IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,743

DAVID EUGENE JOHNSTON,

Appellant,

v.

STATE OF FLORIDA,

Appellee,

ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT COURT, IN AND FOR ORANGE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Johnston's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The lower court ordered evidentiary resolution of questions concerning incompetent mental health evaluations, Mr. Johnston's competency at time of trial and various allegations of trial counsel's deficient performance.

Citations in this brief shall be as follows: The record on appeal concerning the original court proceedings shall be referred to as "R. ___" followed by the appropriate page number. The record on appeal after denial from the evidentiary hearing shall be referred to as "T. ___." All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

Mr. Johnston has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue, and Mr. Johnston through counsel accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE

In the early morning hours of November 5, 1983, Karen Fritz awoke to find an hysterical young man at her door, "crying" and "very upset," telling her that her grandmother was dead (R. 472). David Johnston was that young man. He had also called the police and reported that he had found his "grandmother" murdered (R. 510). Several police officers arrived at the scene and each reported finding Mr. Johnston "hysterical", "very upset," and apparently under the influence of drugs and/or alcohol (R. 513, 492, 566). Mr. Johnston was given Miranda warnings at the scene, but "he said he didn't want to talk to us at that time" (R. 496). Mr. Johnston was arrested on suspicion of murder. In the ensuing three months, the police obtained numerous statements from Mr. Johnston, all asserting his innocence.[1]

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[1]A full reading of the transcripts of the statements is encouraged since it will show the delusional thinking of Mr. Johnston throughout the pretrial process. A very brief example follows:

Q: Are you a very religious person?

A: I'm a Baptist, and, ah I always respect myself and go to church on Sunday, pay my tithe and respect myself, cause, ah, the way things going right now it looks like this world fixing to end, you know, the war, Reagan, and that big old ship from out of New Jersey going over there to Beirut and stuff, airplanes about ready to kick off, and damn, (inaudible). I seen Christ the other day in the newspaper.

Q: Pardon me?

A: I saw a figment of Jesus Christ in the newspaper the other day, you know, like ah, (inaudible) showed his hair, mustache and everything, but, ah.

Q: You mean you saw a picture or you just saw a figure transposed or interposed on the . . .

A: Interposed in the newspaper, you know, and, ah, like I told Clyde I wouldn't kill Mary. I can be stoned, messed up in my head and I wouldn't kill nobody.

Q: You would be able to do this and not remember?

A: No, that's wrong, see, ah, Penny told me that, ah, I made something like a comment that if anybody tried to get between me and Pat, I would kill them, you know, and like I told Penny, wow, man, I can't remember saying

(continued...)

In December of 1983, Mr. Johnston was indicted by an Orange County Grand Jury for the first-degree murder of Mary Hammond. The Public Defender's Office was appointed to represent Mr. Johnston. Clyde Wolfe and Christine Warren were assigned to the case. Throughout their representation of Mr. Johnston, both Mr. Wolfe and Ms. Warren had difficulty dealing with Mr. Johnston and had filed a "Notice of Intent to Rely Upon the Defense of Insanity" (R. 1949) and a "Motion for Appointment of Expert" (R. 2006). Mr. Johnston had been previously repeatedly committed to a mental hospital in the state of Louisiana and found incompetent to stand trial in the State of Kansas (T. 347-50). During his incarceration, Mr. Johnston gave several statements to the police, none of which counsel ever challenged even though counsel were aware of some of Mr. Johnston's

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[1](...continued)
anything like that. If I say anything like that towards you or anybody else, I'm terribly sorry, you know. She say you are sorry, you tell me you're sorry, but you can't remember cause you was high, you just too damned stoned, and that's when I kissed Pat and headed home, you know, and I wasn't quite done in the 7-11, maybe 10 or 15 minutes and I went there to the old _____, stopped there on the sidewalk, cut to the short cut through the park, got on Bumby, started heading home, and when I stopped there at the corner of Ridgewood and Broadway, looking around, just, you know, working. That's when I noticed Mary Hammond's kitchen light, you know, and ah, got off the bike, come off the bike up to the driveway, I remember walking over to her lawn and going up to the window, there was a hole in the top part of it, so I went to the door, door was already open. I can't remember, Mr. Mundy, if I knocked or not, I do remember going in, you know, and I noticed the house was all a total wreck, the living room lamps overturned, and the dog was right there at the door when I went in, you know, and my first thing I did, I looked at the kitchen counter and the kitchen sink. I seen the glass everywhere and the dirt and something like a cement looking rock and I think it's laying on the counter, I ain't for sure, you know, and then the next thing I remember I opened up the refrigerator, got a coke, and throwed it into my systems and I seen the dog down on the floor, and I looked down and petted him, you know, and I got them Kiwi crackers down off the top of the refrigerator, took them into the dining room threw them on the floor. I looked at the living room and noticed it was a total wreck, and I remember that I started yelling for Mary, but I got no response, and this, this, this, you know, I can't remember, you say that I did or I didn't throw out throw away this door, dog cages, and I remember going upstairs and turning on Mary's light, right, and seeing all the blood up on the wall, well I think it was all over the wall, bedstand, the telephone and I went over, held Mary to my right arm, alright, I, I just want want you do me one favor, right now, turn the tape off.

(Transcript of 12/19/83 statement, pages 8 and 9).

long history of mental illness and evidence indicating he was under the influence of intoxicants at the time of his arrest.

After cursory evaluations performed by Drs. Pollack and Wilder (evaluations which only addressed competency to stand trial and sanity at the time of the offense) Mr. Johnston was found "competent" to proceed to trial, was tried, convicted and sentenced to death.[2] Neither Pollack nor Wilder conducted any psychological testing. Their examinations consisted of forty five minute interviews of Mr. Johnston. After concluding Mr. Johnston was competent, the doctors received some of the Louisiana records regarding Mr. Johnston's numerous commitments. The doctors did not have any of the records from Kansas finding Mr. Johnston incompetent to stand trial. The doctors did not talk to defense counsel and did not have the statements Mr. Johnston made to the police, which Dr. Wilder has now conceded contained evidence of delusional thought processes.

The jury returned an eight to four advisory recommendation of death. On June 1, 1984, the court imposed a sentence of death. Mr. Johnston's appeal of his conviction and sentence were denied. Johnston v. State, 497 So. 2d 863 (Fla. 1986).

In November of 1988 a death warrant was signed against Mr. Johnston by Governor Martinez. A Rule 3.850 motion was then filed in the circuit court. Judge Powell stayed the execution and ordered evidentiary resolution of the several claims involving ineffective assistance of trial counsel, inadequate mental health evaluations and questions about Mr. Johnston's competence. The evidentiary hearing was held in June of 1989. At the commencement of the hearing, an incoherent David Johnston was removed from the courtroom and was

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[2]Drs. Pollack and Wilder were never asked to evaluate Mr. Johnston's competency to waive his fifth and sixth amendment rights nor were they asked to evaluate for mitigating circumstances. No psychological testimony was presented in the penalty phase proceeding by the defense despite Mr. Johnston's longstanding diagnosis of schizophrenia.

placed in a holding cell. For some time thereafter, Mr. Johnston's rantings could be heard in the nearby courtroom. When Mr. Johnston quieted down, he was returned to the courtroom. Testimony was heard from trial counsel and from mental health experts. The defense attorneys testified Mr. Johnston was incompetent at time of trial. Mr. Johnston also presented the testimony of a psychiatrist and a psychologist who agreed Mr. Johnston was incompetent to stand trial. Evidence was also received regarding the presence of substantial mental health mitigation which had not been presented to the jury or the court during guilt-innocence phase or the penalty phase of trial. On August 16, 1989, Judge Powell denied all relief, and this appeal was taken.

SUMMARY OF ARGUMENT

I. Mr. Johnston was not competent to stand trial. He was a delusional schizophrenic who was unable to assist counsel in any meaningful fashion and was unable to comprehend what was at stake in the proceedings. The two mental health examiners at trial were unaware of Mr. Johnston's delusions. Without this evidence of delusions, the opinions based on forty five minute conversations were invalid. One of these two mental health examiners was called at the 3.850 hearing and he conceded that, in light of the evidence of delusions, more testing and examination was necessary in order to determine whether Mr. Johnston was competent. A new trial must be ordered.

II. Mr. Johnston's pre-trial mental health examinations was inadequate. The mental examiners had no background information. Nothing was done beyond a forty five minute conversation with Mr. Johnston. Counsel failed to provide the examiners with the numerous red flag indicators of delusions which reflected Mr. Johnston's incompetence and schizophrenia. Further the examiners were not asked to evaluate all the mental health issues in the case. They did not consider whether mitigation was present. As a result, Mr. Johnston's judgment and sentence must be reversed.

III. Mr. Johnston was deprived effective assistance at the penalty phase of his capital trial. No mental health testimony was presented by the defense describing Mr. Johnston's schizophrenia. Counsel conducted inadequate investigation. They were unprepared, and as a result Mr. Johnston was sentenced to death.

IV. Mr. Johnston's mental impairment precluded him from comprehending and validly waiving his Miranda rights and his Sixth Amendment rights when he made statements to the police. Trial counsel was ineffective in not litigating this issue.

V. Defense counsel was ineffective in failing to investigate Mr. Johnston's alcohol and drug abuse as a defense which rendered him incapable of forming specific intent.

VI. Mr. Johnston was deprived effective assistance of counsel at the guilt-innocence phase of his capital trial.

VII. The jury was inadequately instructed regarding the elements of the aggravating circumstance heinous, atrocious or cruel.

VIII. Mr. Johnston's death sentence rests upon an unconstitutional automatic aggravating circumstance. The jury received inadequate instructions regarding this aggravator.

IX. Mr. Johnston's eighth amendment rights were violated by improper consideration of victim impact information.

X. Mr. Johnston's eighth amendment rights were violated when the sentencing judge refused to find and consider mitigation clearly set out in the record.

XI. Mr. Johnston's jury was improperly instructed to shift the burden of proof to Mr. Johnston on the issue of whether to sentence him to life or death.

XII. Mr. Johnston's jury's sense of responsibility was improperly diminished by the judge's instructions and arguments of the prosecutor.

XIII. The jury was improperly allowed to consider a prior conviction and counsel was ineffective in failing to adequately litigate this issue.

ARGUMENT I

MR. JOHNSTON'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE ABROGATED BECAUSE HE WAS FORCED TO UNDERGO CRIMINAL JUDICIAL PROCEEDINGS ALTHOUGH HE WAS NOT LEGALLY COMPETENT.

David E. Johnston was not competent to undergo the 1984 proceedings which resulted in his capital conviction and sentence of death. A wealth of evidence was available then which would have revealed his lack of competency. On January 3, 1984, Mr. Johnston's attorney filed a "Motion for Psychiatric Evaluation" pursuant to Fla. R. Crim. P. 3.210 in order to "specifically address [Mr. Johnston's] competency to stand trial. . . ." in accordance with Rules 3.211 (a)(1)(i-xi), 3.216(a) (R. 1950-51). Two psychiatrists, Dr. Robert Pollack and Dr. J. Lloyd Wilder, were appointed to evaluate Mr. Johnston (R. 1953-54). On January 3, 1984, counsel also filed a "Notice Of Intent To Rely Upon The Defense Of Insanity" (R. 1949). In that motion counsel wrote that "the particular nature of the insanity relied upon as a defense is: (1) schizophrenia" (R. 1949). Ten days later counsel filed a second "Motion For Appointment Of Expert" pursuant to Fla. R. Crim. P. 3.216(a). This motion provided in part:

> 1. That the undersigned has reason to believe that the Defendant may be incompetent to stand trial or that he may have been insane at the time of the alleged offense for the following reasons:
>
> (a) The Defendant has made statements which indicate the Defendant might be suffering from mental and emotional disturbances which may prevent Defendant from adequately assisting counsel in its preparation of Defendant's defense.
>
> The Defendant's conduct has been such that it indicates that Defendant might be suffering from mental and emotional disturbances which may prevent Defendant from adequately assisting counsel in its preparation of Defendant's defense.

(R. 2006).

A hearing was held on March 2, 1984, on the matter of Mr. Johnston's competency to stand trial (R. 1031-64). Both court appointed experts opined

that Mr. Johnston was competent (R. 1037 [Pollack]), (R. 1050-51 [Wilder]). However, neither mental health expert spent more than an hour with Mr. Johnston, nor was any psychological testing conducted. They were unaware of the fact that Mr. Johnston was receiving social security benefits for his mental disability. They did not receive or review Mr. Johnston's statements to the police which contained indicia of delusions. They did not talk to defense counsel regarding the many problems counsel was having with Mr. Johnston.

At the evidentiary hearing on the Rule 3.850 motion, Mr. Wolfe, trial counsel on Mr. Johnston's case, stated:

> I always felt David was very suspicious and guarded in his communication.
>
> . . .
>
> It was a changing rapport [with David]. Some days he would be suspicious of me, Miss Warren, or Mr. Durocher or anybody from our office. Some days he would be easy to get along with, easy to talk to. Some days he would not want to talk about anything except tangential issues that were pressing on his mind.

(T. 22).

> From talking with him, talking with Mr. Johnston, you had the suspicion that he had some mental problems. And he had mentioned another attorney here in Orlando who was representing him or helping him on certain things, an attorney by the name of Ken Cotter. I contacted Ken Cotter and he advised me that David was receiving a S.S.I. check on a regular basis because he had some psychiatric history that prohibited him from holding down employment.
>
> And some of the information early on that we were able to get about his mental status we got from Mr. Cotter. And then later, spending time with David, just to discuss with him, we found out that he had, in Louisiana, some mental history, mental problems, histories there.

(T. 24).

Ms. Warren, co-counsel for Mr. Johnston during trial, described her relationship with David:

> I can't tell you exactly when I first met him. I know that I had numerous meetings with him. Numerous telephone conversations with him. I believe I received one or two letters from him.

There came a time during the course of my representation of him where I talked with him on almost a daily basis. But I can't say exactly when it was that I first met him.

I do know that from the beginning of the representation, it was clear to me that he had some serious psychiatric problems.

Q. How did you come to understand that?

A. I could tell him something, and fifteen minutes later, it would become clear that he did not understand what I had said. In fact, really couldn't -- I don't know if remember is the right word, but did not incorporate it into his consciousness. He made bizarre comments and statements. Was very childish; very demanding.

It was -- and then, of course, he had a, as the case developed, you know we learned that he had been committed and had received psychiatric treatment earlier.

I had, at that point, I had been practicing law about four years. One of the first cases that I ever became involved in was a first-degree murder case. In fact, the day after I was sworn in, I appeared for initial appearances for that particular person where we, where the insanity defense was a defense.

I have family members who are schizophrenic and I have had a lot of, had had even then, a fair amount of experience with clients who had psychiatric problems. And he just seemed to me to have severe mental problems.

(T. 143-145).

Both attorneys related their recollection of what occurred with regard to their request for a competency evaluation and both attorneys expressed their concern over the type of evaluation they felt they would get in the ninth circuit. Mr. Wolfe reported:

[The psychiatrists in the ninth circuit] would not give tests. They would go to the jail, talk to someone for a few minutes and then you would get a written report.

(T. 37).

Ms. Warren recalled:

The psychiatrists [in this case] were willing to render an opinion without [a psychological] evaluation.

(T. 149).

Clyde [Wolfe] and I both felt that he [David] was continually incompetent.

(T. 150).

When asked to elaborate her answer in light of Rule 3.211, she stated:

> There are various standards under the rules for determining competency. If you looked at each one of those standards superficially, I think David probably fit within each one of those standards and was competent superficially. But if you looked at them on a deeper level, and I think -- and if you spent time with him talking with him, dealing with him on an in-depth basis, you would realize, anyone I think would realize that he was not competent.
>
> It was just that we couldn't get a psychiatrist who was willing to do that, nor could we get him in the position in a hearing, in front of the judge, where he would talk to the judge the way he talked to us. I mean, you know, he was always able to pull himself together for whatever hearings that there were.
>
> It would -- we would go up and talk with him the night before or two days before, and he would be rambling incoherent. Talking about how far superior he was to everybody else. And refusing to listen to anything that we had to say, imperialously ordering us to leave the room. And then as we are getting up to leave, start talking you know, pulling us back in.
>
> * * *
>
> Q. In, in that regard, did he understand who were his adversaries and who were his friends as far as the criminal process was concerned?
>
> A. I don't think he did until the trial, itself. And the reason I say that is Clyde and I spoke with him many times about the possibility of the death penalty. And that the fact that the police, that he should not be talking to the police. He should not be giving statements to them.
>
> That -- I believe there is even a statement where he made to them in, where he said, Clyde tells me you're the enemy, but I want to talk to you anyway.
>
> It wasn't until, I think the day before trial or the very middle of the trial, we went up to talk with David at night, and he said, in a panic, they're trying to kill me. Do you know that they're trying to kill me. Does President Reagan know they're trying to kill me. This is terrible. President Reagan should be told these people are trying to kill me.
>
> And it was like that was the very first time that it had ever actually connected in his mind that he was facing the death penalty and that he was in a very serious situation. We told him over and over and over again, and it just, as I said, you tell him something, and fifteen minutes later, it was as if it just didn't mean anything to him at all.

(T. 150-155)(emphasis added).

Dr. Pat Fleming, a psychologist that conducted a competent evaluation of Mr. Johnston in 1988 (see Argument II) testified at the 3.850 hearing and was asked, among other things, her opinion about Mr. Johnston's competency at time of trial. Dr. Fleming described what occurred during her evaluation that led to her conclusion:

> A. Mr. Johnston, I said I saw him for seven hours. The first was to get a flavor of his functioning, to ask him questions, to -- and he initially was, was intact. He could answer the questions relatively well. By the time that the day progressed, he became increasingly agitated. He was unable to track the conversation. I estimate that after the first hour, he had increased difficulty.
>
> He has difficulty understanding information. This is most difficult to identify because it found that he has, he showed aphasic symptoms, which means the language disorders, which is characteristic of brain damaged people. But also the loosening of associations or the ability to track information, that's characteristic of schizophrenics. He showed perseveration. He showed evidence of delusions and hallucinations which had been documented in the previous documents. He now hears music. I talked about this hallucinations.
>
> He had, has an ingrained delusion about food, which began when he was about seven and has been consistent. At the time that I evaluated him, they brought the food, he refused to eat it because it had been made by the inmates. And we then went to, that probably was the inmate association. He has an ingrained delusion of, a fear of being poisoned.
>
> He has had consistent delusions of grandeur, which, which showed that he truly believes that he is, is better able to understand and know things than attorneys, judges; psychologists, certainly. He felt that he had been misrepresented; was very clear that he wished to represent himself at all times. He planned and has the plans well formulated that when he is released, he is going to earn a Ph.D. or a law degree so that he can help other people.
>
> He -- these are not fantasies. These are part of a well-defined delusional system. He's very difficult to follow the conversations because they, they tend to be concentrated on minutia and he moves quickly from one subject to another. Conversely, he stays on one thought and cannot move. At the time, we talked about the possibility that he might, in fact, be put to death, he said that that was a fact. But he could not get off of the thought that he was being poisoned with the jello in the noon tray, and this was infinitely more important to him than his status at the present time.
>
> He has showed a gradual slippage of thought. He would, he just deteriorated progressively through the day. He reported and had, at that time, migraines. He has had that for a long period of time.

Since childhood. They're severe and debilitating. Doctor Merikangas and I talked about those implications for people with brain damage.

(T. 240-242). Dr. Fleming noted that unlike "known malingerers who are happy to acknowledge and agree to any kind of mental problems" (T. 242), Mr. Johnston "consistently denied that he had any mental problems" (T. 242).

Dr. Fleming saw signs of both schizophrenia and organic brain damage and explained how both can exist in the same person (T. 243). She described the battery of tests she administered to assist her in forming her opinion:

> The individual testing of intelligence was interesting and significant in that in this Wechsler Adult Intelligence Scale we have a full scale I.Q. The mean for the general population would be one hundred. But this is also broken down into two sections. A verbal and a performance. The verbal sections are those that have those subtests that relate to the ability to understand information, the ability to integrate it and make sound judgments and the ability to express one coherently. The performance subtests are based on limited verbal information. And are, are more in visual, perceptual, and manipulative tasks.
>
> The interesting things about these findings of this test, which probably took an hour, an hour and a half, was that on the tests that are primarily verbal in nature, where the individual must have, be able to understand, he was in the significantly low range. His verbal I.Q. was 75. He showed limited background information. He is able to repeat things, still in a, in a below average range. But he is able to repeat information wrote [sic]. For example, when I presented a list of numbers, six, seven, he was able to do that with a scale score of eight. Ten is mean, which is his highest subtest. The minute we got into more abstract information, where it, it was necessary to find commonalties in two different concepts, he was unable to do this consistently. None of the other subtests, they were all five, with one six, which is significantly impaired. The interesting part of this is that on the performance subtests, which has eliminated the requirement of language, is that he performed not only in the average range, but in the above average range and on all but one test. He was able to sequence visual material when it didn't require language output or input or output. The only test that he was significantly impaired on in this battery was that, the digit symbol test. This test is the test, of this particular battery, is the most significant for brain damage. As compared to the twelves and the nine on all the other tests, he earned a six on this test.
>
> So we have learned from this discrepancy or I learned from this discrepancy is that this twenty-six point discrepancy would not have occurred by chance. And it was supportive of the past information of brain damage. Because he had had trouble following the conversation of -- he made inappropriate responses and was unable to answer appropriately. For example, I said, what's the difference between a fox and a dog. And Mr. Johnston said that a fox could walk

a straight line. This is an example of the inability to follow the conversation or to make sense. This was consistent.

