IN THE SUPREME COURT OF FLORIDA

NO. 72,231

MARVIN EDWIN JOHNSON,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF
THE FIRST JUDICIAL CIRCUIT, IN AND
FOR ESCAMBIA COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This is an appeal of the trial court's summary denial of Mr. Johnson's motion for post-conviction relief filed pursuant to Rule 3.850, Florida Rules of Criminal Procedure.

STATEMENT OF THE FACTS

The facts as known to this Court in 1980 are contained in this Court's plurality opinion in Johnson v. State, 393 So.2d 1069 (Fla. 1980). Facts relevant to post-conviction issues are discussed within the body of Arguments I, II and III, infra. Briefly stated, Mr. Johnson, if provided an evidentiary hearing, would show that the court-appointed clinical psychologist, court-appointed the day of capital sentencing, was completely unaware of Mr. Johnson's family and personal background. That psychologist has been made aware of background, and now is of the opinion that several statutory and many nonstatutory mitigating circumstances were available at sentencing in 1978. In addition, it will be demonstrated that trial counsel, who began preparing for sentencing the night before sentencing began, were grossly ineffective in their efforts to convince the sentencing judge that life was the proper penalty. Counsel also wholly failed to address critical but highly refutable ballistics and scene-reconstruction evidence.

SUMMARY OF ARGUMENT

Argument I: Mr. Johnson's sentencing attorney in 1978 began preparation for capital sentencing the night before sentencing began. That night, counsel had a clinical psychologist speak with Mr. Johnson, and that psychologist testified the next day. Counsel and the psychologist candidly told the court that more information was necessary for the psychologist, the judge, and the jury to make decisions about Mr. Johnson. Counsel informed the Court that a complete and thorough investigation into Mr. Johnson's history was essential, but counsel did not perform such an investigation. The clinical psychologist who testified at sentencing has now been provided background information, and it is his expert opinion that compelling statutory and nonstatutory mitigating circumstances were available but not produced for the sentencer's consideration in 1978. Because counsel failed to provide compelling evidence in mitigation to the psychologist, judge, and jury in 1978, Mr. Johnson's rights to effective assistance of counsel, and to a competent mental health evaluation were violated. See Strickland v. Washington, 466 U.S. 668 (1984); Mason v. State, 489 So. 2d 734 (Fla. 1986).

Argument II: The State had only a shaky eyewitness identification to tie Mr. Johnson to the crime scene.

Consequently, the State presented complicated, confusing, and, we now know, completely unreliable ballistics and crime-scene reconstruction evidence purportedly to show that one of the bullets shot during cross-fire at the scene ended up in Mr. Johnson's body. Because trial counsel did not even look at the physical evidence until the weekend before trial, and then did nothing to analyze the evidence, Mr. Johnson was unable to refute readily refutable opinions, and was unable to demonstrate the complete unreliability of the State's evidence. Counsel's duty is to investigate, and a competent investigation in this case would have created a reasonable probability that the result at guilt/innocence would have been different. Strickland, supra.

Argument III: The two-year time limitation contained in Rule 3.850, Florida Rules of Criminal Procedure, does not bar Mr. Johnson's claims because:

a. The claims involve innocence in fact, gross attorney ineffectiveness, and fundamental constitutional rights. Even if this Court were to find that the rule literally applies, exceptions must be made for "prejudicial ineffectiveness, see Card v. Dugger, 512 So. 2d 829 (Fla. 1987) (Barkett, J., concurring), in "unique circumstances," Darden v. State, 475 So. 2d 217, 218 (Fla. 1985), and when "the alleged constitutional error [either] precluded the development of true facts [or] resulted in the admission of false ones." Moore v. Kemp, 824

F.2d 847, 856 (11th Cir. 1987).

b. Without exception, this Court's prior invocation of the two-year bar has been accompanied by facts in addition to passage of two years, for example: (1) the appellant had filed an earlier motion under Rule 3.850; (2) the matters raised could have been raised on direct appeal, or in a first Rule 3.850 motion, or (3) the matters had been previously resolved. Mr. Johnson filed his first Rule 3.850 motion April 10, 1988, and the issue contained therein could not have been raised on direct appeal. As soon as he became aware of the claims, he raised them. There is no two-years "plus," and application of the two-year rule to him is unjustified.

c. Mr. Johnson's claim in Argument I is based upon new law, and it was raised upon discovery.

d. Mr. Johnson's claim in Argument II was raised upon discovery, and it cannot be said that volunteer pro bono counsel acted with anything less than due diligence by proceeding with federal proceedings until completion before proceeding in state court.

e. The application of the two-year rule to Mr. Johnson, under the unique circumstances of his case, violates due process of law.

ARGUMENT I

MR. JOHNSON IS ENTITLED TO AN EVIDENTIARY HEARING TO DEMONSTRATE THAT HIS RIGHTS TO COMPETENT ASSISTANCE FROM MENTAL HEALTH EXPERTS, AND TO EFFECTIVE ASSISTANCE OF COUNSEL, WERE VIOLATED

Mr. Johnson was sentenced to death. According to the majority of this Court in 1980, no reasonable basis existed in the record for any other penalty. If true, then sentencing counsel acting reasonably should have recognized this of-record shortcoming -- counsel's chore is to obtain a life sentence, not a life recommendation, and reasonably competent counsel when reviewing what was to be placed and what was placed before the jury must have known it did provide a reason for life. This Court said there was no reasonable basis produced, so it must also have been obvious to counsel -- if no reasonable person could have voted for life, the dearth of mitigation must have leapt from the record. In fact, sentencing counsel did admit, on the record, their total failure to investigate.

If the record was so sparse, it was not because it was necessarily so. As will be shown, upon the provision of relevant background data to a competent mental health expert, statutory and non-statutory mitigating evidence was available in abundance. While the judge in this case found no mitigation, "assuming [Mr. Johnson's] allegation to be true as we must in this posture,

there were mitigating circumstances which cannot be characterized as insubstantial", and counsel simply failed to produce them. Porter v. Wainwright, 805 F.2d 930, 936 (11th Cir. 1986) (emphasis added). Mr. Johnson will demonstrate 1) that the jury's recommendation of life, being (as this Court decided) unreasonable, did not cure the constitutional error that occurred, 2) that counsel acting reasonably would have provided the jury with a record that would have required a life sentence, and that the right to competent mental health assistance was violated, and 3) that counsel was ineffective before the sentencer, the judge.

A. A JURY RECOMMENDATION OF LIFE DOES NOT RENDER CONSTITUTIONAL ERROR HARMLESS

Mr. Johnson was entitled to competent mental health assistance. See State v. Sireci, 502 So.2d 1221 (Fla. 1987); Mason v. State, 489 So.2d 734 (Fla. 1986). He was also entitled to effective assistance of counsel. Strickland v. Washington, 466 U.S. 668 (1984). The issue is not whether the procedure in which counsel for Mr. Johnson participated produced an unreasonable but favorable recommendation from the jury. The issue is whether the denial of the right to counsel and to expert assistance undermines this Court's confidence in the reliability of the result of capital sentencing. Both the sixth and fourteenth amendment violations in this case undermine confidence

in the result, and an evidentiary hearing is necessary.

Jurors do not sentence in Florida. Judges do. That is the rationale given by this Court for its rejection of Caldwell v. Mississippi, 472 U.S. 320 (1985). See Combs v. State, 13 F.L.W. 142, 143 (Fla. 1988). ("[T]he trial judge imposes the sentence.") Consequently, what matters in analyzing constitutional error before juries and judges is whether the error undermines confidence in what the trial judge did. Thus, if the trial court correctly overrode a recommendation of life, and if, as petitioner alleges, but for counsel's (or mental health expert's) errors the trial judge could not have overridden, then confidence in the outcome of capital sentencing is shaken. Similarly, since the judge sentences, and since evidence can and frequently should be presented to the judge alone, post jury recommendation, see Craig v. State, 510 So. 2d 857 (Fla. 1987), confidence is shaken when evidence that could have been presented to the judge sentencer was not presented because of counsel's misplaced and unreasonable reliance upon the non-supportable jury recommendation.

The Eleventh Circuit's decision in Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986), provides the proper sixth amendment analysis, which is equally applicable to the fourteenth amendment

claim here.[1] In Porter, the Court wrote:

> In light of the mitigating evidence Porter proffered to the district court, assuming Porter's version of the facts to be true, Porter can successfully overcome the performance obstacle of the Strickland test.
>
> In order for Porter to show constitutional ineffective assistance of counsel, he must also show that he was prejudiced by his attorney's performance. See Strickland, 104 S.Ct. at 2064. Porter must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 2068. Thus, Porter must should enough to undermine our confidence in the trial judge's decision to reject the jury's recommendation of life.

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[1]This Court affirmed the summary denial of Mr. Porter's post-conviction claims, Porter v. State, 478 So.2d 33 (Fla. 1985), but did not suggest in the slightest that a jury recommendation of life ipso facto defeats a constitutional challenge. This Court did not address the second matter under discussion here -- that the judge should be presented with mitigation post-jury recommendation, especially when he or she knows additional purportedly bad things about a defendant. The Eleventh Circuit disagreed with this Court's decision that "on its face the claim of ineffective assistance of counsel showed no grounds for relief." 478 So. 2d at 35.

> Our assessment of this issue should "proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision." Id. In this case, the trial judge applied Fla.Stat.Ann. sec. 921.141(3) (West 1985) in rejecting the jury's recommendation of life. The Florida Supreme Court has held that, in order for a judge to reject a sentencing jury's recommendation of life imprisonment, the facts justifying a death sentence must be so clear and convincing that virtually no reasonable person could differ as to the appropriateness of the death penalty. Eutzy v. State, 458 So.2d 755, 758 (Fla. 1984), cert. denied, 471 U.S. 1045, 105 S.Ct. 2062, 85 L.Ed.2d 336 (1985); Lemon v. State, 456 So.2d 885, 888 (Fla. 1984), cert. denied, 469 U.S. 1230, 105 S.Ct. 1233, 84 L.Ed.2d 370 (1985); Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). In light of the very strict standard that applies in jury override cases, and in light of the fact that the sentencing judge viewed this case as one without any mitigating circumstances when in fact, assuming Porter's allegations to be true as we must in this posture, there were mitigating circumstances which cannot be characterized as insubstantial, our confidence in the outcome--the outcome being the trial judge's decision to reject the jury's recommendation--is undermined. See Strickland, 104 S.Ct. at 2068. We cannot say that, with Porter's proffered evidence in hand, no reasonable person could differ as to the appropriate penalty. Thus, we conclude that, assuming Porter's version of the facts to be true, Porter would have satisfied both the performance and prejudice prongs of the Strickland test for ineffective assistance of counsel.

Porter, 805 F.2d at 936-37. At footnote 6, the Porter Court recognized that the Strickland standard was easier to satisfy in

an override setting than in a non-override setting:

> Since this case involves a jury override, we need not decide whether Porter's proffered evidence would undermine our confidence in a death sentence entered upon recommendation of the jury. Our conclusion in this jury override case is bolstered by this court's recent decision in Thomas v. Kemp, 796 F.2d 1322 (11th Cir. 1986). In Thomas the defendant proffered mitigating character evidence that had not been presented at his sentencing. As in the instant case, Thomas proffered the testimony of family members and others to show that Thomas had a difficult home environment, that he cared for his family, that he worked hard at school and that he was mentally ill. The Thomas court held that, had this evidence been presented at sentencing, there was a reasonable probability that the result of the sentencing would have been different. 796 F.2d at 1325.
>
> Thomas was not a jury override case. Since the facts in Thomas were sufficient to undermine the court's confidence in the death sentence which was rendered by the jury itself, we are sure that the facts alleged by Porter are sufficient to undermine confidence in the jury override sentence here.

Id.

The evidence presented next should be developed at an evidentiary hearing, and will show that confidence in the outcome of sentencing is undermined.

B. VIOLATION OF DUE PROCESS AND RIGHT TO EFFECTIVE ASSISTANCE BEFORE THE JURY

1. Counsel and the Mental Health Expert Admitted Their Lack of Preparation

There were two attorneys at guilt/innocence, neither of whom

were prepared for trial. After the guilty verdict, three new attorneys appeared. These attorneys admitted they had not conducted the investigation and preparation necessary for capital sentencing. The preparation began and ended the night before sentencing. The preparation at that date guaranteed that the due process right to capital mental health expert assistance would be violated.

On December 8, 1978, the jury returned a guilty verdict. On December 9, 1978, sentencing counsel appeared, filed motions, and discussed what should happen for a proper sentencing hearing. Specifically, counsel told the Court he believed the judge and jury should know about Mr. Johnson's background, but counsel had done nothing to find out about it. He also told the Court that Mr. Johnson needed time to receive a competent mental health evaluation, which had not occurred.

a. Background Information Was Not Investigated

One of the motions filed the day of the jury sentencing was a Motion for Pre-Sentence Investigation (R. 1683). The motion stated:

> COMES NOW, the Defendant, by and through his undersigned counsel, and moves this Court to order a pre-sentence investigation so that counsel for the Defendant may be adequately prepared to offer material and relevant disclosures in that pre-sentence investigation as mitigating circumstances to the jury impaneled to render an advisory sentence and for the trial judge.

> WHEREFORE, Defendant prays this Court will order a pre-sentence investigation prior to the penalty portion of this cause.

Id. (emphasis added). In argument to the Court, counsel admitted:

> We do not believe under the circumstances of this case that adequate time exists for such preparation.

(R. 1577).

> It's inconceivable to me that Your Honor could consider imposition of the death penalty without thorough background study of the defendant . . . Your Honor should have absolutely all possible relevant information about the defendant. And we believe, Your Honor, that if you should have that information, if the jury is to hear all possible mitigating circumstances, that that investigative report should be made available to counsel.
>
> JUDGE: Certainly it would be available to counsel if I order a P.S.I., no question about that.
>
> MR. KERRIGAN: But I'm saying, Your Honor, prior to the hearing by the jury of the sentencing portion of the trial because there may be information ---
>
> JUDGE (Interposing) You're saying I should have a P.S.I. before the sentencing portion of the trial?
>
> MR. KERRIGAN: This is really a bifurcated request. We're saying that we want you to get a P.S.I., of course, but if Your Honor is going to order one, it would seem to me that it ought to be ordered prior to the time that the jury considers the sentencing portion because there may be some information that comes out in that report that will benefit the defendant, and that

> information should be made known to the jury -- information that we do not now know, and that the investigative agencies of the State would be able to learn to assist the Court and counsel for the State and counsel for the defendant in that portion of the trial. If Your Honor elects not to do that, of course, we would ask you to order one before you make your decision. So it's really a bifurcated request.
>
> JUDGE: I don't know if I should ask the State to comment on that or not because it's a decision the Court has to make anyway. I will decide on that after the advisory jury comes back --
>
> MR. KERRIGAN: (Interposing) Okay. Thank you, Your Honor.

