IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,457

DAVID EUGENE JOHNSTON

v.

HARRY K. SINGLETARY,

Movant.

ON MOTION FILED BY HARRY K. SINGLETARY
INVOKING THIS COURT'S RESIDUAL
JURISDICTION TO DO JUSTICE

BRIEF OF DAVID EUGENE JOHNSTON

MICHAEL J. MINERVA
Capital Collateral Representative
Florida Bar No. 092487

MARTIN J. MCCLAIN
Chief Assistant CCR
Florida Bar No. 0754773

DAREN L. SHIPPY
Assistant CCR
Florida Bar No. 0508810

OFFICE OF THE CAPITAL
COLLATERAL REPRESENTATIVE
1533 South Monroe Street
Tallahassee, FL 32301
(904) 487-4376

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

Citations in this brief are as follows: The record on appeal from the original court proceedings are referred to as "R. ___" followed by the appropriate page number. The record on appeal from the Rule 3.850 evidentiary hearing are referred to as "PC-R ___" followed by the appropriate page number. The order of the federal district court is referred to as "FDC Order at ___" followed by the appropriate page number. All other references are self-explanatory or will be otherwise explained.

REQUEST FOR ORAL ARGUMENT

Mr. Johnston is under sentence of death. The resolution of the issues in his case will determine if he lives or dies. Previously, this court has allowed oral argument in capital cases where the issue concerned the harmlessness of Eighth Amendment error. Thus, in order to assure equal protection to Mr. Johnston, he should be granted an oral argument. An opportunity to argue the issues before this court via oral argument is appropriate in light of the seriousness of the issue and the consequences involved. Mr. Johnston requests an oral argument.

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JURISDICTIONAL STATEMENT

Movant's motion requested this Court to "open a case" (Motion at 1) in order to "reweigh or perform the requisite harmless error analysis" because of constitutional error (Motion at 3). In his motion, Movant cited no authority recognizing this Court's jurisdiction to "open a case" for such a purpose. Despite Mr. Johnston's objection on jurisdictional grounds, this Court ordered briefs submitted, presumably to include a discussion of the jurisdictional question.

The "Initial Brief of Respondent"[1] asserted, "[w]here the jurisdiction of this court has attached in capital cases, the State would submit that it retains residual jurisdiction to do justice to all parties." (Id. at 9). For this novel proposition the Movant-"Respondent" cited Anderson v. State, 267 So. 2d 8 (Fla. 1972), later app. 275 So. 2d 226 and later app. 286 So. 2d 548. In Anderson, the Attorney General of the State of Florida filed a motion seeking an order in forty (40) pending capital appeals remanding the cases to the appropriate circuit courts for the imposition of life sentences in accord with the decision in Furman v. Georgia, 408 U.S. 238 (1972), and thereafter transferring the pending appeals to the appropriate district courts of appeal. This Court ruled that, since each of the forty cases was a capital case at the time the notice of appeal was

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[1]Harry K. Singletary initiated this proceeding by filing a motion in which he was the Movant. Since that motion, however, Mr. Singletary has styled himself as the Respondent in some pleadings and as the Appellee in others.

filed, jurisdiction remained in the Florida Supreme Court despite the decision in Furman declaring the Florida death penalty statute unconstitutional and thus rendering the death sentences unconstitutional:

> Our jurisdiction having attached at the time notice of appeal was filed in each case, we were not divested of such jurisdiction by the decision of the Supreme Court of the United States in Furman v. Georgia, *supra*. Having once acquired jurisdiction, we will retain jurisdiction until a final disposition of the cases.

Anderson v. State, 267 So. 2d at 11. Thus, Anderson would seem to stand for the unremarkable proposition that once a notice of appeal is filed in a capital case jurisdiction vests in the Florida Supreme Court "until a final disposition" even if intervening events cause the death sentence to be reduced to a life sentence.[2]

This Court's jurisdiction encompasses only the narrow class of cases described in Article V, Section 3(b) of the Florida Constitution. Mystan Marine, Inc. v. Harrington, 339 So. 2d 200, 201 (Fla. 1976); Lawyers Title Insurance Corp. v. Little River

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[2]However, Anderson does indicate that, where a federal court has declared that the death penalty statute is facially vague and overbroad and not cured by application of a narrowing construction, it is improper to conduct a harmless error analysis. No effort was made in Anderson to determine whether the application of a vague and overbroad statute was harmless as to the forty individual death sentences.

Here, the federal court has determined that the facial invalidity of the statute was not cured by the application of an adequate narrowing construction during the penalty phase before Mr. Johnston's jury. Accordingly, under Anderson, this Court should order a resentencing.

Bank and Trust Co., 243 So. 2d 417 (Fla. 1970). Movant may not confer jurisdiction by request. Bullard v. Wainwright, 313 So. 2d 653, 655 (Fla. 1975)("Neither the court below nor petitioner can by request confer jurisdiction where none exists"). Movant has made no attempt to establish a basis for this Court's jurisdiction.

In Parker v. State, Case No. 63,700, the State filed a motion on October 16, 1991, seeking to reopen the direct appeal. The State conceded that error was present in this Court's appellate analysis in light of Parker v. Dugger, 112 S. Ct. 812 (1991). This Court, thereupon, granted the State's request and reopened Mr. Parker's direct appeal. Mr. Parker was permitted to file an initial and a reply brief. He was also given an oral argument. Mr. Parker's reopened direct appeal is still pending at the time this brief is being written.

Similarly, in Hill v. State, Case No. 68,706, a federal district court found error in this Court's direct appeal analysis. The State of Florida chose not to appeal that finding of error. Accordingly, Mr. Hill petitioned this Court to reopen his direct appeal and set a briefing schedule. The motion was granted and a briefing schedule has been put in place providing Mr. Hill with the opportunity to submit both an initial and a reply brief. Presumably, once the briefs have been submitted, Mr. Hill will be afforded oral argument on his reopened direct appeal. Here, the federal courts have determined that this Court during Mr. Johnston's direct appeal erroneously found no

merit to Mr. Johnston's challenge to the facially vague and overbroad statutory language defining "heinous, atrocious or cruel." The federal court indicated that it was permissible for either the State to obtain an adequate harmless error analysis from this Court or to conduct a resentencing. At this juncture, the State has chosen to ask this Court to engage in a harmless error analysis.[3] The State has not sought to reopen Mr. Johnston's direct appeal.

This Court responded by setting a briefing schedule. This order did not indicate whether Harry K. Singletary's, et al., motion had been granted. The order does not address whether the briefs ordered are on the motion itself and the jurisdictional issue raised by Mr. Johnston, or whether the briefs are those briefs requested by Harry K. Singletary addressing the harmlessness of the Eighth Amendment error found by the federal district court in Johnston v. Singletary. There is no indication whether this Court is contemplating overturning longstanding law and engaging in appellate reweighing. The order does not reflect what, if any, rules of court apply.

In Huff v. State, 622 So. 2d 982 (Fla. 1993), this Court recognized that due process principles apply to capital collateral defendants such as Mr. Johnston. In Huff, Mr. Huff was not given a reasonable opportunity to be heard. In addition to a reasonable opportunity to be heard, due process includes

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[3]Mr. Singletary has also suggested that this Court conduct an appellate reweighing even though Florida law clearly precludes appellate reweighing.

reasonable notice. It also includes principles of fairness and equal application of the law. See Lopez v. State, 18 Fla. L. Weekly S634 (Fla. 1993). Certainly this principle incorporates fair opportunity to know what procedural and substantive rules of law apply. Is this an appeal? Is this a proceeding on an extraordinary writ? Is it an appellate reweighing? This Court has refused to disclose the answers to these questions to Mr. Johnston and his counsel.

This Court has ordered briefs. It has set a briefing schedule which gives the State an initial and a reply brief. There is no indication what the brief is to discuss. Is it to discuss whether to grant Harry K. Singletary's et al. motion and set a briefing schedule for briefs regarding whether the Eighth Amendment error identified by the federal court is harmless? Or is it to brief whether the error was harmless? If it is to submit a brief on the latter, any other capital defendant would be entitled to submit the initial and reply briefs. Why would different rules apply to Mr. Johnston? Certainly, application of different rules to Mr. Johnston would be arbitrary and capricious, especially in light of this Court's action in Parker and Hill. Or is the brief to address this so-called appellate reweighing which current law forbids? If this Court is going to engage in an appellate reweighing, this Court must consider the ample mitigation presented in Mr. Johnston's Rule 3.850

proceedings in addition to that which was presented at trial.[4] Clemons v. Mississippi, 110 S. Ct. 1441, 1450 (1990)(Lockett v. Ohio, 438 U.S. 586 (1982), applies to appellate reweighing). Unfortunately, this Court's order does not address what is supposed to be briefed. This violates equal protection and due process.[5]

This Court's order fails to indicate what rules of court apply. Apparently, this is not an appeal; thus, the well established rules of appellate procedure do not apply.[6] Nor does this appear to be an extraordinary writ case. No extraordinary writ has been identified. Thus, the rules and case law explaining the procedures and burdens attached to such extraordinary writs are also inapplicable. Mr. Johnston does have legal representation, but his counsel is unaware of any proceeding wherein a movant has initiated an action in the Florida Supreme Court by filing a "request[ ] that this honorable court open a case." This is a proceeding without rules. As such, it violates due process.

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[4]If this proceeding is an appellate reweighing, Mr. Johnston would like the opportunity to submit additional mitigation.

[5]On an appeal, Mr. Johnston would be entitled to oral argument. He would know that the State of Florida bears the burden of proving the error is harmless beyond a reasonable doubt. He would also have a record on appeal, and the availability of record expansion. Here, he has been ordered to file a brief without any indication of what the nature of these proceedings are.

[6]Although this Court's most recent order indicates that Mr. Johnston is to file an "Appellant's Brief."

Mr. Johnston is under sentence of death. The death sentence has been found to be infected by Eighth Amendment error. This Court's order gave no guidance as to what rules and procedures will be followed in reviewing the error -- there is no indication that this Court will even review the error. This is not due process.

Harry Singletary's motion is simply a request to reconsider a decision of this Court in light of a subsequent ruling of a federal district court. However, this Court has repeatedly held that res judicata principles preclude revisiting issues previously determined absent compliance with the standards enunciated in Witt v. State, 387 So. 2d 922, 930 (Fla. 1980). However, in Witt, this Court specifically concluded that a decision of a federal district court (or even a United States Court of Appeals) did not warrant deviation from the general rule that res judicata precludes revisiting previously addressed issues. Numerous times this Court has held that it will not revisit issues previously addressed. Sullivan v. State, 372 So. 2d 938 (1979); Henry v. State, 377 So. 2d 692 (Fla. 1979); Adams v. State, 380 So. 2d 424 (Fla. 1980). The State of Florida is not entitled to a different rule of law than collateral capital defendants. Accordingly, the matter should simply be remanded for a resentencing proceeding in the circuit court.

As Mr. Johnston has previously stated, this Court lacks jurisdiction to "open a case" simply upon Movant Singletary's request. See Mystan Marine, Inc. v. Harrington, 339 So. 2d 200,

201 (Fla. 1976); Bullard v. Wainwright, 313 So. 2d 653, 655 (Fla. 1975). However, since Movant Singletary's request for a harmless error analysis is a concession that error exists, this Court could treat Movant Singletary's motion as a request to reopen Mr. Johnston's direct appeal, as was done in Parker v. State, No. 63,700. This Court should reopen Mr. Johnston's direct appeal and follow the rules of appellate procedure and order a resentencing in circuit court before a new jury.

STATEMENT OF THE CASE AND OF THE FACTS

A. Procedural History

On December 5, 1983, Mr. Johnston was indicted on charges of first degree murder. On April 26, 1984, Mr. Johnston filed a motion alleging in part "[t]he enumerated aggravating ... circumstances are unconstitutionally vague and overbroad" (R. 2243). On May 4, 1984, the trial judge denied this motion (R. 1671). Mr. Johnston's jury trial commenced on May 14, 1984. At the conclusion of the guilt phase Mr. Johnston was found guilty of first degree murder.

The penalty phase commenced on May 29, 1984. The jury was instructed on eight aggravating circumstances as follows:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence. One, the defendant has been previously convicted of a felony involving the use or threat of violence to some person.
>
> Two, the defendant, in committing the crime for which he is to be sentenced, knowingly created a great risk of death to many persons.

> Three, the crime for which the defendant is to be sentenced, was committed while he was engaged in the crime of burglary.
>
> Four, the crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest of effecting an escape from custody.
>
> Five, the crime for which the defendant is to be sentenced was committed for financial gain.
>
> Six, the crime for which the defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any government function or the enforcement of laws.
>
> Seven, the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious, or cruel.
>
> And, eight, the crime for which the defendant is to sentenced was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification.

(R. 1216-17)(emphasis added). The jury returned a death recommendation by an eight to four vote.

On June 1, 1984, the trial court gave the eight to four death recommendation great weight and sentenced Mr. Johnston to death (R. 2403; 2412-2415). In its findings in support of the death sentence, the trial court found three aggravating circumstances; these were (1) prior violent felony; (2) during the commission of an enumerated felony; and (3) heinous, atrocious, or cruel (R. 2412-2415).[7] He further noted in some detail the mitigating evidence that Mr. Johnston presented:

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[7]See Sections 921.141(5)(b), (d), and (h), Florida Statutes (1983).

> 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. 2414).

