IN THE SUPREME COURT OF FLORIDA

Case No. _____

MARVIN EDWIN JOHNSON,

Petitioner,

v.

HARRY K. SINGLETARY, Secretary,
Florida Department of Corrections,

Respondent.
_____/

---

PETITION FOR WRIT OF HABEAS CORPUS AND
EXTRAORDINARY RELIEF AND CONSOLIDATED
MOTION FOR STAY OF EXECUTION

---

BILLY H. NOLAS
Fla. Bar No. 806812
JULIE D. NAYLOR
Fla. Bar No. 794351
Post Office Box 4905
Ocala, FL 34478-4905
(904) 620-0458

STEVEN J. UHLFELDER
Florida Bar No. 139581
Holland & Knight
Suite 600 Barnett Bank Bldg
315 South Calhoun Street
Tallahassee, FL 32301
(904) 224-7000

IN THE SUPREME COURT OF FLORIDA

MARVIN EDWIN JOHNSON,

Petitioner,

v. Case No._____

HARRY K. SINGLETARY, Secretary,
Florida Department of Corrections,

Respondent.
_____/

PETITION FOR WRIT OF HABEAS CORPUS AND
EXTRAORDINARY RELIEF AND CONSOLIDATED
MOTION FOR STAY OF EXECUTION

Petitioner, MARVIN EDWIN JOHNSON, respectfully petitions this Court for a writ of habeas corpus and extraordinary relief. Petitioner also consolidates in this submission a request for stay of execution.

## I. INTRODUCTION

There is no difference between Marvin Johnson's case and Richmond v. Lewis, 121 L.Ed.2d 411 (1992). The reasons why Willie Richmond's execution was precluded are the very same reasons why Marvin Johnson's execution should not be allowed. This Court did not have the benefit of Richmond when it previously reviewed Mr. Johnson's case. Richmond now controls and establishes that, in the eyes of the eighth amendment, Marvin Johnson has never been "sentenced."

If, as Richmond holds, Marvin Johnson has never been "sentenced" under the eighth amendment, the normal procedural questions associated

with capital cases have no relevance here -- a person who has not been afforded "capital sentencing" cannot be executed.

A. *Richmond v. Lewis* Invalidates This Death Sentence

In Richmond, as here, the trial court relied on invalid aggravation. Richmond, 121 L.Ed.2d at 420-21. The Supreme Court explained that that fact invalidated the death sentence unless a majority of the state appellate court conducted constitutional appellate reweighing or harmless error analysis:

> Where the death sentence has been infected by [an] . . . 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.

Richmond, 121 L.Ed.2d at 422 (emphasis added). As in Richmond, there is no majority opinion that "actually perform[s] a new sentencing calculus" in Johnson.

Richmond v. Lewis instructs that: (a) because the original override death sentence was infirm, it was invalid and does not count as a "sentencing" under the eighth amendment and (b) because a majority of the Florida Supreme Court did not "cure" the invalid death sentence on appeal, the appellate proceeding does not count as a "resentencing" or "reevaluation" of the sentence mandated by the eighth amendment.

Richmond is an intervening decision which squarely controls this case. Its plain language allows for no question that it applies to those few individuals who, like Marvin Johnson or Willie Richmond, find themselves facing execution in the absence of what is understood as "capital sentencing" by the eighth amendment.

At the time that the trial judge imposed the death sentence on Mr. Johnson, trial courts had received little guidance from this Court concerning the proper application of aggravating factors -- in particular the "especially heinous, atrocious and cruel" aggravating factor -- or concerning the proper treatment of nonstatutory mitigation. By the same token, this Court had received little guidance from the United States Supreme Court concerning its crucial role in providing appellate review of death sentences, in particular those infected by the consideration of invalid aggravating factors. As a result, the trial judge's sentencing decision was infected by consideration of invalid aggravation, and this Court's review of that decision failed to cure the infection.

The trial judge sentenced Mr. Johnson to death on the basis of five aggravating factors, two of which -- great risk of death to many and especially heinous, atrocious and cruel -- were invalid. The trial judge found no statutory mitigating circumstances, but made no finding that there was no nonstatutory mitigating evidence -- a substantial case for life based on such evidence was heard at trial.

This Court's decision on appeal in Johnson was divided in exactly the same way as the state appellate opinion in Richmond. On direct appeal, only three (3) Justices of this Court comprised the lead opinion for affirmance of the death penalty. As in Richmond, the lead opinion for affirmance in Johnson was less than a majority, and, as in Richmond, the lead opinion relied on the "heinousness" aggravator. Three Justices (Justices Overton, McDonald and Sundberg) dissented, holding that the override death sentence in this case was

improper and that Mr. Johnson should receive life. The crucial fourth vote for death was cast by Justice England. Justice England found that in this case -- where the victim was killed by a single gunshot wound to the chest, dying instantaneously, after an exchange of gunfire initiated by the victim -- the especially heinous, atrocious and cruel aggravating factor was not valid and should not have been weighed by the trial judge. Just as in Richmond, the concurring opinion was crucial -- unless Justice England performed a "new sentencing calculus," the death sentence was invalid. Neither he nor the three-Justice lead opinion, however, performed a "new sentencing calculus" without the invalid "heinousness" aggravator, as the eighth amendment requires. Richmond, 121 L.Ed.2d at 422.

"[A]t least a majority of the [state] Supreme Court . . . needed to perform a proper reweighing and vote to affirm petitioner's death sentence if that Court was to cure the sentence" of the "initial" "error." Richmond, 121 L.Ed.2d at 423. Just as in Richmond, this never happened in Mr. Johnson's case -- "even assuming that the [three] justices who joined the principal opinion properly reweighed, their votes did not suffice to validate the death sentence." Id. at 423 (emphasis added). Less than a majority affirmed the aggravator, but no majority performed a "new sentencing calculus."

Justice England performed absolutely no "reweighing" and absolutely no "harmless error" analysis of what the trial court would have done absent the aggravator after holding that the "heinous, atrocious, cruel" aggravator was invalid. See Johnson v. State, 393 So. 2d 1069, 1074 (Fla. 1980)(England, J., concurring). He said only

that his holding was "irrelevant to the outcome of the case." Id. As the United States Supreme Court explained in Richmond, this type of statement is not harmless error analysis or appellate reweighing -- if anything, it is merely the use of the remaining aggravation as a "justification for the death penalty," i.e., the application of a prohibited automatic affirmance rule. Richmond, 121 L.Ed.2d at 422. As in Richmond, "[t]he passage plainly evinces the sort of automatic affirmance rule proscribed in a 'weighing' state -- a rule authorizing . . . affirmance of a death sentence so long as there remain [other] aggravating circumstance[s]." Id. at 422 (citation omitted).

At best, Justice England's concurrence thus affirmed because there were "other aggravators." Cf. Richmond, 121 L.Ed.2d at 419 (where the concurrence voted to affirm after finding the "especially heinous" aggravator invalid and stated, in words paralleling those of Justice England: "I concur in the [principal opinion] except its finding that this crime was heinous and depraved and I concur in the result."); see also id. at 418-419 (noting that in Richmond, like Johnson, "the concurrence agreed that a death sentence was appropriate for petitioner, even absent the [aggravating] factor"); id. at 422 (noting that the concurrence upheld the sentence after holding the "especially heinous" aggravator invalid because of "other" aggravation arising from the fact that the petitioner had been convicted of "another" prior homicide and kidnapping). Such an approach is invalid under the eighth amendment: "[I]n a 'weighing' state, where the aggravating and mitigating factors are balanced against each other,

it is constitutional error" for the sentencer to give weight to an invalid aggravator, "even if other, valid aggravating factors obtain." Richmond, 121 L.Ed.2d at 420 (emphasis supplied). After all,

> [W]hen 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.

Id. at 421 (citation omitted). Such an assumption is all that the Johnson concurrence discloses.

At worst, Justice England gave no thought to the problem whatsoever. Under either reading, the affirmance here is infirm. Neither the trial judge, nor the lead opinion, nor Justice England's concurrence "actually performed [the] new sentencing calculus" required "if the sentence is to stand." Id. at 422.

In fact, in Richmond, the concurring opinion said much more than Justice England about why death was appropriate despite the trial court's consideration of the invalid aggravator:

> The criminal record of this defendant . . . clearly places him above the norm of first degree murderers. He has been convicted of another first degree murder and a kidnapping, each arising in separate incidents. This history of serious violent crime justifies the imposition of the death penalty.

Richmond, 121 L.Ed.2d at 422. The United States Supreme Court explained that even this language (language going well beyond what Justice England wrote) was not enough. Id. at 422. Justice England did even less.

Because neither the Johnson lead opinion nor the necessary concurrence constitutionally evaluated the effect of the infirmity

in the trial judge's death sentence, the infirmity was not "cured" on appeal. As the United States Supreme Court held in precisely this situation: the three votes in the lead opinion "did not suffice to validate the death sentence. One more proper vote was needed, but there was none. . . . [T]he concurring [opinion which] also voted to affirm petitioner's sentence did not perform the curative reweighing, while the dissenter[s] voted to reverse." Richmond, 121 L.Ed.2d at 423.

"Therefore," the Richmond court held in language that controls Marvin Johnson's case, "petitioner's sentence is invalid, whether or not the principal opinion properly relied upon the 'especially heinous, cruel or depraved' factor." Id. at 423. Marvin Johnson's case, like Willie Richmond's, is one in which no "capital sentencing" recognizable by the eighth amendment has occurred. Id.

B. "Weighing" Error

A majority of the Court (the three lead-opinion Justices and Justice England) did hold that the trial judge improperly relied on the "great risk of death to many" aggravating factor. Nevertheless, none of the Justices engaged in any express harmless error analysis or appellate reweighing. The trial judge's reliance on this "great risk" aggravator comprised a substantial portion of the sentencing order -- there is no question about the significant weight the trial judge gave this aggravator. See Johnson, 393 So. 2d at 1073 (quoting the order). The three-Justice lead opinion and Justice England agreed that the aggravator was "not applicable" and "erroneously found" by the trial court. Id. at 1073. After recognizing that the trial

judge's sentence was infirm ("invalidated" under Richmond), however, the Court undertook no analysis of what the trial judge would have done without this erroneous aggravator -- one on which he substantially relied. Again, under Richmond, this execution must not be allowed to proceed.

"[T]he Florida Supreme Court has made it clear on several occasions that it does not reweigh the evidence of aggravating and mitigating circumstances when it reviews death sentences on appeal." Parker v. Dugger, 498 U.S. 308, 319 (1991). In Mr. Johnson's case, not only was there no appellate "reweighing," there was absolutely no analysis, under the "beyond a reasonable doubt" or any other standard, of what the sentencer (the trial judge) would have done without the invalid "great risk" factor on which he substantially relied. Although the eighth amendment requires a "thorough" explanation and "close appellate scrutiny" of what the sentencer would have done without the invalid aggravator, Stringer v. Black, 112 S. Ct. 1130, 1136-37 (1992); Sochor v. Florida, 112 S. Ct. 2114, 2123 (1992), this Court undertook no such analysis. Rather, the Court affirmed because there were other aggravators -- an approach which the United States Supreme Court has now struck down as flawed under the eighth amendment. See Richmond, 121 L.Ed.2d at 422 (holding that such an "automatic affirmance" approach cannot be squared with the eighth amendment).

An automatic affirmance approach was one which this Court sometimes followed at the time of Mr. Johnson's direct appeal. See, e.g., Demps v. State, 395 So. 2d 501, 506 (Fla. 1981) ("Since death

is presumed" where an aggravator is invalidated but other aggravating circumstances remain, the trial court's consideration of invalid aggravation "does not render the sentence invalid"). Now, in light of Richmond, such a practice no longer holds up.

C. Mitigation Error

Like the aggravation side of the scales, the mitigation side was also improperly weighted in favor of death. The trial judge did not find that there was no mitigation; he found that there was no statutory mitigation: "there are no mitigating circumstances, as enumerated in subsection (6). . . . " (R. 1723). He did, however, consider nonstatutory mitigation. See Johnson v. Dugger, 523 So. 2d 161, 163 (Fla. 1988) (so holding). Since there was abundant uncontroverted nonstatutory mitigation in the record, it is highly likely that the judge found some of the mitigation to have been established, but did not believe that it outweighed the aggravating circumstances he relied upon, including the invalid "especially heinous" and "great risk of death to many" aggravating factors.

This Court, however, never analyzed how the judge would have weighed the mitigation in the absence of the invalid aggravators. See Richmond, 121 L.Ed.2d at 420 (In a "weighing" state, "the invalidation of an aggravating circumstance necessarily renders any evidence of mitigation 'weightier' or more substantial . . ."). Although the three dissenters (Justices Overton, McDonald and Sundberg) recognized that there was plenty of mitigation (albeit nonstatutory) calling for life in this case, the three-Justice lead opinion simply assumed that the trial judge found "no mitigation,"

despite the strong evidence that he must have. The United States Supreme Court held such an unfounded assumption unconstitutional in Parker v. Dugger, 498 U.S. 308 (1991). That same erroneous assumption fatally compromised this Court's review of Mr. Johnson's death sentence. This Court has never reviewed whether the trial judge would have imposed the death sentence in the absence of the invalid aggravation and in the light of the nonstatutory mitigation that was clearly established by this record.

D. "Heinousness" Aggravation Error

Since the time of Mr. Johnson's direct appeal, this Court has enforced a limiting construction on the "heinous, atrocious, cruel" aggravator. Such a construction was nowhere applied by the trial judge in Mr. Johnson's case. To the contrary, the trial judge expressly found that "the method and manner of the murder was not especially heinous, except to the extent that any murder is heinous," R. 1722, and said that the killing did not "inflict pain" because it was "pretty brief" and the decedent "died immediately." R. 1625. The State itself conceded, R. 1548, that the offense was not "torturous" -- that it was not "designed to inflict a high degree of pain" -- and the judge never found that it was.

This case is the paradigm of the case that could not be found "especially heinous" or "torturous": the case where the decedent dies almost instantaneously from a single gunshot wound, with little or no time beforehand in which the decedent knows that death is certain. In addition, the exchange of gunfire here was actually initiated by the decedent and, according to the State's theory, the

robber was struck by a bullet fired by the decedent before he fired his weapon. Neither the trial judge nor the three Justices who comprised the lead opinion, however, relied on any limiting construction of the "especially heinous" aggravating factor. Since both the trial judge and the three Justices of this Court who voted to affirm in the lead opinion expressly relied on the invalid aggravating factor, both the trial judge's imposition of sentence and this Court's affirmance of the sentence are incurably infected with reliance on invalid aggravation.

Justice England was correct in holding the "especially heinous, atrocious, cruel" aggravator invalid in this case as "those terms are used in our death penalty statute." Johnson, 393 So. 2d at 1074 (England, J.) Neither he nor the three-Justice lead opinion, however, cured the error through "reweighing" or "harmless error" analysis. As in Richmond, so too in Mr. Johnson's case: "Petitioner's death sentence was tainted by Eighth Amendment error" when "the sentencing judge gave weight" to an invalid aggravating factor, Richmond, 121 L.Ed.2d at 423-24, and the "Supreme Court of [Florida] did not cure this error," because the crucial opinion of the fourth Justice "who concurred in affirming the sentence did not actually perform a new sentencing calculus." Id. at 424 (emphasis added). The only review Marvin Johnson has ever gotten was conducted with weighted scales.

E. This Execution Should Not Be Allowed

The trial judge considered invalid aggravation. A majority of this Court has never performed a "new sentencing calculus," free from the invalid aggravation, as the eighth amendment requires "if the

sentence is to stand." Richmond v. Lewis, 121 L.Ed.2d 411, 422 (1992). Marvin Johnson's death sentence is illegal -- indeed, in every sense meaningful to the eighth amendment, he has never had valid capital sentencing at all.

This Court has reevaluated its direct appeal resolutions where United States Supreme Court precedent directly establishes that the earlier decision was in error, see Jackson v. Dugger, 547 So. 2d 1197, 1199-1200 and n.2 (Fla. 1989) (reevaluating the direct appeal decision as to evidence admitted in aggravation and ordering resentencing on habeas review because an intervening United States Supreme Court decision called into question the earlier ruling); James v. State, 615 So. 2d 668, 669 (Fla. 1993) (reevaluating the direct appeal decision as to the application of an aggravating factor and granting resentencing during post-conviction proceedings because an intervening United States Supreme Court decision established unconstitutionality in the application of an aggravator); Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987) (reevaluating the direct appeal decision and ordering resentencing on habeas review because an intervening United States Supreme Court decision established invalidity in the direct appeal affirmance of death sentence), or when its own later decision is on point and shows that the direct appeal decision was erroneous. See Alvord v. Dugger, 541 So. 2d 598, 600 (Fla. 1989) (reevaluating the direct appeal decision in habeas proceedings because subsequent decision of the Florida Supreme Court "receded" from the opinion on direct appeal).

"[T]he doctrine of finality," this Court has held, "should be abridged" when "a more compelling objective appears, such as ensuring fairness." Moreland v. State, 582 So. 2d 618, 619 (Fla. 1991). In light of Richmond's holding that those few capital petitioners in Marvin Johnson's shoes have not been "sentenced," it is hard to even discuss matters of procedure -- procedural issues neither preclude review nor apply in cases such as Marvin Johnson's and Willie Richmond's because such cases have not made it to the first step which the eighth amendment requires in capital proceedings (a valid "sentencing"). Richmond establishes that true fundamental error has infected these proceedings and that this execution cannot go forward.

Marvin Johnson was sentenced to death despite the fact that his jury rendered a verdict of life imprisonment. The fact that only three people out of the hundreds who received a jury life verdict in Florida have ever been executed demonstrates that the execution of Marvin Johnson would be "unusual," and consequently "cruel," under Article I, § 17 of the Florida Constitution as those terms are now defined by this Court. Allen v. State, No. 79,003, slip op. at 8 and n.5 (Fla. Mar. 24, 1994) (holding that it is cruel or unusual to execute a defendant where the "vast majority" of similarly-situated defendants are not executed).

