IN THE SUPREME COURT OF FLORIDA

LARRY JOE JOHNSON,

Appellant,

vs. CASE NO. _____

STATE OF FLORIDA,

Appellee.

APPLICATION FOR STAY OF EXECUTION AND SUMMARY INITIAL BRIEF FOR APPELLANT, AND, IF NECESSARY, MOTION FOR STAY OF EXECUTION PENDING FILING AND DISPOSITION OF PETITION FOR WRIT OF CERTIORARI IN THE UNITED STATES SUPREME COURT

ON APPEAL FROM THE THIRD JUDICIAL CIRCUIT,
IN AND FOR MADISON COUNTY, FLORIDA

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This is an appeal from summary denial of Mr. Johnson's Rule 3.850 motion and request for stay of execution. All three claims presented in this proceeding were raised on direct appeal, and the claims are presented to this Court again because of significant recent changes in the law. For example, in Booth v. Maryland, 107 S. Ct. 2529 (1987), the United States Supreme Court prohibited evidence and argument of a type argued in Mr. Johnson's case. This Court has recently acknowledged that Booth "apparently" prohibits such argument and evidence. Patterson v. State, 513 So. 2d 1257, 1263 (Fla. 1987).

More importantly, Booth is reflective of an analysis of error at capital sentencing that has evolved in the United States Supreme Court since the time of Mr. Johnson's direct appeal. In a series of cases, the United States Supreme Court has promulgated the consistent rule that error in capital sentencing proceedings requires reversal unless it can be shown by the state that the error had no effect on the sentence imposed. See Caldwell v. Mississippi, 472 U.S. 320 (1985); Skipper v. South Carolina, 106 S. Ct. 1669 (1986); Booth, supra. It is with this test for prejudice that the following earlier raised claims must now be analyzed.

CLAIM I

THE PROSECUTOR INJECTED IRRELEVANT, PREJUDICIAL, AND INFLAMMATORY NON-STATUTORY AGGRAVATING CIRCUMSTANCES INTO THE CAPITAL SENTENCING EQUATION BY ARGUING AT SENTENCING MATTERS THAT HAD NOT BEEN, AND WHICH COULD NOT HAVE BEEN, INTRODUCED INTO EVIDENCE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

> Whatever intangibles a jury might consider in its sentencing determination, few can be gleaned from an appellate record.

Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 2646 (1985).

The prosecutor argued the following improper, inflammatory, irrelevant, and non-record bases for the death penalty in closing argument:

a. Victim impact "evidence":

> You have heard some evidence presented by the defense here designed to tug at your heart strings, to show you that the defendant was a living, breathing, human being with feelings possessed by an ordinary person. You have become acquainted with his family here today. Another family, perhaps you haven't become closely associated with, that is the Hadden family, will be facing this holiday season one short.

(R. 938)(emphasis added). Motion for mistrial was denied. As noted in Claim II, infra, the Sheriff, who was the protector of the jury, was especially sensitive to the rights of the victim's family, and believed that somebody should be concerned about the victim.

b. Non-rebuttable Prosecutorial Expertise:

> I find myself doing something that I have not been previously called upon to do since being elected State Attorney. That is to stand before a jury of twelve persons and ask that jury to render an advisory opinion or advisory recommendation of the imposition of the supreme penalty provided for by the laws of our state and nation, the penalty of death. The fact that I have not yet, in the one year or almost one year I have served as State Attorney, been required to do that is a recognition I think that there are few cases that call for imposition of the death penalty. As a matter of fact, there are even few murder cases, few homicide cases, that call for imposition of the death penalty. But there is, from time to time, a murder that is so unnecessary, so senseless, so outrageous, so repulsive, that the only proper penalty would be death, and any other penalty would make a mockery out of our system of justice. This is such a murder.

(R. 932)(emphasis added). The objection to this argument was overruled. (R. 937-39).

c. Non-rebuttable Stamp of Divine Approval, And Prosecutor Opinion

> The people of the State of Florida, through their elected officials, have spoken on the subject of the death penalty. Under circumstances to be enumerated by the Court, it is a proper penalty. It has been upheld by the highest Court, it is now the law of the land. Not only is it provided by statute, but the death penalty is sanctioned by our Judeo-Christian heritage which recognizes "thou shalt not kill."
>
> MR. HUNT: That is completely outside the evidence in the case.
>
> THE COURT: Overruled.

> MR. BLAIR: It is further recognized, a few verses later in that same book, which says, "he that smiteth a man so that he die shall surely be put to death." I know not what your views are on the death penalty, only on the basis of what you represented them to be. I want to stress to you, in as strong terms as I am able of generating, the death penalty is appropriate under certain circumstances. I believe these are appropriate circumstances.

(R. 940-41)(emphasis added).

All of these comments were improper. New law makes them unconstitutionally so. The decision to impose the death penalty, the gravest of sanctions, must "be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (opinion of Stevens, J.). In Booth v. Maryland, 107 S. Ct. 2529, 2533 (1987), the United States Supreme Court found that introduction of evidence of "the emotional impact of the crimes on the family" violates the eighth amendment. The victim's family in Booth "noted how deeply the [victims] would be missed," id. at 2531, explained the "painful and devastating memory to them," id. at 2531-2532, and spoke generally of how the crime had created "emotional and personal problems [to] the family members . . . ." Id. at 2531. In Patterson v. State, 513 So. 2d 1257, 1263 (Fla. 1987), the Florida Supreme Court noted that Booth was new law: "Allowing this type of evidence in aggravation appears to be reversible error in view of the United

States Supreme Court decision in Booth v. Maryland, 107 S. Ct. 2529 (1987)."

Booth's rejection of such statements reaffirmed the directive that the sentencing body's discretion to impose death be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." California v. Ramos, 463 U.S. 992, 999 (1983); Gregg v. Georgia, 428 U.S. 153, 189 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). The Court stressed the need for an "individualized determination" of whether an individual should be executed, weighing such factors as "the character of the individual and the circumstances of the crime." Zant v. Stephens, 462 U.S. 862, 879 (1983)(emphasis in original). See also Booth v. Maryland, 107 S. Ct. 2529, 2532 (1987); Eddings v. Oklahoma, 455 U.S. 104, 112 (1982). In imposing the penalty of death, it is vital that the sentencer consider only those factors which directly pertain to the defendant's "personal responsibility and moral guilt." Enmund v. Florida, 458 U.S. 782, 801 (1982); see also Booth v. Maryland, 107 U.S. at 2533. To take into account extraneous matters such as victim impact, purported prosecutorial expertise, the Judeo-Christian tradition, or anything else similarly prejudicial, creates the risk that the death sentence will be based on factors that are "constitutionally impermissible or totally irrelevant to

the sentencing process." See Zant v. Stephens, 462 U.S. at 885; Booth v. Maryland, 107 S. Ct. at 2533.