On direct appeal, Mr. Johnston argued that the statutory language defining the aggravating circumstances was vague and overbroad on its face. Mr. Johnston asserted: "The aggravating . . . circumstances as enumerated in this section are impermissible vague and overbroad" (Initial Brief at 15). Mr. Johnston elaborated: "Almost any felony murder would appear especially cruel, heinous and atrocious to the layman" (Initial Brief at 17).[8] This court affirmed Mr. Johnston's conviction and sentence in Johnston v. State, 497 So. 2d 863, 865 (Fla. 1986) ("we conclude that the trial court did not err in denying [Mr. Johnston's challenge that] the aggravating . . . circumstances . . . are impermissibly vague and overbroad").

On November 28, 1988 Mr. Johnston filed his Rule 3.850 motion in the circuit court (PC-R. 1054-1397). An evidentiary hearing was held in June of 1989 and Mr. Johnston was denied

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[8]Mr. Johnston's initial brief on direct appeal also detailed deficiencies in the definition of each aggravating circumstance on which the jury was instructed.

relief (PC-R. 1678-1688).[9] An appeal was taken to this court, which denied Mr. Johnston relief in Johnston v. Dugger, 583 So. 2d 657 (Fla. 1991).

Mr. Johnston then filed a Petition for Writ of Habeas Corpus in federal district court on October 23, 1991. In this petition, Mr. Johnston presented his claim that "Florida's overbroad death penalty statute was applied to Mr. Johnston in violation of the Eighth Amendment" (Supplemental Petition at 2). Mr. Johnston asserted:

> His jury was permitted to consider "invalid" aggravation because the aggravating factors specified by Fla. Stat. § 921.141 (5) (h) and (i) were unconstitutionally vague. The jury was not given the proper narrowing construction so the facial unconstitutionally of the statute was not cured.

(Supplemental Petition at 12). On September 16, 1993, the federal district court granted relief on this claim. The federal district court ruled that Mr. Johnston's rights under the eighth amendment to the United States Constitution were violated (1) because the Florida statute defining the especially heinous, atrocious, or cruel aggravating circumstance was unconstitutionally vague; and (2) the jury was urged to weigh the facially vague and overbroad aggravating circumstance.

The relief granted to Mr. Johnston was in the alternative. The state could (1) agree to a sentence for Mr. Johnston of life

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[9]During the 3.850 hearing, Mr. Johnston presented a wealth of additional mitigation. He presented expert testimony detailing the presence of two statutory mitigating circumstances in addition to a plethora of nonstatutory circumstances.

imprisonment without the possibility of parole for 25 years; (2) agree to a resentencing; or (3) have this court conduct either a reweighing or harmless analysis of the case. The state chose to seek to have this Court conduct a harmless error analysis or an appellate reweighing.[10]

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[10] The question of whether appellate reweighing is permissible in Florida has previously been addressed. Based upon this Court's precedent, the United States Supreme Court has repeatedly stated that reweighing is not permissible in Florida:

> More to the point, the Florida Supreme Court has made it clear on several occasions that it does not reweigh the evidence of aggravating and mitigating circumstances. See, e.g., Hudson v. State, 538 So.2d 829, 831 (per curiam), cert. denied, 493 U.S. _____ 110 S.Ct. 212, 107 L.Ed.2d 165 (1989) ("It is not within this Court's province to reweigh or reevaluate the evidence presented as to aggravating or mitigating circumstances"); Brown v. Wainright, 392 So.2d 1327, 1331-1332 (1981) (per curiam).

Parker v. Dugger, 111 S.Ct. 731, 738 (1991).

> We noted in Parker that the Supreme Court of Florida will generally not reweigh evidence independently, id., at _____, 111 S.Ct., at 738 (citing Hudson v. State, 538 So.2d 829, 831 (Fla.) (per curiam), cert. denied, 493 U.S. 875, 110 S.Ct. 212, 107 L.Ed.2d 165 (1989); Brown v. Wainright, 392 So.2d 1327, 1331-1332 (Fla. 1981) (per curiam)), and the parties agree that, to this extent at least, our perception of Florida law was correct.

Sochor v. Florida, 112 S.Ct. 2114, 2123 (1992).

Florida law is clear. Eighth Amendment error requires a resentencing unless and until the State proves the error harmless beyond a reasonable doubt. Hudson v. State, 538 So. 2d 829 (Fla. 1989). See Preston v. State, 564 So. 2d 120 (Fla 1990).

However, if this Court is to overturn that law and engage in appellate reweighing all the evidence presented in Mr. Johnston's

(continued...)

B. Circumstances of the Homicide

In the early morning hours of November 5, 1983, Karen Fritz awoke to find an hysterical young man at her door, "crying" and "very upset," telling her that her grandmother, Mary Hammond, was dead (R. 472). David Johnston, a diagnosed schizophrenic, was that young man. He had also called the police and reported that he had found his "grandmother" murdered (R. 510). Several police officers arrived at the scene and each reported finding Mr. Johnston "hysterical", "very upset," and apparently under the influence of drugs and/or alcohol (R. 513, 492, 566). Mr. Johnston was given Miranda warnings at the scene, but "he said he didn't want to talk to us at that time" (R. 496). Mr. Johnston was arrested on suspicion of murder. In the ensuing three months, the police obtained numerous statements from Mr. Johnston, all asserting his innocence. These statements were introduced into evidence by the State. In these statements, Mr. Johnston revealed that he had taken LSD while intoxicated on the night of Mary Hammond's death:

> Q. Do you remember what time you took the LSD and the (inaudible)?
>
> A: I'm thinking 2:30.
>
> Q: 2:30? What time did you go over to Mary's?
>
> A: About 2:30, too, I really can't remember.

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[10](...continued)
3.850 motion should also be considered and weighed by this Court. In addition, Mr. Johnston should be given the opportunity to supplement the record with additional mitigation.

Q: Were you still hallucinating pretty good?

A: Yes.

Q: Do you remember seeing any demons or anything while you were in the apartment?

A: I seen alot of things.

Q: While you were in the apartment what do you remember seeing while you were in the apartment?

A: I saw a dog and a person that looked like a dog to me it looked like ah sorta like a creature that came up out of the lake and ah it shook my hand, but tonight my visions getting clear (inaudible) and I went into the kitchen and took (inaudible) the crackers off the refrigerator took them into the dining room sat down at the bar and had me one or two sodas to get my head clear.

Q: Do you remember hallucinating anymore?

A: I was sorta still hallucinating but I --

Q: Do you remember any of the things you saw?

A: Her apartment.

Q: Yeah, but I'm talking about as far as hallucinations?

A: I seen her message chair down on the floor, the apartment's, the (inaudible) rocking and ah I remember seeing something like white smog in the apartment and ah I went upstairs I knew when I seen ah I really can't remember how her body lying on the bed but then I seen the blood on the bed and things all mixed up I don't know.

Q: Did you ever have the feeling that you were blacked out or anything and then when you came back around you saw all these things?

A: Nah. I I know I didn't pass out.

Q: No. I don't mean passing out physically where you couldn't walk but I mean you know hallucinating and (inaudible) you couldn't remember it.

A: Well, I saw Mary's body first it looked like maggots crawling around.

Q: Was the was the knife there at the time?

A: I seen something like it ah something like a bad looking stick sticking out of her middle chest you know and I went over and bent down and her eyes looked kinda of a yellowish green color and ah her I can't remember if her mouth was open or not but I remember picking her up and cuddling her into my arms and started crying over her body and then I noticed her bedroom was all racked up (inaudible), tore up.

(Transcript of 1-25-84 statement at 3).

In yet another statement, he demonstrated his schizophrenic thought process while again discussing his recollection of the night Mary Hammond died:

Q: Are you a very religious person?

A: I'm a Baptist, and, ah I always respect myself and go to church on Sunday, pay my tithe and respect myself, cause, ah, the way things going right now it looks like this world fixing to end, you know, the war, Reagan, and that big old ship from out of New Jersey going over there to Beirut and stuff, airplanes about ready to kick off, and damn, (inaudible). I seen Christ the other day in the newspaper.

Q: Pardon me?

A: I saw a figment of Jesus Christ in the newspaper the other day, you know, like ah, (inaudible) showed his hair, mustache and everything, but, ah.

Q: You mean you saw a picture or you just saw a figure transposed or interposed on the . . .

A: Interposed in the newspaper, you know, and, ah, like I told Clyde I wouldn't kill Mary. I can be stoned, messed up in my head and I wouldn't kill nobody.

Q: You would be able to do this and not remember?

A: No, that's wrong, see, ah, Penny told me that, ah, I made something like a comment that if anybody tried to get between me and Pat, I would kill them, you know, and like I told Penny, wow, man, I can't remember saying anything like that. If I say anything like that towards you or anybody else, I'm terribly sorry, you know. She say you are sorry, you tell me you're sorry, but you can't remember cause you was high, you just too damned stoned, and that's when I kissed Pat and headed home, you know, and I wasn't quite done in the 7-11, maybe 10 or 15 minutes and I went there to the old _____, stopped there on the sidewalk, cut to the short cut through the park, got on Bumby, started heading home, and when I stopped there at the corner of Ridgewood and Broadway, looking around, just, you know, working. That's when I noticed Mary Hammond's kitchen light, you know, and ah, got off the bike, come off the bike up to the driveway, I remember walking over to her lawn and going up to the window, there was a hole in the top part of it, so I went to the door, door was already open. I can't remember, Mr. Mundy, if I knocked or not, I do remember going in, you know, and I noticed the house was all a total wreck, the living room lamps overturned, and the dog was right there at the door when I went in, you know, and my first thing I did, I looked at the kitchen counter and the kitchen sink. I seen the glass everywhere and the dirt and something like a cement looking rock and I think it's laying on the counter, I ain't for sure, you know, and then the next thing I remember I opened up the refrigerator, got a coke, and throwed it into my systems and I seen the dog down on the floor, and I looked down and

petted him, you know, and I got them Kiwi crackers down off the top of the refrigerator, took them into the dining room threw them on the floor. I looked at the living room and noticed it was a total wreck, and I remember that I started yelling for Mary, but I got no response, and this, this, this, you know, I can't remember, you say that I did or I didn't throw out throw away this door, dog cages, and I remember going upstairs and turning on Mary's light, right, and seeing all the blood up on the wall, well I think it was all over the wall, bedstand, the telephone and I went over, held Mary to my right arm, alright, I, I just want want you do me one favor, right now, turn the tape off.

(Transcript of 12/19/83 statement, pages 8 and 9).

In another statement Mr. Johnston gave the police, he demonstrated delusional thinking: "I saw a figment of Jesus Christ in the newspaper, the other day, you know, like ah, (inaudible) showed his hair, mustache and everything" (R. 2357). "Q. Are you afraid of getting electrocuted? A. I'm not afraid of that, I done died before" (R. 2347).

Q. What do you remember about the hallucinations?

A. I've seen dogs (laughing) 18 wheelers trying to run over me and ah monsters you know.

Q. What kind of monsters?

A. Weird, weird looking creatures.

Q. Can you remember what they look like?

A. Like out of a swamp, I can see 'em ah their green headed, long teeth look like they got seaweed hanging off of 'em you know and ah I see 'em every now and them in cell I know it's not really there, but it bothers me. I think that ah I might be suffering.

Q. What do you mean?

A. Well, my head my head be hurting when I wake up.

Q. You mean flashbacks?

A. Yes sir ah I tell the nurse about it and Dr. Burns that I've been having flashbacks when I look in the mirror I see the Devil then I'll see myself and sometimes I see my face you know in the mirror and ah I feel that I might have done something (inaudible).

(R. 2370).

I talked to my Dad, died at 42, I talk to him here sometimes and sometime (inaudible) my Dad and I talk to him like he's really there and he talks to me you know and I don't know how I came about getting these type of problems, but I can go to ah not only here but I can go to where my Dad's buried out on Highway 15 in Monroe, Louisiana, Hall Cemetery, I communicate with my Dad and he (inaudible) He tells me it was not a heart attack but a guy hit him in the back of the head with a pipe you know and he wanted it investigated, they said he had a heart attack and fell out cause they examined his heart, he had a bad heart you know and I talk to my Dad all the time you know I dream about him you know and I believe I'm going to see my Dad one day.

(R. 2374).

Q. You don't remember what it was?

A. Uh uh I I can't remember that part but I did hit something.

Q. Something in these hallucinations?

A. Yeah it's you know somebody like somebody's standing there and I started getting hypertension and I said "fuck it" (inaudible) punched a hole in the wall (inaudible) I don't know if I kicked a hole in the bathroom wall or punched a hole in it.

Q. It was kicked.

A. Yeah and some some

Q. Someone standing back there?

A. Some ah guy I don't remember who it was but he looked strange, he put his arm on my arm and said sit down and shoved me down to this chair.

Q. Ah huh, he wanted to make sure you didn't hurt anybody or yourself, sometimes it takes a a kind of a gruff voice to bring you back to your senses.

A. And when I got pushed down in the chair, I looked up and it looked like the sergeant faced me, I really can't remember, what the hell it was, but there I was, again on my arm you know he shoved me down in the chair and I looked over across the table and there was Ray sitting there and I was I going bonkers that night.

Q. You were bouncing in and out pretty good.

(R. 2376).

At trial, the evidence was that Mr. Johnston had known Mary Hammond for two weeks; however, in his statement to the police, Mr. Johnston related a detailed delusion concerning Mary Hammond who he referred to as grandma and her dog:

Q: O.K., What's the dog's name, do you know?

A: Ted.

Q: Is the dog kind of old?

A: He is old, he's deaf, he's blind to my knowledge in his right eye, but he could see pretty good out the left eye. And when I always went there, grandma would always say don't pamper that dog. 'Cause I would give him like those small Reese's peanut butter

cups, and crackers and stuff like that, you know.

Q: Well, you like those Reese's cups?

A: Uh huh, they're good.

Q: They're good, aren't they?

