IN THE SUPREME COURT OF FLORIDA

LARRY JOE JOHNSON,

Appellant,

v.

CASE NO. 72046

STATE OF FLORIDA,

Appellee.

_____/

ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

Larry Joe Johnson was convicted of first degree murder and sentenced to death. Johnson appealed the judgment and sentence to the Supreme Court of Florida, raising the following issues:

(1) Denial of due process of law due to the conduct of the Sheriff of Madison County in acting as bailiff during trial.

(2) Prejudicial and improper prosecutorial argument during the penalty phase.

(3) The death penalty "violated" §921.141, Fla.Stat. since the jury was improperly influenced and the evidence supporting aggravating and mitigating factors was not considered.

(4) The Court violated the Eighth Amendment by relying upon observations of the defendant and by applying §921.141 in a matter that made death mandatory.

(5) The conviction for robbery was improper.

Johnson lost his appeal. Johnson v. State, 442 So.2d 185 (Fla.), cert. denied, 466 U.S. 963 (1984).

A collateral attack was filed after the signing of Johnson's death warrant in 1985. The petition, filed pursuant

to Fla.R.Crim.P. 3.850, raised nine general grounds for relief; to-wit:

(1) "Involuntary removal from court".

(2) Denial of due process due to removal from court.

(3) Improper use of peremptory challenges.

(4) Improper admission of psychiatric testimony.

(5) The jury was biased due to improper prosecutorial argument and jury instructions.

(6) Exclusion of anti-death veniremen.

(7) Improper argument by the prosecutor.

(8) The weight of the mitigating evidence.

(9) A statistical challenge to Johnson's conviction and a request for resentencing.

Relief was denied as to all grounds due to procedural violations of Fla.R.Crim.P. 3.850, since Johnson could not use Rule 3.850 to litigate claims that could and should have been raised on direct appeal. The Florida Supreme Court affirmed. Johnson v. State, 453 So.2d 207 (Fla. 1985).

Johnson petitioned for federal habeas corpus relief pursuant to 28 U.S.C. §2254; alleging:

(1) Misconduct of the Sheriff due to his functioning as bailiff.

(2) Error in permitting Johnson to leave court.

(3) Error in permitting Johnson to waive his presence.

(4) Limitation of mitigating factor review to statutory factors.

(5) Improper argument by the prosecutor.

(6) Misuse of peremptory challenges.

(7) Admission of psychiatric testimony.

(8) Assorted errors in instructing and arguing to the penalty phase jury.

(9) A Witherspoon claim.

(10) Reconsideration of expert testimony is necessary.

(11) A need to resentence Johnson.

(12) Error by the Court in observing Johnson's demeanor while considering the appropriate sentence.

The Honorable Judge Paul found claims 2, 3, 5, 6, 7 and 8 procedurally barred. Claims 1, 4, 10 and 12 were rejected on the merits and claim 11 was deemed an improper request for federal resentencing. Claim 9 was withdrawn.

Johnson appealed to the Eleventh Circuit, which affirmed the District Court. Johnson v. Wainwright, 778 F.2d 623 (11th Cir. 1987), cert. denied, ____ U.S. ____ (1987).

Johnson's second death warrant was signed setting his execution for the week of March 8-15, 1988.

Johnson, prior to issuance of the warrant, petitioned the Florida Supreme Court for relief pursuant to Hitchcock v. Dugger, ____ U.S. ____, 107 S.Ct. 1821 (1987).

After reviewing the entire record, the Supreme Court, like the United States District Court, found no error in either the jury instructions or the trial judge's consideration of non-statutory mitigating evidence.

Johnson petitioned for relief for a second time in violation of Fla.R.Crim.P. 3.850. Johnson's petition raised two claims which had previously been resolved against him on the merits and a third claim which, if preserved, could and should have been raised on direct appeal or by prior collateral attack. All three claims were properly rejected on procedural grounds.

SUMMARY OF ARGUMENT

Mr. Johnson's untimely and successive motion for post conviction relief was properly denied on procedural grounds.

