IN THE: SUPREME COURT OF FLORIDA

NO. 81,121

LARRY JOE JOHNSON,

Petitioner,

v.

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

Respondent.

REPLY TO STATE'S RESPONSE TO PETITION FOR EXTRAORDINARY RELIEF AND FOR A WRIT OF HABEAS CORPUS AND TO APPLICATION FOR STAY OF EXECUTION

STEVEN L. SELIGER
Florida Bar No. 244597
16 North Adams Street
Quincy, FL 32351
(904) 875-4668

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

MARTIN J. MCCLAIN
Chief Assistant CCR
Florida Bar No. 0754773

GAIL E. ANDERSON
Assistant CCR
Florida Bar No. 0841544

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

COUNSEL FOR PETITIONER

INTRODUCTION

The State's response does not contest that if the facial vagueness and overbreadth of Florida's list of aggravating factors constitutes fundamental error, that error is cognizable in these proceedings. Rather, the State argues, "The constitutionality of Florida's death penalty statute is unquestionable" (Response at 3), and then proceeds to mischaracterize Mr. Johnson's claims.[1] The fundamental error identified in Mr. Johnson's petition presents a substantial and significant question to this Court, warranting the Court's careful consideration and a stay of Mr. Johnson's execution. Particularly in light of the State's apparent concession that if fundamental error exists, Mr. Johnson's claims are cognizable, Mr. Johnson urges that the Court enter a stay of execution, allow briefing and oral argument, and grant Mr. Johnson relief.[2]

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[1] The most egregious mischaracterization is the claim Mr. Johnson did not object at trial or on appeal to the jury instructions. The State is obviously counting on this Court to not look at the record. However, the record shows that trial counsel requested "[t]hat the Court instruct the jury as a matter ~~of law~~ there is no testimony to support those aggravating circumstances" (R. 931)(emphasis added).

[2] The State makes no response to Mr. Johnson's application for a stay of execution, which was filed with Mr. Johnson's habeas corpus petition. Significantly, the State does not discuss the show cause orders issued by this Court in the case of other capital petitioners presenting claims premised upon Espinosa v. Florida, 112 S. Ct. 2926 (1992) (See Application for Stay of Execution, p. 1-2). Those show cause orders, issued in cases of capital petitioners who like Mr. Johnson have presented second or third habeas corpus petitions, demonstrate the substantiality of Mr. Johnson's claims and therefore the propriety of a stay of execution.

The State argues that Mr. Johnson's reliance upon State v. Johnson (Cecil), 18 Fla. L. Weekly 55 (Fla. 1993), is "misplaced" (Response at 2), because "[t]he constitutionality of Florida's death penalty statute is unquestionable" (Id. at 3). Mr. Johnson's petition argues that Florida's statutory language on aggravating circumstances is vague and overbroad, and that the vagueness and overbreadth must be cured by providing Florida's capital sentencers (jury and judge, see Espinosa v. Florida, 112 S. Ct. 2926 (1992)), with appropriate narrowing constructions. The State's response does not address this argument but simply asserts that the constitutionality of the capital sentencing statute is "unquestionable." In support of this argument, the State cites Proffitt v. Florida, 428 U.S. 279 (1976)(Response at 3).

The State fails to recognize that Proffitt itself affirmed the constitutionality of Florida's capital sentencing statute on the condition that the aggravating factors would be narrowly construed. In Proffitt, the petitioner argued that "the enumerated aggravating ... circumstances are so vague and so broad that virtually 'any capital defendant becomes a candidate for the death penalty.'" Proffitt, 428 U.S. at 255. The petitioner in Proffitt specifically challenged the "heinous, atrocious or cruel" and "great risk of death to many persons" aggravating factors. Id. The Supreme Court noted, "These provisions must be considered as they have been construed by the Supreme Court of Florida," and then discussed the aggravators:

> [The Florida Supreme Court] has recognized that while it is arguable "that all killings are atrocious ... [s]till, we believe that the Legislature intended something 'especially' heinous, atrocious or cruel when it authorized the death penalty for first degree murder." Tedder V. State, 322 So.2d, at 910. As a consequence, the court has indicated that the [heinous, atrocious or cruel] statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So.2d, at 9. See also Alford v. State, 307 So. 2d 433, 445 (1975); Halliwell v. State, supra, 323 So.2d, at 561. We cannot say that the provision as so construed provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases. See Gregg V. Georgia, ante, 428 U.S., at 200-203, 96 S.Ct., at 2938-2939.
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> In the only case, except for the instant case, in which the third aggravating factor -- "[t]he defendant knowingly created a great risk of death to many persons" -- was found, Alvord v. State, 322 So. 2d 533 (1975), the State Supreme Court held that the defendant created a great risk of death because he "obviously murdered two of the victims in order to avoid a surviving witness to the [first] murder." Id., at 540. As construed by the Supreme Court of Florida these provisions are not impermissibly vague.