The troubling circumstances surrounding this case go well beyond the fact that a jury of Florida citizens believed that Marvin Johnson should not die, a belief shared by five (5) Florida Supreme Court Justices and six (6) federal Judges. Marvin Johnson's case is a mirror image of Willie Richmond's. Richmond controls and establishes

that, in the eyes of the eighth amendment, there has been no capital sentencing here. Richmond instructs that this execution should not go forward in a system governed by constitutional law.

## II. STATEMENT OF THE FACTS[1]

Marvin Johnson's jurors voted that he be sentenced to life imprisonment. The incident at issue occurred at the Warrington Pharmacy in Pensacola, Florida. Mr. Johnson had become addicted to drugs "not in the usual way which a fact finder might ordinarily condemn, but as a result of a motorcycle accident . . . . Johnson's drug addiction began as a result of the severe pain Johnson experienced from a serious back injury in a motorcycle accident. When the prescribed pain medication was discontinued, Johnson began self administering illegal narcotics in an attempt to ease the continuing pain." Johnson v. Singletary, 938 F.2d 1166, 1202 (11th Cir. 1991) (en banc) (Anderson, Kravitch, Johnson and Clark, JJ., dissenting). The pharmacy robbery at issue involved an attempt to steal drugs. Johnson v. State, 536 So. 2d 1009, 1013 (Fla. 1988)(Barkett and Kogan, JJ., dissenting). "[T]here is no evidence that petitioner ever intended anything other than robbing the store of drugs." Id. at 1013.

After the robbery, the robber was leaving the pharmacy and had "started towards the front of the store" when the store owner "grabbed a gun from behind the prescription counter" and fired several shots.

---

[1]As the motion which is being filed pursuant to Fla. R. Crim. P. 3.850 relates, newly-discovered evidence establishes much more than a reasonable probability that Mr. Johnson is innocent -- that he was not involved in the offense. This outline, however, addresses the facts as noted by prior court opinions in this case.

Johnson v. State, 393 So. 2d 1069, 1071 (Fla. 1980)(lead opinion). This Court reported that "Moulton continued to fire at Johnson until his gun was empty . . . " Id. "At trial, the testimony indicated only that petitioner was making the getaway without having physically harmed anyone when the drugstore owner suddenly pulled out a concealed gun and emptied it in petitioner's direction . . . ." Johnson v. State, 536 So. 2d at 1013 (Barkett and Kogan, JJ.). "[T]here was an exchange of gunfire." Johnson v. State, 393 So. 2d at 1071 (lead opinion). The robber was shot and injured. He shot the decedent, id., but "directed no overt act of hostility or harm at the witness [Gary] Summitt, whose subsequent testimony at trial was primarily responsible for Johnson's conviction, nor did he attempt to harm any other occupant of the store." Johnson v. State, 393 So. 2d at 1076 (McDonald and Overton, JJ., dissenting); see also Johnson v. State, 536 So. 2d at 1013 (Barkett and Kogan, JJ., dissenting) ("Leaving the store, petitioner made no attempt to injure two other persons who were nearby.").

On the day after the jury had convicted, "the same jury . . . recommended [that] Johnson be sentenced to life imprisonment" and not death. Johnson v. Singletary, 938 F.2d at 1169. "[T]he judge overrode the . . . jury's recommendation . . . and sentenced Johnson to death." Johnson v. Dugger, 911 F.2d 440, 445 (11th Cir. 1990).

A sharply divided Florida Supreme Court affirmed the death sentence on direct appeal. See Johnson v. State, 393 So. 2d 1069 (Fla. 1980)(three-Justice lead opinion); see also id. at 1074 (England, J.); id. at 1075 (Sundberg, C.J., Overton and McDonald,

JJ., dissenting); id. at 1075 (McDonald and Overton, JJ., dissenting).[2]

Then-Chief Justice Sundberg, joined by Justices Overton and McDonald, wrote, inter alia, in dissent:

> [T]he circumstances surrounding the criminal episode -- the fusillade of pistol shots initiated by the victim and the apparent conscious act of the appellant to spare the two other occupants of the premises from kidnapping or murder -- support a reasoned judgment by the jury in favor of a life sentence. Hence, I would affirm the convictions but vacate the death sentence with directions to impose a sentence of life imprisonment . . . .

Johnson v. State, 393 So. 2d at 1075 (Sundberg, C.J., Overton and McDonald, JJ., dissenting). Justices McDonald and Overton drafted an additional dissenting opinion in which they explained that given the "totality of the circumstances," the "proper sentence in this case is life imprisonment." Id. at 1075-76 (McDonald and Overton, JJ.).

Petitioner applied for habeas corpus relief in the Florida Supreme Court. Johnson v. Dugger, 523 So. 2d 161 (Fla. 1988). At the time, without the benefit of the United States Supreme Court's decision in Richmond, the Court denied relief in an opinion which explained that "even though the jury override might not have been sustained today, it is the law of the case." Id. at 162. Justice Barkett wrote a separate opinion, joined by Justice Kogan, in which she explained: "I believe there was a reasonable basis for the jury's

---

[2]Justice England, whose concurrence was the fourth vote for affirmance, wrote a separate opinion emphasizing that the heinous, atrocious and cruel aggravator was invalid in this case. Johnson, 393 So. 2d at 1074.

recommendation of life and thus that the court originally erred in sustaining the jury override." Johnson, 523 So. 2d at 163. In their dissent in the prior Rule 3.850 appeal, Justices Barkett and Kogan also wrote: "there is no evidence that petitioner ever intended anything other than robbing the store of drugs"; "[a]t trial, the testimony indicated only that petitioner was making his getaway without having physically harmed anyone when the drugstore owner suddenly pulled out a concealed gun and emptied it in petitioner's direction"; "[l]eaving the store, petitioner made no attempt to injure two other persons who were nearby"; the override death sentence was fundamentally unfair. Johnson, 536 So. 2d at 1012-13 (Barkett and Kogan, JJ., dissenting).

Five members of the Florida Supreme Court (Overton and McDonald, JJ., 393 So. 2d at 1075-76; Barkett and Kogan, JJ., 523 So. 2d at 163; Sundberg, then-C.J., 393 So. 2d at 1075), even without the benefit of Richmond, have stated that the override death sentence in this case is questionable, improper and unfair.[3]

---

[3]And six federal judges have not disagreed -- District Court Judge Hoeveler; Eleventh Circuit Judges Anderson, Clark, Johnson and Kravitch; and Eleventh Circuit Chief Judge Tjoflat. District Judge Hoeveler explained in his order that under Tedder, this case "was not one for which execution was appropriate." Johnson v. Wainwright, TCA No. 82-0875, slip op. at 53 (N.D. Fla. 1985). The panel of the Eleventh Circuit which reviewed this case in 1990 noted that the override death sentence and its affirmance were open to serious question and left serious doubts about its fairness. The panel granted an evidentiary hearing on the claim of ineffective assistance of counsel, finding that the case raised serious questions relating to the fundamental unfairness of the death sentence imposed. Johnson v. Dugger, 911 F.2d 440 (11th Cir. 1990).

The case was then reviewed by the Eleventh Circuit sitting en banc. In a sharply divided 6-5 opinion and over a number of lengthy and strenuous dissents, the en banc court reversed the panel. Johnson v. Singletary, 938 F.2d 1166 (11th Cir. 1991). The five dissenters

Richmond was unavailable to this Court when this case was previously reviewed.

## III. JURISDICTION AND PROPRIETY OF GRANTING THE RELIEF REQUESTED

This is an original action under Fla. R. App. P. 9.100(a). This Court has jurisdiction pursuant to subsections 3(b)(7) and (9) of Article V of the Florida Constitution and Rule 9.030(a)(3) of the Florida Rules of Appellate Procedure. The petition presents constitutional issues that directly implicate the legality and validity of this Court's review of Mr. Johnson's sentence of death and demonstrate that death has not been validly imposed on Mr. Johnson. Jurisdiction in this action lies in this Court, see, e.g., Smith v. State, 400 So. 2d 956, 960 (Fla. 1981), for the fundamental constitutional errors challenged herein involve the appellate review process. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985); Baggett v. Wainwright, 229 So. 2d 239, 243 (Fla. 1969); cf. Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981).

This Court has long held that "habeas corpus is a high prerogative writ" which "is as old as the common law itself and is an integral part of our own democratic process." Anglin v. Mayo, 88 So. 2d 918, 919 (Fla. 1955). Because it enjoys such historical stature, the writ of habeas corpus encompasses a broad range of claims for relief:

---

(Chief Judge Tjoflat, and Circuit Judges Anderson, Kravitch, Johnson and Clark) explained that there were serious questions about the fairness of this override death sentence. The United States Supreme Court then denied certiorari review on the ineffective assistance claim, over the dissents of Justices Blackmun, O'Connor and Souter. Johnson v. Singletary, 113 S. Ct. 361 (1992).

> The procedure for the granting of this particular writ is not to be circumscribed by hard and fast rules or technicalities which often accompany our consideration of other processes. If it appears to a court of competent jurisdiction that a man is being illegally restrained of his liberty, it is the responsibility of the court to brush aside formal technicalities and issue such appropriate orders as will do justice. In habeas corpus the niceties of the procedure are not anywhere near as important as the determination of the ultimate question as to the legality of the restraint.

Anglin, 88 So. 2d at 919-20. See also Seccia v. Wainwright, 487 So. 2d 1156 (Fla. 1st DCA 1986) (relying on Anglin); State v. (Cecil) Johnson, 616 So. 2d 1 (Fla. 1993)(error involving a "fundamental 'liberty' due process interest" can be corrected whenever it is presented to the court).

Thus, this Court has held, "Florida law is well settled that habeas will lie for any unlawful deprivation of a person's liberty." Thomas v. Dugger, 548 So. 2d 230 (Fla. 1989). When a habeas petitioner alleges such a deprivation, the petitioner "has a right to seek habeas relief," and this Court will "reach the merits of the case." Id. See also State v. Bolyea, 520 So. 2d 562, 564 (Fla. 1988)("habeas relief shall be freely grantable of right to those unlawfully deprived of their liberty in any degree").

Where this Court has addressed an issue on direct appeal, it will "revisit a matter previously settled by the affirmance," if it involves a claim of "error that prejudicially denies fundamental constitutional rights . . . ." Kennedy v. Wainwright, 483 So. 2d 424, 426 (Fla. 1986). Such a claim is presented herein.

In accord with that analysis, in cases such as James v. State, 615 So. 2d 668, 669 (Fla. 1993), Alvord v. Dugger, 541 So. 2d 598, 600 (Fla. 1989), and Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989), this Court revisited an issue previously addressed "because all the pertinent facts are contained in the original record on appeal . . . .," id. at 1199-1200 n.2, and an intervening decision of the United States Supreme Court called into question the earlier ruling. Similarly, in Bush v. Dugger, 579 So. 2d 725, 726 (Fla. 1991), this Court, in a habeas corpus action, reconsidered a claim previously decided on direct appeal where an intervening decision of the United States Supreme Court called into question the previous ruling. As the Court explained in Moreland v. State, 582 So. 2d 618, 619 (Fla. 1991), error that affects the propriety of a prior ruling may be corrected in collateral proceedings and "[t]he doctrine of finality should be abridged" when "a more compelling objective appears, such as ensuring fairness."

## IV. APPLICATION FOR STAY OF EXECUTION

Richmond demonstrates that no capital sentencing recognized as such by the eighth amendment has occurred here, although execution is imminent. Such an execution should not be allowed to go forward in any case in a system governed by constitutional law. The compelling circumstances in Marvin Johnson's case, however, go beyond this fundamental principle and demonstrate that his execution would constitute an "unusual," and consequently "cruel," punishment. The issues presented herein are not just debatable among reasonable jurists, Barefoot v. Estelle, 463 U.S. 880 (1983), but actually

demonstrate that Mr. Johnson has never lawfully been sentenced to death and that he is entitled to relief. Since a stay is warranted when a petitioner demonstrates that he "might be entitled to relief," State v. Schaeffer, 467 So. 2d 689, 699 (Fla. 1985), it is all the more necessary here. A stay of execution in order to afford petitioner reasoned, judicious and meaningful review of the claims presented is appropriate.

## V. GROUNDS FOR HABEAS CORPUS RELIEF

By his Petition for Writ of Habeas Corpus, Petitioner asserts that his death sentence violates the sixth, eighth and fourteenth amendments to the United States Constitution and Article I, sections 9 and 17 of the Florida Constitution.

### CLAIM I

THE TRIAL COURT'S DEATH SENTENCE WAS INVALIDATED WHEN THAT COURT WEIGHED INVALID AGGRAVATION; THE FLORIDA SUPREME COURT FAILED TO CURE THE ERROR ON APPEAL; AS A RESULT, MARVIN JOHNSON HAS NEVER HAD A CAPITAL SENTENCING THAT THE EIGHTH AMENDMENT CAN RECOGNIZE AND HAS NOT HAD AN INDIVIDUALIZED AND RELIABLE DETERMINATION OF WHETHER HE SHOULD LIVE OR DIE

Richmond v. Lewis, 121 L.Ed.2d 411 (1992), was unavailable when Marvin Johnson's case was previously reviewed. It squarely controls Mr. Johnson's case. It directly shows that Marvin Johnson has not had a capital sentencing that can be recognized as such by the eighth amendment. Mr. Johnson has neither been afforded an individualized trial court determination of whether he should live or die, nor

meaningful appellate review of the unreliable trial court decision.

A. The Requirements of the Eighth Amendment

While the United States Supreme Court long ago found the death penalty statutes of several states to be facially constitutional, see e.g., Gregg v. Georgia, 428 U.S. 153 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Proffitt v. Florida, 428 U.S. 242 (1976), the Court has continued over the years to strike down the unconstitutional application of these constitutional statutes. The Court has focused, inter alia, on ensuring that aggravating circumstances as applied truly narrow the class of individuals who can be sentenced to death, see Godfrey v. Georgia, 446 U.S. 420 (1980); Maynard v. Cartwright, 486 U.S. 356 (1988); that aggravating factors not be applied against individuals unfairly or unjustly, Lowenfield v. Phelps, 484 U.S. 231 (1988); Johnson v. Mississippi, 486 U.S. 578 (1988); and that mitigating circumstances in application truly provide for meaningful sentencer consideration of sentences less than death for individuals who may be eligible for death. See Lockett v. Ohio, 438 U.S. 586 (1978); Hitchcock v. Dugger, 481 U.S. 393 (1987).

Having in such decisions established the law of when a constitutional violation arises, the Court has most recently confronted the intractable issue of whether a person may be executed notwithstanding a violation of these constitutional principles. In this delicate endeavor, the Court has never in a "balancing" state (such as Florida), found such a violation, on either the mitigation or the aggravation side of the sentencing equation, to be excusable.

See, e.g., Espinosa v. Florida, 112 S. Ct. 2926, 2928 (1992). Recently, however, the Court explored circumstances under which state courts might find such balancing errors to be excusable. Richmond v. Lewis; see also Clemons v. Mississippi, 494 U.S. 738 (1990); Stringer v. Black, 112 S. Ct. 1130 (1992); Sochor v. Florida, 119 L.Ed.2d 326 (1992); Espinosa v. Florida, 112 S. Ct. 2926 (1992).

Central to these decisions is the Court's recognition of the pernicious effect that consideration of invalid aggravation has on the entire weighing process. In a weighing state, consideration of even a single invalid aggravating factor skews the "weighing" process by adding unfair and improper weight to "death's side of the scale." Richmond, 121 L.Ed.2d at 421. Where that happens, the sentencing process at the trial level is invalidated because it fails to accord the defendant the individualized consideration of his or her sentence demanded by the eighth amendment. Id. at 421-22. This principle applies equally where the invalid aggravating factor is unduly vague, Stringer, 112 S. Ct. at 1136-37; or where the aggravating factor is invalid as a matter of law, see Sochor, 119 L.Ed.2d at 341; or where the aggravator is found to be unsupported by the facts. Id.

The eighth amendment thus now recognize that in a "weighing" state, when invalid aggravation is used by the trial court, the appellate court may not apply a rule that allows for affirmance of the death sentence because there remain other aggravating circumstances:

> At a minimum, we must determine that the state court actually reweighed. "[W]hen the sentencing body [weighs] 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."

Richmond v. Lewis, 121 L.Ed.2d 411, 421 (1992) (citation omitted). "An automatic rule of affirmance in a weighing State would be invalid under Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973, 98 S. Ct. 2954 (1978), and Eddings v. Oklahoma, 455 U.S. 104, 71 L.Ed.2d 1, 102 S. Ct. 869 (1982), for it would not give defendants . . . individualized treatment." Clemons v. Mississippi, 494 U.S. 738, 752 (1990). Instead, the appellate court must engage in a "thorough analysis of the role an invalid aggravating factor played in the sentencing process." Stringer, 112 S. Ct. at 1136. After all, in a "weighing" state, "the invalidation of an aggravating circumstance necessarily renders any evidence of mitigation 'weightier' or more substantial in a relative sense." Richmond, 121 L.Ed.2d at 420.

Richmond thus holds that if the trial court sentencing has been "infected" by "an 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." Id. at 422 (emphasis added).

> When the [trial court] weighing process itself has been skewed [by invalid aggravation], only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.

Stringer, 112 S. Ct. at 1137 (emphasis added).

