IN THE SUPREME COURT OF FLORIDA

LARRY J. JOHNSON,
Appellant,

v.

STATE OF FLORIDA,
Appellee

CASE NO. ~~79-33~~ 66458

BRIEF OF APPELLANT

On Appeal From Denial of Motion to Vacate by the Circuit Court of the 3rd Judicial Circuit of Florida, In and For Madison County, Florida, and On Petition for Writ of Habeas Corpus

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TABLE OF CONTENTS

(TABLE OF CONTENTS) PAGE

(TABLE OF CONTENTS) PAGE

(TABLE OF CONTENTS)

AUTHORITIES CITED

CASES CITED	PAGE

CASES CITED — PAGE

OTHER AUTHORITIES

PRELIMINARY STATEMENT

At the time of the preparation of this brief, the transcript of the hearing in the lower court was not available. References to that hearing and the summary of the hearing are compiled from the best recollection of counsel. Likewise, the written orders of the lower court were not available. References to those orders are paraphrased, not verbation quotations.

In this brief, the appellant will be referred to as "appellant" or Mr. Johnson. The appellee will be referred to as the "State" or "prosecution".

STATEMENT OF THE CASE

The appellant was indicted by a Madison County Grand Jury for the murder of James Maxwell Hadden and for armed robbery. Appellant entered a not guilty plea but was convicted by a jury as charged. After a penalty phase advisory proceeding, the jury recommended death regarding the murder charge. The trial judge then sentenced the appellant to death for first degree murder conviction and to life imprisonment for the armed robbery conviction.

Appellant's judgments and sentences were appealed to the Supreme Court of Florida which affirmed same. See Johnson v. State, 442 So.2d 185 (1983). Appellant filed, in the Supreme Court of the United States, a petition for a writ of certiorari to the Supreme Court of Florida. Certiorari was denied on April 30, 1984. See Johnson v. Florida, ___ U.S. ___, 104 S.Ct. (1984).

On July 5, 1984, appellant appeared before the Florida Board of Executive Clemency. On January 3, 1985, the Governor denied clemency and signed a death warrant effective from noon on January 23, 1985 to noon on January 30, 1985.

The Superintendent of Florida State Prison at Starke, Florida, where the appellant is incarcerated, has set appellant's execution for 7:00 A.M., January 29, 1985.

Appellant then filed in the circuit court his motion

to vacate judgment and sentence, pursuant to Rule 3.850, Fla.R.Crim.P., as amended December 28, 1984. With that motion, appellant filed an application for stay of execution with supporting memorandum of law. There was also a motion to have the appellant present at any scheduled hearing.

A hearing on the motions and the application for stay of execution was scheduled and held on Tuesday, January 22, 1985 at 3:00 P.M.

On Wednesday, January 23, 1985, the circuit judge entered final orders denying the motion to vacate judgment and sentence; the motion to have the appellant present at the hearing; and the application for stay of execution. Thereafter, the judge refused to stay Mr. Johnson's execution pending appeal to this Court.

A notice of appeal was filed January 23, 1985, timely vesting jurisdiction in this Court. The trial court also entered an order allowing Mr. Johnson to proceed without payment of costs incident to this appeal. Rule 9.430, Fla.R.App.P.

STATEMENT OF THE FACTS

Appellant was charged with fatally shooting James Maxwell Hadden, a service station operator, in Madison County on March 16, 1979. The direct evidence supporting the state's case came primarily from Patty Burks, a seventeen year old girl who had accompanied appellant for two weeks on

a trip to Florida from Kentucky. Ms. Burks, who had known appellant for nine years, made arrangements to leave her home in Beaver Dam, Kentucky, without her mother's knowledge or consent and to visit some of appellant's friends with him (TR.427,428). She packed a suitcase with a change of clothes, and met appellant at a railroad crossing (TR.429, 430). Instead of going to visit his friends in a Kentucky prison, appellant headed for Florida (TR.431). Despite Ms. Burks' protestations she stayed with appellant for the two weeks they traveled to and remained in Orange Park, Florida, living with him as though she were his wife (TR.432). Only once did she try to call her mother and she made no attempt to run away (TR.432).

On March 16, 1979, appellant and Ms. Burks decided to go to Minnesota where she had relatives; they planned to stop in Kentucky on the way (TR.432). As they drove west on Interstate 10, appellant said he wanted some cigarettes. He stopped at a service station in Lee, Florida. Ms. Burks was sent inside to buy the cigarettes. Appellant then entered carrying a sawed off 12 gauge shotgun (TR.435). The attendant, Mr. Hadden, tried to walk out but appellant told him to open the cash register (TR.435,436). At appellant's direction Ms. Burks removed the money and started out the door (TR.436). As she looked back she saw appellant shoot Mr. Hadden. The recoil from the shotgun cut appellant's lip

(TR.436). In the car afterward appellant said the man had a gun and "it was us or him" (TR.476). He also told Ms. Burks "dead witnesses don't talk" (TR.439). One hundred thirty five dollars plus change was taken from the station (TR. 439).

When appellant and Ms. Burks returned to Beaver Dam, Kentucky, she went to her friends house while appellant waited down the road in his car (TR.441). Ms. Burks telephoned her mother and reported that "Larry Joe shot a guy" (TR.442). Ms. Burks waited in the house while the police were called. Several officers eventually arrived and appellant was arrested (TR 442,443).

When questioned by Florida Department of Law Enforcement Agent James Taylor, appellant admitted he and Ms. Burks left Orange Park for Kentucky on March 16th, and while driving west on Interstate 10 he saw signs for Madison County and the town of Lee. He also admitted to Taylor that in Florida he had possessed the shotgun seized by Kentucky authorities when he was arrested there but denied killing anyone in Florida (TR. 609,610). Several months later, however, while in a car with Madison County Deputy Sheriff Fred Respress, appellant said "hanging him wouldn't undo what he had already did and by putting him in the electric chair wouldn't bring the man back." (TR. 633,634).