Proffitt, 428 U.S. at 255-56 (emphasis added). It can be no clearer that the United States Supreme Court affirmed the constitutionality of Florida's aggravating factors only because this Court had provided narrowing constructions of the facially vague and overbroad statutory language.[3] The constitutionality

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[3]The State's citation to Spinkellink V. Wainwright, 578 F.2d 582 (5th Cir. 1978), is misplaced for the very same reason. In Spinkellink, the petitioner argued that the "heinous, atrocious or cruel" aggravating factor was vague and overbroad. 578 F.2d (continued...)

of the statute is therefore not "unquestionable," as the State argues, but is brought into serious question by the failure to utilize the narrowing constructions which are necessary to render the statutory language constitutional.

The State recognizes this Court's holding in State v. Johnson (Cecil), 18 Fla. L. Weekly 55 (Fla. 1993), that fundamental error may be raised on appeal whether or not there was an objection at trial (Answer at 2). The State, however, attempts to skirt Johnson, first, as discussed above, by arguing that there was no fundamental error because Florida's capital sentencing statute is constitutional, and, second, by mischaracterizing Mr. Johnson's contentions. The State says, "[Mr.] Johnson's only complaint is that the aggravating factors when applied to a particular set of facts may or may not, support a particular aggravating factor" (Response at 3). This is not Mr. Johnson's argument. Mr. Johnson's argument is: without the limiting constructions adopted by this Court, Florida's statutory language on aggravating factors is vague and overbroad. This

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[3] (...continued)
at 610. The court discussed the definition of this factor which this Court had provided in State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973), and concluded that this aggravator "as construed by the Florida Supreme Court, provides adequate guidance to those charged with the duty of recommending or imposing sentences in capital cases." Spinkellink, 578 F.2d at 611 (emphasis added). Again, it is this Court's limiting construction which saves the statutory language from vagueness and overbreadth.

argument has nothing to do with the facts of any particular case.[4]

The State also argues, "[Mr.] Johnson's suggestion that Espinosa v. Florida, 112 S. Ct. 2926 (1992), or Richmond v. Lewis, 113 S. Ct. 528 (1992), identified 'fundamental' error or for that matter address a facial constitutional challenge is erroneous" (Response at 3). The State simply misunderstands Mr. Johnson's claim. Again, that claim is: without the limiting constructions adopted by this Court, Florida's statutory language on aggravating factors is vague and overbroad. Proffitt says as much. What Espinosa and Richmond make clear, consistent with Proffitt, is that the only way to overcome such vagueness and overbreadth is to provide capital sentencers with limiting constructions defining the statutory language. Espinosa held that Florida capital juries must be instructed on the limiting construction of the "heinous, atrocious or cruel" aggravator. Without the limiting construction, this aggravator is "invalid" because "its description is so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor." Espinosa, 112 S. Ct. at 2928 (emphasis

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[4]Indeed, Mr. Johnson's petition does not even discuss whether or not the facts of his case do or do not support any particular aggravating factor. A challenge regarding whether or not the facts of a case do or do not support an aggravating factor would be an argument, for example, that an instantaneous, unanticipated death by gunshot does not constitute "heinous, atrocious or cruel."

added).[5] Richmond likewise held that a limiting construction of a vague and overbroad aggravating factor must actually be communicated to and relied upon by the sentencer. Richmond, 113 S. Ct. at 535.[6] Espinosa and Richmond unequivocally establish that it is not enough for a limiting construction to exist -- the limiting construction must be provided to and relied upon by the capital sentencer.