The Court in Booth recognized the importance of narrowing the jury's consideration to those factors which are strictly related to the defendant:

> Nor is there any justification for permitting such a decision to turn on the perception that the victim was a sterling member of the community rather than someone of questionable character. This type of information does not provide a 'principled way to distinguish [cases] in which the death penalty was imposed, from the many cases in which it was not.'

Id. at 2534 (footnote and citations omitted). The Court recognized that defendants whose victims were "assets" to their community are not, therefore, more deserving of punishment. Id. at 2534 n.8. The attributes of the victim, or the family that would miss the victim, are irrelevant to the sentencing determination: "We thus reject the contention that the presence or absence of emotional distress of the victim's family, or the victim's personal characteristics, are proper sentencing considerations in a capital case." Id. at 253 (footnote omitted). The Florida Supreme Court and the Eleventh Circuit, both addressed this issue without the benefit of Booth or other new and controlling decisions. See Johnson v. State, 442 So. 2d 185 (Fla. 1983); Johnson v. Wainwright, 778 F.2d 623 (11th Cir. 1985).

Booth provides a new and minimal threshold test for reversal -- whether the death sentence "may turn on the unconstitutionally introduced and[/or] argued evidence." The "risk" that it "may" required a per se rule of excluding "victim impact information." Id. at 2534. The Court's decision in Booth adopted and refined the standard of review previously enunciated in Caldwell v. Mississippi, 105 S. Ct. 2633 (1985), and both opinions post-date trial, appeal, and adjudication on Mr. Johnson's first federal petition. Caldwell held that the state may not urge the sentencing body to consider facts which are constitutionally excluded from their consideration and which could not be introduced into evidence. The test set forth in Caldwell was similar to that in Booth: where the error in Booth "may" have affected the result, in Caldwell the state failed to show that the error had "no effect on the sentencing decision," and thus "that decision [did] not meet the standard of reliability that the Eighth Amendment requires." Id. at 2646. The improper factors considered here "may" have affected the sentencing decision, Booth, supra, and they certainly cannot be said to have had "no effect" on sentencing, Caldwell, supra. The United States Supreme Court's recent decisions in Caldwell and Booth are controlling.

Furthermore, Mr. Johnson's right to deny or explain the impermissibly argued factors was denied. When a prosecutor

argues factors that de hors the record, and the jury is exposed to and/or allowed to consider those matters, a defendant has no opportunity to rebut information "on which his death sentence may, in part, have rested." Skipper v. South Carolina, 106 S. Ct. 1669, 1674 (1986)(Powell, J., joined by Burger, C. J., and Rehnquist, J., concurring). Thus, in Skipper, when the prosecutor argued that Mr. Skipper would be violent in prison and so deserved death, there was no opportunity to introduce evidence that the violence argument was false. Caldwell, Booth, and Skipper apply here.

In Mr. Johnson's case, the jury was allowed to consider the "fact" that the prosecutor had never sought the death penalty before, and Mr. Johnson had no way to rebut or explain this proposition by showing that that fact spoke for life, not death. The previous cases that the prosecutor considered, his reasons for not seeking death, etc., all would be permissible rebuttal and explanation. So it is with the religious argument -- the prosecutor was allowed to argue that the Judeo-Christion heritage supported capital punishment, and there is much rebuttal to this type of argument, but no opportunity existed to introduce that evidence.

Mr. Johnson's death sentence rests upon improper matters that could not be rebutted because no opportunity for rebuttal was afforded. New law requires resentencing.

This Court considered only the victim impact argument, and determined that it did not lead the jury to render a more severe penalty than it otherwise would have. Johnson v. State, 442 So. 2d 185, 188. Booth requires reassessment of that conclusion.

The Eleventh Circuit opinion on appeal of the first petition wrongly rejected the victim impact issue, and incorrectly applied guilt/innocence due process prosecutor misconduct law instead of death penalty "reliability in sentencing" law. The single victim impact error is sufficient to justify revisiting the issue, but that in combination with Skipper, Caldwell, Booth, McCleskey, etc., makes reconsideration imperative.

Neither this Court's, nor the earlier Eleventh Circuit's panel decision, utilized the new "no effect" test. The Johnson panel wrote the following about the prosecutor's misconduct:

a. Victim impact "evidence".

After excerpting the quote found at subparagraph a., p. 2; supra, the panel wrote:

> This court found an almost identical argument permissible in Brooks. We held that a reference to the loss suffered by the victim's family "is no more than a compelling statement of the victim's death and its significance," a matter relevant to the valid consideration of retribution in sentencing. We likewise conclude that the argument as made in this case was proper.

Johnson, 778 F.2d at 630. Booth rejects this analysis.

b. Non-rebuttable Prosecutorial Expertise.

After excerpting the quote found at subparagraph b., p. 3, supra, the panel found that "[t]hese remarks were improper." Id. The panel suggested that no objection had been made to the comment, id., footnote 7, but in fact defense counsel's objection was overruled. (R. 937-39).

c. Non-rebuttable Stamp of Divine Approval And Prosecutor Opinion.

After excerpting part of the quote found at subparagraph c., pp. 3-4, supra, the panel wrote that "these [arguments] were improper." Id. at 631.

The panel then analyzed only the two arguments it found to be improper, and found that there was no prejudice. That calculus excluded any consideration of the improper victim impact statement, because the Court believed it proper. In fact, we now know there were at least three improper arguments, and one of them -- victim impact -- was especially egregious, as opposed to "relevant":

> "[I]t creates an impermissible risk that the capital sentencing decision will be made in an arbitrary manner.
>
> . . . .
>
> We also note that it would be difficult -- if not impossible -- to provide a fair opportunity to rebut such evidence without shifting the focus of the sentencing hearing away from the defendant. A threshold problem is that victim impact information is not easily susceptible to rebuttal. . . . [T]he

> defendant also must be given the chance to rebut this evidence [or argument].
>
> . . . .
>
> We thus reject the contention that the presence or absence of emotional distress of the victim's family . . . [is a] proper sentencing consideration[] in a capital case.

Booth, 107 S.Ct. at 2534-35. Under any test, the panel was incorrect, and the error requires resentencing.