A latent fingerprint lifted from inside the door of

the service station (TR. 655,656) matched an inked print of one of appellant's fingers (TR.684). Shotgun pellets recovered from the brain of James Hadden at autopsy (TR.510) were examined by firearms expert Donald Champagne. Their weight was consistent with number five shot (TR.666,667). Twelve gauge shot shells seized from appellant's car in Kentucky (TR.523,524) were sectioned and found to contain number shot (TR.668). Pellets and wadding found in the service station also were consistent with the twelve gauge shells taken from appellant's car (TR.668,669).

The gun, which had been found under the front seat of appellant's car, was in good working order. Trigger pressure was about 6 1/2 pounds (TR.663). The recoil could cause the barrel to fly up into the face of the person holding the gun because it had no stock (TR.677). (Deputy Respress had noticed a bruise on appellant's lip when he saw him March 20, 1979 [TR.633]).

The license number from the plate on the front of appellant's car was the same as the number in a notebook found with Mr. Hadden's clothing after his death (TR.417).

Appellant did not testify or otherwise present evidence at the guilt phase and was found guilty of both murder and robbery.

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

appellant was on parole from Kentucky when Mr. Hadden was killed (TR.778), (c) a judgement and sentence against appellant for second degree assault, the offense for which he was on parole (TR.778), and (d) "rebuttal" testimony from two court-appointed psychiatrists, Doctors George W. Barnard and Frank Carrera who together had examined appellant before trial and who concluded that on March 16, 1979, he knew the difference between right and wrong and was aware of the nature and consequences of his acts (TR.779,787,794-802). Neither doctor was able to find any "direct" causal relationship between appellant's experiences while in Vietnam, or a subsequent head injury, and the killing of James Hadden (TR.787,801,802).

In the penalty phase appellant presented testimony of family members, service acquaintances, two psychologists and documentary evidence including reports of army psychiatrists.

Appellant's aunt, Alice Morton, was the sister of appellant's mother (TR.886). Appellant's biography was etched by Mr. and Mrs. Morton and appellant's sister, Carolyn Johnson Lee.

The Mortons lived in Owensboro, Kentucky, and appellant had lived with his grandmother, who raised him in the nearby small town of Livermoore, Kentucky, (TR.811). When he was five or six appellant's mother (whom he never knew [TR.889]) was killed in a car accident; his father died

of tuberculosis several years later (TR.812). Although appellant "didn't make real fine grades" (TR.812), and "never cared much" for school (TR.809) there were no "discipline problem[s]" (TR.812,809,887). School records verified these recollections (TR.888)

Appellant's grandmother lived next to the local National Guard Headquarters. As a boy appellant "looked up to military, he wanted to be in the military" (TR.893). When he was sixteen appellant dropped out of school and, by convincing someone he was older, joined the National Guard (TR.809,813). Following basic training, appellant returned to Livermoore but soon was on active duty when his National Guard unit was mobilized (TR.813). Appellant was released after about a year and again returned to Livermoore where he was employed first as a cook and then as an iron and steel worker constructing buildings and bridges (TR.814). By this time appellant had married his first wife. He lived and worked in the Livermoore-Owensboro area until 1967 or 1968 when he joined the Navy (TR.815). He was sent to Vietnam, returned, and was sent back there for a second tour (TR.816).

Appellant lived in California a short while after release from the Navy, then he and his second wife returned to Kentucky and lived with the Mortons (TR.816,817). This time appellant was different. According to Mr. Morton appellant's "personality changed. He was despondent at

times, quick tempered" (TR.816). Appellant's aunt "could see a big difference" in that "he was not as tender-hearted as he used to be" (TR.891).

Appellant rejoined the Livermoore National Guard (TR.817). Malcolm Brown, who had known appellant casually before, became well acquainted with him while both served in the unit (TR.828). Because of his prior service appellant "moved up quicker" than Brown, eventually becoming a sergeant and Brown's tank commander (TR.829,830). Appellant was considered "one of the group" by the men in the company, most of whom were "pretty tight, stuck together" (TR.831); he was "well liked" by all of the men (TR.831). All that changed, however, after night manueuvers of September 14, 1974. A smoke grenade hit appellant on the head, dropping him to the front deck of the tank (TR.832,833). Appellant was bleeding and screaming for help; "there was blood all over the front deck of the tank" (TR.833). He was evacuated to a hospital and never attended drills again while Brown was in the Guard (TR.833,834). Until the time of that injury, appellant had been "well regarded" in the community (TR.833).

Charles Miller was the full time National Guardsman responsible for the day to day administration of the Livermoore unit (TR.836,837). Appellant's military records were explained. Appellant's service included the Army National Guard, the Army Reserve, and the Navy totalling over

twelve years; fifteen months of that duty was overseas (TR.838, 839).

Miller said that after being injured on September 14th appellant had been given emergency treatment at a civilian hospital. He was transferred to the Fort Campbell Army Hospital where he received out patient care for several months (TR.842). Later appellant was hospitalized in a psychiatric ward for "weeks or months" as a result of the injury (TR.843). The Army eventually discharged him because of the medical disability resulting from the smoke grenade injury (TR.843,844).

Mr. Miller attested to the change in appellant's personality. Before being injured he had been liked "real well" by the other men; afterward he was "a little more nervous, more serious about everything" as if "he was mad at the world" (TR.845). Following his discharge from the hospital, appellant telephoned Mr. Miller, saying he was going to re-enlist in the Guard. He claimed to have been assured by "the general" that he could return to duty; he claimed also to have been promoted and "been on jump status" while in the hospital (TR.846). Miller knew all this was impossible (TR.846).

