IN THE SUPREME COURT OF FLORIDA

MARVIN EDWIN JOHNSON,

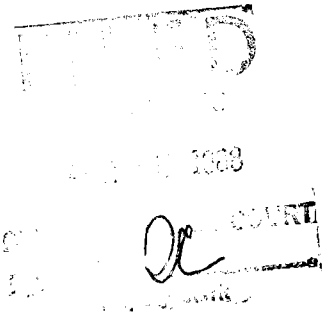
Appellant,

v. **CASE NO. 72,238**

RICHARD L. DUGGER,

Appellee.

_____/



ANSWER BRIEF OF APPELLEE

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STATEMENT OF THE CASE AND FACTS

The details of the murder committed by Marvin Johnson are adequately set forth in **Johnson v. State,** 393 So.2d 1069 (Fla. 1980), **cert. denied,** 70 L.Ed.2d 191, 102 S.Ct. 364 (1981), and shall not be repeated.

Following Johnson's conviction and sentence of death (R 1700), Johnson filed an unsuccessful motion for new trial (R 1705, 1715), which was followed by an appeal.

On appeal, Johnson raised the following claims:

1. Improper cross examination (of Johnson) by the prosecutor.

2. Cumulative error stemming from said examination.

3. Improper admission of photographic evidence.

4. Improper exclusion of expert testimony.

5. The constitutionality of "jury overrides".

While Johnson's appeal was pending, Johnson joined with 122 other death row inmates in seeking extraordinary relief in **Brown v. Wainwright,** 392 So.2d 1327 (Fla.), **cert. denied,** 454 U.S. 1000 (1981).

A death warrant was signed on Johnson in May of 1982. Rather than pursue relief in the state courts, Johnson waived state remedies and went directly into federal district court with a petition for relief pursuant to 28 U.S.C. §2254. Johnson's petition raised the following claims:

1. A renewal of the **Brown** claim.

2. The constitutionality of jury overrides.

3. A challenge to the "Tedder" standard for reviewing overrides.

4. The "failure" of the Florida Supreme Court to order a new sentencing hearing after striking one aggravating factor.

5. Failure (by the sentencer) to consider nonstatutory mitigating factors in violation of **Lockett v. Ohio,** 438 U.S. 586 (1978).

6. The state court's exclusion of expert testimony.

7. Prosecutorial misconduct.

8. The admission of photographs into evidence.

After thorough merits review by the federal district court (Judge William Hoeveler), relief was denied, on the merits, on all counts.

Johnson, still ignoring state remedies, simply proceeded with an appeal to the Eleventh Circuit, which also failed, see **Johnson v. Wainwright,** 806 F.2d 1479 (11th Cir. 1986), **cert. denied,** (October 7, 1987).

Johnson's second death warrant was signed on March 3, 1988 and his execution was set for April 13, 1988.

Following common procedure in death cases, Johnson filed a petition for habeas corpus at 1 a.m. on April 10, 1988, and a petition for relief pursuant to Fla.R.Crim.P. 3.850 at approximately 11 p.m. on April 10, 1988.

Oral argument was held on the habeas corpus petition on April 11, 1988 and relief was denied. Meanwhile, Johnson's "3.850" petition was considered by the Circuit Court on April 11 and was dismissed as time-barred under the rule.

This appeal ensued.

The facts relevant to each issue presented by this appeal are as follows:

(1) **Time Bar**

The record speaks for itself on this issue. More than two years elapsed between Johnson's appeal and the filing of his 3.850 petition. Johnson was a member of a privileged group which had until January 1, 1987 to file any collateral attack. Johnson did not meet the deadline even though he had both the assistance of competent counsel and notice of the rule.

Johnson felt he could indulge in the usual pattern of piecemeal litigation, as conceded at the 3.850 hearing; to-wit:

> "There was no time bar at all, and it was under those circumstances when the decision was made to go into federal court that the mind processess of the people working on the case, the volunteers operated, and that was it doesn't matter if we go into federal court now or not because state court is there, **and it's forever**". (emphasis added)

(Tr. 18, 19).

