IN THE SUPREME COURT OF FLORIDA

DAVID EUGENE JOHNSTON,

Petitioner,

v. CASE NO. 82,457

HARRY K. SINGLETARY,

Respondent.
_____/

INITIAL BRIEF OF RESPONDENT ON EXPEDITED REWEIGHING OR HARMLESS ERROR ANALYSIS

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STATEMENT OF THE CASE AND FACTS

At approximately 3:30 a.m. on November 5, 1983, David Eugene Johnston called the Orlando Police Department, identified himself as Martin White, and told the police "somebody killed my grandma" at 406 E. Ridgewood Avenue. Upon their arrival, the officers found the dead body of 84-year-old Mary Hammond. The victim's body revealed numerous stab wounds as well as evidence of manual strangulation. The police arrested Johnston after noticing that his clothes were blood-stained, his face was scratched and his conversations with the various officers at the scene of the crime revealed several discrepancies as to his account of the evening's events.

Prior to the murder Johnston had been working at a demolition site near the victim's home and had had contact with the victim during that time. In fact, Johnston was seen washing dishes in the victim's apartment five nights before the murder.

Johnston was seen earlier on the evening of the murder without any scratches on his face and the clothing he was wearing tested positive for blood. In addition, the watch that Johnston was seen wearing as late as 1:45 a.m. on the morning of the murder was found covered with blood on the bathroom countertop in the victim's home. Further, a butterfly pendant that Johnston was seen wearing as late at 2:00 a.m. that morning was found entangled in the victim's hair.

A reddish-brown stained butcher-type knife was found between the mattress and the boxspring of the victim's bed, a footprint matching Johnston's shoe was found outside the kitchen

window of the victim's house, and silver tableware, flatware, a silver candlestick, a wine bottle and a brass teapot belonging to the victim were found in a pillowcase located in the front-end loader parked at the demolition site.

On December 19, 1983, Johnston requested to speak to Investigator Mundy, at which time he confided that he had received a letter from someone named "Sissy" who confessed to the murder. Johnston explained that he gave a copy of the letter to his attorney. He also told his girlfriend that he received a different letter from someone confessing to the murder.

The office of the state attorney issued subpoenas duces tecum to both of Johnston's attorneys, seeking any written statement which purported to be a confession to the killing of the victim by any person other than Johnston. Johnston filed a motion to quash the subpoenas which, after a hearing, was denied. Both attorneys then responded to the subpoenas and turned the two letters over to the prosecutor. In a later statement to Investigator Mundy, Johnston revealed that he had written both letters.

The public defender sought to withdraw from the case, in part, because Johnston disregarded his advice by continually calling the Orlando Police Department and inviting them to the jail so that he could give statements about the murder. Counsel also indicated that he could not pursue a line of defense suggested by Johnston. The public defender considered the line of defense completely unethical. The trial court denied the motion to withdraw.

After hearing evidence in the penalty phase the jury rendered an advisory sentence of death. The trial judge imposed the death penalty after finding three aggravating and no mitigating circumstances. The aggravating factors were: (1) two previous convictions of a felony involving the use or threat of violence to the person to wit; battery upon a law enforcement officer in Florida and terroristic threat in Kansas (2) the capital felony was committed while the defendant was engaged in the commission of a burglary and (3) the murder was especially heinous, atrocious or cruel. In support of its finding of the HAC factor, the trial court noted that the medical examiner testified that the victim, an 84-year-old woman who had retired to bed for the evening, was strangled and stabbed three times completely through the neck and twice in the upper chest. The medical examiner's testimony also revealed that it took the helpless victim three to five minutes to die after the knife wound severed the jugular vein. The victim was in terror and experienced considerable pain during the murderous attack.

As indicated by the sentencing order and the record, the trial court fulfilled its obligation to consider all of the evidence and all of the mitigating circumstances. The trial court properly found that the taking of L.S.D. did not warrant mitigation in support of the mitigating factors that the capital felony was committed while he was under the influence of extreme mental and emotional disturbance, section 921.141(6)(b), Florida Statutes (1983), and that his capacity to appreciate the criminality of his conduct or conform his conduct to the

requirements of law was substantially impaired. §921.141(6)(f), Fla. Stat. (1983). Johnston gave numerous statements full of discrepancies and his credibility was rightfully questioned. The trial court properly considered all of the evidence, including past mental disorders. Johnston's actions did not reach the level required to find mitigation under subsections (6)(b) and (f). Johnston's age, twenty-three years at the time of the murder, is not a mitigating factor. His history of being abused by his parents did not rise to the level of a non-statutory mitigating circumstance.