The panel opinion contains other errors that have come to light since the time that the panel decision was written. First, as part of the court's evaluation of the harm of the two (now three) improper arguments, the Court concluded that the jury knew it had a "weighty choice," and so the jurors were not deflected in their chore by the prosecutor impropriety. In fact, the jury had a reduced rather than an enhanced sense of responsibility, because the prosecutor and judge repeatedly mislead the jurors into believing the judge was solely responsible for sentencing. The panel was mistaken in its conclusion that the jurors knew they should be careful and so the improper conduct was ameliorated.

Intervening law, and the circumstances of petitioner's case, reveal that eighth amendment, not fourteenth amendment, standards control, and relief is proper. It must first be emphasized that recent law underscores that the jury's capital sentencing decision, which is critical to the sentencing process in Florida,

see Adams, supra, is a very fragile undertaking, and that determining the basis for that recommendation is virtually impossible upon an appellate record. McCleskey, supra. Consequently, the measurement of prejudice from error before the sentencer is highly attenuated -- it is the "no effect" test, recently articulated in Skipper, Booth and, earlier, in Caldwell.

Eighth amendment analysis is particularly apropos here. Unlike in Darden v. Wainwright, 106 S. Ct. 2464 (1980), the misconduct in this case occurred at sentencing, not guilt/innocence. The prosecutorial expertise argument -- "never before seeking death" -- was a completely improper consideration, and was unrebuttable, as was the prosecutor's opinion and reference to what God's opinion was. See Skipper; Booth. The reference to victim impact we now know was absolutely improper and unrebuttable. The case calls out for eighth amendment analysis.

This was not a case that mandated the death penalty, and so it cannot be said there was "no effect." As Justices McDonald and Overton agreed:

> A sympathetic jury could logically have recommended life.

Johnson, 442 So. 2d at 191 (dissenting opinion). It cannot be said that the improprieties had no effect on the jurors' sympathy or logic, and resentencing is required.

CLAIM II

THE HIGH SHERIFF OF MADISON COUNTY WAS BIASED AGAINST PETITIONER, HAD INFORMATION ABOUT PETITIONER AND THE OFFENSE THAT THIS JURY DID NOT HAVE, WAS A MAJOR PARTICIPANT IN THE INVESTIGATION OF THE OFFENSE AND THE INTERROGATION OF THE PETITIONER, LIVED FOR OVER EIGHT MONTHS WITH THE STAR WITNESS IN THE CASE, AND ACTIVELY ASSISTED THE PROSECUTOR IN CHOOSING THE JURY.

THE HIGH SHERIFF WAS ALSO THE BAILIFF, THE PERSON SOLELY CHARGED WITH THE DUTY TO CARE FOR AND CONTROL THE JURY, HE SAW TO ALL THE JURORS' PERSONAL NEEDS, TELEPHONE CALLS, AND QUESTIONS, AND HE SQUIRED THE JURORS FROM PLACE TO PLACE, DINED WITH THEM, AND INSULATED THEM FROM THE PUBLIC.

SINCE IT CANNOT BE SAID THAT THIS DUAL ROLE BY THE SHERIFF HAD NO EFFECT ON THE JURY'S DELIBERATIONS AND RECOMMENDATION, THE PROCEDURE VIOLATED MR. JOHNSON'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

I'm glad [the Sheriff] thought he was guilty. He's the man who arrested him.

Mark Menser, Assistant Attorney General, Argument, March 4, 1987.

This claim was presented on direct appeal. Because the United States Supreme Court has recently defined a prejudice test for error in capital sentencing proceedings that differs from the analysis previously used in this case, it is proper to readdress this "old" claim under "new" law, and successor bars do not aply.

As will be shown, the Sheriff of Madison County was given custody of 1) the petitioner, 2) the state's star witness, and 3) the jury, as bailiff. As a matter of common sense, there is a risk that the use of Sheriff as bailiff in this case had an

effect on sentencing. The impact of this error at capital sentencing is at issue. What effect did it have on the jury for the High Sheriff -- the person who arrested and interrogated petitioner, the person who believed petitioner had no mental problems and that petitioner deserved harsh treatment, the person who obtained renumeration for the victim's family, and who believed that people should be concerned for them, not for petitioner, and the person who brazenly assisted the state in picking the jury -- to be the jury's bailiff, the only person they could speak with, their protector and leader. Under new and controlling case law, new sentencing is required unless it can be said the error had no effect.

A. THE JURORS' KEEPER BELIEVED PETITIONER WAS NOT SUFFERING FROM MENTAL ILLNESS, THAT HE WAS BEING TREATED TOO GOOD, AND THAT SOMEONE SHOULD CARE MORE ABOUT THE VICTIM'S FAMILY

This trial was held in the county of the offense, a typical small county where the Sheriff is very well known. The Sheriff, unrevealed in the direct appeal record, had clear opinions about the precise issues that were to be decided in this case: petitioner's guilt, petitioner's mental health, and what punishment petitioner "deserved." Mr. Johnson's entire defense at sentencing was that he suffered from a mental illness, post-traumatic stress disorder caused during his military service, and there was plenary evidence in support of his contention. Pre-

trial the Sheriff, who had arrested and interrogated petitioner, and who had complete control over the jail and Mr. Johnson's activities therein, decided that Mr. Johnson was absolutely sane, and that he deserved harsh treatment.

The files of the Madison County Sheriff's department[1] reveal that Sheriff Joe Peavy was contacted by Mr. George Hansen, Services Officer, Disabled American Veterans Chapter 126, regarding a telephone call received from Mrs. Alice Morton. According to Mr. Hansen's letter, Mrs. Morton had said:

> 11:00 a.m.
> A Mrs. Alice Morton of xxxxOwensboro, Ky, Telephone Number: [unreadable]-9754, called about her nephew a Larry Joe Johnson, 35 years of age, Disabled American Veteran with a disability of a nervous condition . . . served in the Viet Nam War and after his discharge was in the National Guards . . . . He was confined to the LaGrange Reformatory in Kentucky and was extradited to Madison County Jail where he is now being charged and held for first degree murder . . . . All his medication has been taken from him and at the present time he is in solitary confinement . . . and on the verge of a complete collapse . . . . Mrs. Morton, who has raised the fellow since an infant is pleading for someone to help her . . . . He has had brain

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[1]At the time of trial, direct appeal, and the filing of the previous Rule 3.850 Motion, the Sheriff's file was unavailable, as petitioner attempted to prove last Friday at the state post-conviction hearing. The state judge summarily denied the petition based upon the state's motion, and no evidence was allowed. Access to the Sheriff's file was recently obtained pursuant to Florida's Public Records Act.