(2) Ineffective Assistance of Counsel

(a) Preparation by Counsel

The State rejects Johnson's representations and shall rely upon the following facts:

Defense counsel began preparing for the penalty phase of this case months prior to trial, not the "night before" as misrepresented. On September 27, 1978 (R 28), defense counsel demanded from the State a list of "aggravating factors" it intended to use at the penalty phase. On October 27, 1978, attorney Kerrigan filed his appearance in the case and argued sentencing phase motions before the Court. (R 54-71). At that time, Kerrigan requested a sixty to ninety day hiatus between the guilt and penalty phases of the trial and the empanelling of a second jury for purposes of sentencing. (See R 112).

Claims that defense counsel were unaware that Johnson was a drug addict seem to be contradicted by certain exhibits (R 455, 456, 457, 458), filed by counsel in support of their motions for change of venue. The exhibits are news stories, obviously read by counsel, which repeatedly describe Johnson as a "drug addict" and a "self confessed drug addict". If Johnson was capable of telling the State (and the media) he was an addict he was, of course, capable of so advising Dr. Yarbrough.

Counsel made a strategic choice not to admit character or let unnecessary historical evidence about Johnson come before the jury. Counsel expressly stated: (R 1613)

(Mr. Rankin)

> "We intend to put on some evidence that we feel is helpful in mitigation and will be permitted under the Court's general powers of relevant evidence as to the defendant's background. However, we intend to put on no evidence as to the defendant's character for reasons that are obvious. For that reason, we'd like to be very sure that certain slips -- and I'm not attributing anything to anybody -- that we have an order in limine directing that until such evidence of character is introduced, and we intend not to do it and will state it in front of the jury, that no comments be made and --"

and

> "I think we've made our point by making it clear that we're not going to get into character". (R 1616).

Mr. Kerrigan then stated that the Court should order a full "P.S.I." and consider all nonstatutory mitigating evidence. (R 1617).

Mr. Kerrigan went on to discuss his contact, the day before, with Dr. Yarbrough (R 1619-21), after the guilty verdict and the need for a continuance to permit Yarbrough to run more tests. (R 1621). This was obviously part of the general attempt to put off the sentencing phase as requested prior to trial rather than an indication of "lack of preparation", especially since Yarbrough came to the jail on a moment's notice.

Defense counsel called four witnesses (Dr. Yarbrough, Rabbi Schwartz, Gertrude Curtner and Martha Dixon), despite their alleged unpreparedness. (R 1508, et seq.).

Evidence that Johnson acted out of "narcotic disability", of course, would totally contradict the trial defense of alibi and thus appear foolish.

Dr. Yarbrough did extensive tests on Johnson and found him bright (if not highly intelligent), a decision maker, a survivor who could think on his feet and non-psychotic or brain damaged. While Yarbrough's evaluation was not tainted by coaching from defense counsel, it was honest. Yarbrough examined Johnson for as long or longer than any subsequent "expert".[1]

(b) Guilt Phase Instruction

Conspicuously absent from the gaggle of chronic "affidavits," is an affidavit from lead counsel (Ms. Williams), or from Mr. Rankin, Mr. Yetter, Mr. Kerrigan or any other attorney actively involved in the case.

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[1] Defense counsel did not want Dr. Yarbrough to elucidate upon Johnson's lifestyle and objected to any reference to his living in a criminal subculture. By placing Johnson's life history at issue, this testimony would be admissible.

We also note that the bullet "mark" on the wall and the "hole" near the ceiling were both known at trial, both appeared in exhibits and indeed may have been the "high" marks and holes argued to the jury by Mr. Terrell.

Again, the defense was alibi, not self defense, so the ballistics evidence as of marginal relevance. Terrell argued extensively about the lack of definitive evidence and the state's inability to link the slug in Mr. Johnson's body to the crime scene evidence. (R 1368-1381).

The affidavit filed by Terrell does not account for the overall defense strategy, nor does it justify the nine year delay in coming forward with this claim.

Mr. Nute's affidavit does not explain the delay - since the evidence was known during trial or discovered shortly thereafter - and in any event does not positively or unequivocally state:

> A. Any bullet hole was created at the time of the shootout or can be linked thereto.
>
> B. That any hole was definitely created by either Moulton's gun or Johnson's.
>
> C. That any of this evidence would compel acquittal.