I read to him on the Wechsler Memory Scale in order to determine if he had sufficient memory, to retain information long enough to be competent. He earned on that test an I.Q. of 66. This was lower than the verbal I.Q. of 75. But, more interesting, he simply could not track the information. I read him a paragraph that, that would be interesting -- if you would like me to read that to you or I can just tell you that it had to do with dogs are, they are trained in war time. It had 22 thoughts in it. I asked him, upon completion, what the paragraph was about. He said it's about dogs. And I said, well tell me more. And he said it tells how they executed the wounded.

Another paragraph was similar and it told about school children that were harmed in the war time. He again completely missed the point of this paragraph.

On three different presentations, he was unable to remember paired words such as black, gold. You know, black, silver; night, day. He could not retain this. When we have known malingerers, there is a consistent, a consistent bottoming out, generally. People do not know how to be good malingerers intellectually and so we don't have highs and lows generally. You know, people will say that they don't know when they were born; what's their mother's name; things that even severely retarded people do. Mr. Johnston did not have the profile on my testing of the malingerers.

I did sensory perceptual screening. I knew that he was going to be seen by Doctor Merikangas, who is a, a psychiatrist and neurologist. And he showed also signs of poor motor functioning. He was unable to do simple meteoric tasks. He could do finger tapping but he was unable to touch his hands to his nose. Some of those simple tasks. On the sensory evaluation he was unable to differentiate between sounds, to repeat, or to recognize if they were different. Doctor Merikangas -- I then called Doctor Merikangas to check neurologically if he was intact and he can, he can report on his findings.

But the, the significant findings were the aphasic symptoms, the indications of left hemisphere damage which, upon which our language functions are dependent. The organicity was clear.

In addition, his schizophrenic, first order symptoms, his hallucinations, the delusions, the thought disorder, unfortunately when we think of people who, who have serious mental problems or are psychotic, we always think of them as being very bizarre and never being able to be in contact with reality. And this is not true. Mr. Johnston has periods of time when he appears very coherent. He can repeat information by wrote [sic] he can memorize things and repeat it. When asked to apply the principle however, he is severely deficient.

(T. 243-247). Dr. Fleming made a diagnosis -- "it's a tri-part diagnosis. One

is organic brain syndrome; schizophrenia undifferentiated with paranoid features; and substance abuse" (T. 252).

Dr. Fleming then opined that Mr. Johnston was not competent to stand trial at the time of the offense and gave her reasons why by going through the eleven point criteria of rule 3.211:

> Q. The first one, defendant's appreciation of the charges. What did you find with regard to that?
>
> A. He knew intellectually the charges. He did not relate them to himself because he knew he did not commit the crime. You have to understand that his basis for viewing any of this was based on illogical and damaged thinking. He was unable to make that kind of a judgment.
>
> Q. All right. And the second one, defendant's appreciation of the range and nature of possible penalties. Did you have a finding on that?
>
> A. I'm finding that he, my finding on that was that he did not understand, he did not connect the charges with the penalty. Shortly before the trial, he was astounded and told his defense attorney he realized, he said did you know, did you realize those guys are trying to kill me? Does President Reagan know this? He did not understand prior to that that he actually, that one of the penalties was death. He knew it. They had told him that. And this was much later.
>
> THE COURT: Let me clarify that, ma'am. Did he know that the penalty for first-degree murder could be either life imprisonment or death by electrocution? Was he aware of that and was it, and was it a case that he simply did not think that that would happen to him because he was innocent? Was that the case?
>
> THE WITNESS: There is, there is two phases to that. First, he knew -- your second statement true. He thought that it would not happen to him because he, he knew he was innocent.
>
> But the second phase is that he, he was as, as noted earlier, he is unable to make those connections in a rational way. It's, the definition of knowing. He can restate numbers. He can restate laws. But to know in terms of understanding, he is deficient by nature of his illness.
>
> Did I answer your question, Your Honor?
>
> THE COURT: I'm not quite sure I understood your answer.
>
> THE WITNESS: He, he knows.
>
> THE COURT: Was he aware, generally, that a person convicted of first-degree murder in Florida faced two possible penalties? Death by electrocution or life imprisonment?

THE WITNESS: He knew that by rote. He could restate that. He could not apply it to his particular case.

THE COURT: Because he thought he was innocent and he would be --

THE WITNESS: That was the first phase, but --

THE COURT: It would never happen to him.

THE WITNESS: Well, there is that flavor, of course, is that he knew that he was innocent and so it wouldn't happen to him. But he didn't understand that, through the years -- this was several years later -- through that whole adversarial process, that that was truly what they were trying to do. They meaning the prosecution.

THE COURT: He became aware of that during the trial?

THE WITNESS: Well, he became aware of it -- I think Miss Warren said about a week before the trial, he said, did you know that they were thinking of killing me? That they were going to try to kill me. He was confused and remained that way throughout the trial is my understanding.

BY MS. DELK:

Q. Number three in that list is the defendant's understanding of the adversary nature of the legal process. Did you have a finding of that?

A. Yes.

Q. And what was that?

A. That refers back to his confusion of the whole adversary nature of trials. His initial confusion. Which was greater than just trying to, to get out of something. Is that he truly did not understand that the police were as in the role of prosecutors. He, does not understand the difference. And there are two, there are two factors. First of all, going back to the brain damage and the schizophrenic thinking, he starts from an illogical premise. He starts from an illogical premise and then all of the subsequent reasons stem from that. So, if he knew that he knew more than anyone else, he -- and the victimization that he aligns with the most powerful, it is so distorted and his thinking is so illogical that he can't, not won't, understand the adversarial nature.

Q. Number four, the defendant's capacity to disclose to the attorney pertinent facts surrounding the alleged offense.

A. This goes, again, back to the illogical thinking. I have a note here, he said -- when he went to the police he said, you know, I voluntarily came down here. Now you won't let me go home. That refers partially to the, to the preceding statement. But he -- his slippage that I referred to earlier, the illogical thinking, makes it

difficult, impossible to separate the, the facts from, from his, his illogical thinking or his psychotic thinking. He concentrates on minutia. Anyone who has talked with Mr. Johnston knows that it takes hours to sort through all of the details. He knows the details. He doesn't know the big picture.

Q. Number five, the defendant's ability to relate to his attorney.

A. All right. I think that is well documented. And when I talked with the attorney, he fired them; he has fired the C.C.R. attorneys -- it depends upon his mood. It depends upon how he views it that day. Are they, are they helping or are they harming. And because he has such variable functioning and perceives, again, that he doesn't need that, it would make it almost impossible -- well, not almost. Miss Warren told me that it was, it really was impossible to represent him adequately.

Q. The defendant's capacity to realistically challenge prosecution witnesses. Did you have a finding on that?

A. Yes. He was not able to do that for the same reasons. He couldn't realistically integrate or understand the facts.

Q. The defendant's ability to manifest appropriate courtroom behavior.

A. Variable. As he was in, during the interview, at times he's, very calm and coherent and other times illogical and near psychotic.

Q. The defendant's capacity to testify relevantly.

A. The, the defendant's ability to testify relevantly is, is very -- it's a crucial difference. Because he is able to, state memorized facts, it sounds relevant and coherent but it often has nothing to do with the facts. Or he draws inappropriate conclusions from the facts that he has memorized. He's unable to integrate that information.

Q. The defendant's motivation to help himself in the legal process.

A. He's highly motivated to help himself. Just woefully inadequate to know what to do to make that happen.

* * *

He's motivated. He does not have the ability to channel that motivation in helpful directions.

Q. The defendant's capacity to cope with the stress of incarceration prior to trial. Did you make any finding with regard to that?

A. This is variable. At the time that I saw Mr. Johnston, I, I

stated that I felt that he would have difficulty maintaining later and he has had variable functioning. In previous incarcerations, he disintegrates and attempts to harm himself. He becomes psychotic and disassociated. And during these periods of time is one of these times when he refused to see his attorney. He at that time, was, I would say unable to perceive who, who's his help. He just can't reason that way at that time. And so as stress, any kind of stress, the effect of stress, the effect of alcohol, as it does with everybody in the courtroom, affects his functioning. Only to a, only to a greater degree. And so any kind of stress, the stress of incarceration, would diminish his ability to reason adequately; function adequately.

(T. 266-273).

Dr. James R. Merikangas, M.D., a psychiatrist and neurologist also testified at the evidentiary hearing. After conducting a competent evaluation that "consisted of reviewing his medical records, which are quite extensive; his psychiatric history and interviewing him, psychiatrically and performing a medical examination, including a neurological examination" (T. 364), Dr. Merikangas testified as to his opinion of Mr. Johnston's mental health:

A. My diagnosis is that he is psychotic and has been, at least since he was 17. That he has brain damage, probably from early childhood. And that as a result of the organic brain damage and the psychosis, he's more susceptible to the effects of drugs and alcohol, and emotional stress and distress.

Q. What kinds of things indicated to you that he was, in fact, brain damaged?

A. Well, very important in his evaluation is the, is the historical record and the medical records. He was tested at age seven and a half in schools having an I.Q. of 57. And he was labeled at that time as an educably retarded child. He was noted at that time to be hyperactive, inattentive, difficult to be directed, not benefiting from learning. He was held back in school. And he began almost immediately to get in trouble with the authorities.

When he was 13, it was recommended that he be institutionalized because of his psychiatric difficulties, his learning difficulties and his violent behavior. And then he was, in fact, hospitalized a number of different places, including the central Louisiana State Hospital and the Conway Memorial Hospital, in particular.

And all of these people, or almost all of these people agreed that he had a severe mental illness. They varied in light details. Many of them calling him schizophrenic, which does summarize fairly well the thought disorder that he has. He suffers from delusions, hallucinations and a complex disorder of logical thought, which causes him not to be able to judge his environment and react to

it in a way that normal people do.

In addition to that, though, he has the physical findings of brain damage. Which included his being, if I could refer to the, my notes, he has trouble with coordination of the left side of his body. Moving his left hand and arm is done with difficulty. He has changes in his reflexes. Hyper reflexia. Particularly at the left knee. He has an altered sensitivity to pin prick. The test is to touch the patient with a sharp object and have him report. The entire left side of his face, arm and leg. There is an asymmetry to his head and his face, which if you look at him, you will see that the right eye appears somewhat smaller than the left. He had, when moving his face spontaneously, it moves asymmetrically. The right side of the face moving more than the left.

These physical signs are things that accompany brain damage. The psychological testing also bears that out. But in my own examination of him, he also has scoliosis, which is spinal curvature, and although this is a disease of the bone, the growth of the spine is controlled by the nervous system and is probably as a result of his brain damage that he has the spinal curvature.

Q. And you said that the psychological testing done by Doctor Fleming bore out your findings as well?

A. Yes. It corroborated that he has asymmetry of his psychological tests as well. And she reviewed also the same records which I did and the previous testing. And her own results show a discrepancy between the verbal I.Q., which came out to be 75, and the performance I.Q. of 101. The discrepancy between these two numbers is diagnostic of brain damage. Also scored a 66 on the Wechsler Memory Scale, which is quite abnormal.

(T. 365-367).

Dr. Merikangas then related his findings of Mr. Johnston under the Florida statutory criteria for competency determinations, Rule 3.211.

So based upon all that I found, that his appreciation of the charges was deficient in that he, he made very peculiar statements which are characteristic of a person who has a severe disorder of thinking. That he stated, for instance, that he would, he would not need to stay at the police station because he had come there voluntarily. He could leave. And that he was not able to be tried because he would rather die than be accused of something that he didn't do, which, of course, is logically not consistent.

One of the characteristics of schizophrenic thinking is it's illogical. That conclusions do not follow premises in a logical manner. But rather, in an idiosyncratic and autistic manner of thought. So I don't think that he appreciated that he was charged with the murder. In fact, referred to it as not only saying that someone else did it, but referring to himself in a third person when it was clear that he was describing things that he, himself, had done. That he, he did this; he did that, rather than I did this and I did

that. And that his appreciation that he was, in fact, being charged with that. He was, indeed, being questioned regarding his own arrest, rather than simply making ethicatory statements to the police which were, I think the opposite. All indicated he didn't appreciate what was going on in that regard.

His appreciation ranged, in the nature of possible penalties, was deficient because not only did he think that he was going to be freed and let go, he simply gave all of these various stories, but he made the statement that he couldn't be executed or electrocuted because he had already died. Obviously, if you have already died, you can't be electrocuted. And if you believe that, then you're not appreciating what the penalties may be.

His understanding of the adversary nature of the legal process is very strange.

* * *

... Mr. Johnston, at numerous times, in the statements which he made, upon which I base my opinion, to the police, indicated that he knew that his attorneys had told him not to talk to them. And not go keep giving, going down there each time there was a, something came into his mind. Something idiosyncratic and making statements and different statements and that he stated to the police that his attorneys had told him not to do that. And that certainly, to me, indicates a lack of cooperation by Mr. Johnston with his attorneys at that time, and that he thought that the police were more on his side and more able to even to dismiss the charges, if they believed him, than the advice of his attorney might indicate. So relating to his attorneys, based upon that, and based upon what the attorney himself told me, indicated that he was not able to do that.

His ability to assist the attorneys in planning defense was sufficiently impaired and substantially impaired because not only did he deny doing it, but was giving these discrepant versions of it. And I believe that the mental state of the patient at the, or the defendant, rather, at the time, was sufficiently impaired that it's likely he did not even remember precisely enough what had happened. Even to make up a good story about it. In other words, to tell the truth was not possible because for him and to make a good deception was not possible to him based upon his psychosis, his drug intake, alcohol and LSD, included. His brain damage, his deficient memory, that he was not able to then assist the attorney to realistically challenge the witnesses.

And his ability to manifest appropriate courtroom behavior, obviously, is better testified to by people who were there. But I would, I would not make a wager regarding that. His capacity to testify relevantly I think is well, well documented in the various conflicting and tangential statements that he made, which are indeed irrelevant. His various statements of the position of doors and windows, why he used one phone, why he had to use all three bathrooms to, to wash blood off. Throwing dog boxes up and down stairs. All of this is not relevant to helping in his defense.

. . .

Q. Defendant's capacity to cope with the stress of incarceration prior to trial. Did you have any findings with regard to that?

A. Well, there were, there were also statements that he made that he would rather talk when he was less intoxicated. That appears in one of his statements. That he was hallucinating at various times up to and including the present. And that, I think, that the capacity to cope with the stress of incarceration is a double-edged sword. In some way, incarceration is very good for him. It provides him the structure and keeps him relatively free of drugs and alcohol. So in that sense, he is able to, to deal with the stress of incarceration. The stress that he was trying to avoid by this was the stress of being placed in a mental hospital again, to which he prefers incarceration.

(T. 371-378). Dr. Merikangas was then asked his opinion of whether Mr. Johnston was competent at the time to stand trial: "Well, I think at the time, that he was not competent to stand trial" (T. 379).

The elected public defender, Mr. Joe DuRocher also testified at the evidentiary hearing, regarding a motion his office made to withdraw from Mr. Johnston's case. This motion was made partly because of conflicts they were having with David and a "part of it was just to, frankly, was just to help educate the judge about the problems we were having" (T. 442). Mr. DuRoucher explained his concerns about Mr. Johnston's mental health:

Well, in -- when I first met him, and in that first interview, I, I had concerns, you know, it was sort of him telling me that he was receiving S.S.I., sort of was a documentation, but what I was seeing and the person I was talking to on the day in November of 1983, was a person who was just not, not rational.

I, I couldn't, I'm not diagnosing. The person I was talking to, I have seen, to give an image, judge, I have seen a commercial that, an anti-drug commercial where they drop an egg on a sidewalk and the egg fries. I thought I was talking to somebody with a fried brain. He admitted to us extensive drug and alcohol use. It was either that, I figured, or, or he might be retarded.

Without testing or anything, he just wasn't able to -- he could tell me things, but what I had done prior to my interview with him and, is common practice, and one I generally follow in this case, my notes reflect I had reviewed the arrest affidavit. And so I had, I knew what the police said. I know, at least in that probable cause sense, what, what they were basing their arrest on. And I didn't tell him that. I just asked him to tell me his version of what was going on. And, and the two were so dramatically different. He was not

responsive to, to the, to the factual situation that the police had perceived and based their arrest on. I thought he was intellectually retarded, dull, and I reported those concerns to, to Clyde Wolfe in a meeting which my notes reflect was on November 8th of 1983.

(T. 443-444).

While Mr. DuRocher easily acknowledged that he was not a mental health expert, he clearly had a great deal of experience in talking with people under similar circumstances:

A. Pick a number of thousands of people in initial interviews in criminal cases. You know, I mean, I don't want to be flip about it. To characterize it, he was just a strange person. He, he -- wasn't so much words that I wrote down I am sitting here talking to a fellow who's just not all there mentally.

Q. Well --

A. And he could say, he could say what he was doing -- I didn't really know if it was true or not, but I didn't, didn't feel comfortable with the processes of his mind.

Q. I am trying to get down to some, some basics as to why you felt that way. Was it something he said or just the way he looked at you?

A. Part of the way he looked at me. Part of the way he expressed himself. Partly the manner in which he spoke.

Q. Did he indicate to you any, any delusions, things which appeared to you to totally not based on reality in any way? Martians?

A. I don't recall anything like that. I recall sort of a, an inappropriate manner [affect] sometimes he'd be very intense and concerned. Other times it was just like he was spacey.

(T. 449-450). There is no question that everyone who spent any substantial time with Mr. Johnston knew he was just "not rational" (T. 443).

Dr. Pollack who evaluated Mr. Johnston pretrial, testified at the 1984 competency hearing and described his "examination method or evaluation technique" as "essentially . . . a direct inquiry, . . . to get whatever history [he] could obtain, just some kind of dialogue sense of understanding of Mr. Johnston, reviewing the observations made of his behavior by the jail staff, reviewing the charges, talking with him, and just a formal mental status

examination" (R. 1040).[3] Pollack acknowledged that he received Louisiana reports detailing several commitments in that state after he conducted his examination. Dr. Pollack had submitted his report as to his examination and conclusion on the same day that he conducted it (R. 1040-41). Obviously, he had not considered Mr. Johnston's records from Louisiana in concluding Mr. Johnston was competent.[4] Pollacks examination of Mr. Johnston lasted between 45 to 50 minutes (R. 1041). The only test he attempted to administer was "some psychometric drawings" but Mr. Johnston apparently unwilling to cooperate (i.d.). Pollack did find Mr. Johnston was narcissistic. This conclusion was because Mr. Johnston apparently felt that everyone was antagonistic and hostile towards him and that he was the only one that knew the truth (R. 1042). Mr. Johnston believed himself brighter and more important than everyone including his own attorneys. Pollack acknowledged that this could affect his "ability to relate to his attorney" depending on whether he saw them as being "useful to his cause" (R. 1043). Pollack asked if Mr. Johnston "didn't see his attorney as being useful to his cause [whether] it would impair that ability to relate to the attorney, as well as planning his defense." Pollack agreed that "should that occur, that's correct" (R. 1043). Dr. Pollack did not discuss with Mr. Johnston's counsel whether these potential difficulites had in fact materialized (T. 156, 518).

Pollack reiterated that pathological narcissism is marked by a person feeling that everyone is against him or adverse to him. He conceded that there is a "flavor" of "paranoia associated with pathological narcissism" but based on his brief conversation with Mr. Johnston, Dr. Pollack did not think that it

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[3]Dr. Pollack testified at the competency hearing in 1984 but was not called either by the State or Mr. Johnston at the 3.850 hearing.

[4]There is no indication that Dr. Pollack ever knew or considered that Mr. Johnston had been declared incompetent to stand trial in the State of Kansas.

reached the point where it "distorts perception to reality," rather "there is a perception of it" (R. 1044)(emphasis added).[5] Pollack stated that he thought that Mr. Johnston was "probably of average intelligence [and] . . . [didn't] see any deviation there" (R. 1045).[6] He described Mr. Johnston as "exceptionally immature . . . react[ing] to situations by extremes, . . . much like you would see in a child . . . [and] with mental stimulation he could easily overact, especially as a way of controlling environment" (R. 1045). However, Pollack acknowledged that he did not "administer any intelligence or IQ tests" (R. 1046). Pollack did not discuss Mr. Johnston's "self-destructive or suicidal activities or tendencies" with any of the correction officers (R. 1046).

According to Pollack, a characteristic trait of pathological narcissism is that one perceives everyone else in an adversarial relationship. Because of this, Pollack stated that Mr. Johnston's relationship with his attorney could be negatively affected if he perceived that his attorney's advice was a threat to his freedom or if it was not useful in exonerating him (R. 1047). Pollack would not concede that this amounted to a distortion of reality, but explained that Mr. Johnston "view[ed] everything as black and white. . . . there are no shades of gray. You are either for him or against him. There is no room for anything in between, and so his perception of reality is there but it is exaggerated." (R. 1047). Pollack just did not think that this would interfere with Mr. Johnston's ability to assist in his own defense (R. 1047). Even though it is "an exaggerated sense, and so it would be an exaggerated posture. [Pollack thought] it would still be within the bounds of reality, but at the extremes" --

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[5]There is also no indication that Pollack ever saw Mr. Johnston's statement to the police which reflected delusional thinking. In these statements Mr. Johnston claimed among other things, to have seen an image of Christ in the newspaper and to have looked in a mirror and seen the devil (T. 521).