The effects of appellant's head injury were described by his aunt and uncle, who saw him frequently. He complained of "headaches and dizziness," started "passing out" and was

"a little harder to get along with" (TR.818). An exhibit at trial was a letter from an ambulance driver describing an episode when appellant was unexplainedly unconscious for several hours. His wife told Mr. Morton of appellant having nightmares in which he would "wake up screaming" (TR.818). Appellant's behavior was characterized as despondent and short-tempered (TR.821); he became irritated with his children because of "those bad headaches" (TR.897). After the brother of appellant's wife "jumped on him one night in his home" appellant began openly carrying a gun strapped around his belt "like a cowboy" (TR.821,893). He impersonated a police officer (TR.894). Whether by accident or otherwise appellant shot his second wife. For this offense he was indicted and ultimately convicted of a lesser offense. This apparently was the only criminal offense on appellant's record.

The Mortons believed appellant was mentally ill and needed help (TR.821,895). Appellant sought psychiatric treatment not only at Fort Campbell, but at a V.A. clinic in Evansville (TR.820). The sheriff and others in Ohio County were contacted but were told nothing could be done "till he hurt somebody" (TR.894). Through one of the local judges, appellant's sister had him committed to a hospital in Murfreesboro, Tennessee, for two or three weeks (TR.822,895). Other efforts to have him hospitalized apparently failed

because "his wife had the say-so about that" (TR.895).

Appellant did not like being discharged from the service; he "wanted to make a career of it" (TR.893). Although Mrs. Morton had observed changes in appellant when he returned from Vietnam "the most difference was after he was hit on the head with the smoke bomb" (TR.892).

After being arrested for the Hadden murder, appellant had been given a psychological evaluation by clinical neuropsychologist Dr. Elizabeth McMahon. She interviewed appellant, reviewed his medical records, and administered a series of tests which measured intelligence, neurological function and personality (TR.900-908). These tests showed (a) appellant was below average in intelligence with an I.Q. in the 70's (TR.901); (b) he had brain damage, described as generalized bilateral cortical disfunction (TR.904); and (c) he was an anxious, emotionally immature individual who tended to lose control under stress (TR.907,908).

Appellant described the shooting incident to Dr. McMahon as follows:

> [H]aving been in the gas station, having acquired the money . . . the gas station attendant was some distance from him . . . He stated that the man, as he saw it, reached to the back pocket and . . . he saw something black. From Mr. Johnson's perception, he saw this as, or perceived this in his own head, and stated he had a gun, he fired as he was turning, and ran. (TR.912).[2]

Appellant's reactions during the robbery were "very compatible with his general state, general condition" (TR.912). The relationship between appellant's "cognitive deficiencies" and a stressful situation was put this way:

> Intelligence is the kind of ability to think and reason. Because he does not have that ability to a large degree, he has less of an ability to think a thing through. The language barrier, it comes out with an alternative, a more reasonable, I could do this and this and this. Under stress he tends to break down and lose control and simply react in a, what you might term, a shotgun approach. He is just not goal directed. His behavior lost all goal direction. He was just reacting as opposed to trying to solve the problem. (TR.911).

Through the combination of low mental ability, cognitive deficiencies and lack of personality development, the appellant was under extreme mental or emotional

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[2] This brief description of the actions of Mr. Hadden conforms to Patty Burks' original statement given to Agent Taylor on March 20, 1979. She said then "he [Hadden] turned around, he walked off, you know he went to the back . . . And I guess he had something on him because he reached in his back and he looked out the window . . . Then Larry shot him." (R.1013,1014).

disturbance, extreme duress and "beyond any choice to conform his behavior to the requirements of law" at the time he pulled the trigger (TR.912-914).

Between the guilt and penalty trial appellant was examined by psychologist Dr. Charles R. Figley, one of the nation's foremost authorities on post-traumatic stress among Vietnam veterans (TR.850-855). Dr. Figley concluded that appellant had been exposed to several "life-threatening situations over there and that subsequent to that time, he did re-experience those life-threatening experiences following military service" (TR.858,859). The stress appellant had undergone in Vietnam was "[s]ignificant in that it would have a long-lasting effect." It would affect his behavior "after he came back" and "years later" (TR.860). Dr. Figley described the combination of appellant's Vietnam experiences and the 1974 injury, saying:

> I think when Mr. Johnson came back from Vietnam he was traumatized by his experience and could not put Vietnam away, even though he tried a great deal over the next two years. He adjusted fairly well. He had fewer and fewer nightmares. He felt less paranoid. Again, it is a rather common reaction in that he had fewer exposures to the war. He wanted to stay in the military because he enjoyed the military. I think this is one of the more important components. I think he was going to make a career of the military until he found out what war was like. He was shipped over for another tour of duty. He cut that tour of duty short when he was exposed to some very stressful situations. When he was hit by the smoke cannister, I think it resurrected a lot of the fears he experienced in Vietnam, I think. (TR.866).

Until hit by the smoke cannister appellant had begun to forget the details of the Vietnam trauma but that injury "brought back the fact that the war was still with him, there was a potential of him being killed" (TR.866). This led to appellant's "use of weapons as a desperate attempt to control the amount of threat to him" (TR.867).

Dr. Figley had reviewed the statements of the witnesses and discussed with appellant the details of the offense. Appellant told him that after he and Ms. Burks held up the station attendant "she was leaving and he claims that he was under threat. He thought the guy was reaching for a gun and immediately shot him" (TR.868). At that time appellant was under the influence of "extreme mental disturbance" (TR.868). In terms of appellant's ability to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law, Dr. Figley said:

> I think it did not impair him in terms of going in and robbing. In terms of his reactions to the stress, in other words, his fear that the man was going to kill him, was going to threaten him, he immediately reacted very, very quickly without thinking. (TR.868)
>
> After he was in the station and ready to leave, I think because of his Vietnam experience, because of the post-traumatic stress he was experiencing there, he was definitely impaired in that he acted without thinking, on impulse. (TR.882).