Finally, Nute's guess that the mark on the wall was made by a bullet "greater than a .22 and less than a .44" is based upon the rank (hearsay) observation by some lawyer - not a firearms expert - from Pensacola.

The fact is that Johnson has had this evidence for nine years and has "sandbagged it" for use now - and his brief (and affidavits) admit it.

SUMMARY OF ARGUMENT

Mr. Johnson, fully aware of all possible claims including those regarding counsel, elected to waive all state proceedings and proceed directly to federal court. Johnson obtained federal review by swearing exhaustion of all state claims and remedies. Johnson's counsel confessed at his subsequent 3.850 hearing that no state proceedings were initiated in 1982 because counsel **assumed** those remedies would "always be there". In other words, Johnson conciously piecemealed this litigation.

Every claim raised by Johnson was known and could have been raised in 1982. He has not shown any legal or equitable basis for waiving the two year time bar of Rule 3.850.

ARGUMENT

ISSUE I

THE TRIAL COURT DID NOT ERR IN RELYING UPON AND ENFORCING THE PROVISIONS OF FLA.R.CRIM.P. 3.850

Marvin Edwin Johnson's petition for post conviction relief was time barred under the two year limitations period created by Fla.R.Crim.P. 3.850. Johnson, however, believes that the time bar should not be applied to him for several reasons; set forth as follows:

(a) Reliance upon the "old" rule.

(b) **"Ex Post Facto"** considerations.

(c) Involvement in federal litigation.

(A) Reliance Upon the Old Rule

As noted by Mr. Johnson at oral argument in the Circuit Court, the only reason he did not file a "3.850" petition at the conclusion of his direct appeal or at the time of his first warrant is because he assumed that the state remedy would "always be there". This is a telling admission, for now we have a recorded representation by capital counsel that they indeed engaged in piecemeal litigation; filing only a few claims at a time since they knew other claims and other stall tactics would

"always be there". Johnson has truly let the cat out of the bag.[2]

(B) The **Ex Post Facto** Issue

Florida Rule of Criminal Procedure 3.850 was created as a modification of former Criminal Procedure Rule 1, which in turn

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[2] We call the court's attention to the 3.850 petition at bar, wherein stored, boilerplate claims from the Bueford White case were taken off the CCR word processor and applied to Johnson in a pleading that was not filed until April 10. Indeed, the petition even refers to Mr. Johnson as Mr. White at one point, a fact noticed at the 3.850 hearing. (Tr 11). We submit that many of the standard complaints we see in these death warrant cases are boilerplate complaints which could have been filed much sooner. As to the claims of ineffective counsel, a look at CCR's appendices shows the usual litany of affidavits, all signed within days of filing, none of which remotely approach the "proof" required by **Strickland v. Washington,** 466 U.S. 688 (1984). We submit that as a matter of timing and strategy - no matter whether a 30, 40 or 60 day warrant is involved - death row inmates always file their petitions on the weekend before their execution, with massive appendices and boilerplate claims accompanied by an attack on counsel and friendly psychiatric reports from Dr. Carbonell, Dr. Krop, Dr. Fox, Dr. Lewis or some other defense stable doctor, and a massive "personal history" of the petitioner.

No matter how many warrants are signed, this same tactic, using piecemeal claims or flatly barred claims, is repeated. Of course, this pattern has already been recognized. **Dugger v. Johnson,** ____ U.S. ____ (March 15, 1988, No. A-698); **Davis v. Wainwright,** ____ U.S. ____, 92 L.Ed.2d 783 (1986); **Woodard v. Hutchins,** 464 U.S. 377 (1984).

A classic example of this strategy is the pending case of **Kennedy v. State,** Case No. 71,678 (pending case files can be noticed). In that case CCR prepared and served on this office a 3.850 petition, but an intervening United States Supreme Court stay (based on **Lockhart v. McCree**) caused CCR not to file the petition (withdraw it) and then hold the petition for **ten months.** The complete history is set forth in the court's files.

was created in response to the decision in **Gideon v. Wainwright,** 135 So.2d 746, **reversed,** 372 U.S. 335 (1963). It was patterned after 28 U.S.C. §2255. The intent of this rule[3] was explained in **Roy v. Wainwright,** 151 So.2d 825, 826-7 (Fla. 1963); to-wit:

> "When **Gideon** was announced the only practicable procedures available in Florida for a post conviction assault upon a judgment were by habeas corpus, or writ of error coram nobis. On September 15, 1962, the Florida Judicial Council instituted a study of post conviction remedies and the advisability of establishing some expeditious method of disposing of post conviction claims of deprivation of organic rights which occurred at trial. At its meeting on October 27, 1962, the Council specifically recommended the adoption of a rule or the enactment of a statute which would facilitate and expedite the handling of post conviction claims".