> damage and epiplesy [sic] . . . . and as I understand the conversation he has had this even before entering the service . . . (I'm not quite sure on this point) He has a lawyer a Mr. Hunt of Lake City who is handleing [sic] the case and she has spoke with him . . . He is on Dilantin . . . Valium, Elivile (sp) or some other type of tranquilizer . . . at the present time he has nothing . . . . Mrs. Morton, says that sheriff Joe Peavy, of Madison County has been very cooperative but has not been able to help the situation . . . she does not want Mr. Peavy, to get the impression that she is [unreadable] him but wants help from someone . . . that is why she has asked the D.A.V. to step in and perhaps give this young [unreadable] help in getting his medication . . . .

(App. 1).

Sheriff Peavy, the jury's protector,[2] responded that Mr. Johnson was very sane, deserved very bad treatment, and that someone should be concerned about the victim's family:

> As for a complete collapse, I just talked to [Mr. Johnson] an hour or so ago and he seemed <u>perfectly normal</u>. Also his lawyer stated today that he seemed better off physically and mentally than he was when he came to our jail.
>
> I know we do not have the facilities of the Holiday Inn, but <u>I do believe Mr. Johnson is being treated far better than he deserves to be treated, taking into consideration that he had no mercy on the poor man that he robbed</u> for $78.00 and shot his head off with no

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[2]As shown in the following text, the Sheriff was the only person the jurors could speak with, by Order of the Judge, and he catered to all their needs, accompanying them everywhere.

> resistance from his victim. It seems no one is concerned with his family or how the victim suffered.

(App. 1). This arresting Sheriff had complete custody of the jury, the jurors had the responsibility to decide what petitioner "deserved," and they, unlike the Sheriff, were prohibited under the constitution from being "concerned with [the victim's] family . . . ." Booth v. Maryland, 107 S. Ct. 2529 (1987). Their custodian's opinion, and, indeed, his very position as Sheriff, was incompatible with the jury function.

This concrete information about the Sheriff's opinion was not previously known, and was not in the record on appeal.

B. SHERIFF PEAVY WAS RESPONSIBLE FOR OBTAINING RENUMERATION FOR THE VICTIM'S FAMILY PRE-TRIAL

Also unknown earlier were the Sheriff's efforts (and responsibility) to obtain compensation for the victim's family. Sheriff Peavy twice pre-trial received letters from the State of Florida Crime Compensation Commission regarding that office's requirement that the Sheriff provide information so that the victim's family could be given money by the State (App. 2), thereby demonstrating "concern[] with [the victim's] family . . . ." See App. 1.

The Sheriff's files also reveal that he was being contacted pre-trial by the victim's family, whose members were concerned

that Mr. Johnson had not yet been extradicted for prosecution. Sheriff Peavy informed the state attorney of the family's concerns, and the state attorney wrote the widow a two page "reassurance" that began:

> Dear Mrs. Hadden:
>
> Sheriff Peavy called me earlier this week and discussed with me your concern about the delay in returning Larry Joe Johnson to Florida to stand trial for Mr. Hadden's murder.

and ended:

> I hope this letter will serve to reassure you that everyone, including the Madison County Sheriff's Office, the State Attorney's Office, and Governor's Office, are doing everything possible to insure that Larry Joe Johnson is returned to Florida to stand trial for your husband's murder. As I indicated to you earlier, I am doing and will continue to do everything in my power to see that Larry Joe Johnson is tried, convicted and executed.

(App. 3).

The Sheriff of small counties quite naturally takes personal responsibility for the investigation of serious crimes. This case presents no exceptions. For example, all letters, reports, and memoranda regarding the testing and investigation conducted in this case by the Florida Department of Law Enforcement were addressed:

> TO: Honorable Joe C. Peavy
> Sheriff, Madison County
> Madison County Courthouse
> Madison, Florida 32340

RE: JOHNSON, Larry Joe
Death Investigation
HADDEN, Max J.
MADISON COUNTY
03 16 79

(App. 4). This is because the Sheriff arrested the petitioner, the Sheriff interrogated the petitioner, the Sheriff was responsible for preparing the case against the petitioner, and the Sheriff was, overall, the elected official charged with law enforcement in the county.

C. SHERIFF PEAVY WAS THE STAR WITNESSES' LEGAL GUARDIAN

The Sheriff actually allowed (or required) the state's star witness to live in his residence with him and his wife throughout the pre-trial period. As the Sheriff's file reflects, although perhaps unknown to the jurors, the judge in this action paid the jurors' custodian, Sheriff Peavy, "for expenses incurred in maintaining Patricia Burks . . . a total amount of $1,815.41." (App. 5).

D. THE SHERIFF'S ROLE AT TRIAL

Sheriff Peavy was subpoenaed as a witness to appear at Mr. Johnson's trial (App. 6). The state attorney once wrote a special letter to the Sheriff apologizing for inconveniencing him

when the trial was postponed so as allow Mr. Johnson to be evaluated by psychiatrists (App. 6).

The Sheriff was, in fact, a "witness." Mr. Johnson's statements were introduced against him at trial, as were the results of a search of his automobile. The consent to search form was published to the jury, and at the bottom the following signatures appeared in cursive:

Signed x /s/ Larry Johnson

Witness: /s/ James R. Taylor
SA FDLE
Witness: /s/ Fred Respress

Witness: /s/ Joe C. Peavy Sheriff

Time & Date: 8:45 AM MARCH 21, 1979

Place: OHIO Co JAIL
HART FORD, KY

(App. 7); (R. 611-612, State's Exhibit 17).

This High Sheriff, who arrested and interrogated Mr. Johnson, who had decided Mr. Johnson was sane and should be treated badly, who had decided that someone should worry about the victim's family, who was responsible for assisting the family in receiving remuneration, who was doing what he could for the victim's family to ensure that Mr. Johnson came to trial, who the county citizens knew, and who protected the citizens in their homes and on their property -- this High Sheriff was allowed to be the jurors' protector, confidant, helper, and only source of information throughout trial.

