IN THE SUPREME COURT OF FLORIDA

MARVIN EDWIN JOHNSON,

Petitioner,

v. CASE NO. 83,690

HARRY K. SINGLETARY, Secretary,
Department of Corrections,

Respondent.
_____/

RESPONSE TO SUCCESSIVE PETITION FOR WRIT OF HABEAS CORPUS

The Respondent, Harry K. Singletary, submits that the successive petition for writ of habeas corpus should be denied and would show:

PROCEDURAL HISTORY

On June 7, 1978, Marvin Edwin Johnson murdered Woodrow Moulton in the course of an armed robbery.

Mr. Johnson was tried before a jury and testified on his own behalf at trial. Mr. Johnson relied upon an alibi defense, denying involvement in the crimes and rendering any contradictory "mental health" defenses useless. Johnson was found guilty of armed robbery and first-degree murder.

Although the advisory jury suggested a life sentence, the trial judge sentenced Johnson to death. Five aggravating factors were cited:

(1) Johnson was under sentence (an escaped convict) at the time.
(2) Johnson had prior convictions for violent felonies.
(3) Johnson created a great risk to other persons.
(4) Johnson committed the murder in the course of a robbery.

(5) The murder, while not "heinous", was both atrocious and cruel.

These aggravating factors were described as follows:

FINDING: Marvin Edwin Johnson was under sentence of imprisonment in the State of Tennessee, but had escaped therefrom, when he committed the murder of which he has been convicted.

FINDING: Marvin Edwin Johnson had not previously been convicted of any capital felony, but had been convicted of a felony involving the use or threat of violence to the person, to-wit:

(1) On October 14, 1964, the defendant pled guilty to the offense of robbery in Glynn County, Georgia, and sentenced to four years, wherein said robbery was committed by "grabbing and holding (the victim), throwing him down upon a bunk located in the Glynn County Jail, tying his hands and feet . . ., placing a cloth gag in his mouth, and threatening and offering to strike and hit him with two pieces of metal, fastened together, making one piece . . ., the same being then and there an offensive weapon, and a weapon likely to produce death if used in the way and manner as then and there threatened. . . ." State Exhibit No. 1, Penalty Phase, December 9, 1978.

(2) On November 16, 1976, the defendant was found guilty and sentenced to twenty years for the offense of armed robbery in Bradley County, Tennessee. State Exhibit No. 5, Penalty Phase, December 9, 1978.

(3) The defendant testified at the trial that he had been convinced of a crime ten times. The only evidence of what those crimes were are the two convictions enumerated in 1 and 2 above. This Court has recently been furnished copies of several prior convictions of the defendant, but the Court has neither studied these documents nor knows the details of them. Copies have been sent to defense counsel. In view of the evidence of prior convictions, the Court makes no judicial determination of what type of convictions are on the defendant's record except as enumerated above.

FINDING: Marvin Edwin Johnson did create a great risk to many persons. He did, in robbing Woodrow Moulton at gunpoint and in the ensuing gun battle within the confines of the Warrington Pharmacy, and in murdering the said Woodrow Moulton, create a great risk of death to the other three persons present in the drugstore at the time.

Finding: The murder was committed while Marvin Edwin Johnson was engaged in the commission of an armed robbery of the Warrington Pharmacy.

FINDING: The murder was committed during an armed robbery during which the defendant, Marvin Edwin Johnson, engaged in a pistol shoot-out with the victim. Upon discovering that the victim had exhausted his ammunition, and with the victim's arms raised in a sign of surrender, the defendant coolly and with calculation approached the victim and pointing his .357 magnum revolver within a foot or two of the victim's chest, remarked to his victim, "You think you're a smart son-of-a-bitch, don't you?" and proceeded to shoot the victim dead with one shot through the victim's heart.

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 for having defended his life and property in a completely lawful manner.

No mitigating circumstances, statutory or non-statutory, were found.

The Florida Supreme Court reviewed Johnson's conviction and sentence. On appeal, Johnson raised the following claims:

(1) Whether the prosecutor "unfairly" cross-examined Johnson on various collateral issues.
(2) Whether the cumulative effect of the cross-examination compelled relief.
(3) Whether the trial court erred in admitting certain photographs of the reconstructed crime scene into evidence.

(4) Whether the court erred in not allowing Johnson to call an "expert witness" on the subject of eyewitness fallibility.
(5) Whether the trial court violated Johnson's constitutional rights by overriding the advisory jury's suggestion of a life sentence, or misapplied Florida law.

Relief was denied on all counts, but the Florida Supreme Court disallowed the aggravating factor relating to "great risk to many others." Johnson v. State, 393 So.2d 1069 (Fla.), cert. denied, 454 U.S. 882 (1981) stating:

> The trial court erroneously found that Johnson created a great risk of death to many persons. The "many persons" referred to by the trial court were the other three persons present in the drugstore at the time of the shoot out. Three people are not "many persons" as we have interpreted that term in the context of section 921.141(5)(c). Kampff v. State, 371 So.2d 1007 (Fla. 1979). We therefore hold that this aggravating circumstance is not applicable. However, the trial court's findings that there were four other aggravating circumstances and no statutory or other mitigating circumstances were proper.

The Court concluded:

> In the present case, we find from the totality of the circumstance that the facts suggesting the death sentence are so clear and convincing that virtually no reasonable person could differ. There are no mitigating circumstances, statutory or otherwise, and there are four valid aggravating circumstances. We conclude that death is the appropriate sentence to be imposed for this atrocious and cruel execution murder committed during the commission of an armed robbery by an escaped convict who previously had been convicted of felonies involving the use or threat of violence.
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> Id. at 1074.

Marvin Johnson's next move was to join the class of plaintiffs in Brown v. Wainwright, 392 So.2d 1327 (Fla.), cert. denied, 454 U.S. 1000 (1981).

In May, 1982, a death warrant was signed. Johnson immediately proceeded to federal court with a petition for writ of (statutory) habeas corpus relief. See, 28 USC §2254. The petition raised the following claims:

(1) Reargument of Brown v. Wainwright (i.e., court receipt of confidential materials).
(2) Whether the "jury override" was constitutional .
(3) Whether the "Tedder" standard for reviewing overrides was proper.
(4) Whether the Florida Supreme Court erred in denying resentencing after striking an aggravating factor.
(5) Whether the trial judge considered non-statutory mitigating evidence.
(6) Whether the trial court erred in excluding expert testimony.
(7) Whether the prosecutor's cross-examination violated Johnson's rights.
(8) Whether the trial court erred in admitting photographs into evidence.

The petition was heard specially by the Honorable William Hoeveler of the Southern District of Florida; as noted, as one of his claims, Johnson specifically argued that the Florida Supreme Court had deprived him of due process, when it failed to remand for resentencing, after striking one of the aggravating circumstances, especially in light of the fact that the majority allegedly could not agree on the applicability of another aggravating circumstance. (Petition, Johnson v. Wainwright, U.S. District Court Case No. TCA 82-875, filed May 12, 1982, at p. 7-8; see appendix). Relief was denied on all counts. Johnson v. Wainwright, ___ F. Supp. ___, (N.D. Fla. 1985), Case No. TCA 82-0875.

The court found Count I barred by Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983) given Johnson's failure to provide a factual basis for his claim. Count II was mooted by Spaziano v. Florida, 468 U.S. 447 (1984). Count III (the application of the Tedder rule) was identified as an issue of state law as to its handling by the Florida Supreme Court and procedurally defaulted in the context of any federal constitutional claim. (Order, Johnson v. Wainwright, U.S. District Court No. TCA 82-875, October 4, 1985, at pages 21-7; see appendix).

Count IV (the Florida Supreme Court's "failure" to remand for resentencing) was rejected on authority of controlling United States Supreme Court precedent in Barclay v. Florida, 463 U.S. 939 (1983) and the Eleventh Circuit's decision in Dobbert v. Strickland, 718 F.2d 1518 (11th Cir. 1983), both of which recognized that there was no constitutional defect in allowing the Florida Supreme Court to determine whether the striking of an aggravating factor had an impact on the sentencing decision.

Count V ("failure to consider mitigating evidence") was denied as meritless, while Count VI (exclusion of expert testimony) was both meritless and an issue of state rather than federal law. Count VII (prosecutorial misconduct) was denied on its merits while Count VIII (admission of photographic evidence) failed to establish constitutional error.

Mr. Johnson filed an appeal in the Eleventh circuit, raising the following claims:

(1) Whether the trial court erred in excluding expert testimony.
(2) Whether "prosecutorial misconduct" rendered the trial unfair.

(3) Whether an "error of fact" by the Florida Supreme Court and Judge Hoeveler compelled a new trial.
(4) Whether the trial court erred in not allowing consideration of "residual doubt about guilt" as a mitigating factor.
(5) Whether the trial court refused to consider non-statutory mitigating evidence.
(6) Whether the District Court erred in not granting "discovery" to Johnson to revive his Brown v. Wainwright claims.
(7) Whether the jury override is constitutional.

The Eleventh Circuit denied all relief. Johnson v. Wainwright, 806 F.2d 1479 (11th Cir. 1986), cert. denied, 484 U.S. 873 (1987).

In footnote (5) of the opinion, the Eleventh Circuit held:

> "5. Those issues which were raised before the district court and have not been asserted on appeal are deemed abandoned (i.e. the trial judge's application of the Tedder standard; the admission of interior photographs and the alleged due process violation for failure to remand)."
>
> Id. at 1481.

The Eleventh Circuit found no merit to the argument regarding "lingering doubt" as an overlooked mitigating factor, no merit to the claim that the court failed to consider mitigating evidence, no merit to his claim regarding the exclusion of expert testimony, either no error or no prejudice in assorted claims of prosecutorial misconduct, and no merit to Johnson's Brown reargument, Spaziano argument, or claim of (state) Supreme Court error.

A second death warrant was signed on March 3, 1988, with execution scheduled for April 13, 1988. On April 10, 1988,

Johnson filed a motion for post-conviction relief in the (state) circuit court. See Fla.R.Crim.P. 3.850. This was followed by a petition for writ of habeas corpus to the Florida Supreme Court.

The Rule 3.850 petition raised the following claims:

(1) Ineffective assistance of counsel during the penalty phase.
(2) Ineffective assistance of counsel during the guilt phase of trial.