From its inception, therefore, the purpose of Rule 3.850 has been to "facilitate and expedite" claims, not to create new avenues for delay, procedural gamesmanship or the obstruction of justice.

The reference to §2255 bears notice, of course, because the twin federal "statutory habeas corpus" acts (§2254 and §2255), do **not** involve "constitutional habeas corpus" rights or **any due**

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[3] Rule 1 and Rule 3.850 were similar. Rule 3.850 primarily served to take the caseload pressure off of the circuit court where the state prisons were located. See Author's Comments to Fla.R.Crim.P. 3.850.

process rights at all. **Sumner v. Mata,** 455 U.S. 591 (1982); **Wainwright v. Torna,** 455 U.S. 586 (1982); **Ross v. Moffitt,** 417 U.S. 600 (1974) and **Pennsylvania v. Finley,** 481 U.S. ____, 95 L.Ed.2d 539 (1987).

The **Finley** case bears notice for in it the court held that a state, by graciously providing for non-constitutional collateral attack, will not suffer "attachment" of a full "panoply of due process rights". Thus, in that case, the state of Pennsylvania, though providing for counsel on collateral attack, was not required to provide "competent counsel" (or defend attacks on the competence of collateral counsel).

For our purposes, this means that Rule 3.850, created to expedite collateral attacks, carries with it no "due process" or constitutional rights whatsoever. When we consider the fact that Rule 3.850 is not a penal statute and does not affect the length of sentence, we find that no constitutional issues are present which warrant suspension of the rule, even as amended.

The two year time provision of Rule 3.850 was created on January 1, 1985. Originally, Johnson and others convicted prior to that date had until January 1, 1986 to file their petitions. **The Florida Bar re Amendment to Rules of Criminal Procedure,** 460 So.2d 907 (Fla. 1986). That deadline was extended to January 1, 1987. **In re Rule 3.850 of the Florida Rules of Criminal**

Procedure, 481 So.2d 480 (Fla. 1985). As we all know, the time bar was created to prevent the very abuses present in this case.

Marvin Johnson has had nine years to file this petition. He has been continuously represented by counsel. He **elected** to ignore Rule 3.850 and go directly to federal court. He **elected** to abuse process and piecemeal his claims, a few at a time, in the state and federal courts as each warrant was signed.

Time limitations for the filing of collateral attacks have always been upheld. See **United States ex rel Caruso v. Zelinsky,** 689 F.2d 435 (3rd Cir. 1982). Congress itself has periodically limited and expanded §2254 in response to the needs of the federal courts. **Henry v. Mississippi,** 373 U.S. 443 (1965); **Fay v. Noia,** 372 U.S. 391 (1963); **Wainwright v. Sykes,** 433 U.S. 72 (1977).

The **"ex post facto"** clause does not attach to changes in law which to not alter substantial personal rights and are merely procedural. **Miller v. Florida,** _____ U.S. _____, 96 L.Ed.2d 351 (1987). Time limits for filing collateral attacks are merely procedural. **Doran v. Compton,** 645 F.2d 440 (5th Cir. 1980). Of course, "piecemeal litigation" is not a "right" just because it is "possible". It is "not to be tolerated". **Woodard v. Hutchins, supra.**

We would also note that the **ex post facto** clause restricts the legislature, not the judiciary, and Rule 3.850 is a judicial creation. **In re Rules of Criminal Procedure,** 272 So.2d 65 (Fla. 1972); accord: **Marks v. United States,** 430 U.S. 188 (1971). The central concerns of the **ex post facto** clause are criminalization of conduct that was legal when committed and enhanced punishment, neither of which is implicated by Rule 3.850. See **Weaver v. Graham,** 450 U.S. 24 (1981).