On appeal, this court affirmed Johnston's conviction and imposition of the death sentence, finding that a sentence of death was appropriate upon a finding of three aggravating and no mitigating circumstances. Justice Barkett concurred in the result. *Johnston v. State,* 497 So. 2d 863 (Fla. 1986).

On direct appeal Johnston alleged that *twenty-two* errors occurred. One error alleged to have occurred was that the trial court erred in denying a motion to vacate the death penalty because the aggravating and mitigating circumstances enumerated in section 921.141, Florida Statutes (1983), are impermissibly vague and overbroad. In regard to the HAC factor, Johnston argued that "almost any felony would appear especially cruel, heinous and atrocious to the layman, particularly a 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." (A 18).

This court held "As in *Medina v. State,* 466 So. 2d 1046, 1048 n.2 (Fla. 1985) we summarily reject many of the issues raised by appellant that we have rejected in the past and similarly do not warrant reversal in this instance. Thus, we conclude that the trial court did not err in denying the following motions..." 497 So. 2d at 863. In determining that the HAC factor had been properly applied this court looked to other cases to insure consistent application. The court stated:

> The heinous, atrocious or cruel aggravating circumstance was properly applied in this instance. *Cf. Wright v. State,* 473 So. 2d 1277 (Fla. 1985) (multiple stab wounds on the body of a 75-year-old woman) *cert. denied,* ___ U.S. ___, 106 S.Ct. 870, 88 L.Ed.2d 909 (1986); *Brown* (81-year-old semi-invalid woman beaten raped and killed by asphyxiation); *Quince v. State,* 414 So. 2d 185 (Fla.) (severe beating, wounding, raping and manual strangulation of an 82-year-old frail woman), *cert. denied,* 459 U.S. 895, 103 S.Ct. 192, 74 L.Ed.2d 155 (1982).

497 So. 2d at 871.

The governor subsequently signed a warrant for Johnston's death in 1988. Johnston filed a motion for post conviction relief pursuant to Florida Rule of Criminal Procedure 3.850. The circuit court granted a stay and conducted an evidentiary hearing. Relief was ultimately denied. On appeal to this court Johnston raised the claim that the aggravating circumstance of heinous, atrocious, or cruel was applied in violation of the Eighth and Fourteenth Amendments.[1] In disposing of this and

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[1] Johnston argued for the first time to this court that the manner in which the jury and judge were allowed to consider "heinous, atrocious or cruel" provided for no genuine narrowing

other claims this court stated "the remaining claims are without merit or are procedurally barred because they have been or should have been raised on direct appeal." *Johnston v. State,* 583 So. 2d 657, 662 (Fla. 1991). The same identical claim was raised in a petition for habeas corpus. This court stated "All of these claims are duplicative of claims raised in the motion for post conviction relief. All the claims are procedurally barred because they were raised or should have been raised on direct appeal." *Johnston v. Dugger,* 583 So. 2d 657, 663 (Fla. 1991). This court ultimately affirmed the denial of 3.850 relief and denied the petition for writ of habeas corpus. *Johnston v. Dugger,* 583 So. 2d 652 (Fla. 1991).

Although the opinion in *Sochor v. Florida,* 112 S.Ct. 2114, 2120 n. (1992), made it absolutely clear that a simple pretrial motion objecting to the vagueness of Florida's heinousness factor was not sufficient to preserve the claim that the jury was not properly instructed on the heinousness factor, the United States District Court applied *Espinosa v. Florida,* 112 S.Ct. 2926 (1992), retroactively, based on its reasoning that this court's determination of this claim did not clearly and expressly state that its judgment rested on a state procedural bar by virtue of

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of the class of people eligible for the death penalty, because the terms were not defined in any fashion, and a reasonable juror could believe any murder to be heinous, atrocious or cruel, citing *Maynard v. Cartwright,* 108 U.S. 1853 (1988) (A. 29-30). The state responded that the record reflected no request for a limiting instruction as to this aggravator or an objection to the instruction as given and that since the statute itself was challenged on direct appeal, this claim is procedurally barred (A 36-37). The trial court also found this claim to be procedurally barred as a claim that should have been raised on direct appeal.

its language on appeal from the denial of Florida Rule of Criminal Procedure 3.850 relief that this claim was "one of the remaining claims that was either without merit or procedurally barred because it had been or should have been raised on direct appeal." (A 59).

