IN THE SUPREME COURT OF FLORIDA

MARVIN EDWIN JOHNSON,

Petitioner,

v. Case No. 83,690

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

Respondent.
_____/

PETITIONER'S REPLY TO THE STATE'S
RESPONSE TO PETITION FOR WRIT OF HABEAS CORPUS

The issue in this case involves the fact that this Court's review of Marvin Johnson's death sentence is indistinguishable from the review that was held unconstitutional in Richmond v. Lewis, 121 L.Ed.2d 411 (1992), and therefore that Richmond controls this case and, because of the invalidation of this death sentence, that it compels relief. In its Response, the State relies primarily on inapplicable and self-contradictory arguments concerning procedural bar, and secondarily on generalized comments that are at best peripheral to Mr. Johnson's claim. The Response neither addresses Richmond, nor its application to Mr. Johnson's case, nor the reasons discussed by Mr. Johnson as to why it warrants relief. One can only conclude that the Response levels a broad range of hyperbole on the Petitioner and his counsel but ignores Richmond itself because its application herein cannot be seriously disputed.

A. The Richmond v. Lewis Claim

This Court was divided on direct appeal in the same way as the appellate court was in Richmond. Three members of the Court voted for death, in reliance on the "especially heinous" aggravating factor,

although striking the "great risk" factor. Johnson, 393 So. 2d at 1069, 1073-74 (Fla. 1981). Justice England held the "especially heinous" aggravating factor invalid, but also voted to affirm the death sentence. Id. at 1074 (England, J., concurring). Three members of the Court -- then-Chief Justice Sundberg and Justices Overton and McDonald -- dissented, holding that the jury's life verdict was appropriate and should not be overruled. Id. at 1075-76 (opinions of Sundberg, C.J., and McDonald, J.)[1]. The dissenting Justices discussed a number of mitigating factors which this case established, albeit nonstatutorily.

The division in this Court was identical to that of the court in Richmond v. Lewis. In Richmond, the lead opinion was also the opinion of less than a majority of the court. It held that the "especially heinous" aggravating factor, as limited by the appellate court, properly applied to the defendant's case. Richmond, 121 L.Ed.2d at 419. In Richmond, as here, because the lead opinion was not the opinion of a majority of the court, the concurring opinion was necessary to affirm the death penalty. In Richmond, as here, the concurrence held that the "especially heinous" factor should not have been applied, but nevertheless voted to affirm the death penalty. Id. And in Richmond, as here, the dissent held that the death penalty should not have been imposed, that the defendant should be

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[1]As discussed infra, the Johnson dissenters also found that the "especially heinous, atrocious, cruel" aggravator was not applicable in this case. See, Johnson, 393 So. 2d at 1075 (Sundberg, then-C.J., and Overton and McDonald, JJ., dissenting) ("There is nothing about the actual homicide itself to set it apart from the norm of murders -- a single gunshot to the chest with death ensuing instantly.")

resentenced to life imprisonment, and that "especially heinous" was not a valid aggravator in the defendant's case. Id. See also n.1, supra.

In Richmond, as here, less than a majority of the court affirmed the "especially heinous" aggravator, but no majority "actually performed a new sentencing calculus" in the absence of the aggravator. Id., 121 L.Ed.2d at 422. Richmond establishes that where a state appellate court is so divided, at least a majority of the court must perform a constitutional appellate reweighing or harmless error analysis ("perform a new sentencing calculus," Richmond, 121 L.Ed.2d at 422), and vote to affirm the death sentence in order to cure the error caused by trial sentencer's consideration of the aggravating factor:

> [A]t least a majority of the [state] Supreme Court . . . needed to perform a proper reweighing and vote to affirm petitioner's death sentence . . . . Thus, even assuming that 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 . . . [The concurrence which] also voted to affirm petitioner's 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 relied upon the "especially heinous, cruel or depraved" factor.

Richmond, 121 L.Ed.2d at 423 (citations omitted; emphasis supplied).

> Petitioner's death sentence was tainted by Eighth Amendment error . . . . The [state] Supreme Court did not cure this error, because the two justices who concurred in affirming the sentence did not actually perform a new sentencing calculus. Thus the sentence, as it stands, violates the Eighth Amendment.

Richmond, 121 L.Ed.2d at 422.