A: Uh hm. (yes)

Q: Tell you what I can eat about twelve of them at a sitting, those are the big ones?

A: Really.

Q: Do you usually get the big ones or the little bitty ones?

A: Well, Ms. Hammonds always let me have the little bitty round ones, you know.

Q: Uh hum, she like those?

A: Uh huh (yes) she always was very carefully on a diet.

Q: Uh hm. (yes)

A: You know, because like one time when I get ready to go to work, I go by there and check on her and she'd be there at the table having her morning breakfast and it would be a very light meal. And when I sit there at the table with her, and I talked and talked with her, Toto would be right there beside me.

Q: Toto?

A: Uh huh, that's what I call him. Anyway, ah . . .

Q: You seen the movie, too?

A: Alright, anyway I would turn around and give him a piece of candy or a piece of a cracker.

Q: Uh hm. (yes)

A: I named her Cinnamon but anyway ah me and Miss Hammonds, we're very close like (inaudible) you know she would come outside and shut the back door and she'd call me over, she'd say David, would you care to come in and have lunch or would you care to come in and have coffee, cold water or something. I say well mam as long as you are offering, I can't turn it down, you know. 'Cause I felt that Ms. Hammonds felt like that she was alone at all times and she needed company and when I would go over her house, I would go in and have coffee or cold water or a light lunch and everytime when I left I'd say bye grandma, see you later on. I'll come by and check on you. She'd say Okay sweetheart you be careful now. I say okay I'm locking the door behind me, she said okay. So the main out entrance door from the front, I would lock the door, shut it and make sure that it's locked.

Q: Uh hm. (yes)

A: And she wouldn't care to check it, she go in and lay down on the couch or something you know (inaudible) and I always checked on her at 2, sometimes four, sometimes 3:30 in the morning. You know I'd go by there and she only knew how I would ring the doorbell.

Q: Uh hm. (yes)

A: I ring it quick you know like a musical tone (inaudible) and she would open the door and I'd say I'm sorry to wake you up, are you O.K? She say I'm fine and she say, she would gripe you know about me waking her up.

Q: I don't blame her.

A: But ah she she is like a grandmother to me and that's the reason why I basically went by there and check on her all the time, like tonight, when I noticed her kitchen light was on, I knew something was suspicious. And that's when I immediately stopped, almost got thrown off my bike, and took it over there and parked it on her driveway and I noticed you know the curtains, right there at the kitchen window was shut.

She's never done that, never she's always left the livingroom light on and never the kitchen.

Q: Never shuts her . . .

A: No, she leaves the ah kitchen curtains open to where you know anybody that comes by could see a real full view of the house, you see and that'd be only one thing burning or light and that'd be the livingroom light.

Q: Did she drink?

A: No, Ms. Hammonds wouldn't touch a drink if you paid her.

Q: Did she smoke?

A: No, she never smoked.

Q: She just ate a lot of Reese's peanut butter cups?

A: Well, she ate a lot of Reese's, she ate, she drank a lot of coffee and she ate a very special breakfast.

Q: Did she buy those Reese's peanut butter cups to share them with you, is that part of the idea?

A: She, well apparently would say that she bought those Reese's peanut butter cups to share with me (inaudible) you know because (inaudible) her granddaughter came by and she told her straight out, she say grandma some thing about Tom or something like that I can't barely remember but any way she say (inaudible) so grandma told her that she could have three Reese's peanut butter cups to take to the grandchildren and she did she took them over there.

Q: Who's Tom?

A: I don't really don't know, I don't know if that's her granddaughter's husband or baby or what.

Q: Was her granddaughter married?

A: Yes, to my knowledge, she was supposed to be married.

Q: She lives right next door, right?

A: Right, you know that's the reason why I like I said earlier, I don't see how her granddaughter didn't hear anything you know. I mean you imagine a kitchen window getting busted out.

Q: Uh hm. (yes)

A: And and the way I saw the house, somebody should have heard something, you know and I wish to God I could have been there at the right time.

Q: I wish you could have too.

A: You know because I'd probably killed him, whoever it was, I can't stand much more of this, I want to go home, she was very close to me.

(Transcript of 11/7/83 Statement, pages 10-11). However at trial, Mary Hammond's granddaughter testified that Mr. Johnston's statements about knowing Mary Hammond for years, regularly taking her to church, and being very close to her as if she were his own grandmother were not true (R. 475). Obviously, if the statements were not true, they constitute evidence of delusions consistent with schizophrenia. Moreover, a hysterical Mr. Johnston was the person who first reported finding Mary Hammond dead. At that time, he reported that Mary Hammond was his grandmother.

Mary Hammond, the victim in this case, died as the result of being stabbed (R. 728). She suffered three stab wounds to her neck, all as the result of a <u>single stabbing effort</u> (R. 721-722). She also suffered two stab wounds to her upper abdomen that were inflicted <u>after</u> she died (R. 722-723). The autopsy of Ms.

Hammond revealed two areas of bruising on the right side of her neck that were consistent with strangulation (R. 723). Strangulation probably occurred simultaneous with the stabbing ("I would think that if someone were there strangling her with the right hand, that probably the left hand would have been used as the stabbing instrument" R. 735).

Given the wounds, in normal circumstances a person would have bled to death within three to five minutes of being stabbed (R. 733). However here, strangulation would have hastened Ms. Hammond's death because the pressure exerted caused more rapid blood loss (R. 734). Further, Ms. Hammond would have been rendered unconscious even sooner still ("would she go into shock or lose consciousness prior to that?" "Yes" R. 733). Since strangulation occurred prior to or simultaneous with the stabbing of Ms. Hammond, she died very shortly after being stabbed.

C. Mr. Johnston's Background and History

During the penalty phase, mitigating evidence was presented as Judge Powell found:

> Mrs. Corrine Johnston, his stepmother, testified in essence that defendant was the product of a broken home; he was abuse, neglected and rejected by his natural mother and several time 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. 2414).

The evidence presented established that Mr. Johnston's childhood can only be characterized as sad and unfortunate, in

addition to, mitigating. When only one to one-and-a-half years of age, his natural mother tried to drown him in the bathtub (R. 1143). A relative intervened and Mr. Johnston was saved, but not until after he had already turned blue (R. 1143).

The abuse from his natural mother continued as he got older. On one occasion she smashed him against a dresser and he received several stitches in his head as a result (R. 1136). Mr. Johnston endured further rejection and emotional abuse from his natural mother after he went to live with his natural father and stepmother; she refused to see him for visits (R. 1142).

Life after his natural mother abandoned him was not much better with his natural father. There he was subjected to repeated battering and abuse (R. 1143). The abuse was so intense and extensive that his stepmother threatened to leave his father if it didn't stop (R. 1143). As a grim reminder of the abuse, Mr. Johnston now wears a partial plate in his mouth because of his father having knocked his teeth out (R. 1243). No protection was ever afforded Mr. Johnston since the abuse was never reported to the police (R. 1143-1144). Notwithstanding his father's tortuous abuse, Mr. Johnston was very upset when his abuser died (R. 1142).

Mr. Johnston was always nervous and never learned to play with other children (R. 1136). He was a loner who never learned to socialize with others.

As a 10-year-old boy he was forced to sell coke bottles in order to have money to buy food because his family was poor (R.

1134). This had such a profound effect upon him that later he (1) would eat until he became physically sick; and (2) resorted to hiding substantial amounts of food in the drawers of his dresser for fear he would not have enough food later (R. 1138). His clothes were not very good and they were always dirty. He, along with his siblings, were rarely bathed (R. 1135).

Mr. Johnston's intellectual level was described as "very, very, very low" (R. 1140).[11] In fact, he couldn't even begin to learn (R. 1140). Special education schools were suggested for him, but he only received standard public education which provide no special assistance for Mr. Johnston despite his mental deficiencies (R. 1139).

Mr. Johnston began exhibiting bizarre behavior early on in his life (R. 1138). On one occasion he destroyed a stereo, only to try and repair it later by using toothpaste (R. 1138). On another occasion he cut a hole in a mattress, placed a radio in it, and then urinated in the hole (R. 1138). He also had episodes in which he laughed at odd times without explanation (R. 1139).

Mr. Johnston made several suicide attempts. On one occasion, Mr. Johnston attempted suicide by ingesting rat poison, which very nearly resulted in his death (R. 1142).

On several occasions he has been admitted to mental health facilities where he was diagnosed as suffering from schizophrenia

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[11]At the age of seven and a half, Mr. Johnston's I.Q. was 57 (PC-R. 514); when he was twelve his I.Q. was measured at 65 (PC-R. 240).

and medication was prescribed (R. 1140, 1178). In particular, he has been treated by a psychiatrist at Monroe Health Center, sent to the Alexandria Mental Hospital on at least two occasions, and treated at the psychiatric unit at Conway Hospital seven to eight times (R. 1140-1141). One of his treatments required a month long stay (R. 1140).

As a result of Mr. Johnston's diagnosis as a schizophrenic (R. 1140; 1178), he was awarded social security benefits for his mental disability (R. 1146). He also has admitted that he needs help with his disability (R. 1147-1148). Mr. Ken Cotter was appointed guardian to oversee Mr. Johnston's receipt of his disability benefits.

Mr. Johnston suffered from tremendous mood swings consistent with schizophrenia (R. 1124). On many occasions he spoke on the phone to his court-appointed guardian, Ken Cotter, and said things that made no sense (R. 1128-1129). Mr. Cotter believed Mr. Johnston on occasion lost touch with reality (R. 1129).

Mr. Johnston continually cried out for what he has never received - love (R. 1155). He was lonesome and wanted someone to love, as well as to be loved in return (R. 1155). It is clear from his statements to the police that Mr. Johnston has constructed a belief that Mary Hammond was the maternal grandmother -- the fountain of love his life never had.

In keeping with that and despite all of his misfortune, Mr. Johnston has always been especially nice to older persons (R. 1147).

Evidence was presented to Mr. Johnston's jury that in addition to his low IQ and schizophrenia, Mr. Johnston had consumed alcohol and taken LSD on the night of Mary Hammond's death.

The record is replete with reference to Mr. Johnston having been under the influence of both alcohol and drugs on the night of the offense. Officer Kleir testified on cross-examination that when he spoke to Mr. Johnston at the scene of the crime, Mr. Johnston was hysterical and exuded a strong odor of alcohol (R. 566). Officer Mann corroborated that Mr. Johnston reeked of alcohol (R. 576). Two lay witnesses for the State, Farron Martin and Jose Mena provided additional evidence that Mr. Johnston imbibed at least alcohol on the night in question. Martin, a former roommate of Mr. Johnston's testified that Johnston had drunk two pitchers of beer and fourteen six ounce bottles of champagne (R. 699, 704). Mena confirmed that he and Mr. Johnston had consumed both beer and champagne that evening (R. 753, 756-757). As to Mr. Johnston's drug usage at the time, he told Investigator Mundy that he was high on drugs at the time of the murder. He had apparently ingested LSD, Blotter Acid, Blue Star and other illegal substances (R. 821). Mr. Martin testified that he had found a bag of pot in the clothes Mr. Johnston had been wearing a few hours before the incident occurred (R. 710). The State made frequent reference to Mr. Johnston's besotted condition due to his heavy drug and alcohol usage. In fact the State argued in closing that Mr. Johnston

stabbed the victim in the midst of a rage, while he was hallucinating -- all of which was induced by his illegal substance abuse (R. 957, 973, 987, 988). The sentencing order acknowledged that Mr. Johnston had been drinking alcoholic beverages and taking LSD prior to the killing . . ." (R. 1250). And this Court wrote that "Johnston had been drinking that night and testimony was forthcoming about appellant's heavy drug usage on the evening in question." Johnston v. State, 497 So. 2d at 868 (emphasis added). ("A. You know because I was on black star, LSD, reefer, and alcohol and its . . . Q. Okay. A. It's hard when your stoned to rememorize anything." Transcript of 12-19-83 statement at 12).[12]

ARGUMENT I

THE EIGHTH AMENDMENT ERROR FOUND BY THE FEDERAL DISTRICT COURT WARRANTS A RESENTENCING BEFORE A DULY EMPANELED JURY

A. Introduction

This proceeding arises from a motion filed by Harry K. Singletary in which he asks this Court to either 1) declare the Eighth Amendment error found by the federal district harmless

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[12]Mr. Johnston's "heavy drug usage" and his intemperate use of alcohol was not a one night aberration. Substance abuse runs rampant throughout his history. This is a phenomena not uncommon among mentally ill people, especially schizophrenics, who resort to substance abuse as a form of self-medication. Some highlights from Mr. Johnston's records indicate very clearly that Mr. Johnston was frequently diagnosed as abusing both drugs and alcohol. Examples are: Monroe Mental Health Center admitted Mr. Johnston on June 17, 1980 with diagnosis of "Alcohol Abuse (1/5 whiskey daily)" and "Drug Abuse (Black Mollies)(PC-R. 1393-1395). On March 18, 1981, Larned State Hospital in Kansas gave this diagnosis "Cannibus Abuse in remission 305.23" and "Cocaine abuse in remission 305.63" (PC-R. 1396-1398).

beyond a reasonable doubt or 2) conduct an appellate reweighing and reimpose a sentence of death upon Mr. Johnston. This motion was filed because the federal district court, after finding Mr. Johnston's death sentence infected with constitutional error, authorized Mr. Singletary to return to this Court in an effort to cure the error. The federal district court also gave Mr. Singletary other options: impaneling a new jury or simply imposing a life sentence. Certainly, the federal district court did not determine which of these options were proper under Florida law. Further, the federal district court did not order this Court to engage in harmless error analysis if this Court lacks jurisdiction under Florida law. The federal district court did not order this Court to engage in a harmless error analysis if Florida law requires that given the seriousness of the error a new jury sentencing is required. The federal district did not find that an appellate reweighing is required or even permissible under Florida law.

