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

REPLY BRIEF OF APPELLANT

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STATEMENT OF THE CASE

In light of the State's failure to include any facts in its statement of the case, Mr. Johnston will generally rely upon his Statement of the Case set forth in the initial brief. However, the State's brief is otherwise replete with factual errors which shall be specifically addressed here.

The State claims that there was no evidence that Mr. Johnston received social security benefits for a mental disability (Appellee's brief at 10-11). Yet in the very same brief, the State acknowledges that Kenneth Cotter, an attorney who testified at the penalty phase, "disbursed Johnston's social security disability checks to [Mr. Johnston] from an escrow account since Johnston was unable to administer his money (R. 1124)" (Appellee's brief at 23). Obviously, Mr. Johnston was not mentally competent to handle his own disability check. Further, trial counsel has testified that he was advised by Mr. Cotter that the SSI benefits were for a mental disability (T. 40). Finally, the State at page 26 of its brief conceded "Johnston receives a social security check on account of his mental disability (R. 1146)" (Appellee's brief at 26).

The State asserts that there is no evidence that Mr. Johnston had not known Mary Hammond, the victim, for four years (Appellee's brief at 12). However, Mary Hammond's granddaughter testified at trial that Mr. Johnston's claims about knowing Mary Hammond for years, regularly taking her to church, and being very close to her as if she were his own grandmother were not true (R. 475). Mr. Johnston's statements are replete with stories about Mary Hammond that according to the evidence were either delusions or lies.[1] Yet Dr. Wilder accepted Mr. Johnston's stories without knowing that there was evidence that the stories were delusions or lies.

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[1]The life history of Mr. Johnston supports the view that these were the delusions of an individual who never had a loving relationship. He desperately wanted and needed a loving grandmother.

The State misrepresents the testimony of trial counsel. The State alleges "It would appear that Ms. Warren's uncertainty as to competency is largely based on her client's arrogance in wanting to control the case" (Appellee's brief at 14). However, Ms. Warren's testimony was clearly not based on Mr. Johnston's arrogance. It was based on the fact that Mr. Johnston "would be rambling incoherent" (T. 151).

> 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 talking to the police. He should not be giving statements to them.
>
> * * *
>
> 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 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 every [sic] 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 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. 154-55).

> Q. And what, what do you recall?
>
> A. Well, as I said earlier, he would start out logically and then the longer you talked with him, the worse he got.
>
> You'll note the bottom part -- my notes were taken as I spoke with him. The bottom part here, the last two full sentences says defendant says some people, correctional officers know he's not guilty because he holds his eyes too straight. And then another sentence says defendant says sand don't shine shoes, polish does. That's why he wants Judge Powell off the case. And I think that that was just an example of some of his, the loosening of his thinking or -- as the longer I would talk with him, the looser his thinking would become.

As you can see, my notes start out fairly logical. And then they just get illogical at the end.

(T. 162-63).

Q. In terms of leading up to trial and Mr. Johnston's contributions to assisting in the defense, his decision making, the limits he placed upon you and what you would investigate and what you couldn't investigate, the limits he placed upon you in terms of seeing a psychologist or not seeing a psychologist, was he competent to be making these decisions?

[Objection overruled]

A. No.

(T. 195-96).

Q. All right. Now, you said he wasn't competent to make that decision. Would you please explain to me your definition of what your standards for competency to make that decision are, and from what source you get those standards?

A. Because he did not comprehend the seriousness of the situation that he was in. We could tell him over and over and over again that he was looking at the possibility of going to the electric chair and he would go from one moment to crying and wanting to plead guilty and be sent to the psychiatric chair to the next moment sitting there telling us that he's been sold down the river and it's our fault that this is all happening and he's not out out of jail and he wants to go home.

(T. 204).

The State in its brief claims that Dr. Fleming's and Dr. Merikangas' "opinions are differing" (Appellee's brief at 21; see also at 16). The State is clearly wrong. Both doctors reached the same conclusions. Dr. Fleming testified:

Q. All right. And based on, in your expert opinion, based on your use of the background materials, the interviews that you conducted, the testing, the interview with Mr. Johnston, what was the diagnosis that --

A. It's, it's a tri-part diagnosis. One is organic brain syndrome; schizophrenia undifferentiated with paranoid features and substance abuse.