Johnson equates the creation of a limitations period with denial of access to the courts. There is no right, however, to collateral attack. In **United States v. MacCollum,** 426 U.S. 317, 323 (1976), the court held:

> "The due process clause of the Fifth Amendment does not establish any right to an appeal, see **Griffin v. Illinois,** 351 U.S. 12, 18, 100 L.Ed.2d 891, 76 S.Ct. 585, 55 A.L.R.2d 1055 (1956) (plurality opinion) and certainly does not establish any right to collaterally attack a final judgment of conviction".

Finally, we note that Johnson has not been discriminated against by the application of the time bar. Unlike "new" convicts, Johnson had from 1982 to 1987 to file a collateral attack (5 v. 2 years). Johnson also had a full two years after the amendment within which to file. The same two years given to everyone else.

(c) Federal Litigation

While it is true that Johnson was in federal court, he was not precluded **in any way** (even if his federal litigation looked like it might succeed) from filing a simultaneous action in state court. As this Court is aware from its own files, Charles Kenneth Foster just recently filed for and won a state habeas corpus action (and attempted to get 3.850 relief) while his case - like Johnson's - was pending in the Eleventh Circuit and the United States Supreme Court.

After Johnsons' briefs were filed, his idle attorney could have drafted state court pleadings just as Foster, Meeks and Cooper have done.

In **Sanders v. United States,** 373 U.S. 1, 18 (1963), the court held:

> "Nothing in the traditions of habeas corpus requires the federal courts to tolerate needless piecemeal litigation or to entertain collateral proceedings whose only purpose is to vex, harrass or delay".

Just as no federal "tradition" exists, no state tradition exists.

We must not lose sight of Mr. Johnson's motives or his ultimate plan for this case. Johnson wants to delay these proceedings for as long as possible. He is not interested in "disposition" of the case, orderly or otherwise, because

"disposition" means "execution".

Opponents of capital justice readily concede that most, if not all, of the major challenges to the system are dead. As the New York Times reported last year, capital litigation has now evolved into a "judicial guerilla war", in which opponents of the system work to maximize case backlogs and public expense until a frustrated populace yields to their position. In this way a strident minority can overcome democratic processes.

Applying the philosophy to Johnson's case, his program for the future (and status under **Sanders, supra**) is clear.

Johnson, represented by competent counsel, eschewed both state habeas and "3.850" relief in 1982 and went directly to federal court. Having exhausted that system, he now flagrantly asserts "reserved claims" in proceedings he allegedly "assumed would always be there". Why didn't Johnson raise these claims in 1982? The answer is clear - he reserved them to stay his **second** warrant.

We, of course, have seen this trend before. Ronald Straight and Larry Joe Johnson both filed single issue "habeas" petitions in this Court which they felt would warrant a stay. Only when habeas was denied did either man begin preparing his "3.850". Had this Court granted Johnson a stay on his habeas, who knows if he would have filed, or pursued (see **Kennedy, supra**) his 3.850.

Johnson's lawyers have stated on the record why no state action was taken. What they have not mentioned is the intended course of litigation.

Johnson used up time from 1982 to 1987 in federal court. Johnson hopes that this Court would permit this federal escapade to excuse his inactivity and permit protracted state court "merits" review on the "competence of counsel", "competence of expert witnesses" and who knows what else. After appealing any adverse decision and petitioning for certioari, Johnson intends to return to federal district court.

Any waiver of our procedural rules will provoke new federal "merits" review, Eleventh Circuit review and certiorari. This will easily consume several more years. Should a third warrant be signed, the Appellant will start the process again under whatever chic new theory is being touted ("McClesky", "Lockhart", "Caldwell" or whatever).

To opponents of capital justice, this is "orderly" review, to people of normal sensibilities, this is pure obstructionism.

Should this Court permit capital defendants to pick and choose when and how they will file in the state courts the concept of "finality" will be destroyed. By excusing state

inactivity due to federal action, the Court would sanction all manner of delay tactics and forum shopping.[4]

Finally, we note that the courts of Florida are not "functionaries" or "subsidiaries" of the federal courts, even on "federal questions". **Duckworth v. Serrano,** 454 U.S. 1 (1981); **Atlantic Coast Line Railroad v. Engineers,** 398 U.S. 281 (1980). We can not demean and degrade our courts and procedures just because someone wants to go to federal court "first" and chooses to "see us later" because state procedures will "always be there".