The custodian of the petitioner, of the state's star witness, and of the jury, actively and in full view assisted in the determination of who the jurors would be. During jury selection, the following occurred:

> Further during the course of the selection of this jury, I have seen the State Attorney consult with the Sheriff on each occasion prior to the attorneys approaching the bench to give court challenges, peremptorily [sic] challenges and challenges for cause. I feel that conferences with Sheriff Peavy by Mr. Blair are there in the presence of the jury, observed by the jury. The jury can figure out what they are discussing and I do not feel that it would be proper for the State Attorney or Defense Attorney, for that matter, to consult with the jury bailiff concerning who is to sit on the jury.

(R. 209). The motion was denied (R. 210).

After the jury selection was completed, petitioner's counsel renewed the earlier objection to the Sheriff acting as bailiff (R. 396). This followed at least one occasion in which counsel noted that prior to a bench conference at which the court heard challenges to jurors, the prosecutor had conferred with the Sheriff in the presence of the jury (R. 357).

During the renewed motion petitioner's counsel testified, and the testimony was accepted by the court, that the prosecutor had been conversing with the Sheriff during the voir dire examination. He described the process as follows:

> Well, as is usual practice in this Circuit, the prosecution will first question the

> potential jurors, question the venire and then the Defense, after which we would approach the bench and exercise peremptorily [sic] challenges. On most, if not all occasions prior to the time we approached the bench to exercise peremptorily [sic] challenges, the prosecution would confer with the sheriff. These conversations were held usually some eight or ten feet from the jury box.

(R. 397).

During these conversations, twelve prospective jurors were seated in the jury box. These conversations preceded the state's exercise of peremptory challenges and occurred between eight and twenty times during the selection process (R. 397, 398).

Sheriff Peavy testified it was customary in that County and Circuit for him to confer with the prosecuting attorney in the selection of a jury; he had done so in "nearly every case since I've been sheriff" (R. 400). The method of communicating with the state attorney was in the manner described by petitioner's counsel. The distance between the Sheriff and the jurors was approximately fifteen feet; the Sheriff did not believe the jurors were able to hear what was being said (R. 400).

The Sheriff's obvious interest in the case, in who the jurors would be, and in how the petitioner was to be treated did not disappear at the conclusion of voir dire. Because the Sheriff had participated so actively in the investigation, he was repeatedly referred to during testimony as he sat in the courtroom with his jurors. The jury could not help but believe

that the person who was their confidant and protector believed that Mr. Johnson was guilty, that he had exercised his authority properly by arresting Mr. Johnson, and that he wanted Mr. Johnson convicted and executed. The following excerpts reveal how, in fact, the Sheriff was a witness:

a. Consent to search:

A Yes, sir, I did. I told him, I think it was on March 21, 1979. On that morning I had talked with Sheriff Peavy and Investigator Fred Respress and we had decided that we might need the car back in the state of Florida for purposes of witness identification or for any other sort of evidence and that the car may be of benefit to us. I explained to Mr. Johnson that we wanted to look inside his car. We wanted to look at the articles or contents of the car and trunk. We requested he give us permission to do so, which he did.

Q How did he give that permission?

A He gave us verbal permission and also signed a consent to search form that was provided to him.

Q Mr. Taylor, I hand you a form captioned 'Consent to Search' marked for identification as State's Exhibit Seventeen. I ask you if you can recognize that?

A Yes, sir. It is a form used by F.D.L.E. for consent to search. Permission is given by the person of the vehicle that we want to search. This is the same form that I read and explained to Mr. Johnson on March twenty-first in Hartford, Kentucky.

Q Did the defendant have an opportunity to read that form?

A Yes, sir. I read the form to him verbally and then offered to let him read it and sign it. He read and signed it.

Q Did the defendant sign that form in your presence?

A Yes, sir, he did.

Q Is the signature 'Larry Joe Johnson' the signature made by the defendant that you previously testified to?

A Yes, sir, that is correct.

Q And again, were any threats made against the defendant?

A No, sir.

Q Were any promises made to him?

A No, sir.

Q Were there any offers of leniency or consideration if he would sign this consent to search form?

A No, sir.

Q Have you had this consent to search form in your possession since the time it was signed by the defendant to the present time?

A Yes, sir.

Q Had it been altered, changed, or defaced in any manner?

A No, sir.

MR. BLAIR: At this time the State would offer the form identified by the

witness into evidence as State's Exhibit Seventeen.

MR. HUNT: No objection.

THE COURT: State's Exhibit Seventeen admitted without objection. It may be published to the jury.

(R. 611-612)(emphasis added). In fact, Sheriff Peavy's signature appeared as a witness on the consent form.

b. Jury Selection:

MR. HUNT: Have you ever had occasion to file a criminal complaint with the sheriff, state attorney, or anyone?

MR. PAGE: I bought a lawn mower two years ago and never mowed a bit of my grass with it. It was stole from somewhere, stole before I got it. I called Mr. Peavy, he come out there, checked it out, that is the only time.

(R. 343-44)(emphasis added).

c. Opening Statement - Prosecutor:

A unit from the Madison County Sheriff's Office responded. Deputy Jimmy Bunting was the first unit, in the company of Sonny Williams. Shortly, Sheriff Peavy and Investigator Fred Respress arrived. The crime scene was sealed off.

(R. 408).

d. Star Witness Was Protected by the Sheriff:

Q After you left the Dickey residence, you lived with Officer Respress?

A Yes, sir.

Q Then later on you lived with Sheriff Peavy, is that right?

A Yes, sir.

Q Patty, did it every occur to you that you could be charged in this incident?

A Yes, sir.

(R. 478).

e. Sheriff Peavy the Investigator:

Q Tell us your full name and address, please.

A James Bunting, Route three, Box one twelve, Madison, Florida.

Q Where are you employed?

A With Sheriff Joe Peavy, Madison County Sheriff's Office.

Q And how long have you been employed with Sheriff Peavy?

A Approximately seven years.

Q What is your position with Sheriff Peavy's department?

A Deputy Sheriff.

Q Were you employed in that capacity back on March sixteenth of this year?

A Yes, sir.

Q Did you have occasion to respond to a call at the Shell Station at the intersection of State Road two fifty-five and I-10 in Lee?

A Yes, sir.

Q Do you recall approximately what time you received that call?

A Just after dark. It was between eight and nine o'clock.

Q What, if anything, did you do in response to receiving that call?

A I proceeded to the scene of the Shell Station. When I got there I secured the scene until Investigator Respress and Sheriff Peavy arrived.

(R. 482).

f. Sheriff Peavy and Chain of Custody:

Q Do you recall specifically who you turned them over to?

A To the Sheriff?

Q Was Deputy Respress with the sheriff?

A Yes, sir.

