IN THE SUPREME COURT OF FLORIDA

LARRY JOE JOHNSON, Petitioner, vs. RICHARD L. DUGGER, Secretary, Florida Department of Corrections, Respondent.	)	CASE NO.:

APPLICATION FOR RELIEF
PURSUANT TO HITCHCOCK V. DUGGER

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The Petitioner, LARRY JOE JOHNSON, through his undersigned counsel, requests this Court to grant him relief from his sentence of death as required by Hitchcock v. Dugger, 107 S.Ct. 1821 (1987), and as grounds states:

JURISDICTION

1. This Court's original jurisdiction is invoked pursuant to Article V, Sections 3(b)(1), (7) and (9), Florida Constitution; and Rules 9.030(a)(3) and 9.040(a), Florida Rules of Appellate Procedure.

2. Review is sought to correct the prior judgment of this Court upholding Mr. Johnson's death sentence, for it resulted from an "error that prejudicially denies fundamental constitutional rights." Kennedy v. Wainwright, 483 So.2d 424, 426 (Fla. 1986).

3. Specifically, Mr. Johnson presents the issue of the restricted consideration of mitigating circumstances disapproved by Hitchcock v. Dugger, 107 S.Ct. 1821 (1987). This Court has recently held the April, 1987 decision in Hitchcock to be a fundamental change in Florida law, so as to permit correction by way of original action in this Court. Riley v. Wainwright, ___ So.2d ___, 12 FLW 457 (Fla. September 3, 1987); Downs v. Dugger,

514 So.2d 1069 (Fla. 1987).

4. The Application for Relief procedure followed in this case is based on this Court's jurisdiction over its own judgments as well as its authority to issue all writs necessary for the complete exercise of its jurisdiction and to issue writs of habeas corpus. It has sound and reasonable precedent. The application for relief procedure was previously utilized by this Court to correct a significant change of law emanating from the Supreme Court's decision in Gardner v. Florida, 430 U.S. 349 (1977). The procedure has the practical benefit of judicial economy by permitting expedited and narrowly focused review of a single issue that will likely control or moot any other sentencing issues. For Example, when Gardner was announced, this Court decide it would be more efficient to correct the error itself by application for relief rather than post-conviction challenges. The same is true for the Hitchcock issue presented here, for it is a "record issue" which needs no further evidentiary development and can be decided as a matter of law.

COURSE OF PRIOR PROCEEDINGS

5. By indictment filed in the Circuit Court of Madison County, Mr. Johnson was charged with first-degree murder and robbery while armed with a firearm. R. 994-995.[1] After trial Mr. Johnson was convicted as charged on two counts. R. 1117. The sentencing trial was held on December 17, 1979 and resulted in a jury recommendation of death. R. 1118. The trial court imposed the sentence of death on January 9, 1980 (R. 1130) and filed findings of fact the same day. R. 1136.

6. In the penalty phase, the state relied on (a) the evidence presented to prove guilt; (b) a stipulation that Mr.

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1. The symbol "R." is used to denote references to the record on appeal filed in the direct appeal in this case (Case No. 58,713).

Johnson was on parole from Kentucky at the time of the murder (TR. 778)[2]; (c) a certified copy of a judgment for second degree assault, the offense for which he was on parole (TR. 778); and (d) testimony from two court-appointed psychiatrists, Drs. George W. Barnard and Frank Carrera.

Mr. Johnson presented the testimony of family members, military service acquaintances, two psychologists and documentary evidence. The essence of this testimony consisted of information relating to Mr. Johnson's childhood, military service, general personal character, psychiatric history, drug use on the day of the offense and psychological makeup.

7. In support of the death sentence, the trial judge found six statutory aggravating circumstances: (1) that Mr. Johnson was under sentence of imprisonment, Sections 921.141(5)(a), Florida Statutes (1977); (2) that Mr. Johnson had previously been convicted of a felony involving the use or threat of violence, Section 921.141 (5)(b); (3) that the capital offense was committed while Mr. Johnson was engaged in a robbery, Section 921.141 (5)(d); (4) that the capital offense was committed to avoid arrest, Section 921.141 (5)(e); (5) that it was committed for pecuniary gain, Section 921.141 (5)(f); and (6) to hinder the enforcement of laws, Sections 921.141 (5)(g). The trial judge combined these six aggravating circumstances into three. R. 1136. Provence v. State, 337 So.2d 783 (Fla. 1983).

With regard to mitigation, the trial judge reviewed the statutory mitigating circumstances and found none to apply. R. 1136.