Not only must the appellate court conduct either constitutionally appropriate "harmless error" analysis or "appellate reweighing" in order to cure such errors and provide the defendant with

individualized consideration of the sentence, the court must do so explicitly and with a degree of clarity. Where the reviewing court fails to make clear what it is doing -- whether it is employing a rule of automatic affirmance, conducting appellate reweighing or attempting harmless error analysis -- the appellate review is insufficient to cure the infected sentencing decision. Sochor, 119 L.Ed.2d at 341 (ambiguous references to prior state court decisions insufficient to establish adequate harmless error analysis); see id. at 342 (O'Connor, J., concurring)(assertion of harmless error insufficient in absence of "principled explanation" for conclusion on the basis of the actual record in the case).

B. Marvin Johnson's Case

In Marvin Johnson's case, this Court's ruling did not approximate these fundamental principles. The three-Justice lead opinion believed that the invalid "heinous, atrocious, cruel" factor was part of the equation, and thus did not afford Mr. Johnson reliable review. The crucial fourth vote of Justice England held that the aggravator was not valid, but neither reweighed nor undertook any analysis of the effect of the error on the trial court sentencer. This is exactly what happened in Richmond -- although under the eighth amendment the trial court sentencing was "invalidated" due to the infirm aggravation, a majority of this Court neither reviewed the effect of this infirmity on the trial court sentencer (i.e., conducted harmless error analysis), nor properly "reweighed" in the absence of the invalid aggravation.

"[T]he Florida Supreme Court has made it clear on several occasions that it does not reweigh the evidence of aggravating and mitigating circumstances when it reviews death sentences on appeal." Parker v. Dugger, 498 U.S. 308, 319 (1991).[4] In Mr. Johnson's case, however, a majority of this Court never evaluated what the sentencer would have done without the invalid aggravation -- much less so was there an analysis employing the "beyond reasonable doubt" harmlessness standard. See Booker v. Dugger, 922 F.2d 633, 644 (11th Cir. 1991) (Tjoflat, C.J., concurring) ("Nor could the [Florida Supreme Court] be sure that," absent the error, "the judge would have sentenced Booker to death . . . I cannot conceive of a situation in which a pure reviewing court would not be acting arbitrarily in affirming a death sentence after finding a sentencing error that relates, as the error does here, to the balancing of aggravating and mitigating circumstances").

The United States Supreme Court's opinion in Richmond v. Lewis covers the identical situation to that in Johnson. In Richmond, as here, the trial court invalidly found and weighed the "especially heinous" aggravating circumstance. The United States Supreme Court held that this error invalidated the trial court death sentence. Then, as in Johnson, the invalid trial court sentence was not cured on appeal. The lead opinion in Richmond, as in Johnson, was the opinion of less than a majority of the court. The United States Supreme Court held that whether or not the less-than-a-majority lead

---

[4]This Court so reiterated again today: "[i]t is not this Court's function to reweigh"; "we will not reweigh." Melton v. State, No. 79,959, slip op. at 7 (Fla. May 12, 1994).

"[T]he Florida Supreme Court has made it clear on several occasions that it does not reweigh the evidence of aggravating and mitigating circumstances when it reviews death sentences on appeal." Parker v. Dugger, 498 U.S. 308, 319 (1991).[4] In Mr. Johnson's case, however, a majority of this Court never evaluated what the sentencer would have done without the invalid aggravation -- much less so was there an analysis employing the "beyond reasonable doubt" harmlessness standard. See Booker v. Dugger, 922 F.2d 633, 644 (11th Cir. 1991) (Tjoflat, C.J., concurring) ("Nor could the [Florida Supreme Court] be sure that," absent the error, "the judge would have sentenced Booker to death . . . I cannot conceive of a situation in which a pure reviewing court would not be acting arbitrarily in affirming a death sentence after finding a sentencing error that relates, as the error does here, to the balancing of aggravating and mitigating circumstances").

The United States Supreme Court's opinion in Richmond v. Lewis covers the identical situation to that in Johnson. In Richmond, as here, the trial court found and weighed the "especially heinous" aggravating circumstance. Like Johnson, however, less than a majority of the appellate court affirmed the aggravator. This invalidated the trial court death sentence. As in Richmond, the invalid trial court sentence in Johnson was not cured on appeal. The lead opinion in Richmond, like the lead opinion in Johnson, was the opinion of less than a majority of the court. The United States Supreme Court

---

[4]This Court so reiterated again today: "[i]t is not this Court's function to reweigh"; "we will not reweigh." Melton v. State, No. 79,959, slip op. at 7 (Fla. May 12, 1994).

held that whatever the less-than-a-majority lead opinion did as to the aggravator, it was irrelevant: the concurring opinion had found the aggravator invalid; and the concurrence did not "actually perform a new sentencing calculus" (it neither "reweighed" nor undertook a harmless error analysis). This is just like Johnson:

> [A]t least a majority of the Supreme Court of Arizona needed to perform a proper reweighing and to affirm petitioner's death sentence if that Court was to cure the sentence of the initial . . . error . . . Thus, even assuming that the . . . justices who joined the principal opinion properly reweighed, their votes did not suffice to validate the death sentence. One more proper vote was needed, but there was none. As we have already explained, the concurring justice[ ] who also voted to affirm petitioner's sentence did not perform a curative reweighing, while the dissenter[s] voted to reverse. Therefore, petitioner's death sentence is invalid, whether or not the principal opinion properly relied upon the "especially heinous" . . . factor.

Richmond, 121 L.Ed.2d at 423 (citation omitted) (emphasis added).

Here, as in Richmond, Justice England found that the "especially heinous" aggravating factor was invalid, but neither conducted harmless error analysis of what the trial court would have done without the aggravator, nor reweighed. Johnson, 393 So. 2d at 1074. To the extent Justice England relied on the lead opinion, his analysis was infected with the very same aggravator whose invalidity he wrote about in his separate opinion -- the less-than-a-majority lead opinion relied upon the aggravator in its review.

What is clear is that Justice England did not give much thought to the effect of the sentencing error he recognized. His opinion is far removed from what the eighth amendment requires -- "actually

perform[ing] a new sentencing calculus," Richmond, 121 L.Ed.2d at 422, or "thorough" and thoughtful harmless error analysis of what the trial sentencer would have done without the invalid aggravator. Richmond; Sochor; Stringer.

At its core, what Justice England did was to vote for affirmance because there were other aggravators. This is just what the concurrence in Richmond did. See id., 121 L.Ed.2d at 422. And this is just what the eighth amendment forbids -- "the sort of automatic affirmance rule proscribed in a 'weighing' state - 'a rule authorizing . . . affirmance of a death sentence so long as there [remain other] aggravating circumstance[s].'" Richmond, 121 L.Ed.2d at 422 (citation omitted).

Less than a majority affirmed the "heinousness" aggravator in Johnson, but no majority has ever "actually performed a new sentencing calculus" without the invalid aggravator. What happened in Johnson is identical to what happened in Richmond. The United States Supreme Court held that what happened in Richmond was unconstitutional -- Willie Richmond, the Court held, never had valid capital sentencing. Marvin Johnson also has not had valid capital sentencing. Richmond controls this case.

Where a prior decision of this Court has been expressly overruled, this Court will reconsider that decision -- an intervening decision directly on point requires no less. See Alvord v. Dugger, 541 So. 2d 598, 600 (Fla. 1989); Jackson v. Dugger, 547 So. 2d 1197, 1199-1200 and n.2 (Fla. 1989); James v. State, 615 So. 2d 668, 669

(Fla. 1993). Richmond holds unconstitutional exactly what happened in Marvin Johnson's case.

C. The Trial Court's Findings

The jury voted for life. The trial judge overrode that recommendation. The trial judge found five aggravating circumstances, including "great risk of death to many persons" and especially heinous, atrocious and cruel. R. 1720, 1721-22. The trial judge recognized that the manner in which the decedent was killed (a single gunshot wound) neither was intended to nor did cause a high degree of pain: "I'm not sure that it inflicts pain. I'm rather confident that it did not because it was pretty brief, I think, and I am confident that Mr. Moulton died immediately." R. 1625 (emphasis added). The prosecutor agreed with this assessment. See R. 1548 ("There is no real evidence that this was done to inflict a high degree of pain because Mr. Moulton probably died very quickly") (closing argument at penalty phase); see also R. 1609 ("I'm not saying there was any unnecessarily torturous pain on the victim"). The trial judge also expressly found that the "method and manner of the murder was not especially heinous, except to the extent that any murder is heinous." R. 1722 (emphasis added). Nevertheless, the trial judge found the aggravator because the offense was "committed to seek revenge upon Woodrow Moulton." R. 1722.[5] Nowhere did the trial court apply any of the limiting constructions which this Court now enforces

[5]That is, the victim had shot first at the robber and, according to the State's theory of the case, had wounded him before he himself was shot.

on the "especially heinous" aggravator.[6] Justice England was correct in concluding that the offense was not heinous, atrocious and cruel "as those terms are used in our death penalty statute." Johnson, 393 So. 2d at 1074.

The trial judge found no statutory mitigating circumstances: "[T]here are no mitigating circumstances, as enumerated in [§ 921.141](6) and set forth in these findings of fact, to weigh against the aggravating circumstances and facts set forth, supra." R. 1723, citing Alford v. State, 307 So. 2d 433 (Fla. 1975) (a case which indicated that findings need only be made on "statutory" factors). The trial judge, however, considered nonstatutory mitigation, Johnson v. Dugger, 523 So. 2d 161, 162 (Fla. 1988), and made no findings which rejected the nonstatutory mitigation in this case. As the record shows, the judge believed that the statute did not require any findings concerning nonstatutory mitigation. R. 1591; see also § 921.141(3), Fla. Stat. (1977) (findings on nonstatutory mitigating factors not necessary at that time); Parker v. Dugger, 498 U.S. 308, 317 (1991) (same).

At the guilt and penalty phases of the trial, much evidence, most of it uncontroverted, had been presented in support of numerous nonstatutory mitigating circumstances. See infra. This record does

---

[6]That the crime must be "unnecessarily torturous to the victim"; that this is what the perpetrator must intend; that the aggravator cannot be based on a single gunshot wound which causes instant death; that the offense must be both "pitiless" or "conscienceless" and "unnecessarily torturous." See Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992) ("the crime must be both conscienceless or pitiless and unnecessarily torturous to the victim"); Rhodes v. State, 547 So. 2d 1201 (Fla. 1989); Cochran v. State, 547 So. 2d 928 (Fla. 1989).

not demonstrate that the trial judge declined to find nonstatutory mitigating factors -- just as was the case with an identical record in Parker, 498 U.S. at 317-19, the record here indicates that the judge considered and must have found nonstatutory mitigation, but believed it was not enough to outweigh the aggravation, aggravation which included two invalid factors ("heinous, atrocious, cruel" and "great risk to many").

D. The Lead Opinion on Appeal

On direct appeal, the lead opinion held that the trial court "erroneously found that Johnson created a great risk of death to many persons." Johnson v. State, 393 So. 2d at 1073. The three-Justice lead opinion, however, did not reverse the trial court's finding on the "heinous, atrocious, cruel" aggravator. Id. The lead opinion also believed that the trial court had not found mitigating circumstances, although the trial court had never said that there were no nonstatutory mitigating circumstances. Id. at 1073-74. Cf. Johnson, 393 So. 2d at 1075-76 (Sundberg, C.J., and McDonald and Overton, J.J., dissenting) (discussing the nonstatutory mitigating circumstances). The lead opinion then followed an approach which was not unusual at the time, an approach which Richmond has now expressly overturned -- it affirmed because there were other aggravators. See, e.g., Demps v. State, 395 So. 2d 501, 506 (1981) ("Since death is presumed" where an aggravator is invalidated but other aggravators remain, the trial court's consideration of invalid aggravation "does not render the death sentence invalid.")

Nowhere did the three-Justice lead opinion evaluate what the trial court sentencer would have done without the "great risk" factor -- there is no such "harmless error" analysis in the opinion.[7] And, as to the "heinous, atrocious, cruel" aggravator, the three-Justice lead opinion believed it applied and relied upon it in its review.

E. Justice England's Concurrence

Justice England provided the crucial fourth vote in favor of the death sentence. In contrast to the three-Justice lead opinion, Justice England recognized that the "heinous, atrocious, cruel" aggravator was invalid in Marvin Johnson's case. His opinion, however, fell far short of what Richmond and the eighth amendment require. Justice England's entire concurring opinion was:

> While I concur in the Court's affirmance of Johnson's conviction and sentence, I cannot characterize this killing as either atrocious or cruel, as those terms are used in our death penalty statute. My disagreement on this point, however, is irrelevant to the outcome of the case.

Id. at 1074 (England, J., concurring).

The Arizona appellate court's review in Richmond was eerily similar. There also the concurring opinion provided the crucial vote necessary for affirmance of the death sentence. As in Johnson, the Richmond concurrence rejected the less-than-a-majority lead opinion's ruling that the "especially heinous and depraved" aggravating circumstance applied. Richmond v. Lewis, 121 L.Ed.2d at 419. The concurrence nevertheless voted to affirm the death sentence. Id.

---

[7]This Court has made it clear on several occasions that it does not independently "reweigh." Parker, 498 U.S. at 319. There was thus neither harmlessness analysis nor reweighing in the lead opinion.

at 419 ("I concur in the [principal opinion] except its finding that this crime was heinous and depraved, and I concur in the result").

The United States Supreme Court found the concurring justices' review constitutionally deficient -- the trial court's sentence had been invalidated because the concurring opinion, an opinion which, as in Johnson, was necessary for affirmance, had found the "heinousness" aggravator invalid; a majority of the reviewing court, however, never cured the error by evaluating the petitioner's case in the absence of the invalidated factor. Richmond, 121 L. Ed. 2d at 423.

In Richmond, like Johnson, neither the lead opinion (which relied on the aggravator) nor the concurrence "actually performed a new sentencing calculus" without the invalid heinousness aggravator:

> "[O]nly constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence." Where the death sentence has been infected by [an] 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.

Richmond v. Lewis, 121 L.Ed.2d at 421-22 (citation omitted) (emphasis added). There is no such analysis in Justice England's concurrence.

The United States Supreme Court then noted that although the Arizona court purports to "reweigh" the death sentence in every case, id. at 422, "[a]t a minimum," it had to determine whether a majority of the state court "actually reweighed." Id.[8]

---

[8]In contrast to the Arizona court, this Court has consistently disavowed the intent or ability to reweigh, see Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981); Hudson v. State, 538 So. 2d 829 (Fla.

The Supreme Court noted that the concurrence in Richmond, like the concurrence in Johnson, had not "actually reweighed." The Court so noted despite the fact that the concurring justices joined in the plurality's holding that the Arizona court had an obligation to reweigh in every case. Id. at 422. The "language of the concurrence itself," id., like the language of the concurrence in Johnson, demonstrated that the concurrence had voted to affirm because it believed the striking of the aggravator "irrelevant" to the outcome. This belief, in Richmond and in Johnson, was based on the fact that there was other aggravation in the case.

Under Richmond, such an approach is neither "reweighing" nor "harmless error" analysis -- it is

> [T]he sort of automatic affirmance rule proscribed in a "weighing" state -- "a rule authorizing or requiring affirmance of a death sentence so long as there remains at least one valid aggravating circumstance."

Id. at 422 (citation omitted).

Indeed, Justice England actually said even less than the concurrence in Richmond (which specifically cited that petitioner's "aggravated background," Richmond, 121 L. Ed. 2d at 422). Justice England's concurrence contained only the bald statement that the

---

1989); Parker 498 U.S. at 319, and this distinction makes the infirmity even clearer here than in Richmond. In light of these precedents, the United States Supreme Court has required an unambiguous statement from this Court that harmless error analysis is being performed. Sochor v. Florida, 119 L.Ed.2d 341 (ambiguous references to prior state court decisions insufficient to establish adequate harmless error analysis); see id. at 342 (O'Connor, J., concurring) (assertion of harmless error insufficient in absence of "principled explanation" for conclusion on the basis of the actual record in the case). A majority of this Court has never undertaken such an analysis in this case.

invalidity of the "especially heinous" aggravating factor was "irrelevant to the outcome of the case." Johnson, 393 So. 2d at 1074. Since there is not a glimmer of analysis in those words concerning the effect of the error on the trial judge (or of reweighing of the sentence) the only way that they can be understood, under Richmond, is that Justice England believed the other aggravating factors provided a "justification for the death penalty." Richmond v. Lewis, 121 L.Ed.2d at 422. Justice England either applied an automatic affirmance rule or did not think about the issue at all. Under Richmond, there can be no other reading of the concurrence in Johnson.

Justice England's treatment of the invalid aggravation is a xerox copy of the Richmond concurrence. As a result, Mr. Johnson's death sentence is invalid, just like Willie Richmond's -- at least a majority of the state appellate court must perform constitutional harmless error analysis or appellate reweighing; no such review was afforded in either Johnson or Richmond:

> [E]ven assuming that the . . . justices who joined the opinion properly reweighed, their votes did not suffice to validate the death sentence. One more proper vote was needed, but there was none. As we have already explained, the [concurrence which] also voted to affirm petitioner's death sentence did not perform a curative reweighing, while the dissenter[s] voted to reverse. Therefore petitioner's sentence is invalid, whether or not the principal opinion properly relied on the "especially heinous, cruel or depraved" factor.

Richmond v. Lewis, 121 L.Ed.2d at 423 (citation omitted)(emphasis supplied). So too in Johnson, "one more proper vote was needed" to "validate the death sentence." Justice England's opinion, like the Richmond concurrence, missed the mark.

This error standing alone invalidates Marvin Johnson's death sentence. It is, however, far from the only error. The lead opinion and Justice England joined in striking the "great risk of death to many" aggravating factor. The Court, however, then applied a rule of automatic affirmance to uphold death. After striking the "great risk" aggravator, the Court stated simply that the trial court's findings concerning the remaining aggravators "were proper." Johnson, 393 So. 2d at 1073-74. With no further analysis, the lead opinion then concluded:

> death is the appropriate sentence to be imposed for this atrocious and cruel execution murder committed during the course of an armed robbery by an escaped convict who previously had been convicted of felonies involving the use or threat of violence.