Q From the time that you received them and placed them in your vault or in your safe on March eighteenth, 1979, until the time that you turned them over to Sheriff Peavy and Deputy Respress in July, did they remain locked in the safe at all times?

A Yes, sir.

(R. 545).

A It was on July thirty, 1979 when I turned them over to the Sheriff of Madison County, Madison, Florida.

Q Do you recall specifically who you turned them over to?

A To the Sheriff.

(R. 601).

g. Sheriff Peavy the Interrogator:

A . . . After talking to him, I decided to go to Kentucky.

Q Did you go to Kentucky alone?
A No, sir. Sheriff Peavy, the Madison County Sheriff, and Investigator Fred Respress, of the Madison County Sheriff's Office went with me.

Q How did you travel to Kentucky?

A We traveled by car, Sheriff Peavy's vehicle.

Q When did you arrive in Kentucky?

A In the morning of March 20, 1979.

Q On the date of March 20, 1979, did you have occasion to see an individual identified to you as Larry Joe Johnson?

A Yes, sir, I did.

Q Is the person you saw on that date, the person identified to you as Larry Joe Johnson, present in the courtroom today?

A Yes, sir.

Q Point him out, please.

A In the gray coat sitting to the right of Mr. Hunt at the counsel table.

MR. BLAIR: Let the record reflect that the witness has identified the defendant, Larry Joe Johnson.

Q Where did you first see the defendant on the date of March twentieth?

A In the interview room at the Ohio County Sheriff's Office in Hartford.

Q Who was present in the interview room at that time?

A Investigator Fred Respress and also Madison County Sheriff Joe Peavy.

(R. 606)(emphasis added).

Q You said that, if I remember the day correctly, on March 20, 1979 you drove to Hartford, Kentucky?

A Right.

Q With Sheriff Peavy and Officer Respress?

A Yes, sir. We began on the evening of March nineteenth and drove through the night and arrived there on the morning of the twentieth.

Q The first time you had any contact with Larry Joe Johnson was on March 20, 1979?

A Yes, sir.

Q And the conversation that you had with him took place in Hartford, Kentucky?

A Yes, sir.

Q Present during the conversation you had with him was yourself and Officer Respress?

A Yes, sir.

Q Anyone else?

A Sheriff Peavy was there at the beginning of the interview. He left shortly after the interview began.

Q Officer Taylor, did you tape record that interview that you had with Mr. Johnson?

(R. 616).

h. Sheriff Peavy and the Shotgun:

A When I arrived at the scene, I believe Sheriff Peavy and Jimmy Bunting were there. As I pulled into the station, I observed Mr. Hadden laying in the service station. He was dead at that time.

Q Did you know Mr. Hadden prior to that time?

A Yes, sir, I did.

Q Did you observe any weapons at the scene in the service station?

A No, sir.

(R. 620)(emphasis added).

Q What are those?

A This is the bag -- this is the shotgun that was given to me.

Q When did you receive those?

A This was got from Sheriff Minton in Hartford, Kentucky on July 30, 1979.

Q Were you and Sheriff Peavy present at the time these were received?

A Yes, sir.

(R. 623-24).

Sheriff Peavy was the only person the jurors could speak with, and he was their protector:

THE COURT: Ladies and gentlemen of the jury, in just a few minutes I am going to break for lunch. I am going to ask the bailiff to take you to lunch together, so you will be in the custody of the bailiff and the assistant bailiff. It is only natural,

> perhaps, sometimes that if you know members of the court personnel that you may speak to them or have the tendency to speak to them. The attorneys and other court personnel will make an effort to be aloof from you. That is only natural in keeping with the dignity of the court that no one have any contact with the jury other than what is absolutely necessary. That excludes the bailiff in this case. I ask you not to communicate with any of the court personnel, or anyone else for that matter, unless it is just an incidental matter of whether or not you can make a telephone call or something of that nature. If it is absolutely necessary, you can communicate with the bailiff concerning those matters. If you do need to make a telephone call, you need only ask the bailiff. He will tell you when and where that can be accomplished. If you're able to accomplish lunch, Mr. Bailiff, by one o'clock, we would like to start back then. If you're not, we will wait till you're able to return. But as to everyone else, we would like to be able to begin back at one o'clock. As I instructed you yesterday, of course, you should not have any discussions among yourselves or with any other person concerning this trial. You may take the jury at this time to lunch.

(R. 588-89).

The defense repeatedly objected to the Sheriff as bailiff, and it was raised on direct appeal (R. 113, 114). Furthermore, during the trial, petitioner's counsel objected to the Sheriff talking and reacting during testimony:

> I have been sitting behind the bailiff, Sheriff Peavy, He and the clerk are carrying on a conversation and I am having trouble hearing the witness talking over their conversation. Sheriff Peavy is reacting to the testimony, granted some times [sic] I am having trouble hearing the witness.

(R. 471). Later petitioner's counsel told the Court:

> I renew our motion to have another bailiff on grounds cited yesterday. We urge that Sheriff Peavy, through no fault of his own, did appear to react to some of the testimony, some of the questions that were asked, particularly of Patty Burks. In my view, he was indicating disapproval of the questioning or the manner in which the questions were asked. I feel this is, or at least could have been, observed by the jury. I don't know whether they did or not. I haven't been talking to them. Since he is in a rather sensitive position, I feel that the Court out to point [sic], appoint another bailiff.

(R. 501, 502). This statement of counsel was considered equivalent to testimony supporting the motion, which was denied (R. 502, 503). Petitioner's motion for mistrial on the same ground was also denied (R. 503). The jury was not sequestered but on occasion went to lunch as a group with the Sheriff (R. 579). After the state rested, petitioner again moved for a mistrial based upon the Sheriff serving as bailiff (R. 736). The motion was denied (R. 736).

Without question, the jury had to know that the Sheriff believed the co-defendant's story about what had happened; the jury must have believed that the Sheriff obtained a voluntary statement and waiver; the jury must have believed the Sheriff found the shotgun, that it was Mr. Johnson's, and that Mr. Johnson, not Patty, fired the fatal shot; the jury must have believed that the Sheriff had justifiably charged Mr. Johnson, and that he expected the jurors to convict him and sentence him

to death: the judge had placed the jurors in the Sheriff's hands and custody, and who were they to say the Sheriff was wrong?