The first two grounds raised in Johnson's petition repeated claims litigated in his direct appeal and prior collateral attack and are both improper and an abuse of process.

The third ground, attacking the application of capital punishment to felony murder, is an exercise in sophistry which, if preserved, could and should have been raised on direct appeal. It, too, is procedurally barred.

As to all grounds, the petition was untimely and subject to the January 1, 1987, time bar.

ARGUMENT

THE CIRCUIT COURT DID NOT ERR IN DENYING POST CONVICTION RELIEF

Appellant, Larry Joe Johnson, filed a successive motion for post conviction relief in an effort to once again obtain a stay of execution. Johnson raised three claims; to-wit:

(1) The Sheriff of Madison County improperly served as bailiff.

(2) Improper prosecutorial argument during the penalty phase of trial.

(3) The ability to convict a defendant of felony murder injects an automatic aggravating factor into the penalty phase considerations.

Each of these claims are addressed as follows:

(a) The Bailiff Issue

The complaint that Sheriff Peavy should not have served as bailiff was resolved against Johnson on direct appeal, collateral (3.850) attack, collateral appeal, federal habeas corpus and Eleventh Circuit appeal; on the merits. The inclusion of this issue in Johnson's second 3.850 petition was improper and, thus, the trial court did not err in summarily rejecting this claim.

Mr. Johnson, aware of the fact that he cannot raise this issue again, attempts to avoid Rule 3.850 by alleging the existence of "new evidence" supporting his contention that Sheriff Peavy prejudiced the jury. This so-called new evidence is the (alleged) discovery that Peavy thought Johnson was guilty and that the sheriff was solicitous and sympathetic to the victim's family.

Absent from Mr. Johnson's petition, as before, is any record of any improper communication to the jury from Sheriff Peavy which in any way carried his opinions to that body. In every material respect, the claim regarding the sheriff is identical to the one litigated before.

Mr. Johnson contends that this new evidence only came to his attention due to his recent, serendipitous, application for the sheriff's files pursuant to Chapter 119 of the Florida Statutes. Johnson alleges that Chapter 119 could not have been invoked prior to this time. He is not correct on this point.

Chapter 119 of the Florida Statutes, particularly §119.07, governing disclosure of criminal investigative files to the targets of said investigations, has been in effect since 1979.

It was available to Johnson at the time of his first "3.850" petition and his federal habeas corpus petition.

Johnson's situation is similar to the one found in Demps v. Dugger, 12 F.L.W. 561 (Fla. 1987). Demps, like Johnson, was convicted prior to January 1, 1985, and had until January 1, 1987, to file all petitions for relief pursuant to Fla.R. Crim.P. 3.850 except those alleging facts both unknown and incapable of discovery. Demps, like Johnson, filed a successive "3.850" petition after January 1, 1987, alleging the recent discovery of "new" evidence, courtesy of chapter 119.

This Honorable Court rejected Demps claim as procedurally barred, finding specifically that Demps chapter 119 "evidence" could have been obtained prior to January 1, 1987 and, as a result, Demps was "cut off" by operation of Rule 3.850.[1]

Johnson, like Demps, could have obtained his chapter 119 material prior to January 1, 1987. Also, while this "evidence" is cumulative, it certainly is not "new" or "newly discovered", unless Johnson's position is that he never suspected, till now, that the sheriff thought he was guilty (an absurd proposition). Johnson's petition, like Demps', is time barred.

[1]We must note that the same attorneys represented Demps and Johnson.

The petition is also subject to dismissal given the fact that it merely realleges claims previously litigated by Johnson on collateral attack. Indeed, the issue of Sheriff Peavy's role, as bailiff, has been resolved against Johnson on the merits and cannot be renewed here. Card v. Dugger, 512 So.2d 829 (Fla. 1987); Straight v. State, 488 So.2d 530 (Fla. 1986); Francois v. Wainwright, 470 So.2d 685 (Fla. 1985); White v. State, 12 F.L.W. 433 (Fla. 1987).

