnston challenged the appropriateness and merits of his death sentence and more specifically, the trial court's failure to find any mitigation. However, the Court, pre-Hitchcock, denied relief." See, Johnston v. State, 497 So.2d 863, 871-72 (Fla. 1986), Johnston admittedly seeks reconsideration of his claim by virtue of Hitchcock. On direct appeal, petitioner

argued that the court had erred in failing to find mental health mitigating circumstances as Johnston suffered from schizophrenia and was on L.S.D. and other substances the evening of the murder. Johnston's counsel also argued that his court had failed to consider such factors as the abuse which he had suffered from his parents and the times which he had been confined to mental hospitals (Initial Brief, at 99-101). This court expressly rejected these claims of error and, in the course of so doing, found that the lower court had "fulfilled its obligation to consider all the evidence and all the mitigating circumstances." Johnston at 871-2. The court likewise affirmed the lower court's failure to find any of the statutory mitigating circumstances and found that the lower court "did not err in failing to find that Johnston's history of being abused by his parents rose to the level of a nonstatutory mitigating circumstance." Johnston at 872. When claims of this nature have already been correctly resolved on direct appeal, this court has held that Hitchcock does not require collateral litigation. See, Daugherty v. Dugger, 533 So.2d 287 (Fla. 1988).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Response to Petition for Extraordinary Relief, for a Writ of Habeas Corpus, Request for Stay of Execution, and Application for Stay of Execution Pending Disposition of Petition for Writ of Certiorari, has been furnished by U.S. Mail to K. Leslie Delk, Office of Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, counsel for petitioner, this 13th day of November, 1990.

Margene A. Roper
Of Counsel