8. On direct appeal, this Court affirmed the judgment and sentence. Johnson v. State, 442 So.2d 185 (Fla. 1984), cert. denied, 104 S.Ct. 2182 (1984). Mr. Johnson had challenged his death sentence on various grounds. Pertinent to the issue

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2. The symbol "TR." is used to denote references to the trial transcript in this case.

presented herein, Mr. Johnson challenged the sentencing judge's restriction on the consideration of nonstatutory mitigating factors, arguing:

> There was evidence supporting a non-statutory mitigating circumstance of appellant's military record. It was uncontradicted that until the head injury, appellant had been a good guardsman. The report of the Army doctors who treated him established that appellant suffered a debilitating psychiatric illness after being hit in the head with a smoke canister. This injury forced him out of the service, to which he had devoted 12 years. The trial judge should have recognized and considered appellant's service to his country for a substantial number of years as a mitigating circumstance. The trial judge instead appeared to bind himself to the statutorily enumerated circumstances; if he considered non-statutory mitigating he did not give any indication of doing so. His order is therefore defective because under Lockett v. Ohio, 438 U.S. 586 (1978) consideration of mitigating circumstances may not be restricted by the trial judge. As a corollary, a trial judge must not arbitrarily disregard the non-statutory mitigating circumstances which the defendant offers.
>
> Another mitigating circumstance which the trial court was urged to consider and which should have played a part in this case was the lack of any criminal prosecution of Patty Burks (TR. 968, 969). The disposition of the charges against a co-defendant are relevant to the capital sentencing process. Messer v. State, 330 So.2d 137 (Fla. 1976).
>
> Although Patty Burks was not charged with complicity in the robbery or murder of Mr. Hadden, there is a strong suspicion she could have been. Without repeating all of the impeachment evidence discussed previously, appellant notes that there were reasonable grounds to suspect her involvement and her avoidance of any criminal liability should have been considered as a mitigating circumstance favoring life imprisonment for appellant rather than the death penalty. Gafford v. State, 387 So.2d 333 (Fla. 1980).
>
> Mitigating circumstances, both statutory and otherwise, were established by the evidence but were either improperly rejected or not considered by the trial judge. For this reason, the death sentence was defective.

9. This Court's opinion did not discuss these challenges. The Court upheld the three aggravating factors relied upon by the trial judge and affirmed the death sentence. Any discussion of the sentencing order focused exclusively on statutory mitigation.

10. On rehearing, Mr. Johnson again challenged the judge's restricted consideration. Rehearing was denied by this Court,

without opinion.

11. Subsequent to this denial, the Governor signed a death warrant and Mr. Johnson began collateral proceedings. His motion for post-conviction relief was denied by the Circuit Court on January 23, 1985 without a hearing. This Court affirmed the judgment of the circuit court and simultaneously denied Mr. Johnson's original habeas petition. Johnson v. Wainwright, 463 So.2d 207 (Fla. 1985).

12. Mr. Johnson then filed a federal habeas corpus petition in the United States District Court for the Northern District of Florida. The habeas petition raised the precise issue before this Court. The district court held:

> First, "[t]he fact that the sentencing order does not refer to the specific types of non-statutory 'mitigating' evidence petitioner introduced indicates only the trial court's finding the evidence was not mitigating, not that such evidence was not considered." Dobbert [v. Strickland], 718 F.2d [1518,] at 1524 [([11th Cir.] 1983), cert denied, ___ U.S. ___, 104 S.Ct. 3591 [82 L.Ed.2d 887] (1984)]. Second, the petitioner lists "evidence of mental or emotional disturbance which may not have met the statutory standard, Defendant's service to his country during two tours in Vietnam . . ." as non-statutory mitigating circumstances adduced at trial. The trial judge referred expressly to the testimony concerning mental disturbance and the asserted causal link to defendant's Vietnam service in the sentencing order. Finally, the trial judge correctly instructed the jury that they were to consider all evidence of mitigating circumstances, including but not limited to the statutory circumstances. In view of all this, no inference may be drawn from the trial judge's use of the statutory list of mitigating circumstances as a format for writing the sentencing order that he failed to consider non-statutory mitigating circumstances.

Johnson v. Wainwright, Memorandum Opinion (January 29, 1985). This determination was affirmed on appeal.

> Like the district court, we believe that these aspects of the record establish that the trial judge knew he could, and did, consider any non-statutory mitigating factors introduced by the petitioner. See also Palmes v. Wainwright, 725 F.2d 1511, 1523 (11th Cir.) ("we cannot conclude that because the sentencing order discusses only the statutorily maintained factors that other evidence was not considered"), cert denied, ___ U.S. ___, 105 S.Ct. 227, 83 L.Ed.2d 156 (1984).

Johnson v. Wainwright, 778 F.2d 623, 629 (11th Cir. 1985).