Johnson chose to waive Rule 3.850, he is bound by and should be held to that choice; **Wainwright v. Sykes, supra.**

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[4] As stated above, other capital litigants - not represented by CCR, have had no problem pursuing either simultaneous litigation or "abating" pending federal cases while they returned to state court.

ARGUMENT

ISSUE II

TRIAL COUNSEL WERE NOT INEFFECTIVE IN THEIR GUILT AND PENALTY PHASE PREPARATIONS

The Circuit Court dismissed Johnson's petition as time-barred and as a result did not rule on the merits of his claims of ineffective assistance of counsel. This decision was correct. No one precluded Johnson from challenging the competence of counsel when, in 1982, he deliberately chose not to file a 3.850 petition. His abuse of procedure should not be rewarded by or with "merits" review if this Court's rules mean anything at all. **Blanco v. Dugger,** 12 F.L.W. 237 (Fla. 1987).

Without waiving our procedural defense the State will briefly discuss Johnson's claims so that we (should the Court elect to waive its own rules and address the merits) will not be precluded from arguing the actual facts as in **Foster v. Dugger,** 12 F.L.W. 598 (Fla. 1987).

The standard of review to be applied is that of **Strickland v. Washington,** 466 U.S. 688, 80 L.Ed.2d 674 (1984), which requires establishment of both error by counsel and actual resulting prejudice so serious as to render unreliable the outcome of the case.

(a) "Penalty Phase" Counsel

Johnson is in "error" when he represents that nothing was done in anticipation of the penalty phase of his case. While it is true that counsel postured and begged for a sixty to ninety day break between the trial and penalty phases (as well as a second jury), the record is clear that they had witnesses (four, in fact) and were ready to proceed.

Johnson's "new evidence" all clearly could have been presented in 1982. It is, in any event, facially deficient as follows:

1. Affidavits from Johnson's friends and relatives are irrelevant since counsel for Johnson explicitly stated on the record (R 1614) that they did not intend to open his bad character up to inspection. Counsel made a strategic decision to avoid character evidence **on the record,** even should they now deny it. Even a "bad" strategic decision is not a basis for relief, **Tucker v. Kemp,** 776 F.2d 1487 (11th Cir. 1985); **Stanley v. Zant,** 697 F.2d 955 (11th Cir. 1983); **Stephens v. Kemp,** _____ U.S. _____, 78 L.Ed.2d 370 (1983), and the decision **sub judice** has not been shown to be a bad one.

2. The affidavit of Dr. Yarbrough recanting his prior testimony on the basis of "evidence" assembled by CCR is not a basis for relief. **Anderson v. Maggio,** 555 F.2d 447 (5th Cir. 1977). Dr. Yarbrough made an honest appraisal at trial and,

significantly, found no symptoms or evidence of mental illness. We question the viability of any "diagnosis" which can find illness in the absence of symptoms based solely upon egregious reports supplied by the defense. Remember, it is presumed that Johnson, once aware of the purpose of his evaluations, presented his symptoms in a "useful" manner. **Mims v. United States,** 375 F.2d 135 (5th Cir. 1967); **United States v. Mota,** 598 F.2d 995 (5th Cir. 1979).

We would also note the recent decision of the United States Supreme Court in **Traynor v. Turnage,** _____ U.S. _____, 1988 W.L. 45377 (April 20, 1988). In Traynor, the Supreme Court stated that alcoholism, whether or not a "disease", can itself stand as "willful misconduct" (apparently since ingestion of alcohol is still a personal choice).

We submit that Marvin Johnson, who was **not** on drugs or undergoing withdrawal during this murder, cannot rely upon some alleged "drug habit" as mitigating evidence. Drug use is illegal in and of itself. Drug use is a crime and it cannot justify or excuse subsequent crimes. No one of normal intelligence would consider Johnson's dope habit "mitigating". On the contrary, said evidence would probably offend a jury and a judge.