[6]At age seven and a half, Mr. Johnston's I.Q. tested out at 57 (T. 514).

definitely "exaggerated somewhat in the extreme" (R. 1048).[7]

In 1984, Dr. Lloyd Wilder was also examined by the court and opined that as a result of his meeting with Mr. Johnston on January 11, 1984, he was of the opinion that Mr. Johnston was competent to stand trial (R. 1049-51). Wilder explained that his purpose in examining Mr. Johnston was not to "diagnose" him but merely to observe his "ability to do certain things" (R. 1055). Wilder's examination lasted about an hour. Wilder acknowledged that Mr. Johnston would not "get along with others, and would . . . include persons that are supposed to be acting on his behalf" including his lawyer "if his lawyer didn't please him" so that it "could be unpleasant" and would "adversely" affect his ability to relate to his attorney or even his "desire" to do so (R. 1056). In such a case, his lawyer, would have to have the "patience of a saint, more or less, to deal with him, if he chose to do that" (R. 1056).[8] However, Dr. Wilder did not discuss with Mr. Johnston's counsel what difficulties they were encountering.

Even though Drs. Wilder and Pollack had claimed Mr. Johnston was competent at time of trial, neither spent the time, conducted the testing or expended the necessary time and energy to conduct a competent evaluation (See Argument II). At the evidentiary hearing in 1989, Dr. Wilder conceded as much by stating that if he had known certain things he would have, at least, wanted more testing.

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[7]Dr. Pollack was not called to testify at the Rule 3.850 hearing. The State chose not to call him and ask him whether the testing and materials which Dr. Pollack did not have in 1984 would have altered his conclusions.

[8]At the competency hearing in 1984 defense counsel argued that Mr. Johnston had a "distorted perception of the legal process . . . that would hinder his ability to communicate with" his attorney in a situation where Mr. Johnston considered his lawyer to be in a posture "adverse" to him. Counsel further argued that the pro se motions that Mr. Johnston had already filed insisting that his attorneys withdraw, were proof that such adversity did in fact exist. The testimony, taken in conjunction with the exhibits, according to counsel, established that "as a whole . . . Mr. Johnston ha[d] a significantly impaired ability to relate to his defense counsel, to testify relevanty, as well as relate to [counsel] pertinent facts that were relevant to this cause, as well as the other criteria there in the rules, and, therefore [was] not competent to stand trial" (R. 1064).

Dr. Wilder stated that in his examination of Mr. Johnston "I didn't do any neurological studies. I didn't, I didn't do any psychological tests. In other words, I examined him by conversation and observation" (T. 471). His interview was "about an hour" (T. 475). Clearly Dr. Wilder relied completely on Mr. Johnston's self-report. Yet, this Court has questioned this practice:

> Commentators have pointed out the problems involved in basing psychiatric evaluations exclusively, or almost exclusively, on clinical interviews with the subject involved... In light of the patient's inability to convey accurate information about his history, and a general tendency to mask rather than reveal symptoms, an interview should be complemented by a review of independent data. See Bonnie, R. and Slobogin, C., The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation, 66 Va. L. Rev. 427, 508-10 (1980).

Mason v. State, 489 So. 2d 734, 737 (Fla. 1986).

At the evidentiary hearing, Dr. Wilder was asked if it was relevant to competency determinations to know of someone is delusional:

> Well, yes. I think if a person is delusional, it, it inhibits his ability to work with counsel.

(T. 495).

> Q. If checking out, hypothetically, someone's prior mental health records, there are references in there that this person has shown signs of delusions is that something that you want to know when you're analyzing this, this individual.
>
> A. Yes, that helps one because if he has been delusional at times in the past, then it is more likely that he might have been at the time I'm more interested in.

(T. 494-495). Yet, Dr. Wilder had never seen the transcript of the statements David had made to the police. He was unaware of their delusional content. Had he known of the delusional content, Dr. Wilder would have been concerned.

> Q. What I wanted to ask you, hypothetically, if, in those statements, there were references to such things as seeing an image of Christ in the newspaper, looking in the mirror and seeing the devil as himself, are those the kind of red flag indicators, in terms of delusions and hallucinations, that would have been significant to you in conducting a competency evaluation?
>
> A. Yes. Had he reported those things, I would have been more suspicious of either a schizophrenic illness or his being under the

influence of drugs, which might have done that, too.

(T. 521).

Then Dr. Wilder was referred to his report and asked:

> Q. And in the report dated January 13th 1984, in the third paragraph is the one I'm going to ask you about. He discusses the charge, accused of killing Mary Hammond, and he indicated his relationship to Mary Hammond to you. And indicates that he was acquainted with her; they had befriended each other over a period of four years. Would it be significant to the issue of, of delusions, if there was evidence that he hadn't known her but for two weeks prior to the alleged homicide?
>
> A. That would be either delusional or lying.
>
> Q. And that would be something you would have to sort out in your mind which it was?
>
> A. Yes.

(T. 522).[9]

There is no question that the overwhelming evidence in this case was that Mr. Johnston was incompetent to stand trial. Neither doctor appointed by the court at the time had conducted a professionally adequate evaluation (see Argument II) and Dr. Wilder conceded that had he known of hallucinations, delusions, and low I.Q. scores, he would have found that significant and ordered more testing. When confronted with examples of the bizarre stories told by Mr. Johnston in the police interrogation which appeared in police reports, Dr. Wilder stated "[t]hat would be either delusional or lying" (T. 522); yet he admitted that he never sought independent verification of those stories in an

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[9]Dr. Wilder was also asked if learning that Mr. Johnston had been found to have an I.Q. of 57 at age 7 1/2 would be significant. Dr. Wilder stated that I.Q. tests at age 7 1/2 were not very reliable (T. 514), however, he did believe that had he known that, he probably would have asked for additional testing (T. 515). As to organic brain damage Dr. Wilder, admitted that he "would want to know whatever there is to know about it" (T. 516). Even though the criteria under the Rule specifically asks about the defendant's ability to relate to counsel, Dr. Wilder did not speak with the attorneys in this case. Thus as Dr. Wilder conceded there was significant information which was necessary to make a competency determination that he did not have and did not consider.

effort to determine which it might be. At this time, Dr. Wilder can not rule out the possibility that Mr. Johnston was delusional and hence not competent.

The circuit court erred in finding Mr. Johnston competent. In its order denying this claim at the 3.850 hearing, the circuit court said only:

> I found after pre-trial hearing that defendant was competent to stand trial. Evidence offered at the evidentiary hearing does not persuade me that my pre-trial finding was incorrect and I reaffirm it here.

(T. 1687).

The circuit court was wrong factually and legally:

> It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subject to a trial.
>
> * * *
>
> Some have viewed the commonlaw prohibition "as a by-product of the ban against trial in absentia; the mentally incompetent defendant, though physically present in the courtroom, is in reality afforded no opportunity to defend himself." Foote, A Comment on Pre-Trial Commitment of Criminal Defendants, 108 U.Pa.L.Rev. 832, 834 (1960). Se Thomas v. Cunningham, 313 F.2d 934, 938 (CA4 1963). For our purposes, it suffices to note that prohibition is fundamental to an adversary system of justice. See generally Note, Incompetency to Stand Trial, 81 Harv.L.Rev. 455, 457-459 (1967). Accordingly, as to federal cases, we have approved a test of incompetence which seeks to ascertain whether a criminal defendant "'has sufficient present ability to consult with the lawyer with a reasonable degree of rational understanding --and whether he has a rational as well as factual understanding of the proceedings against him.'" Dusky v. United States, 362 U.S., at 402, 80 S.Ct. 788, 4 L.Ed.2d 824.
>
> In Pate v. Robinson, 382 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966), we held that the failure to observe procedures adequate to protect a defendant's right not to be tried or convicted while incompetent to stand trial deprives him of his due process right to a fair trial.

Drope v. Missouri, 95 S. Ct. 896, 903-904 (1975)(emphasis added).

Florida's Rule 3.211 adapts the same standard for competency determinations. Evidence was present pre-trial, trial and at post-conviction that Mr. Johnston clearly did not have "sufficient present ability to consult with his lawyers with a reasonable degree of rational understanding" (supra).

That evidence was absolutely uncontroverted at the evidentiary hearing. All of Mr. Johnston's trial attorneys expressed their concerns from the beginning about Mr. Johnston's mental competence and his ability to understand what was occurring. Indeed, Ms. Warren stated that when Mr. Johnston, in the midst of trial, said "Does President Reagan know they are trying to kill me" (T. 155), that she knew that Mr. Johnston had then fully comprehended the nature of what was occurring. Dr. Wilder admitted in 1989 that he had not known of previous hallucinatory and delusional periods suffered by Mr. Johnston which were red flags that Mr. Johnston may not have been competent. Dr. Wilder conceded this was important information he did not have and could cause him to reach a different conclusion. Dr. Wilder admitted that he had never talked to trial counsel to find out how they related to Mr. Johnston. Conversations with defense counsel were not "routine' (T. 517) and not considered necessary by Dr. Wilder. Nor did Dr. Wilder ever address the statutory criteria of Rule 3.211 in effect at the time of trial.

The State never refuted any of the overwhelming evidence of Mr. Johnston's incompetence to stand trial. With no evidence to the contrary, the court's factual finding of competency is clearly wrong and flies in the face of reason. This Court has found that an expert's competency evaluation must properly address a defendant's functioning under the statutory criteria. Cf. Muhammad v. State, 494 So. 2d 969 (Fla. 1984).

In Mr. Johnston's case as in State v. Sireci, 536 So. 2d 231 (Fla. 1988), and Mason, supra, there was "significant evidence" of mental retardation and brain dysfunction that was ignored by the mental health professionals and an "extensive history" of psychotic behavior that went unexplored by the experts and therefore was completely ignored when the 1984 evaluations were conducted. Based on the record facts alone, it is clear that neither of the evaluations were adequate under the standards set by this Court in Mason and Sireci. The

facts developed at the evidentiary hearing are absolutely uncontroverted that the evaluations pretrial were not professionally adequate and that Mr. Johnston was, in fact, not competent to proceed to trial. No records were considered in those pretrial evaluations, none of the critical facts regarding Mr. Johnston's history were considered, no testing (critical in a case such as this) was conducted, and the Rule 3.211 criteria were never employed.

Mr. Johnston's current evaluations involved not only the necessary review of the material facts about Mr. Johnston's past, but also the requisite professionally adequate testing. Based on these materials, plus extensive testing and interview time totaling well over seven hours, Dr. Fleming concluded Mr. Johnston was not competent. Dr. Merikangas conducted his own evaluation and came to the same conclusion as Dr. Fleming. This is just like Mason. Drs. Fleming and Merikangas, unlike the prior experts, assessed each of the statutory criteria and gave not only their opinions as to whether Mr. Johnston met the criteria, but also provided the reasons for their opinions. Moreover, both Drs. Pollack and Wilder in their testimony in 1984 indicated that Mr. Johnston may become incompetent if he distrusts his lawyers. Mr. Wolfe and Ms. Warren testified that occurred and that Mr. Johnston was incompetent. Further, Dr. Wilder has conceded that the basis for his 1984 conclusions is very much in doubt.

The lower court, however, not only ignored the statutory requirements for determining competency, but also ignored this Court's established precedents regarding determination of professionally adequate mental health evaluations: the court erred by simply ignoring the significant facts proffered with Mr. Johnston's Rule 3.850 motion and proven at the evidentiary hearing, facts undiscovered or ignored by the experts at the time of trial. These facts, however, were and are necessary for the proper determination of mental health issues in a case such as this.

In sum, Mr. Johnston was not competent to undergo criminal judicial proceedings. His lack of competency should have been obvious to the court, defense counsel, and the defense psychiatrists, as well as to the State's psychiatrists. The rights of this mentally ill capital defendant were simply not protected. Accordingly, Mr. Johnston's conviction and sentence of death stand in stark violation of the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution. See, e.g., Pate v. Robinson, 383 U.S. 375 (1966); Hill v. State, 473 So. 2d 1253 (Fla. 1985). The lower court erred and relief is proper now.

ARGUMENT II

MR. JOHNSTON WAS DEPRIVED OF DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE MENTAL HEALTH EXPERTS WHO SAW HIM PRIOR TO TRIAL DID NOT CONDUCT ADEQUATE EVALUATIONS, AND BECAUSE DEFENSE COUNSEL FAILED TO RENDER EFFECTIVE ASSISTANCE AND TIMELY PROVIDE THE EXPERTS WITH THE NECESSARY BACKGROUND INFORMATION.

A defendant is entitled to an independent competent mental health expert evaluation when the State makes his or her mental state relevant to "his criminal culpability and to the punishment he might suffer." Ake v. Oklahoma, 470 U.S. 68, 80 (1985); State v. Sireci, 536 So. 2d 231 (Fla. 1988). What is required is an "adequate psychiatric evaluation of his state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). As important as this right is to a defendant facing the ultimate punishment, the right alone -- as with any right -- is useless without "the guiding hand of counsel" to enforce and implement it. See Powell v. Alabama, 287 U.S. 45, 69 (1932).

There is a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Edwards, 488 F.2d 1154, 1163 (5th Cir. 1974). Mental health and mental state issues permeate the law. Their significance is amplified in capital cases where the jury is to give a "reasoned moral response" to the defendant's "background,

character, and crime." Penry v. Lynaugh, 109 S. Ct. 2934, 2952 (1989). In a capital case, counsel has the duty to conduct an independent investigation to discover if his or her client has any mental health problems and to understand the legal impact of such problems on competency, sanity, waivers, specific intent, and mitigating circumstances. This careful investigation and assessment must be done before any "strategy" decisions are made. Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986). See Deutscher v. Whitley, 884 F.2d 1152 (9th Cir. 1989). Without adequate investigation, the "strategy" decisions, if any, are tantamount to no strategy at all. Evans v. Lewis, 855 F.2d 631 (9th Cir. 1988); Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989); Chambers v. Armontrout, ___ F.2d ___ (8th Cir. July 5, 1990)(in banc).

"The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." Strickland v. Washington, 104 S. Ct. 2052, 2063 (1984). The sixth amendment envisions that every client will be assisted by an attorney "who plays the role necessary to ensure that the trial is fair." Id. at 2063. Whether a defendant was denied the effective assistance of counsel depends upon the two-prong analysis set forth in Strickland. Under the Strickland test, a defendant must identify particular acts and/or omissions of counsel that are outside the range of reasonable competent attorney performance under prevailing standards, and demonstrate that there is a reasonable probability the errors could have had some impact on the proceedings, that is, confidence in the result of the proceedings is undermined because of counsel's errors. Mr. Johnston amply met these requirements with the overwhelming and competent evidence that was presented at the evidentiary hearing. Because of his counsels' errors, he never received the competent psychiatric/psychological examination that was necessary for a "just result" and "fair trial." See Futch v. Dugger, 874 F.2d 1483, 1487 (11th Cir. 1989). Where

counsel does not timely and reasonably employ expert assistance in a case in which mental health is or should be at issue, no "tactic" can be ascribed to any decision counsel may make regarding mental health issues. Evans v. Lewis, supra; Nixon v. Newsome, supra. Mr. Johnston was not evaluated for penalty phase mitigation. The cursory evaluation for competency and insanity was inadequate under Sireci, supra. The failure to obtain a mental health evaluation as to mitigating circumstances was unreasonable and deficient performance. Similarly, the failure to obtain a mental health evaluation with reference to Mr. Johnston's statements to the police was deficient performance.

Florida law made the mental condition of Mr. Johnston relevant to criminal culpability and punishment in many ways: (a) competency at trial and sentencing, (b) legal insanity at the time of the offense, (c) specific intent to commit first degree murder (either premeditation, or the specific intent requirement for underlying felonies in felony murder), (d) statutory mitigating factors, (e) a myriad of nonstatutory mitigating circumstances, and (f) the knowing and intelligent qualify of Mr. Johnston's statements to the police.[10] Consequently, Mr. Johnston's counsel should have been aware of the importance of mental health issues and that they impacted on virtually every aspect of Mr. Johnston's case.

At the evidentiary hearing, trial counsel admitted they had known that Mr. Johnston had been in and out of mental hospitals, that he had been diagnosed schizophrenic and that he had a great deal of difficulty cooperating with them. Trial counsel in fact filed a notice of an insanity defense (R. 1949) and a request for experts (R. 2009).

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[10] In fact, the trial judge found Mr. Johnston "not competent to waive his Sixth Amendment right of counsel" (T. 69). Yet trial counsel never considered challenging the statements to the police on that basis (T. 69, 175).

Yet, counsel ultimately abandoned this avenue and failed to adequate investigate this area that they knew was critical to this case. The sole reason for abandoning the area of inquiry was Mr. Johnston's opposition. As a result, the ball was dropped. Both Mr. Wolfe and Ms. Warren made clear their concerns about the inadequacy of the evaluations they knew to expect in the ninth circuit (T. 39, 149) and yet they failed to pursue the matter further. Their failure to investigate this area further precluded presentation of materials to mental health experts that were critical to a thorough, competent evaluation. This failure was clearly deficient performance under Strickland, supra. See Futch v. Dugger, supra; Evans v. Lewis, supra. "The Sixth Amendment imposes on counsel a duty to investigate, because reasonably effective assistance must be based on professional decisions and informed legal choices can be made only after investigation of options." Strickland, supra, 466 U.S. at 680 (emphasis added). Counsel can make no strategic choice until substantial investigation is undertaken, particularly in the area of mental health, where lawyers have little expertise, and where expert assistance is a dire necessity. See Evans v. Lewis, supra. This is so because "facts form the basis of effective representation. . . . The basis for evaluation of (legal issues) . . . will be determined by the lawyer's factual investigation, for which the accused's own conclusions are not a substitute." A.B.A. Standards on Criminal Justice, The Defense Function, p. 4.55.

Investigation is particularly and critically important with regard to sentencing considerations, especially in a capital context where the counsel can never lose sight of the fact that the client may live or die depending on the lawyer's preparation for a sentencing case. "Trial counsel has a duty to investigate the client's life history, upbringing, education, and relationships, friendships, formative and traumatic experiences, personal psychology, and present feelings." Goodpaster, "The Trial for Life: Effective Assistance of

Counsel in Death Penalty Cases," 58 N.Y. Univ. L. Rev. 299, 323-24 (1983).

Sentencing is too critical to depend on the statements of the client:

> The lawyer also has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court at sentencing. This cannot effectively be done on the basis of broad general emotional appeals or on the strength of statements made to the lawyer by the defendant. Information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like, will be relevant, as will mitigating circumstances surrounding the commission of the offense itself. Investigation is essential to fulfillment of these functions.

A.B.A. Standards, The Defense Function, 4.55 (emphasis added).

> In denying relief Judge Powell said only
>
> I find that Drs. Pollack and Wilder did not conduct an inadequate evaluation of defendant. I reject the evidentiary hearing testimony of Drs. Merekangas [sic] and Fleming to the contrary.

The court did not specifically address whether the attorneys' performances were ineffective, but stated that "no prejudice has been shown" and that Mr. Johnston was "competent to stand trial" (T. 1687). These conclusions of law are legally wrong; the findings are contrary to the evidence presented at the evidentiary hearing and rely solely upon the "appearances" of the defendant to the court. Cf. W.S.L. v. State, 470 So. 2d 828, 830 (Fla. 2d DCA 1985)(how defendant may "appear" to the court is not determinative when the record reflects facts which show that the defendant "may have been incompetent" [emphasis in original]); Bishop v. United States, 350 U.S. 961 (1956). A proper mental health evaluation and proper testing are required so as not to rely on "appearances".

Moreover, here the mental health experts did not consider whether mental health mitigating circumstances existed. Mr. Johnston, a diagnosed schizophrenic, was not evaluated as to whether mental health mitigation existed. See Evans v. Lewis, supra (counsel failed to obtain mental health expert's opinion regarding a known mental impairment which constituted mitigation); Deutscher v. Whitley, supra (counsel knew of defendant's prior hospitalizations

for mental problems but failed to obtain mental health expert's opinion as to mitigating circumstances arising from defendant's poor mental health).

Counsel also failed to seek a mental health expert's assistance regarding the voluntariness of Mr. Johnston's statements to the police. Dr. Wilder conceded at the evidentiary hearing that Mr. Johnston's statements to the police contained indicia of delusional thinking (T. 521-22). However Dr. Wilder did not have the statements when he conducted his evaluation. He did not consider whether the statements were voluntary. An adequate evaluation on this issue would have resulted in a conclusion that the statements were not voluntary.

