IN THE SUPREME COURT OF FLORIDA

LARRY JOE JOHNSON,

Petitioner,

v. CASE NO. 81,121

HARRY K. SINGLETARY,

Respondent.
_____/

**RESPONSE TO PETITION FOR EXTRAORDINARY RELIEF AND FOR WRIT OF HABEAS CORPUS**

COMES NOW Harry K. Singletary, by and through undersigned counsel and files its response to Johnson's successive Petition For Extraordinary Relief And For Writ of Habeas Corpus and would show:

I.

Preliminary Statement

Johnson raises three claims for review in this successive petition for habeas carpus relief; specifically that: (1) the aggravating circumstances are facially vague and overbroad, therefore "fundamental error'' has resulted in Johnson's death sentence, [no objections were made at trial or on appeal regarding the constitutionality of these aggravating factors, rather, Johnson's complaint was premised on whether sufficient evidence existed to support said factors]; (2) the jury's recommendation was tainted because it received a "constitutionally inadequate instructions regarding the 'avoiding arrest' and 'heinous, atrocious or cruel' aggravating factor," [albeit no objections were raised at trial or an appeal

pertaining to the validity of these factors]; and (3) Johnson's sentence of death rests "upon an unconstitutional automatic aggravating circumstance citing Stringer v. Black, 112 S. Ct. 1130 (1992) and Lockhart v. Fretwell, ___ U.S. ___, (decided January 24, 1993) [adversely to Johnson's position].

Respondent would urge the instant petition constitutes an abuse of the writ or process and his claims should be procedurally barred because he is attempting to obtain further review of issues which were raised, or should have been raised on direct appeal or which were waived through failure to object at trial or which could have, should have, or have been raised in previous collateral proceedings. White v. Dugger, 511 So.2d 554, 555 (Fla. 1987); Francois v. Wainwright, 470 So.2d 685 (Fla. 1985); Mills v. Dugger, 574 So.2d 63 (Fla. 1990); Francis v. Barton, 581 So.2d 583 (Fla. 1991); Medina v. Dugger, 586 So.2d 1285 (Fla. 1992); and Martin v. Singletary, 599 So.2d 119 (Fla. 1992).

To the extent Johnson is arguing he is entitled to further review because of this Court's recent decision in Cecil Johnson v. State, ___ So.2d ___ (Fla. 1993) 18 FLW S55, Respondent would submit reliance on same is misplaced. Cecil Johnson v. State, supra deals with a violation of the single-subject rule of Art. 111, Section 6, of the Florida Constitution. In the court's discussion of whether a violation occurred relating to the enactment of Chapter 89-280, this Court opined that "a facial challenge to a statute's constitutional validity may be raised for the first time on appeal only if the error is fundamental."

18 FLW at S56. (emphasis added) The Court further observed that "[t]he constitutional application of a statute to a particular set of facts is another matter and must be raised at the trial level." Id. at 1129-30. 18 FLW S56.

The constitutionality of Florida's death penalty statute is unquestionable. State v. Dixon, 283 So.2d 1 (Fla. 1973); Proffitt v. Florida, 428 U.S. 279 (1976). The aggravating factors found in Section 921.14(5) Fla.Stat., have been found to be valid. Spinkellink v. Wainwright, 578 F.2d 582, 613-14 (5th Cir. 1978). 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. As such any constitutional challenge is procedurally barred unless raised at trial because as noted in Cecil Johnson, supra and Trushin v. State, 425 So.2d 1126 (Fla. 1983) constitutional application of the aggravating factor to a particular set of facts must be first raised at the trial level. 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. See, Espinosa, supra; Kennedy v. Singletary, 602 So.2d 1285 (Fla.), cert. denied, U.S. ___, 113 S.Ct. 2, 120 L.Ed.2d 931 (1992) (Espinosa claim procedurally barred-not raised on direct appeal); Kennedy v. Singletary, 967 F.2d. 1482 (11th Cir. 1992).