Mr. Singletary, having chosen the option of coming to this Court in order to try and cure the error infecting Mr. Johnston's sentence of death, must first establish that this Court has jurisdiction. As Mr. Johnston has set forth in his Jurisdictional Statement, supra, this Court can reopen the direct appeal as was done in Parker v. State, Case No. 63,700 and Hill v. State, Case No. 68,706. This Court has jurisdiction over capital appeals, and where the State of Florida agrees Eighth Amendment error occurred and went uncorrected in the original

direct appeal, this Court has jurisdiction to reopen the direct appeal that was tainted by error. This Court, however, does not have jurisdiction to "open a case."

Assuming that this Court will treat the motion as one seeking to reopen the direct appeal,[13] this Court must first understand the nature of the error found by the federal court. Without recognition of the federal court's finding of error, no adequate harmless error analysis nor appellate reweighing can occur. Moreover, this Court must determine whether the error is of the type which can be harmless. Accordingly, Mr. Johnston will first detail the claim he made to the federal district court which was found meritorious. This will explain the nature of the error which has been found. Mr. Johnston will then address whether such error can be harmless under Florida law. He will next turn to the United States Supreme Court's description of the proper harmless error analysis. Finally, he will discuss current Florida law which precludes appellate reweighing.

B. What Was the Error

The federal district court found that two of Mr. Johnston's claims had merit and warranted habeas relief. The movant completely overlooks this fact. However, this Court must be aware of the claims found to be meritorious. FDC Order at 44

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[13]Of course, if this Court reopens the direct appeal, Mr. Johnston is entitled to due process and equal protection of the law. He should receive the same notice and same opportunity afforded Mr. Hill and Mr. Parker.

n.16 ("the court has determined that Claims VII and XXI are meritorious and that relief is warranted").

In Claim XXI, Mr. Johnston argued, "Florida's overbroad death penalty statute was applied to Mr. Johnston in violation of the Eighth Amendment." Supp. Habeas at 2. Prior to his capital trial, Mr. Johnston had filed a motion in which he argued that the aggravating circumstances "are unconstitutionally vague and overbroad, in violation of the Fifth, Eighth and Fourteenth Amendments to the United States Constitution" (R. 2243). The motion was denied. On direct appeal, Mr. Johnston argued to this Court that the aggravating circumstances enumerated in Fla. Stat. 921.141 were impermissibly vague and overbroad (Initial Brief on Direct Appeal, Argument III).

In Claim XXI of his habeas petition, Mr. Johnston argued that under Richmond v. Lewis, 113 S. Ct. 528 (1992), this Court had erroneously denied Mr. Johnston's challenge to the facially vague and overbroad statutory language on direct appeal. No effort had been made to cure the overbroad statutory language. The federal district court found Mr. Johnston's challenge to the overbroad statute had merit under Richmond. FDC Order at 25 ("it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor, even if other, valid aggravating factors are considered. Richmond v. Lewis, 113 S. Ct. 528, 534 (1992)").

Specifically, Mr. Johnston argued to the federal court as follows:

The United States Supreme Court's opinions in Richmond v. Lewis, 113 S.Ct. 528 (1992) and Espinosa v. Florida, 112 S.Ct. 2926 (1992) establish that the Florida Supreme Court erred in its analysis of Mr. Johnston's claim raised on direct appeal that the Florida Statute, setting forth the aggravating circumstances of "heinous, atrocious or cruel" and "cold, calculated and premeditated," was vague and overbroad under the Eighth Amendment.

* * *

The same result [as occurred in Richmond] is required here. In Mr. Johnston's case, the Florida Statute defined the two aggravating factors at issue as follows: "[t]he capital felony was especially, heinous, atrocious or cruel . . . [t]he capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification." Fla. Stat. section 121.141(5)(h), (i)(1981). The statute did not further define these aggravating factors. This statutory language is and was facially vague. Richmond, 113 S.Ct. at 535; Espinosa v. Florida, 112 S. Ct. 2926 (1992)(jury instruction identical to Fla. Stat. section 121.141(5)(h) unconstitutionally vague).

While the Florida Supreme Court has adopted narrowing constructions of these two statutory provisions, the United States Supreme Court held in Richmond that, not only must a state adopt "an adequate narrowing construction," but that construction must also be applied either by the sentencer or by the appellate court in a reweighing in order to cure the facial invalidity. Richmond, 113 S.Ct. at 535 ("Where the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the state appellate court or some other state sentencer must actually perform a new sentencing calculus, if the sentence is to stand.").

* * *

As the United States Supreme Court recognized in Espinosa, in Florida a sentencing judge in a capital case is required to give the jury's verdict "great weight." As a result, it must be presumed that a sentencing judge in Florida followed the law and gave "great weight" to the jury's recommendation. 112 S. Ct. at 2928. Certainly nothing in Mr. Johnston's case warrants setting aside that presumption. Florida law requires that where evidence exists to support the jury's recommendation, it must be followed. Scott v. State, 603 So. 2d 1275 (Fla. 1992). Here the judge considered, relied on, and gave great weight to the tainted jury recommendation. A "new sentencing calculus" free from the taint, as required by Richmond, had not been conducted. The judge was not free to ignore the tainted death recommendation. Scott.

Mr. Johnston's attacked this facially vague and overbroad statutory language on direct appeal. He presented an argument attacking the aggravating circumstances enumerated in Fl. Stat. 921.141 (1983) as impermissibly vague and overbroad (Initial Brief on Direct Appeal, Argument III, p. 15). He also attacked the application of the "heinous, atrocious or cruel" aggravator to Mr. Johnston's case (Id., Argument XXII, pp. 97-99).

The Florida Supreme Court found no merit in Mr. Johnston's direct appeal claims. As to the heinous, atrocious or cruel aggravating circumstance, the Florida Supreme Court stated: " The heinous, atrocious or cruel aggravating circumstance was properly applied in this instance. Johnston, 497 So. 2d at 871. The Florida Supreme Court did not engage in "a new sentencing calculus," as required by Richmond. Instead, Mr. Johnston's sentence was reviewed to determine whether sufficient evidence existed to support the narrowing construction without considering whether the jury applied the narrowing construction. The Florida Supreme Court summarily rejected Mr. Johnston's challenges to the constitutionality of the statute and erroneously assumed that the

sentencer had actually been provided the narrowing construction.:

> 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: ..., to vacate the death penalty because the aggravating and mitigating circumstances enumerated in section 921.141, Florida Statutes (1983), are impermissibly vague and overbroad;...

Johnston v. State, 497 So. 2d 863 (Fla. 1986). Having rejected Mr. Johnston's challenge to the impermissibly vague and overbroad statutory language as meritless, the Florida Supreme Court did not undertake any meaningful harmless error analysis.

Richmond demonstrates that Mr. Johnston was denied his Eighth Amendment rights. His jury was permitted to consider "invalid" aggravation because the aggravating factors specified by Fla. Stat. § 921.141 (5) (h) and (i) were unconstitutionally vague.

The federal district court agreed with Mr. Johnston, saying, "[a] writ of habeas corpus shall conditionally issue with regard to issues seven[14] and twenty-one, within sixty days from the date of this Order, unless the State of Florida initiates appropriate proceedings as discussed hereinbelow" (FDC Order at 1). Thus, the federal district court found "the jury weighed an

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[14]Claim 7 of Mr. Johnston's habeas petition asserted, "The statutory aggravating circumstance heinous, atrocious or cruel was applied in violation of the eighth and fourteenth amendments" (Habeas Petition at 124).

invalid aggravating circumstance -- heinous, atrocious or cruel" (FDC Order at 26). The federal district court concluded:

> The Supreme Court stated in *Stringer v. Black*, 112 S. Ct. 1130, 1137 (1992) as follows:
>
> > Although we [have] held ... that [when the sentencing process is tainted with an invalid aggravating factor] a state appellate court could reweigh the aggravating and mitigating circumstances or undertake harmless-error analysis, we have not suggested that the Eighth Amendment permits the state appellate court in a weighing State to affirm a death sentence without a thorough analysis of the role an invalid aggravating factor played in the process.
> >
> > ... 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. Otherwise, the defendant is deprived of the precision that individualized consideration demands under the *Godrey* and *Maynard* line of cases.
>
> The Florida Supreme Court failed to perform the requisite analysis with regard to the invalid factor in the instant case.

(FDC Order at 27-28).

C. <u>Elledge</u> Requires a Resentencing

In light of the seriousness of the error and the fact mitigation was present, this court should not conduct either a reweighing of the evidence or harmless error analysis in this case. Instead, this court should remand this case to the trial

court for a resentencing. Elledge v. State, 346 So. 2d 998 (1977) and its progeny are controlling. In Elledge the jury recommended a death sentence by a vote of 11 to 1. The prosecutor, however, erroneously elicited testimony from a police officer concerning the defendant's confession to another murder. The defense did not object to admission of the evidence. This court viewed such evidence as an impermissible nonstatutory aggravating factor.

This court noted in Elledge that the trial court did not specifically find the existence of any mitigating circumstances. In fact, this court said, "[the trial judge's] written findings expressly negate the existence of certain mitigating circumstances." Elledge, 346 So. 2d at 1003. In ordering a resentencing though, this court said, "[i]n order to have weighed the aggravating circumstances against the mitigating circumstances, the [trial] court must have found some of the latter. Likewise, in concluding 'that insufficient mitigating circumstances exist to outweigh the aggravating circumstances' [the trial judge] implicitly found some mitigating circumstances to exist." Elledge, 346 So. 2d at 1003 (Emphasis in original).

As a result, this court held,

> Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing at which the factor of the Gaffney murder shall not be considered.

Elledge, 346 So. 2d at 1003. See also, Hill v. State, 549 So. 2d 179, 183 (Fla. 1989)("We are left, then, with two aggravating circumstances and one mitigating circumstance. On this record, we cannot tell with certainty that the result of the weighing process would be the same absent the invalid aggravating factor"); Mikenas v. State, 367 So. 2d 606 (Fla. 1978)("It is not the function of this court to cull through what has been listed as aggravating and mitigating circumstances in the trial court's order, determine which are proper for consideration and which are not, and then impose the proper sentence. In accordance with the statute, the culling must be done by the trial court....Since mitigating circumstances are present, Elledge, supra, dictates resentencing"); Barclay v. Florida, 463 U.S. 939, 955 (1983)("If the trial court found that some mitigating circumstances exist, [under Florida law] the case will generally be remanded for resentencing").

Recently, this Court followed the reasoning of Elledge when it ordered a jury sentencing in Hitchcock v. State, 614 So. 2d 483 (Fla. 1993). In Hitchcock, the jury had been permitted to consider a vague and overbroad aggravating circumstance -- heinous, atrocious or cruel. This Court found, "[w]e cannot tell what part the instruction [on the vague and overbroad aggravator] played in the jury's consideration of its recommended sentence."

614 So. 2d at 484. Accordingly, a new jury sentencing was ordered because mitigation was present in the record.[15]

Similarly, in the present case, Mr. Johnston is entitled to a resentencing. The sentencing order of the trial judge found mitigating evidence was presented to Mr. Johnston's jury:

> 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 time[s](sic) 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. 2414).

The trial judge in Mr. Johnston's case specifically found the existence of mitigating circumstances and weighed them, although he concluded the mitigation did not outweigh the three aggravating circumstances. Moreover, it is not a question of what the judge found but what the jury may have found. Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989)("The proper standard is whether a jury recommending life imprisonment would have a reasonable basis for that recommendation"). Here, had the jury returned a life recommendation, ample mitigation was presented to support

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[15]The evidence indicated that the defendant had entered into the victim's bedroom, engaged in sexual activity, choked the victim, carried her outside again choking and beating the victim until she was dead. See also, Rhodes v. State, 547 So. 2d 1201, 1208 (Fla. 1989).

and make binding such a verdict.[16] Accordingly, this Court must under Elledge and Hitchcock order a new jury sentencing.

D. Harmless Error Analysis.

The general test for determining whether constitutional error is harmless was formulated in Chapman v. California, 386 U.S. 18 (1967). "The Chapman test is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the [recommendation] obtained.'" Yates v. Evatt, 111 S. Ct. 1884, 1892 (1991), citing Chapman. The burden is on the state to show the harmlessness of the error and to overcome a presumption of harm. Arizona v. Fulminante, 111 S. Ct. 1246 (1991). If there is a reasonable possibility that the constitutional error might have contributed to the jury's recommendation, the error is not harmless beyond a reasonable and Mr. Johnston is entitled to relief. Chapman; Yates.

In Mr. Johnston's case, the Eighth Amendment error identified by the federal court was the jury's consideration of an "invalid aggravating circumstance" (FDC Order at 26). In such a situation the United States Supreme Court has explained:

> We require close appellate scrutiny of the import and effect of invalid aggravating

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[16]The record of the trial court clearly shows the existence of substantial and compelling mitigating circumstances. This included: Mr. Johnston's mental illness -- schizophrenia; his very low I.Q. scores; his intoxication at the time of the victim's death which was exacerbated by ingestion of LSD and other drugs; his abusive childhood marked by severe physical and mental abuse and abandonment; the poverty and hardships he endured; his suicide attempts; and the inadequate mental health treatment he received during his numerous involuntary commitments.

