IN THE SUPREME COURT OF FLORIDA

DAVID EUGENE JOHNSTON,

Appellant,

v. CASE NO. 82,457

STATE OF FLORIDA,

Appellee.

_____/

REPLY BRIEF OF RESPONDENT

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SUMMARY OF ARGUMENT

1. This court found on appeal there were no mitigating circumstances and upon a harmless error analysis death is still the appropriate sentence.

2. Johnston is not entitled to a life sentence based on post conviction psychiatric testimony going to a different issue and rejected by this court.

JURISDICTIONAL STATEMENT

Pursuant to Anderson v. State, 267 So. 2d 8, 11 (Fla. 1972), once a notice of appeal is filed in a capital case jurisdiction vests in this court until final disposition. Anderson hardly mandates a resentencing, since Espinosa v. Florida, 112 S.Ct. 2926 (1992), expressly authorizes this court to reweigh or perform a harmless error analysis. If the state has chosen the wrong vehicle to invoke this court's jurisdiction, then it would ask that the court reopen Johnston's direct appeal on this narrow issue alone and consolidate this case under that appellate case number. The state has no preference as to which case number this case will fall under since the issue to be reviewed remains the same and residual jurisdiction still attaches. Needless to say jurisdiction does not rest upon case numbers.

Since Johnston has argued every procedural and substantive rule there are no due process concerns invoked here. Johnston had more than reasonable notice from the district court, this court and the state as to the nature of this proceeding. If he feels he has to have the absolute last word -- there is always oral argument.

Johnston states absolutely no authority for the proposition that he would be entitled to submit "additional" mitigation upon an appellate reweighing.

Needless to say, the Espinosa decision on which the district court's decision was premised is a change of law under Witt v. State, 387 So. 2d 922, 930 (Fla. 1980).

I. THE EIGHTH AMENDMENT ERROR FOUND BY THE FEDERAL DISTRICT COURT DOES NOT WARRANT A RESENTENCING BEFORE A JURY.

Elledge v. State, 346 So. 2d 998 (Fla. 1977), and its progeny do not warrant a resentencing. As Johnston notes in the jurisdictional portion of his brief "this Court has repeatedly held that res judicata principles preclude revisiting issues, previously determined." Brief of David Eugene Johnston, p.7. On appeal, this court affirmed Johnston's conviction and imposition of the death sentence, finding that a sentence of death was appropriate upon a finding of three aggravating and no mitigating circumstances. Justice Barkett concurred in the result. Johnston v. State, 497 So. 2d 863 (Fla. 1986). The trial judge's sentencing order in this case specifically listed evidence considered and rejected as mitigating (App. 2-3). The paragraph of the sentencing order cited by Johnston concerning his step-mother's testimony concerned possible childhood abuse. Other references pertained to his mental condition, which was fully considered by the court and found not to support mitigating factors. This court specifically found that Johnston's history of being abused by his parents did not rise to the level of a non-statutory mitigating circumstance. 497 So. 2d at 872. In the cases cited by Johnston a new jury sentencing was ordered because mitigation was present in the record. In the present case there was no mitigation. If there is no likelihood of a different sentence a trial court's reliance on an invalid aggravator is harmless. Burns v. State, 609 So. 2d 600 (Fla. 1992). Here there remain two valid aggravating factors and no

mitigation. Thus, the issue of appellate reweighing is not relevant. Even if there could be said to be any tangential mitigation death is still the appropriate result, cf. Shere v. State, 579 So. 2d 86 (Fla. 1991), especially where the judge made it clear in his order that no hypothesized mitigation would outweigh the aggravating circumstances. Cf. Card v. Dugger, 911 F.2d 1494 (Fla. 1990).

Contrary to Johnston's assertion, this court need not even determine what the sentence would have been absent the factor. This court has reaffirmed the heinous, atrocious and cruel factor when substantial evidence in the record showed that the murder was heinous, atrocious, or cruel under any definition of those terms, which is exactly what the cited argument of the prosecutor, based on the evidence reflects in this case. See, Thompson v. State, 619 So. 2d 261 (Fla. 1993); Slawson v. State, 619 So. 2d 255 (Fla. 1993); Foster v. State, 614 So. 2d 455 (Fla. 1992). This court can safely repeat its prior affirmance of the HAC factor for another reason. The decision in Espinosa imputed error to the trial judge because he is a co-actor with the jury and would be affected by instructional error. Johnston has not and cannot demonstrate that the HAC factor has not been appropriately narrowed by the decisions of this court. While the trial judge may not be accorded the Walton v. Arizona, 110 S.Ct. 3047 (1990), presumption that he knows and applies the law because of his erroneously found equal role with the jury, this court is not so limited. Its decision affirming the finding of the HAC factor should have been entitled to the Walton

presumption and that should have been the end of the taint and the issue. Espinosa never addressed this court's role. Stringer v. Black, 112 S.Ct. 1130 (1992), is not controlling in the face of an incomplete analysis.

II. JOHNSTON IS NOT ENTITLED TO A LIFE SENTENCE UPON ANY APPELLATE REWEIGHING.

A life sentence is hardly mandated by the testimony of Drs. Merikangas and Fleming which was offered on a completely different subject especially when this court found that the 1984 psychiatric examinations were sufficient (App. p.24); Johnston v. Dugger, 583 So. 2d 652, 660 (Fla. 1991).

Johnston's remaining arguments are without relevance and previously disposed of.

CONCLUSION

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

Respectfully submitted,

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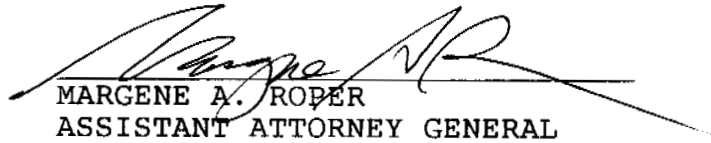

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Reply Brief of Respondent has been furnished by U.S. Mail to Martin J. McClain, Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 31st day of March, 1994.

Margene A. Roper
Of Counsel