This is Johnson's second state habeas, he has not questioned whether he committed the crime. Cf. Herrera v. Collins, ___ U.S. ___ Case No. 91-7328, Decided January 25, 1993) (claim of

factual innocence based on newly discovered evidence does not entitle a defendant to relief.) See also, Graham v. Collins, ___ U.S. ___ (Case No. 91-7580, Decided January 25, 1993).

## II.

## Statement of the Case and Facts

On March 16, 1979, Larry Joe Johnson murdered Mr. James Hadden, the proprietor of a gas station in Madison County, Florida. Johnson was subsequently indicted for the first degree murder and armed robbery (with a firearm). (R 994, 995).

The Florida Supreme Court in Johnson v. State, 442 So.2d. 185. 186 (Fla. 1983) set forth the following facts surrounding the murder:

> "At the trial, Patty Burks testified that on March 16, 1979, she and Johnson stopped at a service station along Interstate Highway 10 in Madison County. She said that Johnson aimed a sawed-off shotgun at the proprietor while she took money from the cash register. She testified that after she left the building, Johnson shot the proprietor. They drove on to Kentucky where Burks, through her mother, informed the police of the murder. The police arrested Johnson for violating probation and later turned him over to Florida authorities. Found in his car were a sawed-off shotgun and number five shot shells, the same type of shot found in the victim's body.

At the penalty phase, the trial court denied defense counsel's request for a "judgment of acquittal as to aggravating circumstances upon the grounds the state has adduced no evidence , . . that the crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel." (TR 930-931) Defense counsel's sole objection was premised an "as a matter of law there is no testimony to support those aggravating

circumstances." (TR-931). Defense counsel also objected to the jury being informed of the aggravating factors that the crime "created great risk to many people - 5C"; the murder was committed to avoid or prevent a lawful arrest - 5E; and that the murder was committed to disrupt or hinder law enforcement - 5G.

The instruction read regarding heinous, atrocious or cruel, hereinafter HAC, (TR-956) was the longer-Dixon instruction, which was not objected to following all penalty instructions, (TR-960), and not subject to any pretrial motions challenging the HAC instruction as either unconstitutional or erroneous.

Johnson was tried by jury in December of 1979 and convicted as charged. In accord with the jury's advisory recommendation, the trial court sentenced Johnson to death.[1]

The Florida Supreme Court reviewed Johnson's convictions and sentences as required by statute. On appeal, Johnson raised the following issues:

> (1) Whether Johnson's due process rights were violated when the Sheriff of Madison County served as bailiff.
>
> (2) Whether "improper" penalty phase arguments by the prosecutor warranted reversal.
>
> (3) Whether the death sentence "violated" 8921.141, Fla.Stat., because the jury was "improperly influenced",[2] the evidence

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[1] The sentencer found three aggravating factors; to-wit: (1) Johnson had a prior conviction for a violent felony and was under sentence; (2) the murder was committed during a robbery and for pecuniary gain, and (3) the murder was committed to hinder law enforcement. No mitigating factors were found.

[2] On page 29 of Johnson's initial brief on appeal, he argued in briefly that the aggravating factor of HAC "should not have been allowed. . . . "because the facts would not support that finding."

supporting the aggravating factors was insufficient, mitigating factors "should have" been found, and that death "was not the proper penalty".

**(4)** Whether the death penalty was improperly applied because the judge relied upon his observations of Mr. Johnson and applied §921.141, Fla.Stat., in a "mandatory" fashion.[3]

**(5)** Whether Johnson could be sentenced for murder and robbery.

The Florida Supreme Court denied all relief. Johnson v. State, 442 So.2d **185** (Fla. 1983), cert. denied, **104** S.Ct. 2181 (1984).

After the signing of Johnson's first death warrant in **1984**, Johnson petitioned for Rule 3.850 relief and sought a writ of habeas corpus from the Florida Supreme Court. The following issues were presented:

(1) Whether Johnson was improperly allowed to leave the courtroom during the testimony of his expert.

