IN THE SUPREME COURT OF FLORIDA

CASE NO. 75909

JESSE JOSEPH TAFERO,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

ON APPEAL FROM THE CIRCUIT COURT FOR
THE SEVENTEENTH JUDICIAL CIRCUIT
IN AND FOR BROWARD COUNTY, FLORIDA

SECOND SUPPLEMENT TO APPELLANT'S SUMMARY BRIEF ON DENIAL OF MOTION FOR RELIEF PURSUANT TO RULE 3.850, DENIAL OF REHEARING, AND DENIAL OF AMENDED RULE 3.850 MOTION, AND MOTION FOR STAY OF EXECUTION, AND, IF NECESSARY, MOTION FOR STAY OF EXECUTION PENDING THE FILING AND DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

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Petitioner submits this second supplement to appellant's summary brief in order to reply to the arguments set out in appellee's answer brief regarding his Johnson v. Mississippi claim. Petitioner regrets the necessity of having to respond in this manner, but because of the pendency of the death warrant, he has no alternative.

In Johnson v. Mississippi, 100 L.Ed.2d 575 (1988), the U. S. Supreme Court emphasized the fundamental importance of insuring that the capital sentencing determination is reliable. Because the Constitution "gives rise to a special need for reliability in the determination that death sentence is the appropriate punishment in any capital case," Johnson, supra, 100 L.Ed.2d, 575, 584 (1988), in Johnson, the U. s. Supreme Court set aside a Mississippi death sentence because it was in part premised on an earlier New York conviction for assault with intent to commit rape which conviction had been invalidated subsequent to the imposition of the death sentence. In granting relief, the U. S. Supreme Court specifically rejected Mississippi's contention that the claim could not be raised in a post-conviction motion and was procedurally barred, see Burr v. State, Case No. 71,234 (Fla., 1989) (slip opinion at P 2).

In the instant matter, like in Johnson, Mr. Tafero's death sentence is premised on an earlier conviction in part for the

crime of assault with intent to commit rape.' To be consistent with Johnson, if Mr. Tafero's death sentence is to withstand constitutional scrutiny, there can be no question about the reliability of the conviction upon which the trial court substantially relied in sentencing him to death. Yet serious and significant questions abound about this conviction. First, an individual has come forward and said under oath that the two crucial witnesses against Mr. Tafero had admitted they were not telling the truth at Mr. Tafero's trial. And, even more significant, another individual has voluntarily come forward who has confessed to the crime for which Mr. Tafero was convicted and who has passed a lie detector test regarding his confession. If nothing else, the Eighth Amendment principles set out in Johnson mandate a stay of execution so as to determine whether in fact Mr. Tafero's sentence is premised on an unreliable conviction.

Yet, the state resists this conclusion. Apparently it does so not because it disputes the general principles set forth above. Rather, its quarrel is with Mr. Tafero's assertion that he has presented sufficient evidence to call into doubt the reliability of his prior conviction. In this regard, it points to two prior proceedings which it says are dispositive of this claim. First it emphasizes that a coram nobis petition

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[1] There is no question that Mr. Tafero's earlier conviction played a central role in the decision to sentence him to death. This earlier conviction "was critical, if not essential, in affirming Tafero's death sentence," Tafero v. State, 406 So.2d 89 (Fla., 3d, 1981).

challenging Tafero's prior conviction has been considered and rejected by the Third District Court of Appeal, see Tafero v. St., 406 So.2d 89 (Fla, 3d, 1981). Further, it asserts that this court has rejected a claim, it deems analogous to the one presented herein, in its decision denying the appeal of Mr. Tafero's initial 3.850 motion, see Tafero v. St., 459 So.2d 1034 (Fla., 1987). It concludes then that Mr. Tafero's Johnson claim should not be addressed on the merits.

However, the state's reliance on each of the above noted decisions, is misguided. Neither is or should be dispositive of the question of whether Mr. Tafero's death sentence is premised on an unreliable conviction. If either is so construed in the manner suggested by the state, such a construction would be in specific contravention of the admonition in Johnson regarding the heightened emphasis on insuring that any capital sentencing determination is reliable.