The jury's subsequent recommendation of death as the proper sentence (R.1118) was followed by the decision of the

trial judge who found as aggravating circumstances:

A. Appellant was under sentence of imprisonment. Sec 921.141(5)(a), Fla. Stat. (1979).

B. Appellant had been previously convicted of a felony involving use or threat of use of violence to another. Sec 921.141(5)(b).

C. Appellant was engaged in the commission of robbery when the capital felony was committed. Sec 912.141(5)(d).

D. Appellant committed the capital felony for pecuniary gain. Sec 921.141(5)(f).

E. Appellant committed the capital felony for the purpose of avoiding or preventing a lawful arrest and to hinder the enforcement of laws. Sec 921.141(5)(e), (TR.1130,1136).

The court rejected all evidence which appellant had offered at the penalty phase by finding that there were no mitigating circumstances (R.1136).

In explaining his decision to impose death the court said:

> The aggravating circumstances warrant the imposition of the death sentence and there are no mitigating circumstances to outweigh the aggravating circumstances.
>
> This Court placed the greatest weight upon the facts supporting Aggravating Circumstance (5)(d) [Robbery-Murder]. Had this been the only aggravating 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)

In assessing the weight assigned to the circumstances the judge found that the same facts gave rise to the prior conviction for felonious assault and the sentence of imprisonment. Those two circumstances were therefore considered as one. Likewise the court combined into one circumstance the robbery and pecuniary gain motive, and combined into another single circumstance the purpose of avoiding lawful arrest and hindering enforcement of law (TR.1130-1136).

ARGUMENT

I.

THE LOWER COURT ERRED IN REFUSING APPELLANT'S REQUEST FOR AN EVIDENTIARY HEARING

A. The Standards Governing Rule 3.850 Proceedings*

A carefully delineated procedure has been established for consideration of motions pursuant to Rule 3.850, Fla.R.Crim.P. See Meeks v. State, 382 So.2d 673 (Fla. 1980).

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* This proceeding is governed by the rule, as amended December 28, 1984. The motion is timely as Mr. Johnson was "adjudicated guilty prior to January 1, 1985" and thus has "until January 1, 1986, to file a motion in accordance with this rule."

Under this procedure, the trial court must initially consider the motion to determine if it sets forth allegations sufficient to constitute a legal basis for relief.

If the motion on its face states grounds for relief, the trial "court shall order the State Attorney to file an answer or other pleading... or take such other action as the judge deems appropriate." Rule 3.850, Fla.R.Crim.P., as amended. In making this determination, the trial court must look only to the official court records of the case to determine whether they conclusively reveal the movant is entitled to no relief.

When the files and records fail to conclusively refute the factual allegations in the motion, the trial court must decide an evidentiary hearing is required. The trial court "shall grant a prompt hearing ... , and make findings of fact and conclusions of law ... " Rule 3.850, Fla.R.Crim.P., as amended.

The allegations presented in appellant's motion to vacate cannot be said to show he is "conclusively" entitled to no relief. To the contrary, appellant has presented substantial claims, which if proven, require his sentence to be vacated.

B. The Lower Court's Ruling

The trial court ruled on the merits of the case, presumably deciding that the motion itself was conclusively refuted by the records and files in the case. Concurrently, the trial judge determined that Rule 3.850, Fla.R.Crim.P., as amended, precluded him from reaching the merits of certain issues because these issues "could have or should have been raised at trial and, if properly preserved, on direct appeal of the judgment and sentence."

C. The Involuntary Removal of Appellant From the Courtroom During a Portion of the Penalty Phase of Trial Violated the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the Florida Constitution and Florida Rule of Criminal Procedure 3.180.

The appellant was removed from the courtroom during the sentencing phase of trial after one of the psychologists, Dr. McMahon, began her testimony. (TR.901-01)* The removal of the appellant was at her request (TR.). The only record reference to the decision to conduct a part of the

* References to the criminal trial transcript are designated by (TR.___).

defendant's trial in absentia is the following:

> MR. HUNT: Your Honor, at this time I would like to allow the defendant to wait outside of the courtroom while this witness is testifying. By a prior arrangement, it was agreed he will not be present at the time she is discussing her findings.
>
> THE COURT: At the request of the defendant and his counsel, it will be permitted.
>
> MR. HUNT: We are so requesting.
>
> THE COURT: Mr. Hunt, I will leave it up to you when you wish him to come back in.
>
> (TR.901-902).

As the record indicates, Mr. Johnson was never asked at this point or after he returned to the courtroom whether he knew that he had a right to be present during this time and knowing this, agreed to waive this right. The failure to make this personal inquiry violated two precepts.

First, Rule 3.180 (a)(5), Fla.R.Crim.P. requires a defendant's presence "at all proceedings before the court when the jury is present ..." The only exception to this rule is if a defendant "voluntarily absent[s] himself from the presence of the court without leave of court, or is removed from the presence of the court because of his disruptive conduct during trial, ..." Rule 3.180 (b), Fla.R.Crim.P. See Mulvey v. State, 41 So.2d 156 (Fla. 1949); Lowman v. State, 85 So. 166, 80 Fla. 18 (Fla. 1920).

Clearly, the record indicates the jury's presence

during times when Mr. Johnson was not present. Further, it is clear Mr. Johnson engaged in no disruptive conduct during the trial which caused his removal. Finally, Mr. Johnson's absence was at the request of his attorney and the trial judge specifically permitted it.