The issue was raised on direct appeal to the Florida Supreme Court. Four members of the Court believed that due process had not been violated. Johnson v. State, 442 So. 2d 185, 187 (Fla. 1983). Justice Ehrlich concurred, finding error, but "no demonstrable harm." Id. at 191. However, Justice McDonald and Overton dissented:

> While Johnson clearly earned several aggravating circumstances, he also presented some mitigating testimony. A sympathetic jury could logically have recommended life. I do not suggest that the sheriff intentionally subjected the jury to the views of the state, but I would be extremely surprised if the jury felt that it would be displeasing him if it recommended death.
>
> This is a sensitive area. The practice here should not be encouraged. Because of that I vote to grant a new sentencing hearing. I would affirm the conviction.

Id.

The majority's analysis on direct appeal was couched solely in terms of fourteenth amendment due process, although petitioner's brief contained an eighth and fourteenth amendment argument. The Eleventh Circuit's later analysis was also devoid of eighth amendment analysis, even though the claim was raised in eighth amendment terms. Since the time of the initial petitioner's denial and affirmance, the following has occurred:

a. Eighth amendment law has developed to the point that error which would withstand fourteenth amendment analysis may not withstand eighth amendment analysis, and the state must prove that the error had no effect on the sentence, see Booth v. Maryland, 107 S. Ct. 2529 (1987) and Skipper v. South Carolina, 106 S. Ct. 1669 (1986),

b. It has been discovered that the Sheriff had formed and expressed opinions pre-trial about Mr. Johnson's sanity and how he should be treated; that the Sheriff was openly sympathetic to the victim's family, believing people should show some concern for the family and the trial should hurry up and happen; and that the Sheriff was instrumental in obtaining remuneration for the victim's family.

Capital sentencing law since the time of the Court's decision provides the new and constitutionally required analysis. The problem with capital sentencing decisions is that the "jury's function is to make the difficult and uniquely human judgment that defy codification," McCleskey v. Kemp, 107 S. Ct. 1756, 1777 (1987), and that defy exacting review on appeal because "[w]hatever intangibles a jury might consider in its sentencing determination, few can be gleamed from an appellate record." Caldwell v. Mississippi, 472 U.S. 320 (1985). Because of the difficulty of determining precisely what caused the death sentence, the law "require[s] us to remove any legitimate basis

for finding ambiquity concerning the factors actually considered," Eddings v. Oklahoma, 455 U.S. 104, 116 (1982) (O'Connor, J., concurring), and the law emphasizes the need to eliminate the risk that impermissible factors -- for example, Sheriff as bailiff -- were actually considered. Booth v. Maryland, 107 S. Ct. 2529 (1987). When the jury was exposed to and may have considered improper matters -- e.g., pleasing, molifying, agreeing with, the Sheriff -- then it must be demonstrated that such matters "had no effect upon the jury's deliberations." Skipper v. South Carolina, 106 S. Ct. 1669, 1673 (1986); see also, Booth; Caldwell; supra. In this case, it is impossible to confidently conclude that the Sheriff as bailiff had no effect, and new law requires resentencing.

Applying common sense, it is abundantly clear that there was a risk that the jury was influenced by their caretaker being the interrogator, investigator, arrestor, landlord for the co-defendant star witness, and selector of their members. The risk is intolerable, and a new sentencing proceeding is required.

CLAIM III

MR. JOHNSON'S DEATH SENTENCE IS PREDICATED UPON THE FINDING OF AN AUTOMATIC, NON-DISCRETION-CHANNELING, STATUTORY AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

> This Court placed the greatest weight upon the facts supporting Aggravating Circumstance (5)(d) [felony-murder]. Had this been the only aggravating circumstance . . . this Court would have concluded that the death sentence would have nevertheless been appropriate in this case.

(R. 1136) (sentencing order).

This claim was raised on direct appeal. See Appellant's brief, pp. 54-55. However, new law has breathed life into the claim, making it appropriate for consideration in a second petition.

In Florida, the "usual form" of indictment for first-degree murder under sec. 783.04, Fla. Stat. (1987), is to "charg[e] murder . . . committed with a premeditated design to effect the death of the victim." Barton v. State, 193 So. 2d 618, 624 (Fla. 2d DCA 1968). The absence of felony murder language is of no moment: when a defendant is charged with a killing through premeditated design, he or she is also charged with felony-murder, and the jury is free to return a verdict of first-degree murder on either theory. Blake v. State, 156 So. 2d 511 (Fla. 1963); Hill v. State, 133 So. 2d 68 (Fla. 1961); Larry v. State, 104 So. 2d 352 (Fla. 1958).

Petitioner was charged with first-degree murder in the "usual form": murder "from a premeditated design to effect the death of" the victim in violation of Florida Statute section 782.04. An indictment such as this which "tracked the statute" charges felony murder: section 782.04 is the felony murder statute in Florida. Lightbourne v. State, 438 So. 2d 380, 384 (Fla. 1983).

It is impossible to determine whether the guilty verdict in this case rests on premeditated or felony murder grounds. The jury received instructions on both theories, the prosecutor argued both, and a general verdict was returned. If one or the other basis for the conviction results in an unconstitutional sentence, then a new sentencing hearing is necessary. See Stromberg v. California, 283 U.S. 359 (1931).

If felony murder was the basis, then the subsequent death sentence is skewed. Cf. Stromberg v. California, 283 U.S. 359 (1931). This is because the death penalty in this case was predicated upon an unreliable automatic finding of a statutory aggravating circumstance -- the very felony murder finding that formed the basis for conviction. Automatic death penalties upon conviction of first degree murder violate the eighth and fourteenth amendments, as was recently stated by the United States Supreme Court in Sumner v. Shuman, 107 S. Ct. 2716 (1987), new law which makes this issue a proper one to now raise and

which provides "cause" for any purported procedural default. In this case, felony murder was found as a statutory aggravating circumstance. The sentencer was entitled automatically to return a death sentence upon a finding of guilt of first degree (felony) murder. Every felony-murder would involve, by necessity, the finding of a statutory aggravating circumstance, a fact which, under the particulars of Florida's statute, violates the eighth amendment: an automatic aggravating circumstance is created which does not narrow ("[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty . . . ." Zant v. Stephens, 462 U.S. 862, 876 (1983)). In short, Mr. Johnson was convicted for felony murder, and he then faced statutory aggravation for felony murder. This is too circular a system meaningfully to differentiate between who should live and who should die, and it violates the eighth and fourteenth amendments.