The State also argues procedural bar. Of course, if, as Mr. Johnson argues, the facial vagueness and overbreadth of Florida's statutory language constitutes fundamental error, there is no procedural bar. Additionally, the State mischaracterizes what was raised at trial and on appeal in Mr. Johnson's case. As explained in Mr. Johnson's petition, defense counsel moved for a judgment of acquittal on certain aggravating factors because the factors were legally inapplicable (R. 930-31). Counsel requested "[t]hat the Court instruct the jury as a matter of law there is no testimony to support those aggravating circumstances" (R. 931)(emphasis added). In making this request "as a matter of law," counsel clearly was pointing out to the court that the law

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[5]Indeed, in Espinosa, "[t]he State ... [did] not argue that the 'especially wicked, evil, atrocious or cruel' instruction given ... was any less vague than the instructions we found lacking in Shell [v. Mississippi, 111 S. Ct. 313 (1990)], [Maynard v.] Cartwright, 486 U.S. 356 (1988)] or Godfrev [v. Georgia, 446 U.S. 420 (1990)]." Espinosa, 112 S. Ct. at 2928.

'Again, in Richmond, regarding the "especially heinous, cruel or depraved" aggravating factor, the Supreme Court held, "there is no serious argument that [this factor] is not facially vague." Richmond, 113 S. Ct. at 534, quoting Walton V. Arizona, 497 U.S. 639, 654 (1990).

made these factors inapplicable.[7] Counsel was not, as the State wishes the Court to believe, saying that there was a dispute about whether the facts established the aggravators. He was requesting that the jury be instructed that the aggravators were not applicable.

On direct appeal, regarding the avoiding arrest aggravating factor, Mr. Johnson's direct appeal brief argued, "To establish that the killing of a person who is not a law enforcement officer was for the purpose of avoiding arrest or detection the proof must be 'very strong"' (Johnson v. State, Fla. Sup. Ct. Case No. 58,713, Initial Brief of Appellant, p. 30), and contended, "the jury was not instructed on this requirement, although it should have been in order to assess correctly whether there was sufficient evidence" (Id. at 30 n.3).[8] Regarding the "heinous, atrocious or cruel" aggravating factor, Mr. Johnson argued:

> The jury was allowed to consider as an aggravating circumstance that the murder was especially heinous, atrocious or cruel (TR-956). The gruesome photograph could have been understood (as almost any lay person would) to be evidence of this aggravation even though the trial judge later correctly ruled that the instantaneous killing was not heinous. Cooper v. State, 336 So.2d 1133 (Fla. 1976). As requested by appellant's

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'Indeed, the trial court ultimately found "as a matter of law" that the "heinous, atrocious or cruel" aggravator did not apply: "the capital felony does not fit within the definition of 'especially heinous, atrocious, or cruel', as defined by the Supreme Court of Florida" (R. 1133). Of course, the jury knew nothing about this law because the trial court denied the defense motion and requested instruction.

[8]The State's response does not refer to this direct appeal argument.

> counsel the jury should not have been allowed to consider heinous, atrocious or cruel because the facts would not support that finding. (TR-930, 931). Massard v. State, ___So.2d___, Case No. 51,614 (Fla. May 7, 1981); contra, Cooper v. State, supra.

(Id. at 29) (footnote omitted). Mr. Johnson further argued, "By not culling these ... improper influences from the jury the trial judge failed to insure a reliable verdict. The penalty phase should be retried before a new jury which has not been exposed to inadmissible evidence, argument and instruction" (Id.).

The State's response does not mention the cases cited to support the direct appeal arguments. Of course, citing cases is intended to inform the court of the basis of an argument. In Mr. Johnson's case, appellate counsel cited Maggard v. State, 399 So. 2d 973 (Fla. 1981), Cooper v. State, 336 So. 2d 1133 (Fla. 1976), and Elledse v. State, 346 So. 2d 998 (Fla. 1977)(Johnson v. State, Fla. Sup. Ct. Case No. 58,713, Initial Brief of Appellant, p. 29). As explained in Mr. Johnson's petition (pp. 39-42), the citations to Maggard and Cooper demonstrate that counsel was arguing that the jury should not have been permitted to consider "heinous, atrocious or cruel" because the limiting construction of that factor had not been met, the citation to Cooper demonstrates that counsel was arguing that the jury should have been provided adequate instructions ("Of course, a proper instruction defining [any aggravating circumstance] must be given," Cooper, 336 So. 2d at 1140.), and the citation to Elledge demonstrates that counsel was arguing that the jury should not have been permitted to consider impermissible aggravating

factors.' Mr. Johnson's arguments regarding the jury instructions on aggravating factors were presented at trial and on direct appeal. There is no procedural bar.