Second, a defendant has a right to be present "at stages of trial where fundamental fairness might be thwarted by his absence." Francis v. State, 413 So.2d 1175, 1177 (Fla. 1982), citing Snyder v. Massachusetts, 291 U.S. 97 (1934). There can be no question that the penalty phase in a capital case is of paramount fundamental importance, equal to the jury selection process. Compare Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982) and Francis v. State, 413 So.2d 1175 (Fla. 1982).

Therefore, this was an involuntary absence of the defendant. The record does not show affirmatively that Mr. Johnson waived this right or acquiesed in his absence after the fact. The silence by Mr. Johnson is not a waiver, See State v. Melendez, 244 So.2d 137, 140 (Fla. 1971); Francis v. State, 413 So.2d 1175, 1178 (Fla. 1982). The State has the burden to show that Mr. Johnson made a knowing and intelligent waiver of his right to be present. This they have failed to do.

Finally, as in Francis v. State, 413 So.2d 1175, 1178 (Fla. 1982), the constitutional harmless error rule should

not apply. That the sentencing phase of a capital trial is of crucial significance to a defendant goes without saying. It provides the only forum for a defendant to persuade a jury and judge to decide for life instead of death. Mr. Johnson's absence precluded him from evaluating the witness' testimony and contributing information to his attorney to assist in his own defense.

II.

THE REMOVAL OF THE APPELLANT FROM THE COURTROOM DURING THE SENTENCING PHASE IS VIOLATIVE OF HIS RIGHT TO A FAIR TRIAL, TO BE FREE FROM CRUEL OR UNUSUAL PUNISHMENT, AND TO DUE PROCESS OF LAW AS GUARANTEED UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION, THE FLORIDA CONSTITUTION AND FLORIDA RULE OF CRIMINAL PROCEDURE 3.180, BECAUSE A DEFENDANT CANNOT WAIVE HIS RIGHT TO BE PRESENT DURING ANY CRITICAL STAGE OF A CAPITAL TRIAL.

As a corollary to the argument in "I.C.", there is a clear distinction between a capital and non-capital case. This Court has so far not decided whether this distinction is a matter of kind. Francis v. State, 413 So.2d 1175, 1178 note 2 (Fla. 1982); Herzog v. State, 438 So.2d 1372, 1376 (Fla. 1983).

The Eleventh Circuit has repeatedly held the defendant's right to be present at a capital trial is so fundamental that it cannot be waived, Hall v. Wainwright 733 F.2d 766, 775 (11th Cir. 1984), and Proffitt v. Wainwright, 685 F.2d 1227, 1256-58, (11th Cir. 1982) modified on reh'g., 706 F.2d 311 (11th Cir. 1983), cert denied ___U.S.___, 104

S.Ct. 508, 509, 78 L.Ed.2d 697, 698.

III.

THE PROSECUTOR'S EXERCISE OF PEREMPTORY CHALLENGES TO EXCLUDE BLACK PERSONS FROM THE JURY BECAUSE OF THEIR RACE VIOLATED DEFENDANT'S RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16, FLORIDA CONSTITUTION. PROSPECTIVE APPLICATION OF FLORIDA'S RULE FORBIDDING THE USE OF CHALLENGES IN SUCH A MANNER VIOLATES THE DEFENDANT'S RIGHT TO EQUAL PROTECTION OF THE LAWS AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION.

The State used the last five of its peremptory challenges to exclude black people from serving on the jury, and used only eight peremptories in all. Nine out of ten defense challenges were of white people. Because of the refusal state officials to provide counsel with the race of jurors reflected on voter registration rolls, defendant has not been able to fully develop the factual basis for this claim. Appellant's attempts to gather the necessary information, and the refusal of state officials to provide it, is documented in the affidavits attached to the motion to vacate judgment and sentence. The information already of record establishes a reasonable basis for appellant's claim.

At the time of appellant's trial, the claim raised here was as a practical matter not cognizable. Any challenge to the use of peremptories by the state to remove black jurors would have been governed by the onerous standard of

Swain v. Alabama, 380 U.S. 202 (1965), described as creating "a nearly insurmountable burden on defendants." McCray v. New York, ___U.S.___, 103 S.Ct. 2438,2441 (1983) (Marshall & Brennan, dissenting from denial of certiorari). However a substantial change in the legal standard governing such challenges has emerged in the intervening years, opening the way for challenges to discriminatory jury selection in State v. Neil, 457 So.2d 481 (Fla.1984), and McCray v. Abrams, 576 F.Supp. 1244 (E.D.N.Y. 1983). These two cases now establish that under the state and federal constitution a defendant can challenge the discriminatory use of peremptories in an individual case. The Supreme Court is preparing to take certiorari to revisit the issue. McCray v. New York, Id.

The burden established for proving a prima facie case of discrimination has been met here, and appellant should be permitted access to voter registration records and additional time within which to prepare for an evidentiary hearing on the issue.

IV.

OFFICIAL JUDICIAL AND SCIENTIFIC RECOGNITION OF POST-TRAUMATIC STRESS DISORDER (PTSD) DID NOT OCCUR UNTIL AFTER TRIAL. RECOGNITION OF PTSD, FROM WHICH THE DEFENDANT SUFFERED IN MARCH, 1979, IS NOW WIDESPREAD AND DRAMATIC. THUS THE COURT MUST RECONSIDER THIS ISSUE AS IT RELATES TO SENTENCING OR VIOLATE THE APPELLANT'S RIGHTS TO DUE PROCESS OF LAW AS GUARANTEED BY AMENDMENTS V, VI, XIII AND XIV,

CONSTITUTION.

To ensure a reliable sentencing determination as required by Lockett, Gardner and Eddings, this Court should hold an evidentiary hearing and consider the vast change in the recognition of Post-Traumatic Stress Disorder since trial. Relevant affidavits setting out the change were attached to the Motion for Vacate Judgment and Sentence.