This claim has been and continues to be raised throughout this state (A 65) and needs to be expeditiously addressed.

SUMMARY OF THE ARGUMENT

I. This court has residual jurisdiction to hear this case and ought to so that a validly imposed sentence will not be delayed.

II. The claim that the jury was not properly instructed on the heinousness factor is procedurally barred and this court should so state in a plain statement.

III. In using the language that "the remaining claims are without merit or procedurally barred" this court did not intend to ignore asserted procedural bars and should so indicate to avoid unnecessary federal construction of such language.

IV. Any error in instructing the jury on the heinousness factor was harmless since the subject murder was heinous, atrocious, or cruel under any definition, and even eliminating the heinousness factor leaves two aggravators and no mitigators.

ARGUMENT

I. THIS COURT HAS JURISDICTION NOT ONLY TO PERFORM A HARMLESS ERROR ANALYSIS BUT TO EFFECTUATE THE ORDERLY PROGRESS OF THE CASE.

Pursuant to the Florida Constitution, Florida law, and the Florida Rules of Appellate Procedure, the Supreme Court is empowered to hear appeals from final judgments of trial courts imposing the death penalty. Fla. Const. Art. V §3(b)(1); F.S. § 924.08(1); Fla.R.App.P. Rule 9.030(a)(1)(A)(i),(ii). Where the jurisdiction of this court has attached in capital cases, the state would submit that it retains *residual* jurisidiction to do justice to all parties. This court has previously held that where its jurisdiction had attached in capital cases before the decision of the United States Supreme Court which abrogated the death penalty as then provided, the court retained jurisdiction over said cases for *all purposes* including the automatic reduction of the death sentences to life imprisonment. *Anderson v. State,* 267 So. 2nd 8 (Fla. 1972), *later app.* 275 So. 2d 226 and *later app.* 286 So. 2d 548. The state now comes before this court in an effort to sustain a validly imposed death sentence and to avoid unnecessary delay in the imposition of the same.

Each delay, for its span, is a *commutation* of a death sentence to one of life imprisonment. *Thompson v. Wainwright,* 714 F. 2d 1495, 1506 (11th Cir. 1983). It is not uncommon to find death penalty cases which have been in ligitation for as much as a full decade with repetitive and careful review by both state and federal courts, as well as by the Supreme Court. *Giarratano v.*

Murray, 836 F. 2d 1421, 1427 (4th Cir. 1988). Litigants, the judical system, and society at large are entitled to have habeas corpus cases, and *especially* death penalty cases, proceed promptly, effectively and fairly. *Bundy v. Wainwright,* 808 F. 2d 1410, 1416 (11th Cir. 1987).

In the order denying Johnston's motion for postconviction relief Judge Rom W. Powell noted "this Court would note that CCR counsel has once again taken a 'shotgun' approach by filing a ponderous, prolix and duplicitous motion totalling 225 pages with a 15 page supplement raising a total of *16* main claims." (A 41). This court previously noted on direct appeal that Johnston had raised *22* claims of error. *Johnston v. State,* 497 So. 2d 863, 865 (Fla. 1986). This case has become nothing except an endurance contest. Nevertheless, not one of the multifarious claims dragged by Johnston through the state and federal courts has occasioned relief with the exception of the claim now brought before this court by the state.

It is clear that there is reason to challenge United States District Judge Anne C. Conway's order of September 16, 1993. There should be little doubt of this court's intent in affirming the denial of postconviction relief on the issue of the lack of a limiting instruction on the heinousness factor despite this court's choice of alternative language, where turning one simple page of this court's opinion reveals that in the context of denying a petition for habeas corpus containing the *same exact claim*, this court found that such claim was "procedurally barred because it was raised or should have been raised on direct

appeal." *Johnston v. Dugger,* 583 So. 2d 657, 663 (Fla. 1991). It is also clear that under *Ylst v. Nunnemaker,* 111 S. Ct. 2590 (1991), that where, as here, the last reasoned opinion on the claim explicitly imposes a procedural default it should be presumed that a later decision rejecting the claim did not silently disregard that bar in considering the merits. Judge Powell's order clearly reflects that this claim was procedurally barred.

The best of all possible state of affairs that David Eugene Johnston could hope for, however, would be for the state to appeal the District Court's order (a possibility the state is still keeping open) thereby opening the avenue to interminable and intractable litigation, through which period he would escape the just imposition of sentence, no doubt only to raise some new claim that came to fruition during the process of appealing the instant decision.