Like the concurring opinion in Richmond, Justice England did not do anything that could even purport to be a new sentencing calculus. He merely said that striking the aggravator was "irrelevant to the outcome of the case." Johnson, 393 So. 2d at 1074 (England, J.)

The State does not argue that Justice England "perform[ed] a new sentencing calculus." Richmond, 121 L.Ed.2d at 422. At its core, the State's response thus concedes the obvious -- that Justice England's concurrence neither undertook the requisite "harmless error" review nor "reweighed."

The State, however, argues (incorrectly, as demonstrated in the Petition at 31-32) that the three-Justice lead opinion conducted harmless error analysis. That argument is the very argument found insufficient in Richmond. See, id., 121 L.Ed.2d at 423. Here, as in Richmond, the State's argument is irrelevant: first because the lead opinions (in Johnson and Richmond) did not constitute a majority of the Court, as required by Richmond; and second because the "principal opinion" in Johnson relied on the "especially heinous" aggravating factor and therefore did not and could not have performed a new sentencing calculus leaving that aggravator out of the equation.[2] Thus, this case is on all fours with and directly controlled by Richmond: Richmond holds that exactly what took place here invalidates the death sentence and violates the eighth amendment.

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[2]To the extent Justice England's concurrence relied on the lead opinion, he relied on an opinion which rested upon the very same aggravator whose invalidity he wrote about in his separate opinion.

In Richmond, after all, the United States Supreme Court assumed that the less-than-a-majority "principal opinion" reweighed, but this was not enough to "validate" the death sentence: a majority of the court must perform the "new sentencing calculus." Richmond demonstrates that Marvin Johnson has never had "capital sentencing" which can be recognized as such by the eighth amendment. Richmond is on all fours with Mr. Johnson's case; it demonstrates that relief is proper here; and, other than reliance on the same argument found insufficient in Richmond itself, the State does not say one word to the contrary.

The State does argue that the claim should be procedurally barred, but cannot decide why. First, the State argues that it should be barred because it should have been raised in a prior habeas petition (Response at 12). Next, the State argues that it was raised in the prior habeas proceeding, and is therefore barred (Response at 14).

Both of these arguments cannot be right. In fact, the claim was raised in the prior state habeas (see Response at 9 and Appendix), before Richmond v. Lewis demonstrated that Mr. Johnson's argument was correct under the eighth amendment. This Court, without the benefit of Richmond, denied relief, saying that the claim had been heard on direct appeal. Johnson v. Dugger, 523 So. 2d 161, 162 (Fla. 1988).

Mr. Johnson has consistently asserted the argument which Richmond has now established as correct under the Constitution. Richmond is a mirror image of this case. It would be unfair indeed to deny relief to a petitioner simply because this Court did not recognize why the

death sentence is unlawful. It is, in fact, for this very reason that this Court has held that petitioners such as Mr. Johnson should be heard -- that, as this Court has recognized, its direct appeal resolutions should be reevaluated where an intervening United States Supreme Court decision directly on point establishes that the prior resolution is in error under the Constitution.

Richmond is directly on point. It shows that relief is appropriate in Mr. Johnson's case, while this Court's precedents show that the Court can and should grant relief. This disposes of the State's procedural argument.

Richmond does not apply to any great number of petitioners. It does apply to those few people in Marvin Johnson's and Willie Richmond's shoes whose capital "sentence is invalid," Richmond, 121 L.Ed.2d at 423, because no true majority "actually perform[ed]" the constitutionally required "sentencing calculus" on appeal. Id. at 422. For purposes of those few petitioners in Marvin Johnson's and Willie Richmond's shoes, there can be no serious dispute that Richmond is an intervening decision that is directly on point. Richmond expressly holds that precisely what this Court did in Marvin Johnson's death sentence violates the eighth amendment. In the face of such an intervening constitutional decision, this Court has not hesitated to consider claims and grant relief, so long as -- like Marvin Johnson's case -- the claim has not been waived.[3] See Jackson v. Dugger, 547 So. 2d at 1199-1200 and n.2 (applying intervening United

[3]See Response at 12, stating that the claim, pre-Richmond, was raised by Mr. Johnson.