Id. at 1074. As in the Richmond concurrence, the "plain meaning of this passage is that [Mr. Johnson's] aggravated background provided a conclusive justification for the death penalty." Richmond v. Lewis, 121 L.Ed.2d at 422 (emphasis in original). Under Richmond this is not enough, and the opinion's failure to perform a curative harmless error analysis or reweighing renders Mr. Johnson's death sentence invalid. Id. at 423.[9]

---

[9]The automatic affirmance approach which this Court applied to several cases at the time Mr. Johnson's appeal (that death would be affirmed if there was other aggravation) relied on language from State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), (stating that "death is presumed to be the proper sentence" where there is one or more valid aggravating circumstance). This approach was followed in cases such as Armstrong v. State, 399 So. 2d 953, 963 (Fla. 1981); Enmund v. State, 399 So. 2d 1362, 1373 (Fla. 1981); Shriner v. State, 386 So. 2d 525, 534 (Fla. 1980) (death presumed because there were other aggravating circumstances); Dobbert v. State, 375 So. 2d 1069, 1071 (Fla. 1979); Ford v. State, 374 So. 2d 496, 503 (Fla. 1979) (death affirmed because there were other aggravators and the trial judge

F. This Court Erroneously Treated This Case As One Involving No Mitigation.

The Court's erroneous review of Mr. Johnson's sentence was not confined to the aggravation side of the sentencing scales. Mr. Johnson's case was wrongfully treated as one with no mitigation. See Johnson, 393 So. 2d at 1073-74. In fact, the trial court only found that there was no "statutory" mitigation. The trial court did not find that there was no mitigation. This Court's reliance on a nonexistent finding of "no mitigation" deprived Mr. Johnson of his right to meaningful appellate review, as well as making it impossible for this Court to "perform a new sentencing calculus," Richmond, 121 L.Ed.2d at 422. The Court left out one half of the equation.

In performing appellate review the court must give due consideration to the actual record in the defendant's case, including the mitigation in the record. "It cannot be gainsaid that meaningful appellate review requires that the appellate court consider the defendant's actual record." Parker v. Dugger, 498 U.S. 308, 321 (1991). This is particularly crucial in the context of a jury override case. Under the law governing such cases, the presence of

---

found no mitigating factors); and Leduc v. State, 365 So. 2d 149, 152 (Fla. 1978)(same). As this Court said in Demps v. State, 395 So. 2d 501 (Fla. 1981), a case decided less than a month after Johnson was decided, "death is presumed" where all the aggravating factors are not stricken. Id. at 506.

As discussed in the text, this Court applied such a presumption and rule of automatic affirmance in Mr. Johnson's case. That approach was expressly struck down by the United States Supreme Court in Richmond. Richmond directly overrules what happened in Johnson and demonstrates that fundamental fairness requires that Mr. Johnson's execution not be allowed. See, e.g., James v. State, 615 So. 2d 668, 669 (Fla. 1993) (reevaluating direct appeal decision because Espinosa v. Florida, 112 S. Ct. 2926 (1992), "declared" that the direct appeal affirmance was erroneous).

mitigation in the record on the basis of which a reasonable person could impose a life sentence requires that the jury's life verdict be enforced. Espinosa, 112 S. Ct. at 2928; Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975).

Contrary to what the lead opinion said on direct appeal, the "actual record" here leaves no question that the trial court never found that there was no nonstatutory mitigation. The trial judge found no statutory mitigating circumstances: "[T]here are no mitigating circumstances, as enumerated in [§ 921.141] (6) and set forth in these findings of fact, to weigh against the aggravating circumstances and facts set forth, supra." R. 1723, citing Alford v. State, 307 So. 2d 433 (Fla. 1975). The trial judge considered nonstatutory mitigation, Johnson v. Dugger, 523 So. 2d 161, 162 (Fla. 1988), (so holding), but made no findings rejecting nonstatutory mitigation or finding that no such factors existed. As the judge himself indicated, he believed that the statute did not require findings concerning nonstatutory mitigation. R. 1591; see also § 921.141(3), Fla. Stat. (1977) (indicating that findings on nonstatutory mitigating factors were then not necessary).

The United States Supreme Court has now explained that the absence of written trial court findings concerning nonstatutory mitigation in sentencing orders from this time period does not mean that the trial court affirmatively found that no nonstatutory mitigation had been established:

> By statute, the sentencing judge [was] required to set forth explicitly his findings as to only the statutory aggravating and mitigating circumstances. Fla. Stat. § 921.141(3) (1985)....

> Only very recently has the Florida Supreme Court established a requirement that a trial court must expressly evaluate in its sentencing order each nonstatutory mitigating circumstance proposed by the defendant.

Parker v. Dugger, 498 U.S. 308, 317 (1991).

Therefore, the fact that the trial judge said nothing about nonstatutory mitigation does not mean that he found that no nonstatutory mitigation was established. As Parker and the existence of uncontroverted nonstatutory mitigating factors in the record show, the trial judge must have recognized and found nonstatutory mitigation (as the three dissenting Justices did on appeal). However, he found that it was outweighed by the aggravating circumstances -- including the invalid aggravating circumstances. The decision in Johnson consequently involves not only reliance on a constitutionally invalid rule of automatic affirmance, it also deprived Mr. Johnson of meaningful appellate review of his "actual record." Parker, 498 U.S. at 321. As the United States Supreme Court explained in Parker, after striking invalid aggravation, a reviewing court's harmless error analysis must be "based on what the sentencer actually found." Id. at 320. What this Court may not do after striking aggravating circumstances is to "ignore the evidence of mitigating circumstances in the record and misread the trial judge's findings regarding mitigating circumstances and affirm the sentence based on a mischaracterization of the trial judge's findings." Id. at 320.

The starting point for determining "what the sentencer actually found" concerning nonstatutory mitigation is an examination of what nonstatutory mitigating the record discloses. Id. at 314. Perhaps

the strongest nonstatutory mitigating evidence in this case was clearly uncontroverted, as it came from the State's own evidence and theory of the case. It is clear from the testimony of the State's crucial witness, Gary Summitt, that the decedent fired first. R. 975-79; Johnson v. State, 393 So. 2d at 1071. Moreover, according to the State's theory of the case and argument, one of the bullets fired by the decedent actually hit the robber. The State argued that the bullet -- according to the State's theory, the bullet fired by the decedent -- is located in Marvin Johnson's pelvis. R. 1146-48, 1170-71, 1175-76, 1181, 1223-39. According to the State's theory, then, Marvin Johnson was shot at and wounded by the decedent before the decedent was shot and killed.

This Court has found such nonstatutory mitigation sufficient to support a jury's life recommendation. Hallman v. State, 560 So. 2d 223, 226-27 (Fla. 1990).[10] It is also clear that the jury actually relied on this factor. Pearl S. Middlecoff, one of the members of Mr. Johnson's jury, expressed her belief in the reasonableness of the jury's verdict of life:

> Johnson went in with the intention of getting drugs, not with the intention of shooting Moulton. If Moulton hadn't shot him, he would probably be alive today . . . I put myself in Johnson's position. I probably would have done the same thing. I think the judge was very much out of place [in overriding the jury].

Pensacola News Journal, March 2, 1986, p. 9A.

---

[10]See also State v. Watson, 628 P.2d 943, 947, 129 Ariz. 60 (1981) (evidence that victim shot first found as nonstatutory mitigating circumstance).

In addition to this powerful mitigating evidence concerning the circumstances of the offense, the defense presented mitigating evidence, most of which was uncontroverted, concerning Mr. Johnson's personality, his deprived childhood, his good deeds, close family ties and potential for rehabilitation. Such evidence has also been found to provide a reasonable basis for a jury's life verdict. See, e.g., McCampbell v. State, 421 So. 2d 1072 (Fla. 1982).

Ronald C. Yarbrough, a clinical psychologist, conducted a diagnostic interview and psychological testing of Mr. Johnson. (R. 1509-11). The reason for conducting these tests "was to determine whether or not there might have been any particular emotional factors that might have perhaps been involved in [Mr. Johnson's] decision making or what occurred in this instance" (R. 1511). The test results were sufficient to allow Dr. Yarbrough to draw certain conclusions (R. 1510-12).

Dr. Yarbrough's testing was intended to "predict . . . Marvin's behavior under a variety of different circumstances." R. 1511-12. "His intellectual functioning . . . his approach to decision making, his . . . common sense" were evaluated." R. 1512. "Personality patterns" and "impulse control" were tested. R. 1512. And lastly Dr. Yarbrough tested Mr. Johnson's ability to "think . . . in a non-structured situation where there might be non-emotional and then emotional stimuli." R. 1512.

Dr. Yarbrough explained that Mr. Johnson has "significant anxiety" and "serious difficulty" when in stressful situations:

> [H]e experiences feelings that he doesn't have a cognitive -- or, his head doesn't always know what his belly or his heart is going to do.
>
> I then took Marvin from this sort of check list approach with true-false questions into the non-structured part of the personality evaluation . . . . [T]he importance of the ink blots . . . [is] to look at the factors behind his perception and behind his decision-making and thinking processes.

R. 1517-18 (emphasis added). This testing and evaluation established that Mr. Johnson has psychological problems with "emotional" and "impulsive" situations. He has emotional, impulsive and "very inadequate response[s] to [external] stimul[i]":

> The emotional stimuli seemed to flood Marvin, and when he is in an extremely demanding emotional situation, he breaks down his normal mode of thinking, even processing information, decision-making; and I hypothesize that he also breaks down his normal mode of responding with behavior.
>
> . . .
>
> Again, his emotional response is so strong that he does no integration of information.

R. 1520 (emphasis added). Under the State's cross-examination, Dr. Yarbrough agreed that "as a hypothetical", if Mr. Johnson were involved in a robbery where "someone else decided to pull a gun on him,... this would be a highly stressful situation" where" his ability to think, make decisions, and probably his behavior" would "deteriorate very rapidly . . . ." R. 1524 (emphasis added). Because of his psychological impairments, under stress "[h]e would respond dramatically, and it would break down from his prior way of perceiving the situation." "Stress," Dr. Yarbrough explained, "breaks down" his "normal way of responding." R. 1525.

Based on Dr. Yarbrough's diagnosis, defense counsel argued that the injury which the State asserted Mr. Johnson suffered when shot by the decedent impaired his rationality at the time of the offense. The surprise, shock and pain caused by the shooting, combined with Mr. Johnson's psychological inability to cope with stressful situations, impaired his rationality. This is nonstatutory mitigation on which a jury can rely to vote for life. There is no evidence in this record that the trial judge rejected it.

Mr. Johnson suffered from a severe addiction to pain medication, an addiction which began through prescriptions provided after a motorcycle accident. The addiction had consumed him. As Dr. Yarbrough explained, Mr. Johnson suffered from significant psychological impairments.

Mr. Johnson's sister and daughter also testified as to his early life and family ties. While a young boy, and after Marvin's parents divorced, he and his sister lived with their blind father, in extreme hardship. R. 1528-30. The family home had no indoor toilet and no hot or running water. A modest amount of farm labor provided a meager family income. R. 1516. Marvin left school in the tenth grade and began working to help his family. R. 1526. Evidence was presented as to the adverse effect his execution would have on members of his family. R. 1526-28.

Following the judge's instructions, R. 1565-72, and the jury's deliberations, R. 1659-60, the jurors returned a verdict for life. R. 1659-60. At judge sentencing, defense counsel submitted the following in mitigation:

(1) No evidence indicated there was any intent to harm or kill when he entered the store or while the robbery was taking place. R. 1731.

(2) Force was used only after, according to the State's theory, Mr. Johnson was being shot at when leaving; force was used, according to the State's case, only after Mr. Johnson was wounded. R. 1748.

(3) The exchange of gunfire was mitigated, again according to the State's own theory, by the fact that Mr. Johnson had been wounded and was in pain and did not premeditate but reacted spontaneously to being shot, R. 1757, as confirmed by Dr. Yarbrouogh's testimony about Mr. Johnson's impairments.

(4) No attempt to harm whatsoever was directed towards the two other persons in the store. R. 1732, 1758.

(5) His background was of a family suffering extreme hardship, R. 1734, with a blind father and a mother who had to work to provide for the family's meager income.

(6) His siblings and his children care for him, R. 1734, and he cared for them.

(7) The injury (being shot) impaired rationality at the time of the homicide. R. 1758.

(8) The offense would not have occurred had the robber not been shot at and injured. R. 1748.

(9) The psychological evidence was important mitigation. This evidence included, inter alia, the evidence that Mr. Johnson was impaired and subject to emotional "flooding" produced by stressful stimuli that caused his normal rationality to "deteriorate dramatically". R. 1520-21.

(10) That Mr. Johnson's emotional underdevelopment should be considered. Id.

(11) That there had been nothing shown by the prosecution upon which to base a conclusion that the jury had reached an arbitrary or capricious decision for life imprisonment in view of the facts of the case. R. 1749.

On appeal, the dissenting opinions of Justices McDonald and Overton and then-Chief Justice Sundberg recognized that there were nonstatutory mitigating factors which supported the jury's life

verdict. See Johnson, 393 So. 2d at 1075-76 (opinions of Sundberg, C.J., dissenting, and McDonald and Overton, JJ., dissenting). The trial judge never made any findings rejecting the nonstatutory mitigation. Here, as in Parker, the fact that there existed "substantial evidence, much of it uncontroverted, favoring mitigation" supports the conclusion that the trial judge "found and weighed nonstatutory mitigating circumstances before sentencing" Mr. Johnson to death. Parker, 498 U.S. at 318.

The lead opinion's failure to consider this nonstatutory mitigating evidence (based on an erroneous view of the trial judge's actual findings) renders the Court's review invalid under the eighth amendment. For this Court to have conducted constitutional harmless error analysis, it would have had to analyze what the trial court would have done, in the absence of the invalid aggravation and in the context of the mitigation that was present in the record. This Court would have had to consider how the trial court would have weighed the remaining aggravation against the mitigation in the actual record and "the recommendation of the jury." Lewis v. State, 398 So. 2d 432, 439 (Fla. 1981). It is manifest from this Court's opinion on direct appeal that it undertook no such "harmless error" review, and thus failed to correct the infirmities in the trial court's death sentence.

G. At the Time of Marvin Johnson's Sentencing and Appeal this Court Had Failed to Enforce a Reliable Limiting Construction of the "Especially Heinous" Aggravating Factor.

1. The Constitutional Standard

In Florida, the sentencing authority is divided between the jury and the sentencing judge. Espinosa, 112 S. Ct. at 2928-29. There is no question that, like the penalty phase jury, the trial judge "is at least a constituent part of 'the sentencer'. . . ." Sochor, 119 L.Ed.2d at 341. Thus, the trial judge's sentencing discretion, like the jury's, must be limited by "clear and objective standards that provide specific and detailed guidance, and that make rationally reviewable the process for imposing a sentence of death." Godfrey v. Georgia, 446 U.S. 420, 428 (1980).

In a series of recent cases, the United States Supreme Court has articulated the eighth amendment standards governing sentencer weighing of vague aggravating factors. Espinosa v. Florida, 112 S. Ct. 2926 (1992); Sochor v. Florida, 112 S. Ct. 2114 (1992); Arave v. Creech, 113 S. Ct. 1534 (1993); Richmond v. Lewis, 121 L.Ed.2d 411 (1992); Lewis v. Jeffers, 497 U.S. 764 (1990). These standards are fully applicable to the Florida trial judge's sentencing decision, and are of particular importance where, as here, the trial judge (and members of this Court) relied on invalid aggravation in a jury override case.

"The relevant Eighth Amendment law is well defined." Richmond, 121 L.Ed.2d at 420. A statutory aggravating factor "is unconstitutionally vague if it fails to furnish principled guidance for the choice between death and a lesser penalty." Id., citing Maynard v.

Cartwright, 486 U.S. 356, 361-64 (1988); Godfrey v. Georgia, 446 U.S. 420, 427-33 (1980). If the language of the aggravating factor itself is too vague to provide guidance to the sentencer, it must then be determined whether the state courts have adopted a limiting construction of the aggravating factor; and if so, whether the limiting construction is constitutionally sufficient, Creech, 113 S. Ct. at 1541, is actually enforced and has been actually applied in the defendant's case. Richmond, supra. In order for a limiting construction to provide guidance to a sentencing judge, the aggravating factor must have been narrowed adequately by the state appellate court prior to the sentencing decision. Richmond, 121 L.Ed.2d at 420. In addition, for a limiting construction to be constitutionally sufficient, it must "provide a principled basis" for distinguishing "those who deserve capital punishment from those who do not": "If the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm." Creech, 113 S. Ct. at 1542 (emphasis added) (citations omitted). In order to comply with this requirement, the state courts must "adhere[] to a single limiting construction." Id. at 1544. Finally, if the state courts have adopted an adequate limiting construction, they must not apply it arbitrarily, i.e., they may not weigh the aggravating factor if no reasonable sentencer could find that the factor, as limited, applies to the facts of the case before the court. Lewis v. Jeffers, 497 U.S. 764, 781 (1990).

Applying these standards, there is no question that the language of Florida's "especially heinous, atrocious, cruel" aggravating circumstance does not provide any guidance to the sentencer -- the United States Supreme Court has now so held. Espinosa, 112 S. Ct. at 2928; see also Shell v. Mississippi, 498 U.S. 1 (1990). As demonstrated below, at the time Mr. Johnson was sentenced to die, this Court did not enforce a limiting construction on the "heinousness" aggravating factor, but reviewed facts (often, as this Court's opinions show, randomly) to determine whether they fit one or more "pejorative adjectives" that "describe a crime as a whole." Creech, 113 S. Ct. at 1541. Accordingly, at the time of sentencing, there was no "constitutionally sufficient" limiting construction of the aggravating factor, and the trial judge's weighing of the factor "invalidated" the death sentence. Stringer, 112 S. Ct. at 1139. Moreover, as Justice England held, and as many of the trial judge's own comments indicated, on the facts of this case no rational fact finder could have found the factor under an adequate limiting construction.