(R. 1617-18)(emphasis added). Of course, counsel was correct that the judge and jury should know about Mr. Johnson's background. What is "inconceivable" is that counsel would appear the day of sentencing without having obtained the evidence independently. The record clearly shows, however, that the day of sentencing was a day of beginning preparation. Motions were filed, counsel "looked at court files for the first time" (R. 1632-33), and the State was asked about their proof, all for the first time.

b. Mental Health Expert Was Unprepared

The trial record reflects the inadequacy of the mental health assistance provided to Mr. Johnson. Counsel stated:

> MR. KERRIGAN: Now, Your Honor, I would advise the Court in regard to our motion for expert witness fees and for a continuance, two things. Number one, Your Honor is well

familiar, I know, with Ron Yarbrough, a very capable psychologist.

JUDGE: I know him very well.

MR. KERRIGAN: After the defendant was found guilty by the jury, I immediately attempted to locate an expert in the field of psychology or psychiatry and, as you know, it's not easy to find people to come to the jail at night and commence any kind of an evaluation. I did that to assist the Court and the jury pursuant to the mitigating circumstances enumerated in paragraph "B" and "F", and I think that's indicated in our motion as "B" and "F" respectively --

JUDGE: (Interposing) I'm not sure where --oh, you mean parts of 921.141?

MR. KERRIGAN: Yes. "B" provides the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance. "F", the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

. . . .

We're presented in this case with a denial of guilt by the defendant. We proceeded after the determination of guilt by the jury to have him examined, and Dr. Yarbrough and I met with the defendant last evening until the early hours of the morning. He conducted the preliminary tests that he'd like to, of course, advise the Court about and the jury. Those preliminary indications, Your Honor, are that the defendant may have, in fact, evidence which would be admissible under sub-paragraph "B". I do not think under sub-paragraph "F". And that provision is, again, under extreme mental or emotional disturbance.

. . . .

We asked Dr. Yarbrough to conduct the examination that he felt would be helpful to determine whether or not the defendant at that time was under a mental or emotional disturbance which could have led to the killing of the decedent. Of course, again, we had to assume because the jury found the defendant guilty that he actually committed the crime.

There are some preliminary indications from Dr. Yarbrough which indicate additional testing would be not only helpful but beneficial to the Court also and to the defendant. We would like for you to reserve judgment on that motion perhaps until you either have an opportunity, on the record or however Your Honor decides to do it, to talk with Dr. Yarbrough about his preliminary examination.

JUDGE: Is Dr. Yarbrough available today?

MR. KERRIGAN: Yes. He's agreed to come in to assist the Court.

JUDGE: Well, if you're moving for the fees to pay the doctor, I'll grant that portion of it, but I'm not going to delay the trial to give him further time to examine him.

MR. KERRIGAN: Your Honor, would you take -- I'd ask you to take that under consideration and not to formally reject it or deny it until Dr. Yarbrough's testimony is heard because it may be at that time that Your Honor would feel that it would be in the best interests of the State and the Court to delay the --

JUDGE (Interposing) Obviously, if there is something said to change my mind, certainly. I'm not going to foreclose that possibility.

(R. 1619-21). The attorneys then asked the court for money and time to prepare a constitutional challenge to the death penalty (R. 1622). Just before sentencing began, the defense attorneys told the Court they had no idea what conclusions Dr. Yarbrough had reached:

> MR. RANKIN: Now, that estimate of an hour doesn't include Dr. Yarbrough.
>
> MR. KERRIGAN: No. We don't know the full ramification of his testimony.
>
> JUDGE: Did you sit there during the interview last night with Dr. Yarbrough?
>
> MR. KERRIGAN: I did. It took about two hours just to ask the questions.
>
> JUDGE: He can summarize in a lot less time than that, though.
>
> MR. KERRIGAN: Oh, sure.
>
> JUDGE: Or tell whatever his findings were. You haven't decided whether you're going to put him on the stand yet? You don't know yet until you talk to him?
>
> MR. KERRIGAN: That's correct, Your Honor.

(R. 1627).

Contrary to defense counsel's optimistic predictions, Dr. Yarbrough had very little good to say at sentencing regarding the existence of mitigation. He formed some "strong hypotheses" regarding "the defendant's behavior in various situations" (R. 1571). He stated that "under intense emotional stimuli that Mr. Marvin's normal mode of decision-making, seeing things, and

behaving changed, deteriorated" (R. 1521). He stressed that his was just a "preliminary evaluation" (R. 1525), and that he could not form "conclusions," just "hypotheses" (R. 1511). It was unreasonable for counsel to allow his testimony because (1) the witness had not been provided sufficient information to form an opinion, and (2) his testimony that Mr. Johnson was smart but sometimes got rattled under stress was damaging, not mitigating. There was plenty of mitigation available. It simply was not obtained.

2. This Court's Law Requires An Evidentiary Hearing: Mason/Sireci

The issue presented by this claim is whether Mr. Johnson's due process right to a professionally competent, court-funded evaluation of his mental status at the time of the offense, and to discover extant mitigating circumstances, was violated by counsel's complete failure and neglect to do any investigation into and evaluation of Mr. Johnson's substantial history of psychoactive substance use, and the concomitant affects such use had on his behavior, cognition, volitionality, and control. While the merits of this claim cannot be determined conclusively in advance of an evidentiary hearing, on the basis of Mr. Johnson's allegations that follow there is at least a reasonable likelihood that he will prevail on his claim after a full and fair evidentiary proceeding. As he demonstrates in the following

discussion, there are three reasons for this. First, he is entitled as a matter of due process to court-funded evaluations that are professionally reliable and valid. Second, his allegations demonstrate that counsel's preparations for sentencing failed to consider Mr. Johnson's substantial history of substance abuse. Third, his allegations demonstrate that, had this information been available and been made known to the jury and judge, the result in this case would have been different.

In Mason v. State, 489 So. 2d 734 (Fla. 1986), this Court recognized for the first time that the due process clause entitles an indigent defendant not just to a mental health evaluation, but also to a professionally competent evaluation. Mr. Mason's competence to stand trial, as well as his mental status at the time of the offense, had been evaluated prior to trial by three psychiatrists. All of them found Mr. Mason competent and sane, but on the basis of their reports, they did not know about his "extensive history of mental retardation, drug abuse and psychotic behavior...," id. at 736 (emphasis added), or his "history indicative of organic brain damage." Id. at 737. This history had not been "uncovered by defense counsel" during trial proceedings and was proffered for the first time in Mr. Mason's Rule 3.850 proceeding. Id. at 736. Recognizing that the evaluations of Mr. Mason's mental status would be "flawed" if the physicians had "neglect[ed] a history" such as this, id. at 736-

37, the Court remanded Mr. Mason's case for an evidentiary hearing "in order to resolve the question, raised by the evidence proffered, of whether Mason's due process rights have been protected through valid evaluations of his competency." Id. at 735. Accordingly, the Court recognized that the due process right to court-funded psychiatric evaluation includes the right to a professionally reliable and "valid" evaluation. The Mason decision was issued June 12, 1986.

In reaching its conclusion, the Court made no distinction between the determination of competence to stand trial and the determination of mental status at the time of the offense, or other mental health issues. Indeed, the due process protections available in connection with the examination of competency to stand trial are deemed "equally applicable ... where examination was sought to determine the defendant's sanity at the time of the offense." Jones v. State, 362 So.2d at 1334, 1336 (Fla. 1978). Since those protections include the right to a valid and professionally competent determination of mental status, Mason, Mr. Johnson was entitled to a valid evaluation of his mental status at the time of his offense, and regarding mitigation.

More recently, in State v. Sireci, 502 So. 2d 1221 (Fla. 1987), this Court upheld the trial court's determination, in a successor posture, that

> a limited evidentiary hearing [was] necessary to address the claim that Sireci was deprived

> of his rights to due process and equal protection because the two psychiatrists appointed before trial to evaluate his sanity at the time of the offense failed to conduct competent and appropriate evaluations. The trial court further held that the hearing [was] necessary solely to determine the effects, if any, this claim may have had on the sentencing hearing. The court specifically found, and [the Florida Supreme Court] agree[d], that the alleged violation of due process/equal protection ha[d] no bearing on the prior determination of Sireci's guilt.

Id. at 1223. These decisions represent new law in Florida. Mason and Sireci have led other courts to evaluate the performance of mental health experts in capital cases. For example, Judge E. Randolph Bentley, Circuit Court Judge for Polk County, recently entered an order in Florida v. Lemon, No. CF82-315-A1 (see App. 17), following this Court's remand, in which he held:

> The defendant introduced expert testimony at the evidentiary hearing on the issue of whether or not there was a professionally competent mental evaluation of Mr. Lemon prior to his trial. The State offered no expert testimony other than that of Dr. Kremper, the evaluating psychologist. Because of the gravity of the outcome of this proceeding, the court feels that the appropriate standard of care must be utilized when assessing the evaluation done by Dr. Kremper. Florida Statutes 768.45(1) (1985) sets forth the standard of care for health care professionals. Counsel for both sides shall submit to the court memoranda indicating the effect, if any, of the application of F.S. 768.45(1) (1985) to the facts of this case.

3. Federal constitutional Rights Created By Mason/Sireci

This Court's conclusions in Mason and Sireci are supported by independent analysis of this question in light of federal due process principles. As the Supreme Court has explained, interests that are protected by the due process clause may arise from two sources -- the due process clause itself or state law. Hewitt v. Helms, 459 U.S. 460, 466-67 (1983); Meachum v. Fano, 427 U.S. 215, 223-27 (1976). Both of these sources recognize and require protection of the defendant's interest in having a valid evaluation of his or her mental status.

The due process clause itself requires protection of this interest as a matter of fundamental fairness to the defendant and in order to assure reliability in the truth-determining process. Ake v. Oklahoma, 470 U.S. 68, 105 S. Ct. 1087, 1094-97 (1985). As the Court explained in Ake, the provision of competent psychiatric expertise to a defendant assures the defendant "a fair opportunity to present his defense," id. at 1093, and also "enable[s] the jury to make its most accurate determination of the truth on the issue before them." Id. at 1096.

Independent of the requirements of the due process clause itself, Florida has created a state law entitlement to the valid evaluation of mental status that is protected by the due process clause. In Florida, a criminal defendant is entitled to an evaluation of his or her mental status upon request unless the

trial judge is "clearly convinced that an examination is unnecessary. . . ." Jones v. State, 362 So. 2d at 1336. Florida law, therefore, mandates evaluation of mental status upon the existence of specified factual predicates. When such an interest is created by state law, it is protected by the due process clause. See Hewitt v. Helms, 459 U.S. at 472 ("use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the state has created a protected liberty interest"); Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 442 U.S. 1, 10 (1979)(due process is required when there is a "set of facts which, if shown, mandate a decision favorable to the individual"). Since the function of the due process clause in this context is "to insure that the state-created right is not arbitrarily abrogated," Wolff v. McDonnell, 418 U.S. 539, 557 (1974), it protects a Florida defendant against professionally incompetent and invalid evaluation of his or her mental status. Because such evaluations would be the functional equivalent of no evaluation at all, the State must be required to provide professionally competent and valid evaluation in order to effectuate the right it has created. Accordingly, Mr. Johnson was entitled to a valid and professionally competent evaluation of his mental status at the time of the offense, at the time of trial, and with respect to mitigating circumstances.

4. The Sentencing Mental Health Expert Has Changed His Mind

Mr. Johnson had a history of drug addiction, clearly known by defense counsel. Even the police knew Mr. Johnson was a "drug addict" who was "seeking drugs" (R. 423-24). That's what this crime was about -- a drug addict seeking drugs and asking specifically for the needed drug. Drug addiction is a medical illness, readily diagnosible, but Dr. Yarbrough was not presented with Mr. Johnson's substantial drug history, and so he did not consider this illness. As will be shown, Dr. Yarbrough's expert opinion is different, now that he has examined the relevant history. Relief under Mason is required.

Dr. Yarbrough's report speaks for itself:

> I am a Clinical Psychologist practicing in the State of Florida, who has evaluated Marvin Johnson, and who has had a particular specialty of working with drug abuse. This specialty was not utilized in preparing information for presentation to the jury at the time of sentencing because of the lack of available information regarding Marvin's drug addiction history at that time. I have taught courses in various aspects of that field for several southeastern states, including the first statewide case in Florida on drug abuse intake and evaluations, in the 1970's.
>
> I have been qualified as an expert in Clinical Psychology and in drug abuse in the Courts of this state and have offered testimony in both criminal and civil cases.
>
> I have been the director of a multiple treatment approach, comprehensive drug

program from 1971, through 1974. I have served on the Board of the City-County Drug Abuse Commission from 1971 to 1981, and was the President from 1978 to 1981. This board was charged with coordinating and securing funding for all law enforcement, treatment, and prevention services in Escambia County, Florida.

I have specialized in and am familiar with the effects of drugs on the brain and the body and their effects on a person's judgment, perception, mood changes, and possible mental state of Marvin Johnson on June 7, 1978.

Related to the above matters, I have reviewed various transcripts and documents regarding Marvin Edwin Johnson including Florida State Correction's, decision of Marvin Edwin Johnson's case; transcripts of testimony given at the sentencing phase of Marvin Edwin Johnson, including my own testimony; the CCR draft of his historical background; various affidavits of friends and family who were familiar with his drug abuse patterns; and the affidavit of a consulting physician, specializing in addictionology, Dr. Peter Macaluso.

The new data that I have reviewed that I have found to have special significance were the following:

A. Marvin has a history of using addictive drugs for the past 25 years, which certainly altered his moods and mental capacities at various times.

B. According to the interview gathered by Dr. Peter Macaluso, Marvin first began using stimulants of various kinds, as well as mind-altering drugs at approximately 25 years of age.

C. According to the affidavits of his ex-wife, friends, and Dr. Macaluso, Marvin began the stages of addiction

approximately twenty-five years ago.

D. Marvin evidently developed an immediate physical, psychological and financial dependency to a poly-drug use habit, that reportedly changed his personality, and attitudes from those shown prior to his extended drug use. Various sources indicate that he was, like all addicts, consumed by his drug usage. Evidently, he had a pattern of use that far exceeded that of a normal addict.

E. Marvin had a history which appears to be consistent with a severe multiple drug addiction. Included in this pattern were a number of automobile accidents and a number of fights which resulted in broken bones in his hands and arms, and a fractured leg. Also included in this pattern was the history of drug store break-ins in order to procure drugs, followed by almost insatiable nearly self-destructive (over-dose) usage.

F. Marvin's continued addictive poly-drug habit very likely led to periods of paranoid thinking, delusions (of grandeur at times, and persecution at other times). During such times, typically for most people, the result is that their perceptions of reality are altered; and for periods of time, they may not be in contact with reality, either during a drug-altered state of mind, or sometimes when seeking the drugs.

G. Marvin, while continuing to use mood altering and addictive drugs, developed a severe drug tolerance, evidently leading to a voracious level of drug abuse.