The Rule 3.850 petition was denied and the denial was upheld on appeal. Johnson v. State, 536 So.2d 1009 (Fla. 1988).

In denying appellate relief, the Florida Supreme Court found that Johnson's Rule 3.850 petition was untimely (having been filed 15 months after the expiration of the two year filing deadline). Furthermore, the Court noted that Johnson's lawyers "candidly stated" that they had made the strategic decision to engage in "piecemeal litigation" by taking some claims to federal court and reserving others for later use in state court. Thus, the procedural ruling (denying relief) by the trial court was upheld.

Johnson also filed a petition for "habeas corpus" relief in the Florida Supreme Court. The petition raised five claims:

(1) Whether the trial court erred under Hitchcock v. Dugger.
(2) Whether the override sentence was correct.
(3) Ineffective assistance of appellate counsel when arguing sentencing issues
(4) Ineffective assistance of appellate counsel when arguing suppression issues and perfecting the appellate record.
(5) Whether the trial court erred in excusing certain women from jury duty.

The habeas petition was denied. Johnson v. Dugger, 523 So.2d 161 (Fla. 1988). As to the fourth claim, in regard to

alleged ineffective assistance of appellate counsel, Johnson specifically contended that the heinous, atrocious or cruel aggravating factor did not apply, and that appellate counsel had done an ineffective job of challenging it. (Petition, Johnson v. Dugger, Florida Supreme Court Case No. 72,231, filed April 9, 1988, at pages 50-66; see appendix).

The Florida Supreme Court found no record support for Johnson's so-called "Hitchcock" claim. In addition, the Court found that Johnson's claims of "ineffective appellate counsel" failed to show either error or prejudice. The final issue (juror excusal) was rejected as having previously been ruled upon by the Court.

The claim that appellate counsel was ineffective in arguing the "override issue" and the sufficiency of the evidence supporting the statutory aggravating factors was specifically denied by the Court as follows:

> Claims II and III were raised on direct appeal and even though the jury override might not have been sustained today, it is the law of the case. In view of this Court's prior consideration of this issue, there has been no showing of prejudice.
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> Id. at 162.

A third death warrant was signed on February 16, 1989, setting Johnson's execution for March 16, 1989. On March 11, 1989, Johnson filed a 206 page "federal habeas corpus" (successive) petition. The petition raised five claims:

(1) The "Hitchcock" issue.
(2) Reargument of the override sentencing decision.
(3) Ineffective assistance of a mental health expert.

(4) Ineffective assistance of trial counsel (pretrial investigation).
(5) Ineffective assistance of appellate counsel due to counsel's failure to raise a suppression issue on appeal.

The district court denied relief on the Hitchcock issue both as "previously ruled upon" and meritless. Claim II was deemed procedurally barred. Claim V (ineffective appellate counsel) was denied as meritless. Johnson v. Dugger, ___ F. Supp. ___, (N.D. Fla. 1989), Case No. TCA 89-40046. Johnson again appealed, raising five claims:

(1) The "Hitchcock" issue.
(2) The propriety of the jury override.
(3) The District Court's findings regarding procedural bar.
(4) Ineffective assistance of counsel on appeal.
(5) Ineffective assistance of trial counsel.

A panel of the Eleventh Circuit initially held that Johnson was entitled to a hearing on his "ineffective counsel" claims. Johnson v. Dugger, 911 F.2d 440 (11th Cir.), vacated, 920 F.2d 721 (1990). The en banc Eleventh Circuit, on rehearing, denied all relief to Johnson. Johnson v. Singletary, 938 F.2d 1166 (11th Cir. 1991), cert. denied, ___ U.S. ___, 121 L.Ed.2d 274 (1992).

This decision grew in importance as the foundation for the subsequent decision by the Supreme Court in Sawyer v. Whitley, 505 U.S. ___, 120 L.Ed.2d 269 (1992).

The en banc Eleventh Circuit ruled:

(1) That the term "innocent of sentence" was an "unnatural use of language" that could not be used to avoid a procedural bar.

(2) That the Florida Supreme Court's enforcement of the time-bar attending Rule

> 3.850 petitions was a valid exercise of state law that would support a federal denial of relief on procedural grounds.
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> (3) That the "cause and prejudice" standard for avoiding procedural bars in federal court could not be satisfied by a showing of "ineffective collateral counsel" because no constitutional right to collateral counsel exists.
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> (4) "Factual inaccuracies" in the guilt and penalty phases of trial do not establish "actual innocence" so as to justify a successive §2254 petition.
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> (5) Johnson's Hitchcock and "ineffective trial counsel" claims were procedurally barred and an abuse of the writ (as to Hitchcock).

Mr. Johnson's case was the foundation for the subsequent decision in Sawyer v. Whitley, supra, but the United States Supreme Court denied Johnson's request for certiorari review to reconcile minor differences in the two opinions.

No action was taken by Mr. Johnson from 1992 to the signing of his fourth warrant on April 26, 1994. **Such warrant is active between noon on Tuesday, May 17, 1994, and noon on Tuesday, May 24, 1994, with execution presently scheduled for 7:00 AM on Thursday, May 19, 1994.**

On May 13, 1994, Johnson filed a successive petition for writ of habeas corpus in the Supreme Court of Florida, raising two primary claims for relief. In one, Johnson contended that, as a matter of state constitutional law, his execution would be unconstitutional, given the relative infrequency with which those sentenced to death pursuant to jury overrides were executed. In the other claim, Johnson contended that his sentence of death had to be reversed because the sentencing judge had weighed invalid

aggravation, and the Florida Supreme Court had allegedly failed to cure such error on appeal, in violation of Richmond v. Lewis, ___ U.S. ___, 113 S.Ct. 528, 121 L.Ed.2d 411 (Fla. 1992).

ARGUMENT

The successive petition for writ of habeas corpus filed on Mr. Johnson's behalf raises two procedurally barred claims that are devoid of record support. This successive petition is an abuse of the writ and should be dismissed.

Mr. Johnson's first claim is that he is entitled to relief under Richmond v. Lewis, ___ U.S. ___, 113 S.Ct. 528, 121 L.Ed.2d 411 (Fla. 1992), because this Court allegedly failed to correctly process his appeal. The claim is procedurally barred as a claim that could have been raised in a prior habeas petition and, in fact, is simply a variation upon other claims argued by Mr. Johnson, "supported" by a case that does not qualify as "new law" or have retroactive application. The claim is also factually unsupported.

Mr. Johnson's second claim alleges that the death penalty is unconstitutional under the Florida Constitution. This issue is one that should have been raised on direct appeal and cannot be considered in a successive petition for habeas corpus relief.

CLAIM I

THE RICHMOND V. LEWIS ISSUE IS PROCEDURALLY BARRED

Mr. Johnson contends that he is entitled to habeas corpus relief because he recently found a case from 1992, Richmond v. Lewis, ___ U.S. ___, 113 S.Ct. 528, 121 L.Ed.2d 411 (Fla. 1992), that looks like it might be helpful to his cause.

To his credit, Johnson does not attempt to argue that Richmond is "new law" or that it somehow has "retroactive impact." That, of course, is because Johnson cannot do so.

Richmond is not new law. Richmond is basically an outgrowth of Parker v. Dugger, 498 U.S. 308, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991), involving state appellate court "error" in not conducting a harmless error analysis after striking an aggravating factor.

As this Court held in Routly v. State, 590 So.2d 397, 403 (Fla. 1991),

> "We note that any attempt to relitigate the validity of the override is procedurally barred. Porter v. Dugger, [citation omitted]; Eutzy v. State, [citation omitted]. Routly relied on Parker v. Dugger, 498 U.S. 308, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991), in an attempt to overcome the procedural bar. Parker does not constitute a change of law which would require retroactive application under Witt v. State, 387 So.2d 922 (Fla.), cert. denied, 449 U.S. 1067 ..."

In Francis v. Barton, 581 So.2d 583 (Fla. 1991), Parker was again identified as nothing more than an "evolutionary refinement" in the law rather than a change of law. Because Parker was decided in 1991, Johnson should have raised a claim based upon it by 1993, under the standards set forth in Adams v. State, 543 So.2d 1244, 1247 (Fla. 1989) (claims based upon "new law" must be raised within two years of decision at issue); no doubt this omission explains Johnson's choice to rely upon Richmond.

The Richmond decision was a fact-specific inquiry into the conduct of the Arizona Supreme Court which, in the opinion's own words, simply followed "well defined" (supra at 420) Eighth

Amendment law. The decision did not break new ground, did not discover a new constitutional right and certainly did not create a jurisprudential upheaval given its fact-specific findings. Clearly, Richmond is not a "change of law" nor does it merit some retroactive application that would overcome any procedural bar. Clark v. Dugger, 599 So.2d 192 (Fla. 1990) (offering an array of cases as "changes of law" without success), see e.g., Johnson v. Singletary, 991 F.2d 669 (11th Cir. 1993).

The basic contentions of fact and law raised by Mr. Johnson are similar to arguments he raised in support of earlier claims of "ineffective appellate counsel" and error (by this Court) in "failing" to remand this case for resentencing. Therefore, the current petition is nothing more than a novel variation of claims that Johnson raised and, in fact, abandoned in earlier collateral proceedings.

Florida law is well-established on the issue of procedural bars. Habeas corpus petitions cannot be used to relitigate past appellate or collateral claims, nor can it be used to litigate issues that could or should have been raised in any earlier proceedings. Provenzano v. Dugger, 561 So.2d 541 (Fla. 1990); Squires v. Dugger, 564 So.2d 1074 (Fla. 1990); Clark v. Dugger, 559 So.2d 192 (Fla. 1990); Parker v. Dugger, 537 So.2d 967 (Fla. 1988); Mills v. Dugger, 574 So.2d 63 (Fla. 1991); Johnson v. Dugger, 523 So.2d 161 (Fla. 1988); Johnson v. Singletary, 612 So.2d 575 (Fla. 1993); Ferguson v. Singletary, ___ So.2d ___, (Fla. 1994), 19 Fla. L. Weekly S.101; Chandler v. Dugger, ___ So.2d ___ (Fla. 1994), 19 Fla. L. Weekly S.95.