(T. 252).[2]

Dr. Merikangas testified:

> Q. And what is your diagnosis?
>
> A. My diagnosis is that he is psychotic and has been, at least since he was 17. That he was 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.
>
> * * *
>
> And all of these people, or most all of these people agreed that he had a severe mental illness. They varied in light details. Many of them calling his [sic] 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.

(T. 365-66).

The State asserts that Mr. Johnston's aunt, Charlene Benoit, "refused to become involved in the penalty phase" (Appellee's brief at 28). However, trial counsel testified that he did not recall whether he talked to Ms. Benoit. When shown a message from the file to refresh his recollection, trial counsel testified "she didn't want to be involved" (T. 120). There was no indication she refused to testify. There was no indication counsel explained the need for her assistance in order to overcome her hesitation. In fact, there is evidence she was not even asked if she would testify (T. 1288).

The State's misrepresentations were simply too numerous to identify them all in a reply brief of acceptable length. However, these examples should demonstrate that the State's brief is factually in error.

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[2]Dr. Fleming's diagnosis (as well as Dr. Merikangas' diagnosis) was corroborated by the results of a 1984 MMPI given by Dr. Tell (T. 1701-05).

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.

As to this Argument, the State failed in its brief to address the real issue. Pretrial mental health experts found Mr. Johnston competent. Those experts did not have the benefit of crucial information. The crucial information those experts did not have constituted "red flags" suggesting incompetence. Dr. Wilder, who was one of the pretrial examiners conceded that the evidence presented at the evidentiary hearing suggested the presence of "red flags" warranting further evaluation. Dr. Wilder conceded he did not know of these "red flags" at the time of his pretrial competency evaluation. Dr. Wilder testified as follows at the evidentiary hearing:

> [Q.] 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.

(T. 521).

In fact, the statements Mr. Johnston gave the police contained many such "red flags": "I saw a figment of Jesus Christ in the newspaper, the other day, you know, like ah, (inaudible) showed his hair, mustache and everything" (R. 2357). "Q. Are you afraid of getting electrocuted? A. I'm not afraid of that, I done died before" (R. 2347).

> Q. What do you remember about the hallucinations?
>
> A. I've seen dogs (laughing) 18 wheelers trying to run over me and ah monsters you know.

Q. What kind of monsters?

A. Weird, weird looking creatures.

Q. Can you remember what they look like?

A. Like out of a swamp, I can see 'em ah their green headed, long teeth look like they got seaweed hanging off of 'em you know and ah I see 'em every now and them in cell I know it's not really there, but it bothers me. I think that ah I might be suffering.

Q. What do you mean?

A. Well, my head my head be hurting when I wake up.

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 my face you know in the mirror and ah I feel that I might have done something (inaudible).

(R. 2370).

I talked to my Dad, died at 42, I talk to him here sometimes and sometime (inaudible) my Dad and I talk to him like he's really there and he talks to me you know and I don't know how I came about getting these type of problems, but I can go to ah not only here but I can go to where my Dad's buried out on Highway 15 in Monroe, Louisiana, Hall Cemetery, I communicate with my Dad and he (inaudible) He tells me it was not a heart attack but a guy hit him in the back of the head with a pipe you know and he wanted it investigated, they said he had a heart attack and fell out cause they examined his heart, he had a bad heart you know and I talk to my Dad all the time you know I dream about him you know and I believe I'm going to see my Dad one day.

(R. 2374).

Q. You don't remember what it was?

A. Uh uh I I can't remember that part but I did hit something.

Q. Something in these hallucinations?

A. Yeah it's you know somebody like somebody's standing there and I started getting hypertension and I said "fuck it" (inaudible) punched a hole in the wall (inaudible) I don't know if I kicked a hole in the bathroom wall or punched a hole in it.

Q. It was kicked.

A. Yeah and some some

Q. Someone standing back there?

A. Some ah guy I don't remember who it was but he looked

strange, he put his arm on my arm and said sit down and shoved me down to this chair.