In its procedural bar argument, the State does not address Mr. Johnson's argument that Espinosa constitutes new Florida law which, in the interests of fundamental fairness, must be applied to Mr. Johnson's case (see Petition, pp. 8-17). Nor has this Court ever addressed that question. It is clear that Mr. Johnson's jury was given unbridled discretion to return a death sentence -- the jury was not provided this Court's narrowing constructions of aggravating factors" and was not aware of the prohibition against "doubling" aggravating factors. The jury thus did not know the rules for applying aggravating factors. Under Espinosa, "we must presume" the jury found and weighed the vague aggravating circumstances submitted. 112 S. Ct. at 2928. Thus, the jury placed at least four extra "thumbs" on the death side of the scale. Mr. Johnson's death sentence is the result of proceedings which undeniably violated the Eighth and Fourteenth Amendments. In such circumstances, fundamental fairness demands

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[9]Again at trial, counsel sought to have the jury instructed that these aggravators did not apply.

[10]The State's response repeatedly refers to Mr. Johnson's jury receiving "the longer-Dixon instruction" on "heinous, atrocious or cruel" (see Response at 5). As Mr. Johnson's petition explains (pp. 19-20 n.15, p. 38) the United States Supreme Court has categorically stated that the precise instruction given Mr. Johnson's jury violates the Eighth Amendment. See Shell V. Mississippi, 111 S. Ct. 313 (1990).

that the claims presented in Mr. Johnson's petition now be addressed.

CLAIM I

The State's Response does not address the issue presented in Claim I of Mr. Johnson's petition. Again, that claim is: without the limiting constructions adopted by this Court, Florida's statutory language on aggravating factors is vague and overbroad. This constitutional defect constitutes fundamental error which is cognizable in these proceedings. State v. Johnson (Cecil), 18 Fla. L. Weekly 55 (Fla. 1993); Trushin v. State, 425 So. 2d 1126 (Fla. 1983). The State's arguments simply ignore the substance of Mr. Johnson's claim.[11]

CLAIM II

Regarding Claim 11, the State continues to overlook and/or misrepresent what was raised at trial and on direct appeal in Mr. Johnson's case. Trial counsel specifically requested that the trial court instruct the jury, as a matter of law, that certain aggravating factors did not apply, including the "heinous, atrocious or cruel" and "avoiding arrest" aggravators (R. 930-31). On direct appeal, appellate counsel argued that the jury should not have been instructed on "heinous, atrocious or cruel" and that the jury should have been instructed on the limiting construction of "avoiding arrest" so that the jury could "assess

[11]The State's arguments on Claim I regarding what was raised at trial and on direct appeal are addressed in the Introduction, supra, and in Claim 11, infra. These arguments are totally irrelevant to Claim I.

correctly whether there was sufficient evidence" (Initial Brief of Appellant, p. 30). Appellate counsel also argued that "[t]he penalty phase should be retried before a new jury which has not been exposed to inadmissible ... instruction" (id. at 29), and that "[e]rrors in the penalty phase trial require a new jury proceeding" (Id. at 58). The State does not mention these direct appeal arguments.

The State argues that several cases from this Court "ha[ve] rejected the claim that Espinosa, somehow saves this issue for review" (Response at 13-14). None of the cases cited by the State have addressed Mr. Johnson's argument that Espinosa is new Florida law which, in the interests of fundamental fairness, must now be applied to Mr. Johnson's case.

The State further argues that any error before the jury "was cured because the trial court did not apply [the "heinous, atrocious or cruel aggravating factor"] and that "[e]ven if the instruction (HAC) given the jury was deficient under Espinosa, both the trial court and appellate court applied a narrowing construction" (Response at 14)(emphasis in original). These very arguments were specifically rejected in Espinosa:

> It is true that, in this case, the trial court did not directly weigh any invalid aggravating circumstances. But, we must presume that the jury did so ... just as we must further presume that the trial court followed Florida law, ... and gave "great weight" to the resultant recommendation. By giving "great weight" to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found. This kind of indirect weighing of an invalid aggravating

> factor creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor, ... and the result, therefore, was error.