> factors to implement the well-established Eighth Amendment requirement of individualized sentencing determinations in death penalty cases. See *Zant, supra,* 462 U.S., at 879, 103 S.Ct., at 2744; *Eddings v. Oklahoma,* 455 U.S. 104, 110-112, 102 S.Ct. 869, 874-875, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio,* 438 U.S. 586, 601-605, 98 S.Ct. 2954, 2963-2965, 57 L.Ed.2d 973 (1978)(plurality opinion); *Roberts v. Louisiana,* 431 U.S. 633, 636-637, 97 S.Ct. 1993, 1995, 52 L.Ed.2d 637 (1977), *Gregg v. Georgia,* 428 U.S. 153, 197, 96 S.Ct. 2909, 2936, 49 L.Ed.2d 859 (1976)(joint opinion of Stewart, Powell, and STEVENS, JJ.); *Woodson v. North Carolina,* 428 U.S. 280, 303-304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976)(plurality opinion). 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. Otherwise, the defendant is deprived of the precision that individualized consideration demands under the *Godfrey* and *Maynard* line of cases.

Stringer v. Black, 112 S. Ct. 1130, 1137 (1992)(emphasis added).

Thus, the Supreme Court has specifically indicated "[i]n order for [this court] to affirm [Mr. Johnston's] death sentence after the [jury] was instructed to consider an invalid factor, [this] court must determine what the sentencer would have done absent the factor." Stringer, 112 S. Ct. at 1136-1137 (emphasis added). "[A] reviewing court in a weighing State may not make the automatic assumption that such a factor has not infected the weighing process." Stringer, 112 S. Ct. at 1137.

The Supreme Court explained in detail why this is so:

> Although our precedents do not require the use of aggravating factors, they have not permitted a State in which aggravating factors are decisive to use factors of vague or imprecise content. A vague aggravating

> factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance. Because the use of a vague aggravating factor in the weighing process creates the possibility not only of randomness but also of bias in favor of the death penalty, we cautioned in *Zant* that there might be a requirement that when the weighing process has been infected with a vague factor the death sentence must be invalidated.

Stringer, 112 S. Ct. at 1139. In other words, "...when the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale." Stringer, 112 S. Ct. at 1137. "[T]he use of a vague aggravating factor in the weighing process creates the possibility not only of randomness but also of bias in favor of the death penalty". Stringer, 112 S. Ct. at 1139. Accordingly, the Eighth Amendment requires the reviewing court to "determine what the sentencer would have done absent the factor." Stringer, 112 S. Ct. at 1137.

In Mr. Johnston's case, an "invalid aggravating circumstance" was considered by the jury.[17] In order to find

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[17]This error is different from a finding that the jury instruction was simply defective. Mr. Singletary in his motion before this Court has failed to appreciate the significance under Stringer of a determination that the aggravating circumstance was invalid.

this error harmless beyond a reasonable doubt, this Court must find beyond a reasonable doubt that the jury without considering the invalid aggravator would have still recommended death. However, only two other aggravating circumstances were urged by the prosecutor. This Court cannot find that the jury's eight-four death recommendation would have remained the same "absent the [invalid] factor." Stringer, 112 S. Ct. at 1137.

During the penalty phase the state relied heavily on the heinous, atrocious, or cruel aggravating circumstance in suggesting to the jury it should recommend death. The state said,

> The next one that the Court is going to tell you about is that the aggravating circumstance of when the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious, or cruel. And I would submit to you, we have to look at the evidence in this case in determining if that particular aggravating circumstance exists.
>
> Obviously, any murder is a cruel incident, obviously. But this is not a murder where a victim was shot, the victim died in a short period of time. I would submit to you from the evidence in this case, this case is an extremely cruel, atrocious, wicked murder. And what was the evidence in this case? If you recall, the evidence of Dr. Hegert, the medical examiner, he testified that Mary Hammond was stabbed twice in the neck, once in the face.
>
> There was evidence of definite knife wounds on her wrists; there was evidence she was manually strangled, that the bones in her neck were fractured. I would submit to you, beyond any doubt, this was an extremely cruel, wicked and atrocious homicide.
>
> Now, also, Dr. Hegert, I believe he said it took at least three minutes for Miss Hammond to die after she was stabbed in the neck, after the main artery in her neck was severed by the stab wound. And that might

seem like a short period of time when you first think about, three minutes. But in those three minutes of time, I would submit to you the victim in this case suffered greatly, and there's no evidence -- and Dr. Hegert testified that there's no way he could determine whether -- what order the stab wounds occurred, or whether she was strangled before all the stab wounds, or after the stab wounds. There's no way to determine that.

I would submit from the evidence in this case that this was an extremely wicked and heinous and atrocious murder in this particular case.

Also, what else did the evidence show in that regard? The evidence showed that in this case the defendant chose to pick on an eighty-six year old lady, a lady that couldn't defend herself, a lady that in the last minutes of her life scratched and clawed at the defendant to try to save herself. There is evidence the defendant was scratched; there's evidence that she ripped a necklace from his neck and that it was found in her hair.

So, I would submit to you that's another thing to consider, the fact that the victim in this case, Miss Hammond, was eighty-six years old. That goes to the cruel, atrocious and heinous nature of this offense.

Now, also, going to that particular factor, the State introduced into evidence a photo during the sentencing hearing that y'all looked at. And I want you to know that I didn't introduce that, or have you look at it because of any morbid sense of curiosity, but that photo was important; it was important because, again, it went to show the terrible suffering that Mary Hammond went through, and the way this particular offense was committed. I would submit to you one look at that photo and the look in Mary Hammond's eyes, there's no question that there was an extremely wicked, atrocious and cruel murder.

(R. 1192-94).[18]

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[18]The prosecution misrepresented the evidence in his closing. The medical examiner testified death would have

(continued...)

Given the ample mitigation, the jury may very well have recommended life for Mr. Johnston but for this extra "thumb" on the death side of the scale. Stringer, 112 S. Ct. at 1137. The record of the trial court clearly shows the existence of substantial and compelling mitigating circumstances. This included: Mr. Johnston's mental illness -- schizophrenia; his very low I.Q. scores; his intoxication at the time of the victim's death which was exacerbated by ingestion of LSD and other drugs; his abusive childhood marked by extra severe physical and mental abuse and abandonment; the poverty and hardships he endured; his suicide attempts; and the inadequate mental health treatment he received during his numerous involuntary commitments.

Mr. Singletary argues that this Court should consider whether a jury instructed on a narrowing construction of heinous, atrocious or cruel would still have returned a death recommendation. However, where the error that was found was "an invalid aggravating circumstance," Stringer specifically says that proper harmless error analysis requires a determination of what would have occurred without that factor. Thus, Mr. Singletary's analysis is in error.

But for the sake of argument, even under Mr. Singletary's analysis the error cannot be found harmless beyond a reasonable

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[18](...continued)
occurred in less than three minutes (R. 734). But even before that Mrs. Hammond would have been unconscious (R. 733). The medical examiner indicated there were three stab wounds but they were the result of one single stabbing effort (R. 721-22).

doubt. This is because the narrowing construction adopted by this Court may have caused the jury to not find this aggravating factor. Actually, Mr. Johnston asserts that the jury would not have found this aggravator. But all that is necessary is a reasonable doubt that the jury would have determined this aggravator was not present.

Recently in Stein v. State, 19 Fla. L. Weekly 532, 534 (Fla. 1994), this Court struck a finding of heinous, atrocious or cruel because "no evidence was presented to demonstrate any intent on Steins' part to inflict a high degree of pain or to otherwise torture the victims." Thus, the narrowing construction of heinous, atrocious or cruel requires that the defendant intended "to inflict a high degree of pain or to otherwise torture." This narrowing construction can be found repeatedly in this Court's opinions. Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. 1993)("absent evidence that [the defendant] intended to cause the victims unnecessary and prolonged suffering we find that the trial judge erroneously found that the murders were heinous, atrocious or cruel"); Santos v. State, 591 So. 2d 160, 163 (Fla. 1991)("A murder may fit this description if it exhibits a desire to inflict a high degree of pain, or an utter indifference to or enjoyment of the suffering of another"); Omelus v. State, 584 So. 2d 563, 566 (Fla. 1991)("where there is no evidence of knowledge of how the murder would be accomplished, we find that the heinous, atrocious, or cruel aggravating factor cannot be applied vicariously"); Chesire v. State, 568 So. 2d 908, 912 (Fla.

1990)("The factor of heinous, atrocious or cruel is proper only in torturous murders -- those that evidence extreme and outrageous depravity as exemplified either by the desire to inflict a high degree of pain or utter indifference to or enjoyment of the suffering of another"); Rhodes v. State, 547 So. 2d 1201, 1208 (Fla. 1989)(victim died from "manual strangulation;" however "we decline to apply this aggravating factor in a situation in which the victim who was strangled, was semiconscious during the attack. Additionally, we find nothing about the commission of this capital felony 'to set the crime apart from the norm of capital felonies'"); Amoros v. State, 531 So. 2d 1256, 1260 (Fla. 1988)(The victim was shot three times as he tried to flee and found himself trapped at the back door, but "[t]he[se] facts [did] not set this murder 'apart from the norm of capital felonies'"); Lewis v. State, 377 So. 2d 640, 646 (Fla. 1979)(Victim shot several times in front of his children. Additional shots as victim tried to flee in an effort to save himself. But, "[i]t is apparent all killings are heinous. However, this aggravator concerns homicides which are unnecessarily torturous to the victims"). See also Scull v. State, 533 So. 2d 1137 (Fla. 1988)(heinous, atrocious or cruel was not established as to victim who died from blow to head by a baseball bat).

Not once did the state at trial address the constitutionally required narrowing construction of this aggravating circumstance. At trial, the state did not show the jury why this offense was

different from any other murder. To Mr. Johnston's prejudice, the state ignored its obligation to prove that Mr. Johnston intended "...to inflict a high degree of pain with utter indifference, or even enjoyment of, the suffering of [Ms. Hammond]." State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). Thus, the jury, as ordinary laypersons, and contrary to established law, naturally assumed that any murder involving an elderly person is especially heinous, atrocious, or cruel. In fact, the prosecutor so argued. The prosecutor's argument certainly encouraged the jury to apply the aggravator in an overbroad fashion.

The defense attempted to argue against the constitutionally infirm aggravating circumstance by saying (1) the death of Ms. Hammond was quick; (2) she was unconscious before she died; therefore, she had a very short awareness of her pending death; (3) there was no evidence of torture; and (4) and certainly no adequate intent to torture (R. 1204-1206).

Specifically, defense counsel argued,

> So, let us look at what has been proved so far. Consider what's to be accomplished here today. What has been proved is that Mary Hammond died. It's a tragic death. She was an old woman; that is a tragedy that she died in the way she died. And she died a violent death, but was it so heinous, so cold, so calculating, so cruel that it is so much worse than anything else that we have in our society that the State can kill someone else for that?
>
> I submit to you that the evidence that has been shown by the State in this case back two weeks ago, was that her death was quick; it was as quick as any violent -- just about any violent death can be.

The Doctor said that she died within three to five minutes, but that she was probably unconscious before she died; so that her awareness of her death was probably a very brief, a very short awareness.

There was no torture involved in this, at least there's no evidence of torture before she died; so that her awareness of her death was probably a very brief, very short awareness.

I think that if you look at the bedroom, you will see that she was lying on her bed in a position as if she had just started to get up out of bed, and was pushed back down. The position of someone who just had very briefly arisen from sleep, very shortly arisen from sleep, and still in that sleepy, numb state, was stabbed and died, lost consciousness, lost awareness -- shortly after she was dead.

Her walker wasn't moved where it had been left by her bedside. So, ladies and gentlemen, although this is a tragic death, I submit to you -- and although she was an old woman, I submit to you that the death, itself, was not so heinous, so atrocious, so cruel, so fraught with her own awareness of her death and her own fear that it's something that gives the State the right to kill someone else for that.

The photograph which you all have already seen that was submitted to you in the sentencing phase today is a facial photograph. The State Attorney said that he didn't submit it to you for its shock value. I don't think, or I submit to you, ladies and gentlemen, that no violent death is pretty. No violent death is calm and quiet. Someone who is stabbed, whether it was over a period of several hours and died over a period of several hours, or died, lost consciousness immediately, it's going to be an ugly picture. And what you saw was an ugly picture of a violent death, not one that shows her horror, because when that picture was taken, she was dead, and she was unconscious before she died.

The Doctor testified that her body, in its normal throes of death, would have gone through certain movements. And so the picture that you see is a picture of her death, not of her consciousness of the fact

> that she was dying, or that she had been attacked.

(R. 1205-1206).

Because the jury did not have the benefit of the narrowing construction of the vague instruction, the defense argument was futile, meaningless, and disregarded by the jury. The jury was misguided and Mr. Johnston suffered harmful prejudice as a result. The jury was encouraged to apply an invalid aggravator factor. Had the jury known that the State had to prove beyond a reasonable doubt that a schizophrenic drugged up Mr. Johnston had to intend to torture, this aggravator would not have been found. The scales would then have tipped towards life and a life recommendation would have resulted. Certainly, there is at least a reasonable doubt such a result would have happened.

Additionally, there was ample evidence of Mr. Johnston's schizophrenia, low intelligence, and ingestion of considerable drugs and alcohol, all of which rendered Mr. Johnston incapably of the intent to torture. Even the prosecutor conceded as much during his guilt phase closing:

> So I would ask you to consider carefully all of the testimony in this case and consider the fact that from the testimony and the evidence that David Eugene Johnston had some alcohol to drink.
>
> Mr. Johnston was under the influence of L.S.D. and if you believe from the evidence in this case that Mr. Johnston did not have a premeditated design to effect the death of Mary Hammond, you may still find him guilty of murder in the first degree if you believe that he was in the commission of a burglary. While in the commission of that burglary he

> went into a rage and he stabbed Mary Hammond to death and also chocked her.