In the absence of constitutional error this court is the final arbiter of Florida death sentences. It has *premier* jurisdiction. Even the decision in *Espinosa v. Florida,* 112 S.Ct. 2926 (1992), recognizes such and cases containing *Espinosa* error were ultimately remanded back to this court for final decision. While it is questionable whether the United States District Court has jurisdiction over this court to enter such an order as it did, the court did act in accordance with *Espinosa* and accorded deference to this court as, essentially, the final arbiter of Florida death penalty cases. The case is, thus, before this court as result of a certain "deference" and "comity." Should the district court's order be upheld on appeal to the Eleventh

Circuit the case would ultimately wend its way here under similar circumstances. This court has "residual" jurisdiction in the face of an intervening decision (*Espinosa*) to do justice. This court should exercise such jurisdiction for numerous reasons. A paramount reason is the fact that this claim is being raised throughout the state. This case should be a vehicle for this court to explain and interpret its own language so as to preserve valid procedural bars. Another reason is to avoid interminable delay. It makes absolutely no sense to await the word of a higher federal court for several years, and, in essence, commute Johnston's sentence to one of life imprisonment, only to possibly have to do eventually, what this court could have done immediately. Even if the order of the district court is overturned, it is certainly a *shallow* victory, for a valid judgment and sentence will have been needlessly delayed. Upon accepting jurisdiction or hearing the case, this court can and should not only apply a new procedural bar to this claim, but reassert its prior procedural bar. If this court has jurisdiction at all, it has jurisdiction for all purposes.

II. THIS COURT SHOULD MAKE CLEAR IN A PLAIN STATEMENT THAT THE CLAIM THAT THE JURY WAS NOT PROPERLY INSTRUCTED ON THE HEINOUSNESS FACTOR IS PROCEDURALLY BARRED.

Sochor v. Florida, 112 S.Ct. 2114, 2120 (1992), and recent caselaw of this court following the reasoning of *Sochor* make it perfectly clear that in the absence of an objection after the trial judge has instructed the jury or an advance request for a specific jury instruction that is explicitly denied, a federal court is without authority to address a claim based on the jury instruction about the heinousness factor, where the state ground of decision is adequate and independent. The district court noted, "The Florida Supreme Court did not specify whether the claim was procedurally barred or whether the claim was determined to be without merit." (A 59). The district court also stated "only the Florida courts can determine the proper approach to Petitioner's sentencing." The state knows of no constitutional provision, statute or case law that would prevent this court from asserting a proper procedural bar in interim litigation where the federal court has admitted that "it cannot be determined whether the determination by the Florida Supreme Court was on procedural grounds or on the merits" and where before any ultimate appeal is taken, the case can again be brought before the district court in a motion for relief pursuant to Federal Rule of Civil Procedure 60(b). It goes without saying that any error procedurally barred from being entertained on the merits must be "harmless," at least in a jurisdictional sense, since relief can never be predicated upon it.

III. THE LANGUAGE USED BY THE COURT IN DENYING JOHNSTON'S HAC JURY INSTRUCTION CLAIM DID NOT NEGATE OR IGNORE ASSERTED PROCEDURAL BARS.

The language used by the court in determining Johnston's claim that the manner in which the jury and judge were allowed to consider the heinousness factor did not narrow the class of persons eligible for the death penalty because the terms were not defined in any fashion is not unique to this case. This court has stated in numerous cases that "the remaining claims are without merit or are procedurally barred because they have been or should have been raised on direct appeal." The instant claim is susceptible to repetition. This court should take the opportunity to clarify its own language before undue federal court intervention in numerous cases and make clear that in using such language the court either did not intend to ignore asserted bars in accordance with its caselaw or was referencing or relying on the order of the lower court. This court is aware of its own intent in utilizing such language and should give voice to such intent before it is subject to construction.