Without waiving any procedural defenses, it should be noted that the basic factual premises of Mr. Johnson's claim are wrong. Johnson's "Richmond" claim can be read to include a number of sub-claims, specifically - (1) a claim that the Florida Supreme Court performed a deficient harmless error analysis after it struck the aggravating circumstance of "great risk"; (2) a claim that the heinous, atrocious or cruel aggravating circumstance has been unconstitutionally implied to Johnson and (3) a claim that the state courts erred in failing to consider or weigh nonstatutory mitigation. Each of these sub-claims, all of which are procedurally barred, will be considered below.

(A) Sub-Claim On Harmless Error

First, Mr. Johnson alleges that this Court failed to perform any "harmless error" analysis in this case. That contention is clearly not supported by this Court's opinion. In relevant part, the opinion states:

> ... We therefore hold that this aggravating circumstance is not applicable. However, the trial court's findings that there were four other aggravating circumstances and no statutory or other mitigating circumstances were proper. Johnson v. State, 393 So.2d at 1073-1074
>
> and,
>
> ... In the present case we find from the totality of the circumstances that the facts suggesting the death sentence are so clear and convincing that no reasonable person could differ. There are no mitigating circumstances, statutory or otherwise, and there are four valid aggravating circumstances. We conclude that death is the appropriate sentence to be imposed for this atrocious and cruel execution murder committed during the commission of an armed robbery by an escaped convict who previously

> had been convicted of felonies involving the use or threat of violence. (Id.).

While the talismanic phrase "harmless error" was not utilized, the court clearly took pains to summarize the status of this murder along the lines of the approved aggravating factors while noting anew the absence of mitigation. By any name, the Court conducted "harmless error" review.[1]

Mr. Johnson accused this Court of failing to conduct a "harmless error" analysis in his first federal habeas corpus petition. In denying relief, the Honorable Judge Hoeveler found:

> The Eleventh Circuit has rejected the argument put forward by Johnson in a case where the Florida Supreme Court found that the evidence was insufficient to support two of four aggravating circumstances relied upon by the trial judge. See, Dobbert v. Strickland, 718 F.2d at 1521-22.
>
> As in Barclay and Dobbert, the Florida Supreme Court has not acted arbitrarily in concluding that the trial judge's error in determining aggravating circumstances in Johnson's case was harmless. The Florida Supreme Court conducted the harmless error and Tedder review approved in Barclay. There is no evidence that the Florida Supreme Court has failed to conduct meaningful appellate review in cases of this type.

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[1] Although the talismanic words "harmless error" are used in Kennedy v. State, 455 So.2d 351 (Fla. 1984), it is noteworthy that the analysis was otherwise identical to the one at bar (i.e., remaining aggravators clearly outweighed single mitigator). On habeas review, counsel's claim that the Kennedy Court failed to properly reweigh the evidence was rejected. Kennedy v. Singletary, 599 So.2d 991 (Fla. 1922). Kennedy also found the analysis issue procedurally barred. Indeed, the Kennedy case reflects that counsel was aware of this general issue back in 1992 (despite the "absence" of Richmond v. Lewis) but simply did not bother to raise it in this case until a few days before Johnson's execution; a fact which clearly implies abuse of the writ.

Order, Johnson v. Wainwright, U.S. District Court No. TCA 82-875, October 4, 1985, at pages 21-7; (see appendix).

Again, Mr. Johnson did not renew his claim (that this Court "failed" to conduct a harmless error analysis) when he appealed his federal habeas petition to the Eleventh Circuit. As a result, the Eleventh Circuit expressly ruled that the issue of this Court's conduct (in not remanding the case, the basis of the harmless-error argument) was expressly waived. Johnson v. Wainwright, 806 F.2d 1479 (11th Cir. 1986).

Not one court that has reviewed this case has ever found that this Court failed to conduct a harmless error analysis. That is why Johnson waived the issue in 1986, and why the allegation is untenable today.

(B) The Sub-Claim In Regards To The Heinous, Atrocious Or Cruel Aggravating Circumstance

In the instant petition, Johnson contends that the heinous, atrocious or cruel aggravating circumstance has been unconstitutionally applied to him, in that, allegedly, under the facts of this case, it should have been found inapplicable, either by the sentencing Judge or the Florida Supreme Court; Johnson contends that his sentence of death violates a number of precedents of the Supreme Court of the United States including Espinosa v. Florida, ___ U.S. ___, 112 S.Ct. 2926, 120 L.Ed.2d 854 (1992) (Petition at 46-58).

The record in this case indicates that the jury was not given the instruction actually condemned in Espinosa, but rather one in which definitions were provided for the terms, including a specific admonition that they could consider the "pitiless"

nature of the crime (R 1567); the jury, of course, returned a life recommendation. In his sentencing order, the judge found that this aggravating circumstance applied, specifically noting that the victim had been "executed" with a single shot to the heart, after he had been rendered defenseless and had indicated that he wished to surrender; the judge specifically noted that Johnson had taunted the victim prior to killing him, stating, "You think you're a smart son-of-a-bitch, don't you?" (R 1721-2).

In his direct appeal to the Florida Supreme Court, Johnson's appellate counsel made a cursory argument, in the Reply Brief, to the effect that, "The finding of the heinous, atrocious or cruel was also erroneous or at most a weak factor under the circumstances of this case." (Reply Brief, Johnson v. State, Florida Supreme Court Case No. 56,167, filed January 10, 1980 at page 16). In the majority opinion in Johnson's direct appeal, the court held that the finding of this, as well as the other three valid aggravating circumstances, had been "proper" under State v. Dixon, 283 So.2d 1 (Fla. 1973), Johnson, 393 So.2d at 1073-4; in the conclusion to the opinion, the Florida Supreme Court expressly described the homicide in this case as an "atrocious and cruel execution murder." Id. at 1074. Justice England specifically concurred, stating that although he disagreed as to the application of this aggravating factor, such disagreement "is irrelevant to the outcome of the case." Johnson, 393 So.2d at 1074 (England, J., concurring). In a separate dissent, Justice Sundberg stated that he found the death

penalty disproportionate under the standards set forth in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975); the Justice, however, described the case as one with "four aggravating circumstances." Johnson, 393 So.2d at 1075 (Sundberg, J. dissenting). Justices Overton and McDonald dissented on the basis of Tedder as well, but did not expressly mention any of the aggravating circumstances. Johnson, 393 So.2d at 1076-7 (McDonald and Overton, J. J., dissenting).

Johnson did not raise any specific attack upon this aggravating circumstance in his 1982 federal habeas petition, although he did contend, inter alia, that his sentence should have been remanded for resentencing when "the majority decision in the [Florida] Supreme Court could not agree on the applicability of another aggravating circumstance." Petition, Johnson v. Wainwright, U.S. District Court Case No. TCA 82-875, filed May 12, 1982, at p. 7-8; see appendix). In his order of October 4, 1985, denying relief, Judge Hoeveler found that, despite whatever split could be said to exist as to the aggravating circumstances, the imposition of the death penalty under the circumstances was neither irrational nor arbitrary Order, Johnson v. Wainwright, U.S. District Court No. TCA 82-875, October 4, 1985, at pages 21-7; see appendix). As noted, Johnson abandoned this claim in his first federal appeal. Johnson v. Wainwright, 806 F.2d 1479, 1481, n.5 (11th Cir. 1986).

In his 1988 state court habeas petition, Johnson specifically contended, inter alia, that appellate counsel had rendered ineffective assistance for failing to sufficiently

attack the aggravating circumstances found, in that, allegedly, this aggravating circumstance had been unconstitutionally applied to him, in violation of such precedents as Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) and the then-pending Maynard v. Cartwright, 486 U.S. 356, 108 S.Ct. 1853, 100 L.Ed.2d 371 (1988) (Petition, Johnson v. Dugger, Florida Supreme Court Case No. 72,231, filed April 9, 1988, at pages 50-66; see appendix). In its opinion, the Florida Supreme Court rejected the claim of ineffective assistance of appellate counsel, finding, inter alia, "no showing of prejudice." Johnson, 523 So.2d at 162. Although Johnson subsequently filed a second habeas corpus petition in federal court, he presented no claim of this nature in his petition to the district court or in the subsequent appeal. See Johnson v. Singletary, 938 F.2d 1166 (11th Cir. 1991).

As his previously been noted, habeas corpus is not a vehicle for obtaining appeals of issues which were raised, should have been raised on direct appeal, or which were waived at trial, or which could have, should have, or have been raised in prior postconviction filings. See e.g., Mills v. Dugger, 574 So.2d 63, 65 (Fla. 1990); White v. Dugger, 511 So.2d 554, 555 (Fla. 1987); Francis v. Barton, 581 So.2d 583 (Fla. 1991). It is clear that the basis for this claim has been available for the last fifteen (15) years, and that Johnson's failure to previously raise it, to the extent that he has not, is inexcusable; the decision affirming Johnson's sentence was rendered in 1981, in Godfrey v. Georgia, was decided in 1980. As noted, this claim represents

something of a rehash of allegations made in Johnson's 1982 federal petition and his 1988 state petition; as such, the matters presented are clearly procedurally barred. See e.g., State v. Salmon, 19 Fla. L. Weekly S226 (Fla. April 18, 1994); Mills, supra. The Florida Supreme Court has specifically held that claims involving the alleged unconstitutional application of an aggravating circumstance are matters which should be presented on direct appeal, and which are procedurally barred when raised on postconviction attack. See, e.g., Henderson v. Dugger, 522 So.2d 835, 836 (Fla. 1988); Johnson v. Singletary, 612 So.2d 575 (Fla. 1993); Henderson v. Singletary, 617 So.2d 313 (Fla.), cert. denied, ___ U.S. ___, 113 S.Ct. 1891, 123 L.Ed.2d 507 (1993). To the extent that Espinosa v. Florida is implicated (which is rather difficult to follow, as such was a case involving jury instructions, and the jury in this case recommended life), Johnson obviously did not comply with the dictates of James v. State, 615 So.2d 668 (Fla. 1993), in that he unquestionably failed to present any claim in regard to the constitutionality of the jury instructions on direct appeal; accordingly, this matter is barred. See, Henderson v. Singletary, supra.