States Supreme Court decision in a habeas proceeding where the decision was on point and the issue had not been waived); Herring v. Dugger, 580 So. 2d 135, 138 (Fla. 1991) (applying a decision that was not a "change in the law" retroactively in second habeas petition where a subsequent decision of the Florida Supreme Court "receded" from the opinion on direct appeal); Alvord v. Dugger, 541 So. 2d at 598, 600 (Fla. 1989) (applying an intervening decision that was not a constitutional "change in law" to the defendant's case because the later decision "receded" from the direct appeal ruling).

It would be unfair indeed to deprive Mr. Johnson of the benefit of Richmond when he has consistently asserted that constitutional error infected and invalidated his death sentence, and where his position has now been found to be the correct one by the United States Supreme Court. See James v. State, 615 So. 2d 668, 669 (Fla. 1993) (applying in post-conviction proceedings intervening United States Supreme Court decision on aggravation because the intervening decision showed that the direct appeal ruling was not constitutionally sound and the claim had not been waived); see also Moreland v. State, 582 So. 2d 618, 619 (Fla. 1992) ("fundamental fairness" required retroactive application of decision that "did not create new law" but "applied existing sixth amendment law to a new situation."); id. at 619 ("[t]he doctrine of finality should be abridged" when a "more compelling objective appears, such as ensuring fairness" in "individual adjudications").

Richmond demonstrates that a death sentence such as Mr. Johnson's -- where an aggravating factor is affirmed by less than a majority

of the Court but no majority of the Court considers what the sentencer would have done in the absence of the aggravating factor -- is not recognized as a valid capital sentence (is "invalidated," Richmond, supra) under the eighth amendment. Richmond was not available to Mr. Johnson or this Court during the previous proceedings in which this Court denied relief. Richmond now counsels that relief be granted.

B. The State's Other Arguments

Although the State shies from addressing Mr. Johnson's Richmond claim, the State does raise inapposite arguments in opposition to what it terms the "sub-claims." First, the State says that the less-than-a-majority lead opinion on appeal did conduct harmless error analysis. Of course, whatever the lead opinion may have done, it could not conceivably have conducted the necessary "harmless error" analysis regarding the less-than-a-majority lead opinion relied on the "especially heinous" aggravator.

In the next breath, the State acknowledges that this Court did not say it was conducting harmless error review as to the other stricken aggravator, "great risk to many." The State nevertheless contends that this Court did what it never said it was doing, and cites the pre-Richmond[4] decisions in Barclay v. Florida, 463 U.S. 939 (1983), and Dobbert v. Strickland, 718 F.2d 1518 (11th Cir. 1983), for this proposition. Every case the State cites for its contention was decided well before Richmond,[5] and the short answer to the State's

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[4]And pre-Clemons, Sochor, Espinosa, Stringer.

[5]And before Clemons, Sochor, Espinosa, Stringer.

argument is that the cases it cites are not consistent with Richmond and other recent United States Supreme Court decisions.[6]

This Court's decisions on direct appeal in Barclay v. State, 343 So. 2d 1266, 1271 (Fla. 1977), and Dobbert v. State, 375 So. 2d 1069, 1071 (Fla. 1979), contain neither references to nor analysis of harmless error, and in fact evince "the 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.'" Richmond, 121 L.Ed.2d at 422. Such decisions are clearly from an era when this Court, without guidance from the United States Supreme Court, did not uniformly follow the constitutional requirement that, after invalidating aggravation, "the state appellate court or some other state sentencer must actually perform a new sentencing calculus, if the death sentence is to stand." Richmond, 121 L.Ed.2d at 422. See also, e.g., Demps v. State, 395 So. 2d 501, 506 (Fla. 1981) (where this Court held, one month after Mr. Johnson's direct appeal and before the Johnson appeal decision had become final, that the practice it was following was to affirm where an aggravator is invalidated but other aggravators remain because "death is presumed" in such circumstances). Even recent cases such as Sochor v. Florida, 119 L.Ed.2d 326 (1992), demonstrate why guidance from the United States Supreme Court was needed.