IV. ANY ERROR IN INSTRUCTING THE JURY ON THE HAC FACTOR WAS HARMLESS.

The order of the district court cites *Stringer v. Black*, 112 S.Ct. 1130, 1137 (1992), for the proposition that in order for a state appellate court to affirm a death sentence after the sentencer was instructed to consider an invalid factor, the court must determine what the sentencer would have done *absent* the factor. The district court's analysis based on a *non*-Florida case overlooks several crucial points. First of all, the right to a jury trial does not even extend to sentencing determinations. *Spaziano v. Florida*, 468 U.S. 447, 464-65 (1984). Similarly, because a defendant does not have the right to a jury-imposed sentence, he or she does not have the right to a jury determination of the facts that may trigger a (minimum) sentence. *See, McMillan v. Pennsylvania*, 477 U.S. 79, 81, 93 (1986). In *Hildwin v. Florida*, 490 U.S. 638 (1989) (per curiam), the Supreme Court specifically held that the Sixth Amendment does *not* require that a jury make the findings necessary to impose a sentence of death. In assessing the role of the jury in Florida's death penalty scheme in *Espinosa v. Florida, 112 S.Ct. 2926 (1992)*, Justice Souter did not discuss another important factor - the role of *this court*. *Espinosa* focused only on the respective roles of the jury and judge as it found suggested by *Tedder v. State*, 322 So. 2d 908 (Fla. 1975). But the jury and judge are not the only sentencing entities. In *Barclay v. Florida*, 463 U.S. 937, 960 (1983), Justice Stevens, joined by Justice Powell, concurring in the judgment, acknowledged that Florida had actually adopted a "trifurcated"

procedure for identifying the persons convicted of a capital felony who shall be sentenced to death. Even compartmentalizing the jury and judge into a cohesive sentencing unit does not affect the considerable discretion of this court. An *appellate* court is permitted to *make* the findings necessary to impose a death sentence. *Cabana v. Bullock,* 474 U.S. 376, 392 (1986). Thus, this court does not have to determine what the sentencer would have done absent the factor. Most recently this court has been finding errors in the HAC instruction harmless where "the facts show a killing to be heinous, atrocious or cruel under any definition of those terms." *See, Gorby v. State,* 18 Fla. L. Weekly S623 (Fla. Dec. 9, 1993); *Thompson v. State,* 619 So. 2d 261 (Fla.), *cert. denied,* 62 U.S.L.W. 3334 (U.S. Nov. 8, 1993). The HAC factor should be implicitly upheld, ratified or imposed anew and such finding made under the circumstances of this case where an 84-year-old woman who had retired to bed for the evening was strangled and stabbed three times completely through the neck and twice in the upper chest. Strangling is definitionally "heinous" under *Sochor v. Florida,* 112 S.Ct. 2114, 2121 (1992). It also took this helpless victim three to five minutes to die after the knife wound severed the jugular vein. She was in terror and experienced considerable pain during the murderous attack. *Johnston v. State,* 497 So. 2d 863, 871 (Fla. 1986). A finding should be made that this aggravator has been sufficiently narrowed. It is certainly the "conscienceless or pitiless crime which is unnecessarily torturous to the victim" described in *Proffitt v. Florida,* 428 U.S. 242 (1976). The factor was applied in a similar

recent case, *Dudley v. State,* 545 So. 2d 867 (1989), where the victim was killed by strangulation and having her throat cut and apparently struggled for life while being accosted in her own home. *See also, Perry v. State,* 522 So. 2d 817 (Fla. 1988). It is clear that such a crime is unnecessarily torturous to the victim under the *Proffitt* approved limitation. The facts of the case under consideration place the crime within the class of cases defined by this court's narrowing construction of the term "heinous, atrocious or cruel." *See, Bertolotti v. Dugger,* 883 F.2d 1503, 1526-27 (11th Cir. 1989).

To satisfy the district court, which will also send this case to the United States Court of Appeals for the Eleventh Circuit with one less appellate issue to quibble about, save for the state's assignment of error, a finding of harmlessness should alternatively be made, excluding the HAC factor. The essence of the factor need not be entirely excluded for pursuant to *Hodges v. State,* 595 So. 2d 929 (Fla. 1992); F.S. §921.141(7), and *Payne v. Tennessee,* 111 S.Ct. 2597 (1991), the victim's uniqueness can generally be considered in sentencing. In this case the victim was an 84-year-old lady. There is no mitigation in this case. Johnston was previously convicted of battery upon a law enforcement officer in Florida and terroristic threat in Kansas. The capital felony was also committed while Johnston was engaged in the commission of a burglary. A trial court's erroneous finding of the aggravating factor that the murder was especially heinous, atrocious, or cruel is harmless absent any mitigating factors and in light of sufficient competent evidence to support

the remaining aggravating factors. *Maqueira v. State,* 588 So. 2d 221 (Fla. 1991); *Young v. State,* 579 So. 2d 721 (Fla. 1991).

CONCLUSION

The state respectfully requests that this Honorable Court grant expedited review and find the heinousness jury instruction claim procedurally barred and find in the alternative that any error is harmless.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing has been furnished by U.S. Mail to Martin J. McClain, Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 23rd day of December, 1993.

Margene A. Roper
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