H. Marvin, from the affidavits of Macaluso, his ex-wife, friends, and evidence from the medical records of Drs. Webb, Hooper, and Clifford appeared to experience withdrawal at various times in his life.

I. I found that the obtaining of

Percodan illegally on June 5, and the drugstore robbery in Gainesville, Florida, on June 6, combined to show a pattern of addiction that was controlling almost all of Marvin's waking energy, prior to the June 7th murder.

These pieces of information combine to lead me to a professional opinion that:

A. Marvin suffered from a severe poly-drug chemical addiction, dating back until he was around the age of 25.

B. Marvin's severe, poly-drug addiction has led to a history of black-outs, dramatically increased tolerance to I.V. narcotics, and withdrawal symptoms at various times.

C. Marvin has a history of multiple arrests and convictions on felony and misdemeanor charges, and evidently has not been offered any forced treatment for his chemical dependency, along the lines of the Treatment Alternatives to Street Crimes (TASC) Program.

D. Marvin's severe poly-drug addiction led to a deterioration in him physically, psychologically, socially, and to his on-going legal difficulties. These all became worse directly as a result of his worsening poly-drug addiction and chemical dependency.

E. Marvin's severe addiction was the primary guiding force in his life around the time of June, 1978. The affidavit of Jerry Mitchell Lawrence depicts Marvin as a person who consumed large amounts of drugs; made rash and irrational decisions, in order to obtain more drugs; and placed himself in danger of physical harm and probable arrest, in order to get the drugs he craved and was addicted to.

F. Marvin was under the influence

> of a totally controlling extreme drug addiction which would have led to his mind being totally controlled by the presence or absence of drugs. In my professional opinion, this would qualify under mitigating circumstances for the F.S. 1985 Section 921.141 (6) (b) (G). Marvin acted under extreme duress when fired upon and as indicated from his psychological testing went into a totally emotional, irrational mode of response. At that instant my opinion is that, due to his drug abuse and combined emotionality of the moment, Marvin's capacity to appreciate the criminality of his behavior or to conform to the requirements of the law were substantially impaired. This set of circumstances would qualify under F.S. 1985 Section 921.141 (6) e and f.
>
> The information I have reviewed, particularly the data showing drug-related crimes, immediately preceding June 7, 1978, show that Marvin Johnson was severely addicted and totally controlled by the availability and use of Schedule IV narcotics. This information was not available to me at the trial and would have strengthened my psychological opinion. My expertise in drug abuse had been developed prior to the trial.
>
> The opinions I have expressed are related to information I have been provided and are based on a reasonable degree of psychological probability.

Two other eminently qualified physicians agree with Dr. Yarbrough. First, Dr. Robert A. Fox, Jr., psychiatrist and neurologist, in his April 9, 1988, evaluation states:

> 1. Identifying Data. This is a psychiatric evaluation of a Marvin Edwin Johnson, a 45 year old white male convicted of murder in the first degree and armed robbery who is now under warrant to be executed.

2. Purpose Of This Evaluation

a. Psychiatric history and mental status examination of Marvin Edwin Johnson.

b. Psychiatric diagnosis and description of Marvin Edwin Johnson.

c. Psychiatric opinion of his state of mind at the time of the offense.

d. Psychiatric opinion regarding mitigating circumstances.

3. Sources Of Information For This Report. The initial source of information for this report was a one and a half hour personal interview with Marvin Johnson at the Florida State Prison conducted on March 12, 1988. Additional information included a review of background material regarding Marvin Johnson, which included a copy of the Florida Supreme Court opinion in Mr. Johnson's case, his life history (supported by several affidavits), criminal records, hospital records, and sections of his sentencing and trial testimony. An index of this background material can be found attached. This is the type of information customarily relied on by experts in my field when forming and expressing opinions.

4. Psychiatric History And Mental Status Examination Of Marvin Edwin Johnson. Marvin Johnson was born in Jacksonville, Florida to Marvin Henry and Mary Anderson Johnson. Mr. Johnson grew up in Starke, Florida. He has a younger sister, Gertrude Johnson Kirtner. His father died of heart disease in 1971. His mother is still living.

Details of Marvin Edwin Johnson's life history, which I have reviewed, can be found in the materials I reviewed. I will discuss here pertinent information reported by him that is relevant to this psychiatric evaluation. Mr. Johnson's father was totally

blind due to an accident suffered when the patient was nine years old. Because of this, the patient was forced to take much responsibility working at the family home and farm. He spoke of his father with great respect and awe because of his father's ability to overcome his severe handicap. The patient clearly felt incapable of living up to his father's accomplishments and "manhood". Nevertheless, he recalls his childhood as having been essentially happy. He relates very little in regards to his mother, whom he views as a less significant factor in his life. Although he obviously is of above average intelligence and large stature, he viewed himself as having significant inadequacies as regards his family and his education. He quit school in the tenth grade. It was at this time that petty involvement in criminal activity began.

He relates that he was a habitual user of marijuana and alcohol, as well as an occasional user of hallucinogens. He was however, strongly opposed to narcotic drug abuse, and he would often, according to his wife, proselytize against this form of drug abuse. This changed in 1974, four years before the crime here, following a motorcycle accident in which he suffered a back injury. Because of the severe pain caused by this injury he was given narcotics by his physician by necessity. After prescription narcotics were discontinued, due to continued pain and upon becoming accustomed, he began self-administration of intravenous opiates. During my evaluation of him, he said that this introduction to opiates changed his life. Other background information confirms this. From then on his life took on a single purpose, namely, the obtaining of drugs for intravenous (IV) use.

The history of the next four years up to his arrest for the offenses under consideration is one of polydrug abuse and dependency, accompanied by compulsive and uncontrollable (often criminal) behavior

aimed at obtaining these drugs. He in detail described for me the large amount of mixed opiates, barbiturates and stimulants that he would inject compulsively and without limit. He described a life where the use of these substances was the sole purpose for his existence, which is consistent with the ultimate diagnosis I determined. The only limit Mr. Johnson placed on drug use was their availability.

He described in detail his repetitive criminal activity, namely burglaries and robberies of pharmacies for the purpose of obtaining both drugs and money, the latter being used to obtain the former. His drug use, while indiscriminate, was nevertheless not without preferences. Given a choice, he would inject heroin over any other substance, but because of the difficulties of obtaining high grade supplies of this drug he would often inject the other substances that were available, especially and very often Dilaudid.

Beside Mr. Johnson's unsuccessful self-help efforts to discontinue drugs he once sought treatment in 1976 when he attended a methadone clinic in Jacksonville. He reports however that he failed in treatment or rehabilitation because his addiction was stronger than his will to stop.

With regard to the time of this offense, there is evidence that two days prior to the crime, Mr. Johnson had obtained a quantity of Percodan by using a forged prescription. Mr. Johnson described the details of an automobile accident that occurred in late 1978, while he was under the influence of drugs, and out of which he was arrested for the offense in this case. Hospital records from University Hospital in Pensacola where he was treated in early August, 1978, for injuries suffered in this accident indicated that he was addicted to narcotics and required detoxification (ironically with Dilaudid).

At the current time, although he has apparently been without narcotics for nearly a decade, it is clear that Mr. Johnson still has an intense desire to utilize these substances and probably would if the opportunity arose. He speaks of his drug taking in grandiose and inflated language. It is obvious that even under the current dire circumstances in which he finds himself, narcotics abuse remains a true obsession.

5. Mental Status Examination. This is a forty-five year old white male who is approximately six feet tall and weighs over 200 pounds. He was dressed in prison clothing and handcuffed during the examination. He was cooperative and friendly. Mr. Johnson speaks spontaneously. His speech is fluent and of normal tone, rate, and intensity. His mood is "calm". Thought form reveals an absence of loosened associations, flight of ideas, or other pathologic form. Thought content shows an absence of delusions, ideas of reference or other pathologic thoughts. His thoughts do reveal an overvaluation of intoxicating substances and his superhuman abilities to ingest them. He is able to do serial seven subtraction, he can spell the word, world, both forward and backward. He recalled three of three objects after five minutes and his fund of general knowledge is excellent.

A review of psychological testing performed by Dr. Ronald Yarbrough at the time of his trial revealed an individual with an above average IQ without evidence of inhibited reality testing or psychotic thinking. However, the testing indicated the likelihood that he would not do well in highly stressful situations.

6. Psychiatric Diagnosis And Profile. On the basis of the review of the background information available and the psychiatric evaluation performed, it is possible to offer the following opinion. It is my professional

opinion to a reasonable degree of medical certainty that Marvin Edwin Johnson carries the following psychiatric diagnosis according to the D.S.M. III-R: polysubstance dependence and polysubstance abuse. These two diagnoses are based on Mr. Johnson's many years of drug abuse as detailed above, and which of course are currently in remission mainly because of the lack of availability of such substances. He remains an individual with a extraordinarily severe drug dependence personality. His diagnosis reflects such a degree of dependence that the seeking of drugs and the use of drugs would supersede his ability to use rational judgment.

7. Psychiatric Opinion Related To The Crime. Although Mr. Johnson denied to me any personal involvement or direct knowledge of the crime for which he has been convicted, it is still possible to offer an opinion as to his state of mind on or about the first week of June, 1978. By his own admission and the affidavits of others, he was at that time highly addicted to opiates and other narcotic substances. At that time he was continuously intoxicated either with synthetic narcotics or a mixture of narcotics and stimulants (specifically a particularly devastating combination of heroin and cocaine known on the street as "speedballing"). Under these circumstances his judgment and ability to reason were greatly impaired and his capacity to appreciate the criminality of any specific acts at that time would have become irrelevant to him, and impossible for him. There is evidence that two days before the crime he had obtained a significant amount of Percodan, a narcotic that is well-known to induce a psychotic state that can include both hallucinations and delusions. Therefore, it is my opinion that in June of 1978, Marvin Johnson was so intoxicated with these substances, or so dedicated to obtaining them, that he was unable to appreciate the nature of his acts.

8. Mitigating Circumstances. I am

> familiar with the Florida death penalty statute and the aggravating and mitigating circumstances contained therein. The following mitigating circumstances would apply to Mr. Johnson:
>
> a. The first mitigating circumstance is that the felony was committed while Mr. Johnson was under the influence of extreme mental or emotional disturbance. At the time of the offense, Mr. Johnson was suffering from an aggravated form of polysubstance dependence and abuse. Whether he was seeking drugs, or using drugs, his medical condition destroyed his capacity for rational thought and volitional behavior.
>
> b. The second mitigating circumstance in my opinion is that Mr. Johnson acted under extreme duress. Due to his psychiatric illness, polysubstance dependence, he was driven to repetitively commit crimes in order to obtain the drugs to which he was hopelessly addicted. Because of this overpowering addiction he was unable to modify his behavior or curtail his criminal activity.
>
> c. Lastly it is my opinion to a reasonable degree of medical/professional certainty that Mr. Johnson's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. Due to his substance abuse and dependency, coupled with the circumstances surrounding the crime, his judgment and perception were so greatly distorted that he would have been unable to appreciate either the nature of the act of homicide or to refrain from committing it.

Report of Dr. Robert Fox, App. 2.

Dr. Peter Macaluso, M.D., an addictionologist, also concludes:

COMES NOW Peter Macaluso, M.D., who, after being duly sworn, deposes and says:

1. I am a physician practicing in the State of Florida with a particular specialty in the field of addictionology and have been certified in that specialty since 1983. I was an expert in the field and was available in Florida in 1978, as were other physicians.

2. I have been qualified as an expert in the area of addictionology in the Courts of this State and also in Federal and Military Courts and have offered expert opinion testimony in both criminal and civil cases. In criminal cases I have testified for both the prosecution and the defense.

3. As a physician, I have treated in excess of 8,000 patients for drug and alcohol abuse.

4. I have specialized in and am familiar with the effects of drugs and alcohol on the human body and mind including the effect on judgment, perception, insight and general competency.

5. I have been asked to offer an opinion as to the effects of alcohol and/or drugs on Marvin Johnson's judgment, perception, insight, ability to form intent, and sanity on June 7, 1978. I have also been asked my opinion regarding mitigating circumstances under the Florida death penalty statutes.

6. In that regard, I have reviewed various transcripts and documents regarding Mr. Johnson, including the Florida Supreme Court's decision, transcripts of Dr. Ronald Yarbrough's 1981 testimony regarding psychological evaluation and testing given at the sentencing phase of Mr. Johnson's trial, hospital records, law enforcement records, a summary of Mr. Johnson's historical background, various affidavits of Mr. Johnson's friends and family who were

familiar with his history and drug abuse, and other records as recorded in the attached list. These are the types of materials normally and regularly relied upon by experts in my field when forming and expressing an opinion.

7. Further, on April 1, 1988, I conducted an extensive evaluation and interview of Mr. Johnson at Florida State Prison during which I obtained a detailed history of Mr. Johnson's alcohol and drug intake.

8. Among those circumstances I have discovered and considered are the following:

a. Mr. Johnson is the product of a chemically dependent family.

b. Mr. Johnson had been using various mood altering and addictive drugs over the 25 years preceding his arrest in this case. By the age of 25, he was using class A drugs including marijuana, alcohol, amphetamines, speed and dexadrine along with LSD.

c. Mr. Johnson began to use quaaludes and became addicted to these as early as 1973.

d. Although Mr. Johnson abused drugs before 1973, his severe opioid addiction began after sustaining a severe back injury in 1973. After being prescribed Demerol for a time, the prescription ran out but Mr. Johnson was still in severe pain. He then began using street Morphine and Heroin administered intravenously.

e. Mr. Johnson subsequently became addicted to opioid narcotics administered intravenously including Demerol, Morphine, Heroin and Dilaudid. This phase of his addiction began in March 1974 and lasted until his arrest in August 1978 with the exception of one year he served in the

Tennessee prison system.

f. Mr. Johnson developed severe tolerance to IV narcotics, being able to inject several hundred-fold the normal dose of narcotic IVs which included Dilaudid, Demerol, Morphine, Percodan and Heroin.

g. Mr. Johnson concurrently began using Cocaine and subsequently developed addiction and increased tolerance to this drug.

h. Mr. Johnson overdosed, and/or went through withdrawal on a number of occasions, on and from intravenous Demerol.

i. Mr. Johnson is and was a severe drug addict. His poly drug addiction is an obsessive, compulsive affliction. The obsession with drugs manifested itself in an adverse impact on his physical well-being. His difficulties included a number of automobile accidents, a number of fights with subsequent broken bones to the hands and arms, and a fractured leg, all of which were sustained under the influence of mood altering and addictive drugs.

j. Mr. Johnson continued to use mood altering and addictive drugs in an obsessive and compulsive manner, despite or because of increasingly severe legal difficulties. He was able to sustain his destructive and self-defeating addiction by resorting to a continuous pattern of crime in order to obtain narcotics for intravenous consumption.

k. Mr. Johnson's uncontrollable use of mood altering and addictive drugs in an obsessive and compulsive manner created psychiatric and emotional difficulties, including four marriages and the development of paranoid ideation and paranoid delusional thinking while under the influence of drugs.

l. Mr. Johnson developed severe

drug tolerance and withdrawal syndromes.

m. Mr. Johnson continued to use in an obsessive and compulsive manner the addictive drugs Morphine, Dilaudid, Demerol, Ritalin, which were being used intravenously along with Marijuana, Cocaine and Percodan on and about the time of the offense of June 7, 1978.

n. Hospital records verify that Mr. Johnson was an addict and suffering from withdrawal at the time of his arrest a little less than two months after the offense.