The lead opinion in Johnson, and certainly Justice England's necessary-to-the-affirmance concurrence, applies the same sort of

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[6]Clemons, Sochor, Espinosa, Stringer.

automatic analysis, evincing absolutely no consideration of how the trial judge would have weighed the remaining aggravation against the nonstatutory mitigation. See Johnson, 393 So. 2d at 1075-76 (Overton and McDonald, JJ., Sundberg, C.J., dissenting) (discussing nonstatutory mitigation in Mr. Johnson's case). There can be no serious dispute that a majority of this Court did not undertake constitutional harmless error analysis on direct appeal -- the issue of what the trial sentencer might have done in a new balancing, in light of the actual record in Mr. Johnson's case, is nowhere analyzed. And there is no question that this Court did not "reweigh" on direct appeal. As this Court has said, "[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); see also Parker v. Dugger, 498 U.S. 308, 319 (1991) ("[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"), citing several cases, including precedent decided prior to Mr. Johnson's direct appeal in which this Court said that it does not "reweigh."

Without citation, the State then makes use of language from Chief Justice Rehnquist's dissenting opinion in Sochor v. Florida, 119 L.Ed.2d 326, 345 (1992), to the effect that the use of the "talismanic phrase 'harmless error'" is not required by the eighth amendment. Richmond and Sochor make clear, however, that some degree of clarity is required from a court that purports to perform harmless error analysis, see Sochor, 119 L.Ed.2d at 341-42 (plain statement or

analysis required), and that, even if "talismanic phrases" are employed, an affirmance which, as here, presumes that the death penalty should be upheld because there is other aggravation -- i.e., an affirmance which uses the other unstricken aggravation as a "conclusive justification for the death penalty," Richmond, 121 L.Ed.2d at 422 (emphasis in original) -- does not qualify as the performance of a "new sentencing calculus" under the eighth amendment.

And, in the end, the State does not even attempt to discuss the obvious problem in cases such as Johnson and Richmond -- that a less-than-a-majority lead opinion which relies on the very aggravator which is not found applicable by a majority of the court, cannot be relied upon as a decision performing the "new sentencing calculus" needed "if the [death] sentence is to stand." Richmond, 121 L.Ed.2d at 422. The problem invalidates the death sentence. Id. at 422, 423-24.

With respect to the "heinous, atrocious or cruel" aggravating circumstance itself, the State first sets forth the procedural history, demonstrating that Mr. Johnson has in fact raised this issue at every available opportunity. See Response at 18-20; see also Johnson v. Dugger, 523 So. 2d at 162 (rejecting a vagueness challenge because the claim was "raised on direct appeal").[7] The State then contends that, for unexplained reasons, the claim is barred, on the basis of State v. Salmon, 19 FLW S226 (Fla. April 18, 1994). Salmon, however, is totally inapplicable: there, the defendant was asserting a claim that counsel was ineffective for failing to object to the

[7]Inexplicably, after showing that the claim has in fact been consistently raised, the State then argues that it is barred because it was not raised. Response at 20.

aggravator, although a majority of this Court had already held that the aggravator was harmless because the crime was "especially heinous" even under a constitutional definition of the aggravator. Id. In Mr. Johnson's case, unlike the situation in Salmon, no such finding has ever been made by a majority of this Court. The Salmon opinion has nothing to do with Richmond or Mr. Johnson's case.

The State then cites cases holding that claims regarding invalid aggravators are barred if not raised on appeal. Those cases, however, are also inapplicable here, because, as even the State's response concedes, here the claim was raised on appeal. See Johnson v. Dugger, 523 So. 2d at 162 (so holding). The State then completely misconstrues the claim, and the reasons why Espinosa v. Florida, 112 S. Ct. 2926 (1992), and James v. State, 615 So. 2d 668 (Fla. 1993), require that the merits of the claim be addressed. As the habeas petition explained, the trial judge exercised unfettered (overbroad) discretion in weighing the "especially heinous" aggravator.[8] The only distinction between Mr. Johnson's submission and a "jury claim" is that Mr. Johnson's case addresses the other component of Florida's divided "capital-sentencing authority" -- the judge. See Espinosa, 112 S. Ct. at 2929. The effect of Espinosa is not confined solely to jury error claims regarding the "especially heinous" aggravating factor. See, e.g., Jackson v. State, 19 FLW S215 (Fla. April 21,

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[8]The unquestionably vague instruction on the aggravator which the trial judge provided, R. 1567, is identical to the one condemned by this Court as overbroad and vague in Atwater v. State, 626 So. 2d 1325 (Fla. 1993). What the judge told the jury is instructive on what the judge himself believed. See, Ziegler v. Dugger, 524 So. 2d 419, 420 (Fla. 1988) (a trial judge is presumed to follow his jury instructions at capital sentencing).