**(2)** Whether said absence constituted a denial of due process.

**(3)** Whether African-Americans were improperly excluded from the petit jury.

(4) Whether Johnson's mitigating evidence received appropriate weight.

**(5)** Whether the Court erred (at trial) by allowing (a) "anticipatory rebuttal" testimony; and (b) various penalty phase

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[3] On pages **54-55** of Johnson's initial brief, he argued "that automatically annexing an aggravating circumstance to a crime would violate the Eighth Amendment;. . ." specifically "this application of §921.141 converts robbery murder into a crime for which death is mandated. . . ." The issue was denied on its merits Johnson v. State, **442** So.2d at **190**.

errors - [none of which raised the correctness of the HAC instruction].

(6) Whether the prosecutor engaged in improper argument.

(7) Whether the jury's role was "denigrated" by the court or the State.

(8) Whether the trial court erred in refusing to find mitigating factors.

(9) Whether the Court erred in excluding anti-death penalty (biased) jurors.

(10) Whether appellate counsel was ineffective.

The Florida Supreme Court rejected the challenge to appellate counsel's competence on the merits (point (10) above). Regarding the nine issues raised pursuant to Fla.R.Crim.P. 3.850, the court found that issues (1), (2), (3), (5), (6), (7) and (9) were barred procedurally as issues which should have been raised on appeal. Issues (4) and (8) were procedurally barred as issues previously litigated. Johnson v. State, 463 So.2d 207 (Fla. 1985).

No issues relating to the effectiveness of trial counsel were presented despite a clear opportunity to do so.

Johnson then petitioned for statutory "habeas corpus" relief pursuant to 28 U.S.C. §2254 in the District Court, Northern District of Florida. Twelve issues were raised:

(1) The "Sheriff as bailiff" issue.

(2) The "absence from court" issue.

(3) The "waiver of presence'' issue.

(4) A Lockett[4] issue.

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

(5) The "improper argument" issue.

(6) The "exclusion of African-American jurors" issue.

(7) The "anticipatory rebuttal" issue.

(8) The "jury instruction" issue.[5]

(9) The exclusion of "anti-death" jurors issue.

(10) The "weight of the mitigating evidence" issue.

(11) A request for resentencing.

(12) The "court's observation of Johnson during trial" issue.

The federal courts resolved issues (1), (4), (10), (11) and (12) on the merits. Johnson withdrew issue (9) and issues (2), (3), (5), (6), (7) and (8) were rejected as procedurally barred. Johnson v. Wainwright, 778 F.2d 623 (11th Cir. 1985).

A second death warrant was signed, prompting successive collateral litigation.

A second Rule 3.850 petition was filed, raising these issues:

(1) Reargument of the "improper prosecutorial argument" issue (including "victim impact").

(2) Reargument of the "Sheriff as bailiff" issue.

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[5] No issue was raised as to the constitutionality of the HAC instruction read at the penalty phase. It would appear Johnson failed to assert in federal court the automatic aggravator claim in his first federal habeas sojourn.

(3) Reargument of the "confusion in the verdict" (felony or premeditated murder) issue (from the direct appeal).[6]

Again, no issue of "ineffective assistance of trial counsel" was raised. All issues were rejected on procedural grounds. Johnson v. State, 522 So.2d 356 (Fla. 1988).

Johnson also filed a second petition for habeas corpus in the State court, raising a claim under Hitchcock v. Dugger, 481 U.S. 393 (1987). Relief was denied. Johnson v. Dugger, 520 So.2d 565 (Fla. 1988).

Johnson filed a successive 28 U.S.C. §2254 petition, raising these issues:

(1) The "Hitchcock" issue (denied on merits).

(2) A Booth[7] issue (denied on merits).

(3) A "Sheriff as bailiff" issue (abuse of writ).

(4) A "denigration of jury's role" (Caldwell[8]) issue (procedurally barred).

(5) A "Lockett" issue (denied on merits).