9. Based upon my interview with Mr. Johnson and my review of the records relating to him, it is my expert opinion that:

a. Mr. Johnson suffers from a severe and advanced form of the disease of chemical dependency.

b. Mr. Johnson has been chemically dependent since about the age of 25 years old.

c. Mr. Johnson's severe and advanced condition of chemical dependency has resulted in a history of blackouts, increased tolerance to intravenous narcotics, and withdrawal syndromes.

d. Despite multiple convictions on felony and misdemeanor charges, Mr. Johnson has never been required to obtain, nor been afforded any treatment for chemical dependency.

e. Due to Mr. Johnson's severe and advanced chemical dependency, he sustained physical, psychiatric, social and legal difficulties, and these worsened as his chemical dependency became more severe.

f. Mr. Johnson's severe and advanced form of chemical dependency resulted in episodes of severe paranoia, metabolic and

chemical organic brain syndrome.

g. Mr. Johnson, during the time period of June, 1978, was suffering from severe and advanced chemical dependency which resulted in an impairment of his judgment, perception, and insight, thereby interfering with rational behavior and his thinking ability.

h. Mr. Johnson, at the time of the crime, suffered from chemical dependency which represented a mental infirmity as described in DSM-IIIR; in my opinion, he was unable to form specific intent to commit the crimes for which he was charged on and/or about June 7, 1978.

i. At the time of the offense, Mr. Johnson was under the influence of extreme mental emotional disturbance, due to his chemical dependency.

j. At the time of the offense, Mr. Johnson was under extreme duress due to the cumulative effect of his drug addiction and the stress of being fired upon.

k. At the time of the offense, Mr. Johnson's capacity to appreciate the criminality of his conduct or to conform his conduct with the requirements of the law was substantially impaired.

l. Mr. Johnson's judgment, perception and insight were globally impaired by his medical condition on or about June 7, 1978, and therefore he was incapable of forming an intent to commit the offenses charged.

10. The opinions expressed in this affidavit are based on a reasonable degree of medical probability.

Report of Dr. Macaluso, App. 3.

5. The Basis for the New Opinion is Background Material

Mr. Johnson has been properly evaluated and diagnosed, and the results are vastly different than those from 1978. The substantial difference in opinion among the evaluations is due to the inadequacy of the 1978 evaluation. This difference in opinion, therefore, is not an example of the well-known "disagreement among experts" that frequently arises in the psychiatric profession. Cf. Ake v. Oklahoma, 105 S. Ct. at 1096. Such disagreement can and does arise where psychiatrists have each followed the recognized procedures for evaluating a patient but have drawn different inferences about the meaning of the data collected. The new information about Mr. Johnson is not such a disagreement. Rather it is wholly attributable to the failure of the 1978 examiner to have the necessary materials then.

a. As the Ake Court held, the due process clause protects indigent defendants against incompetent evaluation by appointed psychiatrists. See also Mason v. State, supra. Accordingly, the due process clause requires that appointed psychiatrists render "that level of care, skill, and treatment which is recognized by a reasonably prudent similar health care provider as being acceptable under similar conditions and circumstances." Fla. Stat. sec. 768.45(1) (1983). In psychology and psychiatry, as in other medical specialties, the standard of care is the national standard of care recognized among similar

specialists, rather than a local, community-based standard of care. See Lemon, supra.

b. In the context of diagnosis, exercise of the proper "level of care, skill and treatment" requires adherence to the procedures that are deemed necessary to render an accurate diagnosis. "[N]ot only must the medical practitioner employ the proper skill and prudence when diagnosing the ailment of a patient but he or she must also employ methods that are recognized as necessary and customary by similar health care providers as being acceptable under similar conditions and circumstances." 36 Fla. Jur. 2d Medical Malpractice sec. 9, at 147 (1962). See also Olschefsky v. Fischer, 123 So. 2d 751 (Fla. 3d DCA 1960).

d. On the basis of generally-agreed upon principles, the standard of care for both general psychiatric and forensic psychiatric examination reflects the need for a careful assessment of medical and organic factors contributing to or causing psychiatric or psychological dysfunction. Kaplan and Sadock at 543. The method of assessment, therefore, must include the following steps:

(1) An accurate medical and social history must be obtained. Because "[i]t is often only from the details in the history that organic disease may be accurately differentiated from functional disorders or from atypical lifelong patterns of

behavior," R. Strub and F. Black, Organic Brain Syndromes 42 (1981), the medical and social history has often been called "the single most valuable element to help the clinician reach an accurate diagnosis." H. Kaplan and B. Sadock, Comprehensive Textbook of Psychiatry 837 (4th ed. 1985). See also MacDonald, T., Psychiatry and the Criminal 102 at 103, 110 (emphasizing the singular importance of a "painstaking clinical history" in order to differentiate an underlying seizure disorder from an antisocial personality disorder).

(2) Historical data must be obtained not only from the patient, but from sources independent of the patient. It is well recognized that the patient is often an unreliable data source for his own medical and social history. "The past personal history is somewhat distorted by the patient's memory of events and by knowledge that the patient obtained from family members." Kaplan and Sadock at 488. Accordingly, "retrospective falsification, in which the patient changes the reporting of past event or is selective in what is able to be remembered, is a constant hazard of which the psychiatrist must be aware." Id. Because of this phenomenon,

> [I]t is impossible to base a reliable constructive or predictive opinion solely on an interview with the subject. The thorough forensic clinician seeks out additional information on the alleged offense and data on the subject's previous antisocial behavior, together with general "historical"

> information on the defendant, relevant medical and psychiatric history, and pertinent information in the clinical and criminological literature. To verify what the defendant tells him about these subjects and to obtain information unknown to the defendant, the clinician must consult, and rely upon, sources other than the defendant.

Bonnie and Slobogin, The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation, 66 Va. L. Rev. 427 (1980). Accord Kaplan and Sadock at 550; American Psychiatric Association, "Report of the Task Force on the Role of Psychiatry in the Sentencing Process," Issues in Forensic Psychiatry 202 (1984); Pollack, Psychiatric Consultation for the Court, 1 Bull. Am. Acad. Psych. & L. 267, 274 (1974); H. Davidson, Forensic Psychiatry 38-39 (2d ed. 1965); MacDonald at 98.

(3) A thorough physical examination (including neurological examination) must be conducted. See, e.g., Kaplan and Sadock at 544, 837-38 and 964; Arieti, S., American Handbook of Psychiatry 1158, 1161 (2d ed. 1978); MacDonald at 48. Although psychiatrists may choose to have other physicians conduct the physical examination, psychiatrists

> [s]till should be expected to obtain detailed medical history and to use fully their visual, auditory and olfactory senses. Loss of skill in palpation, percussion, and auscultation may be justified, but loss of skill in observation cannot be. If the detection of nonverbal psychological cues is a cardinal part of the psychiatrists' function, the detection of indications of

> somatic illness, subtle as well a striking, should also be part of their function.

Kaplan and Sadock at 544. In further describing the psychiatrist's duty to observe the patient s/he is evaluating, Kaplan and Sadock note in particular that "[t]he patient's face and head should be scanned for evidence of disease. . . . [W]eakness of one side of the face, as manifested in speaking, smiling, and grimacing, may be the result of focal dysfunction of the contralateral cerebral hemisphere." Id. at 545-46.

(4) Appropriate diagnostic studies must be undertaken in light of the history and physical examination. The psychiatric profession recognizes that psychological tests, CT scans, electroencephalograms, and other diagnostic procedures may be critical to determining the presence or absence or organic damage. In cases where a thorough history and neurological examination still leave doubt as to whether psychiatric dysfunction is organic in origin, psychological testing is clearly necessary. See Kaplan and Sadock at 547-48; Pollack at 273. Moreover, among the available diagnostic instruments for detecting organic disorders -- neuropsychological test batteries -- have proven to be the most valid and reliable diagnostic instrument available. See Filskov and Goldstein, Diagnostic Validity of the Halstead-Reitan Neuropsychological Battery, 42 J. of Consulting and Clinical Psych. 382 (1974); Schreiber, Goldman, Kleinman, Goldfader, and Snow, The Relationship Between

Independent Neuropsychological and Neurological Detection and Localization of Cerebral Impairment, 162 J. of Nervous and Mental Disease 360 (1976).

(5) The standard mental status examination cannot be relied upon in isolation as a diagnostic tool in assessing the presence or absence of organic impairment. As Kaplan and Sadock have explained, "[C]ognitive loss is generally and correctly conceded to be the hallmark of organic disease," and such loss can be characterized as "(1) impairment of orientations; (2) impairment of memory; (3) impairment of all intellectual functions, such as comprehension, calculation, knowledge, and learning; and (4) impairment of judgment." Id. at 835. While the standard mental status examination (MSE) is generally used to detect and measure cognitive loss, the standard MSE -- in isolation from other evaluative procedures -- has proved to be very unreliable in detecting cognitive loss associated with organic impairment. Kaplan and Sadock have explained why:

> When cognitive impairment is of such magnitude that it can be identified with certainty by a brief MSE, the competent psychiatrist should not have required the MSE for its detection. When cognitive loss is so mild or circumscribed that an exhaustive MSE is required for its recognition then it is likely that it could have been detected more effectively and efficiently by the psychiatrist's paying attention to other aspects of the psychiatric interview.
>
> In order to detect cognitive loss of small

> degree early in its course, the psychiatrist must learn to attend more to the style of the patient's communication than to its substance. In interviews, these patients often demonstrate a lack of exactness and clarity in their descriptions, some degree of circumstantiality, a tendency to perseverate, word-finding problems or occasional paraphasias, a paucity of exact detail about recent circumstances and events (and often a lack of concern about these limitations), or sometimes an excessive concern with petty detail, manifested by keeping lists or committing everything to paper. The standard MSE may reveal few if any abnormalities in these instances, although abnormalities will usually be uncovered with the lengthy MSE protocols.
>
> The standard MSE is not, therefore, a very sensitive device for detecting incipient organic problems, and the psychiatrist must listen carefully for different cues.

Id. at 835. Accordingly, "[c]ognitive impairment, as revealed through the MSE, should never be considered in isolation, but always should be weighed in the context of the patient's overall clinical presentation -- past history, present illness, lengthy psychiatric interview, and detailed observations of behavior. It is only in such a complex context that a reasonable decision can be made as to whether the cognitive impairment revealed by MSE should be ascribed to an organic disorder or not." Id. at 836.

e. In sum, the standard of care within the mental health profession which must be exercised in order to diagnose is most concisely stated in Arieti's American Handbook of Psychiatry:

> Before describing the psychiatric examination itself, we wish to emphasize the importance of placing it within a comprehensive examination of the whole patient. This should include a careful history of the patient's physical health together with a physical examination and all indicated laboratory tests. The interrelationships of psychiatric disorders and physical ones are often subtle and easily overlooked. Each type of disorder may mimic or conceal one of the other type. . . . A large number of brain tumors and other diseases of the brain may present as "obvious" psychiatric syndromes and their proper treatment may be overlooked in the absence of careful assessment of the patient's physical condition. The psychiatrist cannot count on the patient leading him to the diagnosis of physical illness. Indeed, patients with psychiatric disorders often deny the presence of major physical illnesses that other persons would have complained about and sought treatment for much earlier.

Id. at 1161.

f. A history of the patient is especially relevant for a diagnosis of psychoactive substance dependence, and organic brain syndrome caused by drugs:

> The essential feature of this disorder is a cluster of cognitive, behavioral, and physiologic symptoms that indicate that the person has impaired control of psychoactive substance use and continues use of the substance despite adverse consequences. The Diagnostic criteria for Psychoactive Substance Dependence
>
> A. At least three of the following:
>
> (1) substance often taken in larger amounts or over a longer period than the person intended

(2) persistent desire or one or more unsuccessful efforts to cut down or control substance use

(3) a great deal of time spent in activities necessary to get the substance (e.g., theft), taking the substance (e.g., chain smoking), or recovering from its effects

(4) frequent intoxication or withdrawal symptoms when expected to fulfill major role obligations at work, school, or home (e.g., does not go to work because hung over, goes to school or work "high," intoxicated while taking care of his or her children), or when substance use is physically hazardous (e.g., drives when intoxicated)

(5) important social, occupational, or recreational activities given up or reduced because of substance use

(6) continued substance use despite knowledge of having a persistent or recurrent social, psychological, or physical problem that is caused or exacerbated by the use of the substance (e.g., keeps using heroin despite family arguments about it, cocaine-induced depression, or having an ulcer made worse by drinking)

(7) marked tolerance: need for markedly increased amounts of the substance (i.e., at least a 50% increase) in order to achieve intoxication or desired effect, or markedly diminished effect with continued use of the same amount

Note: The following items may not apply to cannabis, hallucinogens, or phencyclidine (PCP):

(8) characteristic withdrawal symptoms (see specific withdrawal syndromes under Psychoactive Substance-induced Organic Mental Disorders)

(9) substance often taken to relieve or avoid withdrawal symptoms

B. Some symptoms of the disturbance have persisted for at least one month, or have occurred repeatedly over a longer period of time.

Criteria for Severity of Psychoactive Substance Dependence:

Mild: Few, if any, symptoms in excess of those required to make the diagnosis, and the symptoms result in no more than mild impairment in occupational functioning or in usual social activities or relationships with others.

Moderate: Symptoms or functional impairment between "mild" and "severe."

Severe: Many symptoms in excess of those required to make the diagnosis, and the symptoms markedly interfere with occupational functioning or with usual social activities or relationships with others.

In Partial Remission: During the past six months, some use of the substance and some symptoms of dependence.

In Full Remission: During the past six months, either no use of the substance, or use of the substance and no symptoms of dependence.

American Psychiatric Association, DSM III-R, 166-68 (1987). As his history reveals, Mr. Johnson was addicted to psychoactive substances.