1994) (applying Espinosa to claim regarding "cold, calculated and premeditated" aggravator).

The gravamen of the Espinosa decision is that the statute and this Court's decisions left the aggravator "so vague as to leave" Florida sentencers (not just juries, but judges as well) "without sufficient guidance for determining the presence or absence of the factor." Espinosa, 112 S. Ct. at 2928. As in James, and as the State now concedes, Mr. Johnson raised this claim on appeal and it was there addressed on its merits, albeit in a manner that cannot be squared with Richmond. Espinosa has now established that Mr. Johnson was correct. And this Court has held that Espinosa should be retroactively applied in post-conviction proceedings. James, supra. Espinosa thus, like Richmond, shows that review and relief are appropriate in Mr. Johnson's case.

On the merits, the State returns to the inaccurate assertion that a majority of the Court affirmed the finding of the "especially heinous" aggravating factor. Response at 18. In fact, as is obvious, only three Justices voted to affirm the aggravator -- this is plainly less than a majority of the Court. Justice England, as noted, wrote a separate opinion to hold that the crime was not "atrocious or cruel, as those terms are used in our death penalty statute." Johnson, 393 So. 2d at 1074.

The dissenters (three Justices) held death inappropriate here and did not find that the crime fit the aggravating factor. After quoting from State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), adding emphasis to the requirement that the commission of the crime be

"'accompanied by such additional acts as to set the crime apart from the norm of capital felonies,'" the dissenters clearly stated that this crime did not qualify under that construction: "There is nothing about the actual homicide itself to set it apart from the norm of murders -- a single gunshot to the chest with death ensuing instantly." Johnson, 393 So. 2d at 1075 (Sundberg, C.J., Overton and McDonald, JJ.) (emphasis added). A majority of the Court not only did not affirm this aggravator, a majority (Justice England and the three dissenting Justices) expressly found that the crime was not "especially heinous, atrocious or cruel." Nevertheless, the less-than-a-majority lead opinion affirmed on the basis of this aggravator. This is just like Richmond.

Finally, the State asserts that the crime "could have" been found to be "especially heinous," because, the State says, it was "cold and calculated" -- an aggravator not involved in this case. Response at 22. Any contention that the facts of this crime could possibly be brought within the limiting construction approved in Proffitt v. Florida, 428 U.S. 242, 255 (1976) -- "'the conscienceless or pitiless crime which is unnecessarily torturous to the victim,'" id. -- runs afoul of the very construction applicable to this aggravator:

> The United States Supreme Court . . . has stated that this factor would be appropriate in a "conscienceless or pitiless crime which is unnecessarily torturous to the victim." Thus, the crime must be **both** conscienceless or pitiless **and** unnecessarily torturous to the victim.
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> Turning to the facts at hand, we note that . . . we [have] found heinousness, atrociousness or cruelty absent in a killing involving a single sudden shot, even though the victim

> lingered in pain for several hours. The evidence here was that Newton was shot suddenly in the heart, lost consciousness, and died within moments. Thus, the factor of heinous, atrocious or cruel is not permissible based on the present facts, because there was no pitiless or conscienceless infliction of torture.

Richardson v. State, 604 So. 2d 1107, 1109 (Fla. 1992) (citations omitted; bold emphasized in original; other emphasis supplied). This too is just like Johnson. See also Bonifay v. State, 626 So. 2d 1310, 1313 (Fla. Sept. 2, 1993) (holding, in a case with far more "heinous, atrocious" facts than Mr. Johnson's, that "[t]he fact that the victim begged for his life or that there were multiple gunshots is an inadequate basis to find this aggravating factor absent evidence that [the defendant] intended to cause the victim unnecessary and prolonged suffering.") Mr. Johnson's case could not possibly qualify as "especially heinous" under the limiting construction, because, as even the trial judge himself recognized, this case did not involve either torture or the infliction of great pain upon the victim. R. 1625, 1722.