(6) The "automatic death penalty" issue (denied on merits).[9]

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6 Johnson in his successive state court motion for post-conviction relief argued the automatic aggravator, distinquishing Lowenfield v. Phelps, 484 U. S. 231 (1988).

7 Booth v. Maryland, 482 U.S. 496 (1987).

8 Caldwell v. Mississippi, 472 U.S. 320 (1985).

9 In Johnson's successive federal habeas petition (Claim IV.), he argued the automatic aggravator issue. The federal district court found that the death sentence "was not imposed in an automatic and non-discriminatory fashion. . . . Because the new law asserted by petitioner is not applicable to the instant case, this claim is dismissed." The Eleventh Circuit decision at 932 F.2d 1368-1370, rejected this claim on the merits finding:

Johnson v. Dugger, 932 F.2d 1360 (11th Cir. 1991), reh'g. denied, 940 F.2d 1540 (11th Cir. 1991), cert. denied ___ U. S. ___, (November 12, 1991).

On January 7, 1993, the Governor signed a third death warrant setting the warrant week to run from noon, Tuesday, February 2, 1993 until noon, Tuesday, February 9, 1993. Execution has been scheduled for 7:00 a.m., Wednesday, February 3, 1993.

On or about January 21, 1993, Johnson filed a Motion For Relief From Judgement Pursuant to Fed.R.Civ.P. 60(B)(6), asserting the decision in Stringer v. Black, 112 S.Ct. 1130 (1992) and the pending decision in Lockhart v. Fretwell,[10] 112 S.Ct. 1935 (1992) "are precisely such intervening decisions, which fundamentally affect the propriety of this Court's (federal district court's) denial of relief in 1988," No action to date has resulted from said motion.

On January 25, 1993, Johnson filed a successive state habeas corpus petition asserting three claims, hereinafter discussed.

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> "The Florida sentencing scheme as applied in Johnson's case "genuinely narrows the class of persons eligible for the death penalty." The sentencing court's individualized "consideration of mitigating circumstances and. . . exercise of discretion" were sufficient to satisfy the requirements of the Eighth and Fourteenth Amendments."

10 Lockhart v. Fretwell, was decided January 25, 1993, adversely to Johnson's position.

## III.

## Reasons for Denying All Relief

The instant petition, successive in nature, constitutes an abuse of the process. Francois v. Wainwright, 470 So.2d 685 (Fla. 1985); Francis v. Barton, supra. Each of the three claims hereinafter discussed in greater detail are procedural barred from further consideration. All relief should be denied based on abuse and procedural bar.

> **A. Whether Florida's Statute Setting Forth The Aggravating Circumstances To Be Considered In A Capital Case Is Facially Vague And Overbroad In Violation Of The Eighth And Fourteenth Amendments. The Facial Invalidity Of The Statute Was Not Cured In Mr. Johnson's Case Where The Jury Did Not Receive Adequate Narrowing Constructions. As A Result, Mr. Johnson's Sentence Of Death Is Premised Upon Fundamental Error Which Must Be Corrected Now In Light Of New Florida Law, Espinosa v. Florida.**

The instant claim is procedurally barred. Unlike Johnson's recital of what "he raised" on direct appeal, the record reflects on page 29 of his initial brief the sum total of his claim:

> "6. 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 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). Maggard v. State, ___ So.2d ___ Case No. 51,614 (Fla. May 7, 1981); contra, Cooper v. State, supra."

Before the penalty phase instructioons, appellant's counsel also moved for a judgment of acquittal on the aggravating circumstances not proven by the State **(TR-930).**

Indeed, the aforecited is a far cry from the present statements of Johnson as to how this issue was preserved. No where in the direct **appeal** brief or at trial did counsel argue that Florida's "death penalty statute was facially vague and overbroad." No where did Johnson argue below that the jury was without guidance. Rather, Johnson's complaint questioned whether evidence existed to support the aggravating Circumstances, in particular HAC; great risk to many people; hindering law enforcement; and avoid arrest at trial (TR 930-931). He argued on appeal only the sufficiency of evidence regarding HAC. **Since** Johnson's claim was fact specific he is without recourse "even" under the Cecil Johnson **v.** State, supra OK Trushin v. State, supra decisions.