First regarding the Third District Court of Appeal coram nobis decision, it is not and must not be dispositive of the question raised herein because that court, in rejecting the petition, relied on a legal standard which is incompatible with the Eighth Amendment principles set out in Johnson. Specifically, the Third District applied a standard which asked whether "the alleged new facts, had they been presented to the trial court, would . . . conclusively have prevented the entry' of the conviction," Tafero v. St. 406 So.2d 89, 93 (Fla. 3d, 1981). Such a "conclusiveness standard" is clearly inconsistent

with the heightened emphasis on reliability mandated by the Eighth and Fourteenth Amendments. This is readily apparent from the Third District statement that "it appears, at least theoretically, that new evidence that another person committed the crime in the face of trial testimony identifying the defendant as the perpetrator can never satisfy the conclusiveness test," Tafero v, St., 406 So. 2d 89, 94, n.11 (Fla. 3d 1981). Perhaps not surprisingly then, at least three members of this court now agree that in death cases the conclusiveness standard must be rejected, see Preson v. St. 531 So.2d 154, 160 (Fla., 1988) (J. Overton and Kogan concurring) ("I . . . . remain firm in my view that the probability test for granting new trials on the basis of newly discovered evidence . . . should be applicable to petitions for writ of error coram nobis in death cases"), see also Darden v. St. 521 So.2d, 1103, 1106 (Barkett, J. concurring) ("I agree with J. Overton's dissents . . . which reject the conclusiveness test in the review of petitions for writ of error coram nobis"). Also, consistent with this view, this court in its first opportunity post Johnson to apply the principles enunciated therein, in Burr unanimously set aside Burr's death sentence because the reliability mandate of Johnson had been violated.[2] A

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[2] The court's decision in Burr, supra, is very instructive. In Burr, this court relying on Johnson, supra, set aside petitioner's death sentence because it was at least in part premised on proof of a collateral crime for which Burr was later acquitted. In his initial 3.850 motion prior to Johnson, Burr had argued that this acquittal rendered the evidence inadmissible with the result that his death sentence should be vacated. This court, however, disagreed finding that the claim was procedurally barred since it had been raised and rejected on direct appeal

similar result is mandated here given that the rejection of Mr. Tafero's state coram nobis petition by the District Court was premised on a legal standard inconsistent with the Eighth and Fourteenth amendment principles enunciated in Johnson.

Nor is the state's reliance on the rejection by this court of what the state deems an analogous claim to the one presented herein when it rendered a decision on the appeal of Mr. Tafero's first 3.850 petition dispositive of this question. Again, the state's attempt to preclude this court from addressing the merits of the claim should be rejected.[3] In that appeal, which like the appeal of Burr's initial 3.850 motion was decided prior to Johnson, see n.3, infra, this court did not address this issue in the reliability context mandated by that decision. Rather it did so in the context of whether Mr. Tafero's trial counsel was ineffective for not raising a claim based on the prior conviction. Mr. Tafero's present claim, on the other hand, is not

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("As to the subsequent acquittal, clearly, at the time the . . . evidence was admitted, it was not error to do so. This much has been settled on direct appeal. There is no reason to suggest that the subsequent acquittal changes that admissibility subsequent to the trial. This Court will not render evidence retroactively inadmissible"), Burr v. St., 518 So.2d 903, 905 (Fla., 1987). The U. s. Supreme Court then decided Johnson. In light of Johnson, the court vacated the Burr decision and remanded the matter for further consideration. As was the case in Burr, Johnson mandates further consideration of Mr. Tafero's claim that his death sentence is unreliable in violation of the Eighth and Fourteenth Amendments.

[3] Parenthetically, one would expect that when the issue is the factual reliability of the capital sentencing determination, the state would welcome and seek a merits ruling on the claim and not seek to preclude the court from addressing it as it is suggesting here.

premised on the competence of his trial counsel, but rather on the constitutional principles announced in Johnson, supra, a decision, to reiterate which was announced some four (4) years after that appeal. Given these facts, this Court has an evident obligation to address this claim in light of Johnson just like it did it Burr, see n.3, infra.

This Court must not countenance the execution of an individual whose death sentence is premised upon a conviction for a crime to which another has given a polygraph proof confession and for which the crucial witnesses have admitted they perjured themselves in implicating Mr. Tafero. As a result, there can be no doubt that there exists serious and significant questions regarding the reliability of Mr. Tafero's death sentence. In Burr, supra, this Court commendably and correctly concluded that it would not allow a death sentence obtained in such a fashion to stand. A similar result is compelled here or at a minimum an evidentiary hearing is required particularly in light ironically of the conclusion of the Third District Court of Appeal that the evidence presented, "if believed would probably have changed the verdict of the jury," Tafero v. State, 406 So.2d 89, 93 (Fla. 3d 1981).

Respectfully submitted,

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Certificate of Service

I hereby certify that a true and correct copy of the foregoing has been furnished by hand delivery to Carolyn Snurkowski, Assistant Attorney General, Office of the Attorney General, Tallahassee, Florida, this 30 day of April, 1990.

Mark Evan Olive

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