2. Marvin Johnson's Case

Central to the United States Supreme Court's capital punishment jurisprudence is the principle that an aggravating circumstance must "genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 462 U.S. 862, 877 (1983). To do this, the aggravator must "provide a principled basis" for distinguishing those who deserve death from those who do not. "If the sentencer fairly could conclude that an aggravating circumstance applies to

every defendant eligible for the death penalty, the circumstance is constitutionally infirm." Creech, 113 S. Ct. at 1542. For a limiting construction of an otherwise vague aggravating factor to be constitutionally sufficient, the limiting construction that relies on something more than "pejorative adjectives" and must truly narrow the class of those eligible for the death penalty. Without such a limiting construction, the sentencer is left free to apply the aggravating factor to virtually any case. At the time of Mr. Johnson's sentencing, this Court had not enforced a limiting construction of the "heinousness" aggravating factor. The trial court was free to apply -- and did in fact apply -- unfettered discretion in finding and weighing the aggravator.

In Proffitt v. Florida, 428 U.S. 246 (1976), the United States Supreme Court approved Florida's heinousness aggravating factor on the understanding that the factor was limited to "the conscienceless or pitiless crime which is unnecessarily torturous to the decedent." Proffitt, 428 U.S. at 255-56; see also Lewis v. Jeffers, 497 U.S. 764, 775 (1990). The Proffitt Court's understanding of the aggravator was based on its reading of Dixon v. State, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974). In light of Sochor v. Florida and Espinosa v. Florida, this Court has now recognized that without the limiting construction, the heinousness aggravating factor is invalid. Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992) ("the crime must be both conscienceless or pitiless and unnecessarily torturous to the decedent.") (emphasis original). See also Elledge v. State, 613 So. 2d 434 (Fla. 1993) (disapproving reliance on the

aggravator that omitted the "unnecessarily torturous to the decedent" language); Cannady v. State, 620 So. 2d 165, 169 (Fla. 1993) (holding that the heinousness aggravating factor applies only to "torturous" murders, and that if applied to a sudden killing by gunshot it would apply to most, if not all first-degree murders, and would therefore be questionable under the eighth amendment.).

Prior to Sochor and Espinosa, however, and at the time of Mr. Johnson's sentencing, this Court often failed to enforce the Dixon/Proffitt "unnecessarily torturous" limiting construction, or any other limiting construction, to the heinousness aggravator. In numerous cases, this Court approved findings of the aggravator because the crime was "evil," "wicked," "atrocious" or some similarly vague term standing alone. See, e.g., Hargrave v. State, 366 So. 2d 1, 5 (Fla. 1979) (crime was extremely wicked and shockingly evil); Henry v. State, 328 So. 2d 430, 432 (Fla. 1976) (crime was atrocious and heinous); Spinkellink v. State, 313 So. 2d 666, 668, 671 (Fla. 1975) (shooting of decedent to recover money stolen from defendant was "especially cruel, atrocious and heinous"). Such characterizations of a crime are axiomatic examples of "pejorative adjectives ... that describe a crime as a whole and that [the United States Supreme] Court has held to be unconstitutionally vague." Creech, 113 S.Ct. at 1541. As a result, they cannot supply a constitutionally sufficient limiting construction.

At times, this Court also relied on a formulation of heinousness derived from Dixon but not approved in Proffitt: that a crime "accompanied by additional acts setting it apart from other capital

felonies," Dixon, 283 So. 2d at 9, is "especially heinous." However, this formulation also provided no guidance to trial judges, as this Court simply would decide whether there were, see, e.g., Hoy v. State, 353 So. 2d 826, 833 (Fla. 1977), or were not, see, e.g., Cooper v. State, 336 So. 2d 1133, 1141 (Fla. 1976), sufficient "additional acts" for the crime as a whole to be characterized as "especially heinous." Thus, this formulation removed all boundaries from the circumstance since the nature of the "additional acts" that could be used to find heinousness was completely undefined and open-ended.

Relying on general facts of the crime, as this Court consistently permitted sentencing judges to do at the time Mr. Johnson was sentenced, allows the sentencer uncontrolled discretion to impose death based solely on the sentencer's subjective reactions, and does not allow for a constitutional narrowing of the class of those eligible for a death sentence.

> We agree that all of the circumstances surrounding a murder must be examined to determine whether the murder was "especially heinous, atrocious or cruel," but there must be some objective standard that specifies which circumstances support such a determination. Consideration of all the circumstances is permissible; reliance upon all the circumstances is not . . . . No objective standards limit that discretion.

Cartwright v. Maynard, 822 F.2d 1477, 1491 (10th Cir. 1987) (en banc), aff'd, Maynard v. Cartwright, 486 U.S. 356 (1988). Allowing trial judges to rely on "all the circumstances" of the crime directly conflicts with the holdings of precedents such as Cartwright, Godfrey and Creech.

Given that this Court had not consistently enforced an adequate limiting construction of the "especially heinous" aggravator at the time of Mr. Johnson's sentencing, it is not surprising that the aggravator was arbitrarily and inconsistently applied to cases with materially identical fact patterns. In fact, this Court was unable to apply the factor consistently in the same case. In Raulerson v. State, 358 So. 2d 826 (Fla. 1978) (Raulerson I), the defendant shot to death a policeman who had interrupted a felony. This Court rejected a claim that the decedent's instantaneous death meant that the crime was not heinous, citing the facts that the murder was committed during the course of a robbery and rape, and that the deceased was aware that his life was in danger during an exchange of gunshots before the fatal shot. Raulerson I, 358 So. 2d at 834. In Raulerson v. State, 420 So. 2d 567 (Fla. 1982) (Raulerson II), the Court, however, held precisely the opposite, citing cases in which it struck the heinousness factor because death was quick. Raulerson II, 420 So. 2d at 572.

Raulerson I (overruled in Raulerson II) is the only case prior to Johnson where the heinousness aggravator was approved although the victim died instantaneously from a single gunshot wound. The Johnson prosecutor cited Raulerson I (subsequently overruled in Rawlerson II) as a reason why the trial judge should find and rely on heinousness aggravator. R. 1755.

The only conclusion that can be reached in light of the lack of an adequate limiting construction of the aggravating factor and the flatly contradictory results of factually indistinguishable cases

is that, at the time Mr. Johnson was sentenced, trial courts decided whether the aggravator had been established and this Court reviewed those decisions based on a general "feeling" about the facts. That is not enough -- such an approach fails to give the sentencer any meaningful guidance in making the decision whether to allow life or impose death, and does not constitutionally narrow the class of death-eligible individuals. Sentencers were free to make the kind of arbitrary and capricious decisions concerning the ultimate penalty that were condemned by the United States Supreme Court over twenty years ago in Furman v. Georgia, 408 U.S. 238 (1972), and just recently in a line of cases concerning the proper application of aggravating factors. Espinosa; Sochor; Stringer v. Black, 112 S. Ct. 1130 (1992). In the absence of a clear, objective limit on the vague words of Florida's heinousness aggravator, Mr. Johnson's death sentence, imposed in reliance on that aggravator, is unconstitutional.

3. The Trial Judge Failed to Apply A Limiting Construction to the Aggravating Circumstance

Trial testimony established that the robber was leaving the pharmacy when the pharmacist grabbed a hidden gun and started shooting. The pharmacist continued to shoot until his gun was emptied. Johnson v. State, 393 So. 2d at 1071. According to the State's theory of the case, one of the bullets fired by the pharmacist hit the robber in the hip, where it lodged in the pelvis. See R. 1146-48, 1170-71, 1175-76, 1181, 1223-39.[11] The robber shot the

[11]The State's theory was based on evidence that one of the bullets fired by the pharmacist was fired from short range and towards the ground at the robber, who was on all fours, and a crime scene reconstruction that according to the State showed that one of the

pharmacist once in the chest and the pharmacist died instantly. Johnson, 393 So. 2d at 1071.

The trial judge found the heinousness aggravating factor on the following basis:

> While the method and manner of the murder was not especially heinous, except to the extent that any murder is heinous, the murder was atrocious and cruel and was committed to reek (sic) revenge upon Woodrow Moulton . . . .

R. 1722 (emphasis added). The trial judge found that the killing was "not especially heinous." He also noted that the killing did not "inflict[] pain" because it was "pretty brief" and the victim "died immediately." R. 1625. Therefore, it is clear that the trial judge did not find that the murder was "designed to inflict a high degree of pain" or that it was "torturous." No rational fact finder could make such a finding in this case, as the State itself admitted. R. 1548.

The trial court did find that the murder was "atrocious and cruel." It must be assumed, see Zeigler v. Dugger, 523 So. 2d 419, 420 (Fla. 1988)(a trial judge is presumed to follow his jury instructions), that the trial judge relied on the definitions of those terms that he gave to the jury. R. 1567. ("Atrocious means outrageously wicked and . . . vile", cf. Godfrey [finding such a construction unconstitutionally vague]; "Cruel means designed to inflict a high degree of pain; utter indifference to or even enjoyment of the suffering of others; pitiless.", cf. Maynard v. Cartwright, [finding such a construction unconstitutionally vague]). Those

---

bullets fired by the pharmacist was unaccounted for.

definitions do not contain any adequate limiting construction of the aggravating factor. Shell v. Mississippi, 498 U.S. 1 (1990); Atwater v. State, 626 So. 2d 1325, 1328-29 (Fla. 1993). Nor is there reference in the findings to any other limiting construction. Rather, the findings merely recite characterizations of the facts that in no way reflect a narrowing of the class of death eligible defendants. Such an ad hoc decision to apply and weigh an aggravating factor violates the eighth amendment and invalidates the death sentence.

4. No Rational Fact Finder Could Find the Heinousness Aggravating Factor if an Adequate Limiting Construction Were Applied

The limiting construction this Court now consistently enforces, had it been applied in Johnson, would have required the sentencer to determine that the crime was "unnecessarily torturous to the victim" before finding and weighing the heinousness aggravating factor. As this Court explained in Richardson v. State, 604 So.2d 1107, 1109 (Fla. 1992) (emphasis in original), the aggravating factor only applies if the crime is "both conscienceless or pitiless and unnecessarily torturous to the victim."

No rational fact finder could find that this crime was unnecessarily torturous to the victim. Until moments, if at all, before the fatal shot, the decedent did not know that he would be killed. He was killed by a single shot to the heart, and "died immediately." R. 1625. The prosecutor agreed that there was no "unnecessarily torturous pain on the victim." R. 1609. The trial judge himself also agreed, noting that there was no evidence that great pain or torture was inflicted, R. 1625, and that the "method

and manner" of the homicide was not "heinous". R. 1722. There was no basis for finding that this was a torturous killing. On these facts, the trial judge's finding of the heinousness aggravating factor was arbitrary, capricious and invalid.

5. Mr. Johnson Is Entitled to Review Under *Espinosa, Creech, Richmond and Lewis v. Jeffers.*

Espinosa invalidated Florida's application of this very aggravator and overruled a substantial body of precedent from this Court upholding this aggravator.[12] Recognizing this fact, this Court held in James v. State, 615 So. 2d 668 (Fla. 1993), that Espinosa must be retroactively applied where the vagueness of the aggravating factor was objected to at trial and the issue was raised on appeal -- as this Court concluded, "it would not be fair to deprive" such petitioners of the benefit of what Espinosa recognized. James, 615 So. 2d at 669.

Mr. Johnson's counsel objected to the vagueness of the heinousness aggravating factor and to its applicability at trial and raised the issue on appeal. He argued that the homicide was a shooting in a felony murder situation, and that "if this case is out of the category of the normal capital crime, it's out of the category . . . in the other direction from" crimes to which the "heinousness" factor applies. R. 1732. He raised the argument that if the aggravator applied to Mr. Johnson's case, the aggravating factor would

---

[12]E.g., Cooper v. State, 336 So. 2d 1133, 1140-41 (Fla. 1976), and Smalley v. State, 546 So. 2d 720, 722 (Fla. 1989) (ruling that the standards of Godfrey v. Georgia, 446 U.S. 420 (1980), and Maynard v. Cartwright, 486 U.S. 356 (1988), are inapplicable to Florida); Occhicone v. State, 570 So. 2d 902, 906 (Fla. 1990)(same).

be overbroadly applied to virtually all first degree murders, in violation of the eighth amendment requirement that aggravating factors genuinely narrow the class of persons eligible for the death penalty. See, e.g., R. 1731 (crime not heinous, atrocious and cruel and aggravator would be overbroadly applied where the robber had no prior intent to kill anyone and had himself been wounded at time of killing); R. 1734 (manner of killing much less aggravated than cases involving "horrible things that people have done to other people where the death penalty is not imposed."). See also Cannady v. State, 620 So. 2d 165, 169 (Fla. 1993) (agreeing with Mr. Johnson's counsel's analysis -- that the aggravator is overbroadly applied in circumstances such as those involved in this case).

Mr. Johnson's then counsel argued on appeal that the aggravating factor was not applicable, and that applying the factor to this case would be arbitrary and overboard. See Johnson v. Dugger, 523 So. 2d 161, 162 (Fla. 1988) (rejecting claim of ineffective assistance of appellate counsel on the grounds that this issue was "raised on direct appeal").

Thus, the objection to the vagueness and applicability of the "especially heinous" aggravating factor was preserved at trial and raised on appeal. As in James, "it would not be fair" to deprive Mr. Johnson of the benefit of Espinosa and the other decisions that have made clear that there was a violation of the eighth amendment when the trial judge weighed the "especially heinous" aggravating factor.

6. The Constitutional Error That Infected the Trial Judge's Weighing Process Was Not Harmless Beyond a Reasonable Doubt

Two of the aggravating factors weighed by the trial judge -- the "heinousness" aggravating factor and the "great risk of death to many" aggravating factor -- were invalid. This Court has never considered the issue of whether those errors were harmless. In fact, the three-Justice lead opinion for death affirmed with the belief that the "heinousness" factor applied. Johnson v. State, 393 So. 2d at 1073-74. Justice England, who found the "heinousness" factor invalid, neither discussed harmless error nor made a constitutionally adequate finding concerning harmless error. Id. at 1074 (England, J., concurring).

No such finding could have been made. Two of the aggravating factors weighed by the trial court -- and the two most weighty -- were invalid. In deciding whether to impose death or life in the absence of those circumstances, the trial judge would have been required to weigh the remaining aggravating circumstances against the uncontroverted and extensive nonstatutory mitigation and the jury's verdict of life. Lewis v. State, 398 So. 2d 432, 438-39 (Fla. 1981). There is no way for this Court to know how the trial judge would have measured those scales. The only way to know whether a judge whose consideration was uninfected by invalid aggravation would have imposed life or death is to conduct a new sentencing proceeding. Mr. Johnson is entitled to relief.

## CLAIM II

### THE EXECUTION OF MARVIN JOHNSON WOULD CONSTITUTE A CRUEL OR UNUSUAL PUNISHMENT, IN VIOLATION OF ARTICLE I, § 17 OF THE FLORIDA CONSTITUTION[13]

Florida's Constitution is a primary and independent source of individual rights that exceeds the rights granted by the United States Constitution. Traylor v. State, 596 So. 2d 957 (Fla. 1992). Article I, § 17 of the Florida Constitution prohibits "cruel or unusual" punishments. Unlike the United States Constitution's "cruel and unusual" punishments clause, Florida's provision is worded in the disjunctive. This difference has substantive significance -- Article I, § 17 prohibits imposing the death penalty if to do so would be either "cruel" or "unusual." Allen v. State, No. 79,003, slip op. at 8 and n.5 (Fla. Mar. 24, 1994); Tillman v. State, 591 So. 2d 167, 169 n.2 (Fla. 1991).

In Allen, this Court held that it would be cruel or unusual, in violation of Art. I, § 17, to impose the death penalty on a defendant who was under sixteen at the time the crime was committed. Allen, slip op. at 8. This Court considered several pertinent facts in arriving at the conclusion that it would be cruel or unusual to execute such a defendant. The Court noted that the execution of such death sentences is rare, and that such death sentences -- for various reasons -- have been generally reversed. Allen, slip op. at 7-8 and n.4. The Court did not inquire into the reasons for these facts, holding instead that "the relevant fact we must confront" is the

---

[13]Mr. Johnson's execution would also be so freakish, for the reasons set forth herein, as to violate the Eighth Amendment to the United States Constitution.

rarity of death being imposed and upheld in such cases. Id., slip op. at 8. In light of this fact (rarity), the Court held that it would be cruel or unusual for some small number of similarly-situated defendants to be executed "while the vast majority of others are not, even where the crimes are similar." Id., slip op. at 8-9.

What this Court said about young defendants in Allen is equally applicable today to persons, like Mr. Johnson, who have received jury verdicts of life. The relevant fact that this Court must confront here is that defendants who receive a jury verdict of life are almost never executed. Prior to Furman v. Georgia, 408 U.S. 238 (1972), of course, a defendant who received a jury verdict of life could not be executed. § 775.082(1), Fla. Stat. (1971) (providing for mandatory sentence of life imprisonment where a majority of the jury so recommended). Since Florida's death penalty statute was amended to permit trial judge overrides of jury life verdicts, only three persons who received a life verdict have actually been executed -- Ernest Dobbert, Beauford White and Bobby Francis.