Moreover regarding Johnson's Provence v. State, **337** So.2d **783** (Fla. **1976)** argument, this Court an direct appeal found same wanting. **442 So.2d** at 190. **As** to the factual support for two of the aggravating factors found, "pecuniary gain" and "avoid arrest," the Court concluded "avoid arrest" was valid, 442 So.2d at 188 and Johnson never specifically challenged the evidence as to whether the murder was committed for pecuniary gain. Pursuant to Witt v. State, 465 So.2d 510, (Fla. 1985) and Martin v. Singletary, **599** So.2d 119 **(Fla.** 1992), Johnson **is** entitled to no relief. See, Mills v. Singletary, **606** So.2d **622 (Fla. 1992).**

B. Whether The Jury's Death Recommendation Which Was Accorded Great Weight By The Trial Court Was Tainted By Consideration Of Invalid Aggravating Circumstances, In Violation Of The Fifth, Sixth, Eighth, And Fourteenth Amendments.

Johnson argues that the jury received constitutionally inadequate instructions regarding "avoid arrest" and "HAC". Citing Espinosa v. Florida, supra, and Richmond v. Lewis, supra, Johnson argues that "the jury also received over objection the standard instruction regarding the 'avoid arrest' aggravating factor . . ." (Petitioner's petition p. 38.) The only objection at trial by defense counsel regarding any instruction appears at TR 960 wherein counsel argued with respect ta the instructions given: "None as given. I again renew my request that the jury - that the judge instruct the jury that robbery carries a possible life sentence and a three-year minimum." (TR 960).

The instant claim has not been preserved for review. Indeed this court has repeatedly held that instruction errors are not reviewable unless objected to in a timely fashion. Mareover, as to this very point, this Court in Kennedy v,. Singletary, supra, Martin v. Singletary, supra; Melendez v. State, ___ So.2d ___ (Fla. 1992) 17 FLW 5699 (claim based upon Espinosa procedurally barred, where issue found waived on direct appeal due to lack of objection at trial); Sochor v. Florida, ___ U.S. ___, 112 S.Ct. 2114, 2119-2120, 119 L.Ed.2d 326 (1992) (pretrial motion attacking constitutionality of aggravating circumstance insufficient to preserve claim as to constitutionality of jury instruction, - no objection at trial); Turner v. Dugger, ___ So.2d ___ (Fla. 1992) 17 FLW S391; Henry v. State, ___ So.2d ___

**(Fla. 1993) 18** FLW **S33,** has rejected the claim that Espinosa, somehow saves this issue for review.

Moreover, any error that might have resulted [albeit the long version suggested by State v. Dixon, supra, was read to the jury regarding HAC] was cured because the trial court did not apply this aggravating factor to the instant case[11] and this Court carefully reviewed the appropriateness of the death sentence on appeal.

Recognizing that a state appellate court may apply a harmless error analysis to claims of this nature, and determine whether the result would have been the same, had the "instruction" been "properly" defined Richmond **v.** Lewis, __ U.S. ___, **113** S.Ct. **528, 121** L.Ed.2d **411** (1992), the Court also provided that an appellate court may rely upon an adequate narrowing construction of an aggravating factor, in curing any error caused by the weighing of said factor. See, Clemons v. Mississippi, **449** U.S. **738 (1990)** and Sochor v. Florida, __ U.S. ___, **112** S.Ct. **2114, 1192** L.Ed.2d **326 (1992).** Even **if** the instruction (HAC) given the jury was deficient under Espinosa, both the trial court and appellate court applied a narrowing construction. This is especially true where, as here, the aggravating factor was neither argued by the prosecutor at the penalty phase closing (TR **931-941)** or mentioned **by** the trial court (the sentences at sentencing) or in his written order.)

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11 The record also reflects that the trial court in his sentencing order made an independent determination, apart from the jury's recommendation that the aggravating factors warranted the imposition of death and no mitigation existed. (TR 1130-1136).