REASONS FOR GRANTING RELIEF

Both constitutional error and the need for relief are now evident. In recognition of the holding in Hitchcock v. Dugger, 107 S.Ct. 1821 (1987), this Court has granted relief where the judge, jury or both were limited in the consideration of mitigating factors to the statutory list.[3] The Eighth Amendment mandate of individualized sentencing[4] has now been fully recognized and because that recognition is set forth in this Court's recent decisions, it will not be restated here. Rather, we will examine the particular circumstances of this case as they relate to this Court's most recent opinions.

In sentencing Mr. Johnson, the judge explained the process he used in determining that sentence:

> Thus this Court concluded, in reaching its decision to impose the death penalty, that there were:
>
> A. No mitigating circumstances.
>
> B. Three aggravating circumstances consisting of:
>
> (1). A combination of statutory Aggravating Circumstances (5)(a) and (5)(b);
>
> (2). A combination of the statutory Aggravating Circumstances (5)(d) and (5)(f);
>
> (3). A combination of the statutory Aggravating Circumstances (5)(e) and (5)(g).
>
> The aggravating circumstances warrant the imposition of the death sentence and there were no mitigating circumstances to outweigh the aggravating circumstances.
>
> This Court placed the greatest weight upon the facts supporting Aggravating Circumstance (5)(d). Had this been the only aggravating

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3. Downs v. Dugger, supra; Thompson v. Dugger, 515 So.2d 173 (Fla. 1987); Riley v. Wainwright, ___ So.2d ___, 12 FLW 457 (Fla. September 3, 1987); Morgan v. State, ___ So.2d ___, 12 FLW 433 (Fla. August 27, 1987); McCrae v. State, 510 So.2d 874 (Fla. 1987). Accord, Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987).

4. E.g., Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1986); Skipper v. South Carolina, 106 S.Ct. 1669 (1986); Truesdale v. Aiken, 107 S.Ct. 1394 (1987); cf. California v. Brown, 107 S.Ct. 837 (1987).

> circumstance and even if the evidence adduced had as a matter of law supported Mitigating Circumstances (6)(b), (6)(e), and (6)(f), this Court would have concluded that the death sentence would have nevertheless been appropriate in this case.
>
> This was a senseless killing, and when considered in the light of the statutory circumstances with respect to both aggravation and mitigation, this Court feels that this sentence is clearly warranted.

R. 1136. (emphasis supplied). It could be no more apparent that the judge considered only the statutory list of mitigating circumstances. His sentencing order reviews only statutorily mitigating circumstances and does so by their statutory paragraph letter designations. R. 1136. This Court accurately discussed the judge's sentencing order in terms of only statutory mitigating circumstances.

After Hitchcock, the constitutional significance of the judge's order referring only to the statutory list and reviewing only the statutory factors is apparent. See e.g., Hitchcock v. Dugger, 107 S.Ct. at 1824 ("the sentencing judge found that 'there [were] insufficient mitigating circumstances as enumerated in Florida Statute 921.141(6) to outweigh the aggravating circumstances.'" (original emphasis)); Morgan v. State, 12 FLW at 434 ("[T]he court, in its order sentencing appellant to death, examined a list of statutory mitigating circumstances and determined that none were applicable. Nowhere in his order is there any reference to nonstatutory mitigating evidence."); Riley v. Wainwright, 12 FLW at 459 ("In sentencing Riley to death, the judge explained: 'The only mitigating circumstance under Florida Statute is the fact that Defendant had no prior criminal conviction'" (original emphasis)).

There was substantial mitigating evidence in this case that did not fall within the narrow statutory list. The defense case for life was based primarily on nonstatutory mitigation concerning Mr. Johnson's character.

During the penalty phase of the trial, the defense offered evidence of Mr. Johnson's prior psychiatric history, which

spanned a period of thirteen years, from 1964 - 1977. TR. 804-805. When Mr. Johnson returned from two tours of duty in Vietnam, his family noticed that his personality had changed and he began exhibiting abnormal behavior. TR. 816. In September, 1974, while in the National Guard, Mr. Johnson was hit on the head with a grenade. TR. 831-834. After this head injury Mr. Johnson suffered from headaches, dizziness, fainting and nightmares. TR. 817-818. Mr. Johnson received psychiatric care from the Army hospital for his bizarre behavior. TR. 819-820. Neuro-psychological tests indicated that Mr. Johnson suffers from organic brain damage. TR. 904. Examination by a psychologist showed that Mr. Johnson suffers from post-traumatic stress reactions, TR. 867, and that on the day of the offense, Mr. Johnson was under the influence of extreme mental disturbance. TR. 868. Mr. Johnson was using the drug Dilantin, which prevents or controls epileptic seizures, and the drug Valium, which reduces anxiety, on the day of the offense. TR. 804.