Following review by this court on direct appeal, only a minuscule number of persons with a jury-override death sentence remain under sentence of death. Since 1974, this Court has rendered 140 decisions on direct appeal, involving 129 individuals, in cases in which a death sentence was imposed following a jury life verdict. In only 40 cases, involving 37 individuals, was the death sentence affirmed by this Court on direct appeal.

Then, in post-conviction proceedings, over half of these 37 individuals obtained relief from the death sentence. Only fourteen

individuals, including Marvin Johnson, whose jury life verdicts were now overridden remain under sentence of death. Of the remaining 115 (89% of the total) almost all have received a life sentence or had their convictions reversed (a few are awaiting resentencing proceedings). See Appendix A. And, of course, there is a likelihood that many and perhaps all of these 14 will obtain relief in post-conviction proceedings.

These figures become even more significant when viewed in conjunction with those concerning homicide defendants whose jury life verdicts are accepted by the trial judge. Although it is impossible to determine the precise number of persons who, following Florida's enactment of its current death penalty statute in December, 1972, have been sentenced to life in prison after a jury life verdict, some estimates may be made. Figures from the Department of Corrections show that since 1980, the earliest point at which computerized records are available, some 2,000 persons have been sentenced to life imprisonment as principals in first-degree murder cases. See Appendix B. Even accounting for those life sentences imposed as a result of guilty pleas, any small number of death-to-life overrides, and cases in which the death penalty was not sought, it is clear that there are hundreds of cases in which jury life verdicts were accepted by the trial judge. These cases stand in contrast to the rare cases in which defendants who received life verdicts were actually executed or might still be executed.

These facts bear out that under Allen and Art. I, § 17, the execution of Marvin Johnson would be "unusual" by any definition and

thus would violate the Florida Constitution. The unusual nature of this pending execution also sheds light on its cruelty.

The unusual and indeed cruel nature of the imposition of the death penalty on Mr. Johnson is highlighted by the grave doubts that numerous judges have harbored concerning the validity of the override in his case, and the fact that at the time Mr. Johnson's sentence was reviewed, this Court did not give jury override cases the same searching review that it now provides. Three (3) Justices of this Court, including two who are now sitting -- Justices Overton and McDonald -- believed that there was a "reasoned judgment by the jury in favor of a life sentence," Johnson, 393 So. 2d at 1075 (Sundberg, C.J., dissenting), based on the facts, inter alia, that the manner of the homicide was not especially aggravated; that the victim had initiated the shooting; that other persons present were spared, id.; and that the psychologist's testimony supported the conclusion that the killing was "an unplanned reaction to being fired at." Id. at 1076 (McDonald and Overton, JJ., dissenting).

Since Mr. Johnson's direct appeal, the law regarding the propriety of the jury override has evolved to the extent that there is no doubt today concerning the wrongfulness of the override in this case. The original dissenters' opinions accurately reflect the current state of the law of overrides. In 1988, two more Justices of this Court agreed with Justices Sundberg, Overton and McDonald that there was a reasonable basis for the jury life verdict and that this override death sentence was wrong under this Court's current

standards. Johnson v. Dugger, 523 So. 2d 161, 163 (Fla. 1988) (Barkett and Kogan, JJ.).

Then, only a year after Johnson v. Dugger was decided, this Court acknowledged that prior to 1986 -- during the time period in which it affirmed Mr. Johnson's death sentence -- it had failed to apply Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975), consistently. As this Court explained in Cochran v. State, 547 So. 2d 928, 933 (Fla. 1989) (emphasis added):

> During 1984-85, we affirmed on direct appeal trial judge overrides in eleven of fifteen cases, seventy-three percent. By contrast, during 1986 and 1987, we have affirmed overrides in only two of eleven cases, less than twenty percent. This current reversal rate of over eighty percent is a strong indicator to judges that they should place less reliance on their independent weighing of aggravation and mitigation. . . .
>
> . . . . Clearly, since 1985 the Court has determined that Tedder means precisely what it says, that the judge must concur with the jury's life recommendation unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Tedder, 322 So. 2d at 910.

As this Court explained in Cochran, override cases decided in 1984-86 or earlier are "not indicative of what the present court does . . . ." Id. at 933. In light of Cochran, the following facts are indisputable: (1) at least half of the members of the current Court believe that an injustice was done to Mr. Johnson when his death sentence was affirmed and (2) at least half of the Court also believes that that injustice was the result of the Court's former practice, now corrected, of not treating Tedder as "meaning what it says."

Five (5) members of the Florida Supreme Court and six (6) federal Judges have explained that Marvin Johnson's override death sentence is questionable, unfair or wrong. See Johnson, 393 So. 2d at 1075-76 (Overton, McDonald and Sundberg, JJ.); Johnson, 523 So. 2d at 163 (Barkett and Kogan, JJ.); Johnson v. Dugger, 911 F.2d 440 (11th Cir. 1990) (Anderson and Kravitch, JJ.); Johnson v. Singletary, 938 F.2d 1166, 1186, 1196 (11th Cir. 1991) (en banc) (Tjoflat, C.J., and Johnson, Clark, Anderson and Kravitch, JJ.); Johnson v. Wainwright, No. TCA 82-0875, slip op. at 53 (N.D. Fla. 1985) (Hoeveler, J.) (Under Tedder, this case "was not one for which execution was appropriate"). This case strikingly demonstrates that "appealing a 'life override' under Florida's capital sentencing scheme [has been] akin to Russian Roulette." Engle v. State, 495 U.S. 924, 928 (1988) (Marshall and Brennan, JJ.).

In light of the statistics set forth above, it is freakish, cruel and unusual enough for any person who received a jury life verdict in Florida to be executed. It would be even more freakish to execute Marvin Johnson, where numerous jurists agree that it would be unjust to execute him, and where his death sentence was only affirmed because this Court misapplied Tedder.

Mr. Johnson's case is unique among override cases: it is the only such case in which the override still stands despite a finding by a majority of the Court that last reviewed the case that the override was improper. This Court's analysis in Allen counsels that Mr. Johnson's execution should not be allowed.

The execution of a person who does not deserve to die would be the ultimate injustice. The writ of habeas corpus lies to prevent exactly this type of injustice. Habeas corpus relief is "freely grantable of right to those unlawfully deprived of their liberty in any degree," State v. Bolyea, 520 So. 2d 562, 564 (Fla. 1988), and the writ of habeas corpus allows this Court to "issue such appropriate orders as will do justice." Anglin v. Mayo, 88 So. 2d 918, 920 (Fla. 1955). This Court should issue the writ to prevent the unjust, cruel and unusual execution of Marvin Johnson.

## CONCLUSION

For the reasons stated herein, Petitioner prays that the Court stay his execution and vacate his death sentence.

Respectfully submitted,

Billy H Nolas (for all counsel)

BILLY H. NOLAS
Fla. Bar No. 806812
JULIE D. NAYLOR
Fla. Bar No. 794351
P.O. Box 4905
Ocala, Florida 32678-4905
(904) 620-0458

STEVEN J. UHLFELDER
Fla. Bar No. 139581
Holland & Knight
Suite 600 Barnett Bank Building
315 South Calhoun Street
Post Office Drawer 810
Tallahassee, FL 32302
(904) 224-7000

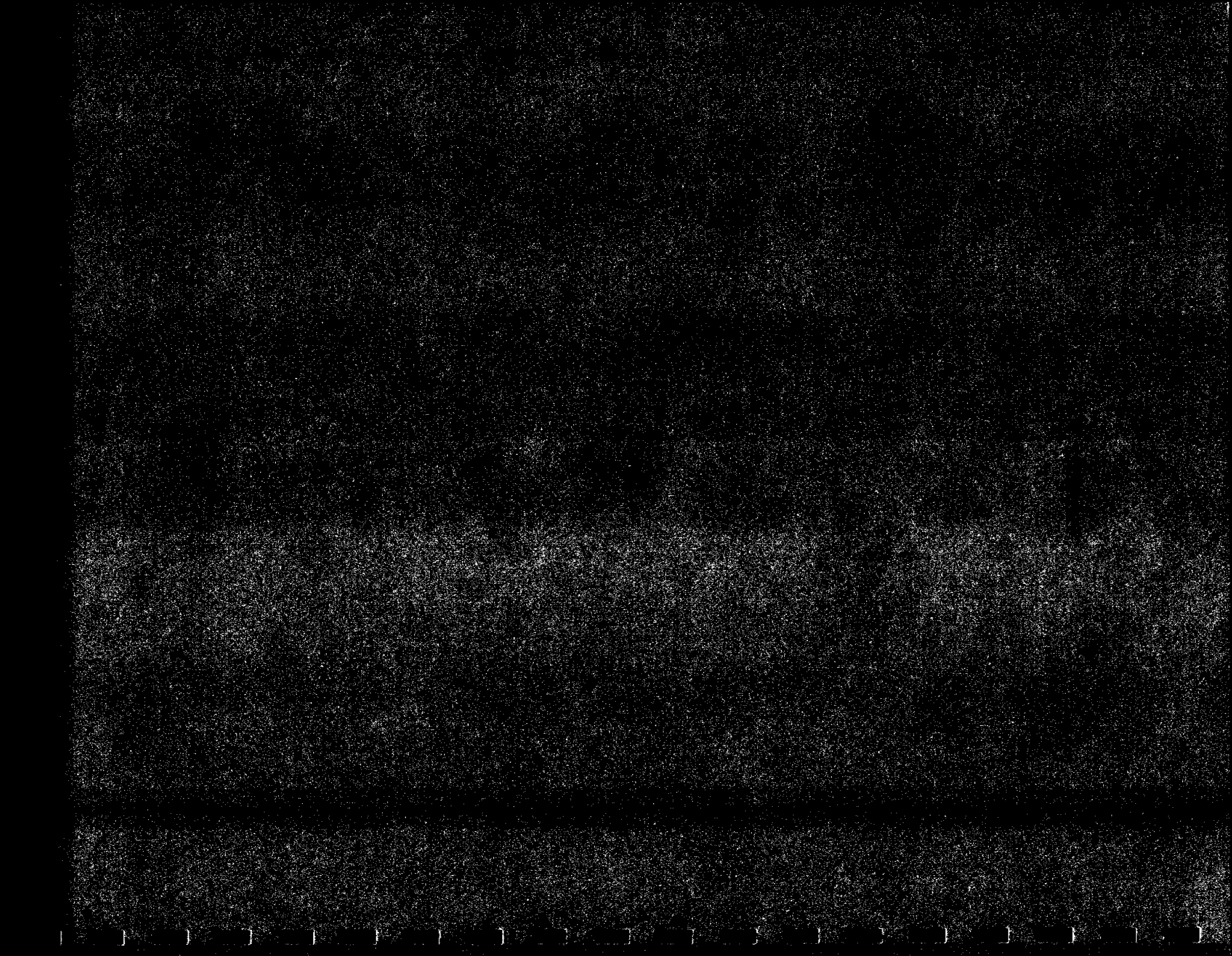
Counsel for Petitioner,
Marvin Edward Johnson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been hand delivered to Mark Menser, Assistant Attorney General, Department of Legal Affairs, The Capitol, Tallahassee, FL, this 13th day of May, 1994.

Billy Nash

Attorney



*FLORIDA SUPREME COURT LIFE OVERRIDE DECISIONS*
*ON DIRECT APPEAL, from 1974 through May 5, 1994*

Since 1974, the Florida Supreme Court has rendered 140 decisions on direct appeal in capital cases in which a sentence of death was imposed by the trial court following a jury recommendation of life. These 140 decisions involved 129 individuals since in one case, (Ziegler), the override has been affirmed twice by the court, once following his conviction and sentence and later following a resentencing; in two cases (Dobbert and Barclay), the override was affirmed on direct appeal and again following a Gardner remand; in three cases (Spaziano, Porter and Engle), the override was affirmed after the FSC had remanded the matter for further sentencing proceedings; and in five cases (Douglas, Barclay, Buford, Stevens and McCrae), the court imposed a life sentence on direct appeal after it had initially affirmed the override (twice for Barclay), but the sentence had been subsequently set aside in collateral post conviction proceedings.

Of the total of 140 jury override decisions rendered on direct appeal, the FSC has set aside the death sentence and imposed a sentence of life in 83, reversed the conviction in 14, remanded for further sentencing proceedings in five, and affirmed the override in 40. The numbers total 142 because in one case, Mac Wright (1991), the court reversed the conviction and precluded a death sentence on retrial, and in another, Robert Craig (1987), the court "affirmed" the override but remanded for a new sentencing proceeding for other reasons. It should also be noted that of the 40 affirmances, two cases, Dobbert and Barclay, were in which the override was affirmed a second time following a Gardner remand hearing. So technically they are not separate override decisions given that the limited purpose of the remand was to determine if the trial court considered matters in sentencing not disclosed to the capital defendant and his counsel. The 40 affirmances then involve 37 individuals given that the overrides were "affirmed twice" in Dobbert, Barclay and Ziegler. The year by year breakdown of affirmances,

life sentences, reversals, and remands for further sentencing is set out below. Following this breakdown is a listing of this court's direct appeal jury override decisions. It should be noted in the following cases, that death was also imposed for a murder in which the jury recommended death; Groover (1984), Craig (1987), Amos (1989) and Garcia (1990) and that in the following cases, the FSC reversed the conviction without referencing the fact that the case involved an override, Jones (1985) and Amos (1989). In light of double jeopardy considerations, see Wright (1991), one would expect the FSC to now address the propriety of the override, irrespective of whether a reversal of the conviction is warranted.

| AFFIRMANCES, LIFE SENTENCES, REVERSALS, AND REMANDS | | | | | |
|---|---|---|---|---|---|
| Year | Life Granted | Death Affirmed | Reversed | Remanded | Total |
| 1974 | 1 | 0 | 0 | 0 | 1 |
| 1975 | 3 | 2 | 0 | 0 | 5 |
| 1976 | 4 | 2 | 0 | 0 | 6 |
| 1977 | 3 | 1 | 0 | 0 | 4 |
| 1978 | 2 | 1 | 0 | 0 | 3 |
| 1979 | 2 | 1 | 0 | 0 | 3 |
| 1980 | 3 | 0 | 1 | 0 | 4 |
| 1981 | 8 | 6 | 0 | 3 | 17 |
| 1982 | 4 | 3 | 2 | 0 | 9 |
| 1983 | 7 | 3 | 1 | 1 | 12 |
| 1984 | 2 | 7 | 1 | 0 | 10 |
| 1985 | 2 | 4 | 2 | 0 | 8 |
| 1986 | 4 | 1 | 3 | 0 | 8 |
| 1987 | 5 | 2 | 0 | 1 | 8 |
| 1988 | 8 | 1 | 1 | 0 | 10 |
| 1989 | 5 | 1 | 1 | 0 | 7 |
| 1990 | 5 | 0 | 1 | 0 | 6 |
| 1991 | 10 | 1 | 1 | 0 | 12 |
| 1992 | 4 | 3 | 0 | 0 | 7 |
| 1993 | 0 | 1 | 0 | 0 | 1 |
| 1994 | 1 | 0 | 0 | 0 | 1 |
| TOTALS | 83 | 40 | 14 | 5 | 142 |

## *FSC JURY OVERRIDE DECISIONS*

*1974:*
Taylor v. State, 294 So. 2d 648 (Fla. 1974). Life sentence on appeal.

*1975:*
Gardner v. State, 313 So. 2d 675 (Fla. 1975). Affirmed.
Sawyer v. State, 313 So. 2d 680 (Fla. 1975). Affirmed.

Slater v. State, 316 So. 2d 539 (Fla. 1975). Life sentence on appeal.
Swan v. State, 322 So. 2d 485 (Fla. 1975). Life sentence on appeal.
Tedder v. State, 322 So. 2d 908 (Fla. 1975). Life sentence on appeal.

*1976:*
Douglas v. State, 328 So. 2d 18 (Fla. 1976). Affirmed.

Chambers v. State, 339 So. 2d 204 (Fla. 1976). Life sentence on appeal.
Jones v. State, 332 So. 2d 615 (Fla. 1976). Life sentence on appeal.
Provence v. State, 337 So. 2d 783 (Fla. 1976). Life sentence on appeal.
Thompson v. State, 328 So. 2d 1 (Fla. 1976). Life sentence on appeal.

Dobbert v. State, 328 So. 2d 433 (Fla. 1976). Affirmed, but later remanded for Gardner hearing, see 1979.

*1977:*
Barclay v. State, 343 So. 2d 1266 (Fla. 1977). Affirmed, but later remanded for Gardner hearing, see 1981.

Burch v. State, 343 So. 2d 831 (Fla. 1977). Life sentence on appeal.
McCaskill v. State, 344 So. 2d 1276 (Fla. 1977). Life sentence on appeal.
Williams v. State, 344 So. 2d 1276 (Fla. 1977). Life sentence on appeal.

*1978:*
Hoy v. State, 353 So. 2d 826 (Fla. 1978). Affirmed.

Buckrem v. State, 355 So. 2d 111 (Fla. 1978). Life sentence on appeal.
Shue v. State, 366 So. 2d 387 (Fla. 1978). Life sentence on appeal.

*1979:*
Dobbert v. State, 375 So. 2d 1069 (Fla. 1979). Affirmed after remand.

Brown v. State, 367 So. 2d 616 (Fla. 1979). Life sentence on appeal.
Malloy v. State, 382 So. 2d 1190 (Fla. 1979). Life sentence on appeal.

*1980:*

Neary v. State, 384 So. 2d 881 (Fla. 1980). Life sentence on appeal.
Phippen v. State, 389 So. 2d 991 (Fla. 1980). Life sentence on appeal.
Williams v. State, 386 So. 2d 538 (Fla. 1980). Life sentence on appeal.

Hall v. State, 381 So. 2d 683 (Fla. 1980). Conviction reversed.