Since trial, the Florida Supreme Court has recognized PTSD as a mitigating circumstance in Moody v. State, 418 So.2d 989, 995 (Fla.1982). The Florida Supreme Court has recognized a related stress disorder may rise to the level of a psychosis, but stated "[t]he evidence is not yet clear enough," in Middleton v. State, 426 So.2d 548, 553 (Fla.1983). The clear implication is that the courts should be open to changes in scientific recognition of psychological disorders in considering death sentences, as it would with non-capital cases under Fla.R.Crim.P. 3.800.

V.

THE COURT BELOW ERRED IN DENYING RELIEF ON CLAIMS GOING TO THE FUNDAMENTAL FAIRNESS AND RELIABILITY OF APPELLANT'S CONVICTION AND SENTENCE.

Appellant's conviction and sentence of death were the result of a process so flawed as to violate the requirements of fundamental fairness and reliability imposed by the due process clause and the Eighth and Fourteenth Amendments. The prosecutor engaged in a pattern of inflammatory and improper

prosecutor engaged in a pattern of inflammatory and improper argument that mislead the jury on critical factual issues. The State used the testimony of psychiatrists appointed by the court to provide information on the issues of appellant's competency and sanity as anticipatory rebuttal during the penalty phase. The jury was selected in a manner designed to bias it toward appellant's guilt and toward the imposition of the death penalty. The jury was given inaccurate information concerning its role in sentencing under Florida law that depreciated the gravity of its decision and lessened its sense of responsibility, making it more likely to impose death and introducing an intolerable degree of unreliability in violation of the Eighth and Fourteenth Amendments.

Errors that are fundamental are reviewable at any stage, including post-conviction proceedings. For example, finding a constitutional violation of double jeopardy in sentencing, the courts in Flowers v. State, 351 So. 2d 387 (Fla.1st DCA 1977), recognized that although the issue had been raised on appeal, reversal on the motion to vacate was required:

> [T]he trial court's resentencing error and our own were fundamental errors which deprived Flowers of a constitutional right not be placed twice in jeopardy for the same offense . . . . We decline to watch helplessly in the hope that our decision here may create decisional conflict that would authorize the Supreme Court to correct our former error, or in the hope that a federal court will do so.

Id. at 390. See also O'Neal v. State, 308 So.2d 569, 570 (Fla. 2d DCA 1975) (defendant deprived of due process right to notice; Dozier v. State, 361 So.2d 727, 728 (Fla. 4th DCA 1978) ("A fundamental error of constitutional dimension may be collaterally attacked"); French v. State, 161 So.2d 879, 881 (Fla. 1st DCA 1964) (denial of continuance); cf. Dallas v. Wainwright, 175 So.2d 785 (Fla. 1965) (although issue was properly a ground for a motion to vacate, court considered it on habeas coprus because error was fundamental); Skinner v. State, 366 So.2d 486, 487 (Fla. 3d DCA 1979).

The decision below does not consider the companion principle applied when the ultimate penalty of death has been imposed: that errors must be more strictly reviewed when a life is at stake. That is, fundamental error is more closely considered and more likely to be present where the death sentence has been imposed. See, e.g., Well v. State, 98 So.2d 795, 801 (Fla. 1957) (overlook technical niceties where death penalty imposed); Burnette v. State, 157 So.2d 65, 67 (Fla. 1963) (error found fundamental "in view of the imposition of the supreme penalty"); Pait v. State, 112 So.2d 380, 385 (Fla. 1959) (improper prosecutorial argument); Grant v. State, 194 So.2d 612, 615-616 (Fla. 1967); Singer v. State, 109 So.2d 7, 30 (Fla. 1959); Harrison v. State, 149 Fla. 365, 5 So.2d 703 (1942); cf.

Anderson v. State, 276 So.2d 17, 18-19 (Fla.1973) (failure to define premeditation).

The errors raised in this case are all of that fundamental character. Judgments are given finality because we rely on the fairness of our procedures to produce just results. But when a conviction and sentence are so riddled with errors so fundamental in nature that they go to the very integrity of the basis of the conviction and sentence, then the courts hsould be open to hear such claims and grant relief. The trial judge's ruling ignores these settled principles and should be reversed.

A. THE STATE'S USE OF THE TESTIMONY OF PSYCHIATRISTS APPOINTED SOLELY TO DETERMINE THE QUESTION OF DEFENDANT'S COMPETENCY AS "ANTICIPATORY REBUTTAL" AT THE PENALTY PHASE WAS VIOLATIVE OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION AND THE FLORIDA CONSTITUTION.

At the penalty phase of the case, the State used the opinions of the two psychiatrists who had been appointed for the purpose of and had in fact examined Mr. Johnson to determine his competency at trial and sanity at the time the offense was committed.

This was objectionable for two reasons. First, the testimony was not pertinent as to any mental mitigating factors. State v. Dixon, 283 So.2d 1 (Fla. 1973).

Second, the use of this testimony violated Mr. Johnson's right to assistance of experts and his Fifth

Amendment right against self-incrimination. As alleged in the verified petition, there was no waiver of Fifth Amendment rights prior to the examination. Any implied waiver of such rights from the defendant's request to be examined is effective only as to the issue of competency at trial and at the time of the offense. Bettie v. Estelle, 655 F.2d 692, 702 (5th Cir. 1981); United States v. Cohen, 530 F.2d 43 (5th Cir.), cert. denied, 429 U.S. 855 (1976). While Estelle was decided in 1981, it has been given retroactive effect. Bettie, 655 F.2d at 699.