To the extent that any further argument is required, the state would contend that Johnson is entitled to no relief. It simply is not true, as Johnson now alleges, that four member of the Florida Supreme Court disapproved the finding of this aggravating circumstance, and it must be remembered that, in the 1988 habeas action, the court unanimously found a lack of

prejudice as to Johnson's related claim of ineffective assistance of appellate counsel, such finding hardly consistent with any uncertainty to the application of this aggravating factor. As to the factor itself, it should be noted that such was found prior to the enactment of the cold, calculated and premeditated aggravating circumstance, under §921.141(5)(i), and that the conclusion by the state sentencing court and the state appellate court that this was a cruel, pitiless murder is supported by the record and consistent with the constitutionally narrow construction of this aggravating circumstance approved by the United States Supreme Court in Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Cf. Hargrave v. State, 366 So.2d 1, 5 (Fla. 1978) (aggravating circumstance properly found where defendant "executed" wounded and defenseless store clerk by shooting him once in the head); Harvey v. State, 529 So.2d 1083, 1087 (Fla. 1988) (where defendant shot already-wounded victim once in the head at point-blank range, such murder was heinous, atrocious or cruel). A rational fact-finder could correctly have found this aggravating circumstance to apply, cf. Lewis v. Jeffers, 497 U.S. 764, 110 S.Ct. 3092, 111 L.Ed.2d 606 (1990), given the fact, inter alia, that Johnson taunted the helpless victim, prior to executing him, and that such clearly evidences a conscienceless and pitiless crime in which unnecessary mental anguish was inflicted upon the victim. Cf. Clark v. State, 443 So.2d 973 (Fla. 1983) (victim's mental anguish, upon knowledge of impending death, may support finding of this aggravating circumstance). Of course, without this aggravating circumstance,

Johnson would remain death-eligible, under the standard which he himself helped create. Johnson v. Singletary, 938 F.2d 1166 (11th Cir. 1991).

(C) Sub-Claim on Lockett Error

The third claim by Mr. Johnson is an interesting positional shift which fully reveals the purely opportunistic nature of this petition as well as Johnson's cavalier attitude towards the facts.

In past petitions, state and federal, Johnson zealously argued that the trial judge violated Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1321, 95 L.Ed.2d 346 (1987) by not considering non-statutory mitigating evidence. This argument was belied by the record (particularly at R 1767-68) and had to be repeatedly rejected by the courts. Johnson v. Wainwright, supra; Johnson v. Singletary, 938 F.2d 1166 (11th Cir. 1991); Johnson v. Dugger, 523 So.2d 161 (Fla. 1988).

Now, however, Mr. Johnson has shifted his claim from "failure to consider" mitigating factors to "failure to find that there were no nonstatutory mitigating factors" (i.e., no findings were made at all). (See, Petition at page 3). This shift in Johnson's position eventually causes him to flatly contradict all of his prior pleadings, and claim that the trial judge "found" nonstatutory mitigating factors but lied in his sentencing order and deliberately kept these still unidentified factors a secret. (The judge's motive is not offered by Johnson's absurd petition). (See, Petition at 31).

This tactical about-face is a clear perversion of the record simply designed to force the "facts" into a mold that will fit Johnson's reference to Parker v. Dugger, 498 U.S. 308, 111 S.Ct. 731, 112 L.Ed.2d 812 (1991). The argument is contrary to the record, which clearly states that no mitigating factors were found even though nonstatutory evidence was considered. Mr. Johnson's attempt to distort the record to imply the finding of "secret mitigating factors" is utterly absurd.

It should be noted that in Parker, the Florida Supreme Court assumed that nonstatutory factors were applied because Parker did not receive a death sentence for one of his murders. No such indicia of mitigation can be found on this record. Here, Johnson's tactical abuse is clear. In 1991, Johnson was denied relief in federal court in a major decision on the subject of procedural bars. Also in 1991, Parker v. Dugger was published, but Johnson made no effort to litigate Parker for the next two years. See Fla.R.Crim.P. 3.850. Now, citing to Richmond v. Lewis, supra, which is not new law, Johnson wants to bootstrap an out-of-time Parker argument that, in turn, is predicated upon a 180 degree change in his "good faith" representations of fact to the courts.

The claim is a pure abuse of process and has absolutely no basis in fact.

CLAIM II

THE STATISTICAL ISSUE IS PROCEDURALLY BARRED

In this claim, but for a cursory footnote, Johnson contends that his execution would violate the state Constitution, in that

those whose sentences of death have arisen as the result of jury overrides have not, allegedly, been executed with sufficient frequency, so as to satisfy Johnson; Johnson's primary legal authority for this position is the non-final decision in Allen v. State, 19 Fla. L. Weekly S139 (Fla. March 24, 1994), which involved the issue of execution of those under the age of sixteen. This claim, raised fifteen years after Johnson was sentenced to death, and presented for the first time in a successive petition for writ of habeas corpus, is obviously procedurally barred. See, e.g., White v. Dugger, 511 So.2d 554 (Fla. 1987); Francis v. Barton, 581 So.2d 583 (Fla. 1991). Further, Johnson's statistics are hardly as persuasive as he believes. Since the re-institution of capital punishment, thirty-three (33) inmates have been executed, and of this number, three - Earnest Dobbert, Beauford White and Bobby Francis - represented jury overrides. This "rate" of execution would seem at least comparable to the rate of affirmance for overrides, and hardly demonstrates "freakishness" under either the state or federal Constitution. Additionally, the number of "override" inmates to be executed is bound to increase as these inmates exhaust their final appeals. See, e.g., Lusk v. Singletary, 976 F.2d 631 (11th Cir. 1992); Porter v. Singletary, 14 F.3d 554 (11th Cir. 1994); Bolender v. Singletary, 16 F.3d 1547 (11th Cir. 1994). No relief is warranted as to this procedurally barred claim.

CONCLUSION

WHEREFORE, for the aforementioned reasons, any and all requested relief, including any stay of execution, should be denied.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

MARK C. MENSER
Chief, Capital Appeals
Florida Bar No. 239161

DEPARTMENT OF LEGAL AFFAIRS
The Capitol
Tallahassee, FL. 32399-1050
(904)488-0600

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand-delivery to Mr. Mr. Billy Nolas and Steven J. Uhlfelder, Esquier c/o Volunteers Lawyers' Resource Center, 805 N. Gadsden Street, Tallahassee, Florida, 32301, this 14 May, 1994.

MARK C. MENSER
Assistant Attorney General

IN THE SUPREME COURT OF FLORIDA

MARVIN EDWIN JOHNSON,

Petitioner,

v. CASE NO. 83,690

HARRY K. SINGLETARY, Secretary,
Department of Corrections,

Respondent.
_____/

APPENDIX

(1) Excerpts from Petition, Johnson v. Wainwright, U.S. District Court Case No. TCA 82-875.

(2) Excerpts of Order, Johnson v. Wainwright, U.S. District Court No. TCA 82-875, October 4, 1985, at pages 21-7; see appendix.

(3) Excerpts from Petition, Johnson v. Dugger, Florida Supreme Court Case No. 72,231, filed April 9, 1988, at pages 50-66; see appendix.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

MARVIN EDWIN JOHNSON,

Petitioner,

vs. CASE NO.: TCA 82-875

filed 5-12-82

LOUIE L. WAINWRIGHT,
Secretary, Florida Department
of Corrections,

Respondent

PETITION FOR WRIT OF HABEAS CORPUS
BY PERSON IN STATE CUSTODY

Prisoner's Name: MARVIN EDWIN JOHNSON

Prison Number: C-018685

Place of Confinement: Florida State Prison, Starke, Florida

TO THE HONORABLE William Stafford, Judge of the District Court for the Northern District of Florida, Tallahassee Division:

1. The name and location of the court which entered the judgment of conviction and sentence under attack are:

(a) The Circuit Court of the First Judicial Circuit, In and For Escambia County, Florida.

(b) Pensacola, Escambia County, Florida.

2. The date of the judgment of conviction of Count 1 and 2 of the indictment charging first degree murder and armed robbery is December 8, 1978. The date of sentence to Count 2 is December 9, 1978, and the date of sentence of death as to Count 1 of the indictment is January 12, 1979.

3. The sentence as to Count 2 of the indictment is life imprisonment. The sentence as to Count 1 of the indictment is that Marvin Edwin Johnson is to be put to death by electrocution.

4. The nature of the offense is that Petitioner was charged with first degree murder, in violation of Section 782.04 Florida Statutes in that he allegedly murdered Woodrow Moulton, and Petitioner was charged with armed robbery of the Warrington Pharmacy.

5. Petitioner's plea was not guilty.

the imposition of the penalty in these circumstances. The Florida Appellate Review Standard of Tedder v. State, 322 So.2d 908 (Fla. 1975), is being, and has been in the Petitioner's case, inconsistently applied in an unpredictble and arbitary manner. The review of Petitioner's sentence was unreliable by the application of vague standards as to when a death sentence may be imposed, despite jury recommendation for life imprisonment. (3) The Florida Supreme Court applied a presumption against Petitioner in its review that upon a single, aggravating factor being found, death is the appropriate sentence despite the decision of the Florida Supreme Court in Williams v. State, 386 So.2d 538 (Fla. 1980), that no such presumption should apply in a case where a trial jury has recommended life imprisonment. This action violates Petitioner's Federally guaranteed right to due process of law under the Fourteenth Amendment, and the prohibition against cruel and unusual punishments under the Eighth Amendment. The presumption that death is appropriate based on a single, aggravating factor has been applied by the Florida Supreme Court in a manner making it irrebuttable when the aggravating factor is that the Defendant has a prior conviction for a violent felony. No such death sentence has been reduced to life imprisonment by the Florida Supreme Court, and, regardless of the circumstances, and despite a life recommendation, Petition could not succeed in obtaining sentencing reduction in the Florida Supreme Court due to the irrebuttable effect given to said aggravating circumstance by the Court, thereby placing the review system as applied herein in violation of the Eighth and Fourteenth Amendments.

(D) The review procedure failed to accord a due process of law when the Florida Supreme Court refused to remand the issue of sentence to the trial court upon its disapproval of the use of one of the aggravating circumstances on which the trial judge based his sentence of death, and further, when the majority decision in the Supreme Court could not agree on the applicability of another aggravating circumstance on which the original sentence was based. The failure to vacate the sentence and remand to the sentencing court violates the separation of sentencing and review functions necessary for the procedure to insure compliance with due process and Eighth

Amendment requirements. As explicated in Stephens v. Zant, 631 Fed. 2d 397 (Fifth Circuit 1980), cert. granted, remanded to State Supreme Court for a clarification of rationale upon certified question in Zant v. Stephens, May 3, 1982, _____ U.S. _____.