Plainly, evidence of mental illness can establish a statutory mitigating circumstance but it may not. It may not be extreme enough or cause "substantial" enough impairment to meet the statutory criteria. See Florida Statutes Sections 921.141 (6)(b), (f). Hitchcock and Lockett nonetheless require any mental or emotional infirmity to be considered if it calls for the imposition of a sentence less than death. For this reason, this Court has held that mental illness or disorder can be a nonstatutory mitigating circumstance. See, e.g., Huddleston v. State, 475 So.2d 204 (Fla. 1985) (Troubled personal life, including suicidal impulses, depression and deep frustration, are valid nonstatutory mitigating factors); Amazon v. State, 487 So.2d 8 (Fla. 1986) (personality disturbance is valid nonstatutory mitigating factor); Moody v. State, 418 So.2d 989 (Fla. 1982) (same). Indeed, the Court has recognized that where mental disturbance is not so extreme or disabling as to establish the statutory mental mitigating circumstances, it should

nevertheless be considered as a nonstatutory mitigating circumstance. See Johnson v. State, 438 So.2d 774, 779 (Fla. 1985). Accord, Hargrave v. Dugger, No. 84-5102, ___ F.2d ___ (11th Cir. November 13, 1987) (en banc), Memorandum Slip Op. at 16-17 (trial judge's failure to find nonstatutory mental mitigating circumstance is strong evidence that trial judge failed to consider nonstatutory mitigating circumstances). Accordingly, if Mr. Johnson's sentencing judge found that the evidence of his mental illness failed to meet the statutory criteria, as he reasonably could have, he could have believed that no further consideration could or should be given to that evidence in determining Mr. Johnson's sentence. Hitchcock and Lockett forbid the imposition of death in just these circumstances.

In addition, the fact that Mr. Johnson had served in the armed forces was not considered to be mitigation. Defense counsel showed that Mr. Johnson was only 16 years old when he first joined the military (TR. 813) and he served overseas for one year and three months. TR. 838. All together, Mr. Johnson served his country in the military for twelve years, five months and twenty-eight days (TR. 839) and was well-liked and regarded by his peers in the National Guard (TR. 831). Mr. Johnson was discharged from the military for a physical disability - a head injury - suffered in the line of duty. TR. 840. Later, Mr. Johnson was granted a medical retirement from the military and declared disabled. TR. 844. The trial judge considered none of these facts when sentencing Mr. Johnson to death. This was error. Pope v. State, 441 So.2d 1073 (Fla. 1983); Drake v. State, 400 So.2d 1217 (Fla. 1981); Hooper v. State, 476 So.2d 1253 (Fla. 1985); Masterson v. State, 12 FLW 603 (Fla., December 10, 1987).

Viewing the proceedings in their entirety, it is plain that the focus was on statutory mitigating "criteria." The judge said so expressly in sentencing Mr. Johnson to die. But Hitchcock changed Florida law in a significant way. It "rejected a prior

line of cases issued by this Court, which has held that the mere opportunity to present nonstatutory mitigating evidence was sufficient to meet Lockett requirements." Downs v. Dugger, 514 So.2d at 1071. Referring to Hitchcock, this Court found a "substantial change in the law has occurred that requires us to reconsider issues first raised on direct appeal." Id. The Court must do so in this case as well.

The principle of Lockett has been violated because nonstatutory mitigation is excluded from the assessment, or its relative importance diminished as a matter of law. Relying on an unconstitutional sentencing determination to uphold the sentence only furthers the constitutional taint. Yet that is precisely what occurred in the direct appeal in this case.

The nonstatutory mitigating factors presented in this case were not considered by the judge in determining the appropriate sentence. This violates Hitchcock, for its point is that no such factors may be precluded from consideration as independent mitigating factors with independent mitigating weight.

The unconstitutional preclusion of the judge's consideration of such factors reaches to the heart of the fairness and accuracy of sentencing determination. The proper sentence should be determined by a judge upon full consideration of all relevant mitigating factors "rather than by this Court on the face of a cold record." Harvard v. State, 486 So.2d 539. See, e.g., Randolph v. State, 463 So.2d at 193 ("This Court's role in reviewing death cases is that of sentence review, not sentence imposition").

The sentencing proceedings in Mr. Johnson's case are similar to those faced in Hitchcock where "the sentencing judge refused to consider evidence of nonstatutory mitigating circumstances." 107 S.Ct. at 1824. Resentencing before a new jury is the constitutional mandate, for the sentencing is fatally flawed. As shown by its recent decisions, this Court has given full effect to Hitchcock, and it must do so again here.

CONCLUSION

For the foregoing reasons, the sentence of death imposed upon Larry Joe Johnson must be vacated and the writ must issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by first class U.S. Mail to Mark Menser, Department of Legal Affairs, The Capitol, Tallahassee, Florida 32301, this 27th day of January, 1988.

ATTORNEY