Even as to the issue of competency and sanity, the mental health evaluation was woefully inadequate. The examiners did not have the necessary background information to illuminate the extent of Mr. Johnston's mental illness. Without Mr. Johnston's delusional statements to the police, the examiners could not consider whether Mr. Johnston's schizophrenia was actively interfering with his sanity at the time of the offense or his competency to stand trial. Moreover, neither doctor knew of Mr. Johnston's low I.Q. level; both had assumed without testing or results of previous testing that Mr. Johnston had a normal I.Q.[11]

Counsel's failure to adequately investigate and present invaluable information to the mental health examiners was deficient performance which prejudiced Mr. Johnston. Dr. Wilder was not provided with information necessary to supplement his brief interview of Mr. Johnston (T. 475). Dr. Wilder had concluded that Mr. Johnston was "competent" because he did not express any delusional thinking (T. 474). However, when Dr. Wilder was presented with questions relating to "facts" that Mr. Johnston had related to Dr. Wilder in his self-report that may or may not have been true, Dr. Wilder was unable to say if

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[11]At seven and a half, Mr. Johnston's I.Q. was 57 (T. 514); when he was twelve his I.Q. was 65 (T. 240); and in 1988 on Wechsler memory scale his I.Q. was 66, though on the verbal scale, it was 75 (T. 254).

these "facts" evidenced delusional thinking or not (T. 492-495). Dr. Wilder admitted that information that a person may have been seen as delusional in the past is helpful:

> That helps me because if he has been delusional at times in the past, then it is more likely that he might have been at the time I'm more interested in.

(T. 496).

Dr. Wilder was then presented with various documents regarding Mr. Johnston which had not been presented to him at the time of his evaluation in 1984. The doctor was then asked whether these matters should have been considered in determining competency to stand trial:

> Q. Did you have any information that he had an I.Q. of 57 at the age of seven and a half?
>
> A. I don't recall that.
>
> * * *
>
> Q. Would it be any kind of a red flag, perhaps, for some testing of his mental abilities, intellectual functioning?
>
> A. Probably I would have if I had known that he had produced a 57.
>
> * * *
>
> Q. How significant, if it's significant at all, in evaluating for competency, is it if the defendant has organic brain damage?
>
> A. Depends on what the organic brain damage is doing to him. Organic brain damage can vary from being almost a vegetable to having something that most people don't even pick up.
>
> Q. If you have some, some history. Some documents that indicate that brain damage is suspected, is that something that you would want to further review?
>
> A. I would want to know whatever there is to be known about it.
>
> * * *
>
> Q. Did you check with the attorneys at all to see how the relationship between Mr. Johnston and the attorney's were going?
>
> A. I don't recall whether we talked.
>
> Q. Is that something that, in the course of a competency

evaluation, you normally do or you normally don't do? Is it important to find out the relationship with counsel?

A. It depends. If the question arises, I certainly feel free to talk to defendant's own counsel, especially, and not so much the state attorney. I guess I'm prejudice. But anyway. I don't recall having done so in this case and it is not -- excuse me. It is not routine to avoid it or routine to do it for me.

(T. 514-518).

[MR. MCCLAIN]: When we broke, I was just asking a little bit about the, the statements and you indicated that you didn't have any of the statements Mr. Johnston made to the police. What I wanted to ask you, hypothetically, if, in those statements, there were references to such things as seeing an image of Christ in the newspaper, looking in the mirror and seeing the devil as himself, are those the kind of red flag indicators, in terms of delusions and hallucinations, that would have been significant to you in conducting a competency evaluation?

A. Yes. Had he reported those things, I would have been more suspicious of either a schizophrenic illness or his being under the influence of drugs, which might have done that, too.

Q. Now, I'm going to refer to your report, and I don't know, it doesn't look like you have got it out right now, but I can get a copy for you.

A. I can get it back. It's right there.

Q. And the report I'm referring to is the 1984 report, which is the one in this particular criminal matter. And in the report dated January 13th 1984, in the third paragraph is the one I'm going to ask you about. He discusses the charge, accused of killing Mary Hammond, and he indicates his relationship to Mary Hammond to you. And indicates that he was acquainted with her; they had befriended each other over a period of four years.

Would it be significant to the issue of, of delusions, if there was evidence that he didn't know her but for two weeks prior to the alleged homicide?

A. That would be either delusional or lying.

Q. And that would be something you would have to sort out in your mind which it was?

A. Yes.

Q. If you knew that it wasn't true?

A. Yes.12

(T. 521-22).

12At trial, the evidence was that Mr. Johnston had known Mary Hammond for two weeks, however, in his statement to the police, Mr. Johnston related the following vignette concerning Mary Hammond who he referred to as grandma:

Q: O.K., What's the dog's name, do you know?

A: Ted.

Q: Is the dog kind of old?

A: He is old, he's deaf, he's blind to my knowledge in his right eye, but he could see pretty good out the left eye. And when I always went there, grandma would always say don't pamper that dog. 'Cause I would give him like those small Reese's peanut butter cups, and crackers and stuff like that, you know.

Q: Well, you like those Reese's cups?

A: Uh huh, they're good.

Q: They're good, aren't they?

A: Uh hm. (yes)

Q: Tell you what I can eat about twelve of them at a sitting, those are the big ones?

A: Really.

Q: Do you usually get the big ones or the little bitty ones?

A: Well, Ms. Hammonds always let me have the little bitty round ones, you know.

Q: Uh hum, she like those?

A: Uh huh (yes) she always was very carefully on a diet.

Q: Uh hm. (yes)

A: You know, because like one time when I get ready to go to work, I go by there and check on her and she'd be there at the table having her morning breakfast and it would be a very light meal. And when I sit there at the table with her, and I talked and talked with her, Toto would be right there beside me.

Q: Toto?

By Dr. Wilder's own account, there were matters that appeared in the record that were indeed "red flags" of which he was unaware.

(footnote continued)

A: Uh huh, that's what I call him. Anyway, ah . . .

Q: You seen the movie, too?

A: Alright, anyway I would turn around and give him a piece of candy or a piece of a cracker.

Q: Uh hm. (yes)

A: I named her Cinnamon but anyway ah me and Miss Hammonds, we're very close like (inaudible) you know she would come outside and shut the back door and she'd call me over, she'd say David, would you care to come in and have lunch or would you care to come in and have coffee, cold water or something. I say well mam as long as you are offering, I can't turn it down, you know. 'Cause I felt that Ms. Hammonds felt like that she was alone at all times and she needed company and when I would go over her house, I would go in and have coffee or cold water or a light lunch and everytime when I left I'd say bye grandma, see you later on. I'll come by and check on you. She'd say Okay sweetheart you be careful now. I say okay I'm locking the door behind me, she said okay. So the main out entrance door from the front, I would lock the door, shut it and make sure that it's locked.

Q: Uh hm. (yes)

A: And she wouldn't care to check it, she go in and lay down on the couch or something you know (inaudible) and I always checked on her at 2, sometimes four, sometimes 3:30 in the morning. You know I'd go by there and she only knew how I would ring the doorbell.

Q: Uh hm. (yes)

A: I ring it quick you know like a musical tone (inaudible) and she would open the door and I'd say I'm sorry to wake you up, are you O.K? She say I'm fine and she say, she would gripe you know about me waking her up.

Q: I don't blame her.

A: But ah she she is like a grandmother to me and that's the reason why I basically went by there and check on her all the time, like tonight, when I noticed her kitchen light was on, I knew something was suspicious. And that's when I immediately stopped, almost got thrown off my bike, and took it over there and parked it on her driveway and I noticed you know the curtains, right there at the

Either trial counsel failed to provide Dr. Wilder with this information or Dr. Wilder failed to use the information. Dr. Wilder's conclusion that Mr.

(footnote continued)

kitchen window was shut. She's never done that, never she's always left the livingroom light on and never the kitchen.

Q: Never shuts her . . .

A: No, she leaves the ah kitchen curtains open to where you know anybody that comes by could see a real full view of the house, you see and that'd be only one thing burning or light and that'd be the livingroom light.

Q: Did she drink?

A: No, Ms. Hammonds wouldn't touch a drink if you paid her.

Q: Did she smoke?

A: No, she never smoked.

Q: She just ate a lot of Reese's peanut butter cups?

A: Well, she ate a lot of Reese's, she ate, she drank a lot of coffee and she ate a very special breakfast.

Q: Did she buy those Reese's peanut butter cups to share them with you, is that part of the idea?

A: She, well apparently would say that she bought those Reese's peanut butter cups to share with me (inaudible) you know because (inaudible) her granddaughter came by and she told her straight out, she say grandma some thing about Tom or something like that I can't barely remember but any way she say (inaudible) so grandma told her that she could have three Reese's peanut butter cups to take to the grandchildren and she did she took them over there.

Q: Who's Tom?

A: I don't really don't know, I don't know if that's her granddaughter's husband or baby or what.

Q: Was her granddaughter married?

A: Yes, to my knowledge, she was supposed to be married.

Q: She lives right next door, right?

A: Right, you know that's the reason why I like I said earlier,

Johnston, a diagnosed schizophrenic, was competent was based totally and completely upon a conversation he had with Mr. Johnston which lasted less than one hour. He now concedes that red flags existed which may have evidenced delusional thinking; yet, Dr. Wilder did nothing to determine the reliability of Mr. Johnston's self-reporting.

> Q. Okay. In the, in the 1982 evaluation, did Mr. Johnston tell you about his mother being married to a prominent Orlando businessman?
>
> A. Yes.
>
> Q. Do you, do you know whether that was true or not?
>
> A. No, I don't.
>
> Q. If it's not true, would it have been a delusion?
>
> A. That would depend on the manner in which he told it. That is my opinion as to whether it was a delusion would have depended on the manner in which he told it and several other things. I didn't think it was a delusion and I'm inclined to think that it was either not a delusion, or a, or that -- excuse me. I am inclined to think that it was a lie or that he was indeed prominent, at least in the eyes of the defendant.
>
> Q. Okay. The Orlando businessman?
>
> A. Mm-Hmm.
>
> Q. Do you need, do you need some outside information to really be able to conclude what exactly it is?
>
> A. I, I'm inclined to doubt that. Just the veracity of that,

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(footnote continued)

I don't see how her granddaughter didn't hear anything you know. I mean you imagine a kitchen window getting busted out.

Q: Uh hm. (yes)

A: And and the way I saw the house, somebody should have heard something, you know and I wish to God I could have been there at the right time.

Q: I wish you could have too.

A: You know because I'd probably killed him, whoever it was, I can't stand much more of this, I want to go home, she was very close to me.

(Transcript of 11/7/83 Statement, pages 10-11).

and, and by whose judgment is, is a man prominent and so forth and so on. I rather doubt that that would really tell you a great deal as to whether this man went around delusional. In other words, whether he was a psychotic person.

Q. What I'm asking you doctor, is when you're told information by somebody you're evaluating and in this instance Mr. Johnston, do you need outside information, collateral information to sort out fact from fiction, and also to help sort out on the fiction end, fantasy from lies?

A. That is sometimes helpful, but that's not absolutely essential. I think if he had -- excuse me. Go ahead.

Q. In this case, do you know whether there was a prominent Orlando businessman that Mr. Johnston's mother was married to?

A. No, I don't.

Q. You don't even know if there was a man that she was married to?

A. No, I don't.[13]

Q. Now, after -- it's the second page of your report. After that statement, or that sentence regarding that, you also note that he indicates he went to Central Louisiana State Hospital and denied epilepsy. Now, when he denies epilepsy, how important is that to have outside information to verify whether that's fact or fiction?

A. Well, in the case of a person who is accused of a sudden violent crime, such as one might commit in an epileptic seizure, I think it could be important. At that time, I don't think there was any such accusation. I don't think there was any, anything in which a history of seizures would have been, you know, of prime concern.

Q. Now, also, you go on there in the next sentence to note that you weren't able to ascertain from Mr. Johnston any idea, what kind of diagnosis may have been at the state hospital. How important is it to you when you're doing an evaluation, when you find out that there is a, some sort of mental health history, to get the information, to try and help pin it down?

A. Well, again, how important, you know, how important? It's nice to know. But on the other hand, his diagnosis given by somebody else, somewhere else, some time ago, is not going to be the diagnosis that I take. And as I have already said. The diagnosis may mean nothing or it may be useful. I'm usually looking for indications as to whether this person, in the case of being able to stand trial, can stand trial. And one of the ways of doing that is using the Florida Rules of Criminal Procedure. Although we lived for decades without it. I don't know how we did it, but we did. And another thing I'm looking for is what did he do, what else was he doing at that time.

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[13]In fact there was no Orlando businessman, prominent or otherwise.

Was he making decisions. And regardless of his diagnosis, he's able to make sensible decisions, and one of them is to kill somebody, then in my opinion, he knew that he was killing somebody.

Q. In deciding competency to stand trial or sanity at the time of the offense, how important is it to know whether the information lie versus fantasy?

A. I don't know how to answer. Do you have a one hundred scale, you know, as to how important something is. If it's extremely --

Q. Is it relevant to know, in competency determinations, if the person being evaluated is delusional?

A. Well, yes. I think if a person is delusional, it, it inhibits his ability to work with counsel.

(T. 492-95). However, Dr. Wilder failed to learn that Mr. Johnston's self-reporting was delusional. As a result, his finding of competency in 1984 can not stand because it has no valid basis.

Dr. Patricia Fleming was accepted as an expert witness in the field of psychology and testified at the 3.850 hearing (T. 229). Dr. Fleming had evaluated David Johnston by conducting a clinical interview and having him complete various psychological tests that took approximately seven hours (T. 230). Additionally, Dr. Fleming reviewed extensive background materials including:

A. The -- these records included records of previous hospitalizations; records from the Monroe Mental Health Center. Larnard State Hospital, Louisville State Hospital, Florida State Prison medical records, medical records from Orange County Jail. Florida Department of Corrections. The psychiatric reports of Doctor Wilder's and, Doctor Wilder and Doctor Pollack. Transcript of competency hearing; the transcript of the, the penalty phase; transcript of the sentencing; Central Louisiana State Hospitals. I reviewed different depositions of Shirley Coleman, Farran Martin, Jeffrey Burdette, Robert Mundy, David Burdette and Geovanni Rey. I read the affidavits of Harvey Johnston and Charlene Johnston Benoit. I talked with personnel, with Doctor Merikangas, who was the psychiatrist who had also evaluated Mr. Johnston. And I had a conversation with Christine Warren, who was the, Mr. Johnston's attorney at the time of the trial.

(T. 231).

With regard to these documents and witnesses, Dr. Fleming reported that

"they were not only helpful, but they were essential" to her evaluation (T. 232). Dr. Fleming explained that the background information she received that related Mr. Johnston's abusive upbringing was "the basis for the, the later finding of organic brain damage. He early demonstrated an explosiveness, a hostility, variable mood swings which made him uncontrollable" (T. 238).

> When he was, first entered public school in 1967, he was evaluated with an I.Q. of 57, which would place him in the mentally retarded range. At that time, it was noted that both parents beat the child, and that he was referred for special education. From that time on, he was never, on a consistent basis, in any kind of regular, regulation education. But due to the behavior problems, the inability to learn, he was placed in special education. He was evaluated, at that time, with moderate to severe brain damage with a high level of anxiety. And that on the, in the psychological evaluation that 90 percent of the conversation from this child at six was of the severe, of the harsh discipline by both parents.
>
> He was admitted for treatment to the Monroe Mental Health Center, but this was not consistent. He was again evaluated for intellectual functioning in 1972 with an I.Q. of 65, which was slightly higher but not significantly higher than the prior evaluation. He was admitted to, on the basis of those findings, admitted to the Louisville State School in 1973, for the mentally retarded. At that time, they noted the organic involvement.
>
> In 1977, he was admitted to the Louisville School, the Training Institute. And then from 1977, he had 13, 14 hospitalizations. And those, to summarize those, 13 had the diagnosis of schizophrenia. There was, I didn't count the number of referrals to organic brain syndrome. But the documents are clear, and they are consistent throughout. The psychiatrists had written to the judges, to have hospitalization rather than incarceration for his behavior to no avail. He was evaluated once at Louisiana State Hospital but returned. At that time, he was incarcerated.
>
> So the documents that I had seen were clear. They were not -- they were consistent with Mr. Johnston's report, but I couldn't, you know, I couldn't count on that. But they were consistent that showed a history of psychological, psychiatric problems, with previous diagnosis of schizophrenia and organic brain syndrome.

(T. 238-239).

Dr. Fleming then described her interview with Mr. Johnston (T. 239-249) and was then asked:

> Q. Would you say that an interview that took about 45 minutes or so, would, would that give you the information you need for an evaluation?

A. It would not.

(T. 249).

Dr. Fleming was then asked whether in her expert opinion, the evaluation performed by Drs. Wilder and Pollack were professionally adequate evaluations. She stated that she believed those doctors would have reached the same conclusions as did she and Dr. Merikangas had they had access to the same materials (T. 284).

> Q. Would you--you stated for the court, at length, the kind of evaluation that you did; the materials that you considered. For you, personally, would you have felt comfortable doing any other sort of evaluation in this case?
>
> A. No.
>
> Q. And why is that?
>
> A. The--there is just a relative ethical or professional standards of care in order to reach a conclusion. In particular, when you're determining, like, a complicated illness or disease such as schizophrenia or the organic brain syndrome or manic depressive syndrome. Any of them, it's essential and it's recognized by authorities that you must have collateral information that you have, you know, past hospitalizations, past school records, past information about dysfunctional families or, or what, however environmentally the patient was reared. All of these are important. And so you need those in order to rule out--it's a case of ruling out certain diagnoses. And so you, it's essential that you have all this.
>
> With, specifically with Mr. Johnston, because of the nature of his disorders, is that he, he functions differently at different periods of time because he's variable in both his functioning, in both his cognitive functioning and his emotional functioning. It's probably essential that you see him over a period of time. And at least be able to have good awareness of what his functioning is over a period of time. This was not done.
>
> Q. When you say he functions differently, how do you mean?
>
> A. I referred previously to what we call the cognitive slippage. The disorganization. The loose associations that are typical of schizophrenics and the concreteness of their responses, and I will deal with that first.
>
> Over a short period of time, even under a stressful situation, a person, Mr. Johnston specifically, would be able to maintain. As periods increase or he's, you know, has additional stress, he deteriorates. He does not think as clearly, -- the delusional system is more apparent due to both disorders. He becomes more volatile and he becomes less able to track information. But his

emotional volatility increases. He becomes sometimes aggressive; sometimes withdrawn. He may refuse to respond.

Q. Now, when you say it changes again from time to time, are you referring to, within an hour, or within days, or what period of time are you looking at?

A. With both. Both. But he, not only with me; with you, but the records indicate that he will. He will change his mercurial and temperament change, going from relative stability to one of psychoticism.

(T. 284-286).

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). In the context of a forensic mental health evaluation in a criminal case, the inquiry focuses upon the acceptable methods of diagnosis of a person presenting symptoms such as those exhibited by the defendant and consideration of the defendant's mental health history. As is obvious, where, as here, the client's history is never obtained, it can neither be adequately considered, nor used to evaluate the causes of the client's symptoms and ailments.

Thus, for example, psychology and psychiatry have long recognized that a professionally adequate evaluation requires consideration of organic brain damage. See R. Slovenko, Psychiatry and the Law 400 (1973). See also S. Arieti, American Handbook of Psychiatry 1161 (2d ed. 1974); J. MacDonald, Psychiatry and The Criminal 102-03 (1958). Accord H. Kaplan and B. Sadock, Comprehensive Textbook of Psychiatry 548, 964, 1866-68 (4th ed. 1985); R. Hoffman, Diagnostic Errors in The Evaluation of Behavioral Disorders, 248 J. Am.

Med. Ass'n 964 (1982). As succinctly stated in the chapter in the 1985 edition of the Comprehensive Textbook of Psychiatry concerned with personality disorders, "it is the rule, not the exception, that organic defects . . . mimic facets of personality disorder." Id. at 964. Similarly, major mental illnesses (e.g. paranoia, schizophrenia) may result in symptoms similar to those exhibited by patients with a behavioral disorder. See DSM-III, pp. 305-331; see also id. at pp. 181-205 (1981). Such illnesses, therefore, must also be always properly evaluated, considered, and assessed. Because organic brain damage and major mental illness can be readily but mistakenly diagnosed as personality disorder, the psychiatric profession has recognized that before a diagnosis of personality disorder can be made, the evaluating mental health professional must first rule out those bases for the symptoms presented. See, e.g., Kaplan and Sadock at 964. See also MacDonald at 98, 102-03. Accordingly,

> [P]sychiatrists have a clear responsibility to search out organic causes of psychic dysfunction either through their own examinations and workups or by referral to competent specialists.

S. Halleck, Law in the Practice of Psychiatry 66 (1980).

Here, counsel failed to obtain the services of an expert who could have tested for and learned of Mr. Johnston's mental deficits, an expert who could have made sense of Mr. Johnston's chaotic background and the ensuing effects on Mr. Johnston's makeup. Counsel failed to investigate and present to the mental health experts the information necessary for an adequate evaluation. Moreover counsel failed to ask for mental health opinions as to voluntary intoxication negating specific intent, the knowingness of the statements to the police, and the presence of mitigating circumstances.

The mental health examiners, themselves, also failed. They failed to obtain an accurate medical and social history which was necessary to disclose Mr. Johnston's delusional system. No independent sources of information were pursued. The examiners simply relied upon a schzophrenic defendant to

accurately report information. No testing was conducted to provide insight into Mr. Johnston's mental functioning. Thus the examiners failed to learn of Mr. Johnston's organic brain damage which existed in conjunction with his schizophrenia. Drs. Wilder and Pollack simply relied upon the standard mental status examination.