The trial court found and this court affirmed all the aggravating listed in the trial court's sentencing order. No mitigation was found. Any error was harmless beyond a reasonable doubt, Martin v. Singletary, 599 So.2d at 121, (the Sochor claim, therefore, is procedurally barred. Moreover, even if the Supreme Court were to declare that aggravator invalid, we would hold the trial court's use of it harmless. Removing that aggravator would leave four valid ones to be weighed against no mitigators. Any reliance on the invalid aggravator would be harmless beyond any reasonable doubt.")

As to the "avoid arrest" aggravator, this Court on direct appeal concluded it was proven beyond any reasonable doubt. If Johnson's claim is correct and preserved regarding this factor, the Court made the necessary analysis and narrowing to conclude its rightful applicability to the facts sub judice. "The evidence clearly shows that the Defendant planned the robbery of the service station, executed the plan, and killed the service station operator because "dead witnesses don't talk." 442 So.2d at 189.

This claim is procedurally barred and constitutes an abuse of the process as raised in this successive petition.

**C. Whether Johnson's Sentence Rests Upon An Unconstitutional Automatic Aggravating Circumstance, In Violation Of Stringer v. Black, Maynard v. Cartwright, Hitchcock v. Dugger, And The Sixth, Eighth, And Fourteenth Amendments.**

Johnson next resurrects his previously argued issue that an improper automatic aggravator was used to support the death penalty. This issue was denied by the Court in Johnson's last

3.850 appeal in Johnson v. State, 522 So.2d 356, 357-358 (Fla. 1988) on the merits, (Sumner v. Shuman, 483 U.S. 66, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987) might be new law; "Sumner involves the automatic, non-discretionary imposition of the death penalty in any situation. Johnson was afforded a full and fair sentencing hearing. While his sentence was proper, it was by no means automatic. . . .") The Court specifically observed". . . the new law cited by Johnson does not apply to this case, and does not require this Court to reconsider an issue raised and disposed of on direct appeal.'' 522 So.2d at 358.

A like result occurred when the panel of the Eleventh Circuit in Johnson v. Dugger, 932 F.2d. 1360, 1368-1370 (11th Cir. 1991) similarly rejected the issue on the merits:

> "The Florida sentencing scheme as applied in Johnson's case genuinely narrows the class of persons eligible for the death penalty." The sentencing court's individualized 'consideration of mitigating circumstances and . . . exercise of discretion' were sufficient to satisfy the requirements of the Eighth and Fourteenth Amendments." 932 F.2d at 1369-1370.

Johnson's suggestion that Stringer v. Black, 112 S.Ct. 1130 (1992) and the decision of Lockhart v. Fretwell (decided January 25, 1993), are controlling is misplaced.

First, Stringer v. Black, does not constitute new law, Mills v. Singletary, 606 So.2d 622, 623 (Fla. 1992) and Kennedy v. Singletary, 599 So.2d 991 (Fla. 1992) cert. denied ___ U.S. ___, 112 S.Ct. 3040, 120 L.Ed.2d 909 (1992). Second, the instant claim constitutes an abuse of the process since, the claim was raised previously and decided adversely to him. Mills v.

Singletary, supra; Witt v. State, 387 So.2d 922 (Fla. 1980). Third, the decision in Lockhart v. Fretwell, rendered January 25, 1993 gives no succor to Johnson's claim. As such, all relief must be denied.

## CONCLUSION

Based on the foregoing, Johnson's successive petition for writ of habeas corpus review should be summarily denied as an abuse of the process. All claims are procedurally barred therefore further review is unwarranted.

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 Steven L. Selinger, Esquire, 16 North Adams Street, Quincy, Florida 32351 and Mr. Larry Helm Spalding, Esquire, Office of the Capital Collateral Representative, 1533 South Monroe Street, Tallahassee, Florida 32301, this 27th day of January, 1993.

CAROLYN M. SNURKOWSKI
Assistant Attorney General