Nor would the State's suggestion that the definition of "especially heinous" be broadened to include "cold and calculated" crimes make the aggravator applicable. This Court has expressly rejected the contention that "cold and calculated" is sufficient for a finding of the heinousness aggravator. Menendez v. State, 368 So. 2d 1278, 1281-82 (Fla. 1979); Lewis v. State, 398 So. 2d 432, 438 (Fla. 1981) (cold and calculated shooting murder is not heinous, atrocious or cruel as a matter of law). Moreover, this offense could not be deemed "cold and calculated," an aggravator which has never

been at issue in this case until the State's current response. There is absolutely no evidence that the robber intended to kill anyone or would have harmed anyone prior to the shooting being initiated by the pharmacist. See Johnson, 393 So. 2d at 1076 (McDonald and Overton, JJ.) (homicide was "unplanned reaction to being fired at."). By no stretch of the imagination could this offense come within the limiting construction of the "cold and calculated" aggravating factor. See Rogers v. State, 511 So. 2d 526 (Fla. 1987) (careful, pre-existing plan to kill; "pre-arranged design;" heightened/pre-arranged premeditation).

The State also cites several cases, to which it seeks to analogize the facts of this case. None of them, however, are even remotely comparable. Both Hargrave v. State, 366 So. 2d 1 (Fla. 1978), and Harvey v. State, 529 So. 2d 1083 (Fla. 1988), involved execution murders of persons who were already wounded and suffering. In such circumstances, unlike the instant case, the offenses were "torturous." In Clark v. State, 443 So. 2d 973 (Fla. 1983) -- also cited by the State -- this Court actually struck the aggravator because "there is no evidence to prove that [the victim] knew for more than an instant before she was shot what was about to happen to her." Id. at 977. Here, too, there is a total absence of any evidence of a torturous killing.

At bottom, the State's response does not really argue that this case could reasonably be found "especially heinous" under the limiting construction. Instead, the State argues that it is permissible to cast adrift from that limiting construction and find the heinousness

factor based on some other fact or facts about the crime that may satisfy "pejorative adjectives," Arave v. Creech, 113 S. Ct. 1534, 1541 (1993), contained in the statute.[9] This, however, is precisely what the eighth amendment does not allow. Id. Nothing the State says alters (or even addresses) the fact that, under Richmond, Mr. Johnson has not had a valid sentencing proceeding which can be recognized as such by the eighth amendment.

With respect to this Court's erroneous treatment of this case as one in which no nonstatutory mitigation was present, the State makes the strange argument that Mr. Johnson contends that the trial judge "lied in his sentencing order . . . . " Response at 23. As the Petition states quite clearly, there was no requirement at the time Mr. Johnson was sentenced that trial courts make findings concerning nonstatutory mitigation. § 921.141(3), Fla. Stat. (1977). That fact, coupled with the undeniable presence of abundant nonstatutory mitigation in the record -- which the State does not challenge and which the three dissenters discussed on appeal -- makes it quite likely that here, as in Parker v. Dugger, 498 U.S. 308 (1991), the trial judge weighed nonstatutory mitigation but found that it did not outweigh the aggravating factors, including the invalid ones.

Just like Richmond, this is a case in which the trial judge relied on invalid aggravation, the divided state appellate court failed to cure the infirmity and thus the death sentence was

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[9]See also petition at 52, discussing Raulerson I and Raulerson II, and lack of enforcement of the necessary "limiting construction" in cases decided at the time of Mr. Johnson's trial and sentencing.

"invalidated;" and nonstatutory mitigation was present. Those are the facts, and the State does not seriously dispute them. In Mr. Johnson's case, just as in Richmond, those facts warrant relief.

C. The Cruel or Unusual Punishment Claim

The State's primary contention with respect to this claim is that it could have been raised on direct appeal. That contention, however, ignores the obvious fact that the statistical evidence on which this claim is based was not available in 1980 at the time of Mr. Johnson's direct appeal. The State also argues that the ratio of inmates executed despite jury overrides to other inmates executed is not "surprisingly" low. That is not the relevant number, however. Here, as in Allen, the issue is whether, within a class of similarly-situated defendants (people whose jurors render a verdict of life), so few are actually subject to capital punishment as to violate Article I, § 17 of the Florida Constitution. For the reasons set forth in Claim II of the Petition, the execution of Marvin Johnson would indeed be "cruel or unusual."

CONCLUSION

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

Respectfully submitted,

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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 16th day of May, 1994.

Billy H Nolas
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