The United States Supreme Court recently addressed a similar challenge in Lowenfield v. Phelps, 56 U.S.L.W. 4071 (January 13, 1988), and the discussion in Lowenfield illustrates the constitutional shortcoming in Mr. Johnson's capital sentencing proceeding. In Lowenfield, petitioner was convicted of first degree murder under Louisiana law which required a finding that he had "a specific intent to kill to inflict great bodily harm upon more than one person," which was the exact aggravating

circumstance used to sentence him to death. The United States Supreme Court found that the definition of first degree murder under Louisiana law that was found in Lowenfield provided the narrowing necessary for eighth amendment reliability:

> To pass constitutional muster, a capital-sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." Zant v. Stephens, 462 U.S. 862, 877 (1983); cf. Gregg v. Georgia, 428 U.S. 153 (1976). Under the capital sentencing laws of most States, the jury is required during the sentencing phase to find at least one aggravating circumstance before it may impose death. Id., at 162-164 (reviewing Georgia sentencing scheme); Proffitt v. Florida, 428 U.S. 242, 247-250 (1976) (reviewing Florida sentencing scheme). By doing so, the jury narrows the class of persons eligible for the death penalty according to an objective legislative definition. Zant, supra, at 878 ("[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty").
>
> In Zant v. Stephens, supra, we upheld a sentence of death imposed pursuant to the Georgia capital sentencing statute, under which "the finding of an aggravating circumstance does not play any role in guiding the sentencing body in the exercise of its discretion, apart from its function of narrowing the class of persons convicted of murder who are eligible for the death penalty." 462 U.S., at 874. We found no constitutional deficiency in that scheme because the aggravating circumstances did all that the Constitution requires.

The use of "aggravating circumstances," is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase. Our opinion in Jurek v. Texas, 428 U.S. 262 (1976), establishes this point. The Jurek Court upheld the Texas death penalty statute, which, like the Louisiana statute, narrowly defined the categories of murders for which a death sentence could be imposed. If the jury found the defendant guilty of such a murder, it was required to impose death so long as it found beyond a reasonable doubt that the defendant's acts were deliberate, the defendant would probably constitute a continuing threat to society, and, if raised by the evidence, the defendant's acts were an unreasonable response to the victim's provocation. Id., at 269. We concluded that the latter three elements allowed the jury to consider the mitigating aspects of the crime and the unique characteristics of the perpetrator, and therefore sufficiently provided for jury discretion. Id., at 271-274. But the Court noted the difference between the Texas scheme, on the one hand, and the Georgia and Florida schemes discussed in the cases of Gregg, supra, and Proffitt, supra:

> "While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowing the categories of murders for which a death sentence may ever be imposed serves much the same purpose . . . . In fact, each of the five classes of murders made capital by the Texas statute is encompassed in Georgia and Florida by one or more of their statutory aggravating circumstances . . . . Thus, in essence, the Texas

> statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed. So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and the other two States is that the death penalty is an available sentencing option--even potentially--for a smaller class of murders in Texas." 428 U.S., at 270-271 (citations omitted).
>
> It seems clear to us from this discussion that the narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase. See also Zant, supra, at 876, n. 13, discussing Jurek and concluding, "in Texas, aggravating and mitigating circumstances were not considered at the same stage of the criminal prosecution."

Id. at 4075 (emphasis added).

Thus, if narrowing occurs either in the conviction stage (as in Louisiana and Texas) or at the sentencing phase (as in Florida and Georgia), then the statute as written may satisfy the eighth amendment. However, as applied, Florida law in this case did not provide constitutionally adequate narrowing at either phase, because conviction and aggravation were predicated upon a non-legitimate narrower -- felony-murder.

The conviction-narrower state schemes require something more than felony-murder at guilt/innocence. Louisiana requires intent to kill. Texas requires intentional and knowing murders. This narrows. Here, however, Florida allows a first-degree murder conviction based upon a finding that does not legitimately narrow -- felony murder. Mr. Johnson's conviction and sentence required only a finding that he committed a felony during which a killing occurred, and no finding of intent was necessary.

Clearly, "the possibility of bloodshed is inherent in the commission of any violent felony, and . . . is foreseen," Tison v. Arizona, 107 S. Ct. 1676, 1684 (1987), but armed robbery, for example, is nevertheless an offense "for which the death penalty is plainly excessive." Id. at 1683. The same is true of burglary, as Proffitt (burglary felony murder insufficient for death penalty), supra, and other Florida cases have made clear. With felony-murder as the narrower in this case, neither the conviction nor the statutory aggravating circumstance meet constitutional requirements. There is no constitutionally valid criteria for distinguishing Mr. Johnson's sentence from those who have committed felony (or, more importantly, premeditated) murder and not received death.

This analysis cannot be sidestepped by any appellate finding of premeditation: first, it cannot be said that the jury found premeditation; second, neither the Florida Supreme Court, nor

this Court, can affirm a premeditation finding, since one does not exist. Consequently, if a felony-murder conviction in this case has collateral constitutional consequences (i.e. automatic aggravating circumstance, failure to narrow), a Florida Supreme Court, or any other court's, finding of premediation does not cure those collateral reversible consequences.

The jury did not find premeditation. "To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined by the trial court." Cole v. Arkansas, 333 U.S. 196, 202 (1948). The principle that an appellate court cannot utilize a basis for review of a conviction different from that which was litigated and determined by the trial court applies with equal force to the penalty phase of a capital proceeding. In Presnell v. Georgia, 439 U.S. 14 (1978), the United States Supreme Court reversed a death sentence where there had been no jury finding of an aggravating circumstance, but the Georgia Supreme Court held on appeal there was sufficient evidence to support a separate aggravating circumstance on the record before it. Citing the above quote from Cole v. Arkansas, the United States Supreme Court reversed, holding:

> These fundamental principles of fairness apply with no less force at the penalty phase of a trial in a capital case than they do in

> the guilty/determining phase of a criminal trial.

Presnell, 439 U.S. at 18. Neither the Florida Supreme Court, now any other court, can "affirm" based on premeditation when it cannot be said that the conviction was obtained based on premeditation. If felony-murder could have been the basis, the appellate court is stuck with it, and Mr. Johnson is entitled to relief.

CONCLUSION

WHEREFORE, Petitioner respectfully requests that this Court stay his scheduled execution and vacate his sentence of death. If this relief is not granted, Mr. Tafero requests that this Court grant a stay of execution pending application for a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. MAIL/HAND DELIVERY to Mark Menser, Assistant Attorney General, Department of Legal Affairs, Magnolia Park Courtyard, 111-2E North Magnolia Street, Tallahassee, Florida 32301, this 7th day of March 1988.

_____
Attorney