Q. Ah huh, he wanted to make sure you didn't hurt anybody or yourself, sometimes it takes a a kind of a gruff voice to bring you back to your senses.

A. And when I got pushed down in the chair, I looked up and it looked like the sergeant faced me, I really can't remember, what the hell it was, but there I was, again on my arm you know he shoved me down in the chair and I looked over across the table and there was Ray sitting there and I was I going bonkers that night.

Q. You were bouncing in and out pretty good.

(R. 2376). Many other "red flags" appeared in these statements. There simply is not enough space to include them all.

The numerous "red flags" contained in these statements were not considered by the pretrial mental health experts because those experts were not given Mr. Johnston's statements (T. 475).[3] In Mason v. State, 489 So. 2d 734 (Fla. 1986), this Court reversed and ordered a new competency determination because "this evidence [i.e. red flags] was not considered by the evaluating psychiatrists." 489 So. 2d at 736. In Engle v. Dugger, ___ So. 2d ___, 16 F.L.W. 123, 125 (Fla. Jan. 15, 1991), this Court acknowledged that reversal was required where red flag indicators "had been overlooked."

Besides the obvious "red flags" contained in the statements, there were other more subtle "red flags" that Dr. Wilder identified at the evidentiary hearing:

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.

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[3]The State does not contest that the pretrial mental health examiners were not provided Mr. Johnston's statements to the police (Appellee's brief at 11).

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.

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

A. Yes.

(T. 522).

Yet, at trial the State established through Mary Hammond's granddaughter that David Johnston's claim to have known Mary Hammond for years and to have accompanied her to church on a regular basis was not true:

Q. If you recall, what do you remember hearing Mr. Johnston say?

A. He said he had been friends with my grandmother for about three years and that he came by and took her to church very often and that, in fact, he had just taken her to church that Wednesday night.

Q. To your personal knowledge, had Mr. Johnston known your grandmother for three years?

A. No.

Q. Had he taken her to church?

A. No as she hadn't been to church in a long time. No, he hadn't.

(R. 475).

Another "red flag" identified by Dr. Wilder was Mr. Johnston's IQ test results:

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.

(T. 515).

In fact, Mr. Johnston at seven and a half earned an IQ of 57 (T. 514). At

twelve, Mr. Johnston earned an IQ of 65 (T. 240). In 1988, Mr. Johnston's memory scale IQ was 66 and his verbal was 75 (T. 254).

Another "red flag" associated with schizophrenics was deterioration over time. Dr. Wilder testified competency is not static, but in fact quite changeable:

> Q. In speaking of schizophrenia as changing or being static or, you know, its relationship to competent, you can be schizophrenic and still be competent because sometimes the symptoms are under control or in remission, whatever, disappear.
>
> Does medication sometimes alleviate the symptoms?
>
> A. Yes, sometimes it does.
>
> Q. And for someone, say, who may be actively delusional or under hallucinations, are there medications that can control that and make them competent to stand trial?
>
> A. Yes.
>
> Q. In that wealth of material that's out there, that may or may not have changed your mind if you had known about it, if there was evidence that, at times, when he was being diagnosed as schizophrenic, he was doing given thorazene to maintain and bring him into a remission? Would that be something that would be significant to you in considering his competency?
>
> A. It's always significant. And these questions, frankly, make it difficult to answer it because I either sound as if I'm, you know, not really giving the attention that the matter deserves. But on the other hand, when you have something established by what you see at the time, what I saw at the time, then bringing up something that happened years ago, or sometimes even months ago -- for example, I have seen people in the jail and they were incompetent to stand trial. But they were improving rapidly, I have suggested to the court that they delay and see, and they may be able to stand trial.
>
> On the other hand, people who are apparently able to stand trial. If kept in jail. And they can't abide by the eleventh item, whatever it is, you know, able to tolerate incarceration, they can lose their equilibrium in jail and become incompetent to stand trial. In fact, that's not an unusual situation.

(T. 528-29).

Thus according to Dr. Wilder, schizophrenics must be monitored closely. Yet, Dr. Wilder never knew that Mr. Johnston's defense attorneys believed that Mr. Johnston was incompetent and that his condition deteriorated with time. Dr.