6. The Investigation Necessary for Proper Evaluation Provides Evidence Having Independent Mitigating Value

It is clear that counsel's failure in this case deprived the jury of significant evidence in mitigation and thereby deprived Mr. Johnson of a reasonable basis for a jury recommendation. Had counsel conducted an investigation, it would have been discovered that Mr. Johnson had an impoverished upbringing, that he had a good relationship with his family, and that his debilitating drug addiction arose from a terrible accident four years before the offense. The following background is relevant to sentencing, should have been provided to Dr. Yarbrough, the jury, and the judge in 1978, and would have provided a basis for life:

a. Marvin Edwin Johnson was born on November 27, 1942, into an impoverished Starke, Florida, family. His father, Marvin Henry Johnson, lost his sight in 1929 after dynamite caps exploded in his face and caused cataracts to develop in both eyes. Mr. Johnson, whose left arm was paralyzed by the blast, was self-employed cutting pulpwood and a common laborer before he lost his sight. Mary Ellen Johnson, who never worked outside of her home, had a limited education and few if any marketable skills. Starke is a rural North Florida town and the Bradford County seat. It offered little, if anything, in the way of employment for its unskilled working women, and no jobs for the disabled.

b. At Marvin's birth, the Johnson family's financial condition was already desperate and remained so throughout Marvin's life. The family survived largely on a state subsidy.

> Welfare was our primary means of support and when Marvin was growing up, it wasn't much. Our financial condition was terrible. The farm made a little money, but not enough to take care of all of our needs or our wants. I could rarely give Edwin extra money. I guess he can still remember me saying, "Edwin, we can't afford it." And we couldn't. Everything was a struggle.

Affidavit of Mary Ellen Johnson, App. 8a.

c. Young Marvin and a cousin of the same age, who his parents also raised, shouldered the immense responsibilities on the farm:

> When we bought the land in Starke, Edwin, along with his cousin, built our house which I am still living in today. My husband told them how to build it. Without a diagram or anything, Marvin, who was probably 12 or 13 at the time, and his cousin completed the house during the summer, working on it night and day. The house did not have indoor plumbing or very many conveniences, but my son helped to provide the first place that we could really call home.

Id. Marvin's contribution to the Johnson family was immeasurable and far-reaching:

> Marvin had work to do before and after school on our 39 acre farm. Before he went to school, he had to feed the livestock. After school, he planted crops, picked beans or strawberries, cut wood and did whatever other work my husband couldn't do.

Id.

d. A strong bond existed between father and son. Marvin never objected to the heavy chores that his father could not do. Marvin admired his father, especially because he never complained about his blindness and blamed his own carelessness for his lost sight. Mrs. Johnson reports Marvin was extremely considerate of his disabled father and often volunteered to help his father:

> Marvin really loved his father and it was not unusual for Marvin to go out of his way to help him. I don't think Marvin ever resented the work, but I know for a little boy trying to wear a man's shoes, it wasn't easy.

Id.

e. While Marvin tolerated the rigors of farm work, the signs of his poverty in his youth, caused him to be the butt of the type of unkind remarks that children often inflict on one another.

f. Marvin's meager financial condition apparently showed itself in his physical appearance. According to his Bradford County Public School records, a 1953 evaluation of his social and personal assets was very low. According to Mrs. Johnson:

> I'd make clothes from feed sacks for Marvin and we depended on people to give us clothes. If they didn't, we probably would have been naked.

See affidavit of Mary Ellen Johnson, App. 8a. Although Marvin claimed he was not bothered by his financial poverty, his self-esteem suffered a blow, judging from remarks made by his fifth grade teacher:

> . . .[Marvin] needed to have confidence in (him)self built up. (See Bradford County Public School records.)

See Bradford County Public School Records, App. 7a.

g. Perhaps the farm work and a poor self image took its toll and served to discourage Marvin, whose aptitude test scores suggested average to above average ability. Marvin's grades pivoted from satisfactory to poor, from 1948 to 1953. Marvin's interest in school was never properly kindled. His sixth and seventh grade teachers reached similar conclusions about his condition:

> He [Marvin] liked to read about science and needs more help to get started than others.

Id.

h. Marvin, however, had little opportunity to neglect his work at home. His chores in fact occasionally caused him to have to miss school. Perhaps if his teachers were aware of the extent of his contribution to his family's livelihood, their perception of Marvin might have been more complimentary. Mrs. Johnson saw in her son a boy with a great deal of initiative:

> Fortunately, Edwin wasn't a lazy boy. I guess he couldn't be. He was busy from morning to night. He had a tough time and rarely had the opportunity to have fun like other little boys. I sometimes think Edwin grew up wanting time to be a child, and before he knew it he was grown and with a family of his own. He married at 17 and his first child was born the following year.

See affidavit of Mary Ellen Johnson, App. 8a.

i. Marvin married four times. His first was the longest. He and Martha Jane Tyler had three children: Martha Jean, Marvin Jr. and Rickey Ray. The family settled in Jacksonville.

j. Marvin's first criminal offense occurred in 1964. His car was destroyed after it was hit by a drunken driver. Within days of the accident, Marvin stole a car from a used car lot in order to go to work. Marvin pled guilty, and he was sentenced to four years in the Duval County Jail. Later he escaped from a road gang and went to Brunswick, Georgia, where he was arrested. A second escape from the Brunswick Jail led to a four-year sentence, two years to be served in the Waycross Road Prison in Reidsville and two years at Union Correctional Institution (UCI). Marvin earned his general equivalency diploma (GED) in 1968, while at Reidsville. During this prison term, his first wife divorced him.

k. Marvin later returned to Jacksonville but within two years, was again arrested and convicted and sentenced to 15

years at UCI for breaking and entering in 1972. After having served two years, he was released when his conviction was overturned on appeal.

l. Marvin married twice more but both marriages ended in divorce within one year. Marvin's legal problems had much to do with this. Marvin's fourth marriage to Sherrie Inez Koehler started out extremely well. Marvin and Sherrie were devoted to one another and the union benefitted from shared interests and a similar North Florida upbringing. Sherrie was from Hampton, Florida, a hamlet located near Marvin's boyhood home. Sherrie recounts their early married life:

> For the first year, our married life was blissful and was everything I expected it to be. We had a lovely townhouse and Marvin had a decent paying job as a carpenter at the Jacksonville shipyards. Marvin was not only a good husband to me, but also a friend and someone I could talk to about everything. He was a kind and generous man, who would give the shirt off his back to a stranger if he needed it. We had a lot in common including our opposition to drugs.

See affidavit of Sherrie Inez Koehler, App. 8e.

m. Marvin and Sherrie despised drugs, but Marvin was more outspoken when speaking to his friends.

> He [Marvin] didn't believe in doing drugs and he preached to people about the pitfalls of using drugs.

Id.

> Marvin was a real health freak who was really concerned about his body and keeping in shape. In fact, he was really down on people who used hard drugs.

See affidavit of Gwendolyn Gail Millikin, App. 8d.

> Marvin had little patience for his friends who used drugs. Sometimes he would fuss at them, cuss them or call them crazy. At one time, Marvin would not have anything to do with drug abusers.

See affidavit of Jerry Mitchell Lawrence, App. 8c.

n. In 1974, Marvin's life took a tragic twist which led him to death row. In early 1974, Marvin was seriously injured in a motorcycle accident. As a result,

> [h]e was in so much pain that many days he was barely able to walk.

See affidavit of Terry Wayne Gayle, App. 8b.

> Marvin couldn't work or comfortably do the things he enjoyed and I think he may have felt he was less than a man because of his back problems.

See affidavit of Sherrie Inez Koehler, App. 8e. Marvin attempted an extreme solution to alleviate the nagging pain:

> Marvin was practically bedridden. By the time his friend, James Halsell, who we called B.B., offered Marvin a shot of morphine to stop the pain, I think Marvin would have tried anything.

Id.

> B.B. injected Marvin with four hits of morphine. I was opposed to the drugs, but Marvin told me that he was doing this for his back and would stop when his back got better. Well his back never got better

> and Marvin's first shot led to many more shots of every kind of hard narcotic: morphine, heroin, dilaudid, cocaine and speed.

Id.

o. Marvin slipped into the drug culture, which assumed a vise-like grip, preventing his escape. In rapid-fire fashion, Marvin's insatiable drug appetite propelled him into a voracious consumption of Class IV narcotics:

> Marvin's world revolved around drugs from 1974 to 1976. If he was not sleeping or nodding off, he was shooting narcotics into his veins. He kept a set of works--a syringe and a spoon--on every floor in our three story townhouse, including the bathrooms. Marvin was never without drugs.

See affidavit of Sherrie Inez Koehler, App. 8e.

> Marvin would shoot 10 #4's of dilaudid at one time. That's enough drugs to kill three people. He did this three times a day and sometimes more often. He would shoot drugs until his supply ran out.

See affidavit of Terry Wayne Gayle, App. 8b.

> Marvin's drug usage ranged from morphine, dilaudid and heroin and cocaine, marijuana and quaaludes. He was the most abusive drug user that I have ever seen. And I've seen them all because I sold drugs and often sold Marvin many of the drugs he consumed. Marvin was easily the contender for the title of worst drug user. He was such a big person that he needed more drugs than most people. I remember seeing Marvin shoot one blue morphine--usually divided between four people. It didn't even phase him.

See affidavit of Jerry Mitchell Lawrence, App. 8c.

p. Marvin's drug use shocked his wife and Marvin's close friends, who witnessed a dramatic change in his personality, disposition and overall emotional state:

> Prior to 1974 and the motorcycle accident, Marvin was anything but an addict. He took pride in his physique and was careful about his weight. Marvin was always well-groomed and neat in appearance. After his introduction to drugs, Marvin lost weight and just didn't seem to care about how he looked.

See affidavit of Terry Wayne Gayle, App. 8b.

> I've seen a lot of addicts, but Marvin was the worst. He went from the good-natured, fun-loving guy to an emotional and irritable person, whose moods were totally predictable. He lost interest in everything except drugs. He didn't want to go out anymore, wouldn't go to see his family and was constantly on edge. It was impossible to be around Marvin when he didn't have drugs.

See affidavit of Gwendolyn Gail Millikin, App. 8b.

q. Marvin's drug addiction made him irritable and cranky. A few times it almost killed him:

> The memory of one particular overdose still troubles me. I had come home from work and found Marvin unconscious and wet with perspiration on the basement floor of our townhouse. Although I weighed 115 pounds, I managed to pick him up and walk him around the room. I decided a cold shower would help to bring him out of it. I got him to the upstairs bathroom and set him down on the commode and turned my back to start the shower. As I turned around, Marvin had reached for his supply of drugs and was attempting to inject himself with

> drugs without a syringe. He was so out of it, he thought his finger was a syringe and he continually pumped his finger trying to extract the drugs from the bottle. I became very emotional and knocked the bottle out of his hands.

See affidavit of Sherrie Inez Koehler, App. 8e.

r. Episodes such as the one previously mentioned could have encouraged Marvin to seek help. For several months during 1976, Marvin went to the Jacksonville methadone clinic:

> The clinic opened and closed on schedule and Marvin would really got frantic when he thought he would be too late to get his methadone. One day when Marvin was out of drugs we got to the clinic after closing time and Marvin almost beat the door down. More than once, when he was too sick to drive himself, I drove him to the clinic. That's when I really knew he was strung out.

See affidavit of Gwendolyn Gail Millikin, App. 8d.

s. On July 8, 1976, Marvin returned home after being out all night shooting drugs and told Sherrie to pack their bags. They drove then to Cleveland, Tennessee. Marvin was sick all the way there. He had no drugs with him, except for a bottle of methadone given to him at the Jacksonville methadone clinic. After checking into a motel, Sherrie drove Marvin to the Cleveland Mall where he robbed a drugstore. They rushed back to the motel room and as soon as they walked in:

> . . .Marvin emptied the bag filled with drugs and money, and wildly searched through the drugs until he found what he wanted. He shot up as quick as he could

> fix it. After his shot, Marvin calmed down. That's the way it was . Marvin was not himself until he had his injection.

See affidavit of Sherrie Inez Koehler, App. 8e.

t. As Sherrie recalled that she and Marvin were both arrested that same day:

> . . .I would call out to him while we were in jail. He was really sick and I was worried about him. But he told he that he was in withdrawal and I gave him the methadone that was found in my purse when we were arrested.

See affidavit of Sherrie Inez Koehler, App. 8e. They both pled guilty and were later sentenced to fifteen years and ten years, respectively. On November 15, 1977, Marvin escaped from the Tennessee State Prison and resumed his drug consumption with a feverish pace.

u. Marvin sought out his former associates with links to the drug world, including B.B.:

> One night Marvin showed up at my house looking for James Halsell. Almost as soon as he arrived, B.B. gave Marvin morphine, demerol and dilaudid. Marvin was on edge, nervous and cranky. One night when B.B. hit a curb, Marvin went berserk. He was almost in a rage. I had never seen Marvin so stressed out. Marvin left Jacksonville within a few days.

See affidavit of Gwendolyn Gail Millikin, App. 8d.

v. Marvin urgently needed drugs with his drug consumption resurrected and criss-crossed Florida, Alabama, Texas and Louisiana looking for drugstores to rob. In Mobile, he

reunited with a friend, Jerry Mitchell, from Jacksonville.

w. Shortly before the offense in his case, Marvin was completely out of control, and virtually psychotic. Marvin and Jerry Mitchell took three ounces of cocaine within two days:

> The coke did not satisfy Marvin's hunger for drugs and he asked me to do a robbery with him to get more drugs. I told him I was not prepared, so Marvin said that he would do the robbery alone.
>
> We checked out a drug store that I thought was too dangerous . . .
>
> While I waited across the street on the opposite corner, I saw Marvin drive a stolen car through the front entrance of the drugstore. I was amazed at Marvin's daring, but it also signalled to me how desperate and unreasonable Marvin was when he needed drugs. I followed him to another hotel across town from the hotel where we were registered to get rid of the car. When we returned to our hotel room, Marvin ran in and dumped the drugs on the bed. Scrambling through them in a frenzy, he ran over to the sink and got the dilaudid ready to shoot up. He shot the two bottles of dilaudid tablets taken in the robbery--at least two hundred pills within two days.

See Mobile Register, May 17, 1976, App. 16.

x. A Florida Department of Law Enforcement investigative report shows Marvin had prescriptions filled June 5 and June 27 for the drug Percodan in the Orange Lake Drug Store, App. 15.

y. On August 3, 1978, Marvin was injured in an

automobile accident in Atmore, Alabama (App. 11), and was taken to the hospital and admitted under the name of Daniel Michael Vale. Within hours, Marvin was taken into custody, transferred by ambulance to the West Florida Hospital (App. 12), and arrested on a charge of armed robbery and the first degree murder of Woodrow Moulton. The medical records reveal he is a severe drug addict.

Sentencing counsel acted unreasonably by failing to offer the jury a reasonable basis for life. Had Dr. Yarbrough known facts, there would have been a different result. An evidentiary hearing is proper.

C. VIOLATION OF DUE PROCESS AND THE RIGHT TO EFFECTIVE COUNSEL BEFORE THE SENTENCER -- THE JUDGE

The sentencing judge knew about the aggravating side of Mr. Johnson's drug addiction -- he presided over pretrial (and out of jury presence) hearings and conferences which revealed to him Mr. Johnson's criminal problems. What the judge did <u>not</u> learn, due to counsel's and mental health expert's omissions, was the mitigating side of drug addiction -- it began with a motorcycle accident and ended with an addiction that was "controlling almost all of Marvin's waking energy prior to the June 7, 1978, murder," he was "totally controlled by the availability and use of Schedule IV narcotics," he "was not in contact with reality

either during a drug-altered state of mind, or sometimes when seeking drugs," and he was in a "totally emotional, irrational mode of response." See 1988 Report of Dr. Yarbrough, App. 1.