*1981:*

Barclay v. State, 411 So. 2d 1310 (Fla. 1981). Affirmed.
Buford v. State, 403 So. 2d 943 (Fla. 1981). Affirmed.
Johnson v. State, 393 So. 2d 1069 (Fla. 1981). Affirmed.
McCrae v. State, 395 So. 2d 1145 (Fla. 1981). Affirmed.
White v. State, 403 So. 2d 331 (Fla. 1981). Affirmed.
Ziegler v. State, 402 So. 2d 365 (Fla. 1981). Affirmed.

Lewis v. State, 398 So. 2d 432 (Fla. 1981). Remand for judge sentencing.
Spaziano v. State, 393 So. 2d 1119 (Fla. 1981). Remand for judge sentencing.
Porter v. State, 400 So. 2d 5 (Fla. 1981). Remand for Gardner hearing.

Barfield v. State, 402 So. 2d 377 (Fla. 1981). Life sentence on appeal.
Goodwin v. State, 405 So. 2d 170 (Fla. 1981). Life sentence on appeal.
Jacobs v. State, 396 So. 2d 713 (Fla. 1981). Life sentence on appeal.
McKennon v. State, 403 So. 2d 389 (Fla. 1981). Life sentence on appeal.
Odom v. State, 403 So. 2d 936 (Fla. 1981). Life sentence on appeal.
Smith v. State, 403 So. 2d 933 (Fla. 1981). Life sentence on appeal.
Stokes v. State, 403 So. 2d 377 (Fla. 1981). Life sentence on appeal.
Welty v. State, 402 So. 2d 1159 (Fla. 1981). Life sentence on appeal.

*1982:*

Bolender v. State, 422 So. 2d 833 (Fla. 1982). Affirmed.
Miller v. State, 415 So. 2d 1262 (Fla. 1982). Affirmed.
Stevens v. State, 419 So. 2d 1058 (Fla. 1982). Affirmed.

Gilvin v. State, 418 So. 2d 996 (Fla. 1982). Life sentence on appeal.
McCampbell v. State, 421 So. 2d 1072 (Fla. 1982). Life sentence on appeal.
McCray v. State, 416 So. 2d 804 (Fla. 1982). Life sentence on appeal.
Walsh v. State, 418 So. 2d 1000 (Fla. 1982). Life sentence on appeal.

Bryant v. State, 412 So. 2d 347 (Fla. 1982). Conviction reversed.
Jaramillo v. State, 417 So. 2d 257 (Fla. 1982). Conviction reversed.

*1983:*
Routly v. State, 440 So. 2d 1257 (Fla. 1983). Affirmed.
Porter v. State, 429 So. 2d 293 (Fla. 1983). Affirmed after remand.
Spaziano v. State, 433 So. 2d 508 (Fla. 1983). Affirmed after remand.

Engle v. State, 438 So. 2d 803 (Fla. 1983). Remand for judge resentencing.

Cannady v. State, 427 So. 2d 723 (Fla. 1983). Life sentence on appeal.
Hawkins v. State, 436 So. 2d 44 (Fla. 1983). Life sentence on appeal.
Herzog v. State, 439 So. 2d 1372 (Fla. 1983). Life sentence on appeal.
Norris v. State, 429 So. 2d 688 (Fla. 1983). Life sentence on appeal.
Richardson v. State, 437 So. 2d 1091 (Fla. 1983). Life sentence on appeal.
Washington v. State, 432 So. 2d 44 (Fla. 1983). Life sentence on appeal.
Webb v. State, 433 So. 2d 496 (Fla. 1983). Life sentence on appeal.

Andrews v. State, 443 So. 2d 78 (Fla. 1983). Conviction reversed.

*1984:*
Eutzy v. State, 458 So. 2d 755 (Fla. 1984). Affirmed.
Gorham v. State, 454 So. 2d 556 (Fla. 1984). Affirmed.
Groover v. State, 458 So. 2d 226 (Fla. 1984). Affirmed.
Heiney v. State, 447 So. 2d 210 (Fla. 1984). Affirmed.
Lusk v. State, 446 So. 2d 1038 (Fla. 1984). Affirmed.
Parker v. State, 458 So. 2d 750 (Fla. 1984). Affirmed.
Thomas v. State, 456 So. 2d 454 (Fla. 1984). Affirmed.

Rivers v. State, 458 So. 2d 762 (Fla. 1984). Life sentence on appeal.
Thompson v. State, 456 So. 2d 444 (Fla. 1984). Life sentence on appeal.

Livingston v. State, 458 So. 2d 235 (Fla. 1984). Conviction reversed.

*1985:*
Brown v. State, 473 So. 2d 1260 (Fla. 1985). Affirmed.
Burr v. State, 466 So. 2d 1051 (Fla. 1985). Affirmed.
Francis v. State, 473 So. 2d 672 (Fla. 1985). Affirmed.
Mills v. State, 476 So. 2d 172 (Fla. 1985). Affirmed.

Barclay v. State, 470 So. 2d 691 (Fla. 1985). Life sentence on appeal.
Huddleston v. State, 475 So. 2d 204 (Fla. 1985). Life sentence on appeal.
Jones v. State, 464 So. 2d 547 (Fla. 1985). Conviction reversed.
Brown v. State, 471 So. 2d 6 (Fla. 1985). Conviction reversed.

**1986:**
Echols v. State, 484 So. 2d 568 (Fla. 1986). Affirmed.

Amazon v. State, 487 So. 2d 8 (Fla. 1986). Life sentence on appeal.
Brookings v. State, 495 So. 2d 135 (Fla. 1986). Life sentence on appeal.
Irizarry v. State, 496 So. 2d 822 (Fla. 1986). Life sentence on appeal.
Van Royal v. State, 497 So. 2d 625 (Fla. 1986). Life sentence on appeal.

Nelson v. State, 490 So. 2d 32 (Fla. 1986). Conviction reversed.
Ramos v. State, 496 So. 2d 121 (Fla. 1986). Conviction reversed.
Thompson v. State, 494 So. 2d 203 (Fla. 1986). Conviction reversed.

***1987:***
Craig v. State, 510 So. 2d 857 (Fla. 1987). Affirmed propriety of the override but remanded for new sentencing for other reasons.
Engle v. State, 510 So. 2d 881 (Fla. 1987). Affirmed after remand.

Fead v. State, 512 So. 2d 176 (Fla. 1987). Life sentence on appeal.
Ferry v. State, 507 So. 2d 1373 (Fla. 1987). Life sentence on appeal.
Hansbrough v. State, 509 So. 2d 1081 (Fla. 1987). Life sentence on appeal.
Masterson v. State, 516 So. 2d 256 (Fla. 1987). Life sentence on appeal.
Wasko v. State, 505 So. 2d 1314 (Fla. 1987). Life sentence on appeal.

***1988:***
Torres-Arboledo v. State, 524 So. 2d 403 (Fla. 1988). Affirmed.

Brown v. State, 526 So. 2d 903 (Fla. 1988). Life sentence on appeal.
Burch v. State, 522 So. 2d 810 (Fla. 1988). Life sentence on appeal.
Caillier v. State, 523 So. 2d 158 (Fla. 1988). Life sentence on appeal.
DuBoise v. State, 520 So. 2d 260 (Fla. 1988). Life sentence on appeal.
Harmon v. State, 527 So. 2d 182 (Fla. 1988). Life sentence on appeal.
Holsworth v. State, 522 So. 2d 348 (Fla. 1988). Life sentence on appeal.
Perry v. State, 522 So. 2d 817 (Fla. 1988). Life sentence on appeal.
Spivey v. State, 529 So. 2d 1088 (Fla. 1988). Life sentence on appeal.

Merritt v. State, 523 So. 2d 573 (Fla. 1988). Conviction reversed.

*1989:*
Thompson v. State, 553 So. 2d 153 (Fla. 1989). Affirmed.

Pentecost v. State, 545 So. 2d 861 (Fla. 1989). Life sentence on appeal.
Freeman v. State, 547 So. 2d 125 (Fla. 1989). Life sentence on appeal.
Cochran v. State, 547 So. 2d 928 (Fla. 1989). Life sentence on appeal.
Fuente v. State, 549 So. 2d 652 (Fla. 1989). Life sentence on appeal.
Christian v. State, 550 So. 2d 450 (Fla. 1989). Life sentence on appeal.

Amos v. State, 545 So. 2d 1352 (Fla. 1989). Conviction reversed.

*1990:*
Morris v. State, 557 So. 2d 27 (Fla. 1990). Life sentence on appeal.
Hallman v. State, 560 So. 2d 223 (Fla. 1990). Life sentence on appeal.
Charles Carter v. State, 560 So. 2d 1166 (Fla. 1990). Life sentence on appeal.
Cheshire v. State, 568 So. 2d 908 (Fla. 1990). Life sentence on appeal.
Buford v. State, 570 So. 2d 923 (Fla. 1990). Life sentence on appeal.

Garcia v. State, 568 So. 2d 896 (Fla. 1990). Conviction reversed.

*1991:*
Ziegler v. State, 580 So. 2d 127 (Fla. 1991). Affirmed.

Douglas v. State, 575 So. 2d 165 (Fla. 1991). Life sentence on appeal.
Downs v. State, 574 So. 2d 1095 (Fla. 1991). Life sentence on appeal.
Hegwood v. State, 575 So. 2d 170 (Fla. 1991). Life sentence on appeal.
Dolinsky v. State, 576 So. 2d 271 (Fla. 1991). Life sentence on appeal.
Cooper v. State, 581 So. 2d 49 (Fla. 1991). Life sentence on appeal.
James McCrae v. State, 582 So. 2d 613 (Fla. 1991). Life sentence on appeal.
Mac Wright v. State, 586 So. 2d 1024 (Fla. 1991). New trial ordered as well as life sentence, i.e., double jeopardy precludes a death sentence given that the override was improper.
Donnie Gene Craig v. State, 585 So. 2d 278 (Fla. 1991). Life sentence on appeal.
James Savage v. State, 588 So. 2d 975 (Fla. 1991). Life sentence on appeal.
Michael Bedford v. State, 589 So. 2d 245 (Fla. 1991). Life sentence on appeal.

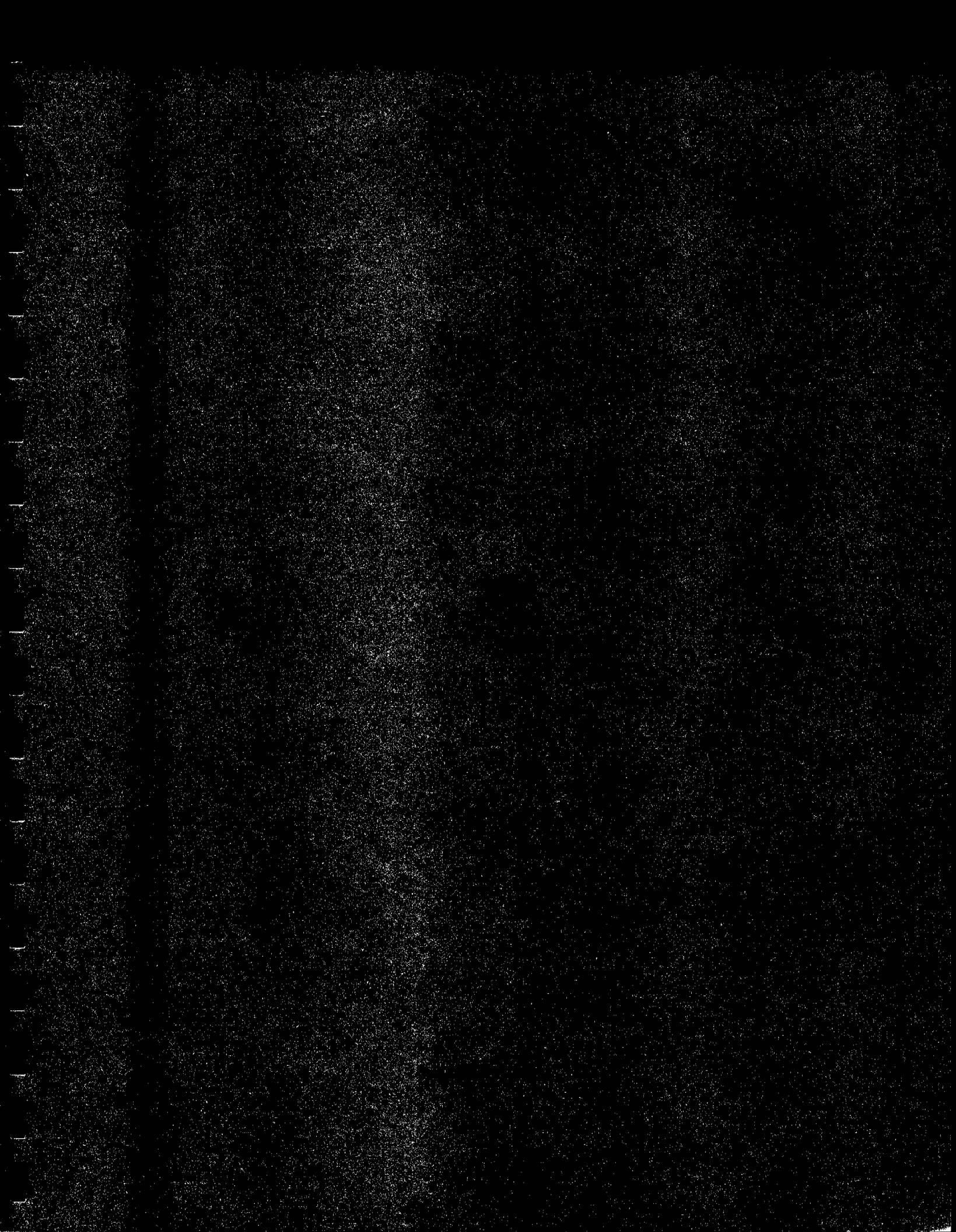
*1992:*
Coleman v. State, 610 So. 2d 1283 (Fla. 1992). Affirmed.
Robinson v. State, 610 So. 2d 1288 (Fla. 1992). Affirmed.
Marshall v. State, 604 So. 2d 799 (Fla. 1992). Affirmed.

Jackson v. State, 599 So. 2d 103 (Fla. 1992). Life sentence on appeal.
Reilly v. State, 601 So. 2d 222 (Fla. 1992) Life sentence on appeal.
Scott v. State, 603 So. 2d 1275 (Fla. 1992). Life sentence on appeal.
Stevens v. State, 613 So. 2d 402 (Fla. 1992). Life sentence on appeal.

*1993:*
Williams v. State, 622 So. 2d 456 (Fla. 1993). Affirmed.

*1994:*

Christmas v. State, No. 79,044 (Fla. 1/13/94). Life sentence on appeal.



```
 STMT NO. MESSAGE
        2 IEFC001I PROCEDURE SPSSX WAS EXPANDED USING SYSTEM LIBRARY JMCT.PROCLIB
ISS7000I LIVETOR Last-Used 04 May 94 12:12 System=ESAP Facility=BATCH
ISS7001I Count=22478 Mode=Fail Locktime=None Name=DC CICS LIVE TOR
IEF142I RSPAT SPSSX SPSSX - STEP WAS EXECUTED - COND CODE 0000
IEF373I STEP /SPSSX    / START 94124.1331
IEF374I STEP /SPSSX    / STOP  94124.1332 CPU    0MIN 10.65SEC SRB    0MIN 00.10SEC VIRT  4068K SYS   228K EXT       8K SYS    90928
*********************************************************************************************************************************
*                                                                                                                               *
*                                        J U S T I C E    D A T A    C E N T E R                    LEVEL=V344                   *
*                                                                                                                               *
*  JOBNAME     RSPAT              START     13.31.08.03  -  94124  -  05/04/94          TCB     00.00.10.65     TAPE MOUNTS    1  *
*  RDR TIME    13.31.06.50        END       13.32.09.07  -  94124  -  05/04/94          SRB     00.00.00.10     DISK MOUNTS    0  *
*  RDR DATE    94124              ELAPSED   00.01.01.04                             TRAN/ACTV   00.00.56.30                     *
*                                                                                                                               *
*  PERF GROUP           6                        PAGE IN/OUT          0/       0                                              *
*  SERV. UNITS      32697                        VIO PAGE IN/OUT      0/       0                  COMPLETION STATUS - NORMAL  *
*                                                                                                                               *
*  JOB CLASS   V                                 PROGRAMMER    PAULA TULLY BRYANT                        SYSTEM ID    ESAP  *
*                                                                                                                               *
*  JOB NUMBER  02956                             ACCT. DATA    DP000,000                                 MVSESA       JES2  *
*                                                                                                                               *
*                                                                                                                               *
*  EXCP TOTALS:          DASD-      1474            TAPE-         700          TP-        0          OTHER-       0          *
*                                                                                                                               *
*********************************************************************************************************************************
IEF375I  JOB /RSPAT   / START 94124.1331
IEF376I  JOB /RSPAT   / STOP  94124.1332 CPU    0MIN 10.65SEC SRB    0MIN 00.10SEC
```

FOR MVS/XA  ** JUSTICE DATA CENTER **  LICENSE NUMBER 473
THIS SOFTWARE IS FUNCTIONAL THROUGH JULY 31, 1994.