Wilder never heard Ms. Warren state:

> It would -- we would go up and talk with him the night before or two days before, and he would be rambling incoherent.

(T. 151).

> 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 that 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 every [sic] 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. 154-55). Dr. Wilder testified he never talked to defense counsel and never learned of the many problems they faced nor of Mr. Johnston's deterioration over time.

Dr. Wilder and Dr. Pollock were ignorant of the crucial "red flags" necessary to a competency determination. In one brief sentence, the State addresses the mental health experts' ignorance of Mr. Johnston's delusional ramblings. The State feebly argues "That [the statements] may have lacked coherence is [sic] some small aspect bears no relation to Johnston's actual ability to understand the proceedings against him and to assist his attorney" (Appellee's brief at 11). However, this sentence flies squarely in the face of this Court's holding in Mason v. State. In Mason, the unconsidered "red flags" were "an extensive history of mental retardation, drug abuse and psychotic behavior." 489 So. 2d at 736. This Court held in Mason that such evidence in fact does need to be considered in a competency determination. The "red flags" present here which were unknown by the mental health experts are of exactly the same ilk as those in Mason. The State's contrary position is flat out wrong.

The State similarly casts aside Mr. Johnston's delusion that he knew Mary Hammond (the victim) for years. The State asserts "this would have little to do with his ability to understand the proceedings against him and to assist his attorney" (Appellee's brief at 12). However, Rule 3.211 in 1984[4] specifically charged mental health experts with considering "Defendant's capacity to testify relevantly," "Defendant's capacity to realistically challenge prosecution witnesses," among nine other items. Delusional thought processes would obvious interfere with those criteria. A delusional Mr. Johnston could not "realistically challenge prosecution witnesses" nor could he "testify relevantly."

The experts here reached conclusions without the necessary information just as the experts in Mason v. State. Crucial evidence necessary for a reliable competency evaluation was not considered. Under Mason, a nunc pro tunc competency determination must be held if it is determined that such a determination possible. However, at this juncture neither Dr. Wilder nor Dr. Pollack has examined the previously unknown "red flags" and made a competency evaluation after considering these indicators. The experts who have considered those "red flags" concluded that Mr. Johnston was not competent.

The circuit court in finding Mr. Johnston competent at the 3.850 hearing ignored the uncontroverted evidence that Mr. Johnston was not competent. Dr. Fleming and Dr. Merikangas both concluded he was not competent. The three defense attorneys opined that Mr. Johnston was not competent. Dr. Wilder testified that there were many facts raising doubts about Mr. Johnston's competency. However, Dr. Wilder did not review those matters and did not reach a conclusion as to whether those materials established Mr. Johnston was

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[4]The State cites to Rule 3.211 as it appears today and not as it appeared at the time of trial.

incompetent at the time of trial. He did not and could not state that Mr. Johnston was competent despite all the red flag indicators. To the extent that the circuit court concluded that Mr. Johnston was competent, there is no evidence to support that conclusion. There was no evidence presented that Mr. Johnston was competent. Relief must be granted.

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.

As to this argument, the State's response is simply that "no prejudice [was] demonstrated" (Appellee's brief at 19). In determining whether sufficient prejudice has been demonstrated, the question is: has confidence in the outcome been undermined. As the Eleventh Circuit explained:

> Petitioner need not show actual prejudice to receive relief under Strickland, however. Petitioner needs to show only a reasonable probability that the result of the sentencing proceeding would have been different had counsel challenged the 1965 and 1968 convictions. We conclude that petitioner's argument would have had a reasonable chance of success if presented to the trial court at sentencing in light of Lingo, supra; Thrower, supra; and Smith, supra.

Harrison v. Jones, 880 F.2d 1279, 1283 (11th Cir. 1989).