(R. 957).

The evidence and argument of the parties was in dispute on the issue of heinous, atrocious, or cruel; therefore, it would be incongruous for this court to recognize the dispute, yet, find the error harmless. Said otherwise, if there is a dispute, the error cannot be harmless because this court is unable to determine what the jury recommendation would have been absent the constitutional error.

In James v. State, 615 So. 2d 668 (Fla. 1993), the defendant appealed "...the trial court's summary denial of his second motion for postconviction relief." 615 So. 2d at 668. This court said,

> In closing argument the state attorney argued forcefully that the murder was heinous, atrocious, or cruel. On appeal, on the other hand, we held that the facts did not support finding that aggravator. James, 453 So. 2d at 792.[19] Striking that aggravator left four[19] valid ones to be weighed against no mitigators, and we believe that the trial court's consideration of the invalid aggravator was harmless error. We cannot say beyond a reasonable doubt, however, that the invalid instruction did not affect the jury's consideration or that its recommendation would have been the same if the requested expanded instruction had been given....The trial court is directed to empanel a new jury, to hold a new sentencing proceeding, and to resentence James.

615 So. 2d at 669 (Emphasis and footnote added).

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[19]Mr. Johnston notes the striking of the especially heinous, atrocious, or cruel aggravating circumstance in his case leaves only two aggravating circumstances.

In Rivera v. Dugger, 18 Fla. L. Weekly S570 (Fla. 1993), this court quoted from itself in Preston v. State, 564 So. 2d 120 (Fla. 1990), and said,

> [T]he prosecutor emphasized the importance of the prior violent felony in his closing argument to the jury. In addition, only two[20] of the four aggravating circumstances remain.... Further, there was mitigating evidence introduced at the trial, even though no statutory mitigating circumstances were found. Finally, the jury only recommended death by a one-vote margin. Had the jury returned a recommendation of life imprisonment, we cannot be certain whether Preston's ultimate sentence would have been the same. Under the circumstances, we are unable to say that the vacation of Preston's prior violent felony conviction constituted harmless error as related to his death sentence.

Rivera, 18 Fla. L. Weekly S572 (Emphasis and footnote added).

Both Rivera and Preston vacated the defendants' death sentences and remanded the cases to the trial courts for resentencings. There is no reason for this court not to do the same in Mr. Johnston's case.

"[T]he invalidation of an aggravating circumstance necessarily renders any evidence of mitigation 'weightier' or more substantial in a relative sense[.]" Richmond v. Lewis, 113 S. Ct. 528, 534 (1992). The mitigation in Mr. Johnston's case is "weighty."

This Court in Christmas v. State, 19 Fla. L. Weekly S35 (Fla. 1994), reduced the defendant's death sentences to life

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[20]The same number of aggravating circumstances as in Mr. Johnston's case, absent the especially heinous, atrocious, or cruel aggravator.

imprisonment without possibility of parole for 25 years and said, "[w]e disagree with the State's contention that the mitigation in this case 'pales in significance' against the strong aggravating circumstances; especially given that the trial judge erroneously found that the killings were heinous, atrocious, and cruel." 19 Fla. J. Weekly S36-S37.

The mitigating circumstances found by the trial judge in this case, and otherwise disclosed in the record, do not pale in significance to the aggravating circumstances. The mitigating circumstances are substantial, weighty, and compelling; therefore, Mr. Johnston is entitled to a resentencing.

In Stein v. State, 19 Fla. L. Weekly S32, S34 (Fla. 1994), this court noted

> [N]o evidence was presented to demonstrate any intent on Stein's part to inflict a high degree of pain or to otherwise torture the victims. We have previously held that multiple gunshots administered within minutes do not satisfy the requirements for the aggravating factor of heinous, atrocious, and cruel. [citations omitted] 'The fact that the victim begged for his life or that there were multiple gunshots is an inadequate basis to find this aggravating factor absent evidence that [the defendant] intended to cause the victim unnecessary and prolonged suffering.' Because we find no evidence in this record that Stein intended to cause the victims unnecessary and prolonged suffering, we find that the trial judge erroneously found that the murders were heinous, atrocious, or cruel.

Slip op. at 12-13.

There was no evidence introduced during any phase of Mr. Johnston's trial that Ms. Hammond suffered a high degree of pain.

Nor was there any evidence that the offense against her was unnecessarily tortuous. To the contrary, the evidence suggested that she died within a short time after being stabbed, and was unconscious prior to her actual death. Under the circumstances, the error was not harmless beyond a reasonable doubt.[21]

E. Appellate Reweighing

The United States Supreme Court has recognized that, where state law permits, appellate reweighing can cure the jury's consideration of an invalid aggravating circumstance. Clemons v. Mississippi, 110 S. Ct. 1441 (1990), This is consistent with the United States Supreme Court's holding that the constitution permits a judge without a jury's input to impose a death sentence. Walton v. Arizona, 110 S. Ct. 3047 (1990). However, simply because the United States Constitution permits appellate reweighing in capital cases does not mean that state law does. The Constitution does require those state courts that engage in appellate reweighing to do so consistent with Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982). In other words, the appellate court that engaged in appellate

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[21]Significantly, the Mississippi Supreme Court has not found errors such as the one present in Mr. Johnston's harmless in any of the post-Clemons cases the court has considered. See, e.g., Clemons v. State, 593 So. 2d 1004 (Miss. 1992); Shell v. State, 595 So. 2d 1323 (Miss. 1992); Jones v. State, 602 So. 2d 1170 (Miss. 1992); Pinkney v. State, 602 So. 2d 1177 (Miss. 1992).

reweighing must carefully weigh and sift mitigation offered on behalf of the capital appellant. Clemons, 110 S. Ct. at 1450.[22]

The question of whether appellate reweighing is permissible in Florida has previously been addressed. Based upon this Court's precedent, the United States Supreme Court has repeatedly stated that reweighing is not permissible in Florida:

> More to the point, the Florida Supreme Court has made it clear on several occasions that it does not reweigh the evidence of aggravating and mitigating circumstances. See, e.g., Hudson v. State, 538 So.2d 829, 831 (per curiam), cert. denied, 493 U.S. _____ 110 S.Ct. 212, 107 L.Ed.2d 165 (1989) ("It is not within this Court's province to reweigh or reevaluate the evidence presented as to aggravating or mitigating circumstances"); Brown v. Wainright, 392 So.2d 1327, 1331-1332 (1981) (per curiam).

Parker v. Dugger, 111 S.Ct. 731, 738 (1991).

> We noted in Parker that the Supreme Court of Florida will generally not reweigh evidence independently, id., at _____, 111 S.Ct., at 738 (citing Hudson v. State, 538 So.2d 829, 831 (Fla.) (per curiam), cert. denied, 493 U.S. 875, 110 S.Ct. 212, 107 L.Ed.2d 165 (1989); Brown v. Wainright, 392 So.2d 1327, 1331-1332 (Fla. 1981) (per curiam)), and the parties agree that, to this extent at least, our perception of Florida law was correct.

Sochor v. Florida, 112 S.Ct. 2114, 2123 (1992).

Florida law is clear. Eighth Amendment error requires a resentencing unless and until the State proves the error harmless beyond a reasonable doubt. Hudson v. State, 538 So.2d 829 (Fla.

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[22]Following the decision in Clemons, the Mississippi Supreme Court specifically held that Mississippi law did not permit appellate reweighing. Clemons v. State, 593 So. 2d 1004 (Miss. 1992).

1989). See Preston v. State, 564 So.2d 120 (Fla 1990). This Court cannot, under current law, conduct an appellate reweighing.

F. Conclusion

This case should be remanded for a resentencing since the trial court weighed mitigating circumstances in reaching its decision to impose a death sentence upon Mr. Johnston. Alternatively, the error of the trial court, either as to the challenge to the especially heinous, atrocious, or cruel aggravating circumstance, or in not giving a narrowing construction of that aggravating circumstance to the jury, was not harmless. Under any scenario, Mr. Johnston is entitled to a resentencing.

ARGUMENT II

ASSUMING FOR THE SAKE OF ARGUMENT THAT THIS COURT OVERTURNS WELL ESTABLISHED LAW PRECLUDING APPELLATE REWEIGHING, MR. JOHNSTON MUST BE GIVEN A LIFE SENTENCE.

Assuming for the sake of argument that this Court overturns well established precedent precluding appellate reweighing, then this Court must impose a life sentence. As the United States Supreme Court has explained, appellate reweighing requires that the appellate court actually consider and weigh all the mitigating evidence presented by the capital appellant as well as consider and discuss the applicable narrowing constructions of each aggravating circumstance. Clemons v. Mississippi.[23] In

[23]At this juncture, Mr. Johnston does not know whether this Court will engage in an appellate reweighing and if it does so what procedure will be followed. Mr. Johnston seeks full notice (continued...)

other words, an appellate reweighing is a sentencing procedure before an appellate court.

A. The Mitigation in the Record

In conducting a constitutional appellee reweighing, the appellate court must discuss and give weight to the mitigating evidence presented by the capital appellant just as this Court has required of the sentencing judges. See Campbell v. State, 571 So. 2d 415 (Fla. 1990). The following is a summary of the mitigation in the record.

The testimony of Dr. James R. Merikangas, M.D., a psychiatrist and neurologist is contained in the record. After conducting a competent evaluation that "consisted of reviewing his medical records, which are quite extensive; his psychiatric history and interviewing him, psychiatrically and performing a medical examination, including a neurological examination" (PC-R. 364), Dr. Merikangas testified as to his opinion of Mr. Johnston's mental health:

> A. My diagnosis is that he is psychotic and has been, at least since he was 17. That he has brain damage, probably from early childhood. And that as a result of the organic brain damage and the psychosis, he's more susceptible to the effects of drugs and alcohol, and emotional stress and distress.
>
> Q. What kinds of things indicated to you that he was, in fact, brain damaged?
>
> A. Well, very important in his evaluation is the, is the historical record

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[23](...continued)
and opportunity to be heard which cannot be provided under the circumstances here.

and the medical records. He was tested at age seven and a half in schools having an I.Q. of 57. And he was labeled at that time as an educably retarded child. He was noted at that time to be hyperactive, inattentive, difficult to be directed, not benefiting from learning. He was held back in school. And he began almost immediately to get in trouble with the authorities.

When he was 13, it was recommended that he be institutionalized because of his psychiatric difficulties, his learning difficulties and his violent behavior. And then he was, in fact, hospitalized a number of different places, including the central Louisiana State Hospital and the Conway Memorial Hospital, in particular.

And all of these people, or almost all of these people agreed that he had a severe mental illness. They varied in light details. Many of them calling him schizophrenic, which does summarize fairly well the thought disorder that he has. He suffers from delusions, hallucinations and a complex disorder of logical thought, which causes him not to be able to judge his environment and react to it in a way that normal people do.

In addition to that, though, he has the physical findings of brain damage. Which included his being, if I could refer to the, my notes, he has trouble with coordination of the left side of his body. Moving his left hand and arm is done with difficulty. He has changes in his reflexes. Hyper reflexia. Particularly at the left knee. He has an altered sensitivity to pin prick. The test is to touch the patient with a sharp object and have him report. The entire left side of his face, arm and leg. There is an asymmetry to his head and his face, which if you look at him, you will see that the right eye appears somewhat smaller than the left. He had, when moving his face spontaneously, it moves asymmetrically. The right side of the face moving more than the left.

These physical signs are things that accompany brain damage. The psychological

> testing also bears that out. But in my own examination of him, he also has scoliosis, which is spinal curvature, and although this is a disease of the bone, the growth of the spine is controlled by the nervous system and is probably as a result of his brain damage that he has the spinal curvature.

Dr. Merikangas also testified that after evaluating Mr. Johnston, Dr. Merikangas found Mr. Johnston to be "psychotic and has been, at least since he was 17. That he has brain damage, probably from early childhood and that as a result of the organic brain damage and the psychosis, he's more susceptible to the effects of drugs and alcohol and emotional stress and distress" (PC-R. 365).

Dr. Merikangas went on to explain Mr. Johnston's complex mental history:

> He suffers from delusions, hallucinations and a complex disorder of logical thought, which causes him not to be able to judge his environment and react to it in a way that normal people do. In addition to that, though, he has the physical findings of brain damage. Which include his being, if I could refer to the, my notes, he has trouble with coordination on the left side of his body. Moving his left hand and arm is done with difficulty. He has changes in his reflexes. Hyper reflexia. Particularly at the left knee. He has an altered sensitivity to pin prick. The test is to touch the patient with a sharp object and have him report. The entire left side of his face, arm and leg. There is an asymmetry to his head and his face, which if you look at him, you will see that the right eye appears somewhat smaller than the left. He has, when moving his face spontaneously, it moves asymmetrically. The right side of his face moving more than the left.
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> These physical signs are things that accompany brain damage. The psychological

testing also bears that out. But in my own examination of him, he also has scoliosis, which is spinal curvature, and although this is a disease of the bone, the growth of the spine is controlled by the nervous system and is probably as a result of his brain damage that he has the spinal curvature.

(PC-R. 363-367).

Dr. Merikangas then reviewed his findings as they related to Florida's statutory mitigating circumstances:

Q. The next mitigating circumstance is the capital felony was committed while the defendant was either under the influence of extreme mental or emotional disturbance. Did you find that that applied?

A. My opinion is that does apply.

Q. All right.

(F) Is the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law substantially impaired.