The petition at bar was untimely, improper and thus an abuse of process. The Circuit Court was clearly justified in dismissing it on procedural grounds. No discussion or re-consideration of the "merits" should be inculged, but we would again note that there is no proof that Sheriff Peavy ever abused his position or duties as bailiff or that any theory of the case retained by the sheriff was expressed, by him, to the jury. The "spectral bias" of a sheriff serving as bailiff has already been rejected by this court and the federal courts. Finally, lest the court be deceived by Johnson's argument, Sheriff Peavy never testified as a witness in the trial of this case.

This is simply another example of an improper attempt to reargue moot or resolved issues so as to obstruct justice in a capital case.

(b) "Improper Argument"

Once again, Johnson's claim is procedurally barred both by Rule 3.850 and by virtue of its successive nature.

Mr. Johnson attempts to revive this settled claim by arguing that the case of Booth v. Maryland, ____ U.S. ____, 107 S.Ct. 2529 (1987) created "new law" which entitled him to relief. To accomplish this, Johnson recharacterizes the prosecutor's argument as a "victim impact statement" and goes on to suggest that Booth has redefined the "harmless error" test.

First, we would note that the decision in Booth is not "new law"; and claims thereunder are subject to procedural bars. Thompson v. Lynaugh, 821 F.2d 1080 (5th Cir. 1987); Streetman v. Lynaugh, 835 F.2d 1519 (5th Cir. 1988) (citing Thompson), stay of execution denied, ____ U.S. ____, 98 L.Ed.2d 634 (1988).

Second, Booth is inapplicable to this case since it addressed the admission of evidence, not attorney argument. Again, the issue of improper argument is settled against Mr. Johnson (as law of the case) and he is not entitled to reargument.

Third, as noted in footnote 10 to Booth, "Harmless error" still applies to these cases and, in fact, "victim impact" argument may even be a proper response to defense arguments

(a contention in this case). Booth does not alter, amend, limit or abolish Chapman v. California, 405 U.S. 1022 (1972) and does not provide a basis for relief.

(c) Aggravating Factors

This issue is both time barred and procedurally barred as one which could and should have been raised on direct appeal.

The propriety of imposing capital punishment for felony murder and the "automatic aggravating factor" issues have been around for years and cannot be characterized as "new". Indeed, the clever bit of sophistry appearing in this petition relies upon Stromberg v. California, 287 U.S. 359 (1984), and Zant v. Stephens, 462 U.S. 862 (1983); two pre-January 1, 1987 cases, as well as Lowenfield v. Phelps, 56 U.S.L.W. 4071 (1988) (upholding Louisiana's law), and a contextural reference to Tison v. Arizona, 107 S.Ct. 1676 (1987) (upholding the Arizona statute).

Johnson must concede that Florida law provides for guided discretion and sentencer (judge) determination of aggravating and mitigating factors, even in felony murder cases. The fact that a felony murder carries a single aggravating factor with it does not render the statute unconstitutional. Alford v.

State,307 So.2d 433 (Fla.), cert. denied, 428 U.S. 912 (1975). In fact, Alford specifically describes the sentencing process as "controlled and channeled". Furthermore, in Clark v. State, 443 So.2d 973 (fla. 1983), this Court rejected the claim that felony murder carries an "automatic" death penalty.

More to the point, however, is the fact that these issues regarding felony murder antedate January 1, 1987, and even Johnson's direct appeal. Thus, the law has not "changed" and this issue, if preserved, could and should have been raised on direct appeal or in the first "2.850" petition. The claim is now procedurally barred. White v. Dugger, 828 F.2d 10 (11th Cir. 1987).

CONCLUSION

The order of the Circuit Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Mr. Steven L. Seliger, Esq., 229 East Washington Street, Quincy, Florida 32351; and to Mr. Larry Helm Spalding, Esq., Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 5 day of March, 1988.

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OF COUNSEL