The State also asserts "[trial] counsel can hardly be faulted for not procuring affidavits as CCR has done when at the time of trial Johnston wanted nothing to do with mental health defenses" (Appellee's brief at 20). However, the circuit court ruled pretrial that Mr. Johnston suffered "mental derangement" and could not represent himself (R. 2144). The Eleventh Circuit has held "An attorney has expanded duties when representing a client whose condition prevents him from exercising proper judgment." Thompson v. Wainwright, 787 F.2d 1447, 1451 (11th Cir. 1986). Thus, the State is wrong. Counsel can and should be faulted when he or she blindly follows the commands of a mentally impaired

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

At this point, no mental health expert who has examined the "red flag indicators" of which Dr. Pollack and Dr. Wilder were unaware has concluded that Mr. Johnston was competent. Under the circumstances, there exists more than "a reasonable chance of success" had counsel presented the necessary "red flag indicators" to the mental health experts. The only two experts who have considered these "red flags" have concluded that Mr. Johnston was not competent to stand trial. Moreover, the pretrial examiners were not asked to evaluate for the presence of mental health mitigation. See Smith v. McCormick, 914 F.2d 1153 (9th Cir.1990). This was deficient performance on counsel's part which resulted in the capital jury not knowing of the presence of statutory mental health mitigation. Rule 3.850 relief is required.

ARGUMENT III

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

As to this Argument, the State again refuses to discuss the real issue. Because of Mr. Johnston's opposition to mental health testimony, his attorneys abandoned the presentation of mental health mitigation. Christine Warren, Mr. Johnston's trial counsel, testified: "Again, David didn't want us to go into 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).

In Anderson v. State, ___ So. 2d ___, 16 F.L.W. 61, 65 (Fla. Jan. 3, 1991), Justice Barkett stated:

> The decision to waive the right to present witnesses in mitigation carries with it the most dire consequences possible under the law--failure to present mitigating testimony may amount to virtually a life-or- death decision. The decision to waive the right to present mitigating testimony in a capital case is of no less significance than the decision to plead guilty to a crime. Any other conclusion would be illogical and would produce absurd results. For example, a trial court is required by Boykin to conduct a record inquiry of a defendant's guilty plea to a first-degree misdemeanor charge of criminal mischief, section 806.13(1)(b)(2), Florida Statutes

(1989), but the same trial court would not have to hold the same inquiry when the defendant is facing a sentence of death in the electric chair when he waives his right to put on mitigating evidence in the penalty phase of a capital case.

These principles compel me to conclude as a matter of constitutional law that a judicial inquiry was required to protect Anderson's constitutional rights, and that the inquiry in Anderson's case failed to satisfy that requirement. "The rights, responsibilities and procedures set forth in our constitution and statutes have not been suspended simply because the accused invites the possibility of a death sentence." Hamblen v. State, 527 So.2d 800, 804 (Fla. 1988).

I also find that the practical concerns addressed by the United States Supreme Court are compelling reasons to require a record inquiry. Such an inquiry would leave "a record adequate for any review that may be later sought and forestalls the spinoff of collateral proceedings that seek to probe murky memories." Boykin, 395 U.S. at 244 (footnote and citations omitted). To require a simple inquiry would have no detrimental effect on the administration of justice. It would require no additional judicial resources to protect the rights of a death- sentenced defendant. In fact, it would facilitate this Court's mandatory review of death penalty appeals.

In Anderson, a majority of this Court agreed with Justice Barkett that an on-the-record inquiry must be made where a defendant opposes presentation of "mitigating witnesses," although those other justices found a sufficient of-record inquiry had been made in that case.

Here, counsel forego pursuing and developing mental health mitigation in order to "maintain" Mr. Johnston. Yet counsel also testified:

Q. In terms of leading up to trial and Mr. Johnston's contributions to assisting in the defense, his decision making, the limits he placed upon you and what you would investigate and what you couldn't investigate, the limits he placed upon you in terms of seeing a psychologist or not seeing a psychologist, was he competent to be making these decisions?

[Objection overruled]

A. No.

(T. 195-96).

In fact, trial counsel also testified that the trial judge had ruled that Mr. Johnston was not competent to proceed pro se (T. 174-75). The circuit court's order in this regard provided:

At a previous hearing, defendant requested that the Court discharge both of his court-appointed counsel and allow him to represent himself, which request was taken under advisement.