Espinosa, 112 S. Ct. at 2928 (citations omitted).

Regarding the "avoiding arrest" aggravator, the State's similar argument -- that no error occurred because this Court affirmed the application of this factor on direct appeal (Response at 15) -- is similarly flawed.[12] While the trial court and this Court knew of this Court's limiting construction of "avoiding arrest," the jury did not, Thus, as appellate counsel argued on direct appeal, without knowing the definition of the factor, the jury was unable "to assess correctly whether there was sufficient evidence" to support this factor. As Espinosa holds, when the jury is not provided sufficient guidance on an aggravating factor, "we must presume" that the jury weighed an invalid aggravating factor. Espinosa, 112 S. Ct. at 2928. Under Espinosa, this Court must "presume" that the jury found invalid aggravation and that therefore Mr. Johnson's death sentence violates the Eighth Amendment. No "new sentencing calculus," free from the tainted jury recommendation has ever been performed. Richmond, 113 S. Ct. at 535.

The State has failed to show that these errors were harmless beyond a reasonable doubt. The State argues simply that the

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[12]Of course, this Court, as an appellate court, reviews findings of fact by determining whether sufficient evidence exists in the record to support the factual determination. This Court does not make actual fact findings. The State ignores this distinction.

errors were harmless because "[t]he trial court found and this court affirmed all the aggravating [sic] listed in the trial court's sentencing order. No mitigation was found" (Response at 15). This argument does not address whether or not the errors before the jury were harmless beyond a reasonable doubt. The jury was given eight aggravating factors to consider, was not given adequate limiting constructions on any aggravating factors, was not told of the prohibition against "doubling" aggravating factors, and was presented with substantial mitigating evidence. This mitigation is detailed in the petition (pp. 43-48). As Justice McDonald noted in dissent on direct appeal, "A sympathetic jury could logically have recommended life." Johnson v. State, 442 So. 2d 185, 191 (Fla. 1983)(McDonald, J., concurring in part and dissenting in part, in an opinion in which Overton, J., concurs). The State does not discuss the mitigation presented to the jury, apparently assuming that because the judge found no mitigating factors, the jury did likewise. As this Court's opinions in cases involving overrides of jury life recommendations make very clear, however, the assumption the State makes is far from a certainty.[13] The jury may very well have assessed the evidence of mitigation differently, but because of the constitutionally invalid instructions on aggravating

[13]In fact, this Court has noted, "Although a trial judge may not believe the evidence presented in mitigation or find it persuasive, others may." Stevens v. State, 552 So. 2d 1082, 1086 (Fla. 1989).

CLAIM III

The State agrees that this claim was presented on direct appeal (Response at 15-16). The State simply argues that Stringer v. Black, 112 S. Ct. 1130 (1992), does not affect the analysis of the claim. The State is wrong. Mr. Johnson relies upon the argument presented in the petition (pp. 50-59).[14] Mr. Johnson is entitled to relief.

CONCLUSION

Based on the foregoing and upon the argument presented in the petition, Petitioner asks this Court to stay his execution, allow briefing and oral argument, vacate his unconstitutional death sentence, and grant all other relief which is just and equitable.

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by United States Mail, first class postage prepaid, to all counsel of record on January 27, 1993.

STEVEN L. BELIGER
Florida Bar No. 244597
16 North Adams Street
Quincy, FL 32351
(904) 875-4668

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

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[14] The State also argues that "Lockhart v. Fretwell, was decided ... adversely to [Mr.] Johnson's position" (Response at 10 n.10). In Fretwell, the Supreme Court specifically declined to address the automatic aggravating factor question. Lockhart v. Fretwell, ___ S. Ct. ___, slip op. at n.4 (Jan. 25, 1993). Thus, the decision does not even address Mr. Johnson's claim, much less decide it "adversely."

MARTIN J. MCCLAIN
Chief Assistant CCR
Florida Bar No. 0754773

GAIL E. ANDERSON
Assistant CCR
Florida Bar No. 0841544

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

By: 
Counsel for Petitioner

Copies furnished to:

Mark Menser
Assistant Attorney General
Department of Legal Affairs
The Capitol
Tallahassee, FL 32399-1050