The standard mental status examination cannot be relied upon in isolation as a diagnostic tool in assessing the presence or absence of organic impairment or major mental illness. "[C]ognitive loss is generally and correctly conceded to be the hallmark of organic disease," Kaplan and Sadock, p. 835, and cognitive loss goes hand in hand with major mental illness. 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 -- standing alone and in isolation from other evaluative procedures -- has proved to be very unreliable in detecting cognitive loss associated with organic impairment or major mental illness. 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. . .
>
> 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[s]" should be considered in the context of the patient's overall clinical presentation -- past history,

present illness, lengthy psychiatric interview, testing, and detailed observations of behavior. Id. at 836. It is only in such a context that a reasonable decision can be made concerning whether any cognitive impairment exists and, if so, regarding what the causes of such an impairment may be.

Dr. Wilder conceded that red flags indicators existed which required a more extensive evaulation than he conducted. Mr. Johnston's attorneys admitted they felt the mental evaluations were inadequate but they did not pursue the matter further. They believed Mr. Johnston was incompetent; yet because of their fear he would explode in the courtroom, they choose not to pursue mental health issues. As a result Mr. Johnston never received an adequate evaluation as to the mental health issues involved in his case.

Adequate evaluations have now been done, and the prejudice to Mr. Johnston is clear. Drs. Fleming and Merikangus testified extensively as to their conclusions. No evidence was presented by the State to contest their findings.

A review of available information would have demonstrated that Mr. Johnston had substantial potential mental health defenses, and that a plethora of mitigating circumstances were more than readily available at the penalty phase of Mr. Johnston's trial. An adequate and complete evaluation would have included consideration of the delusional thought processes apparent in Mr. Johnston's statements to the police. In sum, had Mr. Johnston been provided with a professionally adequate evaluation, significant mental health issues would have been presented for the consideration of the judge and jury. Sadly, the issues were ignored. As a result, Mr. Johnston's capital trial and sentencing proceedings were rendered fundamentally unreliable and unfair. Rule 3.850 relief is warranted.

ARGUMENT III

MR. JOHNSTON WAS DENIED EFFECTIVE REPRESENTATION OF COUNSEL DURING PENALTY PHASE THEREBY DENYING HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

Under Strickland v. Washington, 466 U.S. 668 (1984), a defendant must plead: 1) unreasonable attorney performance, and 2) prejudice. Mr. Johnston sufficiently presented facts on each prong below, and the lower court erred in denying this claim. The Supreme Court has emphasized the importance of focusing the jury's attention on "the particularized characteristics of the individual defendant." Id. at 206. See also Penry v. Lynaugh, 109 S. Ct. 2934 (1989); Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976). Courts have therefore expressly and repeatedly held that trial counsel in capital sentencing proceedings has a duty to investigate available mitigating evidence before deciding whether or not such evidence should be presented. Bassett v. State, 541 So. 2d 596 (Fla. 1989); State v. Michael, 530 So. 2d 929 (Fla. 1988); Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989); Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988); Evans v. Lewis, 855 F.2d 631 (9th Cir. 1988); Stephens v. Kemp, 846 F.2d 642 (11th Cir. 1988); Tyler v. Kemp, 755 F.2d 741, 745 (11th Cir. 1985); Blake v. Kemp, 758 F.2d 523, 533-35 (11th Cir. 1985); Thomas v. Kemp, 796 F.2d 1322, 1325 (11th Cir. 1986); Deutscher v. Whitley, 884 F.2d 1152 (9th Cir. 1989). Moreover counsel has a duty to know the law and make proper objections to admissible evidence. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). Trial counsel here did not meet these standards, and Mr. Johnston is entitled to relief on this claim.

Trial counsel conducted a very limited investigation into Mr. Johnston's background. At the penalty phase, he presented the testimony of two witnesses, Ken Cotter, an attorney who had represented Mr. Johnston on occasion, and Corinne Johnston, Mr. Johnston's stepmother. Yet there was no effort to produce the compelling mental health evidence of which counsel was aware, nor was there

any effort to have a mental health professional explain the importance of this evidence to the jury. Further counsel made no objection to the introduction of evidence introduced by the State in violation of Estelle v. Smith, 451 U.S. 454 (1981). Counsel further neglected due to ignorance to make an objection pursuant to Pait v. State, 112 So. 2d 3809 (Fla. 1959) (T. 104, 178).

Mr. Wolfe, lead counsel at Mr. Johnston's trial, explained at the evidentiary hearing that Mr. Johnston did not like discussing any mental health issues and "did not want to have anything to do with" mental health defenses (R. 42). Yet Mr. Wolfe and Ms. Warren made it very clear that they both knew there were mental problems and questioned even Mr. Johnston's competency to proceed (R. 36-39, 143-145). "Clyde and I both felt that he [DAVID] was continually incompetent." (R. 150).[14] However, faced with Mr. Johnston's refusal to acquiesce to any mental health defense, the attorneys abandoned pursuit of these issues and failed to present the mental health evidence so clearly compelling and obviating a life recommendation. "Again, David didn't want us to go into

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[14]Ms. Warren tried to explain why she believed Mr. Johnston was incompetent as follows:

> Can you tell me what fact it was he didn't understand or didn't know?
>
> A. That any of this applied to him.
>
> Q. In what way?
>
> A. Have you ever dealt with schizophrenic people before?
>
> Q. No, ma'am and I haven't seen any evidence that he's a schizophrenic, so can you tell me what it is he didn't understand?
>
> A. I don't know how else to say it but just say he didn't understand. I, you know, what things were there? The rambling, the meandering, the arrogance, the refusal to listen, the ordering us out of the, ordering us out of the, the room, hanging up on us, calling back, crying, ranting and raving.

(T. 207).

any of the mental health matters at all. And to maintain him through the trial, we felt that was about the only way we could handle that" (T. 100). Thus, counsel deferred the decision to a client they believed was incompetent. However, as the Eleventh Circuit has explained:

> On one hand, it is clear that a defendant's instructions may limit the scope of counsel's duty to investigate a particular defense or strategy. See Tafero v. Wainwright, 796 F.2d 1314, 1320 (11th Cir. 1986); Mitchell v. Kemp, 762 F.2d 886, 889-90 (11th Cir.1985); Grey v. Lucas, 677 F.2d 1086, 1094 (5th Cir. 1982), cert. denied, 461 U.S. 910, 103 S.Ct. 1886, 76 L.Ed.2d 815 (1985); cf. Strickland v. Washington, 466 U.S. at 691, 104 S.Ct. at 2066. On the other hand, it is equally clear that lawyers may not follow such commands blindly.
>
> Although the defendant retains the right to control his defense at trial, counsel must first advise his client which strategies offer the best chance of success. Thompson v. Wainwright, 787 F.2d 1447, 1451 (11th Cir.1986), cert. denied, --- U.S. ---, 107 S.Ct. 1986, 95 L.Ed.2d 825 (1987); Mulligan v. Kemp, 771 F.2d 1436, 1442 (11th Cir. 1985).
>
> Uncounseled jailhouse bravado should not deprive a defendant of his right to counsel's better-informed advice. Thompson v. Wainwright, 787 F.2d at 1451 (quoting Martin v. Maggio, 711 F.2d 1273, 1280 (5th Cir.1983), cert. denied, 469 U.S. 1028, 105 S.Ct. 447, 83 L.Ed.2d 373 (1984)). This principle especially holds true where a possible mental impairment prevents the client from exercising proper judgment, id. at 1451 (citing Model Code of Professional Responsibility EC-7-12 (Fla. Stat. Ann. 1983)), or where an attorney foregoes a defendant's only plausible line of defense, cf. Washington v. Strickland, 693 F.2d 1243, 1252 (5th Cir. Unit B 1982)(en banc), rev'd on other grounds, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

Foster v. Dugger, 823 F.2d 402, 407 n.16 (11th Cir. 1987).

Counsel failed to provide effective assistance. They blindly followed a crazy client's commands, and failed to pursue the defendant's only plausible defense at the penalty phase.[15] This was deficient performance which prejudiced Mr. Johnston. Counsel could have and should have presented the compelling evidence of Mr. Johnston's mental illness and other mental deficits. This compelling evidence was presented at the Rule 3.850 hearing.

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[15]Mr. Wolfe opined that Mr. Johnston "was more concerned about going to a state mental hospital" than he was about going to prison or being executed (T. 135).

Dr. Pat Fleming testified at the evidentiary hearing as to her opinion of whether statutory and nonstatutory mitigating factors were present:

> What I'm asking right now is that whether you consider any of these mitigating circumstances with regard to Mr. Johnston. And do you feel, in your expert opinion, that any of them applied to his case?
>
> A. Yes.
>
> Q. And would you tell which ones you felt did apply?
>
> A. Two.
>
> Q. And what were they?
>
> A. The -- that he was under the influence of extreme mental or emotion disturbance and under extreme duress.

(R. 228).

Dr. Fleming had also testified as to Mr. Johnston's difficult upbringing and how his mental illness had gone untreated.

> David has never had a cat scan. He's never had an MRI. He's never had any of the early, the treatment or the follow up that he needed. It's a sad commentary. . . When we identify someone has the behaviors and fail to provide the treatment.

(R. 254).

Dr. Fleming felt very strongly:

> that there is a pattern of schizophrenic symptoms beginning in adolescence, late adolescence, and there is a consistent pattern of organicity, organic brain syndrome beginning very early at age two and three.

(T. 303).

Dr. Merikangas, a psychiatrist and neurologist experienced in evaluating criminal defendants, also testified at Mr. Johnston's evidentiary hearing. After evaluating Mr. Johnston, Dr. Merikangas found Mr. Johnston to be "psychotic and has been, at least since he was 17. That he has brain damage, probably from early childhood and that as a result of the organic brain damage and the psychosis, he's more susceptible to the effects of drugs and alcohol and emotional stress and distress" (T. 365).

Dr. Merikangas went on to explain Mr. Johnston's complex mental history:

A. Well, very important in his evaluation is the, is the historical record and the medical records. He was tested at age seven and a half in schools having an I.Q. of 57. And he was labeled at that time as an educably retarded child. He was noted at that time to be hyperactive, inattentive, difficult to be directed, not benefiting from learning. He was held back in school. And he began almost immediately to get in trouble with the authorities.

When he was 13, it was recommended that he be institutionalized because of his psychiatric difficulties, his learning difficulties and his violent behavior. And then he was, in fact, hospitalized a number of different places, including the Central Louisiana State Hospital and the Conway Memorial Hospital, in particular. And all of these people, or most of all these people agreed that he had a severe mental illness. They varied in light details. Many of them calling him schizophrenic, which does summarize fairly well the thought disorder that he has.

He suffers from delusions, hallucinations and a complex disorder of logical thought, which causes him not to be able to judge his environment and react to it in a way that normal people do. In addition to that, though, he has the physical findings of brain damage. Which include his being, if I could refer to the, my notes, he has trouble with coordination on the left side of his body. Moving his left hand and arm is done with difficulty. He has changes in his reflexes. Hyper reflexia. Particularly at the left knee. He has an altered sensitivity to pin prick. The test is to touch the patient with a sharp object and have him report. The entire left side of his face, arm and leg. There is an asymmetry to his head and his face, which if you look at him, you will see that the right eye appears somewhat smaller than the left. He has, when moving his face spontaneously, it moves asymmetrically. The right side of his face moving more than the left.

These physical signs are things that accompany brain damage. The psychological testing also bears that out. But in my own examination of him, he also has scoliosis, which is spinal curvature, and although this is a disease of the bone, the growth of the spine is controlled by the nervous system and is probably as a result of his brain damage that he has the spinal curvature.

(T. 363-367).

Dr. Merikangas then reviewed his findings as they related to Florida's statutory mitigating circumstances:

Q. The next mitigating circumstance is the capital felony was committed while the defendant was either under the influence of extreme mental or emotional disturbance. Did you find that that applied?

A. My opinion is that does apply.

Q. All right.

(F) Is the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law substantially impaired.

A. I believe that one applies.

Q. All right. And can you just give a brief statement about that? Why you feel that applies?

A. Well, I think that his capacity to understand and appreciate his conduct is, in general, impaired. And that his ability to conform his conduct to any kind of standard, including the requirements of law, is impaired because he has idiosyncratic delusional thinking, with hallucinations and that he does things based upon fantasies, dreams and thoughts that he cannot distinguish from reality.

(T. 387-388).

Dr. Merikangas was then asked:

Q. Are there any other matters that, in Mr. Johnston's history that you would testify to as far as mitigating factors?

A. There are.

Q. What would those be?

A. A very long and substantial history of child abuse. That he was physically, emotionally and sexually abused throughout his childhood and that he witnessed scenes of violence and alcohol and a great deal of turmoil. And that in addition to active physical abuse, he was subjected to the abuse of isolation and confinement, and a deprivation of love. That is one factor.

I would include his non-education, his failing in school, his doing very badly in all areas of education and gaining knowledge skills. That he was not able to then deal on a mature level with the relevant world because of a lack of an education. He was not afforded the special education and the skilled treatment that would, might have prevented this.

That he was brain damaged, perhaps from the physical abuse, perhaps from some other factor. And in a developing child, brain damage interferes with, with emotional growth and emotional maturation.

And although he doesn't qualify, by reason of age, for a mitigating thing, he does not have the mind of an adult. He has a brain damaged mind which is less than that of a normal adult person. His I.Q. of 57, when he was seven years old, meant that his mental age at that time was that of a four year old. And that this disparity between his mental age and his chronological age, although on the average, if one takes his current I.Q. score, he is an adult, his emotional and his culturation have lagged far behind. His working at a job as an unpaid employee and pretending to be a construction worker is a way of pretending to be an adult. And I believe that this is,

should be taken in mitigation. This he is, in a sense a, a child-like person.

There is a family history of mental illness, family history of incest. And all these factors of, of abuse, and of, of his disturbed parental background, both environmental and genetic, I believe are things which might be mitigating.

(T. 389-391).

All of this information was available at the time of Mr. Johnston's trial. Counsel knew of the substantial mental health history their client had and obviously attempted to present some evidence of Mr. Johnston's bizarre behavior by having Mr. Cotter and Mrs. Johnston testify as to their dealings with Mr. Johnston. But clearly this testimony in no way presented the full picture of David Johnston, a young man who is the product of an abusive and dysfunctional family. He suffered incredible abuse at the hands of his mother, father and siblings (T. 1282-95). His mother almost drowned him when he was a year and a half for "messing" in his pants (T. 1285). Another time she smacked his head against the bathtub so hard that his baby teeth were knocked out (T. 1285, 1290-91). Since David suffers from organic brain damage, it is likely that these injuries contributed to or even caused that damage (See testimony of Drs. Merikangas and Fleming, T. 214-438). But defense counsel failed to present this evidence to the jury.

As part of the basis of their expert diagnosis of David, Drs. Merikangas and Fleming relied on family historical information provided by David's aunt, Charlene Benoit. Mrs. Benoit had been available for trial but inexplicably not called by defense counsel. Had she been asked to testify Mrs. Benoit would have told of David's harsh upbringing:

When David was young we all lived in New Orleans. I spent a lot of time visiting David's home. I was a witness to the abuse David received. The worst thing I saw was one time when David was about a year and a half old my mother and I were visiting at Albert and Mary's. David was not successful at potty training, and this time David messed himself. Mary took David and submerged him in the sink for a long time. David turned black under the water. Finally, my mother made Mary stop drowning David when Mary finally stopped, David

seemed to be gone. Mary shook David very hard and he started breathing and came back to us. My mother and I were very scared, Mary was out of control. I don't know if she did this David other times. [sic] Also, when David was less than 2 years old Mary beat his head on the side of the bathtub so hard she knocked all of David's teeth out. He was hurt badly. My brother Harvey tryed [sic] to make Albert and Mary take David to the Hospital to get the injuries to his mouth and head looked at, but they wouldn't take him to the doctor. This beating was so severe it could have killed him. From birth until David left Mary's house he received beatings and all the time. Mary had something against David from the start, I never could figure out why she had it out for him. Mary did not treat any of her children well, but she was very mean to David. Mary would allow the other children to beat David. On Holidays the other kids would receive presents and David wouldn't get any. David would be left out when Mary bought ice cream and sweets for the other kids. Sometimes when I would visit Mary would make David sit in front of the blank T.V. screen for hours on end while the other kids played if David cryed [sic] or moved, Mary would beat him. All David's childhood his parents told him he was crazy and retarded. David was in special education classes in school and had to take medicine to control his behavior. I don't believe Albert and Mary did a good job at keeping David on his medicine.

(T. 1284-86). Mrs. Benoit further described the difficulties David had in school and how he was eventually sent to a school for the retarded and how as David got older, his bizarre behavior got him frequently committed to the "Special Unit" of Conway Memorial Hospital in Monroe, Louisiana (T. 1286).

In relating her observation of the family, Mrs. Benoit described how all of David's siblings had problems "of one degree or another" (T. 1286).

Dennis, Mickey and David are in prison. Clifford is very withdrawn and has a hard time talking to people. Debra ended up marrying her step-brother, David Neilson. David Neilson is Mary's second husband's son. Debra had three children by different men while she was married to David Neilson. Debra was unstable and could not hold a job down because she was slow. She ended up not being able to handle her responsibilities of motherhood. She gave up her 3 children. She left one with me at age 5 months, and my husband and I have raised him for 7 years now. She left another one to Margie, my sister in Shreveport, and she left the other to her mother's side of the family. This last child is severely retarded. Debra is in New Orleans and I have not heard from her for a long time. David's sister Pamela is somewhere in Texas. Pamela had 2 children by David Neilson while David was married to Debra. Pamela is also slow. I haven't heard from her in years. I do know that mental health problems seem to run in Mary's family. I think it is very odd for a mother to totally disown a child like Mary did with David when he was 10.

(T. 1286-87).

David's uncle, Harvey Johnston, was also available at time of trial but inexplicably not called. He remembered a great deal about the Johnston family history. Drs. Fleming and Merikangas also relied on his recollection to formulate their opinions. Harvey Johnston recalled:

> David was an abused child. From David's birth both David's parents Mary and Albert resented David. David's father spent alot of time working and Mary was very cruel to David. Even as an infant David was severely beaten by his mother.
>
> One specific incident of abuse happened when David was about 18 months old. David's mother beat David's head against the side of the bathtub so hard that she knocked out all of his teeth. The baby was hurt badly. I told my brother Albert he had to take David to the hospital to get the baby treated for the beating. Albert refused and we got into a fight about it. Albert was afraid that Mary would get in trouble. David never did get treatment for this horrible injury. All through David's childhood he was beaten almost daily.

(T. 1290-91). Mr. Johnston remembered other instances of abuse and believed that David received little or no love and was virtually "terrorized" by his mother (T. 1292). He also recalled David's obvious mental problems:

> As David grew up everybody knew something was wrong with him, something was wrong with his mental health. Albert took David to doctors to try to get him help. David spent his childhood in and out of mental hospitals. David had alot of trouble in school. He never did well and caused trouble at school because of his bizarre behavior. Eventually he was sent to special state schools for kids with mental problems. The psychiatrists gave David medicine that helped keep him from being strange. When David was a teenager his dad tried to make David take the medicine that helped his symptoms, but David didn't always take it and would have problems. It was like he had two personalities. When he didn't take his medication he would get in trouble. Sometimes the police would pick him up for being strange and put him in the jail's padded room or take him to the doctors at Conway Memorial Hospital, Special Unit. They would call someone from the family to come carry David home and get him to take his medicine.

(T. 1292).

This tragic story of this brutally abused young man and his constant struggle with mental illness was never revealed to the jury because counsel acceded to their mentally ill client's demands that the issue not be pursued (T. 45-46).

> Again, David didn't want us to go into any of the mental health health matters at all. And to maintain him through the trial,

we felt that was about the only we could handle that.

Q. Okay. So is it fair to say that you didn't introduce the records because of your concern over how David would react?

. . .

A. Mr. Johnston did not want those materials to come in and wasn't going to cooperate with that aspect of the case.

(T. 100).

In a case such as this where counsel, proceeding against his own better judgment, fails to investigate and/or present important relevant evidence because of his client's wishes, deficient performance is clear. In Chambers v. Armontrout, ___ F.2d ___, No. 88-2383 (8th Cir. July 5, 1990)(in banc), counsel argued that his failure to interview a witness was reasonable because his client had agreed with the decision. The court disagreed stating that the client's concurrence "indicates only that a defendant with an eighth grade education, relying on information provided by [counsel], agreed with [counsel's] decision." Slip op. at 11-12. That concurrence, however, did not make counsel's failure any more reasonable. Here, counsel's omissions are even more unreasonable since they relied not only on a client with little more than an eighth grade education but upon one who was mentally ill as well, and a client counsel knew was mentally ill. They did not present the evidence of the mental health mitigation because they feared Mr. Johnston would not be able to maintain and would become psychotic. In Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986), where defense counsel failed to conduct an investigation into his client's background the court said:

> Here, Solomon did not evaluate potential evidence concerning Thompson's background. Thompson had not suggested that investigation would be fruitless or harmful; rather, Solomon's testimony indicates that he decided not to investigate Thompson's background only as a matter of deference to Thompson's wish. Although Thompson's directions may have limited the scope of Solomon's duty to investigate, they cannot excuse Solomon's failure to conduct any investigation of Thompson's background for possible mitigating evidence. Solomon's explanation that he did not investigate potential mitigating evidence because of Thompson's request is especially

> disturbing in this case where Solomon himself believed that Thompson had mental difficulties. An attorney has expanded duties when representing a client whose condition prevents him from exercising proper judgment.