I have personally observed the defendant during his several earlier court appearances, considered the dialogue I had with him at the time he made his request, considered the testimony of the two court-appointed psychiatrists at the competency hearing and have examined their reports together with the three sets of records of defendant's earlier mental hospital admissions. I have further considered factors set forth in Faretta v. California, 422 U.S. 806 (1975) and Cappetta v. State, 204 So.2d 913 (Fla. 4th DCA 1967), 216 So.2d 749 (Fla.1968), cert denied 394 U.S. 1008.

Defendant claims to have represented himself at a non-jury criminal trial some years back. He has been through several criminal proceedings as a defendant with counsel, and has spent time in the law library while in custody on this charge reading law. However, he is 24 years of age, has little or no formal education, and has been classified by various mental health experts as being of average or dull normal intelligence level. He has been admitted to mental hospitals on three occasions in the past when exhibiting threatening, hostile or psychotic behavior, and has been diagnosed variously as an Emotionally Unstable Personality, Antisocial Personality, Sociopathic and Schizophrenic. Dr. Pollack in his testimony stated that defendant was exceptionally immature and would react to the least stimulus. Dr. Wilder stated in his testimony that defendant was emotionally unstable with an explosive personality and that in his opinion, defendant ought not to be allowed to represent himself. This is the type of "mental derangement" mentioned in Faretta and Capetta, supra. Finally, the charge against the defendant is one of Murder in the First Degree carrying with it a potential death penalty, and the case has several complex legal and factual issues.

Based on the foregoing, I find that to discharge defendant's counsel and to allow him to represent himself in this case would deprive him of a fair trial and that legal representation is necessary to insure him of a fair trial. Consequently his request to discharge both counsel and to represent himself is denied.

(R. 2144). Thus, of-record it was determined that Mr. Johnston suffered a "mental derangement" which precluded self-representation. Nevertheless, Mr. Johnston was allowed to veto presentation of mental health mitigation. Counsel permitted Mr. Johnston to act as his own counsel. Counsel's performance was deficient. Deferring decisionmaking to a mentally ill client that counsel knows and believes is incompetent is deficient performance, particularly where the court has specifically determined that the defendant is incompetent to make these decisions.

The resulting death sentence is unreliable. Mental health mitigation did not get presented to the jury. See Deutscher v. Whitley, 884 F.2d 1152 (9th Cir. 1989); Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985). Mitigation which the jury must be able to consider was not presented. See Penry v. Lynaugh, 109 S. Ct. 2934 (1989). The resulting death sentence is unreliable. The jury should have heard the mental health mitigation. It is not a question of whether it would have made a difference to the sentencing judge, the issue is whether the evidence would have given the jury a reasonable basis for a life recommendation. Hall v. State, 541 So. 2d 1125 (Fla. 1989). Rule 3.850 relief is required.

Moreover, the State in its brief after asserting that it was reasonable for counsel to defer to Mr. Johnston's decision not to present mental health mitigation argued:

> Johnston opened the door by putting his mental health in issue and cannot complain of a violation of Estelle v. Smith, 451 U.S. 454 (1981), and counsel had no obligation to do so either.

(Appellee's brief at 32).

This is a non sequitur. Clearly Mr. Johnston never wanted his mental health in issue and tried to prevent it from being placed in issue. Either defense counsel should have presented mental health testimony or counsel should have opposed presentation of the State's mental health expert whose testimony violated Estelle v. Smith, 451 U.S. 454 (1981). Certainly not presenting mental health testimony for Mr. Johnston and permitting the State to present evidence against him was the worst of both worlds. The State does not contest that Estelle v. Smith was violated, but merely argues that the failure to object was reasonable. However, it was not reasonable, just as it was not reasonable to fail to object to a double jeopardy violation in Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990), to fail to object to sentence enhancement in Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1990), and to fail to timely pursue an insanity defense in McInerney v. Puckett, 919 F.2d 350 (5th Cir. 1990). The failure to object

prejudiced Mr. Johnston. Reversal on appeal would have been required had counsel interposed a timely objection. Relief is required.