A. I believe that one applies.

Q. All right. And can you just give a brief statement about that? Why you feel that applies?

A. Well, I think that his capacity to understand and appreciate his conduct is, in general, impaired. And that his ability to conform his conduct to any kind of standard, including the requirements of law, is impaired because he has idiosyncratic delusional thinking, with hallucinations and that he does things based upon fantasies, dreams and thoughts that he cannot distinguish from reality.

(PC-R. 387-388).

Dr. Merikangas was then asked:

Q. Are there any other matters that, in Mr. Johnston's history that you would testify to as far as mitigating factors?

A. There are.

Q. What would those be?

A. A very long and substantial history of child abuse. That he was physically, emotionally and sexually abused throughout his childhood and that he witnessed scenes of violence and alcohol and a great deal of turmoil. And that in addition to active physical abuse, he was subjected to the abuse of isolation and confinement, and a deprivation of love. That is one factor.

I would include his non-education, his failing in school, his doing very badly in all areas of education and gaining knowledge skills. That he was not able to then deal on a mature level with the relevant world because of a lack of an education. He was not afforded the special education and the skilled treatment that would, might have prevented this.

That he was brain damaged, perhaps from the physical abuse, perhaps from some other factor. And in a developing child, brain damage interferes with, with emotional growth and emotional maturation.

And although he doesn't qualify, by reason of age, for a mitigating thing, he does not have the mind of an adult. He has a brain damaged mind which is less than that of a normal adult person. His I.Q. of 57, when he was seven years old, meant that his mental age at that time was that of a four year old. And that this disparity between his mental age and his chronological age, although on the average, if one takes his current I.Q. score, he is an adult, his emotional and his culturation have lagged far behind. His working at a job as an unpaid employee and pretending to be a construction worker is a way of pretending to be an adult. And I believe that this is, should be taken in mitigation. This he is, in a sense a, a child-like person.

There is a family history of mental illness, family history of incest. And all these factors of, of abuse, and of, of his disturbed parental background, both environmental and genetic, I believe are things which might be mitigating.

(PC-R. 389-391).

Dr. Pat Fleming, a psychologist conducted a mental health evaluation of Mr. Johnston. She testified:

A. Mr. Johnston, I said I saw him for seven hours. The first was to get a flavor of his functioning, to ask him questions, to -- and he initially was, was intact. He could answer the questions relatively well. By the time that the day progressed, he became increasingly agitated. He was unable to track the conversation. I estimate that after the first hour, he had increased difficulty.

He has difficulty understanding information. This is most difficult to identify because it found that he has, he showed aphasic symptoms, which means the language disorders, which is characteristic of brain damaged people. But also the loosening of associations or the ability to track information, that's characteristic of schizophrenics. He showed perseveration. He showed evidence of delusions and hallucinations which had been documented in the previous documents. He now hears music. I talked about this hallucinations.

He had, has an ingrained delusion about food, which began when he was about seven and has been consistent. At the time that I evaluated him, they brought the food, he refused to eat it because it had been made by the inmates. And we then went to, that probably was the inmate association. He has an ingrained delusion of, a fear of being poisoned.

He has had consistent delusions of grandeur, which, which showed that he truly believes that he is, is better able to

> understand and know things than attorneys, judges; psychologists, certainly. He felt that he had been misrepresented; was very clear that he wished to represent himself at all times. He planned and has the plans well formulated that when he is released, he is going to earn a Ph.D. or a law degree so that he can help other people.
>
> He -- these are not fantasies. These are part of a well- defined delusional system. He's very difficult to follow the conversations because they, they tend to be concentrated on minutia and he moves quickly from one subject to another. Conversely, he stays on one thought and cannot move. At the time, we talked about the possibility that he might, in fact, be put to death, he said that that was a fact. But he could not get off of the thought that he was being poisoned with the jello in the noon tray, and this was infinitely more important to him than his status at the present time.
>
> He has showed a gradual slippage of thought. He would, he just deteriorated progressively through the day. He reported and had, at that time, migraines. He has had that for a long period of time. Since childhood. They're severe and debilitating. Doctor Merikangas and I talked about those implications for people with brain damage.

(PC-R. 240-242). Dr. Fleming noted that unlike "known malingerers who are happy to acknowledge and agree to any kind of mental problems" (PC-R. 242), Mr. Johnston "consistently denied that he had any mental problems" (PC-R. 242).

Dr. Fleming saw signs of both schizophrenia and organic brain damage and explained how both can exist in the same person (PC-R. 243). She described the battery of tests she administered to assist her in forming her opinion:

> The individual testing of intelligence was interesting and significant in that in

this Wechsler Adult Intelligence Scale we have a full scale I.Q. The mean for the general population would be one hundred. But this is also broken down into two sections. A verbal and a performance. The verbal sections are those that have those subtests that relate to the ability to understand information, the ability to integrate it and make sound judgments and the ability to express one coherently. The performance subtests are based on limited verbal information. And are, are more in visual, perceptual, and manipulative tasks.

The interesting things about these findings of this test, which probably took an hour, an hour and a half, was that on the tests that are primarily verbal in nature, where the individual must have, be able to understand, he was in the significantly low range. His verbal I.Q. was 75. He showed limited background information. He is able to repeat things, still in a, in a below average range. But he is able to repeat information wrote [sic]. For example, when I presented a list of numbers, six, seven, he was able to do that with a scale score of eight. Ten is mean, which is his highest subtest. The minute we got into more abstract information, where it, it was necessary to find commonalties in two different concepts, he was unable to do this consistently. None of the other subtests, they were all five, with one six, which is significantly impaired. The interesting part of this is that on the performance subtests, which has eliminated the requirement of language, is that he performed not only in the average range, but in the above average range and on all but one test. He was able to sequence visual material when it didn't require language output or input or output. The only test that he was significantly impaired on in this battery was that, the digit symbol test. This test is the test, of this particular battery, is the most significant for brain damage. As compared to the twelves and the nine on all the other tests, he earned a six on this test.

So we have learned from this discrepancy or I learned from this discrepancy is that

this twenty-six point discrepancy would not have occurred by chance. And it was supportive of the past information of brain damage. Because he had had trouble following the conversation of -- he made inappropriate responses and was unable to answer appropriately. For example, I said, what's the difference between a fox and a dog. And Mr. Johnston said that a fox could walk a straight line. This is an example of the inability to follow the conversation or to make sense. This was consistent.

I read to him on the Wechsler Memory Scale in order to determine if he had sufficient memory, to retain information long enough to be competent. He earned on that test an I.Q. of 66. This was lower than the verbal I.Q. of 75. But, more interesting, he simply could not track the information. I read him a paragraph that, that would be interesting -- if you would like me to read that to you or I can just tell you that it had to do with dogs are, they are trained in war time. It had 22 thoughts in it. I asked him, upon completion, what the paragraph was about. He said it's about dogs. And I said, well tell me more. And he said it tells how they executed the wounded.

Another paragraph was similar and it told about school children that were harmed in the war time. He again completely missed the point of this paragraph.

On three different presentations, he was unable to remember paired words such as black, gold. You know, black, silver; night, day. He could not retain this. When we have known malingerers, there is a consistent, a consistent bottoming out, generally. People do not know how to be good malingerers intellectually and so we don't have highs and lows generally. You know, people will say that they don't know when they were born; what's their mother's name; things that even severely retarded people do. Mr. Johnston did not have the profile on my testing of the malingerers.

I did sensory perceptual screening. I knew that he was going to be seen by Doctor

> Merikangas, who is a, a psychiatrist and neurologist. And he showed also signs of poor motor functioning. He was unable to do simple meteoric tasks. He could do finger tapping but he was unable to touch his hands to his nose. Some of those simple tasks. On the sensory evaluation he was unable to differentiate between sounds, to repeat, or to recognize if they were different. Doctor Merikangas -- I then called Doctor Merikangas to check neurologically if he was intact and he can, he can report on his findings.
>
> But the, the significant findings were the aphasic symptoms, the indications of left hemisphere damage which, upon which our language functions are dependent. The organicity was clear.
>
> In addition, his schizophrenic, first order symptoms, his hallucinations, the delusions, the thought disorder, unfortunately when we think of people who, who have serious mental problems or are psychotic, we always think of them as being very bizarre and never being able to be in contact with reality. And this is not true. Mr. Johnston has periods of time when he appears very coherent. He can repeat information by wrote [sic] he can memorize things and repeat it. When asked to apply the principle however, he is severely deficient.

(PC-R. 243-247). Dr. Fleming made a diagnosis -- "it's a tri-part diagnosis. One is organic brain syndrome; schizophrenia undifferentiated with paranoid features; and substance abuse" (PC-R. 252).

Additionally, Dr. Fleming reviewed extensive background materials which supported her findings. These materials included:

> A. The -- these records included records of previous hospitalizations; records from the Monroe Mental Health Center. Larnard State Hospital, Louisville State

> Hospital, Florida State Prison medical records, medical records from Orange County Jail. Florida Department of Corrections. The psychiatric reports of Doctor Wilder's and, Doctor Wilder and Doctor Pollack. Transcript of competency hearing; the transcript of the, the penalty phase; transcript of the sentencing; Central Louisiana State Hospitals. I reviewed different depositions of Shirley Coleman, Farran Martin, Jeffrey Burdette, Robert Mundy, David Burdette and Geovanni Rey. I read the affidavits of Harvey Johnston and Charlene Johnston Benoit. I talked with personnel, with Doctor Merikangas, who was the psychiatrist who had also evaluated Mr. Johnston. And I had a conversation with Christine Warren, who was the, Mr. Johnston's attorney at the time of the trial.

(T. 231).

With regard to these documents and witnesses, Dr. Fleming reported that "they were not only helpful, but they were essential" to her evaluation (PC-R. 232). Dr. Fleming explained that the background information she received that related Mr. Johnston's abusive upbringing was "the basis for the, the later finding of organic brain damage. He early demonstrated an explosiveness, a hostility, variable mood swings which made him uncontrollable" (PC-R. 238).

> When he was, first entered public school in 1967, he was evaluated with an I.Q. of 57, which would place him in the mentally retarded range. At that time, it was noted that both parents beat the child, and that he was referred for special education. From that time on, he was never, on a consistent basis, in any kind of regular, regulation education. But due to the behavior problems, the inability to learn, he was placed in special education. He was evaluated, at that time, with moderate to severe brain damage with a high level of anxiety. And that on the, in the psychological evaluation that 90

percent of the conversation from this child at six was of the severe, of the harsh discipline by both parents.

He was admitted for treatment to the Monroe Mental Health Center, but this was not consistent. He was again evaluated for intellectual functioning in 1972 with an I.Q. of 65, which was slightly higher but not significantly higher than the prior evaluation. He was admitted to, on the basis of those findings, admitted to the Louisville State School in 1973, for the mentally retarded. At that time, they noted the organic involvement.

In 1977, he was admitted to the Louisville School, the Training Institute. And then from 1977, he had 13, 14 hospitalizations. And those, to summarize those, 13 had the diagnosis of schizophrenia. There was, I didn't count the number of referrals to organic brain syndrome. But the documents are clear, and they are consistent throughout. The psychiatrists had written to the judges, to have hospitalization rather than incarceration for his behavior to no avail. He was evaluated once at Louisiana State Hospital but returned. At that time, he was incarcerated.

So the documents that I had seen were clear. They were not -- they were consistent with Mr. Johnston's report, but I couldn't, you know, I couldn't count on that. But they were consistent that showed a history of psychological, psychiatric problems, with previous diagnosis of schizophrenia and organic brain syndrome.

(PC-R. 238-239).

Dr. Pat Fleming testified at the evidentiary hearing as to her opinion of whether statutory and nonstatutory mitigating factors were present:

What I'm asking right now is that whether you consider any of these mitigating circumstances with regard to Mr. Johnston.

> And do you feel, in your expert opinion, that any of them applied to his case?
>
> A. Yes.
>
> Q. And would you tell which ones you felt did apply?
>
> A. Two.
>
> Q. And what were they?
>
> A. The -- that he was under the influence of extreme mental or emotion disturbance and under extreme duress.

(PC-R. 228).

Dr. Fleming had also testified as to Mr. Johnston's difficult upbringing and how his mental illness had gone untreated.

> David has never had a cat scan. He's never had an MRI. He's never had any of the early, the treatment or the follow up that he needed. It's a sad commentary. . . When we identify someone has the behaviors and fail to provide the treatment.

(PC-R. 254).

Dr. Fleming felt very strongly:

> that there is a pattern of schizophrenic symptoms beginning in adolescence, late adolescence, and there is a consistent pattern of organicity, organic brain syndrome beginning very early at age two and three.

(PC-R. 303).

David Johnston is a young man who is the product of an abusive and dysfunctional family. He suffered incredible abuse at the hands of his mother, father and siblings (PC-R. 1282-95). His mother almost drowned him when he was a year and a half for "messing" in his pants (PC-R. 1285). Another time she smacked

his head against the bathtub so hard that his baby teeth were knocked out (PC-R. 1285, 1290-91). Since David suffers from organic brain damage, it is likely that these injuries contributed to or even caused that damage (See testimony of Drs. Merikangas and Fleming, PC-R. 214-438).