Thompson v. Wainwright, supra at 1451 (emphasis added).

Both Mr. Wolfe and Ms. Warren made clear their concerns about Mr. Johnston's competency and yet acquiesced in the wishes of their mentally ill client and failed to present evidence of his longterm mental illness. Counsel failed their client. Inadequate investigation occurred. In Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989), deficient performance was found because counsel's "strategic decision" was tainted by inadequate investigation and preparation. Here, counsel's failure to investigate, develop and present this compelling material was deficient performance which resulted in the sentence of death for Mr. Johnston. Counsel further failed to know penalty phase law and object to inadmissible evidence, improper instructions, and misleading prosecutorial argument. See Estelle v. Smith, 451 U.S. 454 (1981); Pait v. State, 112 So. 2d 380 (Fla. 1959).

Where there exists deficient performance, a defendant is entitled to relief upon a showing of prejudice. In Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989), a non-capital case, prejudice was found upon a showing of "a reasonable chance of success if presented to the trial court at sentencing." 880 F.2d at 1279. In Deutscher, supra, a capital case, the Ninth Circuit held:

> Although we do not presume prejudice in a case such as this, we must be especially cautious in protecting a defendant's right to effective counsel at a capital sentencing hearing. The Constitution prohibits imposition of the death penalty without adequate consideration of factors which might evoke mercy. California v. Brown, 479 U.S. 538, 554, 107 S.Ct. 837, 846, 93 L.ED. 2d 934 (1987). "Consideration of such evidence is a 'constitutionally indispensable part of the process of inflicting the penalty of death'" Id. (quoting Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed. 944 (1976) (plurality). The Supreme Court has consistently held that "the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'" Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986)(quoting Eddings v. Oklahoma, 455 U.S. 104, 114, 102 S.Ct. 869, 877, 71 L.Ed.2d 1 (1982). See also, Hitchcock v. Dugger, 481 U.S. 393, 398-99, 107 S.Ct. 1821,

> 2824-25, 95 L.Ed.2d 347 (1987). Deutscher's state appointed lawyer failed to present any mitigation evidence at all. A finding that Deutscher was not prejudiced by this failure would deny Deutscher the chance to ever have a jury, Nevada's death penalty arbiter, fully consider mitigating evidence in his favor. Instead, secondhand bits and pieces of mitigation evidence would be analyzed and rebutted based only on speculation about what might have happened if dozens of important variables had been different. Allowing the death penalty to be imposed in that context would fall far short of the constitutional mark. We therefore reverse and remand for resentencing so that a jury can properly weigh mitigating and aggravating circumstances before deciding Deutscher's fate.

884 F.2d at 1161.

This is in accord with what the Eleventh Circuit held in Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985), cert. denied, 477 U.S. 998. It is also supported by Strickland v. Washington, 466 U.S. 668, 696 (1984)(emphasis added):

> A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Accordingly, where a wealth of mitigation was kept from the sentencing jury as was the case here, the result is unreliable. Moreover, the sentencing result is unreliable because it result from proceedings where counsel failed to know the applicable law under Estelle and Pait, supra and guarantee conformity therewith. Confidence in the outcome is undermined, and Rule 3.850 relief is required.

ARGUMENT IV

> THERE WAS NO KNOWING AND INTELLIGENT WAIVER OF MIRANDA RIGHTS IN MR. JOHNSTON'S CASE; HIS MENTAL IMPAIRMENTS PRECLUDED HIM FROM COMPREHENDING, AND VALIDLY WAIVING, THOSE RIGHTS. TRIAL COUNSEL WAS INEFFECTIVE IN NOT LITIGATING THIS ISSUE.

Mr. Johnston was mentally impaired at the time of the offense and at the time of his interrogation by the police. This mental deficiency made it

impossible for him to understand the "rights" he had under the Constitution, or to in any way knowingly, intelligently, and voluntarily waive what he did not comprehend. The inquiry into the validity of a waiver has two distinct dimensions. First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived. Moran v. Burbine, 475 U.S. 412 (1986). In particular, "[t]he determination of whether there has been an intelligent waiver . . . must depend in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

Based on a review of extensive psychiatric records that track Mr. Johnston's long history of mental illness, the study of court records reflecting Mr. Johnston's behavior at the time of the offense, consultation with Dr. Fleming regarding her psychological testing results and personally evaluating and testing Mr. Johnston, Dr. Merikangas concluded:

> It is my opinion that at the time of the trial, David Johnston was not competent . . . to understand and voluntarily waive his Miranda rights . . .

(T. 1392). Mr. Johnston was unable to take the MMPI because of his "poor level of concentration and inability to understand the questions which would have made the results of questionable validity" (T. 1392). Dr. Fleming also reviewed records reflecting Mr. Johnston's history of mental illness, and records reflecting Mr. Johnston's behavior at the time of the offense and conducted psychological testing. Dr. Fleming similarly concluded that Mr. Johnston's

statements were not knowingly and intelligently made (T. 261-62).

Trial testimony reflected that Mr. Johnston was upset and intoxicated during his initial encounter with law enforcement at the victim's home (R. 492). He had called the police and reported the murder of his grandmother. However, Mary Hammond was not his grandmother. He had known her for less than two weeks. Clearly Mr. Johnston was under increasing stress the longer he was incarcerated awaiting trial for first degree murder. It was during this period of heightened stress, the very time when Dr. Fleming believed Mr. Johnston would "increasingly lose contact with reality," that Mr. Johnston made other statements to the police.

> His discrepant accounts of the night's events further substantiate his chaotic state. . . . The alcohol and drug use of the night would further intensify the behaviors and thought processes that were already present.

(T. 1385)(See also T. 261-62). Dr. Merikangas found:

> His manner of speaking is disjointed and involves paraphrasias, neoligisms, and garbled syntax. This reflects the disorganization within his own mind. This condition has existed since childhood. It certainly existed at the time of his trial for murder.

(T. 1391). Dr. Merikangas concluded that the statements were not knowing and intelligent (T. 380-81).

In fact, the statements themselves reflect delusional thought processes and ignorance of his rights:

> Q. What's a voluntary statement? I'm asking you, you know, what is a voluntary statement?
>
> A. To me, it's a voluntary freedom of rights of speech.
>
> Q. Okay, did you give us a voluntary statement?
>
> A. Yes.
>
> Q. Have you ever given me a statement that wasn't voluntary; did I ever grab you by the arm or twist your arm or anything to make you talk to me?
>
> A. Nope, but you violated my rights. Read the constitution. I have the right to remain silent.

Q. That's right.

A. Anything I say can and will be used against me in a court of law. I have the right to have my counsel present during questioning. You tell you why my counsel wasn't present during the time _____ complete more statements.

Q. Okay, well I was not looking at you as a suspect then.

A. Then I'll tell you why I'm filing a suit.....

Q. Well, that's why. Why do you think you are a suspect in this? You felt guilty right after you found the body?

A. No, _____. That's when I felt that I was a suspect. You people just trying to make a story on me cause I have a prison record, we're going to send that convict back, you know, and I want you to know, I did two, hard ass born years of my life _____ barbed wire fence for something that I truthfully, honestly and God knows if I'm lying, he'll strike me dead right now _____ the case, I was not guilty. _____ justice in the state of Florida, I know, the se__s of justice.

Q. What would you do if you were in my spot?

A. Mr. Mundy.....

Q. How would you handle this case?

A. If you was in my spot and you asked me, called me up and say look, I want to get on with it, tell the truth, I'd sit over at my office at first and say "well, I think this guy is going to give another lie you know, and after I came over here and interviewed him, I'd go back and I would say I think he's really trying to get the truth out, you know, because number one, if I die in Florida's electric chair for something I didn't do, Mr. Mundy, I'm going to see to it that it's constant on you'all's conscience for the rest of your life. Just like they're trying to say that the Orlando Police Department actually _____ that's bullshit, that's basically where I knew that man got some of my drugs from.

(Transcript of 1-25-84 statement at 19). Clearly, the disorganization within Mr. Johnston's mind and the heightened stress factors that would contribute to a greater loss of reality, made it impossible for him to understand and knowingly waive his Miranda rights during the police interrogations at the scene and later at the Orange County jail. In fact, the trial judge found Mr. Johnston incompetent "to waive his Sixth Amendment right of counsel" (T. 69).

Adding to Mr. Johnston's problems were his difficulties in processing information. Dr. Fleming found:

> He was unable to report the content of two different paragraphs read orally. He could not retain simply paired words even with three repetitions. His responses clearly point to the difficulty he has in dealing with information of every day living. The test results verify that Mr. Johnston would not understand the content of conversations and certainly would misinterpret nuances.

(T. 1384). Due to Mr. Johnston's chronic mental illness, his inability to process information, his increased stress and disorganized thought processes, Mr. Johnston would not have possessed the abstract reasoning necessary to understand his Miranda rights. The admission of his statements at trial violated Mr. Johnston's fifth, sixth, eighth, and fourteenth amendment rights. Yet counsel failed to obtain the assistance of a mental health expert in order to object the admissibility of these statements.

In Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989), deficient performance was found where trial counsel "lack[ed] awareness" of applicable law and failed to make proper objections as a result. Here counsel failed to know the law and failed to obtain the assistance of a mental health expert even though the statements themselves contained evidence of delusional thought processes ("Q: Are you afraid of getting electrocuted? A: I'm not afraid of that, I done died before." Transcript of 12-6-83 statement at 8). ("Q: You mean flashbacks? A: Yes, sir, ah I tell the nurse about it and Dr. Burns that I've been having flashbacks when I look in the mirror I see the Devil then I'll see myself and sometimes I see myself and sometimes I see my face you know in the mirror and ah I feel that I might have done something." Transcript of 1-25-84 statement at 2). Moreover, had counsel challenged the admissibility of these statements there is a reasonable probability they would have been declared inadmissible. See Harrison v. Jones, supra. Accordingly a new trial must be ordered.

ARGUMENT V

DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL BY FAILING TO INVESTIGATE MR. JOHNSTON'S ALCOHOL AND DRUG ABUSE AND MR. JOHNSTON'S ABNORMAL MENTAL CONDITION WHICH RENDERED HIM INCAPABLE OF FORMING THE REQUISITE SPECIFIC INTENT.

The record is replete with reference to Mr. Johnston having been under the influence of both alcohol and drugs on the night of the offense. Officer Kleir testified on cross-examination that when he spoke to Mr. Johnston at the scene of the crime, Mr. Johnston was hysterical and exuded a strong odor of alcohol (R. 566). Officer Mann corroborated that Mr. Johnston reeked of alcohol (R. 576). Two lay witnesses for the State, Farron Martin and Jose Mena provided additional evidence that Mr. Johnston imbibed at least alcohol on the night in question. Martin, a former roommate of Mr. Johnston's testified that Johnston had drunk two pitchers of beer and fourteen six ounce bottles of champagne (R. 699, 704). Mena confirmed that he and Mr. Johnston had consumed both beer and champagne that evening (R. 753, 756-757). As to Mr. Johnston's drug usage at the time, he told Investigator Mundy that he was high on drugs at the time of the murder. He had apparently ingested LSD, Blotter Acid, Blue Star and other arcane illegal substances (R. 821). Mr. Martin testified that he had found a bag of pot in the clothes Mr. Johnston had been wearing a few hours before the incident occurred (R. 710). The State made frequent reference to Mr. Johnston's besotted condition due to his heavy drug and alcohol usage. In fact the State argued in closing that Mr. Johnston stabbed the victim in the midst of a rage, while he was hallucinating -- all of which was induced by his illegal substance abuse (R. 957, 973, 987, 988). The sentencing order acknowledged that Mr. Johnston had been drinking alcoholic beverages and taking LSD prior to the killing . . ." (R. 1250).[16] And the Florida Supreme Court wrote that "Johnston

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[16]In fact Mr. Johnston told the police:

Q: Do you remember what time you took the LSD and the (inaudible)?

(continued...)

[16](...continued)

A: I'm thinking 2:30.

Q: 2:30? What time did you go over to Mary's?

A: About 2:30, too, I really can't remember.

Q: Were you still hallucinating pretty good?

A: Yes.

Q: Do you remember seeing any demons or anything while you were in the apartment?

A: I seen alot of things.

Q: While you were in the apartment what do you remember seeing while you were in the apartment?

A: I saw a dog and a person that looked like a dog to me it looked like ah sorta like a creature that came up out of the lake and ah it shook my hand, but tonight my visions getting clear (inaudible) and I went into the kitchen and took (inaudible) the crackers off the refrigerator took them into the dining room sat down at the bar and had me one or two sodas to get my head clear.

Q: Do you remember hallucinating anymore?

A: I was sorta still hallucinating but I --

Q: Do you remember any of the things you saw?

A: Her apartment.

Q: Yeah, but I'm talking about as far as hallucinations?

A: I seen her massage chair down on the floor, the apartment's, the (inaudible) rocking and ah I remember seeing something like white smog in the apartment and ah I went upstairs I knew when I seen ah I really can't remember how her body lying on the bed but then I seen the blood on the on the bed and things all mixed up I don't know.

Q: Did you ever have the feeling that you were blacked out or anything and then when you came back around you saw all these things?

A: Nah. I I know I didn't pass out.

Q: No. I don't mean passing out physically where you couldn't walk but I mean you know hallucinating and (inaudible) you couldn't remember it.

A: Well, I saw Mary's body first it looked like maggots crawling around.

Q: Was the was the knife there at the time?

(continued...)

had been drinking that night and testimony was forthcoming about appellant's heavy drug usage on the evening in question." Johnston v. State, 497 So. 2d at 868 (emphasis added). ("A. You know because I was on black star, LSD, reefer, and alcohol and its . . . Q. Okay. A. It's hard when your stoned to rememorize anything." Transcript of 12-19-83 statement at 12).

Mr. Johnston's "heavy drug usage" and his intemperate use of alcohol was not a one night aberration. Substance abuse runs rampant throughout his history. This is a phenomena not uncommon among mentally ill people, especially schizophrenics, who resort to substance abuse as a form of self-medication. Some highlights from Mr. Johnston's records indicate very clearly that Mr. Johnston was frequently diagnosed as abusing both drugs and alcohol. Examples are: Monroe Mental Health Center admitted Mr. Johnston on June 17, 1980 with diagnosis of "Alcohol Abuse (1/5 whiskey daily)" and "Drug Abuse (Black Mollies) (T. 1393-1395). On March 18, 1981, Larned State Hospital in Kansas gave this diagnosis "Cannibus Abuse in remission 305.23" and "Cocaine abuse in remission 305.63" (T. 1396-1398).

While the State in its closing harangued about this drug/alcohol crazed murder, defense counsel virtually ignored mining this rich vein. It was neither made the cornerstone of the defense strategy, nor even presented as an alternative theory of defense. Similarly, it was not presented at sentencing as justification for a finding of mitigation. Defense Counsel never argued that Mr. Johnston could not have formed specific intent as a result of his alcohol

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[16](...continued)

A: I seen something like it ah something like a bad looking stick sticking out of her middle chest you know and I went over and bent down and her eyes looked kinda of a yellowish green color and ah her I can't remember if her mouth was open or not but I remember picking her up and cuddling her into my arms and started crying over her body and then I noticed her bedroom was all racked up (inaudible), tore up.

(Transcript of 1-25-84 statement at 3).

and drug abuse. Nor did counsel explore whether Mr. Johnston may have suffered from an alcohol or drug induced blackout at the time of the offense.

In order to prove first degree murder, the State must show that a defendant was able to form a specific intent to commit the crime:

> To convict an individual of premeditated murder the state must prove, among other things, a "fully-formed conscious purpose to kill, which exists in the mind of the perpetrator for a sufficient length of time to permit of reflection, and in pursuance of which an act of killing ensues." Sireci v. State, 399 So. 2d 964, 967 (Fla. 1981), cert. denied, 456 U.S. 974, 102 S. Ct. 2257, 72 L.Ed.2d 862 (1982). Obviously, this element includes the requirement that the accused have the specific intent to kill at the time of the offense. E.G., Snipes v. State, 154 Fla. 262, 17 So. 2d 93 (1944); Chisolm v. State, 74 Fla. 50, 76 So. 329 (1917). Likewise, specific intent to kill is also an element to be proved by the state in a charge of attempted first-degree premeditated murder. Fleming v. State, 374 So. 2d 954 (Fla. 1979); Deal v. State, 359 So. 2d 43 (Fla. 2d DCA 1978).

Gurganus v. State, 451 So. 2d 817, 822-23 (Fla. 1984).

Mr. Johnston was entitled to a defense built around his inability to form the requisite specific intent due to his intoxication.

> When specific intent is an element of the crime charged, evidence of any condition relating to the accused's ability to form a specific intent is relevant. Cirack v. State, 201 So. 2d 706 (Fla. 1967); Garner v. State, 28 Fla. 113, 9 So. 835 (1981).

Gurganus at 823-24 (emphasis added). No such defense was ever presented on Mr. Johnston's behalf, however.

It is appropriate for mental health experts to testify in regard to the affects of substance abuse on a defendant's inability to form a specific intent:

> As such it is proper for an expert to testify "as to the effect of a given quantity of intoxicants" on the accused's mind when there is sufficient evidence in the record to show intoxicants. Cirack, 201 So. 2d at 709. In this case, after having been told to presume that Gurganus had ingested Fiorinal and alcohol the psychologists testified that Gurganus would have a lessened capability for making rational choices and directing his own behavior, he would not be in effective control of his behavior, and would have had a mental defect causing him to lose his ability to understand or reason accurately. We find these responses to be relevant to the issue of Gurganus' ability to form or entertain a specific intent at the time of the offense. Their exclusion from evidence was error.

Gurganus at 823.

Under the reasoning of Gurganus v. State, 451 So. 2d 817 (Fla. 1984), evidence of any condition relating to the accused's ability to form specific intent is relevant for consideration. In Mr. Johnston's case, the court was not even given the opportunity to decide the merits of such evidence and defense. Defense counsel failed to develop and present this material as an exculpatory defense (if only to reduce the degree of culpability), or in mitigation, and their failure to do so substantially prejudiced Mr. Johnston. The inference is inescapable that his brain damage and psychological deficiencies greatly aggravated the effects of drugs and alcohol on his state of mind and his ability to reason.

After an intensive review of the records in Mr. Johnston's case, and seven hours of clinical testing and interview, Dr. Pat Fleming opined that David Johnston on the night in question was in a "psychotic state at the time of the homicide" (T. 1365). She goes on:

> He consumed considerable beer and champagne that evening according to witnesses. He admits to using LSD that evening. Given the suspected organicity and the underlying psychotic thought processes, the alcohol and LSD, the capacity to be in contact with reality would be significantly impaired. . . . The alcohol and drug use of the night would further intensify the behavior and thought process that were already present.

(T. 1365).

Dr. Merikangas reported:

> He was undoubtedly psychotic at the time of the alleged offenses. . . He has, by history, the kind of explosive, violent behavior of unstable moves that one expects to find with this condition. This also would render him incapable of deliberate action and of forming the specific intent necessary for in commission of this crime. The influence of alcohol and drugs would render him even less able to control himself . . . . The interplay of drugs and alcohol upon his damaged brain affected reason and may have rendered him incapable of knowing right from wrong.

(T. 1390-1391).

Failure to even investigate this defense and to call an expert during either the guilt/innocence or penalty phases deprived Mr. Johnston of his

constitutional right to present a defense as guaranteed by the sixth and fourteenth amendments to the United States Constitution and Article 1 Sections 9 and 16 of the Florida Constitution. See Washington v. Texas, 388 U.S. 14, 17, 87 S. Ct. 1920, 1922 (1967), and Chambers v. Mississippi, 410 U.S. 284, 285, 93 S. Ct. 1038, 1040 (1973). An expert's testimony would have established that Mr. Johnston either could not or did not entertain the specific intent or state of mind essential to proof of first degree premeditated murder or felony murder due to an abnormal mental condition. Expert testimony regarding any such abnormality aids the jury in understanding the circumstances and evaluating the accused's state of mind. Florida rules of evidence allow expert testimony as to the ultimate issue. See Sections 90.702 and 90.703, Florida Statutes (1981).

In addition to expert testimony, there was an abundance of evidence in the form of lay testimony and records which would have established Mr. Johnston's mental abnormality. Some of this evidence was actually available to the trial attorney, but never used. Additional evidence would have been available with even minimal investigation, all of which should have been presented to the jury. The information from family members as to Mr. Johnston's incredibly abusive background coupled with the hospitalization records and expert testimony would have been compelling evidence to present to the jury. If the jury had been provided with this information, and had this information and a great deal more -- information regarding Mr. Johnston's mental deficits, deficits made even more significant by his continuous abuse of intoxicants -- been discussed by a qualified mental health professional, they would have had evidence from which to find that at the time of this offense, David Johnston's mental incapacity to form the specific intent to commit the crime of murder could not be doubted. Moreover, had the jury nevertheless returned a verdict of murder in the first degree, they would have returned a recommendation for a life sentence based on what should have been the evidence. Confidence is undermined in the outcome.

Mr. Johnston was denied the effective assistance of counsel in violation of his rights under the sixth, eighth and fourteenth amendments to the United States Constitution. Rule 3.850 relief is required.