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 State argued that trial counsel reasonably did not pursue a voluntary intoxication defense because there was a plausible identity defense. Yet later in its brief the State conceded that the identity defense was not plausible:

> Considering the scratches on Johnston's face; (R 706; 477; 780) household items found at the demolition site where Johnston claimed he worked; (R 673) his butterfly pendant entangled in the victim's hair; (R 726) his bloodstained watch found on the bathroom countertop; (R 745) and his various statements to the police, it is doubtful that forensic experts could have turned this case around.

(Appellee's brief at 39).

The only reason that a voluntary intoxication defense was not pursued was counsel's desire "to maintain" Mr. Johnston (T. 100). Yet Mr. Johnston had been found incompetent to represent himself and determine what defenses to present. Counsel even believed Mr. Johnston was incompetent to make the decision (T. 195-96). "An attorney has expanded duties when representing a client whose condition prevents him from exercising proper judgment." Thompson v. Wainwright, 787 F.2d 1447, 1451 (11th Cir. 1986). Counsel failed to carry forth on these "expanded duties" and turned the decisionmaking over to a "mental[ly] derange[d]" client (R. 2144). This was deficient performance.

The prejudice was the failure to present the wealth of evidence available to negate specific intent and premeditation. Confidence is undermined in the outcome. Rule 3.850 relief is required.

ARGUMENT VII

MR. JOHNSTON'S SENTENCING JURY WAS IMPROPERLY INSTRUCTED ON THE "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING CIRCUMSTANCE, AND THE AGGRAVATOR WAS IMPROPERLY ARGUED AND IMPOSED, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

A Florida capital jury must be correctly instructed at the penalty phase proceedings. Hitchcock v. Dugger, 481 U.S. 393 (1987). Mr. Johnston's jury was not advised of the limitations on the "heinous, atrocious or cruel" aggravating factor adopted by this Court. 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). Unconstitutional constructions of heinous, atrocious or cruel were argued to the jury. As a result, the instructions failed to limit the jury's discretion and violated Hitchcock v. Dugger, 481 U.S. 369 (1987), and Maynard v. Cartwright, 108 S. Ct. 1853 (1988). In addition, the judge employed the same erroneous standard when sentencing Mr. Johnston to death.

At the time of Mr. Johnston's appeal, Hitchcock was not yet the law in Florida, and jury instructional error was not reversible so long as this Court was satisfied that the sentencing judge's findings were supportable. Hitchcock changed that. Hitchcock held that the jury must receive instructions conforming to the eighth amendment. This Court held Hitchcock was a change in law. On the basis of Hitchcock this claim is cognizable in Rule 3.850 proceedings. The State's argument to the contrary is in error.

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.

As part of his Argument IX in his initial brief, Mr. Johnston argued the circuit court erred in finding no deficient performance in trial counsel's failure to object to victim impact evidence and argument (Initial Brief at 84). The State claimed in its brief this was insufficient argument.

To clarify, the failure to object, in and of itself, has been found sufficient to constitute deficient performance. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989); Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990). Here, Mr. Johnston contends that trial counsel's failure to object to victim impact argument and evidence was deficient performance which prejudiced Mr. Johnston. Had an objection been made, the evidence and/or argument would have been struck or the sentence of death reversed on appeal. Rule 3.850 relief is therefore required.

CONCLUSION

For each of the foregoing reasons, the summary denial of each of Mr. Johnston's Rule 3.850 claims was erroneous, and this Court should reverse and remand the case for an evidentiary hearing on the claims.

Respectfully Submitted,

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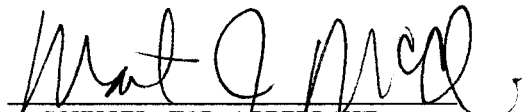
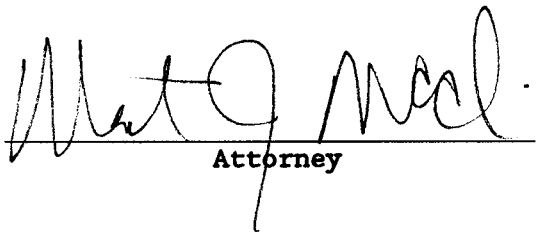
By: 
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded by U.S. Mail, first class, postage prepaid to Margene Roper, Assistant Attorney General, Department of Legal Affairs, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, this 1st day of March, 1991.



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