Jury sentencing occurred December 9, 1978. Judge sentencing occurred January 12, 1979. Counsel knew Dr. Yarbrough was unprepared December 9, 1978, but did nothing to prepare him for the January 12, 1979, sentencing. It is unreasonable to believe a presentence investigation is needed, to believe Dr. Yarbrough needed more information, and to do nothing for over a month. Mr. Johnson was denied the right to effective assistance of counsel, and the right to the assistance of competent mental health professionals.

ARGUMENT II

TRIAL COUNSEL DID NO PREPARATION REGARDING THE CRUCIAL BALLISTICS AND CRIME-SCENE RECONSTRUCTION EVIDENCE WHICH THE STATE USED TO CONNECT MR. JOHNSON TO THE CRIME, AND HAD COUNSEL CONDUCTED REASONABLE INVESTIGATION AND PREPARATION THERE IS A REASONABLE PROBABILITY THAT THE RESULT IN THIS CASE WOULD HAVE BEEN DIFFERENT

The State's case was a shaky eyewitness identification, shaky because of the way in which it was produced.[2] In order to

---

[2]The on-the-scene, suggestive single suspect photographic identification procedure utilized in this case has no equal. Immediately after the offense, police officers arrived at the scene. A distraught, hysterical, crying, frightened, "shook-up" purported eyewitness was encountered (R. 190). The witness, Gary Summitt, gave a brief description of the assailant. In the witness's presence, one officer asked another officer if he had a picture of Mr. Johnson. The officer went to his automobile, returned with a photograph, and the witness was told "look at this and tell me if this is the person" (R. 175). According to the officers, the witness was shown several pictures of only Mr. Johnson. The witness heard the officers say "it is who they figured it was" (R. 181), that the person in the photograph had been "robbing drugstores around in the area" (R. 178), and that the FBI had been trailing him (R. 181). The witness said the man in the picture was the robber.

bolster the case that Mr. Johnson committed the offense, the State presented "crime-scene reconstruction" testimony, the point of which was to show that a bullet that was supposedly in Mr. Johnson's body was a bullet fired by the victim. The victim shot at the culprit, and the culprit shot at the victim. By counting the slugs and shells, and by presenting testimony about whether shots traveled left to right or right to left, Officer Wolff opined that an unrecovered slug was the same slug that apparently was still in Mr. Johnson's body. In closing argument, the importance of this evidence was made clear:

> The defendant's lawyer says there's no physical evidence to link this defendant to this crime. Generally, finger prints and things aren't found, but, certainly, you should be explained to what crime scene investigation was done, but in this case, there's physical evidence, and there's a lot of circumstantial evidence to corroborate Gary Summitt's testimony, and the physical evidence is the bullet in this defendant's body.

(R. 1424).

The linkage requires two findings: (a) that a bullet from the victim's weapon is unaccounted for, and (b) that that bullet was in Mr. Johnson. Both propositions were readily refutable, but trial counsel made no effort to refute. This claim presents the refutation that was available to demonstrate innocence. Since this claim presents a colorable claim of innocence in fact, it should be heard now, in the interest of justice. The two-year

time bar of Rule 3.850 should not apply, for the reasons discussed in Argument III, infra.

A. COUNSEL DID NO INVESTIGATION OR PREPARATION FOR THE BALLISTICS AND SCENE-RECONSTRUCTION EVIDENCE

Counsel unreasonably failed to have any expert assist in interpreting the ballistics and on the same evidence. The State, using photographs of the reconstructed scene, evidence collected at the scene, and the statement of the purported eyewitness -- all of which was available to counsel -- produced the testimony of Wolff who, in great detail, purportedly traced the trajectory of all bullets fired (R. 1060-1143). According to Wolf, the victim had a gun that was a five-shot. Five empty casings were in that gun. The victim was shooting left to right, and four of the victim's shots were purportedly accounted for through trajectory analysis. See Exs. 35, 38, 34, R. 1107-11). Assuming a fifth bullet, and no trajectory marks in the store (i.e., holes in things), the fifth bullet went in Mr. Johnson. Since the officers could find no trace of a fifth bullet from left to right, the theory goes, it was in Mr. Johnson.

This compelling evidence actually was without support, but the professional "expert" crime scene reconstruction evidence went unrefuted. Counsel objected to it, but could offer nothing to refute it. This is because counsel did no preparation. Terry Terrell, who entered the case the weekend before trial began,

explains -- Lynn Williams, counsel up until then, who had been "almost solely involved in gathering the facts" (R. 588), did not look at the evidence:

> 1. I, Terry D. Terrell, Chief Assistant Public Defender, First Judicial Circuit, State of Florida, was assigned as an assistant public defender to a felony division in Escambia County, Florida, during 1978. Our office was appointed to represent Marvin Edwin Johnson on his first degree murder charge in Escambia County during that year. Lynn A. Williams was an assistant public defender assigned to the case and was responsible for its preparation. I believe it was her first capital trial.
>
> 2. As the trial date approached, I had some general discussions with Ms. Williams about the eyewitness identification question in the case and heard about suppression hearings she was presenting on that issue. During the week before trial she was given a list of new witnesses to an alleged jewelry store robbery in Gainesville, Florida, in which Mr. Johnson was alleged to be a participant. Final hearings were being held and this short notice disrupted Ms. Williams trial preparation. She had taken most of the depositions up to that point but had two other assistants do some of the last depositions for her.
>
> 3. Ms. Williams had been concentrating on development of and preparation for admission of expert testimony on the issue of stress affecting perception and memory, and she had not looked at the physical evidence. She had little knowledge of ballistics, and I volunteered to help her review the physical evidence when it became apparent that the Court was not going to allow her to present the expert testimony on eyewitness identification. Ms. Williams and I reviewed the physical evidence at the evidence room over the weekend immediately before trial

began.

App. 4.

Mr. Terrell, over the weekend, suddenly became the attorney responsible for dealing with ballistics and crime scene reconstruction:

> 5. Ms. Williams spent the better part of the day on Sunday taking depositions. It was decided during the weekend that I would sit through the trial taking notes so that I could do a closing statement, being in the position of a neutral observer. I had not taken nor been present at any of the depositions. Ms. Williams and I met briefly with Mr. Johnson to introduce me to him.
>
> 6. On the morning of trial, Ms. Williams was exhausted. Consequently, my role expanded.
>
> . . . .
>
> 11. Although I cross-examined the physical evidence witnesses, I was not familiar with the angle of entry issue of the bullet purportedly in Mr. Johnson's pelvis until that testimony was developed in trial. My voir dire had not touched on the bullet issues because the Court had not ruled on its admissibility, according to Ms. Williams, and I didn't want to expose the jury to facts which might not be admissible.
>
> 12. I was aware that no blood spots had been found in the position where the robber was found, but I did not anticipate the testimony of the radiologist which explained the absence of blood. I did not object to the hypothetical used with the radiologist to develop angle of entry evidence on the basis of an improper predicate.

App. 4.

Had counsel looked at the evidence early enough, rather than the day before trial, they could have prepared for what it meant. Undersigned counsel contacted a forensic expert, Mr. H. Dale Nute, to determine the relevance of the evidence introduced. Mr. Nute worked for FDLE for sixteen (16) years. Among other things, his duties were:

> [O]n-site and laboratory assistance to local and state law enforcement agencies in the use of physical evidence in the investigation of major crimes. This included consultation on the value of physical evidence in the investigation; conduct of detailed crime scene searches for collection and preservation of evidence materials; and interpretation of the information produced by the crime scene analysis with respect to the subsequent crime laboratory analyses.

App. E. He has testified as an expert witness in over 200 criminal trials. He evaluated the exact evidence the State presented and came to the following conclusions:

> Neither the Escambia County Sheriff's Office nor the Public Defender's Office conducted an adequate crime scene investigation or reconstruction. The crime scene examination was inadequately documented to the extent that it would not have been possible for an independent expert to replicate all of the trajectory findings of the Sheriff's Office <u>Evaluation of the existing documents indicates that a reexamination of the scene by an independent expert could have produced additional information which could have materially assisted in the investigation or defense of the case</u>. Evaluation of the preparation by the defense attorneys and trial defense indicates that if adequate crime scene procedures had been employed, <u>the Defense could have challenged the State's</u>

conclusions based on the crime scene analysis.

The location after trail of a copper jacket from a bullet and of a possible additional bullet strike on the west wall together with the omission before trial of a conclusive method of determining which weapon fired specific projectiles indicates that the prosecution could be mistaken in its conclusion that the victim fired five rounds but only four remained at the scene.

Observations:

The following deficiencies were noted concerning the documentation and evaluation of the crime scene:

1. The identification officers did not take adequate or proper photographs;

No close-up photographs were taken of projectiles recovered.
No close-up photographs were taken of the bullet strikes on the west wall.
No photograph was taken to orient the ballpoint pen display portion of the trajectory of one of the bullets with the rest of the scene.
No photograph was taken to orient the bullet holes on the west wall with the rest of the scene.
Sufficient photographs were not taken to document the proper position of the floor scales both in their location on arrival of the ID officer and after being "reconstructed."
Sufficient overall photographs were not taken to orient the locations of the individual actions with each other and the rest of the scene.
Photographs were not taken from the position of the eye witness to establish his opportunity for viewing the actions related in his statement.
Photographs were not taken of all reconstructions and no photographs

relating the reconstructions to the rest of the scene were made.

2. The identification officers did not adequately measure the scene;

The locations of all movable objects required to be positioned for reconstruction were not measures. The locations of those movable objects that were measured from two fixed objects but the relative locations of those objects were not properly measured either to each other or the room walls.
No vertical measurements were made.

3. Conclusions of the identification officer were based on inadequate information;

The six bullets which were recovered were not submitted to a firearms examiner for analysis as to which ones were fired from the victim's revolver and which ones were not.
A piece of metal, apparently a copper jacket from a bullet, was located in one of the packages in the store after the trial.
A hole adjacent to the ceiling moulding on the west wall approximately one-half foot south of the higher bullet impact on the wall was not reported in either the deposition or trial testimony of the identification officer. The hole was observed by this analyst in the photograph duplicating trial exhibit number 10. The hole was physically observed by Mr. F. T. Ratchford, an attorney in Pensacola who has considerable experience with various caliber handguns. His observations are that the size and shape of the hole is consistent with being caused by a bullet of caliber greater than .25 and smaller than .45 which entered at an angle close to vertical
None of the projectiles, including the

one found in the aisle, exhibit 35, were submitted to a laboratory for identification of any debris such as plaster. The identification officer was not qualified as an expert in the identification of trace materials and indicated no basis for his opinion that there was plaster on exhibit 35. However he used that opinion in his interpretation.

The following additional deficiencies were noted in the presentation and defense of the case which could have been more aggressively challenged with additional preparation by the defense attorneys and by the use of an independent crime scene reconstruction expert:

1. In order to prepare for a challenge to the credentials and performance of the identification officer, he should have been questioned during a deposition in the following areas;

The content or quality of the training in the area of crime scene reconstruction,
The inadequate measurements and sketch of the scene,
The inadequate and insufficient photographs of the scene,
The inadequate determination of trajectory,
The failure to follow up by submitting bullets for examination by a firearms examiner,
The failure to recover smeared bullet material from the areas of suspected ricochet for laboratory examination,
The failure to recover the bullets from behind the paneling,
The failure to observe the hole in the west wall above the other two bullet strikes,
Possible inadequate personal questioning of the eyewitness for details that can be used to check or refute

reconstruction hypotheses.

2. The conclusions of the identification officer could have been challenged in the following instances;

The origin of the trajectory for the projectile which traveled through the sanitary napkins on the top shelf and impacted on the west wall, trial exhibit number 38, was not described in trial testimony, page 1140, nearly as precisely as the photograph reconstructing the trajectory, trial exhibit number 30, indicates is possible.

The logic that the projectile located in the aisle 15-20 feet from the west wall could strike a vertical surface and ricochet back the direction it came from. According normal physical principles, the projectile would be expected to have continued in a vertical direction after striking the wall and to have struck the ceiling. No observation of an impact on the ceiling was noted during the original investigation, nor was one apparent, to Mr. Ratchford today. No observation of anything unusual about the wall was noted which would have caused it to behave in an unusual fashion.

The logic for determining that all the "unclad" rounds were fired from the victim's weapon.

The logic that all the rounds fired from "left to right" were fired from the victim's weapon and that all the rounds fired from "right to left" were fired by the assailant.

The logic for ignoring the observation that an "unclad" round, trial exhibit 37, was determined to be fired from "right to left" which contradicts his assumptions.

3. The following preparatory procedures were not followed;

The rough sketch made at the deposition was not included as a part to the transcript.
No sketch was requested for evaluation by an independent examiner.
The photographs were not adequately examined by either the attorneys or an independent examiner to determine that they were not suitable to allow independent evaluation.

Conclusions:

The requirements of photography for reconstruction are more rigorous than those for merely recording the existence of an object. In addition to normal crime scene procedures, photographs must demonstrate the connections between different portions of the trajectory and their orientation with the rest of the scene in clear perspective. Likewise the requirements of measurements for reconstruction are more rigorous than those required only to provide perspective. In addition to normal crime scene measurements all movable objects involved in the calculation of a trajectory should be located by measurement to a fixed object. Vertical measurements obviously become critical in order to establish trajectories in three dimensions.

Reconstruction is an expert opinion based on observations and interpretations. These observations must be able to be reproduced in order to evaluate the interpretations. An opinion of an expert cannot effectively be cross-examined unless the interpretations can be independently evaluated.

It is not possible to conduct a satisfactory independent reevaluation of the trajectory interpretations based on the documentation available in this case. The photographs are inadequate, insufficient and lack connecting orientations. The measurements are inadequate and insufficient. The only

existing sketch does not include all critical items and those it shows are in faulty perspective.

Notwithstanding, evaluation of the existing documents indicates that they could be used in combination with an examination of the nonmovable objects at the scene to produce information in addition to that provided by the State in discovery. Examination of the photographs located an additional hole which upon examination at the scene today had the characteristics of a bullet hole of the appropriate caliber.

The above observations and conclusions demonstrate that the performance, if not the qualifications, of the crime scene processing personnel was not up to the standards commonly acceptable in 1978. This weakness in the State's case was not exploited by the Defense according to the testimony examined. Failure to obtain the assistance of an independent crime scene examiner appears to have been a major omission in the preparation of the Defense. Failing to obtain or to have been provided a crime scene sketch also contributed to not being able to adequately prepare for cross-examination of the identification officer.