(E) The trial court's rejection of a mitigating factor proferred by Petitioner's trial counsel violates Petitioner's constitutional guarantees of the Eighth and Fourtheenth Amendments of the United States Constitution.

At the sentencing hearing, trial counsel presented to the sentencing court as a mitigating factor the fact that Petitioner spared the life of a potential eye-witnesses whom later identified Petitioner as the perpetrator in the guilt phase of the trial. The court, however, prior to imposition of the death sentence contrary to the jury recommendation for life, refused to weigh this circumstance as a mitigating factor and specifically rejected the profer as mitigation. At page 1767 of the trial transcript, the Court stated as follows:

> "Yes, I know that I understand that. And the Court has not disregarded any of the mitigating circumstances that were offered in evidence, either at the penalty phase or during the trial itself. For example, in your argument, Sir, I know that you or Mr. Rankin, one of the two, mentioned that probably one of the mitigating circumstances was that he didn't kill everybody else in the store. Well, I don't think that's a mitigating circumstance at all, Sir. It just does not aggravate the circumstances any more than was done. The fact that he didn't murder everyone in the store certainly cannot be called a mitigating circumstance -- no way. My point is, I've considered that really, Sir, and I reject that argument." (Emphasis added)

It was the sentence of this Court that, in support of his imposition, it found no mitigating factors contrary to the jury's finding that there were sufficient mitigating factors to outweigh the aggravating factors. This rejection of proferred mitigating factors by Petitioner's trial is violative to constitutional dictates of the Eighth and Fourteenth Amendments as prescribed in the Lockett decision.

> "We are now faced with those questions, and we conclude that the Eighth and Fourteenth require that the sentencer, in all but the rarest kind of capital case, not be procluded from considering as a mitigating factor, any aspect of Defendant's character or record, or any of the circumstances of the offense that the Defendant proffers as a basis for a sentence less than death." Pages

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA

NO: TCA 82-0875

MARVIN EDWIN JOHNSON,

Petitioner,

vs.

MEMORANDUM DECISION DENYING PETITION FOR WRIT OF HABEAS CORPUS

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Respondent.

A death warrant was signed by the Governor of the State of Florida scheduling the execution of Marvin Edwin Johnson for May 1982. Johnson then filed a petition for writ of habeas corpus and moved for a stay of execution. The stay was granted on May 14, 1982 to permit this Court to review the federal constitutional claims of the petitioner.

In May 1982, the Eleventh Circuit Court of Appeals had under consideration a habeas corpus case challenging the alleged consideration of ex parte, nonrecord information on capital defendants by the justices of the Florida Supreme Court. Johnson raised this identical issue in his petition and asked for a stay until the appellate process was completed. The Eleventh Circuit, in Ford v. Strickland, 696 F.2d 804 (11th Cir.)(en banc), cert. denied, __U.S.__, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983), rejected the argument that the Florida Supreme Court had

695 F.2d at 1310-11, Johnson cannot show actual prejudice from the procedural default. The constitutionality of the Tedder standard was upheld by the United States Supreme Court in Spaziano. 104 S.Ct. at 3165-66. Therefore, as a matter of law, no actual prejudice resulted and consideration of this issue is barred by Johnson's procedural default.

D. Failure to Remand after Striking Aggravating Circumstances

Johnson argues that the failure of the majority of the Florida Supreme Court to remand the issue of sentence to the trial judge in light of its disapproval of one of the aggravating circumstances on which the trial judge based his sentence of death and the inability of all four members to agree on another aggravating circumstance violated Johnson's right to due process guaranteed by the Fourteenth Amendment.

In the original response to the petition, the Respondent argued that this issue could have been raised by post-conviction attack in the trial court pursuant to Rule 3.850, Florida Rules of Criminal Procedure. Respondent argued that this available state remedy was "deliberately bypassed" and that the Court's consideration of this issue was barred by Wainwright v. Sykes and Engle v. Isaac. Respondent renewed this argument at a hearing on the issues of exhaustion of state remedies and procedural default in relation to Johnson's petition.

Johnson is complaining of actions which were taken by the Florida Supreme Court on its review of his conviction and

sentence. His claim "does not relate to anything the trial court did or failed to do or to anything that transpired during the trial or trial level proceedings. Therefore, it is not an appropriate matter to raise in a Rule 3.850 motion." Armstrong v. State, 429 So.2d 287, 291 (Fla.), cert. denied, __U.S.__, 104 S.Ct. 203, 78 L.Ed.2d 177 (1983)(Citation omitted.); Foster v. State, 400 So.2d 1 (Fla. 1981). The state remedy, if any, available to Johnson would be to raise this issue in a petition for a writ of habeas corpus in state court. See Armstrong v. State, 429 So.2d at 291.

Respondent has characterized Johnson's action as "deliberate bypass." In Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963), the United States Supreme Court held that a state prisoner who knowingly and deliberately bypasses state procedures intentionally forfeits state court remedies and can be denied collateral relief on that basis. 372 U.S. 438-39.[2] A federal court must make a factual determination that a habeas corpus petitioner's action amounts to "deliberate bypass".

> The standard for determining that an issue has been deliberately bypassed is rigid. Montgomery v. Hopper, 488 F.2d 877, 879 (5th Cir. 1973). Proof of bypass typically involves a showing that the prisoner secured some tactical advantage by not pressing his claim earlier. Buckelew v. United States, 575 F.2d 515, 519 (5th Cir. 1978). Moreover, in most cases a deliberate bypass must itself be proved at an evidentiary hearing, unless it is clearly shown on the record, i.e., such as when the trial transcript reveals an express waiver of the issue by defense counsel. Coco v. United States, 569 F.2d 367, 370-71 (5th Cir. 1978).

Solomon v. Kemp, 735 F.2d 395, 404 n.5 (11th Cir. 1984).

Since the only remedy available to Johnson on this issue is a petition for writ of habeas corpus, Johnson could not have "deliberately bypassed" raising this issue on direct appeal or on collateral attack under Rule 3.850. In this case, the trial record can be of no aid in determining whether there was a knowing and intentional relinquishment of this issue, because the issue did not ripen until the Florida Supreme Court rendered its decision. The Respondent has not cited any basis in the record for the claim of deliberate bypass nor has he requested an evidentiary hearing on the issue. The Court cannot conclude that Johnson deliberately bypassed his available state remedy on this issue.

The procedural default analysis of Wainwright v. Sykes and its progeny does not apply to this issue because there is no indication that there is any procedural bar to Johnson seeking relief in the state courts by a petition for a writ of habeas corpus. There is no time limit in the Florida habeas corpus statute for seeking relief. FLA. STAT. §79.01 et seq.

It would appear to the Court that the Respondent actually is complaining that, because Johnson never presented this claim to a state court, he has failed to exhaust avaliable state remedies. See Westbrook v. Zant, 704 F.2d 1487, 1493 n.7 (11th Cir. 1983). Although the Respondent argued in his original response that Johnson's petition contained unexhausted claims and therefore should be summarily dismissed under Rose v. Lundy, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), he later

adopted the view that there was no issue presented by the petition as to whether Johnson failed to exhaust state remedies and that the Court was not required to dismiss the petition as a "mixed petition." Therefore, the Court will assume that the Respondent has waived exhaustion on this issue and will consider Johnson's claim on the merits. See Thompson v. Wainwright, 714 F.2d 1495, 1500-10 (11th Cir. 1983).

The authority which Johnson relied on for his argument that remand was required after the Florida Supreme Court struck down an aggravating circumstance relied on by the trial judge in imposing the death sentence, Stephens v. Zant, 631 F.2d 397 (1980), was reversed by the United States Supreme Court, Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983).[3]

As noted above in the Court's discussion of Johnson's Tedder claim, the majority of the Florida Supreme Court disapproved of an aggravating circumstance found by the trial judge: Johnson created a great risk of death to many persons. The Florida Supreme Court concluded that the three people in the drugstore at the time of the shooting and robbery were not "many persons" under its interpretation of FLA. STAT. §921.141(5)(c) in Kampff v. State, 371 So.2d 1007 (Fla. 1979). 393 So.2d at 1073. In other words, the Florida Supreme Court found that, as a matter of state law, the evidence was insufficient to support this aggravating circumstance.

In addition, one of the justices who made up the majority concluded that the murder was not atrocious and cruel, another aggravating circumstance which the trial judge relied on.

393 So.2d at 1074. He concluded that the evidence was insufficient to support this aggravating circumstance.

The four justices who composed the majority of the Florida Supreme Court which affirmed Johnson's conviction and sentence agreed that the trial judge was correct as to the presence of at least three aggravating circumstances and also correct that there were no mitigating circumstances.

Johnson cannot argue that the procedure followed by the Florida Supreme Court or the outcome of that procedure resulted in a constitutional deprivation. See Barclay v. Florida, 463 U.S. 939, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983). Johnson has not argued that any of the evidence considered by the trial judge in determining the aggravating circumstances on which he relied was constitutionally inappropriate. The trial judge may have erred in his conclusions about the evidence supporting the aggravating circumstances, but a "'mere error of state law' is not a denial of due process." Barclay, 463 U.S. at 951 n.8. (Citations omitted.) In Barclay, the United States Supreme Court concluded that a trial judge's consideration of a nonstatutory aggravating factor did not deprive the defendant of due process. For the reasons stated in that decision, Johnson's challenge must also fail.

As the United States Supreme Court noted in Barclay, the Florida Supreme Court adheres to the following procedure in reviewing a capital case where the trial judge has relied on improper aggravating factors: 1) if the trial court found one or more mitigating circumstances, then the case generally will be

remanded for resentencing; and 2) if the trial court found no mitigating circumstances, then a harmless error analysis is applied. 463 U.S. at 954-55. In the second situation, the Florida Supreme Court has not always concluded that the consideration of aggravating circumstances was harmless. 463 U.S. at 955. In addition to citing this safeguard in the review of a capital sentence, the United States Supreme Court also noted that where the jury recommends life imprisonment (as it did in Barclay), the Florida Supreme Court provides the additional check of the Tedder standard. 463 U.S. at 955-56.