As part of the basis of their expert diagnosis of David, Drs. Merikangas and Fleming relied on family historical information provided by David's aunt, Charlene Benoit. Mrs. Benoit provided an affidavit detailing Mr. Johnston's tragic story:

> When David was young we all lived in New Orleans. I spent a lot of time visiting David's home. I was a witness to the abuse David received. The worst thing I saw was one time when David was about a year and a half old my mother and I were visiting at Albert and Mary's. David was not successful at potty training, and this time David messed himself. Mary took David and submerged him in the sink for a long time. David turned black under the water. Finally, my mother made Mary stop drowning David when Mary finally stopped, David seemed to be gone. Mary shook David very hard and he started breathing and came back to us. My mother and I were very scared, Mary was out of control. I don't know if she did this David other times. [sic] Also, when David was less than 2 years old Mary beat his head on the side of the bathtub so hard she knocked all of David's teeth out. He was hurt badly. My brother Harvey tryed [sic] to make Albert and Mary take David to the Hospital to get the injuries to his mouth and head looked at, but they wouldn't take him to the doctor. This beating was so severe it could have killed him. From birth until David left Mary's house he received beatings and all the time. Mary had something against David from the start, I never could figure out why she had it out for him. Mary did not treat any of her children well, but she was very mean to

> David. Mary would allow the other children to beat David. On Holidays the other kids would receive presents and David wouldn't get any. David would be left out when Mary bought ice cream and sweets for the other kids. Sometimes when I would visit Mary would make David sit in front of the blank T.V. screen for hours on end while the other kids played if David cryed [sic] or moved, Mary would beat him. All David's childhood his parents told him he was crazy and retarded. David was in special education classes in school and had to take medicine to control his behavior. I don't believe Albert and Mary did a good job at keeping David on his medicine.

(PC-R. 1284-86). Mrs. Benoit further described the difficulties David had in school and how he was eventually sent to a school for the retarded and how as David got older, his bizarre behavior got him frequently committed to the "Special Unit" of Conway Memorial Hospital in Monroe, Louisiana (PC-R. 1286).

In relating her observation of the family, Mrs. Benoit described how all of David's siblings had problems "of one degree or another" (PC-R. 1286).

> Dennis, Mickey and David are in prison. Clifford is very withdrawn and has a hard time talking to people. Debra ended up marrying her step-brother, David Neilson. David Neilson is Mary's second husband's son. Debra had three children by different men while she was married to David Neilson. Debra was unstable and could not hold a job down because she was slow. She ended up not being able to handle her responsibilities of motherhood. She gave up her 3 children. She left one with me at age 5 months, and my husband and I have raised him for 7 years now. She left another one to Margie, my sister in Shreveport, and she left the other to her mother's side of the family. This last child is severely retarded. Debra is in New Orleans and I have not heard from her for a long time. David's sister Pamela is

> somewhere in Texas. Pamela had 2 children by David Neilson while David was married to Debra. Pamela is also slow. I haven't heard from her in years. I do know that mental health problems seem to run in Mary's family. I think it is very odd for a mother to totally disown a child like Mary did with David when he was 10.

(PC-R. 1286-87).

David's uncle, Harvey Johnston, was also available at time of trial but inexplicably not called. He remembered a great deal about the Johnston family history. Drs. Fleming and Merikangas also relied on his recollection to formulate their opinions. Harvey Johnston recalled:

> David was an abused child. From David's birth both David's parents Mary and Albert resented David. David's father spent alot of time working and Mary was very cruel to David. Even as an infant David was severely beaten by his mother.
>
> One specific incident of abuse happened when David was about 18 months old. David's mother beat David's head against the side of the bathtub so hard that she knocked out all of his teeth. The baby was hurt badly. I told my brother Albert he had to take David to the hospital to get the baby treated for the beating. Albert refused and we got into a fight about it. Albert was afraid that Mary would get in trouble. David never did get treatment for this horrible injury. All through David's childhood he was beaten almost daily.

(PC-R. 1290-91). Mr. Johnston remembered other instances of abuse and believed that David received little or no love and was virtually "terrorized" by his mother (PC-R. 1292). He also recalled David's obvious mental problems:

> As David grew up everybody knew something was wrong with him, something was wrong with his

> mental health. Albert took David to doctors to try to get him help. David spent his childhood in and out of mental hospitals. David had alot of trouble in school. He never did well and caused trouble at school because of his bizarre behavior. Eventually he was sent to special state schools for kids with mental problems. The psychiatrists gave David medicine that helped keep him from being strange. When David was a teenager his dad tried to make David take the medicine that helped his symptoms, but David didn't always take it and would have problems. It was like he had two personalities. When he didn't take his medication he would get in trouble. Sometimes the police would pick him up for being strange and put him in the jail's padded room or take him to the doctors at Conway Memorial Hospital, Special Unit. They would call someone from the family to come carry David home and get him to take his medicine.

(PC-R. 1292).

Trial testimony reflected that Mr. Johnston was upset and intoxicated during his initial encounter with law enforcement at the victim's home (R. 492). He had called the police and reported the murder of his grandmother. However, Mary Hammond was not his grandmother. He had known her for less than two weeks.

The statements themselves reflect delusional thought processes and ignorance of his rights. These delusional statements are set forth in some detail in the statement of the case.

The record is replete with reference to Mr. Johnston having been under the influence of both alcohol and drugs on the night of the offense. Officer Kleir testified on cross-examination that when he spoke to Mr. Johnston at the scene of the crime, Mr.

Johnston was hysterical and exuded a strong odor of alcohol (R. 566). Officer Mann corroborated that Mr. Johnston reeked of alcohol (R. 576). Two lay witnesses for the State, Farron Martin and Jose Mena provided additional evidence that Mr. Johnston imbibed at least alcohol on the night in question. Martin, a former roommate of Mr. Johnston's testified that Johnston had drunk two pitchers of beer and fourteen six ounce bottles of champagne (R. 699, 704). Mena confirmed that he and Mr. Johnston had consumed both beer and champagne that evening (R. 753, 756-757). As to Mr. Johnston's drug usage at the time, he told Investigator Mundy that he was high on drugs at the time of the murder. He had apparently ingested LSD, Blotter Acid, Blue Star and other arcane illegal substances (R. 821). Mr. Martin testified that he had found a bag of pot in the clothes Mr. Johnston had been wearing a few hours before the incident occurred (R. 710). The State made frequent reference to Mr. Johnston's besotted condition due to his heavy drug and alcohol usage. In fact the State argued in closing that Mr. Johnston stabbed the victim in the midst of a rage, while he was hallucinating -- all of which was induced by his illegal substance abuse (R. 957, 973, 987, 988). The sentencing order acknowledged that Mr. Johnston had been drinking alcoholic beverages and taking LSD prior to the killing . . ." (R. 1250). In fact Mr. Johnston told the police:

> Q. Do you remember what time you took the LSD and the (inaudible)?
>
> A: I'm thinking 2:30.

Q: 2:30? What time did you go over to Mary's?

A: About 2:30, too, I really can't remember.

Q: Were you still hallucinating pretty good?

A: Yes.

Q: Do you remember seeing any demons or anything while you were in the apartment?

A: I seen alot of things.

Q: While you were in the apartment what do you remember seeing while you were in the apartment?

A: I saw a dog and a person that looked like a dog to me it looked like ah sorta like a creature that came up out of the lake and ah it shook my hand, but tonight my visions getting clear (inaudible) and I went into the kitchen and took (inaudible) the crackers off the refrigerator took them into the dining room sat down at the bar and had me one or two sodas to get my head clear.

Q: Do you remember hallucinating anymore?

A: I was sorta still hallucinating but I --

Q: Do you remember any of the things you saw?

A: Her apartment.

Q: Yeah, but I'm talking about as far as hallucinations?

A: I seen her message chair down on the floor, the apartment's, the (inaudible) rocking and ah I remember seeing something like white smog in the apartment and ah I went upstairs I knew when I seen ah I really can't remember how her body lying on the bed but then I seen the blood on the bed and things all mixed up I don't know.

Q: Did you ever have the feeling that you were blacked out or anything and then when you came back around you saw all these things?

A: Nah. I I know I didn't pass out.

Q: No. I don't mean passing out physically where you couldn't walk but I mean you know hallucinating and (inaudible) you couldn't remember it.

A: Well, I saw Mary's body first it looked like maggots crawling around.

Q: Was the was the knife there at the time?

A: I seen something like it ah something like a bad looking stick sticking out of her middle chest you know and I went over and bent down and her eyes looked kinds of a yellowish green color and ah her I can't remember if her mouth was open or not but I remember picking her up and cuddling her into my arms and started crying over her body and then I noticed her bedroom was all racked up (inaudible), tore up.

(Transcript of 1-25-84 statement at 3). Mr. Johnston also stated: "A. You know because I was on black star, LSD, reefer, and alcohol and its . . . Q. Okay. A. It's hard when your stoned to rememorize anything." Transcript of 12-19-83 statement at 12.

Mr. Johnston's "heavy drug usage" and his intemperate use of alcohol was not a one night aberration. Substance abuse runs rampant throughout his history. This is a phenomena not uncommon among mentally ill people, especially schizophrenics, who resort to substance abuse as a form of self-medication. Some highlights from Mr. Johnston's records indicate very clearly that Mr. Johnston was frequently diagnosed as abusing both drugs

and alcohol. Examples are: Monroe Mental Health Center admitted Mr. Johnston on June 17, 1980 with diagnosis of "Alcohol Abuse (1/5 whiskey daily)" and "Drug Abuse (Black Mollies) (PC-R. 1393-1395). On March 18, 1981, Larned State Hospital in Kansas gave this diagnosis "Cannibus Abuse in remission 305.23" and "Cocaine abuse in remission 305.63" (PC-R. 1396-1398).

After an intensive review of the records in Mr. Johnston's case, and seven hours of clinical testing and interview, Dr. Pat Fleming opined that David Johnston on the night in question was in a "psychotic state at the time of the homicide" (PC-R. 1365). She explained:

> He consumed considerable beer and champagne that evening according to witnesses. He admits to using LSD that evening. Given the suspected organicity and the underlying psychotic thought processes, the alcohol and LSD, the capacity to be in contact with reality would be significantly impaired. . . . The alcohol and drug use of the night would further intensify the behavior and thought process that were already present.

(PC-R. 1365).

Dr. Merikangas reported:

> He was undoubtedly psychotic at the time of the alleged offenses. . . He has, by history, the kind of explosive, violent behavior of unstable moves that one expects to find with this condition. This also would render him incapable of deliberate action and of forming the specific intent necessary for in commission of this crime. The influence of alcohol and drugs would render him even less able to control himself . . . . The interplay of drugs and alcohol upon his damaged brain affected reason and may have

> rendered him incapable of knowing right from wrong.

(PC-R. 1390-1391).

B. Aggravating Circumstances.

1. Prior Crime of Violence.

During the penalty phase, the State introduced evidence of two prior violent felonies (R. 1090-96): terroristic threat in Kansas in 1981 and battery on a corrections officer in Florida in 1982. Ms. Warren correctly argued that as to the Kansas conviction there was no corresponding Florida statute and that, in fact, the situation had been a "communication of a threat to do violence" (R. 1090). In Kansas, that apparently was enough to be charged as a felony. In Florida, if it could be charged, it would most likely be a first degree misdemeanor (R. 1093). Ms. Warren went on to argue that in any event, there had been no inherent ability on Mr. Johnston's part to be able to carry out any threats either during or after the occurrence (R. 1093).

The Judge overruled the defense's objection to the introduction of this conviction (R. 1093) and then Ms. Warren and Mr. Wolfe specifically requested that the sentence for this conviction not be published to the jury (R. 1094). Yet the sentence here was that Mr. Johnston had been placed on one year's unsupervised probation. Clearly, then, the Court in Kansas did not view this felony as one serious enough to warrant incarceration or even supervised probation.

When officer Tony Higgins from Kansas was brought by the State to testify as to this incident, he was unable to identify

David Johnston in the courtroom. No matter, defense counsel had stipulated to Mr. Johnston's identity for purposes of this conviction. Clearly, defense counsel had failed to inquire fully about this matter and suddenly were faced with an officer testifying to a crime committed by a defendant he could not identify.

> Q: Sir, I'd ask you to look in the courtroom today and tell me if you see the person you recognized as David Johnston in the courtroom today.
>
> A: I don't see him.

(R. 1101).

2. In the Course of a Felony.

The second aggravating circumstance was that the homicide occurred in the course of a burglary. However, according to this Court the aggravating circumstance of "in the course of a felony" is not sufficient by itself to justify a death sentence in a felony-murder case. Rembert v. State, 445 So. 2d 337, 340 (Fla. 1984)(no way of distinguishing other felony murder cases in which defendants "receive a less severe sentence"); Proffitt v. State, 510 So. 2d 896, 898 (Fla. 1987)("To hold, as argued by the State, that these circumstances justify the death penalty would mean that every murder during the course of a burglary justifies the imposition of the death penalty").

3. Heinous, Atrocious, or Cruel.

As explained supra, the narrowing construction of the aggravating factor requires an intent to inflict torture. There is no evidence that a schizophrenic, mentally deficient Mr.

Johnston while intoxicated and under the influences of numerous drugs intended to torture Mary Hammond. In fact, the evidence shows that she was not tortured.

C. Conclusion.

The weight of the ample mitigation requires the imposition of a life sentence.

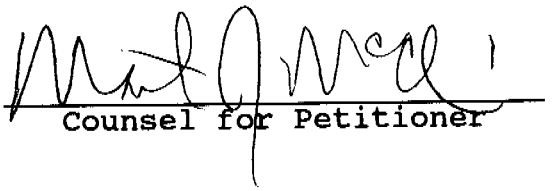
I HEREBY CERTIFY that a true copy of the foregoing Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on **March 21, 1994.**

MICHAEL J. MINERVA
Capital Collateral Representative
Florida Bar No. 092487

MARTIN J. MCCLAIN
Chief Assistant CCR
Florida Bar No. 0754773

DAREN L. SHIPPY
Assistant CCR
Florida Bar No. 0508810

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE
1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376

By: 
Counsel for Petitioner

Copies furnished to:

Margene Roper
Assistant Attorney General
210 N. Palmetto Avenue
Suite 447
Daytona Beach, Florida 32114