A distinct possibility exists that the conclusion, implied by the identification officer and asserted by the prosecution in closing argument, that the bullet in the defendant was from the victim's weapon because only four trajectories were at the scene were determined to originate from the victim's weapon is mistaken. The assumption that all of the ammunition fired in one weapon will be of the same type is not valid as indicated by the defense questions on reloaded cartridge cases. Likewise, the assumption that all of the rounds fired by the other will be in the opposite direction is not valid. A copper jacket from a bullet found after trial in a package at the scene indicates that the identification officer

> could have been mistaken in his conclusion. A more affirmative indication of the possibility of a mistake is the location today of a possible additional bullet hole within three feet of one of the other bullet strikes on the west wall.

App. E.

This expert knows that the State's proof was completely lacking, and finds defense counsel's omissions completely unreasonable. Trial "forensics" counsel Terry Terrell explains why the omission occurred:

> 15. I have reviewed the report of H. Dale Nute dated April 9, 1988. The information he provided would have been extremely helpful to the defense, ... We were not prepared at all to confront, rebut or challenge the conclusions from the ballistics and scene reconstruction witnesses. This was not from strategy -- we simply did not do it. Ms. Williams had not seen the physical evidence until we both looked at it the weekend before trial. We could have hired our own expert in 1978. We never considered the prospect of hiring a crime scene reconstruction expert under the circumstances of the last minute review of the physical evidence. I went by the store during the trial one night after the pharmacy was closed. I looked in the front windows. I was unable to see any of the locations of the bullet strike marks from my vantage point and due to being involved in the trial I was unable to get by there while it was open to make those observations. At no time did Ms. Williams indicate that she had examined the crime scene.

App. 4.

Counsel's unreasonable omissions regarding critical but incorrect State testimony denied Mr. Johnson an adversarial

proceeding, and confidence in the reliability of the outcome is undermined.

B. COUNSEL WAS INEFFECTIVE

Counsel's role is to "assure that the adversarial testing process works to procure a just result under the standards governing decisions." Strickland v. Washington, 104 S. Ct. 2052, 2064 (1984). When confronted "with both the intricacies of the law and the advocacy of the public prosecutor," United States v. Ash, 413 U.S. 300, 303 (1970), a defendant is entitled to counsel who will "bring to bear such skill and knowledge as will render the trial a reliable testing process." Strickland, 104 S. Ct. at 2065. The constitutional right is violated when the "counsel's performance as a whole," United States v. Cronic, 104 S. Ct. 2039, 1046 n.20 (19__), or through individual errors, Strickland, 104 S. Ct. 2064, falls below an objective standard of reasonableness and when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 2062. Petitioner must plead and prove (1) unreasonable attorney conduct, and (2) prejudice. Mr. Johnson has.
794, 805 (11th Cir. 1982).

This overarching duty of counsel has been emphasized repeatedly. See Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982), cert. denied, 103 S. Ct. 1798 (1983)("At the heart of effective representation is the independent duty to investigate and prepare."); Weidner v. Wainwright, 708 F.2d 614, 617 (11th Cir. 1983)(Counsel was ineffective where "pretrial investigation into [defendant's] most plausible defense was woefully inadequate."); House v. Balkcom, 725 F.2d 608, 617-18 (11th Cir. 1984), cert. denied, 105 S. Ct. 218 (1984)("failure to investigate the facts is unconscionable and falls below the level of performance by counsel required by the sixth amendment . . . Pretrial investigation, principally because it provides a basis upon which most of the defense case must rest is perhaps the most critical stage of a lawyer's preparation."); see also Porter v. Wainwright, slip op. November 17, 1986 (11th Cir. 1986)(case remanded for evidentiary hearing on claim of ineffectiveness for failure to investigate mitigating character evidence); Nealy v. Cabana, 764 F.2d 1173 (5th Cir. 1985)(". . . at a minimum, counsel has the duty to interview potential witnesses and to make an independent investigation of the facts and circumstances of the case."); United States v. Baynes, 687 F.2d 659 (3rd Cir. 1982)(". . . the courts must continue to insist that trial counsel, at the very least, investigate all substantial defenses available to a defendant.") Counsel failed here to investigate

critical evidence.

ARGUMENT III

THE TWO-YEAR TIME LIMITATION CONTAINED IN RULED 3.850 SHOULD NOT BAR MR. JOHNSON'S TWO CLAIMS FOR RELIEF

A. REGARDLESS OF THE RULE, THE CLAIMS SHOULD BE HEARD

Mr. Johnson's claims go to the heart of the truth-finding process. First, Argument II addresses the heart of guilt/innocence, and the facts demonstrate that there is a reasonable probability that but for counsel's complete failure to prepare, the result would have been different. Second, Argument I demonstrates "innocence" in that Mr. Johnson is "not guilty" of the death penalty. When a claim of a constitutional violation involves factual innocence, or an incorrect imposition of death, procedural bars such as abuse, default, laches, and abandonment do not apply. See Kuhlmann v. Wilson, 106 S. Ct. 2616 (1986); Moore v. Kemp, 824 F.2d 847 (11th Cir. 1987) (abuse inapplicable when "the alleged constitutional error [either] precluded the development of true facts [or] resulted in the admission of false ones.") Indeed, "[i]f prejudicial ineffectiveness of counsel occurred but was not previously raised, I would not hold the claim procedurally barred," Card v. Dugger, 512 So.2d 829 (Fla.

1987) (Barkett, J., concurring), and this Court, under "unique circumstances," Darden v. State, 475 So.2d 217, 218 (Fla. 1985), "choose[s]" to ignore procedural bars, Id., and abuse of the writ defenses. The claims presented in arguments one and two, supra, are the types of claims that should be heard notwithstanding any two-year rule, or the presence or absence of exceptions to the rule. But as will be demonstrated, the rule should not apply because by its terms it does not apply, and because in similar situations this Court has refused to apply it.

B. UNDER THIS COURT'S APPLICATION OF THE TWO-YEAR RULE, IT SHOULD NOT BAR MR. JOHNSON'S CLAIMS

Mr. Johnson filed his first Rule 3.850 motion April 10, 1988. When the first death warrant was signed in this case, there was no State-funded agency charged with the representation of indigent death row inmates in post-conviction proceedings. Volunteer counsel were the resource, and counsel did volunteer to represent Mr. Johnson and filed a petition for writ of habeas corpus in federal district court. Mr. Johnson's execution was stayed, but he eventually lost, less than six months before he filed his Rule 3.850 motion. As would be proven, the federal court action was filed because of the exigencies of warrant litigation, and because the volunteers were unable independently to investigate "nonrecord" matters like ineffective assistance of counsel. Mr. Johnson did not participate in the decision to

pursue litigation in federal court first.

Long after the federal proceeding was under way, Rule 3.850, Fla. R. Crim. P., was amended. Originally (and at the time of the first warrant), the Rule contained no limitation period for filing a post-conviction motion, but the rule was amended to require that "any person whose judgment and sentence become final prior to January 1, 1985, shall have until July 1, 1987, to file a motion. . . ." Two exceptions were included:

> No other motion shall be filed or considered pursuant to this rule if filed more than two years after the judgment and sentence become final unless it alleges (1) the facts upon which the claim is predicated were unknown to the movant or his attorney and could not have been ascertained by the exercise of due diligence, or, (2) the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.

Id. Mr. Johnson should not be faulted for pursuing remedies in federal court at a time when there was no limit to the filing of state court actions.

Nevertheless, an analysis of this Court's decisions discussing the two-year rule reveals that it is not applied absent additional factors, factors not present here. Counsel's research has revealed the following cases in which the two-year rule was, or could have been, applied: Thompson v. Dugger, 515 So.2d 173 (Fla. 1987); Demps v. State, 515 So.2d 196 (Fla. 1987);

Delap v. State, 513 So.2d 1050 (Fla. 1987); White v. State, 511 So.2d 984 (Fla. 1987); State v. Sireci, 502 So.2d 1221 (Fla. 1987). This Court does not always mention the application of the rule, it sometimes finds other bars instead of the two-year rule, and once the Court has simply found a two-year bar.

In Thompson, appellant had previously filed a motion to vacate, had previously lost in state and federal post-conviction proceedings, and his conviction had long been final. However, on June 19, 1987, Mr. Thompson filed another Rule 3.850 motion, seeking relief under Hitchcock v. Dugger, 95 S. Ct. 1821 (1987), and other grounds. This Court found Hitchcock to be a change in law excusing procedural default, without mentioning the two-year rule. Other issues presented were barred, not by the two-year rule, but because "these issues have been presented and have been previously resolved in the federal courts. . . ." Id. at 176. Thompson thus represents this Court granting relief (and denying relief) when the two-year rule was operable, and when it arguably should have applied, but with no mention of the two-year rule by the Court.

In Delap v. State, 513 So.2d 1050 (Fla. 1987), this Court found two reasons to bar relief: 1) that a previous motion to vacate had been filed and denied, and 2) that the second motion was not filed by January 1, 1987. The essence of why the denial occurred was contained in Justice Barkett's concurrence,

in which Justice Kogan joined: "[T]he merits . . . have already been considered and denied by this Court." Id. at 1051. Mr. Johnson has not had any previous post-conviction review of his claims by this Court.

In Demps v. State, 515 So.2d 196 (Fla. 1987), this Court provided some analysis regarding the application of the two-year rule. The Court found Caldwell v. Mississippi, 472 U.S. 320 (1985) not to be a change of law, so a claim based upon Caldwell could not overcome a procedural bar. A Brady claim material could have been found earlier, plus the substance of the Brady claim had been raised "in the first proceeding for post-conviction relief." Demps, 515 So.2d at 198. Another issue "could have and should have been raised on direct appeal or in Demps' first request for post-conviction relief . . . ." Id. Thus, the only claim that rested solely on the two-year rule was the Caldwell claim, which was barred because there was no change in law. The other claims involved the two-year rule "plus" additional factors. Again, Justices Barkett and Kogan concurred in result only.

In State v. Sireci, 502 So.2d 1221 (Fla. 1987), the Court allowed claims which had been presented after the two-year rule, but which were presented as soon as the matters came to counsel's attention. That occurred here. In White, the Court simply cited the two-year rule, with Justices Barkett and Kogan concurring in

result only.

In every case except White in which this Court has denied relief, it has been on the basis of the two-year rule plus:

a) no change in law; or

b) a previous Rule 3.850 proceeding had addressed the claim; or

c) the claim was otherwise procedurally barred for having not been raised in the first Rule 3.850 proceeding, or on direct appeal.

Mr. Johnson's case is truly unique in that he is raising claims that could not have been raised on direct appeal, he has not previously filed a Rule 3.850 motion, and he raised the claims the minute he discovered them. There is no two-year rule "plus". Not even White covers this situation, because Mr. White had previously filed a Rule 3.850 motion.

C. CLAIM I IS BASED UPON NEW LAW, AND SATISFIES THE EXCEPTION TO THE TWO-YEAR RULE

At the time of capital sentencing in 1978, this Court had not recognized the right of indigent defendants to receive competent mental health evaluations. That right was first articulated in June, 1986, in this Court's Mason decision. At that time, Mr. Johnson was proceeding with an appeal in the Eleventh Circuit of Appeals, from denial of federal habeas corpus

relief. Under the unique circumstances of this case, it cannot be said that there was a lack of due diligence in counsel's presenting this new law claim less than two years after this Court created it.

This case presents an issue of first impression in the reported decisions of Florida and thus represents a first step in interpreting the proper application of the newly-effective time limits on seeking post-conviction relief under Rule 3.850, Fla. R. Crim. P. Mr. Johnson will show that his claim was not time-barred. The ambiguity in the new two-year rule provision must logically be construed as commencing the limitations period upon discovery of the facts supporting the post-conviction claim, as is true in many other areas of civil actions.

A brief review of the nature of the writ of habeas corpus and its specialized form found in Rule 3.850 is helpful to start.[3] "The great writ has its origins in antiquity and its parameters have been shaped by suffering and deprivation. It

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[3]Rule No. 1 now formulated as Rule 3.850 was designed as a simplified procedural form of the petition for writ of habeas corpus. See, e.g., Roy v. Wainwright, 151 So.2d 825, 826-27 (Fla. 1963); State v. Wooden, 246 So.2d 755, 756 (Fla. 1971). The motion therefore must be "treated with the same liberality as that historically granted by the courts in entertaining applications for habeas corpus." Ashley v. State, 158 So.2d 530, 531 (Fla. 2d DCA 1963).

is more than a privilege . . . it is a writ of ancient right." Jamasom v. State, 447 So. 2d 892, 894 (Fla. 4th DCA 1983). The writ may not be suspended and it "'is not to be circumscribed by hard and fast rules or technicalities . . . . [I]t is the responsibility of the court to brush aside formal technicalities and issue such appropriate orders as will do justice. In habeas corpus the niceties of the procedure are not anywhere near as important as the determination of the ultimate question as to the legality of the restraint.'" Id. at 895 (quoting Anglin v. Mayo, 88 So.2d 918, 919-20 (Fla. 1956)). Application of bars to habeas corpus relief must be strictly construed.

The lower court erred in denying Mr. Johnson's motion for post-conviction relief for failure to file within the rule's time limit without first inquiring into the reasons for the filing beyond the deadline. Had there been such an inquiry, the facts now being discussed as well as possibly others could have been brought forth and a ruling made on a complete record. Such a procedure is standard practice in analogous federal post-conviction proceedings.[4] Rule 3.850 itself provides two situations where the time limits are inapplicable -- where the

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[4]Rules Governing Section 2254 Cases in the United States District Courts, Rule 9. See, e.g., Urdy v. McCotter, 773 F.2d 652, 656 (5th Cir. 1985) ("we are constrained to conclude that the trial court should not have dismissed Urdy's [habeas corpus] petition without giving him proper notice that dismissal was pending").

constitutional law changed or where the facts supporting the claim were unknown to the movant.

There are several ambiguities in the Rule 3.850 time limits that require interpretation. By applying a deadline of January 1, 1987 the lower court has misinterpreted the applicability of the rule's time limits. The existence of exceptions to the rule's time limitation indicates that it is not jurisdictional or absolute.[5] The limitation in the rule is more analogous to limitations applied in certain civil actions where the period does not commence until discovery or notice of the cause of action, or when the last element constituting the cause of action occurs.[6] Rule 3.850 provides, in language similar to that

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[5]Limitations are remedial in nature; that is, they act upon the remedy, not the right. The defense of limitations therefore may be waived by failure to properly assert it, e.g., Wetzel v. A. Duda & Sons, 306 So.2d 533, 544 (Fla. 4th DCA 1975), and the one against whom a claim is made may be estopped from raising the affirmative defense of limitations, see, e.g., Salcedo v. Asociacion Cubana, Inc., 368 So.2d 1337, 1339 (Fla. 3d DCA 1979); North v. Culmer, 193 So.2d 701, 704 (Fla. 4th DCA 1967). Limitations, therefore, are "not jurisdictional." Thorney v. Clough, 438 So.2d 985, 986 (Fla. 3d DCA 1983).