In Barclay, the United States Supreme Court concluded that there was no constitutional defect in allowing the Florida Supreme Court to determine that the improper aggravating circumstance did not affect the trial judge's decision since there were other proper aggravating circumstances.

> There is no reason why the Florida Supreme Court cannot examine the balance struck by the trial judge and decide that the elimination of improperly considered aggravating circumstances could not possibly affect the balance. ... "What is important ... is an individualized determination on the basis of the character of the individual and the circumstances of the crime."
> ***
> [O]ur decision is buttressed by the Florida Supreme Court's practice of reviewing each death sentence to compare it with other Florida capital cases and to determine whether the "punishment is too great." ... It is further buttressed by the rule prohibiting the trial judge from overriding a jury recommendation of life imprisonment unless "virtually no reasonable person could differ." Tedder v. State ....

463 U.S. at 958. (Citations omitted.)(Emphasis in original.)

The Eleventh Circuit has rejected the argument put forward by Johnson in a case where the Florida Supreme Court found that the evidence was insufficient to support two of four aggravating circumstances relied on by the trial judge. See Dobbert v. Strickland, 718 F.2d at 1521-22.

As in Barclay and Dobbert, the Florida Supreme Court has not acted arbitrarily in concluding that the trial judge's error in determining aggravating circumstances in Johnson's case was harmless. The Florida Supreme Court conducted the harmless error and Tedder review approved in Barclay. There is no evidence that the Florida Supreme Court has failed to conduct meaningful appellate review in cases of this type. Spaziano, 104 S.Ct. at 3166.

This case does present an unusual split among the justices of the Florida Supreme Court who affirmed the sentence as to how many aggravating circumstances were supported by the evidence. However, the justice who felt that the evidence only supported three aggravating circumstances concluded that death was still the appropriate sentence despite his disagreement. 393 So.2d at 1074. This Court cannot conclude that the imposition of a death sentence under these circumstances was irrational or arbitrary.

E. Rejection of a Mitigating Circumstance by the Sentencing Judge

Johnson claims that the sentencing judge refused to consider a nonstatutory mitigating factor in violation of

IN THE SUPREME COURT OF FLORIDA

NO. _____

MARVIN EDWIN JOHNSON,

Petitioner,

vs.

RICHARD L. DUGGER, Secretary,
Department of Corrections, State of Florida,

Respondent.

PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF HABEAS CORPUS, REQUEST FOR STAY OF EXECUTION, AND APPLICATION FOR STAY OF EXECUTION PENDING DISPOSITION OF PETITION FOR WRIT OF CERTIORARI

LARRY HELM SPALDING
Capital Collateral Representative

CARLO OBLIGATO
Staff Attorney

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

MARK EVAN OLIVE
Attorney at Law
814 E. Seventh
Tallahassee, Florida 32301

4) that appellate counsel unreasonably failed effectively to challenge this aggravating circumstance.

1. This Offense Was Not Heinous, Atrocious, or Cruel

In Zant v. Stephens, 103 S.Ct. 2733 (1983), the United States Supreme Court recognized that "statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: to circumscribe the class of persons eligible for the death penalty." Id. at 2743. In order to "minimize the risk of wholly arbitrary and capricious action," id. at 2741, "aggravating circumstances must genuinely narrow the class of persons eligible for the death penalty," id. at 2742-43.

Thus, if Fla. Stat. Sec. 921.141(5)(h) ("heinous, atrocious or cruel") does not, in application, genuinely narrow, then its application violates the eighth and fourteenth amendments. Godfrey v. Georgia, 446 U.S. 420 (1980). In Godfrey, Georgia's similar statutory aggravating circumstance ("outrageously or wantonly vile, horrible, or inhuman . . . involv[ing] depravity of mind or an aggravated battery to the victim"), while valid on its face, Gregg v. Georgia, 428 U.S. 153 (1976), was found unconstitutional in application because there was in fact no narrowing accomplished through its application in Mr. Godfrey's case: "There is no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." 446 U.S. at 433. Mr. Godfrey, like Mr. Johnson, had been convicted of a crime involving a single gunshot wound. Id. at 425.

Section (5)(h) of the Florida Statute must "genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 103 S.Ct. at 2742-43. Petitioner will show that one of two constitutional errors exist herein with regard to Section (5)(h). Either (1) heinous, atrocious and cruel does not apply

to the killing of Mr. Moulton, and thus "finding" this circumstance impermissibly and prejudicially infected the jury's and the trial judge's balancing of aggravation and mitigation, as will be argued in this subsection, or (2) if heinous, atrocious and cruel does apply to this victim's death, then the Florida Supreme Court has failed to narrow the application of Section (5)(h), and the section is unconstitutional as written and as applied, as will be argued in subsection 2, infra. See Mello, M., Florida's 'Heinous, Atrocious or Cruel' Aggravating Circumstance: Narrowing the Class of Death Eligible Cases Without Making it Smaller, 13 Stet. L. Rev. at . 523, 528 (1984) (hereinafter "Mello").

It is apparent that the (heinous), atrocious, or cruel aggravating circumstance does not and should not apply in Petitioner's case. In 1973, this Court examined and interpreted section (5)(h), and, in language foreshadowing the United States Supreme Court's opinion in Zant v. Stephens, noted that "[t]he most important safeguard presented in Fla. Stat. section 921.141, F.S.A., is the propounding of aggravating. . . circumstances which must be determinative of the sentence imposed." State v. Dixon, 283 So. 2d at 1, 8 (Fla. 1973). Section (5)(h), according to Dixon, includes only "those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies -- the conscienceless or pitiless crime which is unnecessarily tortuous to the victim." Id. at 9. The focus is on what the victim experienced, and "the defendant's mindset is [never] at issue." Pope v. State, 441 So. 2d 1073, 1076-78 (Fla. 1983).

In Tedder this Court, citing and Dixon, stated that while "it is apparent that all killings are atrocious, and that appellant exhibited cruelty. . . [s]till, [the Court] believe[s] the legislature intended something 'especially' heinous,

atrocious, or cruel when it authorized the death penalty for first degree murder." Tedder, 322 So. 2d at 910 n.3. The facts in Tedder follow: On January 17, 1974, appellant's wife and mother-in-law were laying a sidewalk outside the trailer where they resided. Appellant and his wife had recently separated. Without advance warning of any sort, appellant stepped from behind a tree and fired a shot in the direction of the women and the appellant's infant son. All fled toward the trailer, where appellant's wife ran with the baby to a back bedroom in order to obtain a shotgun. She succeeded in locking the bedroom door behind her, but while loading the shotgun she heard more shots and the scream of her mother. Appellant then broke open the bedroom door and, gun in hand, took away the shotgun and told his wife to bring the baby and come with him. As they left, his wife saw her mother lying on the floor in a hallway. Id. at 909 (emphasis added). Tedder involved a victim well aware of her impending death, who "fled toward the trailer." Her daughter was actually cognizant of the treachery, heard her mother being shot and screaming, and saw her body after the shots. On the heels of Tedder came Halliwell v. State, 323 So. 2d 557 (Fla. 1975), and this Court again invalidated a finding of heinous, atrocious, and cruel, because "we see nothing more shocking in the actual killing than in the majority of murder cases reviewed by this Court." Id. at 561. The description of the murder was graphic:

> [T]he appellant flew into a rage after the husband of the woman he loved had beaten her. Appellant grabbed a 19-inch breaker bar and beat the husband's skull with lethal blows and then continued beating, bruising, and cutting the husband's body with the metal bar after the fatal injuries to the brain.

Id. at 561.

The Halliwell assailant attained "a new depth in what one man can do to another, even in death." Id. at 561.

> [S]everal hours after the killing. . . Appellant used a saw, machete and fishing knife to dismember the body of his former friend and placed it in Cypress Creek. It is

> our opinion that when Arnold Tresch died, the crime of murder was completed and that the mutilation of the body many hours later was not primarily the kind of misconduct contemplated by the legislature in providing for the consideration of aggravating circumstances. If mutilation had occurred prior to death or instantly thereafter it would have been more relevant in fixing the death penalty.

Id. (emphasis added).

Certainly a single fatal shot to the chest, as in the case at bar, was far less egregious than the crimes in Tedder and Halliwell, and is undeniably less "shocking in the actual killing than in the majority of murder cases reviewed by this Court." Id. at 561. Even with the assailant's disputed remark to the victim as the circumstantial cornerstone for finding the murder atrocious and cruel, this case cannot be reconciled with the case law extent at the time of the appeal, See Cooper v. State 336 So. 2d 1133 (Fla. 1976), and much case law developed since. Death resulting from a single gunshot, where the victim does not know just before he is shot what his assailant might do, and where he is killed instantly or is rendered unconscious and dies without regaining consciousness, is not a heinous, atrocious, or cruel offense. See McCrae v. State, 416 So. 2d 804, 805-7 (Fla. 1982) (after burglary of van and exchange of gunfire, defendant yelled "[t]his is for you, mother-fucker," before shooting and killing victim," not heinous, atrocious or cruel."); see also Craig v. State, 510 So. 2d 857, 868 (1987)(not heinous, atrocious or cruel because "although fully premeditated, the murders were carried out quickly by shooting"); Jackson v. State, 502 So. 2d 409, 411-412 (1987)("where, as here, a single fatal shot is fired and the victim dies shortly thereafter simply cannot support [sic] a finding of an especially heinous, atrocious or cruel murder"); Melendez v. State, 498 So. 2d 1258, 1261 (1986) (not heinous, atrocious or cruel where "gunshot to the head would have caused instantaneous death"); Jackson v. State, 498 So. 2d 906, 910 (1986)(not heinous, atrocious or cruel where victim killed by