ARGUMENT VI

MR. JOHNSTON WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Counsel's highest duty is the duty to investigate and prepare. Where, as here, counsel unreasonably flouts that duty, the defendant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable. See, e.g., Kimmelman v. Morrison, 477 U.S. 365, 384-88 (1986) (failure to request discovery based on mistaken belief state obliged to hand over evidence); Chambers v. Armontrout, ___ F.2d ___, No. 88-2383 (8th Cir. July 5, 1990)(in banc)(failure to interview potential self-defense witness was ineffective assistance); Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989)(failure to have obtained transcript witness' testimony at co-defendant's trial was ineffective assistance); Code v. Montgomery, 799 F.2d 1481, 1483 (11th Cir. 1986)(failure to interview potential alibi witnesses); Aldrich v. Wainwright, 777 F.2d 630, 633 (11th Cir. 1985)(failure to depose any of the state's witnesses), cert. denied, 107 S. Ct. 324 (1986); Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978)(defense counsel presented no defense and failed to investigate evidence of provocation); Gomez v. Beto, 462 F.2d 596 (5th Cir. 1972) (refusal to interview alibi witnesses); Nealy v. Cabana, 764 F.2d 1173, 1178 (5th Cir. 1985)(counsel did not pursue a strategy, but "simply failed to make the effort to investigate"). Mr. Johnston's court-appointed counsel failed in their duty. Counsel operated through neglect. No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, see Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979), or on the failure to properly investigate and prepare. See Kimmelman v. Morrison, supra; Chambers v. Armontrout, supra; Nixon v. Newsome,

supra. Mr. Johnston's capital conviction and sentence of death are the resulting prejudice.

Defense counsel failed to object to the admission of Williams' Rule testimony and failed to ask for curative instructions when such evidence was admitted. The Florida Supreme Court noted counsel's failure to object to at least one purported violation. Johnston v. State, 497 So. 2d at 868. Defense counsel was also ineffective for having failed to move for a new trial concerning the specific testimony of a State's purported witness as to a Luminol test he performed. See Johnston v. State, 497 So. 2d at 870. Defense counsel were ineffective in failing to raise the defense of insanity or diminished capacity, especially in conjunction with the voluntary intoxication defense. See Argument V. Defense counsel was totally ineffective in failing to be prepared to argue the Motion for New Trial at the sentencing hearing. Defense counsel did not even bring with them to court the material necessary to argue the motion on the date the hearing was scheduled. Defense counsel conceded that he was "not prepared to go forward with it." The court consequently summarily denied the motion (R. 1037, 1235-37).

In preparing and presenting an appropriate defense, counsel was ineffective for having failed to request the court appoint experts to aid them in their formidable task. See, Moore v. Kemp, 809 F.2d 702 (11th Cir. 1987)(in banc), cert. denied, 107 S.Ct. 2192 (1987). Counsel knew the evidence would involve considerable forensic testimony and knew, or should have known, that experts would be needed to contest that testimony. A particularly controverted issue concerned blood spatter evidence and whether Mr. Johnston would have been covered with the victim's blood, if in fact he had killed her. Defense counsel tried to show through cross examination of the State's expert that if he had been the assailant he would have had blood plainly visible on him. The evidence on this score left much room for speculation. On such an absolutely critical

issue, competent counsel would have retained an expert to present evidence which would have born out their theory. Counsel was ineffective for not doing so.

Another critical point was whether the assailant was right or left-handed. Dr. Hegert, the State's pathologist, opined that the assailant was left-handed (R. 730). The police observed Mr. Johnston write and sign a waiver form using his right hand (R. 500). Competent counsel would have obtained expert assistance relating to pathology, the phenomena of blood spatter and human motor activity in order to unravel the several pieces of conflicting circumstantial evidence. Defense counsel was also ineffective for failing to obtain the services of a serologist. Blood was found on several items and in several places in the home, including on Mr. Johnston himself (See R. 507, 526, 532, 548, 639, 678). None of this blood was tested for blood type. A serologist could have examined the evidence containing blood, typed it. A forensics expert on footprint analysis and comparison was also needed for Mr. Johnston's defense. Footprints were found outside the broken kitchen window and in the adjacent lot. Casts were made of these footprints and photographs taken of them as well (R. 508, 581, 629, 680, 682, 742). The one officer who made plaster casts did not compare them with Mr. Johnston's shoes (R. 631). Another officer did compare his shoes to the photographs and the casts. His opinion was that based on "tread design, size and shape one track could have been made by the left shoe" (R. 746)(emphasis added). The State later argued the "seem[ing]" match to the jury. Defense counsel needed its own expert to rebut this damning piece of circumstantial evidence. Moreover he was entitled the assistance of such an expert in a capital case. See Moore v. Kemp, 809 F.2d 702 (11th Cir. 1987)(in banc), cert. denied, 107 S.Ct. 2192 (1987). Their lapse in this regard was also ineffective assistance of counsel. Fourteen sets of fingerprints were found at the scene (R. 691-92). None of these matched Mr. Johnston's prints. Defense counsel was ineffective for failing to obtain a fingerprint specialist to

develop this exculpatory evidence, namely to determine to whom these prints matched. Finally, counsel was ineffective for not obtaining a forensics expert to examine and compare skin samples found under the fingernails of the victim as Mr. Johnston's flesh. In sum, the failure of defense counsel to bring expert testimony to challenge the State's circumstantial evidence in these areas was ineffective. Rule 3.850 relief is proper.

Defense counsel was also ineffective at voir dire. Counsel failed to question eight of the twelve petite jurors on any matter other than their views as to the death penalty. Defense counsel thus had not the slightest notion whether these eight jurors could be fair and impartial in their deliberations toward reaching a verdict. The very purpose of voir dire therefore was totally defeated (See Gande, R. 162-1650; Flickfeldt, R. 217-222; Hurd, R. 241-247; Edwards, R. 248-254; Marzoli, R. 321-322; Turner, R. 361-367; Evett, R. 368-374; and Helgid R. 380-385). The trial court rendered counsel ineffective when it limited general voir dire to a single day, when it curtailed any questioning in areas relating to lesser-included offenses, when it restricted the time and scope of voir dire examination and lastly when it precluded backstriking (R. 152-53, 163, 167). See Harding v. Davis, 878 F.2d 1341 (11th Cir. 1989). Defense counsel was ineffective in failing to challenge certain jurors. For instance, Juror Gande clearly did not comprehend or agree with the presumption of innocence since she was concerned that Mr. Johnston might be released too soon, i.e. even before he had been tried and convicted. Juror Gande displayed confusion as to the burden of proof and as to the sentencing process (R. 165). Juror Evett also did not understand the sentencing process (R. 369-371). Juror Woods felt that the death penalty should apply to more crimes than just murder (R. 223-235). And Woods and Wiggle indicated their opposition to alcohol (R. 147, 150). Similarly counsel did not question or challenge Juror Blakely who had watched two news reports on television concerning this case. These

broadcasts contained extensive details about the case as well as police and prosecutorial comments regarding Mr. Johnston's guilt. Blakely should have been either challenged for cause or peremptorily struck (R. 26). Lastly, Juror Everhart, the victim of an extensive burglary with the case still pending, should have been challenged or struck as well (R. 49-50). See Smith v. Gearinger, 888 F.2d 1334 (11th cir. 1989). Defense counsel failed to even question eight jurors.

The defense mislead three jurors regarding their critical role in the sentencing process: To Juror Turner, Attorney Warren asked: "The Judge is aware of what everybody thinks, so do you understand that whatever you recommend is just a recommendation" (R. 366)(emphasis added). Ms. Warren stated to Juror Helgerud, "Now, of course, the sentence is only an advisory sentence because the Judge makes the final decision" (R. 385)(Emphasis added). To Juror Everhart, the burglary victim, counselor Warren stated, "The recommendation to the judge is just that, just a recommendation, as he is not required to follow that . . . (R. 413)(emphasis added). Defense counsel was ineffective in conducting the voir dire process.

A single isolated error by counsel can be sufficient to demonstrate ineffectiveness. Kimmelman v. Morrison, supra; Nixon v. Newsome, supra. However there was a multitude of errors which either individually or as a whole undermine confidence in the outcome. A new trial must therefore be ordered.

ARGUMENT VII

THE STATUTORY AGGRAVATING CIRCUMSTANCE HEINOUS, ATROCIOUS OR CRUEL WAS APPLIED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The manner in which the jury and judge were allowed to consider "heinous, atrocious or cruel" provided for no genuine narrowing of the class of people eligible for the death penalty, because the terms were not defined in any fashion, and a reasonable juror could believe any murder to be heinous,

fashion, and a reasonable juror could believe any murder to be heinous, atrocious or cruel. Mills v. Maryland, 108 S. Ct. 1860 (1988). Jurors must be given adequate guidance as to what constitutes "especially heinous, atrocious, or cruel." Maynard v. Cartwright, 108 U.S. 1853 (1988). There, the Supreme Court found error in jury instructions which failed to guide and channel the jury's sentencing discretion.

Recently, the Supreme Court explained its holding in Maynard:

> Walton's final contention is that the especially heinous, cruel or depraved aggravating circumstance as interpreted by the Arizona courts fails to channel the sentencer's discretion as required by the Eighth and Fourteenth Amendments. Walton contends that the Arizona factor fails to pass constitutional muster for the same reasons this Court found Oklahoma's "especially heinous, atrocious, or cruel" aggravating circumstance to be invalid in Maynard v. Cartwright, 486 U.S. 356 (1988), and Georgia's "outrageously or wantonly vile, horrible or inhuman" circumstance to be invalid in Godfrey v. Georgia", 446 U.S. 420 (1980).
>
> Maynard v. Cartwright and Godfrey v. Georgia, however, are distinguishable in two constitutionally significant respects. First, in both Maynard and Godfrey the defendant was sentenced by a jury and the jury either was instructed only in the bare terms of the relevant statute or in terms nearly as vague. See 486 U.S., at 358-359, 363-364; 446 U.S., at 426. Neither jury was given a constitutional limiting definition of the challenged aggravating factor. Second, in neither case did the State appellate court, in reviewing the propriety of the death sentence, purport to affirm the death sentence by applying a limiting definition of the aggravating circumstance to the facts presented. 486 U.S., at 364; 446 U.S., at 429. These points were crucial to the conclusion we reached in Maynard. See 486 U.S., at 363-364. They are equally crucial to our decision in this case.
>
> When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face. That is the import of our holdings in Maynard and Godfrey. But the logic of those cases has no place in the context of sentencing by a trial judge.

Walton v. Arizona, ____ U.S. ____, 47 Cr.L. 2206, 2209 (1990).

In Walton, the Arizona capital scheme did not provide for a jury in the penalty phase of a capital trial. Thus, the Court's conclusion that no error occurred in Walton is not controlling here. That is because in Florida a jury

in the penalty phase returns a verdict recommending a sentence. The jury's verdict is binding as to the presence and weight of aggravating circumstances as well as the sentence recommended unless no reasonable person could have reached the jury's conclusion. Hallman v. State, ____ So.2d ____ (Fla. April 12, 1990). See Ferry v. State, 507 So.2d 1373 (Fla. 1987) ("The fact that reasonable people could differ on what penalty should be imposed in this case renders the override improper.") The Florida standard for an override is exactly the same standard that the United States Supreme Court adopted for federal review of a capital sentencing decision. In Lewis v. Jeffers, ____ U.S. ____, 47 Cr.L. 2239, 2244 (1990), the Supreme Court stated:

> Rather, in determining whether a state court's application of its constitutionally adequate aggravating circumstance was so erroneous as to raise an independent due process or Eighth Amendment violation, we think the more appropriate standard of review is the "rational factfinder" standard established in Jackson v. Virginia, 443 U.S. 307 (1979). We held in Jackson that where a federal habeas corpus claimant alleges that his state conviction is unsupported by the evidence, federal courts must determine whether the conviction was obtained in violation of In re Winship, 397 U.S. 358 (1970), by asking "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S., at 319 (citation omitted); see also id, at 324 ("We hold that in a challenge to a state criminal conviction brought under 28 U.S.C. Sections 2254 -- if the settled procedural prerequisites for such a claim have otherwise been satisfied -- the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt") (footnote omitted). The Court reasoned:
>
> "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic fact to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution." 443 U.S., at 319 (footnote omitted).
>
> These considerations apply with equal force to federal habeas review of a state court's finding of aggravating circumstances. Although aggravating circumstances are not "elements" of any offense, see Walton, ante, at -----, the standard of federal review for determining whether a state court has violated the Fourteenth Amendment's guarantee against wholly arbitrary deprivations of liberty

> is equally applicable in safeguarding the Eighth Amendment's bedrock guarantee against the arbitrary or capricious imposition of the death penalty.

The significance of this is that certainly a federal court conducting the review mandated by Lewis v. Jeffers cannot be regarded as the sentencer. In Florida, therefore, the courts, which review the jury's recommendation in order to determine whether it has a "reasonable basis" and whether a "rational factfinder" could have reached the jury recommendation, are not replacing the jury as sentencers for eighth amendment purposes. In Florida a capital jury acts as a sentencer in the penalty phase since its factual determinations are binding so long as a reasonable basis exists. In fact, that was the holding in Hitchcock v. Dugger, 481 U.S. 393 (1987); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). cert. denied 108 S.Ct. 2005 (1988) Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) (in banc), cert. denied 109 S.Ct. 1353 (1989); Hall v. State, 541 So.2d 1125 (Fla. 1989).

The jury was not told in Mr. Johnston's case what was required to establish this aggravator. See Rhodes v. State, 547 So. 2d 1201 (Fla. 1989); Cochran v. State, 547 So. 2d 528 (Fla. 1989); Hamilton v. State, 547 So. 2d 630 (Fla. 1989). Mr. Johnston's jury was not advised of the limitations on the "heinous, atrocious or cruel" aggravating factor (R. 1216). As a result, the instructions failed to limit the jury's discretion and violated Maynard v. Cartwright.

Where an aggravating factor is struck in Florida, a new sentencing must be ordered unless the error was harmless beyond a reasonable doubt. White v. Dugger, ____ So.2d ____ (Fla. July 17, 1990). Error before a sentencing jury must be reversed where the record contained evidence upon which the jury could reasonably have based a life recommendation. Hall v. State, 541 So.2d 1125, 1128 (Fla. 1988) ("It is of no significance that the trial judge stated that he would have imposed the death penalty in any event. The proper standard is whether a jury recommending life imprisonment would have a reasonable basis for

the recommendation.") Mitigation was before the jury which could have served as a reasonable basis for a life recommendation. Mr. Johnston is entitled to relief under the standards of Maynard v. Cartwright.

ARGUMENT VIII

MR. JOHNSTON'S DEATH SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF MAYNARD V. CARTWRIGHT, LOWENFIELD V. PHELPS, HITCHCOCK V. DUGGER, AND THE EIGHTH AMENDMENT.

In Florida, the "usual form" of indictment for first degree murder under sec. 783.04, Fla. Stat. (1987), is to "charge[e] murder . . . committed with a premeditated design to effect the death of the victim." Barton v. State, 193 So. 2d 618, 624 (Fla. 2d DCA 1968). Mr. Johnston was charged with first-degree murder in the "usual form": murder "from a premeditated design to effect the death of" the victim in violation of Florida Statute 782.04 (R. 1918). An indictment such as this which "tracked the statute" charges felony murder: section 782.04 is the felony murder statute in Florida. Lightbourne v. State, 438 So. 2d 380, 384 (Fla. 1983). In this case, it is likely that Mr. Johnston was convicted on the basis of felony murder. The State argued for a conviction based on the felonies charged, and argued that the victim was killed in the course of a felony. (See R. 445-59, 953-90). The jury received instructions on premeditation and felony murder (R. 1001-02, 1017-19). It returned a verdict of first degree murder.

If felony murder was the basis of Mr. Johnston's conviction, then the subsequent death sentence is unlawful. Cf. Stromberg v. California, 283 U.S. 359 (1931). This is because the death penalty in this case was predicated upon an unreliable automatic finding of a statutory aggravating circumstance -- the felony murder finding that formed the basis for conviction. The sentencing jury was instructed that it was entitled automatically to return a death sentence upon its finding of guilt of first degree (felony) murder because the underlying felony justified a death sentence. The state argued to the jury that the jury

should find Mr. Johnston guilty of felony murder and that if so the aggravation is automatic (R. 1190).

According to this Court the aggravating circumstance of "in the course of a felony" is not sufficient by itself to justify a death sentence in a felony-murder case. Rembert v. State, 445 So. 2d 337, 340 (Fla. 1984)(no way of distinguishing other felony murder cases in which defendants "receive a less severe sentence"); Proffitt v. State, 510 So. 2d 896, 898 (Fla. 1987)("To hold, as argued by the State, that these circumstances justify the death penalty would mean that every murder during the course of a burglary justifies the imposition of the death penalty"). However, here, the jury was instructed on this aggravating circumstance and told that it was sufficient for a recommendation of death unless the mitigating circumstances outweigh the aggravating circumstance. The jury did not receive an instruction explaining the limitation contained in Rembert and Proffitt. There is no way at this juncture to know whether the jury relied on this aggravating circumstance in returning its death recommendation. In Maynard v. Cartwright, 108 S. Ct. at 1858, the Supreme Court held that the jury instructions must "adequately inform juries what they must find to impose the death penalty." Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), and its progeny require Florida sentencing juries to be accurately and correctly instructed in compliance with the eighth amendment. Moreover, Hitchcock and its progeny according to this Court was a change in Florida law which excuses procedural default of penalty phase jury instructional error. Mikenas v. Dugger, 519 So. 2d 601 (Fla. 1988).

Trial counsel rendered ineffective assistance of counsel in that he did not object to the state's argument before the jury that the findings of these automatic aggravating circumstances requires the imposition of death. Trial counsel was also ineffective in not requesting that the jury be adequately instructed that if only the two automatic aggravating factors are found that an

advisory opinion of life was required. Surely the jury should have been informed that the automatic aggravating circumstance alone would render a death sentence violative of the eighth amendment. Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988); Zant v. Stephens, 462 U.S. 862, 876 (1983); Rembert v. State, 445 So. 2d 337, 340 (Fla. 1984). A new sentencing is required.

ARGUMENT IX

MR. JOHNSTON'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS WERE DENIED BY IMPROPER CONSIDERATION OF THE VICTIM'S CHARACTER AND VICTIM IMPACT INFORMATION.

The first two jurors questioned in voir dire implied they would have difficulty with being impartial because of the victim's age;

> Juror Croft: I think I would have difficulty in any case where there was a woman of that age being killed.

(R. 21).

> Juror Branch: That would probably be a part of it and just reading what has happened to this lady and that it was such a terrible thing that happened. I was real upset, you know, I was emotional, and I had hoped that they would catch him and do something with him.

(R. 23). These jurors were honest enough to express their sympathies that had developed even before trial. Other jurors had also heard of the case and had formed opinions pretrial (R. 29-30) although did not indicate the basis of that opinion. Clearly, they were predisposed to feel sorry for an elderly victim and want revenge on anyone who "did it."

As mentioned, the victim in this case was an eighty-six year old woman and Mr. Ayers, the prosecutor, wanted to make sure the jury was well aware of that fact. During the guilt phase of the trial, Ayers set up the jury's sympathy by establishing that the victim was old and disabled. In questioning Karen Fritz, the victim's granddaughter, Ayers asked:

> Q: How old was your grandmother?
>
> A: I believe she was eighty-three or eighty-four.
>
> Q: Okay. What kind of condition was she in, her physical condition?

A: She was in pretty good condition. She used a cane most of the time to get around, but she was pretty good.

Q: Could she walk okay?

A: Adequately, yes.

Q: Did she use the cane when she walked?

A: Most of the time.

(R. 469-70).

Having set the stage and planted the image, Ayers only had to remind the jury during closing:

> . . .I would submit to you that's another thing to consider, the fact that the victim in this case, Miss Hammond, was eighty-six years old.

(R. 1194) (emphasis added).

During the guilt phase, the State had introduced a photo of the victim and during penalty phase it was published to the jury (R. 1096-97). Ayers then proceeded to make good use of the photo during closing:

> Now, also, going to that particular factor, [the victim's age], the State introduced into evidence a photo during the sentencing hearing that y'all looked at. And I want you to know that I didn't introduce that, or have you look at it because of any morbid sense of curiosity, but that photo was important; it was important because, again, it went to show the terrible suffering that Mary Hammond went through. . .I would submit to you one look at that photo and the <u>look in Mary Hammond's eyes</u>, there's no question that there was an extremely wicked, atrocious and cruel murder.

(R. 1194) (emphasis added). The photo and the comment were clearly introduced by the State to inflame the passions of the jurors and for no other reason.

Later in his closing, Mr. Ayers began discussing "people's rights,"

> and we've talked about evidence and
>
> burglary proof, and we talked about justice in this case. <u>And one thing that we shouldn't forget is that Mary Hammond had some rights, too</u>.

(R. 1201) (emphasis added). Sua sponte, the Court objected:

> Excuse me, members of the jury, disregard that last comment of the Prosecutor. Move on to some other point.

(R. 1202). Instead, Mr. Ayers told the jurors:

> . . .you have to come back and make a recommendation to the Court that will do justice in this case, do justice for everyone.

(R.1202) (emphasis added). Clearly, even though he had been instructed by the Court to "move on to some other point" (R. 1202), Mr. Ayers was determined to make the point that the victim had "rights" and that "justice for everyone" would be to put to death the man convicted of killing her. The defense made no objection to these blatantly improper comments.