[6]See, e.g., sec. 95.031, sec. 95.11(4)(a), Fla. Stat. (1985) ("limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence"); Pinkerton v. West, 353 So.2d 102 (Fla. 4th DCA 1977).

applied in other civil actions, that the limitations do not apply if "the facts upon which the claim is predicated where unknown to the movant or his attorney and could not have been ascertained by the exercise of due diligence."[7] Under the literal language of this provision, if facts previously unknown were discovered, there would be no applicable time limit. Read alone, the rule's

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[7]There is little if any history of the adoption of the amendment to Rule 3.850 because the concept of a time limit was expressly rejected by The Florida Bar and thus not proposed by the Bar to the Supreme Court. Rather, the rule was adopted by the Court on its own after the suggestion was made by then Chief Justice Alderman in his concurring opinion in McCrae v. State, 437 So.2d 1388, 1391 (Fla. 1983). The actual formulation of the rule was proposed by the Attorney General. The amendment was adopted on November 30, 1984. The Florida Bar Re Amendment to Rules of Criminal Procedure (rule 3.850), 9 FLW 501 (Fla. 1984). The Bar moved for clarification asking that its opposition to the time limits be reflected in the opinion. That motion was granted and the rule was adopted. The Florida Bar Re Amendment to Rules of Criminal Procedure (Rule 3.850), 460 So.2d 907 (Fla. 1984). The Bar's opposition explains why there are no Committee Notes dealing with the time limit and why the Supreme Court's opinion expressly disavows the Committee Notes that refer to the Bar's proposal of adopting the "delayed petitions" provision followed in the federal courts, Rule 9, Rules Governing Section 2254 Cases in the United States District Courts. A year later the rule was amended to make certain technical changes to make the language consistent and to extend the date for filing the motion to January 1, 1987 for pre-1985 cases. In re Rule 3.850 of the Florida Rules of Criminal Procedure, 481 So.2d 480 (Fla. 1985).

In reviewing the notes of the Bar's committee meetings, the various pleadings filed with regard to the rule change including that of the Attorney General, and an informal transcript of the oral argument on the rule change, the undersigned counsel has been unable to find any mention of the question discussed in the text as to the commencement of the limitations period.

exception would apparently mean that if the facts were unknown, then a motion for post-conviction relief could be filed "at any time" -- as was true prior to the amendment to the rule. One ambiguity is therefore the failure to specify a time limit for cases where the exceptions are established.

A second ambiguity is that the rule does not identify when the later discovery of the facts supporting the claim qualifies for the exception to the time limitation. That is, when must the facts supporting the claim be "unknown" -- during the limitation period or prior to the judgment and sentence becoming final? It could mean that the facts "were unknown" within the limitation period. Under such a reading of the rule, the two-year limit would begin to run at the time the judgment and sentence become final.[8] A prisoner who discovered the facts supporting his claim at the time of (or before) the entry and affirmance of his judgment and sentence would have two years thereafter in which to prepare and file a motion under the rule. In contrast, under

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[8]A judgment and sentence become final after direct appeal and further proceedings seeking direct review, including certiorari. Although not stated in the rule, it was uniformly agreed that this was the intended meaning of the rule, see McCrae v. State, 437 So.2d at 1391 (Alderman, C.J., concurring), and has since been expressly adopted in conference by the Florida Supreme Court.

this reading of the rule, a prisoner who discovered the facts supporting his claim a day before the expiration of his limitation period, would have only a day to research, prepare and file his motion in the trial court. It is suggested that this interpretation of the rule should not be adopted because it would result in inequities and hardship that cannot be assumed as being intended. There is a more logical and equitable construction of the rule.

The construction of the rule suggested by Mr. Johnson takes into account the intent of the rule of providing finality while at the same time maintaining fair access for redress of legitimate claims. The rule can logically be read only one way. If the facts upon which the claim is based were known by the time the judgment and sentence became final, the prisoner would have two years in which to file his motion for post-conviction relief in the trial court.[9] Where, on the other hand, the facts supporting the claim are unknown until after the judgment and sentence become final (or the constitutional law changes) there

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[9]The prisoner could not, of course, file his motion before the judgment and sentence became final because there is no jurisdiction to consider a motion for post-conviction relief while the direct appeal is pending, Jones v. State, 400 So.2d 204 (Fla. 4th DCA 1981), or while the case is pending on certiorari, State v. Meneses, 392 So.2d 905 (Fla. 1981).

either is no time limit or if the time limit does apply it does not commence until the discovery of the facts supporting the claim (or the announcement of the law change).[10]

This reading of the rule is consistent with the intent of the limits in the rule. It provides finality, meets the ostensible fear that prisoners will hold back valid claims until a time when the state could not retry them, and maintains equitable access to the court for redress of legitimate claims. The time limitations in the post-conviction rule should be narrowly construed because they are contrary to the prior practice[11] and generally disfavored as restricting access to the

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[10]Establishing the date of discovery of the facts supporting the claim or "due diligence" are not an unfamiliar inquiries for the courts. They are undertaken frequently in civil actions as questions of fact. E.g. Pinkerton v. West, supra; Schetter v. Jordan, 294 So.2d 130 (Fla. 4th DCA 1974). Such factual determinations are appropriate in post-conviction proceedings, since "the acknowledged purpose of Rule 3.850 [is] to facilitate factual determinations." State v. Wooden, 246 So.2d at 756.

[11]Since time restrictions in rule 3.850 act in derogation of the "ancient" writ of habeas corpus, they must be strictly construed as not displacing the pre-existing common law right any further than explicitly stated and necessary. E.g. State v. Egan, 287 So.2d 1 (Fla. 1973); Palm Beach Management Corp. v. DeWoody and Co., 497 So.2d 1298 (Fla. 4th DCA 1986). Accordingly, the broadest reading of the time restrictions is required in resolving the ambiguity of the language so as to preserve the common law right to redress by way of habeas corpus except where explicitly curtailed by the rule.

courts.[12] It is a general rule of construction that the provision under consideration must be interpreted logically rather than illogically.[13] The only logical reading of the rule is that the time limit commences at the time of the judgment and sentence becoming final if the claim is known at that time, or at the time that the facts supporting the claim become known (or

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[12]In addition to the constitutional prohibition on suspension of the writ of habeas corpus, Art. I, sec. 13, Fla. Const., the constitution further guarantees access to the courts. Art I, sec. 21, Fla. Const. See generally Overland Const.Co., Inc. v. Sirmons, 369 So.2d 572 (Fla. 1979) (statutory limitation held violative of right to access to courts). Specifically, time limits on the availability of post-conviction remedies have been disfavored. As previously mentioned, The Florida Bar opposed time restrictions for Rule 3.850, as have others who have studied the question. See Uniform Post-Conviction Procedure Act (1966), 11 U.L.A., Crim. Law and Proc. 513 (Supp. 1974); ABA Standards for Criminal Justice, Standards Relating to Post-Conviction Remedies, Std. 22-2.4(a) (2d ed. 1980) ("a specific time period as a statute of limitations to bar post-conviction review of criminal convictions is unsound"). The general opposition to restriction upon post-conviction motions underscores the serious nature of such restrictions and the consequential need to construe such restrictions in favor of the prisoner's right to seek redress unless explicitly precluded by the rule. If there are several possible reasonable interpretations of the rule, the interpretation favoring the right to seek redress must be accepted.

[13]Where a provision is susceptible of more than one interpretation, the "rational, sensible" construction is favored. City of Boca Raton v. Gidman, 440 So.2d 1277 (Fla. 1983). Thus, the "logical and practical" construction is favored over an illogical construction when more than one interpretation is possible. Silver Sands v. Pensacola Loan and Savings Bank, 174 So.2d 61, 66 (Fla. 1st DCA 1965); Gracie v. Deming, 213 So.2d 294, 296 (Fla. 2d DCA 1968).

with due diligence should have become known) or when the constitutional law change is announced.

Applied to this case, this reading of the rule would mean that the time limit commenced in June, 1986, the date of Mason, at the very earliest. That is when the law change occurred, and when Mr. Johnson's counsel could be chargeable with any notice that the right to a competent mental health examination existed. Arguably, the two-year period did not begin to run until two or three weeks ago, when the facts underlying the claim were discovered. Mr. Johnson's federal litigation did not end until October 5, 1987, when certiorari review was denied. It cannot be said that turning to state court less than six months after exhausting federal review, and less than two years after a state right was created, provides any basis for denying relief.

D. IT CANNOT BE SAID THAT COUNSEL OR MR. JOHNSON FAILED TO EXERCISE DUE DILIGENCE IN PRESENTING HIS RECENTLY DISCOVERED CLAIM OF GROSS INEFFECTIVE ASSISTANCE OF COUNSEL

Mr. Johnson did not previously know of or abandon this claim, contained in Argument II, supra. In order for volunteer counsel to pursue the claim, money and other resources were required. Volunteer counsel did not have money. The rule did not change to require a time limitation until Mr. Johnson's case was in the Eleventh Circuit Court of Appeals. It shows absolutely no lack of due diligence for volunteer counsel to have

continued to pursue the federal remedy rather than assuming the petition would be lost. The rule would be totally nonsensical, and have no independent and adequate basis, if it is interpreted to require counsel to pursue separate actions in separate forums in order to demonstrate "due diligence." It was completely proper for the federal litigation to terminate before requiring counsel to pursue another remedy.

E. APPLICATION OF THE TWO-YEAR BAR UNDER THESE FACTS IS UNCONSTITUTIONAL

The application of Florida's new time limitation constitutes an obviously unconstitutional ex post facto application, violating the due process clauses. Decisions by the United States Supreme Court "prescribe that two critical elements must be present for a criminal or penal law to be ex post facto: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it. . . . A law need not impair a 'vested right' to violate the ex post facto prohibition." Weaver v. Graham, 450 U.S. 24, 30 (1981).

Both prongs of the Graham test are met here. The application of the new rule would be retrospective. The "new" Rule 3.850 was amended and became effective after Mr. Johnson's initial proceedings were filed in federal court, and at a time

when he had unlimited time to file a Rule 3.850 motion. The law in Florida when Mr. Johnson filed his federal habeas was that he could file in state court forever. Because application of the "new" 2-year rule to this case would be a retrospective application that would disadvantage Mr. Johnson, its application is flatly improper. Graham, supra.

Due process and equal protection of law are abrogated by the application of the recently enacted two-year Rule 3.850 limitation to bar review of the merits of Mr. Johnson's claims. That limitation did not exist at the time Mr. Johnson filed his initial Rule 3.850 motion. The law now, i.e., the recently enacted two-year Rule 3.850 limitation, cannot be applied retroactively to bar review. Such arbitrary and retroactive application of a state procedural statute would be the paramount example of a procedural "trap for the unwary." See Lefkowitz v. Newsome, 420 U.S. 283, 293 (1975); Spencer v. Kemp, 781 F.2d 1458, 1469-71 (11th Cir. 1986) (en banc); Wheat v. Thigpen, 793 F.2d 621, 624-27 (5th Cir. 1986). See also Ashby v. Wyrrek, 693 F.2d 789, 793-94 (8th Cir. 1982). Such a procedural "trap" simply cannot be squared with due process and equal protection of law.

In short, the retroactive application of the two-year Rule 3.850 limitation violates the fourteenth amendment just as assuredly as due process and equal protection are abrogated by

the retroactive expansion of a criminal statute. The United State Supreme Court's opinion in Bouie v. City of Columbia, 378 U.S. 347 (1964), makes this undeniably clear:

> The basic due process concept involved is the same as that which the Court has often applied in holding that an unforeseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this Court's review of a federal question. See e.g., Wright v. Georgia, 373 U.S. 284, 291 [83 S. Ct. 1240, 1245, 10 L.Ed.2d 349]; N.A.A.C.P. v. Alabama, 357 U.S. 449, 456-58 [78 S. Ct. 1163, 1168-69, 2 L.Ed.2d 1488]; Barr v. City of Columbia, ante, [378 U.S.] p. 146 [84 S. Ct. 1734, 12 L.Ed.2d 766]. The standards of state decisional consistency applicable in judging the adequacy of a state ground are also applicable, we think, in determining whether a state court's construction of a criminal statute was so unforeseeable as to deprive the defendant of the fair warning to which the Constitution entitles him. In both situations, "a federal right turns upon the status of state law as of a given moment in the past -- or, more exactly the appearance to the individual of the status of state law as of that moment. . . ." 109 U.Pa.L.Rev. supra, at 74, n. 34.
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> When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law "in its primary sense of an opportunity to be heard and to defend [his] substantive right." Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 678 [50 S. Ct. 451, 453, 74 L.Ed. 1107]. When a similarly unforeseeable state-court construction of a criminal statute is applied retroactively t

> that his contemplated conduct constitutes a crime. Applicable to either situation is this Court's statement in Brinkerhoff-Faris, supra, that "if the result above stated were attained by an exercise of the State's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious," and "the violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid . . . state statute." Id. at 679-80 [50 S. Ct. at 453-54].

Id. at 354-55.

To apply Rule 3.850 in such a way would further no adequate and independent state law ground. Placing Mr. Johnson in such an untenable procedural "trap" simply does not pass muster under the fourteenth amendment. See James v. Kentucky, 466 U.S. 341 (1984) (only "firmly established and regularly followed state practice can prevent implementation of federal constitutional rights.") Barr v. City of Columbia, 378 U.S. 146, 149 (1964) (state procedural rules which are not fairly applied and regularly followed cannot be used to bar review of federal claims); Hathorn v. Lovorn, 457 U.S. 255, 262-63 (1982) ("state courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly."); see also Henry v. Mississippi, 379 U.S. 433, 447-48 (1958); Williams v. Georgia, 349 U.S. 375, 389 (1955); Wright v. Georgia, 373 U.S. 284, 291 (1963); Sullivan v. Little Hunting Park, 396 U.S. 229, 233-34 (1969). Accordingly, in NAACP v. Alabama ex rel. Patterson, 375 U.S. 449

(1958), the Supreme Court explained that an arbitrarily applied procedural bar such as the retroactive application of Rule 3.850's two-year limitation would not be considered independent and adequate where the criminal defendant

> could not fairly be deemed to have been apprised of its existence. Novelty in procedural requirements cannot be permitted to thwart review in this court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.

NAACP v. Alabama ex rel. Patterson, 375 U.S. at 457-58 (emphasis supplied). See also Spencer, supra; Wheat, supra.

CONCLUSION

Mr. Johnson respectfully requests that this Court remand his case for an evidentiary hearing, and that the motion to vacate judgment and sentence be granted.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT a true and correct copy of the foregoing Initial Brief of Appellant has been served (copy left at the Court) on Mark E. Menser, Assistant Attorney General, Department of Legal Affairs, 111-29 Magnolia Drive, Tallahassee, FL 32301, this 19th day of April, 1988.