single bullet in his side and "there were no additional acts indicative of . . . cruelty)"; Kokal v. State, 492 So. 2d 1317, 1319 (1986)(not heinous, atrocious or cruel where "death was instantaneous"); Philips v. State, 476 So. 2d 194, 196-197 (1985)("mindset or mental anguish of the victim is an important factor in determining whether [heinous, atrocious or cruel] applies"); Parker v. State, 476 So. 2d 134, 139 (1985)("a pistol shot to the head of the victim does not establish this aggravating circumstance [heinous, atrocious or cruel]"); Bundy v. State, 471 So. 2d 9, 21-22 (1985)(where there was no clear evidence to show victim struggled with abductor, "experienced extreme fear and apprehension, or was sexually assaulted before her death," not heinous, atrocious or cruel); Henderson v. State, 463 So. 2d 196, 201 (1985)(not heinous, atrocious or cruel where "victims died instantaneously from single gunshots to their heads"); Randolph v. State, 463 So. 2d 186, 193 (1985)("finding that the murder was heinous, atrocious or cruel as an aggravating circumstance cannot be supported by the evidence in this case," where state's chief witness testified she overhead defendant tell victim not to try anything and he would not shoot, then heard two gunshots); Parker v. State, 458 So. 2d 750, 754 (Fla. 1985)(not heinous, atrocious or cruel where victim shot and killed "execution style" after being shown body of previously murdered boyfriend since "nothing unusual in the manner or method of effecting the crime."); Kennedy v. State, 455 So. 2d 351, 355 (Fla. 1984)(not heinous, atrocious or cruel where victims killed in shoot-out while attempting to recapture James v. State, 453 So. 2d 786 (Fla. 1984)(physically handicapped victim shot in head while husband pleaded for her life); Jackson v. State, 451 So. 2d 458, 463 (Fla. 1984) (not heinous, atrocious or cruel where victim shot in back, wrapped in plastic, placed in trunk, and shot again while still alive); Blanco v. State, 452 So. 2d 520 (Fla. 1984) (not heinous, atrocious or cruel where victim shot

after stumbling upon intruder in house and attempting to take away gun; six additional gunshots inflicted after original); Herzog v. State, 439 So. 2d 1372 (Fla. 1983) ("when the victim becomes unconscious, the circumstances of further acts contributing to his death cannot support a finding of heinousness"); Oats v. State, 446 So. 2d 90 (Fla. 1984)("a pistol shot straight to the head of the victim does not tend to establish this aggravating circumstance"); Clark v. State, 443 So. 2d 973, 977 (Fla. 1983)("Directing a pistol shot to the head of the victim does not establish a homicide as especially heinous atrocious, or cruel. . ."), cert. denied, 104 S.Ct. 2400 (1984); Maxwell v. State, 443 So. 2d 967, 971 (Fla. 1983)("[s]ince the death was instantaneous following a single shot, this crime cannot be considered especially heinous, atrocious, or cruel."); Middleton v. State, 426 So. 2d 548, 552 (Fla. 1982) (not heinous, atrocious or cruel because "the victim died instantly from a shotgun blast to the back of her head from close range. She had just awakened from a nap, was facing away from appellant, and had no awareness that she was going to be shot."), cert. denied, 103 S.Ct. 3573 (1983); Raulerson v. State, 420 So. 2d 567, 571 (Fla. 1982) (not heinous, atrocious or cruel where shoot-out occurred in restaurant between police and defendant). Simmons v. State, 419 So. 2d 316, 319 (Fla. 1982) (not heinous, atrocious or cruel because "[t]here was evidence that the victim was subjected to repeated blows while living; death was most likely instantaneous or nearly so."); Odom v. State, 403 So. 2d 936, 942 (Fla. 1981)("[a]n instantaneous death caused by gunfire, however, is not ordinarily a heinous killing.") cert. denied, 456 U.S. 925 (1982); Maggard v. State, 399 So. 2d 973, 977 (Fla. 1981)(not heinous, atrocious or cruel because "the victim died quickly from a single gunshot blast fire through a window, and there is no evidence that the victim was aware that he was going to be shot."), cert. denied, 454 U.S. 1059 (1981); Lewis v. State, 398

So. 2d 432, 434, 434 (Fla. 1981)("a murder by shooting, when it is ordinary in the sense that it is not set apart from the norm of premeditated murder, it as a matter of law is not heinous, atrocious, or cruel; here, the victim died instantaneously."); Williams v. State, 386 So. 2d 538, 543 (Fla. 1980)("appellant's crime does not rise to the level of 'especially heinous, atrocious, or cruel', [where victim] died almost 'instantaneously' from her gunshot wounds."); Fleming v. State, 374 So. 2d 954, 958, 959 (Fla. 1979)("the murder was committed by a single shot . . . the victim was killed instantaneously and painlessly, without additional facts which make the killing 'heinous' within the statutorily-announced aggravating circumstance."); Kampff v. State, 371 So. 2d 1007, 1010 (Fla. 1979)("directing a pistol shot straight to the head of the victim does not tend to establish [heinous, atrocious or cruel] . . . We hold that the trial judge erred in finding that the murder was especially heinous, atrocious or cruel."); Riley v. State, 366 So. 2d 19, 21 (Fla. 1978)("[t]here was nothing atrocious done to the victim, however, who died instantly from a gunshot to the head.") cert. denied, 459 U.S. 981 (1982); Cooper v. State, 336 So. 2d 1133, 1140-41 (Fla. 1978)("this murder was not in [the heinous, atrocious or cruel category. Deputy Wilkerson was killed instantaneously and painlessly, without additional acts which make the killing 'heinous. . .'"), cert. denied, 431 U.S. 925 (1977); Sims v. State, 444 So. 2d 922 (Fla. 1983) (heinous, atrocious or cruel) improper; apparently instantaneous death). See also collected cases in Mello, supra, 536 n.56.

This Court has "upheld application of [the heinous, atrocious and cruel] factor where victims were killed instantaneously or nearly instantaneously when, before the death occurred, the victims were subject to agony over the prospect that death was soon to occur." Preston v. State, 444 So. 2d 939, 945 (Fla. 1984). In Preston, after the defendant robbed the

store, he forced the victim at knife-point to accompany him on a one and a half mile journey, during which she was "speculating as to her fate and undoubtedly cognizant of the likelihood of death. . . ." Id. at 946 and cases cited. In the case at bar it is obvious that the victim had virtually no expectation of his impending death which followed the cessation of the shooting almost immediately.

This Court has refused to uphold findings of heinous, atrocious, or cruel even in situations where the killer confronted by the victim with the murder weapon, and the victim was keenly aware of the imminent possibility of death. In Gorham v. State, 454 So. 2d 556 (Fla. 1984), the appellant forced his victim, at gunpoint, to stand with his face to the wall during a robbery. During the course of the robbery, the victim was shot twice in the back and died within seconds as a result. The trial court based its finding of heinous, atrocious, or cruel on the fact that the victim had been in apprehension of death and had been shot in the back, indicating a lack of resistance. This Court reversed that finding, holding that

> [t]here was evidence disproving any possibility of prolonged and tortuous captivity and no evidence whatsoever that the victim apprehended certain death more than moments before he died. While the murder was of course a cruel and unjustifiable deed, there is nothing about it to 'set the crime apart from the norm of capital felonies.'"

Id. at 554, quoting Dixon v. State, 283 So. 2d at 9. Johnson's victim, like Gorham's, had little if any presentiment of his death. The assailant's purported remark at most probably left the victim wondering for a moment just what was being contemplated by the assailant. And then he was shot.

In Blanco v. State, 452 So. 2d 520 (Fla. 1984), this Court refused to uphold the trial court's finding of heinous, atrocious, or cruel where the victim had appeared by chance in the room where the intruder was menacing another resident of the house, the victim's niece. The victim was shot and killed in the

ensuing scuffle. There, the victim was aware of the presence of the gun, as it was the subject of the struggle which ultimately lead to his death, and consequently must have been "subject to the agony of the prospect that death would soon occur," Preston, supra, or at least was very likely soon to occur. Yet this Court still found that the murder was not within the ambit of Dixon's requirement that the "capital felony . . . [be] . . . accompanied by such additional acts as to set the crime apart from the norm of capital felonies," id. at 9, before a finding of heinous, atrocious, or cruel is appropriate. The victim sub judice had no more notice of his fatal position than did the victim in Blanco.

The only decision found which upholds a finding of heinous, atrocious, or cruel in a non-execution type killing where death was caused by a single gunshot is Harvard v. State, 375 So. 2d 833 (Fla. 1977). There, the appellant pulled up next to his estranged wife's car and shot her in the face and neck with a shotgun which resulted in her immediate death. Because the appellant had lain in wait outside a bar in the early hours of the morning for this victim and then stalked her for miles, and had engaged in a systematic and ongoing pattern of terror and harassment against her prior to the killing, the "additional acts [which] set the crime apart from the norm of capital felonies," as per Dixon, were found to exist. In the instant case, the killing of Mr. Moulton was virtually spontaneous. If the process of lying in wait for and 'stalking' the victim are indeed those types of "additional acts" contemplated by Dixon, the decision in Harvard upholding a finding of heinous, atrocious, or cruel is entirely consistent with the above cited line of Florida cases and entirely inconsistent with the trial court's instant application of (heinous), atrocious, or cruel to Mr. Johnson's case.

Petitioner requests the opportunity to present this issue to the court in an orderly, judicious manner. Heinous, atrocious,

or cruel should not have figured in the balancing of aggravating and mitigating circumstances.

2. The Application Of This Statutory Aggravating Circumstance Is Arbitrary

Should this Court determine that heinous, atrocious or cruel does apply to the facts herein, Petitioner contends that that statutory aggravating circumstance fails to "genuinely narrow the class of persons eligible for the death penalty." Zant v. Stephens, 103 S.Ct. 2733, 2742 (1983). In short, the statute is unconstitutional on its face, because this Court has not "sufficiently narrowed the heinous, atrocious or cruel circumstance so as to bring it within the ambit of constitutional acceptability." Mello, supra at 529. Petitioner cannot, given the circumstances of this warrant, list and discuss the decisions in this Court which apply this section (5)(h) in "virtually every type of capital homicide," id. at 533, but incorporates the exemplary and in-depth analysis of the problem explicated in the Mello article. Since the time of the Mello article, Professor Richard A. Rosen has updated the summary and has come to the same conclusions: "The incoherency of the standard applied by the Florida Supreme Court is readily evident." Rosen, R., "The 'Especially Heinous' Aggravating Circumstance in Capital Cases -- The Standardless Standard," 64 N.C.L. Rev. 942, 974 (1986) Professor Rosen's analysis should likewise be regarded as incorporated herein by specific reference.