In Booth v. Maryland, 107 S. Ct. 2529 (1987), requires the exclusion of evidence of the opinions of the victim's family members as to the appropriate sentence in a capital case. This is because the presentation of this information "can serve no other purpose than to inflame" and divert attention away from relevant inquiries. The Court found the introduction of this information to be improper constitutional error. It violated the well established principle that the discretion to impose the death penalty must be 'suitably directed and limited so as to minimize the risks of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976)(joint opinion of Stewart, Powell, and Stevens, JJ.); California v. Ramos, 463 U.S. 992, 999 (1983). The sentencing determination should turn on the "character of the individual and the circumstances of the crime." Zant v. Stephens, 462 U.S. 862, 879 (1983)(emphasis in original). See also Eddings v. Oklahoma, 455 U.S. 104, 112 (1982); Emnund v. Florida, 458 U.S. 782 (1982).

In South Carolina v. Gathers, 109 S. Ct. 2207 (1989), the court vacated the death sentence there based on admissible evidence introduced during the guilt-innocence phase of the trial from which the prosecutor fashioned a victim impact statement during closing penalty phase argument. Booth and Gathers mandate reversal where the sentencer is contaminated by victim impact evidence or argument. This is precisely what occurred in Mr. Johnston's trial. Here, the

proceedings violated Booth and Gathers, thus calling into question the reliability of Mr. Johnston's penalty phase. The State's evidence and argument was a deliberate effort to invoke "an unguided emotional response" in violation of the eighth amendment. Penry v. Lynaugh, 109 S. Ct. 2934, 2952 (1989).

In Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633 (1985), the Supreme Court discussed when eighth amendment error required reversal: "Because we cannot say that this effort had no effect on the sentence decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." Id., 105 S. Ct. at 2646. As in Booth and Gathers, contamination occurred, and the eighth amendment will not permit a death sentence to stand where there is the risk of unreliability. Victim impact information is a patently unreliable basis for a death sentence. Its introduction is a violation of the eighth and fourteenth amendments. Since the improper factors not only "may" have but in fact did affect the sentencing decision, Booth, supra, and because the admission of victim impact evidence certainly cannot be said to have had "no effect" on the imposition of the death sentence, Caldwell, supra, the sentence must be vacated, and a life sentence imposed instead.

The lower court denied this claim stating

> Trial counsel cannot be held to be ineffective by failing to anticipate the holdings of Booth v. Maryland, 107 S. Ct. 2529 and Scull v. State, 533 So. 2d 1137 (Fla. 1988).

The court held that any objection by counsel would have been "without merit." (Id). However, Booth is new law as this court has stated in Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989) and the error is cognizable at this time. The lower court erred in denying relief.

ARGUMENT X

THE SENTENCING COURT'S REFUSAL TO FIND THE MITIGATING CIRCUMSTANCES CLEARLY SET OUT IN THE RECORD VIOLATED THE EIGHTH AMENDMENT AND DEMONSTRATES THAT THE JURY'S CONSIDERATION WAS SIMILARLY CONSTRAINED.

On review of a death sentence the record should be reviewed to determine

whether there is support for the sentencing court's finding that certain mitigating circumstances are not present. Magwood v. Smith, 791 F.2d 1438, 1449 (11th Cir. 1986). Where that finding is clearly erroneous the defendant is entitled to new resentencing. Id. at 1450. The sentencing judge in Mr. Johnston's case found no mitigating circumstances should be considered because they were not of sufficient weight (R. 1251). Finding three aggravating circumstances the court imposed death. The court's conclusion that no mitigating circumstances were to be considered, however, is belied by the record. The 3.850 court's dismissal of this claim ignores the fundamental constitutional requirements that capital sentencing be reliable and noncapricious. Statutory and nonstatutory mitigating circumstances were reflected in the trial and resentencing record. The State did not contest the record mitigating evidence; however, the court not only refused to find this mitigation but failed to even consider it.[17]

On direct appeal, Mr. Johnston challenged the appropriateness and merits of his death sentence and more specifically the trial court's failure to find any mitigation. However, this Court, pre-Hitchcock, denied relief. See Johnston v. State, 497 So. 2d 863, 871-72 (Fla. 1986). Now, post-Hitchcock, Mr. Johnston properly urges reconsideration of his claim.

During the course of Mr. Johnston's pretrial, trial, and penalty phase proceedings a number of classically recognized statutory and nonstatutory mitigating factors were elicited. The court, however, unconstitutionally restricted its consideration of the mental health mitigating evidence. As reflected in the court's sentencing order and in its pronouncements prior to the imposition of sentence, the court considered and then rejected the ample

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[17]At the 3.850 hearing, the judge ruled Dr. Wilder's opinion as to the presence of mitigation was inadmissible because it invaded the jury's and the sentencing judge's province.

mitigation relating to mental health because at least with regard to one circumstance it was not "reasonably convinced" the evidence was sufficient to "fit" within the pertinent statutory category (see R. 1249) and implicitly found the same as to the remaining categories (See R. 1249-51). Having reached this conclusion the court thereafter completely ignored the wealth of mental health evidence as bearing on nonstatutory mitigation. See Morgan v. State, 515 So. 2d 975, 976 (Fla. 1987).

The trial court's sentencing order reflects what mitigating evidence was considered in imposing sentence. The order spoke both to the statutory and nonstatutory factors:

> The Court considered each of the following mitigating factors and finds as follows:
>
> * * *
>
> 2. Although the evidence showed that the defendant had an argument with his fiance and was angry with a person who had been arrested for shoplifting in the convenience store where she was working, both of these events occurring within an hour or two of the murder, and that the defendant was excited because of these events, I am not reasonably convinced that the defendant was under the influence of extreme mental or emotional disturbance at the time of the murder which would constitute a mitigating factor.
>
> * * *
>
> 5. The defendant did not act under extreme duress or under the substantial domination of another person.
>
> 6. Although there was evidence that the defendant suffered from mental disorder; that he had earlier been diagnosed as schizophrenic; that he had been admitted to mental institutions on a great number of occasions as he was growing up; that he was given to tremendous mood swings on occasions; that he told one of the officers that he had been drinking alcoholic beverages and taking LSD prior to the killing, the evidence affirmatively showed that defendant had capacity to appreciate the criminality of his conduct. Immediately following the murder he attempted to make the apartment look as if it had been burglarized by some unknown intruder prior to his calling the police and reporting the crime. Further, I do not find that his capacity to conform his conduct to the requirements of law was substantially impaired at the time of the killing.
>
> * * *
>
> 8. I have considered the other evidence offered relating to the

> character of the defendant. Mrs. Corrine Johnston, his stepmother, testified in essence that defendant was the product of a broken home; he was abused, neglected and rejected by his natural mother and several times physically abused by his father; that his father's death when defendant was 18 greatly affected him; that defendant has a very low IQ, did not do well in school and was mentally disturbed despite the mental health treatment he had received.
>
> In summary, I find that three aggravating factors exist and no mitigating factors exist which would outweigh them; consequently, under the evidence and the law of this State a sentence of death is mandated.

(R. 2413-14)(emphasis added). The palpable Hitchcock error involved the evidence relating to mental health and the statutory subsections of Fla. Stat. section 921.141(6)(b)(e) and (f)(1983) in that the court "considered" that evidence as presented solely for the purpose of establishing those three statutory factors, even though the evidence was intended to establish, and did establish, a great deal more. That evidence did not "fit" exclusively within subsections (b), (e) and (f) of the statute. The two generic classes of mitigation are interrelated and overlap and cannot be considered in isolation. Since the court so regarded them, however, the court consequently never "weighed" or meaningfully considered the evidence as nonstatutory mitigation. Similarly, other substantial nonstatutory mitigating evidence which was included in the record was also ignored. Certainly it is reasonably likely that the jury similarly misunderstood the law.

However there was undisputed mitigation before the sentencing jury and judge. Mr. Johnston's prior attorney, Mr. Kenneth Cotter, testified as to the extreme mood swings of Mr. Johnston (R. 1124, 1128), as well as Mr. Johnston's inability to administer his own money (R. 1120). Mrs. Corinne Johnston, Mr. Johnston's step-mother, testified as to the unstable and abusive background of her step-son (R. 1131-55). She explained some of David's mental health problems and sporadic attempts at treatment (R. 1140-41) including commitment to a school for the mentally retarded (R. 1141). She described the bizarre behavior of

David as he was growing up, his abandonment by his mother and of the death of his father (R. 1131-55). Additionally, the record was replete with evidence of David Johnston's alcohol and drug usage during the night of the murder.

Under Eddings v. Oklahoma, 455 U.S. 104 (1982), and Magwood, supra, the sentencing court erred in refusing to accept and find the statutory and nonstatutory mitigating circumstances which were established. A proper balancing cannot occur if the "ultimate" sentencer fails to consider obvious mitigating circumstances. The mitigation should now be recognized and this Court should grant relief.

ARGUMENT XI

THE SHIFTING OF THE BURDEN OF PROOF IN THE JURY INSTRUCTIONS AT SENTENCING DEPRIVED MR. JOHNSTON OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

A capital sentencing jury must be:

> [T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .
>
> [S]uch a sentence could be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Johnston's capital proceedings. To the contrary, the burden was shifted to Mr. Johnston on the question of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Maynard v. Cartwright, 108 S. Ct. 1853 (1988). Mr. Johnston's jury was unconstitutionally instructed, as the record makes abundantly clear (See R. 1900, 1195, 1201, 1215, 1217). Moreover, the judge's sentencing order reflects that he only considered mitigation to the extent that it outweighed aggravation (R. 1251); as does his order denying 3.850 relief.

Mr. Johnston the burden of proving that life was the appropriate sentence (R. 1215, 1217).[18] The prosecutor reiterated that the mitigation had to outweigh the aggravating factors in order for the jury to recommend a life sentence (R. 1195, 1201). Under Hitchcock, Florida juries must be instructed in accord with the eighth amendment principles. Hitchcock constituted a change in law in this regard. Under Hitchcock and its progeny, an objection, in fact, was not Mr. Johnston's sentence of death is neither "reliable" nor "individualized." This error undermined the reliability of the jury's sentencing determination and prevented the jury and the judge from assessing the full panoply of mitigation presented by Mr. Johnston. For each of the reasons discussed above the Court must vacate Mr. Johnston's unconstitutional sentence of death.

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[18]The United states Supreme Court has held in Walton v. Arizona, ____ U.S. ____, 47 Cr.L. 2206 (1990), that the eighth amendment does not preclude a state from placing the burden on the defendant to prove mitigation outweighs the aggravation. However, unlike the situation in Walton, Florida law in fact requires the aggravation to outweigh the mitigation. Arango v. State, 411 So.2d 171 (Fla. 1982). Thus the jury instruction in Mr. Johnston's case conveyed inaccurate information to the jury when it indicated ithe question was whether the mitigation outweighed the aggravation. Caldwell v. Mississippi, 472 U.S. 320 (1985), established:

> that the need for reliable sentencing in capital cases required a new sentencing proceeding because false prosecutorial comment created an "unacceptable risk that 'the death penalty [may have been] meted out arbitrarily or capriciously,'"

472 U.S., at 343 (opinion of O'Connor, J.).

The opinion in Sawyer makes clear that Caldwell is applicable to Mr. Johnston's case. Mr. Johnston's direct appeal was not decided until over a year after the decision in Caldwell. Thus even after Walton, the issue remains as to whether the instruction here violated the eighth amendment principles contained in Caldwell. Under Sawyer's description of Caldwell and the extra level of protection contained therein, certainly the inaccurate information contained in the jury instructions violated the eighth amendment.

ARGUMENT XII

MR. JOHNSTON'S SENTENCING JURY WAS REPEATEDLY MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. COUNSEL WAS INEFFECTIVE IN FAILING TO LITIGATE THIS ISSUE.

In Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(in banc), cert. denied, 44 Cr. L. 4192 (1988), relief was granted to a capital habeas corpus petitioner presenting a Caldwell v. Mississippi claim involving prosecutorial and judicial comments and instructions which diminished the jury's sense of responsibility and violated the eighth amendment in the identical way in which the comments and instructions discussed below violated Mr. Johnston's eighth amendment rights. David Johnston should be entitled to relief under Mann, for there is no discernible difference between the two cases. A contrary result would result in the totally arbitrary and freakish imposition of the death penalty and violate the eighth amendment principles.

Caldwell v. Mississippi, 472 U.S. 320 (1985), involved diminution of a capital jury's sense of responsibility which is far surpassed by the jury-diminishing statements made during Mr. Johnston's trial. The Eleventh Circuit in Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988), determined that Caldwell assuredly does apply to a Florida capital sentencing proceeding and that when either instructions or comments minimize the jury's role relief is warranted. Caldwell involves the most essential eighth amendment requirements to the validity of any death sentence: that a sentence be individualized (i.e., not based on factors having nothing to do with the character of the offender or circumstances of the offense), and that a sentence be reliable.

Throughout Mr. Johnston's trial, the court and prosecutor frequently made statements about the difference between the jurors' responsibility at the guilt-innocence phase of the trial and their non-responsibility at the sentencing phase (R. 159, 187-8, 216-17, 235, 242, 250-51, 320-23, 352-53, 370, 382, 409-

10, 1098-99, 1187-88). In preliminary instructions to the jury in the penalty phase of the trial, the judge emphatically told the jury that the decision as to punishment was his alone (R. 1098-99). After closing arguments in the penalty phase of the trial, the judge reminded the jury of the instruction they had already received regarding their lack of responsibility for sentencing Mr. Johnston, but noted that the "formality" of a recommendation was required (R. 1187-88).

Under Florida's capital statute, the jury has the primary responsibility for sentencing. In Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), the United States Supreme Court for the first time held that instructions for the sentencing jury in Florida was governed by the eighth amendment. This was a retroactive change in law. See Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987), which excuses counsel's failure to object the adequacy of the jury's instructions and the impropriety of prosecutor's comments. Thus, the intimation that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is in any way free to impose whatever sentence he or she sees fit, irrespective of the sentencing jury's own decision, is inaccurate, and is a misstatement of the law. The jury's sentencing verdict may be overturned by the judge only if the facts are "so clear and convincing that virtually no reasonable person could differ." Tedder, 322 So. 2d at 910. Mr. Johnston's jury, however, was led to believe that its determination meant very little. Under Hitchcock, the sentencer was erroneously instructed.[19]

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[19]This claim is made pursuant to Caldwell v. Mississippi, 472 U.S. 320 (1985), and Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) (in banc), cert. denied 109 S.Ct. 1353 (1989). See Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1987), reversed on other grounds, Dugger v. Adams, 109 S.Ct. 1211 (1989). Mr. Johnston's conviction became final in 1986. Johnston v. State, 497 So.2d 863 (Fla. 1986). Since Caldwell was decided over a year before Mr. Johnston's conviction became final, Caldwell is the applicable law.

As Sawyer v. Smith, ____ U.S. ____, 47 Cr.L. 2192 (1990), recently explained, Caldwell stands for the proposition that "the Eighth Amendment prohibits the imposition of a death sentence by a sentencer that has been led to

(continued...)

In Caldwell, the Court held "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death lies elsewhere." 472 U.S. 328-29. The same vice is apparent in Mr. Johnston's case, and Mr. Johnston is entitled to the same relief. The Court must vacate Mr. Johnston's unconstitutional sentence of death.

ARGUMENT XIII

IMPROPER CONSIDERATION OF A PRIOR CONVICTION NOT ADEQUATELY TIED TO THE DEFENDANT DENIED MR. JOHNSTON HIS RIGHT TO AN INDIVIDUALIZED SENTENCING IN VIOLATION OF HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS. COUNSEL'S FAILURE TO LITIGATE THIS ISSUE WAS INEFFECTIVE ASSISTANCE.

During the penalty phase, the State introduced evidence of two prior violent felonies (R. 1090-96): terroristic threat in Kansas in 1981 and battery on a corrections officer in Florida in 1982. Ms. Warren correctly argued that as to the Kansas conviction there was no corresponding Florida statute and that, in fact, the situation had been a "communication of a threat to do violence" (R. 1090). In Kansas, that apparently was enough to be charged as a felony. In Florida, if it could be charged, it would most likely be a first degree misdemeanor (R. 1093). Ms. Warren went on to argue that in any event, there had been no inherent ability on Mr. Johnston's part to be able to carry out any threats either during or after the occurrence (R. 1093).

The Judge overruled the defense's objection to the introduction of this conviction (R. 1093) and then Ms. Warren and Mr. Wolfe specifically requested that the sentence for this conviction not be published to the jury (R. 1094). Yet the sentence here was that Mr. Johnston had been placed on one year's

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[19](...continued)
the false belief that the responsibility for determining the appropriateness of the defendant's capital sentence rests elsewhere." 47 Cr.L. at 2193. The Eleventh Circuit has already held that Caldwell applies in Florida to a capital jury that has its sense of responsibility improperly minimized. Mann, 844 F.2d at 1458.

unsupervised probation. Clearly, then, the Court in Kansas did not view this felony as one serious enough to warrant incarceration or even supervised probation.

When officer Tony Higgins from Kansas was brought by the State to testify as to this incident, he was unable to identify David Johnston in the courtroom. No matter, defense counsel had stipulated to Mr. Johnston's identity for purposes of this conviction. Clearly, defense counsel had failed to inquire fully about this matter and suddenly were faced with an officer testifying to a crime committed by a defendant he could not identify.

> Q: Sir, I'd ask you to look in the courtroom today and tell me if you see the person you recognized as David Johnston in the courtroom today.
>
> A: I don't see him.

(R.1101).

The defense let the questioning continue with no objections, however, the Court was obviously troubled by this turn of events and called a bench conference:

> THE COURT: But aren't you going to have a problem if this officer can't identify him?
>
> MR. AYERS: Well, I think that they have said that they will be willing to stipulate that it's the same David Eugene Johnston that was adjudged for that Information. I think the officer will be able to testify that it happened on the date that's alleged in the Information.
>
> THE COURT: Are you all willing to stipulate that David Eugene Johnston is sitting over there as the one arrested by the officer?
>
> MR. AYERS: It's been four years. I don't think it's unusual that this officer can't identify someone that he saw on that date one time.
>
> THE COURT: Are you going to stipulate to that?
>
> MISS WARREN: I told Mr. Ayers earlier that we would, but I did expect the officer to be able to identify him.
>
> MR. AYERS: Really, Your Honor, it doesn't go to the admissibility of the judgment of sentence; it just goes to the weight of the officer's testimony.
>
> THE COURT: There is a case that permitted the entry or the entry into

evidence as a judgment and sentence which bore the same name as the defendant.

MISS WARREN: I'm not aware of that, Your Honor.

THE COURT: Are you aware of that case?

MISS WARREN: I think I did read it last week.

THE COURT: That's prima facie to the fittest, but the defendant can deny it if he wishes to.

MISS WARREN: Well, Your Honor, I don't think there's any question that this judgment of sentence is David Johnston's. In my conversation with the client, there's no question.

(R. 1101 -1103).

Clearly, the Court was troubled by the defense's lack of argument on behalf of her client. Even confronted by the Court's repeated inquiry as to whether the defense would stipulate to the identity of their client, Ms. Warren refused to object or to argue the point. The Court even presented Ms. Warren with case law with which she may have been familiar (although the questions and answers as to that are confusing) and certainly would have allowed her time to review and argue if she had chosen to do so. The Court's pronouncement that the case presented prima facie evidence regarding identity certainly did not preclude Ms. Warren from rebutting that or from distinguishing the case. In fact, the record makes it clear that the Court invited argument on this point. None was provided, however, and the evidence went to the jury uncontested. This was ineffective assistance. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). Lewis v. Lane, 832 F.2d 1446 (7th Cir. 1987).

This conviction was one of two that the Court used to find an aggravating factor of a prior violent felony. The Court found no mitigating circumstances present even though considerable evidence in mitigation had been presented. The failure of defense counsel in this instance meant that the weight of the evidence as to the aggravating factor of a prior violent felony was substantially increased. Had this conviction been successfully suppressed, the

Court could, of course, still have found a prior violent felony existed, however, the weight given to that aggravating circumstance would have been lessened both in the jury's mind and the Court's. This then skews the balancing of the weighing process between the aggravating factors and the mitigating. See Nibert v. State, 508 So. 2d 1 (Fla. 1987).

Moreover, this court has stated:

> We agree with the district court that the elements of the subject crime, not the stated degree or the sentence received, control in determining whether there is a Florida statue analogous to an out-of-state crime. The various jurisdictions may choose to punish the same acts differently, so the elements of a crime are the surest way to trace that crime.

Forehand v. State, 537 So.2d 103 (Fla. 1989). Ms. Warren's argument that this prior crime could not be used in evidence at sentence as a prior violent felony was correct and relief is warranted. Rule 3.850 relief must be granted.

CONCLUSION

On the basis of the argument presented to this Court above, and in the Initial Brief, as well as on the basis of his Rule 3.850 motion, Mr. Johnston respectfully submits that he is entitled to 3.850 relief, and respectfully urges that this Honorable Court set aside his unconstitutional convictions and sentences of death.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing has been furnished by United State Mail, postage prepaid to Margene Roper, Assistant Attorney General, Department of Legal Affairs, 210 North Palmetto Avenue, Suite 447, Daytona Beach, FL 32114 this 7th day of September , 1990.

_____
Attorney