B. THE JURY'S SENTENCING ROLE WAS IMPROPERLY INFLUENCED AND THE RELIABILTY OF THE SENTENCING DETERMINATION CRITICALLY IMPAIRED BY THE INDEPENDENT AND CUMULATIVE EFFECT OF IMPROPER INSTRUCTIONS, INAPPROPRIATE PROSECUTORIAL COMMENTS, QUESTIONS, AND MISSTATEMENTS OF THE APPLICABLE STANDARDS FOR DETERMINING THE EXISTENCE OF MITIGATING CIRCUMSTANCES, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION.

1. The jury was improperly instructed a majority vote was necessary for a life recommendation.

The petition alleges that the trial court repeatedly instructed the jury that a majority vote was required to return either a life or death recommendation (R. 958, 959, 960). While Florida law requires a majority vote for a jury to return a death recommendation, the Supreme Court of Florida has recently recognized that a life recommendation is to be returned by the jury if six or more jurors so vote and

that a tie vote on penalty constitutes a life recommendation. Harich v. State, 437 So.2d 1082 (Fla. 1983); Rose v. State, 425 So.2d 521 (Fla. 1982). The revised standard jury instructions promulgated by the Florida court now include such directions. Florida Standard Jury Instructions in Criminal Cases (1981) at 81-82.

The "greater degree of reliability" necessary in capital sentencing proceedings, Lockett v. Ohio, 438 U.S. at 604, demands that a trial court "clearly instruct the jury about mitigating circumstances and the option to recommend against death." Chenault v. Stynchcombe, 581 F.2d at 448. Accurate and precise jury instructions have been a focal point of the Supreme Court's scrutiny of death penalty statutes, that Court holding: "When erroneous instructions are given, retrial is often required. It is quite simply a hallmark of our legal system that juries be carefully and adequately guided in their deliberations." Gregg v. Georgia, 428 U.S. 153, 193 (1976). Accord, Godfrey v. Georgia, 446 U.S. 420, 427 (1980). The failure to provide the correct jury instruction as to the effect of a tie vote states a prima facie constitutional violation, particularly in a case such as this, where the trial judge additionally failed to individually poll the jurors as to whether the verdict was rendered by a majority vote.

The 1981 change in the jury instruction relevant to

this issue creates two classes of persons, some of whom were provided the right to a clear instruction on majority vote, and some who were instructed under the old, erroneous instruction. This classification injects an intolerable arbitrariness into the statute.

2. The prosecutor improperly demeaned the jury's advisory sentencing role.

The prosecutor told the jury its recommendation at penalty phase was "only" advisory and that the trial judge makes the "real" decision. (R.351, 360). These references downgrade the jury's advisory sentencing function and imply the life or death decision is not one to be taken seriously. See Corn v. Zant, 708 F.2d 549, 557 (11th Cir. 1983). The true role of the jury in a capital case is far from that described by the prosecutor. The State Supreme Court has emphatically and repeatedly declared that "the jury recodmmendation under our trifurcated death penalty statute should be given great weight and serious consideration" in the imposition of the sentence. Ross v. State, 386 So.2d 1190, 1197 (Fla. 1980). Tedder v. State, 322 So.2d 908, 810 (Fla. 1975). The United States Supreme Court relied in part on that deference in upholding a challenge to non-binding jury life recommendations in Spaziano v. Florida, 462 U.S. ___, 82 L.Ed.2d 340, 104 S.Ct. ___ (1984).

3.The prosecutor's reference to irrelevant, nonrecord matters while questioning a witness during the penalty phase.

For some inexplicable reason, the prosecutor asked a defense witness whether he was aware whether the defendant "pulled a gun on men who were attempting to arrest him" (R.825-6). Nowhere in the record is there any reference to the defendant pulling a gun on anyone. The prosecutor also asked a witness to state the amount of time defendant had spent in prison for his prior assault charges, in an apparent attempt to show the jury defendant had not been sufficiently punished for that crime. These irrelevant and nonrecord references further add to the unreliability of the jury recommendation. Gardner v. Florida, 430 U.S. 349 (1977).

4. The Court failed to instruct the jury on the potential sentence defendant could receive for the contemporaneous robbery conviction.

The conviction for armed robbery assured the defendant would serve a mandatory minimum three year prison sentence, and a potential life sentence in addition to any sentence imposed for the first degree murder conviction. Defendant requested an instruction to that effect, which was denied (R.927). The Supreme Court has strictly demanded individualized sentencing determinations be made in capital cases, most clearly requiring "that the sentencer, in all but the rarest kind of capital case, not be precluded from

considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as the basis for a sentence less than death," in Lockett v. Ohio, 438 U.S. 586, 604 (1978).

The failure to instruct on the armed robbery sentence deprived the jury of a significant consideration in its decision to recommend life or death that defendant could be serving three years to life in addition to a life sentence for first degree murder. It is eminently reasonable to conclude a juror would be very interested in the excluded information, and the failure to instruct the jury is a clear violation of Lockett.

5. The prosecutor's misstatement of the standard for finding a mitigating circumstance violates the Eighth and Fourteenth Amendments.

Under Florida law, the statutory mitigating circumstances to which the psychological testimony was relevant are applicable to "[m]ental disturbance which interferes with but does not obviate the defendant's knowledge of right and wrong"... in other words, "less than insanity." State v. Dixon, 283 So.2d 1,10 (Fla. 1973) (emphasis supplied); see also, Miller v. State, 373 So.2d 882, 886 (Fla. 1979); Burch v. State, 343 So.2d 831, 833-4 (Fla. 1977); Huckaby v. State, 343 So.2d 29, 33 (Fla. 1977).

The prosecutor's arguments to and comments in front of the jury erroneously limited the jury's consideration of the mental mitigating circumstances, and impaired the reliability of the sentencing recommendation. Lockett, supra.

VI.

