IN THE SUPREME COURT OF FLORIDA

LARRY JOE JOHNSON,

Petitioner,

v. CASE NO. 71,824

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

Respondent.

_____/

RESPONSE TO PETITION FOR
RELIEF PURSUANT TO HITCHCOCK V. DUGGER

The Respondent answers as follows:

1. Petitioner, Larry Joe Johnson, filed a pleading seeking relief under the "all writs" language of the Florida Constitution and the Florida Rules of Appellate Procedure. Inasmuch as this Court has ruled that the "all writs" clause does not establish jurisdiction or a new form of relief, St. Paul Title v. Davis, 392 So.2d 1305 (Fla. 1980), the State properly moved to strike the petition.

2. Two recent decisions in Foster v. Dugger, Case No. 70,184 and Waterhouse v. State, Case No. 69,557 and 70,549, indicate that this Honorable Court, if it denies the State's motion, will grant relief and not conduct an analysis of the facts of the case despite §924.33, Florida Statutes.

3. These decisions force the State into the Hobson's choice of waiving procedural rights to avoid waiver or waiving those rights vested by statute by requesting procedural relief.

Our only option at this point is to protect the rights of the people of Florida by lodging this separate response for implementation, at once, upon any denial of our procedural claims. This response is timely pursuant to the show cause order of this Court.

I. Facts

We must assume that the "all writs" petition will be treated as a habeas corpus petition. If so, we note that Johnson's petition is successive.

Johnson was tried in January of 1980, after the amendment to Sec. 921.141, Fla.Stat., permitting consideration of non-statutory mitigating evidence. The jury was properly instructed on this point, and Johnson was permitted to present and argue his evidence.

Judge Lawrence, whose sworn affidavit is attached as exhibit A to this answer, fully considered all non-statutory mitigating evidence prior to passing sentence even though he did not expand his written order to include references thereto.

We would note that on direct appeal the issue of mitigating evidence was argued and reference was made to the sentencer's statutory duty under the amended statute and the two year old Lockett[1] decision. In this regard the action at bar is different from pre-Lockett and pre-amendment cases previously reviewed by this Court, because no novel legal issue exists and the claim is clearly abusive.

The record does not refute Judge Lawrence's sworn affidavit.

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[1] Lockett v. Ohio, 438 U.S. 586 (1978).

ARGUMENT

This case comes before the Court, if at all, as an attempt to unduly expand Hitchcock v. Dugger, ____ U.S. ____, 107 S.Ct. 1821 (1987) so as to permit arcane inquiry and speculation into virtually every capital case in Florida, no matter when it was decided or the status of the law at the time.

Larry Joe Johnson was tried after Lockett and after the July 3, 1979, amendment to Sec. 921.141, Florida Statutes. Johnson's advisory jury was correctly instructed and it is undisputed that they considered all statutory and non-statutory mitigating evidence. The jury, after proper consideration, recommended death. Tedder v. State, 322 So.2d 908 (Fla. 1975), compelled Judge Lawrence to sentence Johnson to death unless no reasonable person would differ with the jury's recommendation. See Burch v. State, Case No. 68,881; Rogers v. State, 511 So.2d 526 (Fla. 1987). Even if the Judge was to have simply complied with the jury's sentencing recommendation, any error would be harmless. Harmless error, of course, would also derive from the record itself. Johnson relied upon two psychologists in alleging various mental disorders but two state psychiatrists rejected the non-medical opinions of the psychologists. The court was thus able to find no credible evidence that Johnson suffered any mental dysfunction. Meanwhile, the brutal facts of this case clearly supported death. As this Court held in Johnson v. State, 412 So.2d 185 (Fla. 1983), it was within Judge Lawrence's province to afford the psychologists' testimony "little or no weight".

Compelling, however, is Judge Lawrence's sworn affidavit that he did, in fact, consider non-statutory mitigating

evidence prior to sentencing Johnson. Thus, a discussion of "harmless error" logically yields to a finding of no error at all, which in fact correctly describes this case.

Johnson has two reasons for promoting this action. First, though fully aware his case has no merit (and in fact abuses the writ), Johnson seeks to employ Hitchcock as some kind of magic talisman for rearguing the mitigating evidence discussed on appeal. Second, Johnson hopes to circumvent the presumption that trial judges obey the law by innuendo and idle speculation.

The writ of habeas corpus is not a vehicle for obtaining a second appeal. Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985); Johns v. Wainwright, 253 So.2d 873 (Fla. 1971); Steinhorst v. Wainwright, 477 So.2d 537 (Fla. 1985). Johnson (and counsel) know this, see Johnson v. Wainwright, supra, but continue to ignore the rule by trying to expand Hitchcock.

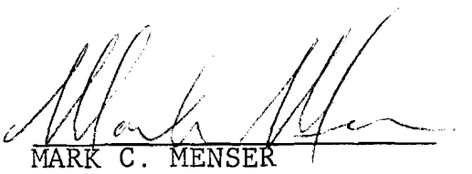
The Hitchcock decision clearly addresses Florida law (and jury instructions) as they existed prior to the 1979 amendment to §921.141. The Supreme Court explicitly mentioned the "confusion" over non-statutory factors at that time. Hitchcock was never intended to apply to post amendment cases at all.

This Court ruled that Hitchcock constituted a "change of law" in interpreting these pre-amendment cases and held that procedural bars would not be applied as a result. This Court has not held that post amendment cases are also under "Hitchcock" or that Hitchcock is going to serve as a rubric for reargument of every single Florida death case.

PAGE(S) MISSING

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by Federal Express to Mr. Steven L. Seliger, Esq., Counsel for Petitioner, 229 East Washington Street, Quincy, Florida 32351, this 18th day of February, 1988.



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OF COUNSEL