The United States Supreme Court is currently considering the very issue raised by petitioner's case and by the Mello and Rosen articles. If heinous, atrocious or cruel applies to Mr. Johnson's crime, then it is indeed a standardless standard, and it fails genuinely to narrow. In Maynard v. Cartwright, No. 87-519, the petitioner sought and was granted certiorari from the tenth circuit's en banc decision, in which the court had relied heavily on the Rosen article in finding Oklahoma's especially heinous, atrocious or cruel" statutory aggravating circumstance

unconstitutional. That circumstance is just like Florida's. What is clear from the Cartwright en banc decision is that if Florida finds Mr. Johnson's case "atrocious or cruel," then the eighth amendment has been violated. Maynard v. Cartwright, 822 F.2d 1477, 1489-90 (10th Cir. 1987). It is important to note that the Oklahoma courts are closely tied to the Florida courts on this issue, and consequently the review of Oklahoma by certiorari directly affects Florida. See Cartwright v. Maynard, 802 F.2d 1203, 1217 (10th Cir. 1986)("Oklahoma has clearly adopted the unnecessarily torturous element through its wholesale adoption of the Florida Supreme Court's construction of 'heinous, atrocious or cruel' in State v. Dixon . . . ."). With that in mind, the following question upon which the United States Supreme Court granted certiorari in Cartwright is of critical importance here:

> Whether the Oklahoma Court of Criminal Appeals has been interpreting the aggravating circumstance "especially heinous, atrocious, or cruel" in an unconstitutional manner when that court relies upon the attitude of the murderer, the manner of the killing, and the suffering of the victim in reviewing death sentences in which that aggravating circumstances has been found.

Within this "question presented," petitioner in Cartwright has submitted the following argument:

> The definition of "especially heinous, atrocious, or cruel" should not be limited to those situations where the victim has suffered physical or mental torture; the wording of the phrase itself makes it appropriate for the sentencer to consider the manner of the killing and the attitude of the killer.

The pending United States Supreme Court's consideration of application of the exact same aggravating circumstance in Cartwright is reason enough for this Court to stay Mr. Johnson's execution, should this Court conclude that (heinous), atrocious, and cruel does apply in Mr. Johnson's case.

3. Resentencing Is Required

In Lewis v. State, 398 So. 2d 432, 438-39 (1981), aggravating circumstances that the sentencer found were rejected by this Court. The case was remanded for reconsideration so that the remaining circumstances could be weighed against the jury's recommendation:

> The jury recommended a sentence of life imprisonment. The trial court judge's sentencing findings contain a discussion of each of the statutory mitigating circumstances and a statement that none of them are applicable to the facts of this case. However, the jury is not limited, in its evaluation of the question of sentencing, to consideration of the statutory mitigating circumstances. It is allowed to draw on any considerations reasonably relevant to the question of mitigation of punishment. Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L.ED. 2d 973 (1978)); Songer v. State, 365 So. 2d 696 (Fla. 1978), cert. denied, 441 U.S. 956, 99 S.Ct 2185, 60 L.Ed. 2d 1060 (1979). Since three of the trial court's four aggravating circumstances have been found to be erroneous, we remand the case for reconsideration of sentence by the trial court judge so that the single established aggravating circumstance can be weighed against the recommendation of the jury.

See also Randolph v. State, 463 So. 2d 186 192-193 (Fla. 1985) (resentencing required in light of Supreme court determination that only one valid aggravating circumstance was present). The Court has also remanded when two aggravating circumstances survived review. The sentencing balancing process is not a matter of see-saw equilibrium, but "rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present. . . . Dixon, 283 So. 2d at 10.

It cannot be said that the reduction in the number or the weight of aggravating circumstances does not require resentencing, or a life sentence. A fair review of aggravatin versus recommendation in this case requires life.

Mr. Johnson was also denied even-handed appellate review as required by State v. Dixon, 283 So. 2d 1. Reversal is proper:

> Review by this court guarantees that the reasons present in one case will reach a similar result to that reached under similar circumstances in another case. . . . If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great.

Id. at 10. A comparison of this case with others factually similar reveals that in this instance that the review standard failed to operate properly. Historically, it appears that juries consistently recommend a life sentence in situations where the eventual homicide victim initiated or escalated the use of deadly force, see Taylor v. State, 294 So. 2d 648, 649, 652 (Fla. 1974); Chambers v. State, 339 So. 2d 204, 207 (Fla. 1976); Thompson v. State, 328 So. 2d 1, 3 (Fla. 1976); McCaskill v. State, 344 So. 2d 1276, 1277 (Fla. 1977), a factor not advanced by appellate counsel.

In McCaskill, supra, this Court was faced with a situation similar to the facts presented in the case at bar. There, following the perpetration of a robbery, the robbers were pursued by two patron/victims one of whom was armed with a chair and who was ultimately killed by a shotgun blast originating from the automobile in which the robbers were fleeing from the scene. This Court found that McCaskill and his co-defendant's death sentences could not stand in comparison with life sentences given in similar cases. Likewise under the Tedder standard the Court could not ignore the jury's recommendation for life. With regard to the former finding the Court said:

> The imposition of life sentences in similar cases is not absolutely controlling. Were they to be ignored, however, our death penalty statute, Section 921.141, Florida Statutes, could not be upheld under the requirements of Proffitt v. Florida, supra, and Furman v. Georgia, 408 U.S. 238, 92 S. Ct. 2726, 33 L.Ed.2d 346 (1972).

Id. at 1280.

It is well-established that appellate comparison of cases is both a constitutional and statutory requirement. This review is not vitiated simply because the trial court was able to find, and this Court was later able to approve of, the existence of statutory aggravating circumstances. This Court has interpreted the law to require a jury life recommendation to be followed where there is a relevant factual basis upon which reasonable persons could have so concluded. That this is true in light of the Tedder standard is best evidenced by this Court's opinion in Malloy v. State, 382 So. 2d at 1190 (Fla. 1979). From the facts as stated by the Court in Malloy and given pre-existing case construction of the aggravating circumstances set forth in Section 921.141(5), Florida Statutes, five aggravating circumstances were presented by the facts surrounding Malloy's double murder convictions. Notwithstanding these five aggravating circumstances and the absence of any statutory mitigating circumstances, this Court citing, inter alia, to McCaskill and Tedder, reversed Malloy's dual death sentences for imposition of life sentences in accordance with the jury's recommendation. The key factor in Malloy's sentence reversal stemmed from this Court's ability to find a reason for the jury's life recommendation. Just as this court is bound by its decisions upholding sentences of death where the circumstances of the crime and the character of the offender are similar to those presented in any given case under review, id. at 1197 (Boyd, J., concurring in part and dissenting in part), likewise, where reductions of death sentences have been ordered such as in Taylor, Thompson, Chambers, McCaskill, and Malloy, supra, this Court is bound to follow their precedential value and reduce the penalty in the instant case since the circumstances are so similar.

4. Counsel was Ineffective

The appellate level right to counsel also encompasses the sixth amendment right to effective assistance of counsel. Evitts v. Lucey, 105. S.Ct. at 830 (1985). Appellate counsel must function as "an active advocate," Anders v. California, 386 U.S. at 738, 744, 745 (1967), providing his client the "expert professional . . . assistance . . . necessary in a system governed by complex laws and rules and procedures. . . . " Lucey, 105 S.Ct. at 835 n.6. Even a single, isolated error on the part of counsel may be sufficient to establish that the defendant was denied effective assistance, Kimmelman v. Morrison, 106 S.Ct. at 2574, 2588 (1986); United States v. Cronic, 466 U.S. at ;648, 657 n.20 (1984), notwithstanding the fact that in other aspects counsel's performance may have been "effective". Washington v. Watkins, 655 F.2d at 1346, 1355 (5th Cir.), reh. denied with opinion, 662 F.2d at 1116 (1981).

Moreover, as this Court has explained, its "independent review" of the record in capital cases neither can cure nor undo the harm caused by appellate counsel's deficiency:

> It is true that we have imposed upon ourselves the duty to independently examine each death penalty case. However, we will be the first to agree that our judicially neutral review of so many death cases, many with records running to the thousands of pages, is no substitute for the careful, partisan scrutiny of a zealous advocate. It is the unique role of that advocate to discover and highlight possible error and to present it to the court, both in writing and orally, in such a manner designed to persuade the court of the gravity of the alleged deviations from due process. Advocacy is an art, not a science. We cannot, in hindsight, precisely measure the impact of counsel's failure to urge his client's best claims. Nor can we predict the outcome of a new appeal at which petitioner will receive adequate representation. We are convinced, as a final result of examination of the original record and appeal and of petitioner's present prayer for relief, that our confidence in the correctness and fairness of the result has been undermined.

Wilson v. Wainwright, 474 So. 2d 1162, 1165 (Fla. 1985). "The

represents his client zealously within the bounds of the law." Id. at 1164.

Appellate counsel failed to act as an advocate for his client regarding heinous, atrocious or cruel. With regard to this issue, no "advocacy" in any true sense was provided to Mr. Johnson on direct appeal. The "adversarial testing process" failed to work. See Matire v. Wainwright, 811 F.2d at 1430, 1438 (11th Cir. 1987), citing Strickland v. Washington, 466 U.S. at 668, 690 (1984). To prevail on his claim of ineffective assistance of appellate counsel Mr. Johnson must show deficient performance and prejudice. Matire v. Wainwright, 811 F.2d at 1435. Mr. Johnson has.

B. THE AUTOMATIC AGGRAVATING CIRCUMSTANCE OF ROBBERY SHOULD HAVE BEEN STRICKEN OR AFFORDED LITTLE WEIGHT

If there is no mitigation, the issue in an override case is the strength of the aggravating circumstances. The jury at guilt/innocence was instructed upon premeditated and felony murder, and returned a general verdict. As the State argued, "the robbery itself is an aggravating circumstance at sentencing." (R. 1466). Thus, one of the aggravating circumstances sustained by this Court was a fact intimately intertwined with the offense. This Court has often discounted the effects of aggravating circumstances that are directly related to or inherent in the offense. Appellate counsel was ineffective in this case for failing to argue so as to ameliorate the aggravating weight of felony murder.

While it is not necessary for this Court to so find in order for Mr. Johnson to demonstrate ineffectiveness in an override context, Mr. Johnson also contends that counsel was ineffective for not challenging as per se unconstitutional the finding of an