THE PROSECUTOR'S VOUCHING FOR THE TESTIMONY OF A WITNESS, EXPRESSIONS OF PERSONAL BELIEF, AND INFLAMMATORY ARGUMENTS DURING CLOSING ARGUMENTS VIOLATED THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION AND THE FLORIDA CONSTITUTION.

During the course of closing argument at penalty phase the prosecutor:

1. Made reference to the fact that he was an elected official and that this was the first time he had sought the death penalty since elected;

2. Expressed his personal opinion on at least two occasions that death was the appropriate punishment;

3. Cited Biblical references not a part of the record;

4. Made an emotional reference to the victim's family being "one short" over the holidays;

5. Suggested the defense was acting dishonestly in its presentation of testimony and that the state wasn't.

It is as if the prosecutor pulled out a manual on closing argument and picked out every improper and inflammatory appeal he could squeeze in to obtain the jury's death recommendation in this case. "With a man's life at

stake, a prosecutor should not play on the passions of the jury." Hance v. Zant, 696 F.2d 940 (11th Cir.1983). In Hance, the Eleventh Circuit vacated a death sentence where the prosecutors, among other things, expressed his personal opinion to the jury on the propriety of recommending the death sentence and the magnitude of the crime by referring to the fact that he had asked for death in only a few cases. Id. at 951-2. The argument is indistinguishable from the one at bar. The prosecutor's closing argument at the guilt phase this his office considered her testimony to be "key" is also improper and impermissibly influenced the jury at the sentencing phase. A prosecutor is prohibited from asserting his personal belief of the veracity of a witness. United States v. Rodriguez, 585 F.2d 1234, 1244 (5th Cir.1978); United States v. Morris, 568 F.2d 396, 401 (5th Cir.1978).

In addition, the prosecutor's reference to the fact that he was an elected official and related statements demeaned the jury's role and indicated to them that someone in a high position of authority had already decided on the appropriate punishment.

The need for a reliable sentencing recommendation convinced several panels at the Eleventh Circuit to vacate death sentences in several cases which are now before that court en banc. Brooks v. Francis, 716 F.2d 780, 787-790 (11th Cir.1983); rehearing en banc granted, 728 F.2d 1358

(11th Cir.1984); Tucker v. Francis, 723 F.2d 1504, 1506-1508 (11th Cir.), rehearing en banc granted, Tucker v. Zant, 724 F.2d 882, 886-890 (11th Cir.), rehearing en banc granted, 724 F.2d 898 (11th Cir.1984); Drake v. Francis, 727 F.21d 990, 995-996 (11th Cir.), rehearing en banc granted, 727 F.2d 1003 (11th Cir.1984).

VII.

THE COURT'S FAILURE TO FIND ANY MITIGATING CIRCUMSTANCES, STATUTORY OR NONSTATUTORY, IN LIGHT OF THE EXTENSIVE EVIDENCE PRESENTED AT TRIAL, IS VIOLATIVE OF THE EIGHTH AND FOURTEENTH AMENDMENTS, UNITED STATES CONSTITUTION.

The extensive evidence relevant to mental and emotional mitigating circumstances has been described in the post-conviction motion at pages 25-30. It is sufficient to note the record includes testimony about the appellant's loss of both parents during childhood, his service record, and most importantly, the testimony establishing his low I.Q., Post-Traumatic Stress Disorder as a result of his experiences in Vietnam, head injury, and related emotional problems.

Appellant is aware of the pitfalls of challenging in a post-conviction motion the decision whether certain circumstances should have been found or how they are weighed, Barclay v. Florida, 77 L.Ed.2d 1134 (1983); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978), but is also aware that the death penalty

statute must be applied in a manner as to "genuinely narrow the class of persons eligible for the death penalty ..." Zant v. Stephens, ___ U.S. ___, 103 S.Ct. 2733, 2742-43 (1983); Godfrey v. Georgia, 446 U.S. 420 (1980).

Failure to define mitigating circumstances so that they will be found when the evidence compels such a finding renders the death penalty statute unconstitutional. Godfrey, supra; Lockett, supra. Arbitrary application of the mitigating circumstances remains open to challenge. The cases construing the mental mitigating circumstances irrefutably require some finding of mental mitigation under the facts at bar. See Moody v. State, 418 So.2d 989, 995 (Fla. 1982).

VIII.

THE TRIAL COURT IMPROPERLY EXCLUDED DEATH-SCRUPLED JURORS FOR CAUSE IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE FLORIDA CONSTITUTION

Witt v. Wainwright, ___ U.S. ___ (1985) establishes the standard for determining whether a particular juror should be allowed to serve in a capital case. Two jurors in this case fail to meet this standard and were improperly excluded for cause.

First, potential juror Stephenson was excused after the following:

> Q. Could you set aside your belief and follow the judge's instructions on the law in

this case if you were sitting as a juror?

A. About the death penalty?

Q. Yes.

A. I don't know. I don't think I could.

(Tr.135-137) (emphasis added).

Potential juror Bellamy was illegally excused after completely irrelevant Witherspoon inquiries:

> Q. . . ."do you have any reservations, personally about the death penalty.
>
> A. Yes, sir.
>
> Q. Are those reservations such that you don't think you could ever bote to impose the death penalty or to recommend that it be imposed?
>
> A. Right.
>
> Q. You don't think you could do that even though Judge Lawrence instructs you that you're to consider certain factors, you don't think you could ever under any given set of circumstances vote to recommend the death penalty, is that correct?
>
> A. I don't.

WHEREFORE, appellant requests this Court to stay the execution in this case, reverse the final order entered by the trial and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been delivered by hand to Mark Menser, Assistant Attorney General, The Elliot Building, 401 South Monroe Street, Tallahassee, Florida, 32301, this 24th day of January, 1985.

STEVEN SELIGER