Jan-April 1994

TRY THE NEW SPSS RELEASE 4 FEATURES:

* LOGISTIC REGRESSION PROCEDURE
* EXAMINE PROCEDURE TO EXPLORE DATA
* FLIP TO TRANSPOSE DATA FILES
* MATRIX TRANSFORMATIONS LANGUAGE
* GRAPH INTERFACE TO SPSS GRAPHICS
* CATEGORIES OPTION:
*  CONJOINT ANALYSIS
*  CORRESPONDENCE ANALYSIS
* NEW LISREL AND PRELIS OPTIONS
*

SEE THE NEW SPSS DOCUMENTATION FOR MORE INFORMATION ON THESE NEW FEATURES.

```
   1  0 00380000  SET BLANKS=0/MXWARNS=5000                                00380000
   2  0 00390000  SET UNDEFINED=NOWARN                                     00390000
   3  0 00400002  SET PRINTBACK=NO                                         00400002
```

>WARNING # 4474 ON LINE 580.  COMMAND NAME: VALUE LABELS
>THE (ADD) VALUE LABELS COMMAND SPECIFIES AN UNKNOWN VARIABLE NAME.  THE NAME
>WILL BE IGNORED.
THE ERROR IS ASSOCIATED WITH 'OFFENSE1'

THE FILE TO BE SORTED CONTAINS 57 CASES OF 2,640 BYTES EACH.
160,592 BYTES OF MEMORY ARE AVAILABLE TO THE SORT.
17,636 BYTES IS THE MINIMUM IN WHICH THE SORT WILL RUN.
160,588 BYTES WOULD SUFFICE FOR AN IN-MEMORY SORT.

SUCCESSFUL COMPLETION OF THE SORT.

PRECEDING TASK REQUIRED 9.86 SECONDS CPU TIME;  16.62 SECONDS ELAPSED.

THERE ARE 2,849,984 BYTES OF MEMORY AVAILABLE.
THE LARGEST CONTIGUOUS AREA HAS 2,819,160 BYTES.

1,215 BYTES OF MEMORY REQUIRED FOR THE LIST PROCEDURE.
984 BYTES HAVE ALREADY BEEN ACQUIRED.
231 BYTES REMAIN TO BE ACQUIRED.

4

## Florida County Codes

County Codes

1 - Alachua
2 - Baker
3 - Bay
4 - Bradford
5 - Brevard
6 - Broward
7 - Calhoun
8 - Charlotte
9 - Citrus
10 - Clay
11 - Collier
12 - Columbia
13 - Dade
14 - DeSoto
15 - Dixie
16 - Duval
17 - Escambia
18 - Flagler
19 - Franklin
20 - Gadsden
21 - Gilchrist
22 - Glades
23 - Gulf
24 - Hamilton
25 - Hardee
26 - Hendry
27 - Hernando
28 - Highlands
29 - Hillsborough
30 - Holmes
31 - Indian River
32 - Jackson
33 - Jefferson
34 - Lafayette
35 - Lake
36 - Lee
37 - Leon
38 - Levy
39 - Liberty
40 - Madison
41 - Manatee
42 - Marion
43 - Martin
44 - Monroe
45 - Nassau
46 - Okaloosa
47 - Okeechobee
48 - Orange
49 - Osceola
50 - Palm Beach
51 - Pasco
52 - Pinellas
53 - Polk
54 - Putnam
55 - St. Johns
56 - St. Lucie
57 - Santa Rosa
58 - Sarasota
59 - Seminole
60 - Sumter
61 - Suwannee
62 - Taylor
63 - Union
64 - Volusia
65 - Wakulla
66 - Walton
67 - Washington

OffQLF1 - codes for Offense qualifier

QLFOFF OFFENSE QUALIFIER.
(CMOFFQLF-3CE)

1 = CONSPIRACY TO ATTEMPT
2 = CONSPIRACY TO COMMIT
3 = ACCESSORY TO ATTEMPT
4 = ACCESSORY
5 = PRINCIPAL IN ATTEMPT
6 = PRINCIPAL
7 = SOLICIT/IN ATT.CRIM. ACT
8 = SOLICIT. IN CRIMINAL ACT
9 = UNKNOWN

JUDGE CONVICTING JUDGE

VALID CASES 57 MISSING CASES 0

---

OFFQLF1 OFFENSE QUALIFIER-1

| VALUE LABEL | VALUE | FREQUENCY | PERCENT | VALID PERCENT | CUM PERCENT |
|---|---|---|---|---|---|
| principalm attempt | 5 | 2 | 3.5 | 3.5 | 3.5 |
| principal - 6 | 6 | 55 | 96.5 | 96.5 | 100.0 |
| | TOTAL | 57 | 100.0 | 100.0 | |

VALID CASES 57 MISSING CASES 0

---

ADMYR ADMISSION YEAR

| VALUE LABEL | VALUE | FREQUENCY | PERCENT | VALID PERCENT | CUM PERCENT |
|---|---|---|---|---|---|
| | 1994 | 57 | 100.0 | 100.0 | 100.0 |
| | TOTAL | 57 | 100.0 | 100.0 | |

VALID CASES 57 MISSING CASES 0

---

OFFENSE PRIMARY OFFENSE

| VALUE LABEL | VALUE | FREQUENCY | PERCENT | VALID PERCENT | CUM PERCENT |
|---|---|---|---|---|---|
| CAPITAL MURDER | 1 | 57 | 100.0 | 100.0 | 100.0 |
| | TOTAL | 57 | 100.0 | 100.0 | |

VALID CASES 57 MISSING CASES 0

```
1 //RSEAT JOB (DP000,000),'PAULA FULLY BRYANT',MSGLEVEL=(2,0),                  J9802096
  //       MSGCLASS=H,CLASS=V, TYPRUN=HOLD                                     0R020079
  // USER=LIVETUR
  //*                                                                          00030000
  //*STATS.SOURCE( TADMSFS )********************************** WM.RIEDELL*00040000
  //*    SPSSX                                                               *00050000
  //*               INMATE ADMIT SPSS  FOR  FY 91-92                         *00060000
  //*                     (RERUTLT 1/93, URECL = 773).                       *00070000
  //*   INSTRUCTIONS:                                                        *00080000
  //*         -  DON'T CHANGE THIS PGM!  COPY IT TO YOUR WORKFILE, FIRST!    *00090000
  //*         -  SELECT  DESIRED FISCAL YR FILE BELOW.                       *00100000
  //*********************************************************************00110000
  //*                                                                          00120000
  //*PSSX    EXEC SPSSX,OUTC=H,TIME=1439,CYLS='50,5'                          00130000
2 //SPSSX    EXEC SPSSX,OUTC=H,TIME=1439,CYLS='200,20'                        00140000
  //*                                                                          00150000
  //*************************************************                        00160000
  //*******  SELECT DESIRED FISCAL YR  ***************                        00170000
  //*******  BY REMOVING COMMENT '*'   ***************                        00180000
  //*                                                                          00190000
  //*DMFILE DD DSN=DCRES.INADM.FY9394,DISP=(OLD,KEEP)                         00191097
  //*DMFILE DD DSN=DCRES.INADM.FY9293,DISP=(OLD,KEEP)                         00200093
  //*DMFILE DD DSN=DCRES.INADM.FY9192,DISP=(OLD,KEEP)                         00210091
  //*DMFILE DD DSN=DCRES.INADM.FY9091,DISP=(OLD,KEEP)                         00220091
  //*DMFILE DD DSN=DCRES.INADM.FY8990,DISP=(OLD,KEEP)                         00230091
  //*DMFILE DD DSN=DCRES.INADM.FY8889,DISP=(OLD,KEEP)                         00240091
  //*DMFILE DD DSN=DCRES.INADM.FY8788,DISP=(OLD,KEEP)                         00250039
  //*DMFILE DD DSN=DCRES.INADM.FY8687,DISP=(OLD,KEEP)                         00260026
  //*DMFILE DD DSN=DCRES.INADM.FY8586,DISP=(OLD,KEEP)                         00270002
  //*DMFILE DD DSN=DCRES.INADM.FY8485,DISP=(OLD,KEEP)                         00280002
  //*DMFILE DD DSN=DCRES.INADM.FY8384,DISP=(OLD,KEEP)                         00290002
  //*DMFILE DD DSN=DCRES.INADM.FY8283,DISP=(OLD,KEEP)                         00300002
  //*DMFILE DD DSN=DCRES.INADM.FY8182,DISP=(OLD,KEEP)                         00310000
  //*DMFILE DD DSN=DCRES.INADM.FY8081,DISP=(OLD,KEEP)                         00320000
  //*DMFILE DD DSN=DCRES.INADM.FY7980,DISP=(OLD,KEEP)                         00330000
  //*DMFILE DD DSN=DCRES.INADM.FY8387,DISP=(OLD,KEEP)                         00331050
  //*DMFILE DD DSN=DCRES.ADM9207.END9310,DISP=(OLD,KEEP)                      00340048
  //*DMFILE DD DSN=DCRES.INADM.FY8793,DISP=(OLD,KEEP)                         00350073
  //*DMFILE DD DSN=DCRES.INADM.FY8393,DISP=(OLD,KEEP)                         00351004
37 //ADMFILE DD DSN=DCRES.INADM.FY7993,DISP=(OLD,KEEP)                         00352004
  //*FFLAB   DD DSN=DCR.GTH.OFFENSE,DISP=SHR                                 00360000
38 //SYSIN    DD *                                                           00370000
```

1980-1993

X

```
 STMT NO. MESSAGE
        2  IEFC001I PROCEDURE SPSSX WAS EXPANDED USING SYSTEM LIBRARY JMCT.PROCLIB
IKS7000I LIVETOR Last-Used 04 May 94 11:52 System=ESAP Facility=BATCH
IKS7001I Count=247/ Mode=Fail Partition Name Name=DC CICS LIVE PDR
IEF142I RSPAT SPSSX SPSSX - STEP WAS EXECUTED - (UNB) CODE 0000
IEF373I STEP /SPSSX    / START 94124.1212
IEF374I STEP /SPSSX    / STOP  94124.1220 CPU     2MIN 50.62SEC SRB     0MIN 00.81SEC VIRT  4068K SYS   240K EXT        8K SYS     9124K
*****************************************************************************************************************************
*                                                                                                                           *
*                                    J U S T I C E     D A T A     C E N T E R                    LEVEL=V344                  *
*                                                                                                                           *
*   JOBNAME     RSPAT              START     12.12.26.88  -  94124  -  05/04/94          TCB     00.02.50.62     TAPE MOUNTS    2  *
*   RDR TIME    10.47.05.87        END       12.20.15.37  -  94124  -  05/04/94          SRB     00.00.00.81     DISK MOUNTS    0  *
*   RDR DATE    94124              ELAPSED   00.07.48.49                              TRAN/ACTV   00.07.43.64                     *
*                                                                                                                           *
*   PERF GROUP          6                        PAGE IN/OUT          0/       0                                             *
*   SERV. UNITS      502914                      VIO PAGE IN/OUT      0/       0                  COMPLETION STATUS - NORMAL *
*                                                                                                                           *
*   JOB CLASS   V                                PROGRAMMER    PAULA TULLY BRYANT                        SYSTEM ID    ESAP  *
*                                                                                                                           *
*   JOB NUMBER  02096                            ACCT. DATA   DP000,000                                 MVSESA       JES2  *
*                                                                                                                           *
*                                                                                                                           *
*   EXCP TOTALS:          DASD-      5038            TAPE-       11967          TP-       0          OTHER-       0        *
*                                                                                                                           *
*****************************************************************************************************************************
IEF375I  JOB /RSPAT   / START 94124.1212
IEF376I  JOB /RSPAT   / STOP  94124.1220 CPU     2MIN 50.62SEC SRB     0MIN 00.81SEC
```

FOR MVS/XA  ** JUSTICE DATA CENTER **  LICENSE NUMBER 473
THIS SOFTWARE IS FUNCTIONAL THROUGH JULY 31, 1994.

TRY THE NEW SPSS RELEASE 4 FEATURES:

* LOGISTIC REGRESSION PROCEDURE.
* EXAMINE PROCEDURE TO EXPLORE DATA
* FLIP TO TRANSPOSE DATA FILES
* MATRIX TRANSFORMATIONS LANGUAGE
* GRAPH INTERFACE TO SPSS GRAPHICS
* CATEGORIES OPTION:
*   CONJOINT ANALYSIS
*   CORRESPONDENCE ANALYSIS
* NEW LISREL AND PRELIS OPTIONS
*

SEE THE NEW SPSS DOCUMENTATION FOR MORE INFORMATION ON THESE NEW FEATURES.

```
    1   0 00380000  SET BLANKS=0/MXWARNS=5000                                  00380000
    2   0 00390000  SET UNDEFINED=NOWARN                                       00390000
    3   0 00400002  SET PRINTBACK=NO                                           00400002
```

>WARNING # 4474 ON LINE 580.  COMMAND NAME: VALUE LABELS
>THE (ADD) VALUE LABELS COMMAND SPECIFIES AN UNKNOWN VARIABLE NAME.  THE NAME
>WILL BE IGNORED.
THE ERROR IS ASSOCIATED WITH 'OFFENSE1'

THE FILE TO BE SORTED CONTAINS 2,144 CASES OF 2,640 BYTES EACH.
2,836,496 BYTES OF MEMORY ARE AVAILABLE TO THE SORT.
17,636 BYTES IS THE MINIMUM IN WHICH THE SORT WILL RUN.
5,695,312 BYTES WOULD SUFFICE FOR AN IN-MEMORY SORT.

SUCCESSFUL COMPLETION OF THE SORT.

PRECEDING TASK REQUIRED 169.06 SECONDS CPU TIME;  425.60 SECONDS ELAPSED.

THERE ARE 2,849,984 BYTES OF MEMORY AVAILABLE.
THE LARGEST CONTIGUOUS AREA HAS 2,819,160 BYTES.

1,215 BYTES OF MEMORY REQUIRED FOR THE LIST PROCEDURE.
984 BYTES HAVE ALREADY BEEN ACQUIRED.
231 BYTES REMAIN TO BE ACQUIRED.

JUDGE CONVICTING JUDGE

| | | | |
|---|---|---|---|
| WESSEL | 1 | .0 | .0 | 97.2 |
| WETHERIN | 3 | .1 | .1 | 97.3 |
| WHATLEY | 2 | .1 | .1 | 97.4 |
| WHITE | 3 | .1 | .1 | 97.6 |
| WIGGINS | 9 | .4 | .4 | 98.0 |
| WILKES | 3 | .1 | .1 | 98.1 |
| WILLIAMS | 1 | .0 | .0 | 98.2 |
| WILLIS | 4 | .2 | .2 | 98.4 |
| WILSON | 6 | .3 | .3 | 98.6 |
| WILSON,J | 1 | .0 | .0 | 98.7 |
| WINEGEAR | 3 | .1 | .1 | 98.8 |
| WINGEART | 1 | .0 | .0 | 98.9 |
| WOLFMAN | 1 | .0 | .0 | 98.9 |
| WOODS | 6 | .3 | .3 | 99.2 |
| WOODSON | 10 | .5 | .5 | 99.7 |
| YANN | 2 | .1 | .1 | 99.8 |
| YOUNG | 1 | .0 | .0 | 99.8 |
| ZEIDWIG | 3 | .1 | .1 | 100.0 |
| 4364412 | 1 | .0 | .0 | 100.0 |
| TOTAL | 2144 | 100.0 | 100.0 | |

VALID CASES 2144 MISSING CASES 0

OFFQLF1 OFFENSE QUALIFIER-1

| VALUE LABEL | VALUE | FREQUENCY | PERCENT | VALID PERCENT | CUM PERCENT |
|---|---|---|---|---|---|
| | 0 | 67 | 3.1 | 3.1 | 3.1 |
| | 2 | 14 | .7 | .7 | 3.8 |
| | 4 | 2 | .1 | .1 | 3.9 |
| | 5 | 103 | 4.8 | 4.8 | 8.7 |
| | 6 | 1950 | 91.0 | 91.0 | 99.6 |
| | 8 | 1 | .0 | .0 | 99.7 |
| | 9 | 7 | .3 | .3 | 100.0 |
| | TOTAL | 2144 | 100.0 | 100.0 | |

VALID CASES 2144 MISSING CASES 0

ADMYR ADMISSION YEAR

| VALUE LABEL | VALUE | FREQUENCY | PERCENT | VALID PERCENT | CUM PERCENT |
|---|---|---|---|---|---|
| | 1980 | 94 | 4.4 | 4.4 | 4.4 |
| | 1981 | 77 | 3.6 | 3.6 | 8.0 |
| | 1982 | 128 | 6.0 | 6.0 | 13.9 |
| | 1983 | 123 | 5.7 | 5.7 | 19.7 |
| | 1984 | 122 | 5.7 | 5.7 | 25.4 |
| | 1985 | 157 | 7.3 | 7.3 | 32.7 |
| | 1986 | 170 | 7.9 | 7.9 | 40.6 |
| | 1987 | 143 | 6.7 | 6.7 | 47.3 |
| | 1988 | 156 | 7.3 | 7.3 | 54.6 |
| | 1989 | 175 | 8.2 | 8.2 | 62.7 |
| | 1990 | 193 | 9.0 | 9.0 | 71.7 |
| | 1991 | 223 | 10.4 | 10.4 | 82.1 |
| | 1992 | 188 | 8.8 | 8.8 | 90.9 |
| | 1993 | 195 | 9.1 | 9.1 | 100.0 |
| | TOTAL | 2144 | 100.0 | 100.0 | |

VALID CASES 2144 MISSING CASES 0

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

OFFENSE PRIMARY OFFENSE

| VALUE LABEL | VALUE | FREQUENCY | PERCENT | VALID PERCENT | CUM PERCENT |
|---|---|---|---|---|---|
| CAPITAL MURDER | 1 | 2144 | 100.0 | 100.0 | 100.0 |
| | TOTAL | 2144 | 100.0 | 100.0 | |

VALID CASES 2144 MISSING CASES 0

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

LENMAX SENTENCE LENGTH

| VALUE LABEL | VALUE | FREQUENCY | PERCENT | VALID PERCENT | CUM PERCENT |
|---|---|---|---|---|---|
| | 9999998 | 2144 | 100.0 | 100.0 | 100.0 |
| | TOTAL | 2144 | 100.0 | 100.0 | |

VALID CASES 2144 MISSING CASES 0