3. Dr. Krop is nothing more than a chronic anti-death activist and ready source of eleventh hour "incompetence" affidavits. See **James v. State,** 489 So.2d 737 (Fla. 1986). His

evaluation, like Yarbrough's, was based upon a meeting with Johnson. Unlike Yarbrough, Krop had a CCR case history.

4. Dr. Macaluso's affidavit misstates his credentials and conveniently omits a recent five year probation and license suspension. These facts should have been mentioned by Johnson if he knew about them.

The fact of the matter is that Johnson's counsel performed well enough to win a life recommendation from the jury (by avoiding character evidence) and thus were **per se** competent and effective. Johnson's petition simply asks for leave to retry the case using an alternate strategy, thus perverting justice. **McPhee v. State,** 254 So.2d 406 (Fla. 1st DCA 1971); **Curry v. Wilson,** 405 F.2d 110 (9th Cir. 1968).

Even if Johnson could establish error by counsel (although his charge of failure to prepare is refuted by the record), he cannot establish prejudice. The life recommendation aside, Johnson cannot show that anyone would feel sorry for him because, in addition to robbing and killing people he also takes illegal drugs. (Under Johnson's theory, drunk drivers would be entitled to an "intoxication defense").

This aspect of Johnson's claim is facially without merit.

In a related matter, Johnson alleges he received "ineffective psychiatric assistance", contending he has a "due

process right" to follow his "ineffective counsel" claims with "ineffective expert witness" claims - thus promoting the "expensive crush of litigation" mentioned above.

Johnson cannot be permitted to manufacture "ineffectiveness" by withholding information from his lawyers and doctor and then complaining they did not "find" it. In **Tucker v. Kemp,** 776 F.2d 1487 (11th Cir. 1985), this very sort of claim was rejected. Nevertheless, Johnson has neither alleged nor shown that this character evidence would have been used even if it had been known. Counsel had the right to not use it. **Stanley v. Zant,** 697 F.2d 955 (11th Cir. 1983).

Finally, we note that Johnson's guilt phase defense was that he was **not present** and was **not** the robber. In **Moore v. Kemp,** 809 F.2d 702 (11th Cir. 1987), the federal court held that a trial defense of "alibi" rendered sentencing phase evidence of "unwilling participation" inadmissible. The same holds true here. Are we to believe that Johnson could tell the jury (first) that he was not there an (second) that he was there but acted due to stress and dope? The notion is typically absurd, yet Johnson has grabbed his second stay of execution, so it worked.

(b) Guilt Phase Preparation

Here, again, we find a specious claim.

Johnson denied ever going into Moulton's store and claimed he was shot while in another city. Johnson forbade the state access to he bullet, while exploiting at trial the state's inability to link the bullet (inside him) to Mr. Moulton. **Now,** suddenly, Johnson wants ballistics tests.

The entire claim is too fatuous to discuss. Clearly, he cannot meet the **Strickland** test on the basis of this assertion and Mr. Terrell's peculiar affidavit (which fails to mention Johnson's refusal to permit removal of the bullet or trial argument).

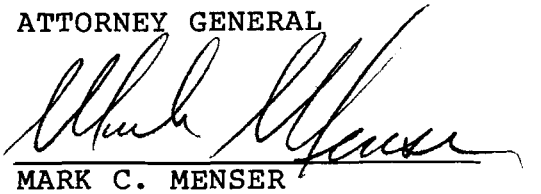
We note again that Mr. Nute's affidavit does **not** positively attribute the bullet mark on the wall or the "hole in the wall near the ceiling" to either Johnson's gun or Moulton's gun. Indeed, these marks cannot even be dated. The description of the marks and the hypothesis regarding the kind of bullet that made them are hearsay comments from some defense lawyer, not Mr. Nute. Most important of all, however, is the fact that this "evidence" appeared in the trial exhibits, **was argued** by Mr. Terrell (no matter what he says now), and **was available prior to 1982!** In other words, this claim has been successfully sandbagged for use against Johnson's warrant.

CONCLUSION

Johnson's petition was properly dismissed as time barred and, on its face, fails to establish any basis for waiver of the rule.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by hand delivery to Mr. Mark Evan Olive, Esq., Office of the Capital Collateral Representative, 1533 South Monroe Street, this 25 day of April, 1988.

MARK C. MENSER
Assistant Attorney General

OF COUNSEL